

**THE FEE TAIL AND  
THE COMMON  
RECOVERY IN  
MEDIEVAL ENGLAND  
1176–1502**

*JOSEPH BIANCALANA*

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THE FEE TAIL AND THE COMMON RECOVERY IN MEDIEVAL  
ENGLAND 1176–1502

Fee tails were a basic building block for family landholding from the end of the thirteenth to the beginning of the twentieth century. The classic entail was an interest in land that was inalienable and could only pass at death by inheritance to the lineal heirs of the original grantee.

Biancalana's study describes the development of the fee tail from the late twelfth to the fifteenth century, and the invention, development, and early use of the common recovery, a reliable legal mechanism for the destruction of entails, from 1440 to 1502. His discussion includes the law governing *maritagium* and the duration of fee tails before *De Donis* (1285), and the decisions taken by Chancery to extend the statutory restraint on alienations of land in fee tail until the creation of 'perpetual' entails in the fifteenth century. He also discusses the uses of fee tails by tracing the change from *maritagium* to marriage portion and the turn to jointure, and by surveying transactions in which fee tails were created. Biancalana's discussion of the common recovery begins with other methods of barring entails – chiefly the doctrines of assets by descent and collateral warranty. He then traces the procedural and doctrinal development of the common recovery, closing with a consideration of the transactions in which common recoveries were used as well as the complicated attitudes towards ending fee tails.

*The Fee Tail and the Common Recovery in Medieval England* includes a calendar of over three hundred common recoveries with discussions of their transactional contexts. It is a major work of great interest to legal and social historians.

JOSEPH BIANCALANA is Professor in the College of Law at the University of Cincinnati. He has published articles in journals including *The Cambridge Law Journal*, the *Columbia Law Review*, and the *Law and History Review*.

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To the memory of  
Samuel Edmund Thorne  
1907–1994  
*lo mio maestro*

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ABBREVIATIONS AND  
ABBREVIATED CITATIONS

- Ames The Ames Foundation (Yearbooks of Richard II).  
*Ancient Deeds A Descriptive Catalogue of Ancient Deeds in the  
Public Record Office*, 6 vols. (London: HMSO, 1890–1915).
- BNB F. Maitland (ed.), *Bracton's Note Book*, 3 vols. (London:  
C. J. Clay & Sons, 1887).
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(London: Selden Society, 1984).
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Henry III* (Bedfordshire Historical Record Society, vol. 4,  
1919); *A Calendar of the Feet of Fines for Bedfordshire . . . of the  
reign of Edward I* (Bedfordshire Historical Record Society, vol.  
12, 1928).
- Berkshire Eyre* M. T. Clanchy (ed.), *The Roll and Writ File of  
the Berkshire Eyre of 1248* (Selden Society, vol. 90, 1972–3).
- BL British Library
- Boarstall Cartulary* H. E. Salter and A. H. Cooke (eds.), *The  
Boarstall Cartulary* (Oxford Historical Society, vol. 88, 1930).
- The Book of* M. Clough (ed.), *The Book of Bartholomew  
Bolney Bartholomew Bolney* (Sussex Record Society, vol. 63,  
1964).
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G. Woodbine (ed.), S. Thorne (trans.) (Selden Society and  
Harvard University Press, 1968 (vols. I and II) and 1977 (vols.  
III and IV)).

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- Cornwall Fines* J. H. Rowe (ed.), *Cornwall Feet of Fines*, 2 vols. (Devon and Cornwall Record Society, 1914, 1950).
- CUL Cambridge University Library
- CRR *Curia Regis Rolls*, 18 vols. (London: HMSO, 1922–).
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- IPM, Henry VII Calendar of Inquisitions Post Mortem . . . Preserved in the Public Record Office, Henry VII*, 3 vols. (London: HMSO, 1898–1955).
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- PKŷ* D. M. Stenton (ed.), *Pleas Before the King or his Justices*, 4 vols. (Selden Society, vols. 67, 68, 83, and 84, 1948–9, 1966–7).
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- RS** Rolls Series.
- Rot. Parl. Rotuli parliamentorum*, 6 vols. (London, 1783).
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- YB Yearbooks. Unless otherwise indicated citations are to *Les Reports des Cases* (ed.) J. Maynard (1678–80) by term, regnal year, folio, and plea.
- Yorks.* D. M. Stenton (ed.), *Rolls of the Justices in Eyre for Yorkshire in 3 Henry III (1218–19)* (Selden Society, vol. 56, 1937).

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## INTRODUCTION

This book began as a study of the common recovery, a feigned action in the Court of Common Pleas. A holder of land in fee tail could transfer land free of the entail by means of a common recovery. The aim of the study was threefold: to discover when lawyers invented the device, to trace subsequent refinements and elaborations, which made the device at once more powerful and more efficient, and to determine the kinds of transactions in which landholders used the device in its first decades of existence. Research on that initial project revealed that lawyers invented the device in the 1440s and that by 1502 they had developed the common recovery into pretty much its final form. By 1502 common recoveries were used in over 200 transactions annually. By reconstructing the contexts of the recoveries gleaned from the plea rolls between 1440 and 1502 one could determine the kinds of transactions in which landholders used the common recovery.

That initial study grew backwards into the present book. Because the common recovery was a device for barring fee tails, I became curious about other methods lawyers had developed for conveying land free of entails. But then it seemed inadequate to speak of various devices for the barring of entails without speaking of fee tails themselves. Where did they come from? When and how did grants in fee tail come to be perpetual? And under what circumstances and for what purposes did landholders put their land in fee tail? For the origins of entails one had to go back to 1176, when the royal officials of Henry II invented the assize of mort d'ancestor, a rapid action that enforced royal, common law rules of inheritance. Fee tails were invented as a means of avoiding the doctrines that enabled royal government to enforce common law rules of inheritance. As much as I would have liked to summarize existing accounts of the origin, development, and use

of fee tails in a chapter introductory to a study focused on the common recovery, that strategy was not available. There was no adequate account of the origin, development, and use of fee tails. Thus I found myself working on a project which could fairly bear the title “The Fee Tail and the Common Recovery in Medieval England.”

The long period covered by the book has required a severe selection of topics. Although the personal and social circumstances of the use of fee tails and common recoveries are important to understanding the practical import of the relevant legal rules and doctrines, the focus has been more on the legal than on the social history of fee tails and the common recovery. I have selected topics in the legal history of fee tails and the common recovery with a view to filling the gaps left by earlier legal historians and to placing their work in the larger picture permitted by new research. The result has been the form of connected essays. The reader might be assisted by having a general view or plan of the book in advance.

Chapter 1 traces the history of fee tails from about 1176 to the statute *De Donis Conditionalibus* in 1285. In this period there are three main subjects: the origin of fee tails and the law governing succession to and alienation of lands held in fee tail, the complicated relation between fee tails and *maritagium*; and the development of writs to secure the different interests – reversion, remainder, and the fee tail itself – created by a grant in fee tail. In this period, and indeed for most of the period covered by the book, the courts treated succession to land held in fee tail differently from alienations of land held in fee tail. The courts would not upset a grant made by a grantor who had received land in fee tail if the grantor had had a child who survived him. In 1281, however, the court changed its view: it would upset a grant if the grantor had a child, whether or not the child survived the grantor. This new position provoked the statute *De Donis*. The relation of fee tails to *maritagium* was complicated because it was reciprocal. Certain features of *maritagium* – the exclusion of collateral heirs and the retention of a reversion – served as models for grants in fee tail. But the law governing fee tails when applied to *maritagium* transformed customary understandings of *maritagium* until by 1285 *maritagium* came to be understood as merely a type of fee tail. Tracing the development of the formedon writs,

which secured the interests created by a grant in fee tail, is a matter of filling a few gaps left by Milsom and Brand.

Chapter 2, covering the period from the enactment of *De Donis* in 1285 to the third decade of the fifteenth century, traces the development of the indefinitely enduring fee tail. Lawyers first read *De Donis* as barring alienations by the grantee of land in fee tail whether or not he had a child and whether or not the child survived him. The primary focus of Chapter 2 is on the extension of this statutory restraint on alienation to every generation of the first grantee's lineal heirs. The Council and Chancery took discrete decisions to extend the statutory restraint on alienations and, what is not the same thing, the reach of the formedon in the descender writ. Not until the third decade of the fifteenth century was the statutory restraint on alienation perpetual. In the absence of an alienation, fee tails became perpetual probably as early as the third decade of the fourteenth century. This meant that, in the absence of an alienation, reversions or remainders limited after a fee tail would not be destroyed by the mere passage of time.

Chapter 3 turns to the use of fee tails and some of the consequences of holding land in fee tail. The chapter begins with the transformation of marriage settlements from grants of land in *maritagium* by the bride's father to his payment of a money marriage portion in exchange for the groom's or his father's grant of land to the groom and bride in joint fee tail. This transformation in marriage settlements took place during the period from almost 1220 to 1350. The increasing indebtedness of gentry, knights, and nobles drove the change from *maritagium* in land to marriage portion in money in exchange for jointure. The importance of jointures to the history of fee tails is confirmed in the next part of the chapter. The ways in which landholders used fee tails is explored by a study of final concords from seven counties from 1300 to 1480. The vast majority of fee tails were created in one of three situations: as jointure upon marriage, later in life when a landholder wished to give his wife jointure and plan the devolution of his property, and, after the invention of uses, by last will. Understanding the use of fee tails is helped by distinguishing between planning and litigation. The extension of fee tails traced in Chapter 2 did not affect planning. It prolonged the life of claims for litigation. Estate planners used fee tails, not with the hope of creating dynasties, but with the more realistic aim of

directing the devolution of their property to their widows and to the next generation.

Chapter 4 studies the ways in which a tenant-in-tail might grant land free of the entail before the common recovery. Two doctrines of warranty limited the statutory restraint on alienation derived from *De Donis*. By about a decade after *De Donis*, lawyers began to say that the statutory restraint against alienation did not apply if the claimant had assets by descent from the tenant-in-tail who had alienated the land. The more complicated doctrine was the strange doctrine of collateral warranty. The full range of collateral warranties only became conceivable in the tenurial world created by the statute *Quia Emptores*, for in this world warranty became separated from lordship and from grants of land. The mere release with warranty of a collateral ancestor could bar one's claim. Chapter 4 traces the development of collateral warranty and of the various types of collateral warranties. It also addresses the practical question of how useful they were as a method of barring entails. Apart from manipulating doctrines of warranty, a tenant-in-tail might try to bar his entail by manufacturing a feigned judgment against his title in fee tail. The rules limiting the preclusive effect of many types of judgment made this method of barring entails rather cumbersome.

Chapter 5 takes up the origin and development of the common recovery. After an experiment in 1436, the first recovery appears on the plea rolls of the Court of Common Pleas in 1440. By 1502, there were 240 recoveries used in 216 transactions. In the first seventy years or so of recoveries the writ and pleadings used in a recovery changed from writs of right to writs of entry. This change in form reflected a change in theory as to why a recovery was effective to bar an entail. The basic procedure was fairly simple. The grantee of land brought an action for the land in the Court of Common Pleas against the grantor. The grantor vouched a warrantor, who entered into the litigation against the grantee. The grantee-plaintiff or the warrantor received a continuance. The warrantor defaulted upon the resumption of the case. The Court gave judgment that the grantee recover the land from his grantor and the grantor recover over lands of equal value – known as recompense – from his warrantor. The hallmark of recoveries was the defaulting warrantor. At first, recoveries were thought to be effective because of the writ used and the fact that the

warrantor, not the defendant tenant-in-tail, had defaulted. Later, recoveries were thought to be effective because the warrantor owed the defendant recompense for the lands lost. This change in theory supported the change from writ of right to writ of entry. The chapter ends by exploring the use of recoveries with more than one voucher to warranty.

Chapter 6 explores the uses of recoveries, the types of transaction in which the parties used a recovery, and social attitudes to the barring of entails. The study of the types of transactions in which the parties used a recovery is based on an examination of 334 transactions from 1440 to 1502. For these transactions it was possible to discover the transactional context of the recoveries found on the plea rolls of Common Pleas. About 90 percent of these transactions were divided roughly equally between sales of land and resettlements. The remaining transactions were either transfers into mortmain or the settlement of disputes. Social attitudes to the barring of entails depended upon the reason why a tenant-in-tail barred the entail. There was, of course, a norm in favor of maintaining entails, especially when doing so secured male inheritance. But there were also competing norms. Every recovery disinherited someone. The questions were who was disinherited, in favor of whom, why, and under what circumstances. The interplay of competing norms was so complicated and so context sensitive that no systematic ordering of norms was possible. For that reason, neither Chancery nor parliament could formulate rules to control or to limit the use of common recoveries. Chapter 6 tries to give the reader a sense of the various competing norms and the complexity of their interaction.

FEE TAILS BEFORE *DE DONIS*

Fee tails before the statute of *De Donis*<sup>1</sup> (1285) are the subject of two related stories. One story is about the protection the King's Court provided the interests in a fee tail. The subject of this story is mainly the development of the three formedon writs – formedon in the reverter, in the descender, and in the remainder. For this story one can build on the work of S. F. C. Milsom<sup>2</sup> and of Paul Brand.<sup>3</sup>

The second story is about the grants themselves. In the late twelfth and thirteenth centuries there were two basic forms of grant in fee tail. Suppose A granted land in fee tail to B, his grant could take the form “to B and the heirs of his body, but if B should die without an heir of his body the land shall revert to A” or his grant could take the form “to B and the heirs of his body, but if B should die without an heir of his body the land shall remain to C.” Grants in these forms were known as conditional gifts in the thirteenth century because of the explicit condition on the reversion or remainder. Legal historians have thought that conditional gifts were in the form “to B and the heirs of his body” and that the condition was imposed by judges<sup>4</sup> or by Bracton.<sup>5</sup> But the condition on the reversion or the remainder was almost always explicit in the grant. It is convenient to refer to conditional

<sup>1</sup> *De Donis Conditionalibus*, 13 Edw. I, c. 1 (1285), *Statutes of the Realm*, I, 71–2.

<sup>2</sup> S. F. C. Milsom, “Formedon Before De Donis” in his *Studies in the History of the Common Law* (London: Hambledon Press, 1985), 223.

<sup>3</sup> P. Brand, “Formedon in the Remainder Before De Donis” in his *The Making of the Common Law* (London: Hambledon Press, 1992), 227.

<sup>4</sup> F. Pollock and F. Maitland, *The History of English Law Before the Time of Edward I*, 2 vols. (Cambridge: Cambridge University Press, 2nd edn, 1923), II, 17.

<sup>5</sup> T. F. T. Plucknett, *A Concise History of the Common Law* (Boston: Little Brown, 5th edn, 1956), 549.

gifts as fee tails and, although anachronistic, no harm is done as long as one bears in mind that a fee tail was not yet an estate in land. Grants in fee tail before *De Donis* pose at least four questions for the legal historian. When did people begin to make grants in this form? What were they hoping to accomplish? If the grantee had an heir of his body so that the condition on the reversion or the remainder was negated, what then? And what counted as having an heir of one's body for the purpose of negating the condition on the reversion or the remainder?

As if these questions are not difficult enough, the history of fee tails before *De Donis* is involved in the history of *maritagium*. *Maritagium* was a grant of land made by a woman's relative, usually her father, nominally to her husband with her upon or because of her marriage. A grant in *maritagium* served three social functions. As a grant made because of the woman, *maritagium*, in a society of male primogeniture, served as the woman's inheritance, inheritable only by her children. As a grant on marriage, *maritagium* served as material support for the new conjugal unit including the children, if any, of the marriage. As a grant to the groom, *maritagium* served as the material basis for an alliance between the families of bride and groom.

Legal historians have focused on the legal attributes that enabled *maritagium* to perform the social function of serving as the woman's inheritance: that land given in *maritagium* could be inherited only by the woman's children and that if she had no children the land was to revert to the donor or his heir, frequently her father or her brother. Exclusion of collateral heirs and reversion to the donor for default of lineal heirs were key features of a grant in fee tail. Legal historians have thought that *maritagium* served as a model for the first grants in fee tail in the sense that grantors used the basic form of grants in fee tail as the means of making grants that would have these two related features of *maritagium*.<sup>6</sup> Only Milsom, in remarks that warrant and will receive elaboration below, has suggested why grantors in the last

<sup>6</sup> J. H. Baker, *Introduction to English Legal History* (London: Butterworths, 3rd edn, 1990), 311; Plucknett, *Concise History*, 548; T. F. T. Plucknett, *Legislation of Edward I* (Cambridge: Cambridge University Press, 1949), 126; S. J. Bailey, "Warranties of Land in the Thirteenth Century, part 2" *Cambridge Law Journal* 9 (1945), 92.

quarter of the twelfth century might have wished to make grants that copied these features of *maritagium*.<sup>7</sup>

So far, so good. But the relationship of *maritagium* to fee tails was not so simple, nor was it a one-way street from *maritagium* to fee tail. Legal historians such as T. F. T. Plucknett leave the impression that *maritagium* did not change in the more than one century from, say, 1150 to 1285 and that fee tails did not affect the customary institution of *maritagium*.<sup>8</sup> In fact, however, *maritagium* did change in this period and was affected by the growing use of fee tails. The customary practice of making grants in *maritagium* underwent two types of changes. First, as the customary practice came under the legal rules enforced by royal justices beginning in Henry II's reign, the application of those legal rules to *maritagium* changed the customary institution. *Maritagium* given free of service, or at least of intrinsic service, would remain free of homage and service for three generations and the reversion implied after a grant of *maritagium* would remain alive for three generations. Grantors began to add words of entail to their grants of *maritagium*.

This last change points to another type of change, changes not induced by Henry II's legal reforms but by developing understandings about grants in fee tail. These changes may be called the entailing of *maritagium*. Some would apply rules governing the alienability of land held in fee tail to *maritagium* in order to restrict the capacity of a widow to make grants out of her *maritagium*. As lawyers and others came to view *maritagium* as a joint entail to husband and wife they had increasing difficulty understanding why a second husband should enjoy curtesy in his wife's *maritagium* given at her first marriage. These changes – the denial of a widow's ability to alienate her *maritagium* and the denial of curtesy to a second husband in his wife's earlier *maritagium* – were imposed on *maritagium* by the statute *De Donis*.

And there was a third type of change. The typical marriage settlement in which the bride's father granted the groom land in *maritagium* with his daughter and the groom granted his bride

<sup>7</sup> S. F. C. Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 2nd edn, 1981), 172–3.

<sup>8</sup> Plucknett, *Concise History*, 548–51. Plucknett, thought, wrongly in my view, that *maritagium* somehow became alienable. But the opposite is true. See below, pp. 54–6.

dower began to change into a new form of marriage settlement in which the bride's father paid a marriage portion in money and the groom or his father settled a joint fee tail on bride and groom. This joint fee tail, or jointure, was the typical transfer of real property upon marriage after the first decades of the fourteenth century. The transformations of *maritagium* into marriage portion and the practice of providing jointure are discussed in Chapter 3.<sup>9</sup>

The reciprocal influences between *maritagium* and fee tails create difficulties for an exposition that seeks to avoid repetition. This chapter proceeds as follows. Part 1 takes up grants in fee tail. In this part *maritagium* is discussed only to the extent that its influence helps to explain the history of fee tails. Part 2 traces the transformations of *maritagium* from the middle of the twelfth century to the enactment of *De Donis*. The discussion in this part builds on part 1 to explain the entailing of *maritagium*. Part 3 turns to the development of the formedon writs before *De Donis*.

## 1. GRANTS IN FEE TAIL

### (a) *Origins and early history*

Grants of land in fee tail were rarely made until the last quarter of the twelfth century.<sup>10</sup> At that time they begin to appear more frequently in cartularies and among final concords until they became a common type of grant by the third decade of the thirteenth century. The greater evidence of grants in fee tail, even relying on the then recent practice by royal clerks of filing away the bottom part of final concords, is not merely the result of an increased use of charters for conveyancing or a higher survival rate for written evidence. Rather, grantors were making more grants in fee tail. Also, in the last quarter of the twelfth century grants in *maritagium* began to include words of entail. Instead of saying no more than that the grant was in *maritagium*, the charter would go further to say that the land was given to the husband or wife in

<sup>9</sup> See Chapter 3, below, pp. 142–60.

<sup>10</sup> For the paucity of earlier entails see J. Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford: Clarendon Press, 1994), 113. For an example of an early entail, in addition to those cited by Hudson, see *Danelaw Charters*, No. 468 (c. 1140).

some form of entail.<sup>11</sup> The additional words of entail probably rendered explicit a customary understanding that collateral heirs of the husband and wife were excluded from inheriting the land. These entailed grants in *maritagium* seldom rendered explicit the implied conditional reversion.

Grantors turned to fee tails in the last quarter of the twelfth century because the words of entail enabled a grantor to avoid the unwanted consequences of the rules of inheritance and of grants being enforced by Henry II's new legal machinery. Because land was held in tenurial relationship with the grantor-lord, the rules of inheritance and the rules of grants were two sides of a single coin. Each set of rules, however, supplied a slightly different motivation for making a grant in fee tail.

In 1176, royal officials invented the assize of mort d'ancestor.<sup>12</sup> In that year, too, royal officials reorganized the eyres in order to bring royal, common law more effectively to the provinces.<sup>13</sup> Mort d'ancestor enforced legal rules of inheritance. If a person died seised of land in demesne and fee, that person's descendant closest in blood had a claim backed by royal justice to succeed to the land. Inheritance was not a title good against all the world but a claim against one's lord to be accepted as the decedent's successor.<sup>14</sup> With mort d'ancestor a claim based on blood relation to the decedent had the force of royal government behind it. The assize was limited to the children, siblings, nephews, and nieces of the decedent. The closest blood relative to the decedent had the only claim backed by royal power and law.

Norms of inheritance based on one's blood relation to the decedent existed long before mort d'ancestor. Indeed, their acceptance and force provided the basis for the invention of mort

<sup>11</sup> See below, pp. 40–1.

<sup>12</sup> Pollock & Maitland, *History of English Law*, I, 147–8.

<sup>13</sup> P. Brand, "'*Multis Vigilus Excogitatum et Inventam*': Henry II and the Creation of the English Common Law" in his *The Making of the Common Law* (London: Hambledon Press, 1992), 82–91.

<sup>14</sup> S. E. Thorne, "English Feudalism and Estates in Land," *Cambridge Law Journal* 17 (1959), 193; S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976), 154–86; J. C. Holt, "Feudal Society and the Family in Early Medieval England: II. Notions of Patrimony," *Transactions of the Royal Historical Society* 33 (5th ser., 1983), 193; R. Palmer, "The Origins of Property in England," *Law & History Review* 3 (1985), 1.

d'ancestor.<sup>15</sup> In the world of customary law before the reforms of Henry II one's blood relation to the decedent was important but was only one basis for a claim to succeed a decedent. As John Hudson has shown at some length and in fascinating detail it was altogether proper for a lord to consider other factors when deciding a question of succession.<sup>16</sup> Such other factors included whether the decedent had named a candidate as his successor, whether a candidate was suitable to perform the military service owed for the land, whether a candidate had loyally performed services for the lord in the past, whether there was a political advantage in obtaining a particular candidate as one's man. Not only was a claimant's blood relation to the decedent only one factor, the weight given to that factor dwindled the more distant the relation between candidate and decedent.<sup>17</sup> Sons had the strongest claim. Brothers a strong but weaker claim. Nieces and nephews were probably on the margin of having a significant claim.<sup>18</sup>

Under the legal rules enforced by royal justices, however, blood relation to the decedent was all that mattered. This was clear in mort d'ancestor. A relative more distant to the decedent than the relationships covered by the assize could also enlist royal power and law to back his claim of inheritance if he had no closer competitor in blood. He did not have the fairly quick action of mort d'ancestor, but he could bring a writ of right to his lord's court or, if he and his opponent held of different lords or of the king, a *precipe* writ in the King's Court.<sup>19</sup> For a time, perhaps, where the closest relative to the decedent was a distant relative beyond the assize, his lord could justly count other considerations as more important than blood. By covering only close blood relatives to the decedent, mort d'ancestor ousted seigneurial jurisdiction only in those cases in which blood relationship clearly trumped other factors.<sup>20</sup> But in time, a fairly short time, a

<sup>15</sup> Holt, "Feudal Society" and J. Biancalana, "For Want of Justice: Legal Reforms of Henry II," *Columbia Law Review* 88 (1988), 487-514.

<sup>16</sup> Hudson, *Land, Law and Lordship*, 106-53.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, at 114; J. Hudson, *The Formation of the English Common Law* (London: Longman, 1996), 98.

<sup>19</sup> Pollock and Maitland, *History of English Law*, II, 62-3.

<sup>20</sup> Biancalana, "For Want of Justice," 486.

claimant's blood relationship to the deceased was all that mattered, at least to royal officials enforcing royal, common law.

The royal rules of inheritance could create difficulties. Suppose A wants to grant land to B. A is willing for B to hold the land for B's life. A is also willing to accept B's child as B's successor but would rather not have anything to do with B's brother, nephew, or cousin. A might be a lord who knows and trusts B but either does not know B's relatives or knows them only too well. And it is not that A would not accept B's collateral relative but rather that A wants to retain a choice in the matter. A's willingness to accept the royal rules of inheritance could vary according to the sort of tenancy in question – its purpose and its social significance. Is B a knight, a farmer, or A's seigniorial official? Also to be considered is whether A and B share the same ethos. If they are both armigerous, A might be willing to accept the common rules of inheritance because that is what it means to participate in armigerous society. But if A is a monastery, A might well have different attitudes to inheritance when it comes to inheritance by B's cousin.<sup>21</sup>

If A wants to retain a choice whether to accept B's collateral heir as B's successor, A and B have a problem. If A grants the land to B for his life, B has no assurance that, if he has a child, A or A's heir will accept B's child as successor to B. Because the grant was for B's life, B's child will not have a claim recognized by royal law. If A grants the land to B and his heirs and B dies without a child, the royal justices will foist on A whomever is B's closest blood relative. There were two possible ways out of this dilemma. A might grant the land to B and his heirs if B has an heir of his body.<sup>22</sup> This form of grant might not be quite what was desired. Bracton will later say that if B has a child, even if the child does not survive B, on B's death his closest heir will be called to the succession.<sup>23</sup> Bracton's, however, was not the only interpretation. Perhaps in order to avoid a Bractonian reading of such a grant, the grantor could provide for the reversion to himself if the grantee died without an heir of his body.<sup>24</sup> In this context, as in others, to die without an heir of one's body meant to die without a child

<sup>21</sup> See *ibid.*, 497–501; Hudson, *Land, Law, and Lordship*, 97–101.

<sup>22</sup> Grants in this form are discussed below, pp. 21–2.

<sup>23</sup> 2 *Bracton* 68–9, 144.

<sup>24</sup> 3 *CRR* 174 (1204).

surviving one. Grantors contemplated not only the possibility of their grantee's sterility but, more likely, the common facts of infant and child mortality. The grantor was planning for the succession to the land if his grantee, for any reason, did not have a child alive when the grantee died.

The more frequent and less ambiguous course of action would be for A to grant the land in fee tail: to B and the heirs of his body, but if B dies without an heir of his body, the land will revert to A or his heir. By using a fee tail, A can exclude B's collateral heirs from the succession. As Bracton later explained, only heirs who fit the *modus* or form of the gift will be called to the succession.<sup>25</sup> A is giving the land to B for his life, which grant will be extended for B's child and heir. A customary feature of *maritagium* was that only children of the woman were eligible to inherit the land granted in *maritagium*. This feature of *maritagium*, the exclusion of collateral heirs, probably served as a model for grantors creating fee tails.<sup>26</sup> They could create this feature of *maritagium* in other grants only by using the form of words that created an entail. In the earliest grants in fee tail the grantor was probably not looking further than the question of succession that he would face upon the death of his grantee. He was forced to look even that far ahead because he already knew what the royal justices would do if the grant was not in fee tail.

The exclusion of collateral heirs was uppermost in the mind of grantors who acted outside a family context. As noted earlier, monasteries frequently resisted the application of norms and rules of inheritance to their grants.<sup>27</sup> The entail form gave them the means of granting land for the life of the grantee, which could be inherited only by the grantee's issue. Monasteries were among the first lords to make grants in fee tail.<sup>28</sup> The basis on which a lord decided whether to grant fee tail or fee simple can seldom be inferred from the pattern of his conveyancing. Saint Frideswide seems to have reserved the use of fee tails to land within the city of

<sup>25</sup> 2 Bracton 68.

<sup>26</sup> Baker, *Introduction to English Legal History*, 311.

<sup>27</sup> Biancalana, "For Want of Justice," 498–501; Hudson, *Land, Law, and Lordship*, 97–101.

<sup>28</sup> e.g. 2 EYC, No. 795 (1170–84); *Cartulary of Blythburgh Priory*, Nos. 48, 239, 245, 246, 283, 286 (all 13th century); *Luffield Charters*, No. 205 (1263–75); *Early Records of Coventry*, No. 492 (1306).

Oxford, but not all its grants within the borough were in fee tail.<sup>29</sup> The strategy here might have been to restrict the testamentary capacity of the grantee in a borough. It was not too long before the king began making grants in fee tail.<sup>30</sup> When the grant was not to members of the king's immediate family or other relative, the fee tails were given to royal officials or pertained to lands in Ireland or Gascony. In both types of grant, the king had reason to retain some discretion over the succession.

Although lords used grants in fee tail to prevent the automatic succession of the grantee's collateral heirs, by far the most grants in fee tail were made to members of the grantor's family. In order to understand why grantors turned to fee tails in this context, one must consider the rules governing grants in fee simple.<sup>31</sup> If A granted land with warranty to B and his heirs, when B died A's warranty obligation extended to B's heir – his closest blood relative.<sup>32</sup> The warranty obligation barred A from taking back the land. And if A had granted land to B, A would not die seised of that land in demesne. His heir could not have mort d'ancestor. His heir would succeed to the seignery, the lordship. With lordship came the duty of warranty.<sup>33</sup> The duty of warranty barred A's heirs from taking back the grant. This effect of the warranty bar was expressed as a rule against being lord and heir.<sup>34</sup> If you inherit the lordship, you cannot inherit the land in demesne.

<sup>29</sup> *Cartulary of St. Frideswide*, Nos. 115, 210, 293, 385, 460.

<sup>30</sup> e.g. *Patent Rolls, 1232–1247*, 154; *Patent Rolls, 1272–1281*, 135, 136, 145, 155–6, 202–3, 230, 392. Henry III made grants in fee tail to Hubert de Burg, earl of Kent, and his wife Margaret. e.g. *Charter Rolls*, I, 81, 82, 83, 100, 108–9, 130, 154. The reason for royal grants in fee tail is seldom clear. For other grants in fee tail by Henry III see *Charter Rolls*, I, 193, 212–13, 220, 248, 290, 304. Henry also made family grants in the tail. *Charter Rolls*, I, 276, 287, 339, 345, 392, 444; *Charter Rolls*, II, 143.

<sup>31</sup> The discussion that follows in the text elaborates on Milsom's analysis: Milsom, *Historical Foundations*, 172–3.

<sup>32</sup> For the rules of warranty see S. J. Bailey, "Warranties of Land in the Thirteenth Century" (parts 1 and 2), *Cambridge Law Journal* 8 (1944), 274, *Cambridge Law Journal* 9 (1945), 82; S. J. Bailey, "Warranties of Land in the Reign of Richard I," *Cambridge Law Journal* 9 (1946), 192. For the importance of warranty see C. Donahue, "What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century," *Michigan Law Review* 78 (1980), 59.

<sup>33</sup> P. Hyams, "Warranty and Good Lordship in Twelfth Century England," *Law & History Review* 5 (1987), 437.

<sup>34</sup> *Glanvill* 72.

This rule was central to inheritance of land held in tenurial relationships as inheritance was enforced by royal power and law. This rule also secured the maintenance of grants from generation to generation. But the rule created difficulties when it was applied to grants within a family. Suppose that A has four sons and grants land to his second son and his heirs. If the second son dies without a child, who succeeds to the land? Before the royal justices began enforcing rules of warranty, A probably just took back the land. He might give it to another son, but that would be a matter of paternal affection, not legal rule. After the royal justices began their work the result was different. The warranty bar, the rule against being lord and heir, now prevents A from taking back the land. Glanvill reports indecision over the outcome.<sup>35</sup> Some thought that the eldest son should succeed his younger brother. Others thought that the land should go to the youngest son, for if the land were given now to the eldest son, when A died the eldest son would succeed to the seignery and the rule against being lord and heir would force the land out of his hands to a younger brother. Might as well give it to the youngest son right off – a view that ignores the temporary benefit for the eldest son.

Suppose A has two sons and a brother who has a child. A gives land to his younger son and his heirs. A dies. The younger son dies without a child. Before the royal justices began enforcing legal rules of warranty, the eldest son would probably have taken back the land. But after the royal justices have begun their work, the eldest son is barred by the rule against being lord and heir. A's brother or, if the brother is dead, A's nephew succeeds to the land. One can be fairly certain that in making a grant to his younger son A did not intend to have the land go to his brother or nephew. One can also be fairly certain that A's eldest son would be less than pleased to see the land go to his uncle or cousin.

In both of these cases of intrafamily grants, A's problem is how to make a grant to his younger son without the interference of the rule against being both lord and heir in the event that his younger son dies childless. A might try to avoid the warranty bar by confiding the land to his younger son informally. Without a formal transfer of seisin, however, if A died before his younger

<sup>35</sup> *Ibid.*, 72–4.

son, A would die seised in demesne of the land. The eldest son could recover the land in mort d'ancestor.<sup>36</sup> A could avoid the warranty bar by limiting the warranty in the grant to his younger son by the terms of the grant. He could grant the land to his younger son and the heirs of his body, but if he dies without an heir of his body, the land will revert to A or his heir. As Bracton later explained, with this form of grant if the younger son dies without an heir of his body, the warranty bar disappears for lack of heirs who fit the *modus* or form of the grant.<sup>37</sup> If the younger son has a child who survives him, the child will hold of his grandfather or his uncle. Things thus would come out right.

The entail form of grant thus enabled grantors to avoid the rule against being lord and heir. A grant in *maritagium* already implicitly had a similar feature: if the husband and wife died without an heir of their bodies surviving them, the land reverted to the donor. In order to preserve this feature of *maritagium* after the royal justices began to enforce rules of warranty, Glanvill advised grantors of *maritagium* not to take homage for their grants.<sup>38</sup> One reason not to take homage was that homage raised the warranty bar, which prevented the land from reverting to the donor. The reversion implicit in a grant of *maritagium* probably inspired the creation of fee tails.<sup>39</sup> Grantors of other grants could create the reversion implicit in *maritagium* and take homage for their grants by using the entail form with a conditional reversion explicit in the grant. The ability to take homage for a grant in fee tail without losing the reversion in turn prompted grantors of *maritagium* to include words of entail in their grants.<sup>40</sup> A grantor using a fee tail to make an intrafamily grant was probably not looking beyond the question of succession that would arise upon the death of his grantee. Nor, probably, were grantors of *maritagium*.<sup>41</sup> Fathers and mothers used the entail form in grants to their

<sup>36</sup> Glanvill 69–70; S. E. Thorne, "Livery of Seisin," *Law Quarterly Review* 52 (1936), 345; J. Biancalana, "For Want of Justice," 512–14; R. Palmer, *The Whilton Dispute, 1264–1380: A Social Legal Study of Dispute Settlement in Medieval England* (Princeton: Princeton University Press, 1984), 28–34.

<sup>37</sup> 2 Bracton 118; 4 Bracton 219.

<sup>38</sup> Glanvill 92, 116. See below, p. 43.

<sup>39</sup> Plucknett, *Concise History*, 548; Plucknett, *Legislation of Edward I*, 126; Bailey, "Warranties of Land in the Thirteenth Century, part 1," 92.

<sup>40</sup> Below, pp. 39–43.

<sup>41</sup> Below, pp. 47–50.

children and thus avoided the rule against being lord and heir.<sup>42</sup> Similarly, grants to a brother or sister were put in the fee tail form.<sup>43</sup> The combination of its ability to exclude collateral heirs and to secure a reversion in the donor also made the fee tail useful in settling disputes between brothers over inheritance.<sup>44</sup>

In early conveyances in fee tail, the grantor granted a life estate that was to be extended for the lineal heir of the grantee. The grantor does not appear to have looked further than the question of succession he or his heir would face at the death of this grantee. What would happen to the land if the grantee's lineal heir succeeded to the land and later died also leaving a lineal heir was frequently left vague. In the first half or so of the thirteenth century lawyers were not yet debating who might have the fee or when that legal abstraction might envelop the donee. The most frequent form of fee tail was "to A and the heirs of his body" followed later in the conveyance by a condition "that if A dies without an heir of his body the land is to revert to the grantor."<sup>45</sup> The use of the singular noun "heir" in the condition is significant. The grantee has the land for his life and the grantor commits himself to accept that child of the grantee who is his heir as the grantee's successor to the land. The grantor is thinking about and limiting succession to the land upon the grantee's death. More complicated conveyances show grantors planning primarily for the

<sup>42</sup> e.g. 2 *EYC*, No. 786 (1193–1208); 2 *EYC*, No. 984 (1180–89); 6 *EYC*, No. 108 (ante August 1175); 11 *EYC*, No. 96 (1166–80); *Early Northamptonshire Charters*, No. 35a (1185–1209); *Early Records of Coventry*, No. 292 (1260–80), No. 303 (1270s), No. 550 (1294). For a grant by a grandson in fee tail see *Charter Rolls*, II, 139 (1270). And for a grant to a nephew see *Charter Rolls*, II, 149–50 (1270).

<sup>43</sup> *Basset Charters*, No. 255 (1238–41), No. 267 (1230–2), No. 268 (1233–41); *Langley Cartulary*, No. 341 (1301); *Calverley Charters*, No. 67 (c. 1260); *Charter Rolls*, I, 231 (1237), 243 (1239), 334 (1248).

<sup>44</sup> 1 *CRR* 359 (1200); 7 *CRR* 241 (1214); 12 *CRR*, No. 481, *BNB*, No. 1074 (1225); CP25(1)7/1/17 (Berkshire, 1199); Hunter, *Fines*, I, 102 (1199), 291–2 (1202), 251–2 (1212); *Basset Charters*, No. 146 (1236).

<sup>45</sup> e.g. *Sussex Fines*, 3, No. 6 (1196–97); *Buckinghamshire Fines*, 9, No. 15 (1197); *Bedfordshire Fines*, 12, No. 23 (1197); CP25(1)258/1/5 (Worcestershire, 1197); CP25(1)7/1/12 (Berkshire, 1199); *Essex Fines*, I, 21 No. 33 (1200–1); *Somerset Fines*, 9, No. 67 (1201); *Devonshire Fines*, 22–3, No. 32 (1201); *Somerset Fines*, 7–8, No. 74 (1201); *Essex Fines*, I, 53, No. 43 (1218); 3 *CRR* 174 (1204); 5 *CRR* 251 (1208); CP25(1)212/6/152 (Suffolk, 1226); *Essex Fines*, I, 13, No. 38 (1198); CP25(1)212/6/155 (Suffolk, 1226); CP25(1)213/7/139 (Suffolk, 1228); *BNB*, No. 375 (1230); CP25(1)7/13/9 (Lincolnshire, 1240); CP25(1)187/5/25 (Oxfordshire, 1251); *Sussex Fines*, II, 111, No. 898 (1279).

reversion or immediate succession after the grantee's death. For example, a grantor might convey land to X for life and then provide that if X has an heir by his wedded wife such heir will hold the land.<sup>46</sup> One grantor provided that if the grantee did not have a child by his wife, the grantee may make whomever he wished his heir.<sup>47</sup>

Further provisions in grants in fee tail reinforce the idea that grantors using the basic form were focusing their attention on the question of succession upon the death of the grantee. The typical conditional reversion would deprive the grantee's wife of dower. In at least one case, in 1245, a widow claiming dower was ejected and her removal was not a disseisin because the grant to her husband provided that if he had an heir of his body, the land would remain to that heir but if he died without an heir of his body, the land would revert to the grantor.<sup>48</sup> The grantee had died without an heir of his body. His widow did not have dower just as she did not have dower in lands her husband held only for his life. Some grantors of fee tails explicitly provided that dower or a life estate for the grantee's widow would be saved from the reversion if the grantee died without an heir of his body.<sup>49</sup>

Another further provision, which began to appear with some frequency in conveyances in the 1220s and became more frequent later, fit the idea that grantors were thinking primarily in terms of grants for life which might be extended in such a way as to exclude collateral heirs. A grantor might provide that if A died without an heir of his body the land was to revert to someone other than the grantor.<sup>50</sup> Using words of reversion to limit a remainder was quite common. When Bracton gives examples of fee tails with remainders his sample conveyances use words of

<sup>46</sup> *Buckinghamshire Fines*, 34, No. 1 (1212); CP25(1)36/4/49 (Derbyshire, 1226); CP25(1)213/7/100 (Suffolk, 1228); CP25(1)92/6/83 (Huntingtonshire, 1233); CP25(1)182/6/188 (Nottinghamshire, 1236); *Sussex Fines*, II, 27–8, No. 613 (1257).

<sup>47</sup> *Somerset Fines*, 25–6, No. 10 (1209).

<sup>48</sup> JUST 1/482, m.42 (1245).

<sup>49</sup> *Devonshire Fines*, 1–2 (1196); *Essex Fines*, I, 13, No. 38 (1198); *Sussex Fines*, I, 27–8, No. 115 (1207); *Essex Fines*, I, 53, No. 43 (1218) and 53, No. 35 (1218); CP25(1)213/7/139 (Suffolk, 1228); CP25(1)213/7/151 (Suffolk, 1229); CP25(1)40/14/281 (Devonshire, 1238).

<sup>50</sup> *Cornwall Fines*, 10–11, No. 21 (1201); *Kent Fines*, No. 101 (1227); *Lancashire Fines*, 56–8, No. 32 (1229); *Sussex Fines*, II, 67, No. 742 (1269) and 87–8, No. 822 (1272).

reversion.<sup>51</sup> In the fourteenth century, it became clear that where a remainder follows a fee tail, a remainderman cannot take possession until the last heir under the entail has died without issue.<sup>52</sup> By that time, the remainderman named in the original conveyance might well be dead. His then living heir, lineal if the remainder were itself in fee tail, is eligible to take possession. Before *De Donis*, however, remainders were frequently conditional on the named remainderman being alive if the grantee of the fee tail died without an heir of his body. The word imposing the condition was “*vivente*” (living) or “*superstite*” (surviving) used with reference to the remainderman.<sup>53</sup> For example: A grants to B and the heirs of his body such that if B dies without an heir of his body, C living, the land is to remain to C and the heirs of his body, such that if C dies without heir of his body, the land is to revert to A or his heirs. It is unlikely that the grantor expected the remainderman to enjoy possession at the extinction of B’s issue because the chance of C being alive at that time would be slim. The grantor was not creating an interest that would have a high probability of never taking effect. But whether C will outlive B might be close to an even chance. Fathers used this form of grant to limit a series of remainders, thus conditioned, on their sons.<sup>54</sup> They were settling the succession to the land in the case that the first grantee in fee tail died without a surviving child. The next son in the series alive at the time of the first grantee’s death without lineal heir should succeed to the land.

In the 1220s some grantors began explicitly to take into account the possibility that their grantee would leave a lineal heir, who in turn might leave a lineal heir. Grantors who thus tried to look further into the future wanted to restrict succession to the lineal issue of his grantee and preserve the reversion until the last lineal heir of his grantee died. Their problem was to find a form of words that would convey that message. Grantors used various formulations for that purpose. They provided that the land would revert upon the death of (a) the heirs of the grantee’s children or

<sup>51</sup> e.g. 2 *Bracton* 70.

<sup>52</sup> Chapter 2, below, pp. 128–40.

<sup>53</sup> *Sussex Fines*, II, 58, No. 719 (1266); 63, No. 732 (1268); 68, No. 745 (1269); 76, No. 775 (1272); 90–1, No. 833 (1275); 92–3, No. 841 (1275).

<sup>54</sup> e.g. *Sussex Fines*, II, 58, No. 719 (1266) and 122, No. 935 (1281); *Somerset Fines*, 258–9, No. 70 (1283).

(b) the heirs of the body of the grantee's heirs of his body or (c) the heirs of the grantee's heirs of his body.<sup>55</sup> Sir Geoffrey de Langley seems to have preferred taking title to land jointly with his wife Matilda and his heirs by Matilda and "if those heirs die without an heir" remainder to his other heirs.<sup>56</sup> That grantors in the 1220s would begin to take a longer view is understandable given the legal environment of royally enforced rules of inheritance that could apply to claims based on ancestral seisin several generations in the past. When courts look far into the past, landholders have reason to look far into the future. The idea that in the case of a grant in free *maritagium* services were not owing until the third heir might also have led grantors of fee tails to look beyond their grantee's child.<sup>57</sup> When grantors used language referring beyond their grantee's lineal heir they were probably rendering explicit what was coming to be implicit in less wordy grants.

(b) *The duration of fee tails before De Donis*

A grant in fee tail included a condition on the reversion or remainder. After limiting the grant to the grantee and the heirs of his body the conveyance usually provided that if the grantee died without an heir of his body, the land would revert to the donor or remain to someone else. This form of conveyance raised the question of what would fulfill the condition so as to destroy the reversion or remainder. There are three possible answers: (a) as soon as the grantee has a child, the reversion or remainder is

<sup>55</sup> e.g. CP25(1)258/2/7 (Worcestershire, 1221) ("*pueris . . . et heredibus ipsorum puerorum*"); CP25(1)14/15/16 (Buckinghamshire, 1226) (reversion if grantee "*sine herede de corpore suo procreato obierit vel si heredes habuerit et ipsi sine heredibus de corpore suo procreatis obierunt*"); CP25(1)187/4/47 (Oxfordshire, 1228) (grant limited to grantee and heirs of her body "*et eorum heredibus*"); Hunter, *Fines*, II, 91–2 (1203) (reversion if heirs who issue from grantee die "*sine heredibus*"); Hunter, *Fines*, II, 99–100 (1209) (reversion if heirs that wife has by husband die "*sine heredibus de corpore eorum genetis*"). Similarly, *Somerset Fines*, I, 44, No. 53 (1222); *Essex Fines*, I, 65, No. 27 (1222); *Cornwall Fines*, 52, No. 107 (1244); *Somerset Fines*, I, 154, No. 92 (1252); *Beauchamp Cartulary*, No. 39 (1254); *Somerset Fines*, I, 236, No. 6 (1274); *Sussex Fines*, II, 108, No. 891 (1279); *Somerset Fines*, I, 249, No. 44 (1280); *Somerset Fines*, I, 259–60, No. 72 (1283); *Sussex Fines*, II, 131, No. 969 (1283).

<sup>56</sup> *Langley Cartulary*, Nos. 24, 82, 178, 180, 182, 183, 258, 293, 313, 339, 362, 400.

<sup>57</sup> See below, pp. 43–4.

destroyed, (b) if the grantee has a child and the child survives the grantee, the reversion or remainder is destroyed, or (c) even if the grantee has a child and the child survives the grantee, the reversion or remainder is not destroyed. This last possible answer leaves open whether and when the reversion or remainder would ever be destroyed. The question whether a reversion or remainder was destroyed did not arise in the abstract. In litigation, the question arose in two types of cases. In one type of case, a grantee of land in fee tail has alienated the land and has died. The reversioner asks the court to set aside the alienation and give him the land on the grounds that the reversion has not been destroyed.<sup>58</sup> In the second type of case, the grantee of land in fee tail has had a child and the child has died either before or after the grantee. The reversioner or remainderman has entered and the collateral heir of the grantee or of his child claims the land on the grounds that the reversion or the remainder has been destroyed.<sup>59</sup> The first type of case is a case of alienation by the grantee in fee tail. The second type of case is a case of succession to the entail. The courts gave a different answer in each type of case. Although Maitland and Milsom, from different points of view, have suggested that the courts treated cases of alienation differently from cases of succession, a more thorough examination of the plea roll evidence permits a better view of how the courts decided the two types of cases.<sup>60</sup> That the courts indeed decided the two types of cases differently is crucial to understanding the duration of entails before *De Donis*, to understanding *De Donis*, and to understanding the duration of entails after *De Donis*.

(i) *Alienation*

Maitland thought that before *De Donis* entails were conditional grants such that as soon as the grantee had a child the grantee could alienate the land.<sup>61</sup> He then tried to explain how lawyers could have come to such an odd interpretation of grants in fee tail. He thought that early in the thirteenth century grants in fee tail were outnumbered by grants in the form: to A and his heirs if A

<sup>58</sup> See below, pp. 21–33.

<sup>59</sup> See below, pp. 33–7.

<sup>60</sup> Pollock and Maitland, *History of English Law*, II, 17; Milsom, *Historical Foundations*, 174–5.

<sup>61</sup> Pollock and Maitland, *History of English Law*, II, 17.

has an heir of his body.<sup>62</sup> With this form of grant it is perhaps easy to see that if A has an heir of his body, he has fulfilled a condition such that he then holds the land to himself and his heirs. Maitland suggested that this understanding of this conditional grant “extended itself” to grants in fee tail.<sup>63</sup> There is reason to doubt Maitland’s explanation of alienability. First, grants in the form “to A and his heirs if A has an heir of his body” were relatively rare.<sup>64</sup> Secondly, by the 1220s and the time of Bracton lawyers were capable of distinguishing between conditional grants in Maitland’s form and entails.<sup>65</sup> Given the clear distinction between the two types of grant, it is unlikely that the learning on one “extended itself” to the other.<sup>66</sup>

Maitland’s view that before *De Donis* the grantee of a fee tail could alienate the land as soon as he had issue has become the accepted view among legal historians.<sup>67</sup> The accepted view is

<sup>62</sup> *Ibid.*, 18.

<sup>63</sup> *Ibid.* Holdsworth offered a similar explanation. W. Holdsworth, *A History of English Law*, 9 vols. (Little Brown: Boston, 5th edn, 1934), III, 112–13.

<sup>64</sup> See the examples cited by Maitland, Hunter, *Fines*, I, 85, 95, 110, 160, 251, as well as *Essex Fines*, I, 28, No. 103 (1202); CP25(1)15/16/19 (Buckinghamshire, 1227).

<sup>65</sup> *BNB*, No. 250 (1227); 2 *Bracton* 68–69, 144.

<sup>66</sup> In his discussion of Maitland’s form of conditional grant, Bracton is concerned with succession to the land, not with alienation: 2 *Bracton* 68–9, 144. If the condition is fulfilled, and A’s heir of his body survives A, the heir of his body will succeed A. This is straightforward enough. Bracton’s point, however, was that if A’s child does not survive A, the land will not revert to the grantor. The condition was fulfilled, so the *modus* or form of the grant controls the succession. A’s collateral heir will be called to succeed to the land. Bracton’s commentary on this form of grant is not inconsistent with his commentary on entails. This form of grant contains a condition precedent on the grantee holding to himself and his heirs. Entails contained a condition subsequent that triggered the reversion. (See Milsom, *Historical Foundations*, 174, for the importance of this difference.) Unable to find any case on Bracton’s point, I cannot say whether Bracton’s commentary accorded with the practice of the royal courts. A case in 1269 involved a grant to a man in *maritagium* with a woman on the condition that if he had a child by her the land would “remain” to them “*et heredibus suis*”: KB/189, m.14 (Trin. 1269). It is not immediately clear whether this phrase referred to the heirs of the man or of the woman. The couple had a child. The child died, then its mother, and then its father. The father’s nephew brought mort d’ancestor and the defendant vouched the grantor’s heir. The jury thought that the father had held curtesy. They must have interpreted the phrase in the grant “*et heredibus suis*” to refer to the wife’s heirs because the land had been given as her *maritagium*. The plaintiff, the husband’s heir, did not have a claim. Since the plaintiff was not the wife’s collateral heir the case is not quite on Bracton’s point.

<sup>67</sup> e.g. Baker, *Introduction to English Legal History*, 311.

misleading. It is based on the description of the law in the preamble to *De Donis*, which complained that grantees of fee tails were alienating the land as soon as they had a child born to them.<sup>68</sup> *De Donis*, however, was aimed at the decision in a single case in 1281. The view of the law expressed in the preamble to *De Donis* indeed became within two decades after the statute the official view of the law before the statute. One thus has, in a sense, two histories of the law before *De Donis*. One history is that of the development of the official history used in cases after the statute involving alienations before the statute. The second history is the present effort to discover the law before *De Donis* as revealed in cases before the statute involving alienations made before the statute. After considering the development of the official history we can turn to the cases decided before *De Donis*.

The question of what had been the law before *De Donis* arose after the statute, because the statute applied only to alienations made after its enactment.<sup>69</sup> When a defendant to a formedon writ after the statute alleged that the donee of a conditional gift had alienated before the statute, the justices applied what they thought had been the law before the statute. The view of the law before the statute expressed in the preamble to *De Donis* readily became the official view in descender cases. By 1293 defendants in descender cases conformed their pleadings to the requirements of the preamble. When pleading that the grantee had alienated before the statute, the defendant either said no more than that or said that the grantee had alienated after the birth of issue and before the statute.<sup>70</sup> The assumption in these cases seems to have been that the issue had been alive at the time of the conveyance. Given that the case was one of descender, the issue had survived the donee of the conditional gift.

<sup>68</sup> 13 Edw. I, c. 1 (1285), *Statutes of the Realm*, I, 71.

<sup>69</sup> Chapter 2, below, p. 85.

<sup>70</sup> *Taperod v. de Mareny*, CP40/102, m.89d (Mich. 1293) (the defendant did not specify the relative timing of issue and conveyance); *Pykehale v. Coverham*, JUST 1/1102, m.24d (Yorkshire, 1294) (issue then alienation); *Malechere v. Malechere*, CP40/183, m.150 (Mich. 1310) (issue then alienation); *Laxton v. Laxton*, CP40/183, m.408d (Mich. 1310) (issue then alienation); *Tafford v. Paylington*, CP40/183, m.436d (Mich. 1310) (issue then alienation); *Colby v. Spencer*, YB Trin. 4 Edw. II, 42 S.S. 60 (1311) (issue then alienation); *Niton v. Custodian of the Hospital of St. Mary Cirencester*, CP40/283, m.341 (Mich. 1330) (issue then alienation); YB Hil. 6 Edw. III, f. 20, pl. 35 (1332).

In cases of formedon in the reverter, the view stated in the preamble had a more difficult time becoming the official view of what the law had been before the statute. In 1290, a defendant to a reverter writ took the position that a donee could alienate even if his child had died before he conveyed the land.<sup>71</sup> Defendants also argued that the donee of a conditional gift could alienate if he had a child after the alienation. Justice Saham accepted this position in a case on eyre in the 1280s.<sup>72</sup> He dismissed as worthless a reversioner's argument that the alienation had been made before the donee had issue. In his view, birth of issue destroyed the reversion for the purpose of an alienation no matter when issue was born. In 1292, a defendant also argued that a valid conveyance could precede the birth of issue.<sup>73</sup> From this position, he withdrew to the safer position that the grantee's issue might die before he made his conveyance. But neither position was any longer tenable. The question for the jury was whether issue was alive at the time of the alienation. In 1304, Malberthorpe for a defendant to formedon in the reverter tried to enter the plea that the alienation had taken place before the birth of issue.<sup>74</sup> In his view, the birth of issue, even after the alienation, would have destroyed the reversion. But Friskeny quoted the preamble to *De Donis* and, again, the question for the jury was whether issue was alive at the time of the alienation. Yet, as late as 1317, Chief Justice Bereford in a reverter case expressed indifference whether issue had been born before or after the alienation.<sup>75</sup>

Returning to the period before *De Donis*, two distinctions are helpful to understanding the law governing alienations by the

<sup>71</sup> *Waleys v. Peveler*, CP40/82, m.16 (Pas. 1290).

<sup>72</sup> Bodlein Ms. Holkham Misc. 30, ff. 35r–v. I am grateful to Dr. Paul Brand for providing me with a transcription of this report. The report cannot be dated more precisely than the 1280s.

<sup>73</sup> *Redeshale v. Robert son of William the Provost*, CP40/95, m.65 (Trin. 1292), BL Add. Ms. 31826, f. 67. This case illustrates how the preamble of *De Donis* affected arguments about the law before the statute, for eight years earlier and before the statute, the same plaintiff had brought reverter against the same defendant for the same land: *Redeshale v. Robert son of William the Provost*, JUST 1/460, m.1d (Leicestershire, 1284). In this earlier case, the plaintiff argued that the grantee had alienated while tenant by the curtesy and the issue was whether the plaintiff could not sue until the grantee of the conditional fee was dead. If the plaintiff were consistent, issue preceded the alienation in these cases.

<sup>74</sup> YB (RS) 32–3 Edw. I 278 (1304).

<sup>75</sup> 34 S.S. 201 (1317).

donee of a conditional gift. First, one must differentiate grants in *maritagium* from grants in fee tail. A widow could alienate her *maritagium*. Her ability to do so provoked the barons in 1258 to complain that widows were alienating *maritagium* whether or not they had had a child.<sup>76</sup> In making this complaint the barons thought of *maritagium* as a fee tail. But *maritagium* was not treated as a fee tail as far as its alienability by widows was concerned until *De Donis*. This transformation of *maritagium* is discussed in the analysis of *maritagium*.<sup>77</sup> Secondly, it is useful to distinguish between claims by the donee's issue from claims by the holder of the reversion.

One does not find cases in which the donee's issue sought to set aside an alienation by the donee. The requirement that an heir must warrant his ancestor's grants precluded the issue of a tenant-in-tail from revoking his ancestor's alienation. For Bracton this was obvious. The only problem came in the cases where a husband alienated his wife's *maritagium*.<sup>78</sup> The problem was whether the joint heir of husband and wife had to warrant his father's grant of his mother's *maritagium*.<sup>79</sup> A grant in fee tail not in *maritagium* did not present this special problem. The issue of the tenant-in-tail had to warrant his ancestor's alienation. Bracton pointed out that this rule assumed that the tenant's issue was also the tenant's heir. If the grant is to a man and the heirs of his body with a particular wife and the man has a son by a previous marriage, then the warranty obligation descends not to the issue of the man and the particular woman named in the entail but to the son of the previous marriage, who is the man's closer heir.<sup>80</sup>

Whether the holder of a reversion could revoke an alienation by the donee of a conditional gift presented a more complicated question. There were two possible reasons why a reversioner might not recover the entailed land alienated by his donee: he might be barred by an obligation of warranty or the condition on his reversion might have been negated by the donee having had an heir of his body.

The grantor of a fee tail might be barred from the reversion by

<sup>76</sup> "Petition of the Barons," §27 in W. Stubbs (ed.), *Select Charters and Other Illustrations of English Constitutional History* (Oxford: Oxford University Press, 9th edn, as revised in 1921 by H. W. C. Davis, 1913), 377.

<sup>77</sup> Below, pp. 53–6. <sup>78</sup> 2 *Bracton* 31–3.

<sup>79</sup> Below, pp. 56–63. <sup>80</sup> 2 *Bracton* 32.

his own obligation to warrant his grantee's assigns. Bracton discussed this possibility in two places. In his discussion of *maritagium*, conceived as a joint entail, Bracton says that the land will revert to the grantor for failure of issue and that the grantor need not warrant alienations.<sup>81</sup> And in his discussion of grants to bastards Bracton wrote that if a bastard alienated the land and died without a surviving child the grantor need not warrant the bastard's alienation.<sup>82</sup> He was not barred from taking back the land unless in his grant he had included the assigns of the donee. Bracton thought that the practice of including the assigns of the grantee originated with grants to bastards.<sup>83</sup> In the course of the thirteenth century it became increasingly the practice to include assigns in conveyances,<sup>84</sup> but seldom in grants in fee tail. Grantors of fee tails almost always took care not to include the grantee's assigns lest doing so destroy the condition on the reversion. In 1244, however, when a grantor of land to a bastard tried to set aside his donee's alienation, he failed in part because he could not show that his grant was limited to the donee and the heirs of his body and in part because he brought a writ of escheat, which required that his donee die seised of the land.<sup>85</sup> The justices applied a presumption the reverse of Bracton's: unless explicitly restricted, a donee-bastard could alienate the land. Interpretative presumptions, however, supplement the silence of the parties. Where a grantor included the assigns of his donee, the grantor was probably regulating succession at the death of his donee if the donee had not alienated the land.<sup>86</sup> In the litigated cases, alienees do not seek to bar the reversioner on the grounds that the grant in fee tail included the donee's assigns. They had no basis for doing so.

Indeed, as early as the 1230s some grantors began to place restraints on alienations in their grants in fee tail. The restraint

<sup>81</sup> 2 *Bracton* 81–2.      <sup>82</sup> *Ibid.*, 75.

<sup>83</sup> *Ibid.* For early grants that included assigns of the grantee see Milsom, *Legal Framework*, 105–8; Hudson, *Land, Law, and Lordship*, 226.

<sup>84</sup> Bailey, "Warranties of Land in the Thirteenth Century, part 1," 298–9.

<sup>85</sup> 18 *CRR*, No. 1311 (1244).

<sup>86</sup> Exceptional grants in fee tail which included assigns are *Early Records of Coventry*, No. 616 (1260s–1270s); *Charters of Norwich Cathedral Priory*, II, No. 139 (mid-thirteenth century). In one grant to a daughter in fee tail the grantor gave power to alienate to his daughter's issue. *Langley Cartulary*, No. 114 (1230–50).

usually provided that the donee shall not alienate the land because if he dies without an heir of his body the land is to revert to the grantor.<sup>87</sup> In at least one instance, the restraint sought to protect the issue, not the grantor.<sup>88</sup> Bracton thought that restraints on alienation, unless total, were enforceable.<sup>89</sup> If he acted quickly enough, a grantor could eject the third party and the donee's violation of the restraint would be a good defense to an action of novel disseisin.<sup>90</sup> Otherwise, a grantor could sue his donee for damages.<sup>91</sup> Grantors also placed restraints on alienation in conveyances of life estates and cases of grantors enforcing these restraints against tenants for life appear on the plea rolls.<sup>92</sup> Few cases of grantors enforcing similar restraints on grants in fee tail or *maritagium* could be found on the plea rolls.<sup>93</sup>

The holder of a reversion might be barred by his ancestor's failure to put in his claim. In 1281, when a plaintiff claimed the reversion to a grant in fee tail made by his great-grandfather, the defendant produced a fine by the plaintiff's uncle granting the lands to the original grantee and his heirs.<sup>94</sup> The defendant argued that the plaintiff was barred because his father had failed to put in his claim when the fine was levied. The plaintiff asserted that at the time of the fine his uncle was not seised of the land. For that reason, his father had not had sufficient notice of the fine to put in his claim. The jury found that the plaintiff's uncle had been seised at the time of the fine. Judgment was for the defendant. The

<sup>87</sup> Hunter, *Fines*, II, 12 (1208); CP25(1)213/9/20 (Suffolk, 1233); *Essex Fines*, I, 101, No. 385 (1235); CP25(1)263/30/6 (Yorkshire, 1236); CP25(1)182/8/256 (Nottinghamshire, 1240); *Somerset Fines*, 110, No. 43 (1243).

<sup>88</sup> *Sussex Fines*, II, 25, No. 605 (1256).

<sup>89</sup> 2 *Bracton* 144–5.

<sup>90</sup> *Ibid.*, 147. <sup>91</sup> *Ibid.*, 144–5.

<sup>92</sup> For sample conveyances see Hunter, *Fines*, I, 310 (1204); *Somerset Fines*, 167–8, No. 133 (1256), 170–1, No. 142 (1256), 196–7, No. 40 (1259), 207, No. 78 (1259), 218–19, No. 109 (1268); *Sussex Fines*, II, 12, No. 552 (1255), 125, No. 946 (1282). For cases see *BNB*, No. 36 (1219); *BNB*, No. 153 (1222); 15 *CRR*, No. 180 (1233); 15 *CRR*, No. 1910 (1236); *Berkshire Eyre*, No. 392 (1248).

<sup>93</sup> CP40/58, m.13 (Pas. 1285) (plaintiff seeks to enforce fine and claims damages. He concedes, however, that the defendant is not the proper defendant). 17 *CRR*, No. 2236 (1243). In this case a woman is sued for alienating her *maritagium* contrary to an agreement. An agreement by the woman not to alienate her *maritagium* was necessary because traditionally a woman could in widowhood alienate her *maritagium*: see below, pp. 53–6. In another case, the grantor in fee tail came into the King's Court to interrupt an attempt by his grantee to make a grant: 13 *CRR*, No. 2222 (1229).

<sup>94</sup> JUST 1/1005, m.45 (1281).

holder of a reversion might also be barred by his ancestor's warranty. In a case in 1285, a few months after *De Donis*, when a defendant produced a final concord made by the plaintiff's uncle with warranty, the plaintiff pointed out that the uncle's fine recorded that he held only fee tail and his warranty bound only the heirs of his body.<sup>95</sup> Claiming through their father, they argued that they were not bound to warrant their uncle's grant. Judgment, if any, is unknown. In 1286, when a reversioner brought mort d'ancestor to recover land given to his uncle in fee tail, he was barred by the homage done by another of his uncles for the land.<sup>96</sup> The court suggested that the plaintiff might try formedon in the reverter.

A reversioner might be barred by his donee's warranty. A reversioner would thus be barred if his donee had alienated with warranty and the reversioner turned out to be the donee's heir. In 1232, when a plaintiff sought the reversion of his aunt's *maritagium*, the defendant vouched the plaintiff to warranty and produced his aunt's charter.<sup>97</sup> The plaintiff argued that he need not warrant his aunt's charter because he was not suing as her heir but as the heir of his father who had granted the *maritagium*. The plaintiff withdrew from his writ. Although the case was about an alienation of *maritagium*, the warranty of a tenant-in-tail would have had the same effect as the warranty of a tenant in *maritagium*. On the Gloucestershire Eyre of 1268–9 a grantor sued for the reversion on a grant his father had made in fee tail to his brother.<sup>98</sup> The defendant answered that the brother had granted the land to the defendant's father and mother and had obligated himself and his heirs to warrant the grant. The defendant argued that the plaintiff, as his brother's heir, was barred by warranty. The plaintiff denied his obligation to warrant his brother's grant on the grounds that he had no land by descent from his father. The parties settled. By speaking of land descended from his father, the plaintiff was obliquely arguing that he was claiming as the heir of

<sup>95</sup> JUST 1/622, m.25 (1285). Similarly, JUST 1/319, m.17 (1248).

<sup>96</sup> *Earliest English Law Reports*, II, 231. A father had three sons, A, B, and C. He granted land in fee tail to his middle son, B, who did homage. When the father died, B did homage to his elder brother, A. When B died, C entered and did homage to A. The plaintiff was A's son and heir.

<sup>97</sup> JUST 1/62, m.24d (1232). For a note of a similar case see *Casus Placitorum*, lxxxi (54).

<sup>98</sup> JUST 1/275, m.52 (1268–9).

his father, not as the heir of his brother. Perhaps he knew that, if made forthrightly, the argument would not help him. A lack of assets by descent, however, could lift a warranty bar. The plaintiff's strategy seems to have been to create confusion over whose warranty and whose assets were relevant. It is worth pointing out that in this and the preceding case plaintiffs were resisting a collateral warranty, a warranty, that is, which descended to them collaterally to their claim as the heir of the grantor. If the tenant-in-tail alienated by final concord, the reversioner was barred.<sup>99</sup>

A donor might not be able to recover the reversion because the condition on the reversion had been negated by his donee having had an heir of his body. The question then was what counted as the donee having an heir of his body. There are few cases on the plea rolls on point. In many cases in which a reversioner might be seeking to recover from his donee's grantee, the case does not reach this question. The defendant is given a view of the land,<sup>100</sup> or pleads that the plaintiff is underage,<sup>101</sup> or pleads that he does not hold the land claimed by the plaintiff,<sup>102</sup> or vouches to warranty,<sup>103</sup> or answers that the grant was not in fee tail but in fee simple.<sup>104</sup> In all but one of the cases that do reach the question, the justices took the position that a donee had an heir of his body sufficient to destroy the conditional reversion if the donee had a child who survived him. In 1250, the heir of a donor sought the reversion on a grant in *maritagium* on the theory that the donee had died without an heir of her body.<sup>105</sup> The defendant answered that the donee had not died without an heir of her body. She had had a child who survived her. On that issue, the case went to the jury. In 1261, the defendant to an action for a reversion demanded that the plaintiff produce written evidence of the grant giving him the reversion and would make no other answer.<sup>106</sup> The justices

<sup>99</sup> JUST 1/485, m.6 (1281).

<sup>100</sup> KB 26/195, m.39 (Mich. 1268).

<sup>101</sup> KB 26/208A, m.20 also KB 26/208B, m.2 (Trin. 1272); JUST 1/1000, m.14d (1281).

<sup>102</sup> JUST 1/60, m.12d (1272); JUST 1/758, m.39 (1280); CP40/38, m.13 (Hil. 1281); JUST 1/1000, m.38d (1281); JUST 1/1000, m.10 (1281).

<sup>103</sup> JUST 1/238, m.16 (1272); JUST 1/60, m.11d (1272).

<sup>104</sup> 18 CRR, No. 1212 (1244); CP40/17, m.97d (Mich. 1276); JUST 1/1055, m.41 (1279–80); JUST 1/1062, m.32d (1280); JUST 1/664, m.10 (1280–1); JUST 1/664, m.13d (1280–1); JUST 1/457, m.8 (1284–5).

<sup>105</sup> JUST 1/561, m.67d (1250).

<sup>106</sup> JUST 1/82, m.2 (1261).

decided for the plaintiff for two reasons: the plaintiff was ready to prove to a jury the grant limiting the reversion and the defendant was unable, or unwilling, to show that the donee had had a child who survived him (“*superstes fuit*”). Similar cases, in which the recovery of a reversion turned on whether the donee had had a child who survived him, were decided in 1280<sup>107</sup> and 1284.<sup>108</sup> In a report of a case from the 1280s, which cannot be dated clearly before or after *De Donis*, Justice Saham took the surviving-child idea to a point of logical purity. If the survival of the donee’s child destroys the reversion, then it should not matter whether the child was born before or after the donee alienated the land. Once the plaintiff in a case of formedon in the reverter acknowledged that the donee’s child had survived the donee, his further plea that the child was born after the donee’s alienation, in Saham’s words, “*ne vaut rien*.”<sup>109</sup> The plaintiff lost.

An especially forceful way for a defendant to assert that the donee had a child who survived him was for the defendant to answer that the donee’s child was still alive. The defendants made this answer in cases in 1281<sup>110</sup> and 1284.<sup>111</sup> The answer might have been stronger than merely saying the donee had had a child who survived not only rhetorically but legally. There was the idea that an alienation was good as long as there were warrantors alive to warrant the grant. Bracton expresses this idea in his discussion of grants made to a concubine. He says that her alienations will be good “as long as there are heirs who can warrant the grant.”<sup>112</sup> In a situation of a grant by the donee of a fee tail whose issue is alive at the time of the reversioner’s action, this idea would mean that

<sup>107</sup> JUST 1/1062, m.7 (1280).

<sup>108</sup> JUST 1/502A, m.9d (1284); CP40/54, m.73 (Trin. 1284). These two cases were brought by the same plaintiff against different defendants.

<sup>109</sup> Bodleian Ms. Holkham Misc. 30, ff. 35–35v. I am grateful to Dr. Paul Brand for a transcription of this report. As we have seen, Saham’s logic had its adherents after *De Donis* (above, p. 24).

<sup>110</sup> JUST 1/147, m.7, JUST 1/148, m.6d, JUST 1/151, m.6d (1291).

<sup>111</sup> CP40/53, m.25d (Pas. 1284).

<sup>112</sup> 2 *Bracton* 55. By the phrase “heirs who can warrant the grant” Bracton suggests that an heir might not be obligated to warrant a grant if he does not have assets by descent from the grantor, here the concubine. Although it was certainly true that a warrantor need not give *escambium* unless he had assets by descent from the grantor, it was not so clear that the warranty bar required the heir to have assets by descent. See below, pp. 59–60, for Bracton’s difficulties with this point.

the alienation is still good. This idea would not, of course, support the decisions against recovery of a reversion where the donee had had a child who survived him but who, apparently, had died before the reversioner brought his action. But the fact that the donee's child is alive when the reversioner brings his action was good evidence that the donee had had an heir of his body.

The belief that a grantee's alienation would withstand a claim to the reversion if the grantee had had a child who survived him can be derived from two ideas. First, there was the idea that a grant of land given in inheritance became stronger when and if the grantee had a surviving child, a child, that is, capable of inheriting the land as a matter of fact. One should not think of grants of land in the twelfth and thirteenth centuries as made between individuals so much as made between families or, at least, conjugal units. Under this surviving-child conception of a grant, a grant of land in inheritance was not altogether complete unless and until the second generation entered under the grant. This surviving-child conception of a grant, as is shown below, greatly helps to understand Glanvill's cryptic discussion of parental grants that forisfamiliate a child.<sup>113</sup> The surviving-child conception of a grant was also, as we will see, the traditional understanding of *maritagium* before it was modified by the three-generation rule of the royal, common law.<sup>114</sup> The surviving-child conception of a grant fit a conception of the conjugal unit as completed when the parents reproduced a child.<sup>115</sup> And the surviving-child conception of a grant underlay the grants in fee tail, which were, in effect, grants for life to be extended when and if the donee had an heir of his body.<sup>116</sup> Secondly, the surviving-child conception of a grant dovetailed in cases of alienation with a judicial unwillingness to upset alienations of land. This judicial attitude was one manifestation of a more general unwillingness to remove the current holder of land. The judicial unwillingness to upset alienations helps to account for the difference in outcome between cases of alienation and cases of succession.

The belief that a reversion was good unless the donee had a child who survived him received a shock in 1281. In that year Adam de la Rivere brought a writ of formedon in the reverter against

<sup>113</sup> Below, pp. 47–48.

<sup>114</sup> Below, pp. 44–47.

<sup>115</sup> Below, p. 47.

<sup>116</sup> Above, pp. 17–19.

Edmund Spignurel and Clarice his wife.<sup>117</sup> Adam claimed that his uncle Reginald had given land to Jordan de Wodebergh and Maselote his wife and the heirs of Maselote's body and that Maselote had died without issue. The defendant conceded that if Jordan and Maselote had died without an heir of Maselote's body the land should revert to the plaintiff, but the defendant asserted that Jordan and Maselote had had two boys, John and William, "by which the aforesaid condition was fulfilled and the reversion of the same tenements made totally infirm."<sup>118</sup> The plaintiff asked for judgment on the grounds that the sons had died while their parents were alive so that their parents died without an heir of their bodies. The plaintiff was later amerced for failing to prosecute his case. The plaintiff's failure to go forward suggests that the justices were ready to rule against him. In reaching that decision, the justices departed from the other cases on alienability. They must have thought that the condition on the reversion was negated by the birth of a child to the donee, whether or not the child survived the donee. This reading of the condition was especially hostile to donors. For the point of the standard, conditional reversion was to direct succession to the land in the event that the donee did not have a surviving child able to succeed him. The justices subordinated the surviving-child conception of a grant to their unwillingness to upset an alienation. The position taken by the justices in 1281 was pushed even further in 1290 in a case that involved an alienation before *De Donis*. The defendant to a formedon in the reverter argued the donee's alienation could not be undone even if the donee's child had died before the alienation.<sup>119</sup>

In taking the law toward an extreme, and away from the customary surviving-child conception of a grant, the 1281 case probably did much to motivate the enactment of *De Donis* in 1285. Between 1281 and 1285 a parliament met at Acton Burnel in 1283. At that parliament the Council dealt with a petition about the duration of a reversion after *maritagium*.<sup>120</sup> The petition is dis-

<sup>117</sup> JUST 1/1000, m.12d, JUST 1/1005, m.13 (1281).

<sup>118</sup> *Ibid.*, ("per quod condicio predictus plenus fuisse et reversionem eorum tenementorum totaliter infirmatus").

<sup>119</sup> *Waleys v. Peverel*, CP40/82, m.16 (Pas. 1290).

<sup>120</sup> H. G. Richardson and G. Sayles (eds.), *Rotuli parliamentorum Anglie Hactenus Inediti 1299–1373* (Royal Historical Society, Camden Society, 3rd ser., vol. 51, 1935), 20–1.

cussed below as a case of succession and as another motivation for *De Donis*.<sup>121</sup> At the 1283 parliament no action was taken on clear cases of alienations by a donee in fee tail. The preamble to *De Donis* complained that donees in fee tail have had the power of alienating land held in fee tail “after issue has been begotten and born” to the donee.<sup>122</sup> The only case decided before *De Donis* in which a donee appears to have had the power of alienating merely because of issue born to him before his alienation was the 1281 case. The statute in both its preamble and its operative provisions went beyond merely overturning the decision in the 1281 case. As interpreted at first, the statute prohibited alienations by donees of fee tails under any circumstances. After the statute, the official view of the law before the statute read the preamble as focusing on the situation of the 1281 case: the birth of a child enabled alienation.<sup>123</sup> The anomaly was taken to be the epitome.

(ii) *Succession*

Where succession was the issue, the donee having a child who did not survive him did not count as the donee having an heir of his body such that the reversion would be destroyed. Bracton is fairly clear on this point. In one passage Bracton speaks of the donee having a free tenement that grows into a fee upon the birth of a child and shrinks back into a free tenement if the child dies before the donee.<sup>124</sup> The conclusion to be drawn is that the land will revert to the grantor. Bracton seems to have had this conclusion in mind because he says that in such a case the donee’s widow does not have dower unless there was an explicit provision for dower in the grant. We have noticed that grantors sometimes assured dower to the wives of their donees in tail,<sup>125</sup> and we have also noticed that in a 1245 case a donee’s widow was denied dower because the grant was a conditional grant and the donee had died “*sine herede de se*.”<sup>126</sup> In another passage Bracton says that the land will revert to the grantor if the donee’s heir does not come into being or if he does and “fails.”<sup>127</sup> This statement clearly covers the case of a donee whose child dies before the donee.

<sup>121</sup> Below, p. 36.

<sup>122</sup> 13 Edw. I, c. 1 (1285), *Statutes of the Realm*, 71.

<sup>123</sup> Above, pp. 22–4. <sup>124</sup> 2 *Bracton* 68.

<sup>125</sup> Above, p. 18. <sup>126</sup> Above, p. 18.

<sup>127</sup> 2 *Bracton* 144.

A case of mort d'ancestor in 1269 involved a grant in *maritagium* to the husband and wife and the heirs of their two bodies.<sup>128</sup> The couple had a child who did not survive them. After both wife and husband had died, the donor's heir entered and granted the land. The husband's heir brought the action and the defendant vouched the donor's heir to warranty. The plaintiff lost his action because the entry by the donor's heir had been permitted by the form of the grant. The birth of a child to the donee of a conditional gift did not destroy the reversion. In cases of succession, the donee's issue must at the very least survive the grantee.

But if the donee's child survived him, would the reversion then be destroyed? Grantors who limited their grants not only to the heir of the donee's body but also to the heirs of the body of the donee's heir of his body were intent upon keeping the reversion alive. Their words might have rendered explicit implied understandings of a grant in fee tail. In one passage, Bracton says that even if there is no explicit provision for a reversion, the land must of necessity revert to the donor for lack of heirs when they do not come into being or if they do and fail.<sup>129</sup> This statement, later echoed in *De Donis*, suggests that the conditional reversion takes effect at the extinction of issue. In a case in 1219 plaintiffs certainly thought so.<sup>130</sup> The daughter of a grantor of land in *maritagium* claimed the reversion on the grounds that the son of the donees had died seised but without an heir of his body. From the plaintiff's pleading it sounds as if the donee's child survived his parents and succeeded to the land. Unfortunately, it is not clear who was the defendant, a collateral heir or a grantee. The plaintiff said only that the defendant had intruded himself after the death of the donee's son and during the recent war. The plaintiff lost her case because she had a brother who was closer heir to the grantor. The justices therefore did not have to address the question whether the reversion remained alive until the extinction of issue.

The question arose again in 1243.<sup>131</sup> The plaintiff claimed the reversion after a grant in fee tail with a remainder conditioned on the donee in fee tail dying without an heir of his body. The

<sup>128</sup> *Puttel v. Puttel*, KB26/190, m.6 (Trin. 1269).

<sup>129</sup> 2 *Bracton* 144.

<sup>130</sup> 8 *CRR* 73, *BNB*, No. 61 (1219).

<sup>131</sup> 17 *CRR*, No. 2281 (1243).

defendant was the remainderman. He claimed that the donee had indeed died without an heir of his body because, although the donee had had a child, the donee's child had died while underage without issue. The defendant's allegation that the child had died while a minor suggests that he did not survive the donee. The plaintiff claimed that the land ought to escheat to him because the donee having had children negated the remainder. The case was set aside for judgment but the decision is not known.

The justices addressed the question in a case in 1285.<sup>132</sup> Although the case was decided a few months after *De Donis*, the justices did not mention the statute in rendering their decision. One Bruna married one Simon and bore him two children, Simon and Joan. Simon the father died. Bruna married one Peter. At that time, the land in question was settled on Bruna and Peter in tail with successive remainders in tail to Bruna's children by her first marriage, Simon and Joan. Bruna and Peter had a son, John. Bruna died and Peter married one Reyna. They had a daughter, Maud. The heir in tail, John, succeeded to the land, and died without an heir of his body. Joan, the remainderman under the settlement, Simon having died, entered the land. Maud brought mort d'ancestor. She argued both that once Peter had had a child by Bruna he could alienate the land and that John, succeeding as heir to Peter, could also have alienated the land. John, therefore, held in fee simple and not fee tail. Maud thus reasoned from the alleged ability of Peter and John to alienate the land to the conclusion that they had had fee simple and from that concept back down to consequences for succession. The remainder was destroyed and Maud should take as John's closest heir.<sup>133</sup> The justices, however, did not follow Maud to her conclusory concept of fee simple nor back down to consequences for succession. Fee simple was not yet accepted by the justices as an abstract concept

<sup>132</sup> JUST 1/619, m.11, JUST 1/620, m.5, JUST 1/622, m.6d (1285). These rolls were of cases heard on the Northamptonshire Eyre during Michaelmas Term 1285. D. Crook, *Records of the General Eyre* (London: HMSO, 1983), 153. *De Donis* was enacted in Easter Term 1285. *Statutes of the Realm*, I, 71. Reports of the case are BL Add. Ms. 37657, ff. 62r-v; BL Add. Ms. 32008, ff. 113r-114r; BL Add. Ms. 5925, ff. 244-25r; BL Royal Ms. 10. A.V., ff. 98r-v; CUL Ms. Dd 7.14, ff. 372r-373r; CUL Ms. Ee 6.18, ff. 19r-v. I am grateful to Dr. Paul Brand for transcriptions of these reports.

<sup>133</sup> Maud's claim, that a sister by the same father should be preferred to a sister by the same mother, presented a very difficult issue.

from which one could deduce practical consequences. Although John could have alienated the land, he did not have fee simple. The justices held that the land should “revert” to Joan by the form of the gift because John, the donee’s child, had died without an heir of his body. They formulated a general rule: in a case such as this, the land ought to revert to the donor rather than descend to Maud, the collateral heir.

The general rule of the 1285 case comports with a petition to the Acton Burnel parliament in 1283.<sup>134</sup> Nicholas de Audeley complained that his brother William had brought mort d’ancestor to recover the reversion following his grandfather Henry’s grant of *maritagium* to William de Albo Monasterio and Amice, Henry’s daughter. William and Amice had a daughter, Bertrede, who had survived her parents and had died without issue.<sup>135</sup> Nicholas’ point was that William and Amice did not have issue who attained the degree to do homage, which would destroy the reversion. Nicholas was referring to the rule that homage need not be done for *maritagium* until the third heir, the fourth degree. The holders of the land were Eleanor Lestrangle and her sisters, Joan the wife of William de Barentyn and Maud the wife of William de Bracy. They were Bertrede’s collateral heirs.<sup>136</sup> The justices had told William that he should get a writ of formedon in the reverter. If the collateral heir got in, the reversioner could not use mort d’ancestor. Nicholas’ petition was for a writ of formendon in the reverter, but it is not clear whether Nicholas received his writ.<sup>137</sup> The question of the duration of a fee tail in a case of succession was before the Council and Parliament two years before the enactment of *De Donis*. The justices in 1285 might have expressed the Council’s decision in 1283.

If so, the Council’s decision was also part of the basis for *De*

<sup>134</sup> Richardson and Sayles, *Rotuli parliamentorum*, 20–1.

<sup>135</sup> 2 *IPM*, No. 387 (1281) (Bertrede a daughter of William de Blauminister).

<sup>136</sup> *Ibid.*

<sup>137</sup> There are two discrepancies between Audeley’s petition and the writ he requested. In his petition, he says that the defendants to his brother’s action of mort d’ancestor were Eleanor Lestrangle and her sisters, but the reverter writ he received names the defendant as Robert Bracy and Maud his wife. Maud was a sister of Eleanor. *Ibid.* Although Nicholas complained that his brother William was told to bring formedon in the reverter, his requested writ named Nicholas as the plaintiff. William had died before Christmas 1282 and Nicholas was his heir. 2 *IPM*, No. 476 (1282–3) (William de Auditheleye).

*Donis*. After the complaint about alienations by donees after issue born to them, the preamble to the statute continues: “And furthermore whereas upon failure of issue of such feoffees the tenement so given ought to revert to the donor or to his heir” alienations have precluded the donor from his reversion.<sup>138</sup> A bit later, the preamble returns to the theme that a donor ought to have his reversion where the donee’s issue fails “whether because there was no issue at all or there was issue but it failed by death without an heir [of the body] of such issue.”<sup>139</sup> Although not involving an alienation, the Council’s decision in 1283 did pertain to a case in which the donee’s issue failed because the donee’s issue did not have an heir of her body. The drafter of the statute used the word “issue” to refer to the first generation of the donee’s issue.<sup>140</sup>

Putting the 1281 judicial decision on alienation together with the question before the Council in 1283 one begins to see what the drafter of *De Donis* was trying to accomplish. He was trying to overturn the 1281 case while making the 1283 decision into a general rule. Much of the alleged confusion in *De Donis* dissipates if one views the statute with this double purpose in mind.<sup>141</sup> Bearing in mind that cases of alienation were treated differently from cases of succession will help in understanding the law of entails after *De Donis*.<sup>142</sup>

## 2. THE TRANSFORMATIONS OF *MARITAGIUM*

*Maritagium* was a grant of land made by a woman’s relative, usually her father, mother, or brother, nominally to her husband upon her marriage. *Maritagium* was a woman’s dowry, as opposed to her dower. A grant in *maritagium* served three functions. As a grant made in virtue of the woman, *maritagium* was the woman’s

<sup>138</sup> 13 Edw. 1, c. 1 (1285), *Statutes of the Realm*, I, 71.

<sup>139</sup> *Ibid.*, The emendation was suggested by J. H. Baker and S. F. C. Milsom, *Sources of English Legal History* (London: Butterworths, 1986), 49.

<sup>140</sup> W. C. Bolland, “Introduction,” YB 5 Edw. II, 33 S.S. (1916), xxxvii; C. M. Updegraff, “The Interpretation of ‘Issue’ in *De Donis*,” *Harvard Law Review* 39 (1925), 200; Plucknett, *Concise History*, 552. See Chapter 2, below, p. 87.

<sup>141</sup> Chapter 2, below, pp. 86–9.

<sup>142</sup> Chapter 2, below.

pre-mortem inheritance, which was to descend to her children in accordance with the norms of inheritance.<sup>143</sup> As a grant made with a woman upon her marriage, *maritagium* provided resources for the new conjugal unit.<sup>144</sup> As a grant made to the woman's husband, *maritagium* was the material basis for an alliance between the woman's family and her husband.<sup>145</sup>

From the middle of the twelfth century to the enactment of *De Donis*, *maritagium* was transformed into a special fee tail. This transformation took place in two stages. First, *maritagium* underwent changes when the customary institution was brought within the legal rules of homage and warranty established by the King's Court in Henry II's reign. Grants in *maritagium* began routinely to include words of entail. The words of entail preserved the older understanding of *maritagium* by making it clear that the land was to descend to the woman's issue and that the grantor had a reversion. The words of entail also enabled the grant in *maritagium* to have a more secure status in law because the words of entail enabled the grantor to take homage for his grant. The royal justices adopted a rule that homage need not be taken nor were services due for free *maritagium* until the third heir. This rule, perhaps intended to unify and clarify the understandings that had formed customary practice, was overtaken by the conveyancing practice of explicitly entailing grants of *maritagium*.

The second stage in the transformation of *maritagium* was the result of efforts to give the words of entail in grants of *maritagium* meanings they did not originally have. Reading a grant in *maritagium* as a joint entail made a woman's *maritagium* less the woman's pre-mortem inheritance and more of a grant. Because *maritagium* was the woman's inheritance, she in widowhood could undo

<sup>143</sup> For the term "pre-mortem inheritance" see J. Goody, "Marriage Pretestations, Inheritance and Descent in Pre-industrial Societies," *Journal of Comparative Family Studies* 1 (1970), 51–2; S. J. Tombiah, "Dowry and Bridewealth and the Property Rights of Women in South Asia" in J. Goody and S. J. Tombiah (eds.), *Bridewealth and Dowry* (Cambridge: Cambridge University Press, 1973), 64.

<sup>144</sup> The function of *maritagium* to provide a conjugal fund corresponds to the function of dowry in other preindustrial societies. See J. Goody, "Bridewealth and Dowry in Africa and Eurasia" in Goody and Tombiah, *Bridewealth and Dowry*, 38–9.

<sup>145</sup> *Maritagium* also had this function in common with that of dowry in preindustrial societies. See Goody, "Bridewealth and Dowry," 25; Tombiah, "Dowry and Bridewealth," 64.

grants by her husband out of her *maritagium*. But the King's Court had difficulty permitting a child of the marriage to undo his father's grant of his mother's *maritagium*. A widow's traditional ability to make grants out of her *maritagium* as she might out of her inheritance came under attack as *maritagium* came to be redefined as a grant in fee tail. Redefining *maritagium* as an entail also supported an effort to refuse a second husband curtesy in his wife's *maritagium* received at her earlier marriage. The effort to turn *maritagium* into an entail did not succeed until *De Donis*.

(a) *Maritagium and the legal reforms of Henry II*

The legal reforms of Henry II forced two transformations of *maritagium*. First, grantors began to include words of entail in their grants in order to preserve older understandings that the land would descend to the woman's issue and that the grantor would enjoy a reversion if the woman died without issue. Secondly, customary practices were unified and made more rigid in the rule that homage and service were not owed for free *maritagium* until the third generation.

(i) *Maritagium becomes a fee tail*

Glanvill wrote that a man could give a certain, undefined, part of his land in *maritagium* with his daughter to her husband even if the donor's heir protests.<sup>146</sup> Although Norman customs will set a limit of one-third to the amount of land that a man may give in *maritagium*, in England there was no limit.<sup>147</sup> Cases on the plea rolls record the unavailing complaints by sons that their fathers gave away too much land in *maritagium* or retained too little in services.<sup>148</sup> Glanvill also says that homage is not done for *maritagium* until the third heir.<sup>149</sup> In another passage, Glanvill repeats this statement and, a few lines later, says that homage is not due from the husband for his wife's *maritagium*.<sup>150</sup> Glanvill explains that one reason or part of the reason ("*quedam causa*") homage is not taken for *maritagium* is that homage would prevent the

<sup>146</sup> Glanvill 69. For an example of an heir consenting to a grant of *maritagium* see *Kent Fines*, 84, No. 95/13/104 (1207).

<sup>147</sup> *Trés Ancien Coutumier* c. 80, 2 and 3.

<sup>148</sup> 2 *RCR* 90 (1199) (services); 1 *CRR* 87 (1199) (land); 6 *CRR* 201 (1212) (land).

<sup>149</sup> Glanvill 92. <sup>150</sup> *Ibid.*, 106.

*maritagium* from ever reverting to the donor.<sup>151</sup> What, then, is the rest of the reason? Instead of homage, Glanvill says, the woman or her heirs ought to swear fealty “in nearly the same form and words as are used in the doing of homage.”<sup>152</sup> With good reason, Glanvill keeps the husband well out of the picture. If the husband does homage, the land might not be his wife’s *maritagium*. It might be his land to descend to his heirs, whether of this, a former, or a later marriage. This is the other or the rest of the reason why a husband does not do homage for *maritagium*.<sup>153</sup>

Bracton is more forthcoming. In one passage he repeats Glanvill’s lesson about not taking homage until the third heir and consoles grantors with the thought that after the second heir the chances of a reversion are so slim as not to be a real loss.<sup>154</sup> But in another passage, he poses a dilemma. If a grant is made to a man and his heirs in *maritagium* with the grantor’s daughter, the two parts of the grant – the limitation to the husband’s heirs and the phrase “in *maritagium*” – are antithetical.<sup>155</sup> In giving effect to the grant, one has to choose between what Bracton calls the homage and the *maritagium*. For Bracton the limitation to the husband and his heirs and homage are interchangeable. Bracton says that choosing the homage can be supported by a number of reasons but does not give any.

The new rules of homage posed two problems for grantors of *maritagium*: how to make a grant to a husband of land that is intended primarily for his wife and her issue and how to make such a grant without depriving oneself of the reversion. Introducing words of entail into grants of *maritagium* solved both problems at once. Using words of entail would do no more than preserve in the new legal environment the older, customary under-

<sup>151</sup> *Ibid.*, 93.      <sup>152</sup> *Ibid.*, 92.

<sup>153</sup> Milsom has noticed a similar difficulty with taking a husband’s homage for his wife’s inheritance or *maritagium*. If the husband has done homage, why, if his wife dies before him, does he hold the land only for his life? S. F. C. Milsom, “Inheritance by Women in the Twelfth and Early Thirteenth Centuries” in M. Arnold, T. Green, S. Scully, and S. White (eds.), *On the Laws and Customs of England* (Chapel Hill: University of North Carolina Press, 1981), 88. The entailing of a grant in *maritagium* would help to clarify the terms on which the husband did homage.

<sup>154</sup> 2 *Bracton* 77, 226. One wonders why, if the rule of the third heir were a customary rule preceding Henry II’s legal reforms, Bracton thought that grantors needed consolation.

<sup>155</sup> *Ibid.*, 80–1.

standings of *maritagium* on these two points. Beginning in the late twelfth century, grantors limit grants in *maritagium* mainly in three ways. The limitation could be expressed either “to H and W and the heirs issuing from the bodies of H and W”<sup>156</sup> or “to H and the heirs H procreates on the body of W.”<sup>157</sup> This latter limitation appears to have been the earlier and to have been directed at limiting the class of the husband’s heirs. It responds directly to preventing the husband’s homage from destroying the *maritagium*. A third limitation was “to H and W and the heirs of W’s body.”<sup>158</sup> A limitation “to H and W and the heirs of W” was also used in some conveyances.<sup>159</sup> Grantors rarely said simply “in *maritagium*” without further limitation. The last examples of such laconic grants come from the late twelfth and very early thirteenth centuries – the period of transition.<sup>160</sup>

Bracton gave the rationale for the new conveyancing practice. As for the homage bar, in a passage in which he is not reciting his Glanvill, Bracton says that homage disappears for a failure of heirs who fit the form or *modus* of the grant, tacit or expressed, as in the

<sup>156</sup> *Charter Rolls*, I, 132 (1231); *Beauchamp Cartulary*, No. 39 (1254); *Early Records of Coventry*, No. 380 (1210–20), No. 68 (c. 1270); CP25(1)7/12/11 (Berkshire, 1236); *Cartulary of St. Frideswide*, No. 588 (n.d.); *Haughmond Cartulary*, No. 508 (c. 1200).

<sup>157</sup> *Charter Rolls*, I, 119 (1230); *Charters of the Earls of Chester*, No. 220 (1190); *Beauchamp Cartulary*, No. 133 (early 13th century); *Christopher Hatton’s Book of Seals*, No. 298 (before 1210), No. 261 (1216–40); 2 *EYC*, No. 668 (1190–6); 3 *EYC*, No. 1585 (1180–95); 5 *EYC*, No. 203 (1175–1201), No. 262 (c. 1175), No. 356 (before 1184). 11 *EYC*, No. 134 (1190–1201), No. 220 (1180–1200); 12 *EYC*, 33–4 (1200–10); *Early Northamptonshire Charters*, No. 38 (c. 1222). Other formulations could also be used. *Beauchamp Cartulary*, No. 39 (“*heredibus suis de ipsa duobus exeuntibus*”) (1254); 9 *EYC*, No. 106 (c. 1175–85) (“*et pueris quos de ipsa habuerit*”).

<sup>158</sup> *Basset Charters*, No. 179 (late 12th century to 1205); *Missenden Cartulary*, I, No. 226 (before 1217); *Chatteris Cartulary*, No. 111 (12th century to c. 1235); *Beauchamp Cartulary*, No. 90 (before 1267); No. 248 (1236–40); *Devonshire Fines*, 52, No. 92 (1219); *Kent Fines*, 99, No. 95/13/116 (1228); CP25(1)40/10/198 (Devonshire, 1238); CP25(1)183/11/413 (Nottinghamshire, 1254).

<sup>159</sup> 1 *EYC*, No. 632 (1205–15); *Kent Fines*, 84, No. 95/13/104 (1198); *Buckinghamshire Fines*, 34, No. 4 (1210); CP25(1)212/6/122 (Suffolk, 1223); CP25(1)213/8/4 (Suffolk, 1230); CP25(1)263/26/18 (Yorkshire, 1234); CP25(1)187/5/96 (Oxfordshire, 1244).

<sup>160</sup> Samples of such laconic grants are D. E. Greenway (ed.), *The Charters of the Honour of Mowbray 1107–1191* (London: British Academy, 1972), No. 374 (1138–48); *Calverley Charters*, No. 1 (Temp. Hen. II or Ric. I); *Charters of the Earls of Chester*, No. 193 (1178–80); *Dale Abbey Cartulary*, No. 494 (late 12th century); 7 *EYC*, No. 172 (1190–1210); 10 *EYC*, No. 37 (c. 1200); 12 *EYC*, 33–4 (1200–10).



trumped other limitations to heirs. In 1275, when a plaintiff claimed the reversion of land entailed to a husband and wife and the heirs who issue from the husband and wife, the defendant denied that the grant had been in fee tail.<sup>166</sup> The jury found that the land had been given to the husband in *maritagium*. The court held that a grant in *maritagium* “*secundum legem et consuetudinem regni implicite continet in se predictam formam donacionis*” (“according to the law and custom of the realm implicitly contains in itself the aforesaid forms of the gift”) to them and the heirs of their bodies and if they die without an heir of their body the land will revert to the donor.<sup>167</sup> In 1279, a daughter brought mort d’ancestor on the death of her mother.<sup>168</sup> The defendant conceded that the mother had died seised and that the plaintiff was her closest heir. He argued, however, that the land had been given with the decedent in *maritagium* to her husband such that her husband could give, sell, bequeath, or assign the land. The court held that because the defendant conceded that the land was the decedent’s *maritagium* whatever else was in the charter did not matter. The plaintiff recovered.

(ii) *Maritagium for three generations*

Glanvill, and Bracton when he was merely reciting his Glanvill, taught that homage should not be taken for a grant in *maritagium*.<sup>169</sup> Homage cannot be demanded until the third heir. Closely related to homage were the services for the land. Glanvill says that a grant in *maritagium* can be entirely free of service to the donor or can reserve to the donor the service due for the land.<sup>170</sup> Most charters granting *maritagium* made the donees responsible for forinsec services.<sup>171</sup> In the case of free *maritagium*, Glanvill says

<sup>166</sup> CP40/9, m.45 (Pas. 1275).

<sup>167</sup> Ibid. For a similar case of 1256 the record of which is reproduced in the record for the 1281 Lincolnshire Eyre see JUST 1/492, m.39 (1281). I am grateful to Dr. Paul Brand for the citation to this case.

<sup>168</sup> JUST 1/914, m.5, JUST 1/918, m.16 (1279).

<sup>169</sup> *Glanvill* 92; 2 *Bracton* 77, 226.

<sup>170</sup> *Glanvill* 92; 2 *Bracton* 77–8.

<sup>171</sup> The statement in the text is based on a survey of *maritagium* charters that is far from exhaustive. For samples of charters that make the donee responsible for forinsec services see for example *Christopher Hatton’s Book of Seals*, No. 157 (“*salvo servitio domini regis*”), No. 261; 5 *EYC*, No. 164, No. 203; 8 *EYC*, No. 148 (“*salvo sevitio domini comitis warente*”); *Early Northamptonshire Charters*, No. 38. Samples of *maritagia* for reduced services are *Charters of the Earls of*

that the land will remain free of service until the third heir.<sup>172</sup> In the case of *maritagium* that is not free, the woman's husband and his heirs are bound to do the service "but without homage" until the third heir.<sup>173</sup> In two passages Bracton, writing some forty years later, recites his *Glanvill* on this point.<sup>174</sup> Bracton put the rule of the third heir in terms of degrees. Homage need not be done until the fourth degree, which he explained meant the third heir.<sup>175</sup> The rule used the parental scheme of inheritance under which each generation counted as a degree.<sup>176</sup> The third heir is not simply the third person to succeed to the property by inheritance. The third heir is the heir in the third generation of descent from the donee.

The rule that *maritagium* thus lasted until the third heir had a long future before it. But did it have a past? The question is difficult, because little is known, and given the sources little is knowable, about *maritagium* as a customary institution before it came under the legal rules generated in Henry II's reign. There are reasons, nevertheless, to believe that the rule of the third heir was a creation of the King's Court. The rule seeks to solve a problem that probably did not exist when *maritagium* was an informal allocation of land within a family. Some of those problems and how entailing *maritagium* avoided them were considered above.<sup>177</sup> But there are other reasons. First, the rule of the third heir solved the problem of homage by putting homage outside the family, where it had been before the royal justices began to see all grants as requiring homage for stability. Secondly, the rule created difficulty when it came to the duty of the donor to warrant his grant of *maritagium*. The rule thus imperfectly assimilated the customary institution to the new legal environment. Thirdly, there is evidence that donors and donees acted under a different conception of *maritagium* under which the *maritagium* had served

*Chester*, No. 193 (three knight's fees for the service of two knights); *Christopher Hatton's Book of Seals*, No. 298 (ten knight's fees for the service of eight knights).

<sup>172</sup> *Glanvill* 92.                   <sup>173</sup> *Ibid.*

<sup>174</sup> 2 *Bracton* 77, 226.           <sup>175</sup> 2 *Bracton* 77.

<sup>176</sup> See Baker, *Introduction to English Legal History*, 304–7. For an explanation of the Germanic and the Roman methods of counting degrees of kinship see J. Goody, *The Development of the Family and Marriage in Europe* (Cambridge: Cambridge University Press, 1983), 134–42.

<sup>177</sup> Above, pp. 39–43.

its purpose as support for the conjugal unit and as conduit to the next generation if the couple had a child who survived them. The entailing of *maritagium* enabled the parties to continue the older institution while taking the donee's homage in the new legal environment. As grantors began to take homage for entailed *maritagium*, the rule of the third heir mainly regulated when services were due for free *maritagium*.

The function of the rule of the third heir was to put homage outside the family. A similar rule was used in the case of female inheritance. By the later twelfth century inheritance among daughters was partible.<sup>178</sup> Younger daughters held in *parage* of the eldest but homage need not be done until the third heir.<sup>179</sup> Here, too, the rule regulated the taking of homage. And, here, too, the parties to the *parage* relationship sometimes used the words of entail to describe their relationships to each other.<sup>180</sup> A younger sister holding her inheritance from her older sister thus replicated a sister holding *maritagium* from her eldest brother. In both contexts – *maritagium* and female inheritance – the rule expresses the outer limits of kinship as four generations of descent. In the typical case of *maritagium* the donor is the donee's father so that the third heir is in the fourth generation and in cases of female inheritance, the third heir in *parage* is in the fourth generation of descent from the decedent. The King's Court, for other purposes, also treated persons who were in the fourth generation of descent from a common ancestor as strangers to each other. For example, in the writ of right there was neither battle nor grand assize between parties claiming descent from the same ancestor if they were within three generations of descent from that common ancestor.<sup>181</sup> The writ of cosinage went as far as the plaintiff's

<sup>178</sup> For female inheritance see Milsom, "Inheritance by Women," 155; J. C. Holt, "Feudal Society and the Family in Early Medieval England: IV. The Heiress and the Alien," *Transactions of the Royal Historical Society* 35 (5th ser., 1985), 1; S. Waugh, "Women's Inheritance and the Growth of Bureaucratic Monarchy in Twelfth- and Thirteenth-century England," *Nottingham Medieval Studies* 34 (1990), 71.

<sup>179</sup> *Glanvill* 76, 106; 6 *CRR* 77–8 (1210); 8 *CRR* 387 (1220); *Gloucs.*, No. 1133 (1221); 14 *CRR*, No. 571, *BNB*, No. 1765 (1227); *BNB*, No. 441 (1230); *BNB*, No. 1782 (1227).

<sup>180</sup> *Essex Fines*, I, 18, No. 58 (1198); *Kent Fines*, 26, No. 95/4/35 (1202); Hunter, *Fines*, I, 334–5 (1210); *Essex Fines*, I, 65, No. 27 (1222); 15 *CRR*, No. 1242 (1234–5); 16 *CRR*, No. 618 (1239); *Berkshire Eyre*, No. 229 (1248).

<sup>181</sup> S. J. Bailey, "Warranties of Land in the Thirteenth Century, part 2," 96, n. 63.

great-grandfather.<sup>182</sup> Bracton seems to say that an ancestor more remote than one's great-grandfather is simply one's cousin, which accords with the usage of litigants recorded on the plea rolls.<sup>183</sup> In the legal doctrine of the King's Court, then, homage need not be done for *maritagium* until the parties to the ceremony are strangers to each other. Homage is thus kept out of the family, according to one definition of family.

Excluding homage from the *maritagium* relationship presented the difficulty for the donee that, in the eyes of the King's Court, without homage the *maritagium* relationship was in a sense not an official relationship. There is some evidence that the donor's lord would not always recognize the grant or recognize it as one by subinfeudation.<sup>184</sup> According to Glanvill, if the donee sues to recover her *maritagium* she must do so with her warrantor.<sup>185</sup> A similar idea applied to a widow suing to recover her dower from a stranger and on the early plea rolls defendants in dower cases demand that the widow produce her warrantor.<sup>186</sup> Similar demands were not made in cases for *maritagium*. In only one case does it seem that a plaintiff donee called upon her warrantor and even here it is not clear that the defendant did not vouch the donor to warrant a competing grant to him.<sup>187</sup> In the slightly more frequent case, the donee of *maritagium* is the defendant and she vouches the donor to warranty.<sup>188</sup> Without homage, the basis for his obligation to warrant the *maritagium* was obscure. Ordinarily, without homage a defendant might produce a charter as the basis for his voucher to warranty. Bracton wrote that in the case of *maritagium* the transfer of the woman with the land was sufficient

<sup>182</sup> *Ibid.*, citing 3 *Bracton* 251, 318.

<sup>183</sup> 3 *Bracton* 251, 318. Litigants in cases recorded on the plea rolls use the word "cousin" to refer to ancestors more remote than their great-grandfather ("proavus" or "besaie") and sometimes to refer to their great-grandfather.

<sup>184</sup> *Northants.*, No. 490 (1202); 12 *CRR*, No. 1039 (1225). There are final concords in which it appears that the donor's lord approves that the donor give certain land in *maritagium* to a man who is the third party to the concord. *Essex Fines*, II, 23, No. 41 (1200); *Buckinghamshire Fines*, 19, No. 4 (1208); CP25(1)40/10/198 (Devonshire, 1238). For a lord's confirmation of his tenant's grant in *maritagium* see *Charters of the Earls of Chester*, No. 39 (1135–8).

<sup>185</sup> *Glanvill* 94.

<sup>186</sup> *Glanvill* 63. See J. Biancalana, "For Want of Justice," 527, n. 502.

<sup>187</sup> 4 *CRR* 11 (1205).

<sup>188</sup> e.g. 1 *RCR* 252 (1200); *BNB*, No. 1722 (1226); 14 *CRR*, No. 815 (1230).

basis for warranty.<sup>189</sup> Her body was as good as a charter. There is some evidence that donors were reluctant to warrant without homage.<sup>190</sup> And in some cases, the defendants point out that homage was done for the *maritagium* and it is on that basis that they vouch the donor.<sup>191</sup>

There is some evidence of another conception of *maritagium* under which the grant is completed when the first, not the third, heir entered the land. A grant of *maritagium* provided resources for the new conjugal unit. Not uncommonly in preindustrial societies the new conjugal unit is not complete unless and until the couple has a child.<sup>192</sup> In other societies the new social unit will not be recognized as such until the third generation.<sup>193</sup> For many purposes *maritagium*, as an institution for the devolution of property to the woman's issue, served its purpose if a child survived the couple. For example, grantors sometimes describe the land as having been their mother's *maritagium*.<sup>194</sup> They appear to have no difficulty in making their grants. Their doing so fits the idea that the new conjugal unit is complete and the purpose of *maritagium* has been served upon the succession of a child of the marriage.

The surviving-child conception of *maritagium* parallels Glanvill's teaching that the forisfiliation of a son does not become binding until the next generation. Glanvill explained that where a father died leaving a grandson by his eldest son and a younger son, there was disagreement whether the grandson or the younger son was the decedent's closest heir.<sup>195</sup> Glanvill says that he agrees with

<sup>189</sup> 2 *Bracton* 78.

<sup>190</sup> *BNB*, No. 241 (1227).

<sup>191</sup> 17 *CRR*, No. 2024, *BNB*, No. 1687 (1225).

<sup>192</sup> See A. Radcliffe-Brown, "Introduction" A. Radcliffe-Brown and D. Forde (eds.), *African Systems of Kinship and Marriage* (Oxford: Oxford University Press, 1950), 5; M. Gluckman, "Kinship and Marriage Among the Lozi of Northern Rhodesia and the Zulu of Natal" in Radcliffe-Brown and Forde, *African Systems*, 188.

<sup>193</sup> Tombiah, "Dowry and Bridewealth," 76-8.

<sup>194</sup> *Bassett Charters*, No. 182 (c. 1180-2); *Missenden Cartulary*, II, No. 447 (1205-24); 3 *EYC*, No. 1607 (1160-6); 2 *EYC*, No. 1210 (1190-1210); 7 *EYC*, No. 93 (1229-34).

<sup>195</sup> *Glanvill* 77-8. Indeed, this was the *casus regis*, for which see J. C. Holt, "The Casus Regis: The Law and Politics of Succession in the Plantagenet Dominions 1185-1247" in E. B. King and S. J. Ridyard (eds.), *Law in Mediaeval Life and Thought* (Sewanee, Tenn.: The Press of the University of the South, 1990), 21; Milsom, *Legal Framework*, 147-9, 175-6.

those who favor the grandson, if his father had not been forisfami-  
liated by his grandfather. A father can forisfamiliate a son by  
granting him land and having the son agree that he is satisfied  
with the grant, presumably in lieu of inheritance. Then Glanvill  
says that the heir of the body of the forisfamiated son cannot  
claim more than was granted to his father even though his father,  
if he had survived, could have claimed the entire inheritance.<sup>196</sup>  
Glanvill's argument, here, requires that forisfamiliation be accom-  
plished without the taking of homage, or else under the rule  
against being lord and heir the forisfamiated son would be barred  
even if he were alive at the time of his father's death. Assuming  
that Glanvill was not nodding, two possibilities come readily to  
mind. One possibility, suggested by Milsom, is that forisfamilia-  
tion was accomplished by substitution, not by subinfeudation.<sup>197</sup>  
If this were the case, the forisfamiated son would not be barred  
from his father's inheritance, because the lord of the fee, not his  
father, took his homage. But by the same token, the grandson  
would not be barred from his grandfather's inheritance and  
Glanvill rather clearly says that the grandson is barred. The other  
possibility is that forisfamiliation was achieved by subinfeudation  
and Glanvill is reporting an older understanding, dating from the  
time before the royal justices began enforcing rules of warranty,  
under which the father's grant in forisfamiliation of his son is not  
complete until the next generation. The forisfamiliation is not  
complete until there is issue surviving, because the surviving  
issue, the grandson, is barred although the son is not.

The custom of curtesy modified the surviving-child conception  
of the conjugal unit slightly.<sup>198</sup> Glanvill explains that if a husband  
has an "heir" by his wife, the husband may hold his wife's  
*maritagium* for his life even if his wife and their child both die.<sup>199</sup>  
If he has no "heir" by his wife, then the *maritagium* reverts to the  
donor on the death of the wife. A husband was characterized as  
the caretaker of the *maritagium* for his wife for their child.<sup>200</sup> If

<sup>196</sup> *Glanvill* 78.

<sup>197</sup> Milsom, *Legal Framework*, 139, n. 3.

<sup>198</sup> As Milsom rightly points out, the husband's ability to enjoy for his life his  
wife's inheritance or *maritagium* if he had had a child by his wife did not have a  
name until sometime in the thirteenth century: Milsom, "Inheritance by  
Women," 85-7. It is nevertheless convenient to use the later name to mention  
the earlier phenomenon.

<sup>199</sup> *Glanvill* 92-3. <sup>200</sup> See below, p. 52.

things went well, the child would succeed to his mother's *maritagium*. The courtesy in curtesy, and the point stressed by Glanvill, is that the husband may hold for his life even if he survives the child. This is generous because once the child dies, there is no longer a completed conjugal unit. *Maritagium* will not serve its devolutionary purpose. The *maritagium* is merely the wife's pre-mortem inheritance limited to her issue and as such should, in the absence of issue, revert to the donor. Instead, the *maritagium* does not revert until the husband is dead.

Consistent with the surviving-child conception of *maritagium* were the attempts to redefine or re-establish the donor-donee relationship after the first generation on either side of the relationship. The attempts to put the relationship on a new footing after a single generation raised the question of services owed for the *maritagium*. If the grantor had entailed his grant in *maritagium* he could take his donee's homage and avoid the homage bar.<sup>201</sup> In Bracton's slogan, services followed homage in the sense that if homage was taken, services were due.<sup>202</sup> Significantly, the rule of the third heir was invoked most often as a defense to a claim for services.<sup>203</sup> Perhaps the grantor having taken homage, he or his heir expected services to follow at least in the second generation under the surviving-child conception of the conjugal unit. The evidence of charters and final concords does not suggest that grantors of *maritagium* began to impose services at the outset. But frequently the *maritagium* relationship was changed in the second generation. There is a fair amount of evidence that the donor's heir sometimes sought to put the relationship on a new footing. It

<sup>201</sup> For instances of homage taken for *maritagium* see 3 *CRR* 24 (1203); *BNB*, No. 1100 (1225); *BNB*, No. 1687 (1225); 17 *CRR*, No. 2024 (1243).

<sup>202</sup> 2 *Bracton* 77–8 citing *BNB*, No. 664, 147. See Bailey, "Warranties of Land in the Thirteenth Century, part 2," 94.

<sup>203</sup> 6 *CRR* 354–55 (1212) (homage and relief); 12 *CRR*, No. 137, *BNB*, No. 77 (services) (1225); *BNB*, No. 241 (1227); 13 *CRR*, No. 1143, *BNB*, No. 295 (wardship) (1228); *BNB*, No. 664 (services) (1231); 15 *CRR*, No. 707, *BNB*, No. 811 (services) (1233). In *BNB*, No. 207 (1222) the plaintiff claimed homage, service, and relief because the defendant was the third heir. In another case a dispute over who was owed homage was settled by final concord in which the tenant acknowledged that as third heir he owed homage: CP25(1)156/51/433 (1233). Some thirteenth-century grants of *maritagium* look forward to the day when homage will be done and services will be due. *Beauchamp Cartulary*, No. 380 (1237–54) ("*Set cum tempus evenerit post liberum maritagium quod homagium debeat fieri . . .*"); *Lancashire Fines*, 267–8, No. 46 (1208).

is impossible to tell how frequently they did so. They sometimes challenge the grant in *maritagium*.<sup>204</sup> The donees sometimes are forced to bring an action to recover their *maritagium*<sup>205</sup> or to have the donor's heir warrant, and thus acknowledge, that they hold *maritagium*.<sup>206</sup> The point of much of this litigation might well have been for the donor's heir to extract a settlement in which the land would now be liable for services or the donees would pay for the recognition of the donor's heir.<sup>207</sup>

More importantly for our purposes is what happened if the donees had an heir who succeeded them. The evidence is neither as clear nor as abundant as one would like, but it seems that donors also took that event as the opportunity to change the *maritagium* relationship. These cases fit the surviving-child conception of the conjugal unit. Litigation between the donor or his heir and the donees' heirs probably also had a settlement re-establishing the relationship as the donor's goal.<sup>208</sup> By mid-century, the holder of *maritagium* had a writ of mesne to compel the donor or his heir to acquit the *maritagium* of the services owed

<sup>204</sup> 4 *CRR* 104 (1206); 6 *CRR* 144 (1211); JUST 1/801, m.6 (1227); JUST 1/1046, m.9 (1251).

<sup>205</sup> 1 *CRR* 12 (1190s); 1 *CRR* 41 (1198).

<sup>206</sup> 2 *RCR* 90 (1199); 7 *CRR* 86 (1214).

<sup>207</sup> *Feet of Fines*, No. 169 (1198) (donees pay donor's heir five marks); *Essex Fines*, I, 54, No. 49 (1218); *Langley Cartulary*, No. 205 (early 13th century) ("free" marriage altered to pay 20 pence rent p.a.); *Early Records of Coventry*, No. 678 (1230s) (donor's heir extracts payment of 2 shillings); CP25(1)263/26/18 (Yorkshire, 1234); 1 *CRR* 352 (1200); *Charters of Norwich Cathedral Priory*, II, No. 363 (homage taken). Donor's heir confirms by charter: 3 *EYC*, No. 141; 12 *EYC*, No. 85 (1192–1218); *Beauchamp Cartulary*, No. 177 (1158–74).

<sup>208</sup> (a) Donor or his heir sues donee's heir: 5 *CRR* 137 (1208); *BNB*, No. 1722 (1226); (b) Donee's heir sues donor or his heir: 1 *RCR* 362 (1199); *Gloucs.*, No. 981 (1222); 15 *CRR*, No. 236 (1238); 16 *CRR*, No. 1962 (1242); 18 *CRR*, No. 1196 (1244); (c) Donee's heir comes to agreement with donor or his heir: 3 *CRR* 296–7 (1205); *Lancashire Fines*, 26–7, No. 46 (1208) (donee's heir pays three marks); CP25(1)92/5/74 (Huntingdonshire, 1229); *Early Records of Coventry*, No. 647 (1270s); and possibly *Oxfordshire Fines*, 45, No. 93 (1211); CP25(1)212/6/122 (Suffolk, 1223); (d) Donor comes to agreement with donee's husband and children of donees: *Lancashire Fines*, 50, No. 19 (1227). In a complicated case in 1225, the second-generation heirs of the donee under one grant in *maritagium* sued the second-generation heirs of the donee under a second grant in *maritagium*: *BNB*, No. 1100 (1225). The defendants claimed that the first-generation heir under the first grant did homage to the donor of the second grant and the donees of the second grant did homage to him, the first-generation heir under the first grant.

to the lord of the fee.<sup>209</sup> Failing to pay the services owed for *maritagium* to the chief lord was another method of putting pressure on the holders of *maritagium* to reduce the financial burden of *maritagium*.

Homage and service was the price of recognition an heir paid to have his grandfather or, more likely, his uncle recognize him as holder of his mother's *maritagium*. Refusal to pay the price did not leave the heir with much recourse. The child of a donee could use mort d'ancestor to recover the *maritagium* of which his mother was seised at her death. But what is not clear is whether a plaintiff in mort d'ancestor who recovered his mother's *maritagium* had to do homage for the lands he claimed to hold of the defendant. The plea rolls reveal only the contested cases. If one of the parties has deviated from a customary or legal norm, it is not clear which party has done so. It might well be the donee's heir, who fails to realize that in the new legal environment homage is the only way to secure the old customary relationship. If this is so, then in many cases the donee's heir willingly did homage. He wanted to be recognized as his mother's heir. The function of *maritagium* to support a new conjugal unit had been served successfully. The couple had produced a child who had survived them.

(b) *Maritagium becomes a special fee tail*

The practice of entailing a grant of *maritagium* arose as the means of preserving the customary characteristics of *maritagium* in the new legal environment created by Henry II's legal reforms. As *maritagium* came to be understood as a type of entail, understandings about fee tails reflected back on and changed the institution of *maritagium*. *Maritagium* became more of a grant and less a substitute for the woman's inheritance. This shift in understandings formed the basis for efforts made to deny a woman and her children the ability to treat *maritagium* as the woman's inheritance and to deny a second husband curtesy in his wife's *maritagium*.

(i) *Maritagium and inheritance*

A grant in *maritagium* served not only to support the new conjugal unit. It also served as the woman's pre-mortem inheritance

<sup>209</sup> e.g. JUST 1/1046, m.51 (1252).

destined for her children. For many purposes *maritagium* and inheritance by women were treated similarly. In both cases, a woman's husband functioned as a trustee or guardian of the land for his wife and their children. He was not seised of her *maritagium*.<sup>210</sup> A husband could hold his wife's *maritagium* or inheritance as curtesy after her death if they had had a child.<sup>211</sup> He had the wardship of underage children.<sup>212</sup> If impleaded for land, he vouched his wife or child, the real parties in interest, to warrant his holding the land.<sup>213</sup> Although *maritagium* was given to her husband, there was seldom any question but that it was the woman's land. If a woman who had been given *maritagium* turned out to be the only child to survive her father, her *maritagium* became her inheritance.<sup>214</sup> And upon divorce, the woman retained land given in *maritagium* as she would her inheritance.<sup>215</sup>

If she had brothers, primogeniture meant that a grant by her father or her eldest brother was the only means by which a woman could inherit land. In this, a daughter resembled a younger son. It was fairly common for fathers to allocate portions of their land to their younger sons.<sup>216</sup> If she had sisters and no brothers, a woman might succeed to a portion of her father's lands either by way of inheritance or by way of *maritagium*. By the later twelfth century inheritance among daughters was partible.<sup>217</sup> The younger sisters held their land in *parage* from the eldest.<sup>218</sup> Where there were daughters and no sons, *maritagium* given to one of the daughters raised the question whether a sister's *maritagium* fell into the hotch-pot upon their father's death to be divided among the daughters along with the rest of their father's lands. This issue

<sup>210</sup> JUST 1/176, m.7d (1249); *ibid.*, m.12 (1249); *ibid.*, m.12d (1249); JUST 1/914, m.8 (1279); JUST 1/148, m.2d (1281).

<sup>211</sup> Pollock and Maitland, *History of English Law*, II, 414–18; Milsom, "Inheritance by Women," 79–89.

<sup>212</sup> 2 PKY, No. 455 (1201); 13 CRR, No. 1143, BNB, No. 295 (1228); JUST 1/706, m.15 (1285). For charters explicitly giving the husband wardship see 7 EYC Nos. 69, 70 (1202–3).

<sup>213</sup> *Lincs. & Worcs.*, No. 451 (1219); *Gloucs.*, No. 172 (1221); BNB, No. 694 (1232); 4 Bracton 193. Somewhat later he would pray the aid of the child: KB 26/137, m.17d (Hil. 1250).

<sup>214</sup> *Gloucs.*, No. 390 (1221).

<sup>215</sup> 5 CRR 250–1 (1208); BNB, No. 550 (1231); JUST 1/736, m.8 (1272).

<sup>216</sup> Hudson, *Lord, Law, and Lordship*, 199–202; H. Thomas, *Vassals Heiresses, Crusaders, and Thugs: The Gentry of Angevin Yorkshire 1154–1216*, (Philadelphia, Pa.: University of Pennsylvania Press, 1993), 119–25.

<sup>217</sup> Above, p. 45. <sup>218</sup> Above, p. 45.

signals a tension between *maritagium* as a grant and *maritagium* as pre-mortem inheritance. As a grant, no one, certainly not Bracton, would think that *maritagium* was to be put into the pot.<sup>219</sup> But as pre-mortem inheritance, it could well seem reasonable that after their father's death the daughters ought to put matters on a more equitable footing among themselves. The King's Court resolved the tension by saying that if a daughter with *maritagium* sued for a division of her father's land she had to put her *maritagium* into the pot for division.<sup>220</sup> Her sisters could not force her to do so by suing her for a division. That the defendant was holding the land sought as her *maritagium* was a good defense to their action.<sup>221</sup> This rule was part of the law of the writ used to seek a division, which required the plaintiff to allege that her father had died seised of the land. In effect, the daughter with *maritagium* could choose to treat it as a grant or as her pre-mortem inheritance.<sup>222</sup>

A wife, with the consent of her husband or in her widowhood, could grant part or all of her *maritagium* pretty much as a man could grant his land. This seems to have been the case in Normandy as well as in England.<sup>223</sup> Surviving charters record grant by wives, with the consent of their husbands, and grants by widows.<sup>224</sup> Sometimes, but not always, the woman's son confirms

<sup>219</sup> 2 *Bracton* 223–4.

<sup>220</sup> *Ibid.*, 224. *BNB*, No. 12 (1218). For a later case see *Waxande v. Delaware*, YB Trin. 7 Edw. II, 39 S.S. 180 (1314). In one case it seems that a daughter with *maritagium* may not participate in a division at all. *BNB*, No. 1018 (1224). For a manorial custom to that effect see *BNB*, No. 988 (1224). See *Casus Placitorum*, 1xxx1 (53).

<sup>221</sup> 7 *CRR* 298 (1214); 17 *CRR*, No. 1191 (1242); JUST 1/482, m.21 (1245); JUST 1/778, m.20 (1256); *ibid.*, m.22d (1256); JUST 1/979, m.5d (1256); KB 26/194, m.3 (Mich. 1269). A daughter with *maritagium* might offer to accept a partition if her sisters put their lands into the pot for division. 17 *CRR*, No. 1168 (1242). For similar law on the continent, see J. Yver, *Egalité entre Héritiers et Exclusion des Enfants Dotés: Essai de Géographie Coutumière* (Paris: Sirey, 1966).

<sup>222</sup> Waugh, "Inheritance by Women," 86.

<sup>223</sup> See E. Tabuteau, *Transfers of Property in Eleventh Century Norman Law* (Chapel Hill: University of North Carolina Press, 1988), 174; E. Tabuteau, "Marriage Settlements in Eleventh-Century Normandy," (unpublished paper delivered to the American Historical Association, 28 December 1977), 12. I am grateful to Ms. Tabuteau for a copy of her paper.

<sup>224</sup> *Basset Charters*, No. 200 (1220–65); *Haughmond Cartulary*, No. 341 (c. 1180); *Chatteris Cartulary*, No. 83 (13th century); *Beauchamp Cartulary*, No. 134 (ante 1241); *Cartulary of St. John's Colchester*, 48 (12th century); *Christopher Hatton's Book of Seals*, No. 219 (c. 1200); 2 *EYC*, No. 733 (late 12th century); 2 *EYC*, No. 1109 (1150–7); 3 *EYC*, No. 1613 (1180–1200), No. 1841

the grant much as a son would confirm his father's grants.<sup>225</sup> Sometimes, but not always, the woman's father or brother, who is either the donor of the *maritagium* or his heir, confirms, or consents to, the woman's grant out of her *maritagium*.<sup>226</sup> A jury in 1221 could speak of a collusive attempt to disinherit a woman of her *maritagium*.<sup>227</sup>

A widow's ability to grant her *maritagium*, as if it were her inheritance, began to be threatened as *maritagium* began to be thought of as a kind of entail. Ideas about permissible alienations by a tenant in fee tail began to be applied to *maritagium*. This assimilation of *maritagium* to fee tails underlies the barons' complaint in 1258. They complained that donors of *maritagium* were losing their reversions because widows were making grants of their *maritagium* whether or not they had a child.<sup>228</sup> The barons' petition describes *maritagium* as a grant to husband and wife and the heirs of the wife's body.<sup>229</sup> It was shown above that grants in *maritagium* were frequently made in some such form. But the explicit entailment of *maritagium* had served the purposes of solving the double problem of homage by excluding the husband's heirs from succession and preserving the reversion. It does not follow that the language of entail in a grant of *maritagium* automatically affects a widow's traditional and customary ability to make grants of her *maritagium* treated as her pre-mortem inheritance. Of course, the language of entail can be given the

(1180–1200); 5 *EYC*, No. 390 (1125–30); 9 *EYC*, No. 98 (1169–83); *Cartulary of Blythburgh Priory*, No. 377 (late 12th century), No. 396 (late 12th or early 13th century), Nos. 380 (ante 1217), 381 (first third of 13th century) (husband and son); *Stoke-by-Clare Priory Cartulary*, No. 60 (1198–1217, prob. 1212); *Earldom of Gloucester Charters*, No. 68 (1183–97), No. 78 (1194–7); *Early Records of Coventry*, No. 44 (1240s), No. 412 (1230s); *Cartulary of St. Frideswide*, No. 437 (1220–30). Or, a mother will consent to her son's grant out of her *maritagium*: *Christopher Hatton's Book of Seals*, No. 146 (c. 1160).

<sup>225</sup> 2 *EYC*, No. 819 (1175–90), No. 1203 (1140–75); 11 *EYC*, No. 215 (1148–56); *Stoke-by-Clare Priory Cartulary*, No. 564 (1174–98). In 6 *EYC*, No. 36 (early 13th century) the woman's husband confirms a grant his wife made of her *maritagium* by her will.

<sup>226</sup> 11 *EYC*, No. 261 (father); *Cartulary of Blythburgh Priory*, Nos. 212 (brother), 347 (brother). For a grant made by a widow after the death of the grantor of the *maritagium* see *Early Records of Coventry*, No. 44 (late 1240s).

<sup>227</sup> *BNB*, No. 1946 (1221).

<sup>228</sup> "Petition of the Barons," § 27 in W. Stubbs (ed.), *Select Charters*, 377.

<sup>229</sup> *Ibid.*

meaning and consequence that the barons wanted it to have, but it was a decision, a change, that had to be made.

Cases on the plea roll reveal a tension between the old and the new understandings of *maritagium*. In 1245, two grandsons brought a writ of entry to claim land which, they said, their grandfather's wife had held in dower and had alienated to the defendant's vouchee.<sup>230</sup> The jury found, however, that the grandfather's wife had held the land as her *maritagium* and had alienated the land in her widowhood. Judgment was for the defendant. In 1247 a donor's grandson sought the reversion to a grant by his grandfather to his aunt in fee tail.<sup>231</sup> He did not mention that the grant was in *maritagium*. The defendant's warrantor answered that the donee's aunt had alienated the land in her widowhood, which suggests that the land had been given in *maritagium*. The plaintiff could not deny the answer and lost.<sup>232</sup> In 1272, when the son of a donor sought the reversion of his aunt's *maritagium* against a grantee, the grantee asked for judgment in his favor on the grounds that the plaintiff's aunt had granted him her *maritagium* in her widowhood.<sup>233</sup> The plaintiff countered that the defendant had failed to allege that the aunt had given birth to a child. The plea roll entry ends at that point. In 1284, a son brought mort d'ancestor on the death of his father.<sup>234</sup> The defendant answered that the land had been given to the father in *maritagium* with his wife, that the wife had survived her husband and had alienated to the defendant, and that the plaintiff as heir to the wife was barred by his mother's grant. The plaintiff then made an argument under chapter 3 of the Statute of Gloucester, which provided that a son's warranty of his father's grants out of his mother's inheritance was limited to the value of the land that descended to him from his father.<sup>235</sup> Reversing the statute, the plaintiff argued that he, claiming on the seisin of his father, should not be barred by his mother's deed. The jury found that the land had been given to the

<sup>230</sup> JUST 1/482, m.17d (1245).

<sup>231</sup> JUST 1/56, m.3 (1247).

<sup>232</sup> The plaintiff had used a reverter writ in the escheat form, which required the decedent, whose death gave the plaintiff an action, to have died seised. The limitations to the plaintiff's writ prevented him from questioning the validity of the widow's alienation.

<sup>233</sup> JUST 1/84, m.13d (1272).

<sup>234</sup> JUST 1/502A, m.5 (1284). Similarly, JUST 1/460, m.14d (1284).

<sup>235</sup> 6 Edw. I, st. 1, c. 3 (1278), *Statutes of the Realm*, I, 47.

plaintiff's father in *maritagium* with the plaintiff's mother. Judgment was for the defendant. The question of a widow's ability to grant her entailed *maritagium* also arose in a case in 1286, the year after *De Donis*.<sup>236</sup> But now the defendant had to make two arguments: the woman had granted the land in her widowhood and had done so before the statute *De Donis*. The plaintiff withdrew from his writ. In 1310, the defendant to a descender writ made the same answer: alienation by a widow of her *maritagium* before *De Donis*.<sup>237</sup> The answer framed the issue for the jury. The barons' position that a widow could not alienate her *maritagium* was not adopted until *De Donis* treated *maritagium* as a type of entail.

A husband's grant out of his wife's *maritagium* disrupted the function of *maritagium* as his wife's inheritance that was to descend to her issue or revert to her family. Yet a husband's grant out of his wife's *maritagium* might be necessary for *maritagium* to function as a fund for the conjugal unit. How the law mediated this conflict is best understood by considering who might seek to revoke a husband's grant. There were three such persons: his wife, her child, who might also be his child, and the donor of the *maritagium*.

A woman could not revoke her husband's grant until after his death. A widow's ability to revoke her husband's grant posed a conflict between two functions of *maritagium*. If *maritagium* is the woman's inheritance, her husband should not be able to make an irrevocable grant. If *maritagium* is a conjugal fund, a husband should be able to dispose of his wife's *maritagium* for the benefit of the conjugal unit. Bracton acknowledged the second view. He began his discussion of the alienability of *maritagium* by saying that one must first determine whether the grant was made for "an honest and necessary cause" or was "willful."<sup>238</sup> Only willful alienations may be revoked. Alienations for good reasons are alienations for the common benefit of the couple and their children. The only examples Bracton mentions are grants to sons and grants in *maritagium* to daughters.<sup>239</sup> This way of thinking

<sup>236</sup> JUST 1/572, m.46d (1286).

<sup>237</sup> CP40/180, m.128d (Hil. 1310).

<sup>238</sup> 4 *Bracton* 31.

<sup>239</sup> For a grant to a son out of his mother's *maritagium* see 7 *EYC*, No. 144 (ante 1219).

about whether to revoke a grant of land is reminiscent of an older world in which customary norms restrained the alienation of inherited lands to reasonable grants.<sup>240</sup> Poverty would count as a necessary cause. Similar customs survived in boroughs.<sup>241</sup> The King's Court used different rules.

The writ of entry *cui in vita* enabled a woman to revoke an alienation by her husband of her inheritance or her *maritagium* whatever the reason for the alienation.<sup>242</sup> The writ appears as early as the last decade of the twelfth century.<sup>243</sup> By the latter half of the thirteenth century, a widow could also use *cui in vita* to recover land that had been granted to her and her husband jointly, even though the grant had not been in *maritagium*.<sup>244</sup> This development reflects the increasing practice of married couples taking joint title to acquired land and, perhaps, the shift toward replacing *maritagium* with a money portion in exchange for a marriage settlement made by the groom's father. At any rate, the woman's consent in widowhood to a grant of her *maritagium* was a good defense to any attempt by her or her heir to revoke her husband's grant.<sup>245</sup> By the time of Bracton, a married woman could consent to her husband's grant of her *maritagium* if the grant were made by final concord in the King's Court, because the justices, it was thought, protected the wife from coercion by her husband.<sup>246</sup> Some boroughs had a similar custom: a grant of *maritagium*

<sup>240</sup> See Biancalana, "For Want of Justice," 533.

<sup>241</sup> *Yorks.*, No. 292 (1218–19) (York: husband may sell wife's *maritagium*); JUST 1/701, m.14d (1261) (Oxford: husband may grant wife's *maritagium* to daughter in *maritagium*); JUST 1/664, m.17 (1280–1) (Nottingham: husband may sell out of necessity); 13 *CRR*, No. 1154; *BNB*, No. 294 (1228) (Winchester: husband may sell out of necessity). But in Lichfield a husband could not alienate his wife's *maritagium*: *BNB*, No. 1981 (1221).

<sup>242</sup> Pollock and Maitland, *History of English Law*, II, 69.

<sup>243</sup> 2 *RCR* 68 (1199); 1 *CRR* 142 (1200); *PKŷ*, No. 3157 (1200). The court did not take a consistent position on the use of self-help. The Countess Amice, after the dissolution of her marriage with the earl of Clare, was unable to use her own court to undo her husband's grant of her *maritagium*. 1 *PKŷ*, No. 3199, 2 *RCR* 180, 1 *CRR* 185, 225, 249 (1200). Milsom, *Legal Framework*, 45–6. But three years later, a woman and her son simply took back *maritagium* from her husband's grantee. He brought novel disseisin, and lost. Since the woman was alive, neither her father nor her son could have the land: 3 *CRR* 67 (1203).

<sup>244</sup> e.g. JUST 1/183, m.8 (1281–2); JUST 1/1000, m.27 (1281).

<sup>245</sup> e.g. 1 *RCR* 142 (1198); *BNB*, No. 679 (1232); KB 26/137, m.18 (Hil. 1250).

<sup>246</sup> 4 *Bracton* 31.

enrolled in the borough's court roll would bind the married woman.<sup>247</sup>

The case that gave Bracton and the King's Court the greatest difficulty was the case of a son seeking to revoke his father's, or stepfather's, grant of his mother's *maritagium*. Could the son use *cui in vita*? This question is best approached by considering the case in which a widow brings her *cui in vita* and the defendant vouches the husband's heir to warrant the husband's grant. If the husband had taken the defendant's homage or had granted the land with a commitment to warrant the grant, his son and heir was bound to warrant the grant. Some husbands refused to take homage for their grants out of their wives' *maritagium* or inheritance. In 1201, a husband refused to take homage because the land was his wife's inheritance. She had been pregnant when the plaintiff brought his writ, but she now had a son to whom the land should descend.<sup>248</sup> The justices ordered him to take homage saving the right of the child. Not surprisingly, the sons of grantors denied that they had to uphold a grant that their fathers had made out of their mothers' *maritagium*. In 1203, a son refused to take the homage of the son of his father's grantee on the grounds that the land was his mother's inheritance.<sup>249</sup> The court ordered him to take homage saving to him his right and action. In the Yorkshire Eyre of 1218–19, a son defended an action of warranty of charter by his father's grantee on the grounds that the land was his mother's inheritance.<sup>250</sup> The grantee complained that the son, contrary to his duty of warranty, had taken the grantee's beasts. The court, sidestepping the issue of warranty, made the son wage his law that he had not taken the grantee's beast.

A defendant to *cui in vita* who did not dispute his alleged entry by the husband's grant had to vouch someone to warrant his possession. In a case in 1246, when a defendant admitted his entry by a grant from the plaintiff's husband but vouched no one

<sup>247</sup> JUST 1/561, m.51 (1250) (Norfolk, court roll).

<sup>248</sup> 2 *PKY*, No. 563 (1201). The plaintiff sued for the defendant to take his homage. In her translation Lady Stenton supposes that it is the plaintiff's wife who was pregnant and has now delivered a son, but it is not clear how taking the plaintiff's homage could damage his son. The defendant is said to produce the child, which suggests that the child is his wife's.

<sup>249</sup> 2 *CRR* 221 (1203). Similarly, *Gloucs.*, No. 1134 (1221).

<sup>250</sup> *Yorks.*, No. 255 (1218–19).

“against her,” he lost on the spot.<sup>251</sup> When a defendant to *cui in vita* vouches someone to warrant the husband’s grant, he seems always to vouch the joint heir of the husband and wife, usually their son. The defendants do not, for example, vouch the husband’s brother or the husband’s son from another marriage, although Bracton mentions the latter possibility.<sup>252</sup> They would vouch the husband’s brother or the husband’s son from another marriage only if either were the husband’s heir to whom descended the obligation of warranty. But, perhaps, the existence of a vouchable child was necessary for the grant to be at all good. The child would be the husband’s heir within the *modus* or form of the gift under which the husband had entry to the land.

From an early date it was settled that if the common heir as warrantor could not defend the land for his vouchee he need only provide his vouchee *escambium*, lands to the value of the lands lost in the litigation, to the extent that he had lands by descent from his father.<sup>253</sup> Suppose that the son did not have assets by descent from his father. Bracton was fairly clear that the son nevertheless had to warrant his father’s grantee.<sup>254</sup> But what did that mean? Some thought and others feared that it meant that the loss would fall on the woman. In 1202, a defendant to *cui in vita* vouched the son to warranty but explained that the son had wasted and given away the lands he had received by descent from his father in order to deprive the defendant.<sup>255</sup> He was giving a reason why the son’s

<sup>251</sup> JUST 1/1045, m.36 (1246).

<sup>252</sup> 4 *Bracton* 31–2.

<sup>253</sup> *Lincs.*, No. 1158 (1202). For later cases see 12 *CRR*, No. 2022 (1226); 13 *CRR*, No. 1044, *BNB*, No. 290 (1228); *Yorks.*, No. 167 (1218–19); JUST 1/62, m.12d (1232); JUST 1/1045, m.41 (1246); JUST 1/365, m.86d (1271). *Glanvill* 39 says that a warrantor is bound to give *escambium* “if he has property out of which he can do this” (“*si habuerit unde id facere possit*”). Bailey took this statement to mean that a son’s *escambium* was limited to his assets by descent from his father. Bailey, “Warranties of Land in the Thirteenth Century, part 1,” 293, n. 140. But that need not be the only interpretation. *Glanvill* might well be thinking of a lord who cannot give *escambium* simply because he has no land in demesne.

<sup>254</sup> 4 *Bracton* 31–2. But none too clear. At one point Bracton says that an heir is bound to warrant and defend his father’s deed to the extent of his paternal inheritance but not beyond, which might mean that the heir could object to the voucher on the grounds that he had no assets by his paternal inheritance. *Ibid.*, 32. For a similar, unsuccessful, objection see 14 *CRR*, No. 1295, *BNB*, No. 525 (1231).

<sup>255</sup> *Lincs.*, No. 1158 (1202).

inability to give *escambium* should result in the woman losing her action rather than his losing *escambium*. In 1225, a plaintiff objected to a defendant vouching her son to warranty. He had no assets by descent from his father. The plaintiff asked for judgment whether she for that reason should lose her inheritance.<sup>256</sup>

The King's Court did not bar the widow because of the son's inability to provide *escambium*. If the son could not give *escambium*, the loss fell on the husband's grantee. The son need not provide *escambium* out of the lands that his mother recovers and that later descend to him. The son will, however, have an outstanding obligation to provide *escambium* should he in future inherit lands from his father.<sup>257</sup> This idea of a postponed *escambium* came into play where the son and warrantor was underage. In 1221 the court ruled that a plaintiff was to recover on her *cui in vita* and that the question of the defendant's *escambium* waited until the son came of age.<sup>258</sup> Somewhat later this practice was changed so that the entire case awaited the vouchee's coming of age.<sup>259</sup> The woman would recover only if she were alive for that event. The older practice of not awaiting the majority of the vouchee was restored by chapter 40 of Westminster II.<sup>260</sup>

But could the son recover his mother's *maritagium* granted away by his father? Bracton's discussion of this question reads like a debate between two persons, one who thinks of *maritagium* as the mother's inheritance that should descend to the son and another who applies the rule that an heir must warrant his father's grants. Bracton divides the question into the two cases of the wife dying after her husband and the wife dying before her husband. He disposes of the first case by saying that if the surviving wife did not sue in her lifetime she accepted the injury to her and her son cannot sue.<sup>261</sup> This argument of tacit consent treats the *maritagium* as the wife's inheritance, but the argument reads like a cheap way out of a tight spot. Turning to the case where the husband survives his wife, Bracton at first says that the writ *cui in vita* does

<sup>256</sup> 12 CRR, No. 845 (1225).

<sup>257</sup> JUST 1/365, m.86d (1271).

<sup>258</sup> 10 CRR 257 (1221).

<sup>259</sup> JUST 1/365, m.53d (1271); JUST 1/868, m.11 (1241).

<sup>260</sup> 13 Edw. I, c. 40 (1285), *Statutes of the Realm*, I, 91; YB (RS) 21–2 Edw. I 476–77 (1294); YB (RS) 17–18 Edw. III 292 (Mich. 1343).

<sup>261</sup> 4 Bracton 32.

not lie for their common heirs for if it did an heir could impugn his father's deed, which he as heir should defend.<sup>262</sup> Here Bracton thinks of *maritagium* as a joint grant limited to the common heirs. But he immediately counters his own argument with the argument that the son is not bound to defend his father's deed by his mother's inheritance when nothing descends to him from his father.<sup>263</sup> For when nothing descends from his father, the son is not his father's heir, only his father's son. This argument depends upon *maritagium* being the wife's inheritance even if entailed to the common heirs. A bit earlier Bracton had said that the writ did not lie for the common heir unless the father had had a son by an earlier marriage.<sup>264</sup> In that case, the son of the second marriage and would-be plaintiff would not be his father's heir and the warranty bar would not descend to him. And a bit later, Bracton finds two other ways out of his dilemma.<sup>265</sup> First, he says that a son need not defend his father's deed with his mother's inheritance in the sense that he need give *escambium* only out of lands descended from his father. He is barred, however, from taking back his father's grant. Bracton, here, separates the duty to give *escambium* from the warranty bar.<sup>266</sup> Secondly, Bracton also turns to the language of the *cui in vita* writ. The writ says that the woman could not contradict her husband during his life. Although the writ itself seems to assume coercion of the wife, Bracton argues that the son may not use this writ because it is not for him to say whether his mother could or could not contradict her husband.<sup>267</sup>

Bracton might well have been reporting the policy for the *cui in vita* writ, even though he could produce only poor arguments to justify that policy. In two cases in 1219, a son brought *cui in vita* against his father's grantee. In one case, the defendant vouched the father who was still alive.<sup>268</sup> The outcome of the other case is unknown.<sup>269</sup> Thereafter a son's use of *cui in vita* disappears from the plea rolls. The son's *cui in vita*, later called *sur cui in vita*, does

<sup>262</sup> *Ibid.*, 32.                      <sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*, 31.                      <sup>265</sup> *Ibid.*, 33.

<sup>266</sup> For the difference between positive duty of warranty to defend a grant and give *escambium* and the negative warranty bar, see Hyams, "Warranty and Good Lordship," 465; Hudson, *Law, Lord, and Lordship*, 56–8.

<sup>267</sup> 4 *Bracton* 33.

<sup>268</sup> *Yorks.*, No. 1132 (1219).

<sup>269</sup> *BNB*, No. 22 (1219).

not reappear until after *De Donis* and then probably only to recover his mother's inheritance.<sup>270</sup> He then has formedon in the descender for his mother's *maritagium*.

A son could use other writs to recover his mother's *maritagium*. The defendant's identity is often unclear. When his identity is ascertainable, the defendant is frequently a child of another marriage or is a husband or his heir claiming curtesy.<sup>271</sup> When it comes to a son's ability to recover his mother's inheritance or *maritagium* from his father's grantee the plea roll evidence does not present a clear picture. Oddly, there are few later cases that involve *maritagium*. In two early cases a son sued for his mother's *maritagium* from his father's grantee. In one, the son brought mort d'ancestor for land his father had given to his daughter.<sup>272</sup> The son objected to his father's disposing of his mother's *maritagium*, but his father was still alive. In the other, the son brought a writ of entry *ad terminum qui preterit* for his mother's *maritagium* which his father had gaged to the defendant.<sup>273</sup> If the son was right and the term was over, the issue of warranty would not arise. The case went to the jury to decide whether the defendant's entry was as the plaintiff had alleged. For a while, at least, a son could bring mort d'ancestor to recover his mother's inheritance granted away by his father while tenant by the curtesy. Mort d'ancestor could work in this situation because the plaintiff's mother had died seised.<sup>274</sup> In 1248, a defendant produced the father's charter and claimed that the son was barred.<sup>275</sup> The son responded that he had nothing by descent from his father. In 1261, however, when a defendant produced the father's charter and the son responded that he had nothing by descent from his father, the son later withdrew from his writ.<sup>276</sup> There could be, of course, a number of reasons why

<sup>270</sup> See *Early Registers of Writs*, 292–3. The writs for the son first appear in a register after *De Donis* and they, unlike the writs for the widow, do not mention the nature of the mother's or grandmother's entitlement.

<sup>271</sup> 2 *RCR* 227 (1203) (right); 3 *CRR* 76 (1203) (right); 4 *CRR* 145 (1206) (right); *BNB*, No. 1071 (1225) (entry); 14 *CRR*, No. 1067 (1231) (entry); 16 *CRR*, No. 1962 (1242) (right); JUST 1/778, m.18 (1256) (mort d'ancestor); JUST 1/567, m.33d (1257) (mort d'ancestor); JUST 1/178, m.18 (1269–70) (mort d'ancestor).

<sup>272</sup> 1 *CRR* 330, 2 *RCR* 220–3 (1200).

<sup>273</sup> 2 *CRR* 240 (1203).

<sup>274</sup> e.g. *BNB*, No. 1477 (1221).

<sup>275</sup> *Berkshire Eyre*, No. 196 (1248).

<sup>276</sup> JUST 1/616, m.10 (1261).

the son withdrew, not only that his father's charter was an absolute bar. Chapter 3 of the Statute of Gloucester in 1278 clarified the law: a son will only be barred by his father's deed from recovering his mother's inheritance to the extent that he inherits land from his father.<sup>277</sup> After its enactment the statute was treated as a change in the law. In 1281, a son brought a writ of right for land of which his mother had been seised.<sup>278</sup> The defendant produced the charter of the plaintiff's father. The plaintiff invoked the statute. The defendant claimed that the grant had been made before the statute and the plaintiff conceded as much and lost.

The grantor or his heir had little trouble recovering *maritagium* from the husband's grantee if the husband had alienated the land while tenant by the curtesy after the death of the child which entitled him to curtesy. The grantor could use a writ of entry in the escheat form.<sup>279</sup> If the grantor was also the woman's closest heir, he could also use mort d'ancestor.<sup>280</sup> Both writs asserted that the woman had died seised, which would be the case where a tenant by the curtesy made the alienation. If the husband or the couple alienated during the woman's life, a writ of entry in the reverter form and, later, a writ of formedon in the reverter were the better writs. In such cases, *maritagium* seems to have been treated as a fee tail.<sup>281</sup>

(ii) *Maritagium, marriage alliances, and curtesy*

*Maritagium* also served as the material basis for making marriage alliances between families. Daughters with their *maritagia* were used to make marriages that would increase family influence, forestall enemies, or recruit allies for her family.<sup>282</sup> Marriage with

<sup>277</sup> 6 Edw. I, st. 1, c. 3 (1278), *Statutes of the Realm*, I, 47.

<sup>278</sup> JUST 1/1005, m.6 (1281).

<sup>279</sup> *Casus Placitorum*, 30(1).

<sup>280</sup> JUST 1/1046, m.56d (1252); JUST 1/133, m.1 (1278).

<sup>281</sup> See 11 CRR 83 (1223) (entry in the reverter); JUST 1/60, m.15d (1272) (formedon in the reverter; the defendant challenged descent from donor to plaintiff).

<sup>282</sup> For Normandy see E. Searle, *Predatory Kinship and Creation of Norman Power 840–1066* (Berkeley: University of California Press, 1988), 139–40, 165–6, 210–12. For England see J. Green, *The Aristocracy of Norman England* (Cambridge: Cambridge University Press, 1997), 351–5; C. Newman, *The Anglo-Norman Nobility in the Reign of Henry I* (Philadelphia, Pa.: University of Pennsylvania Press, 1988), 127–30, 151–60; S. Waugh, *The Lordship of England: Royal Wardships and Marriages in English Society and Politics*

*maritagium* also settled disputes between families.<sup>283</sup> This function of *maritagium* helps to explain the battles over curtesy that appear in the plea rolls. The entailment of *maritagium* became the basis of attempts to deny curtesy to a woman's second husband. *De Donis* definitively adopted this transformation of *maritagium*.<sup>284</sup>

A husband who survived his wife could hold her inheritance or *maritagium* for his life if they had had a child. He was said to do so by the law of England and he later came to be known as a tenant by the curtesy of England.<sup>285</sup> There were frequent disputes over whether a particular husband was entitled to curtesy, depending on whether he and his now deceased wife had produced a child.<sup>286</sup> The child, if it survived its parents, would be the union of the two families. *Maritagium* could thus serve its purpose of forging an alliance between families. If the child died before its parents, the alliance function of *maritagium* not having been fully served, there was no reason for the husband to continue to hold the land that had been given in *maritagium*. What is more, the woman's family might well wish to use that land to try again, to give it again in *maritagium*.<sup>287</sup> A grantor, of course, could provide that the surviving husband was to have the land for his life, which concession substituted for curtesy and did not depend upon the birth of a child.<sup>288</sup> Similarly, a husband not entitled to curtesy could purchase a term for his life from the grantor or his heir.<sup>289</sup> In one case, the husband, after the death of his wife and children,

1217–1327 (Princeton: Princeton University Press, 1988), 28–63; M. Altschul, *A Baronial Family in Medieval England: The Clares 1217–1314* (Baltimore: Johns Hopkins University Press, 1965), 44–8; C. M. A. McCauliff, "The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations, and the Interests of Women," *Tulane Law Review* 66 (1992), 929–37.

<sup>283</sup> See *Devonshire Fines*, 14–15, No. 19 (1198); 15 *CRR*, No. 1242 (1234–5).

<sup>284</sup> 13 Edw. I, c. 1 (1285), *Statutes of the Realm*, I, 72.

<sup>285</sup> Pollock and Maitland, *History of English Law*, II, 414–20; Milsom, "Inheritance by Women," 79–89.

<sup>286</sup> e.g. 1 *RCR* 213 (1198); 3 *CRR* 66 (1203); *Yorks.*, No. 22 (1219); JUST 1/404, m.6 (1246); JUST 1/1046, m.10d (1251).

<sup>287</sup> For recycling of *maritagium* see Green, *Aristocracy*, p. 367. See also Altschul, *A Baronial Family*, 51 for the multiple use of the same manors as *maritagium* in the Clare family.

<sup>288</sup> 8 *EYC*, No. 148 (late 1100s); Hunter, *Fines*, I, 160 (1197); *Early Records of Coventry*, No. 82 (1280s); CP25(1)15/16/5 (Buckinghamshire, 1228); KB/181, m.18d (1267); JUST 1/1055, m.36 (1279–80).

<sup>289</sup> Hunter, *Fines*, I, 181 (1199); 4 *CRR* 326–7; JUST 1/1178, m.16d (1249–54).

arranged with the lord of the fee to hold in fee simple the land given to his wife in *maritagium*.<sup>290</sup> A husband claiming curtesy could use a writ of right.<sup>291</sup> More often, having been ejected, he brought novel disseisin.<sup>292</sup> The issue in the case would be whether the husband was entitled to curtesy. Where the husband was not entitled to curtesy, according to Bracton, if the donor of the *maritagium* acted quickly enough, he could eject the lingering husband without committing a disseisin.<sup>293</sup>

The real battle over curtesy, however, was over curtesy for the woman's second husband. If *maritagium* were given implicitly to a woman and her heirs or to a woman and the heirs of her body, then children of a second marriage were her heirs as much as children of her first marriage. Her second husband could serve the function of guardian of the land for his wife and their children. It could well seem that a second husband should be able to hold the land after his wife's death if he and his wife had had a child. There were at least two persons who might not consider the second husband lingering on after the wife's death to be a good thing. A son of the first marriage could well look at the second husband as an interloper delaying the son's enjoyment of his land. What is more, if the second husband had a child by the son's mother or if he survived the son's mother, remarried, and had a child by a new wife, he could complicate the son's ever receiving his inheritance from his mother.<sup>294</sup> In a number of cases sons of a first marriage either ejected their stepfathers and defended actions of novel disseisin or brought mort d'ancestor for the land.<sup>295</sup> Of course, these cases might be nothing more than greedy stepsons challenging equally greedy stepfathers or the result of continuing rivalries

<sup>290</sup> *BNB*, No. 1912 (1223).

<sup>291</sup> 7 *CRR* 345 (1198).

<sup>292</sup> e.g. 3 *CRR* 66; *Yorks.*, No. 22 (1218–19).

<sup>293</sup> 3 *Bracton* 38, 124–5.

<sup>294</sup> See e.g. 16 *CRR*, No. 1962 (1242) where the plaintiff was the daughter and heir by a first marriage suing for her mother's entailed *maritagium* and the defendant was the son of a second marriage between their mother and her second husband. The defendant claimed that their mother received the land in fee simple. Whether she did or not was the issue for the jury.

<sup>295</sup> e.g. 6 *CRR* 333–4 (1212) (novel disseisin); 7 *CRR* 7 (1213) (novel disseisin); JUST 1/1046, m.2 (1251) (novel disseisin), m.10d (1251) (mort d'ancestor); JUST 1/567, m.21 (1257) (novel disseisin); JUST 1/57, m.4d (1262) (mort d'ancestor); JUST 1/914, m.12 (1279) (novel disseisin); JUST 1/148, m.18d (1281) (mort d'ancestor).

for the affections of the now deceased wife and mother. They may also be evidence of a conflict between two understandings of *maritagium* and two understandings of curtesy.

The grantor or his heir also might not be happy with the continued presence of the second husband. The complications a second husband could cause for the inheritance of a son of the first marriage are also complications for the grantor's reversion. But something else was also likely to have been at stake. In one case it seems that the grantor disseised a second husband in order to secure the land for a son of the first marriage.<sup>296</sup> He told the second husband to come to his court and explain why he had intruded into the grantor's fee. When the second husband failed to appear, the grantor ousted him. In a second case, a man was summoned into the King's Court to show by whose grant he had married a widow with her *maritagium*.<sup>297</sup> He claimed that the widow's brother had agreed to the marriage. The brother denied that he had accepted the defendant's intrusion. The case was settled. In a third case, the son of the first marriage tried mort d'ancestor against the second husband but failed.<sup>298</sup> The second husband had curtesy. The son's uncle, the donor of the *maritagium*, then summoned the second husband to his court to explain why he had intruded into the donor's fee. The second husband recovered in novel disseisin. In a number of other cases, grantors challenged the right of a second husband to curtesy<sup>299</sup> or the rights of a son by the marriage to the second husband.<sup>300</sup>

The word intrusion certainly expressed the grantor's point of view, but perhaps the woman had not thought of her second husband as an intruder. And it is unlikely that the grantor thought that the woman's first husband had been an intruder. The grantor had probably chosen the first husband for the purpose of forging a family alliance and had agreed to the marriage. But a woman's family had in fact less control over the selection and approval of her second husband if she already had her *maritagium* from her

<sup>296</sup> 3 *CRR* 305 (1204). See Milsom, *Legal Framework*, 143–4.

<sup>297</sup> 2 *RCR* 124 (1199).

<sup>298</sup> 1 *RCR* 432 (1199). See Milsom, *Legal Framework*, 51–2.

<sup>299</sup> e.g. 7 *CRR* 7 (1213); 11 *CRR*, No. 1435 (1224); *BNB*, No. 1921 (1227); KB 26/143, m.6 (Mich. 1250).

<sup>300</sup> JUST 1/483, m.3d (1271–2). In other cases the grantor has taken back the land and the son of the second marriage tries, unsuccessfully, mort d'ancestor. 3 *PKŷ*, No. 997 (1204); JUST 1/704, m.5 (1285); JUST 1/706, m.4 (1285).

first marriage. A 1294 case shows that after his daughter's first husband died, the grantor of *maritagium* took the charter of *maritagium* from his daughter and burned it.<sup>301</sup> Yet he disclaimed the ability to negotiate with a second suitor for his daughter's hand. Although he purported to grant the land to another, his daughter nevertheless remarried and died seised of the land. Remarriage without her family's consent made for conflict. Where the first marriage produced a child, the grantor's interest and the child's interest coincided. The child is a reason for the *maritagium*. Where the first marriage did not produce a child, the donor's interest was in using her and the *maritagium* again. The woman on her second marriage could get the family into an alliance without the approval of the head of the family and could allow a stranger into the family lands. In one case, the jury reported that grantor ejected the woman and her second husband because she had married against the will of the grantor.<sup>302</sup> In 1243, when the daughter of a tenant-in-chief ignored the counsel of her guardians, the king ordered that the *maritagium* set aside for her be given to her sister.<sup>303</sup> Control of *maritagium* was a means of controlling the woman's choice of marriage partner. A rule against curtesy for second husbands would give grantors of *maritagium* more control over second marriages.

The entailment of *maritagium* could achieve this purpose. If *maritagium* were a grant to a man and his wife and the joint heirs of their bodies one could argue that a second husband does not have curtesy. The argument is made in the margin of a 1231 case in *Bracton's Notebook*.<sup>304</sup> Joan de Bosco brought a writ of entry against her stepfather, Ralph de Bray. She claimed that he had no entry except by Joan's mother, Alice, who had held the land only for her life in that it was given in *maritagium* to William de Bosco and Alice and the heirs issuing from them. As the issue of William and Alice, Joan claimed the land. The defendant made two answers: that he was entitled to curtesy in Alice's *maritagium* in that he had a child by her, and that the grant was not in the form Joan alleged. The plea roll entry ends with Joan offering to prove the form of the grant. The defendant's first answer relies on the

<sup>301</sup> JUST 1/1102, m.21 (1294).

<sup>302</sup> 15 CRR, No. 1932 (1236).

<sup>303</sup> *Close Rolls 1242-1247*, 12 (1243).

<sup>304</sup> BNB, No. 487 (1231).

traditional understanding of *maritagium* and does not attach significance to the particular limitation to heirs which might have been included in the grant. His second answer, however, seems to concede that the alleged limitation to heirs could override the traditional understanding of *maritagium*. The marginalia draws precisely this conclusion and gives a reason. A limitation to the joint heirs of husband and wife would exclude second husbands from curtesy with respect to the land thus granted because a child of the second husband would not be qualified under the grant to take the land as heir. Only a child of the first marriage could take the land as heir under the terms of the grant. Implicit in this reasoning is the idea that a husband has curtesy because of his role as guardian of the heir who is to succeed to the land, even if the child dies. It is worth adding the further point that only a child of the first marriage could complete the conjugal unit the donor acted to support and be the link in the family alliance entered into by the donor.

The marginalia to the 1231 case appears in Bracton as an exception to a claim to curtesy for jointly entailed *maritagium*.<sup>305</sup> The treatise does not generalize the point to all *maritagia*. But Bracton came close to doing so in a passage in which he reports that Stephen Segrave, a royal justice in the 1230s, thought that the doctrine of curtesy was misunderstood and misapplied. Segrave thought that the curtesy “ought to be understood for her first husband and their common heirs, not of a second, especially when heirs of the first husband were in existence.”<sup>306</sup> As reported by Bracton, although Segrave’s argument includes both inheritance and *maritagium*, his reference to the common heirs of the first marriage fits entailed *maritagium* especially well. But the transformation of *maritagium* toward a joint fee tail did not end curtesy for second husbands. In 1236, a son of a first marriage argued to the King’s Council that his stepfather should not have curtesy in part because the children his stepfather had by the petitioner’s mother were dead and he was his mother’s heir ready to assume his inheritance.<sup>307</sup> The king decided not to change the “custom of England” (“*consuetudinem Anglie*”). Although this case had to do with inheritance rather than *maritagium* the decision seems to have

<sup>305</sup> 4 Bracton 362.                      <sup>306</sup> Ibid., 360.

<sup>307</sup> BNB, No. 1182 (1236).

been interpreted to apply to curtesy in both situations. The entailment of *maritagium* did not exclude second husbands from curtesy. In 1280 a grantor sued for his reversion in a grant his grandfather had made to a man and a woman and the joint heirs of their bodies.<sup>308</sup> The defendant claimed curtesy as a later husband of the woman by whom he had a son and vouched the son to warranty. The case was deferred until the boy came of age. *De Donis* made clear that second husbands do not have curtesy in entailed *maritagium*.<sup>309</sup>

### 3. MARITAGIUM AND FEE TAILS IN THE KING'S COURT: THE DEVELOPMENT OF THE FORMEDON WRITS

The work of Milsom and Brand ended the earlier debate whether Chancery had fashioned formedon writs before *De Donis*.<sup>310</sup> All three writs – formedon in the reverter, in the descender, and in the remainder – were in use before *De Donis*. Greater detail can be added at certain points in the history of the development of these writs. The story in large part is about the limitations of other writs and the advantages of the new writs. Since each writ has its own history, it is easiest to take up each writ in turn.

Before doing so, however, it is well to consider two matters as background. First, a high percentage of the cases arise because a grantee of land in fee tail married more than once. Children of one marriage are fighting with children of another, or the child of a first marriage is fighting with, usually, his stepfather or his stepfather's subsequent wife. Grantors are fighting with second husbands or their subsequent wives. The cases are, in the main, family quarrels, quarrels over who is in whose family.

Secondly, the writs stand before the background of self-help. In a very real sense in the medieval period the courts were the alternative to force. For a person with a claim to land perhaps the

<sup>308</sup> JUST 1/1062, m.21d (1280).

<sup>309</sup> 13 Edw. I, c. 1 (1285), *Statutes of the Realm*, I, 72. For cases in which the statutory bar against curtesy for a second husband is invoked see JUST 1/303, m.6 (1292); YB (RS) 20–1 Edw. I 120 (1292); YB (RS) 21–2 Edw. I 276 (Pas. 1293); JUST 1/117A, m.26 (1302); JUST 1/1325A, m.10 (1303).

<sup>310</sup> Milsom, "Formedon Before De Donis," 223; Brand, "Formedon in the Remainder Before De Donis," 227.

first question was whether he had the physical power necessary to take the land and eject whomever was keeping it from him. If so, he might consider what writ the other party could bring against him once he had installed himself on the land and whether he had a good defense. If he lacked the necessary force, he looked for a writ. The limits to self-help are largely found in cases of novel disseisin and mort d'ancestor. These two assizes, in the present context, rewarded self-help in that a good claim to an interest in a fee tail could be a good defense to these assizes. But the two assizes were asymmetrical. If a reversioner, heir, or remainderman got on the land, he could withstand an action of novel disseisin or mort d'ancestor. But novel disseisin could not be used at all and mort d'ancestor could be used in only some cases to recover an interest in a fee tail. This asymmetry betrayed a bias for the party in possession. Other writs, ultimately the formedon writs, corrected for this bias.

(a) *Formedon in the reverter*

A reversioner could, if he were able, take back the land. If he was successful, his entitlement to the reversion would be a good defense to novel disseisin or mort d'ancestor. The usual case of novel disseisin has the reversioner of *maritagium* ejecting a husband claiming curtesy<sup>311</sup> or a collateral heir.<sup>312</sup> If the land is occupied, he must act quickly after the death of the tenant-in-tail and he must, of course, have good title.<sup>313</sup> In one case, the grantor's son ejected the second wife of a deceased tenant by the curtesy.<sup>314</sup> She did not bring an assize of novel disseisin, perhaps because her own seisin was questionable. She brought trespass, which was gentler on the questions of her own right to possession. She recovered; she had been in possession for a year. Although Bracton said that long possession can ripen into defensible seisin, he is not clear how much shorter a period than a year qualified as

<sup>311</sup> e.g. 3 *CRR* 66 (1203); *Yorks.*, No. 22 (1219); *BNB*, No. 1921 (1227); *KB* 26/181, m.183 (Mich. 1267); *JUST* 1/1342, m.7 (1272); *JUST* 1/914, m.2 (1279); *JUST* 1/1055, m.36 (1279). See *Lincs. & Worcs.*, No. 357 (1219); *JUST* 1/300C, m.6d (1255).

<sup>312</sup> *JUST* 1/1187, m.4 (1247-9), m.14 (1247-49).

<sup>313</sup> 3 *Bracton* 15-16 (citing *Gloucs.*, No. 1282 (1221) and 12 *CRR*, No. 1377 (1225)), 38.

<sup>314</sup> *BNB*, No. 1520 (1221).

long possession. In some cases, the grantor, as lord, will defend an assize of novel disseisin on the grounds that he took back the land by judgment of his court. In the reigns of Richard I (1189–99) and John (1199–1216) the King's Court took a hostile view of this answer and held that the lord had disseised his tenant.<sup>315</sup> They were, as Milsom has argued in detail, defining a lord's more restricted role in a new legal system.<sup>316</sup> Somewhat later, the King's Court was more willing to defer to a lord's decision.<sup>317</sup> A reversioner, however, could not use novel disseisin to recover his reversion on the theory that someone being on the land was itself a disseisin of the reversioner.<sup>318</sup> He might, however, bring *quo warranto* asking why the defendant intruded into his fee.<sup>319</sup>

If the land is vacant at the death of the tenant-in-tail without issue, a grantor may enter as lord. He has a good defense to mort d'ancestor, brought usually by one claiming to be the heir general.<sup>320</sup> The King's Court did not take a consistent position on whether a reversioner could use mort d'ancestor. Late in Richard I's reign a reversioner brought the assize and the defendant, claiming curtesy, did not take exception to the assize.<sup>321</sup> He vouched his child and the case was delayed until the child came of age. The point was squarely presented in a case in 1219. The court held that because the plaintiff claimed as the heir of the grantor, the assize did not lie.<sup>322</sup> In mort d'ancestor, the reversioner would have to claim as heir to the donee. In 1252 the jury in a case of

<sup>315</sup> 1 *RCR* 447–8 (1199).

<sup>316</sup> Milsom, *Legal Framework*, 1–35.

<sup>317</sup> See, e.g. *BNB*, No. 1792 (1222).

<sup>318</sup> *Yorks.*, No. 401 (1218–19).

<sup>319</sup> 13 *CRR*, Nos. 757, 760, 919 (1228).

<sup>320</sup> 3 *Bracton* 286, 309–10; *BNB*, No. 250 (1227); JUST 1/1042, m.12 (1231); JUST 1/233, m.28d (1254); JUST 1/361, m.12 (1255); JUST 1/820, m.19d (1257); JUST 1/178, m.11d (1269–70); JUST 1/483, m.36d (1271–2); and m.65d (1271–72); JUST 1/918, m.18d (1279). This seems to be the point of a case reported in *Casus Placitorum* at 101–2, 102–5, and 121–6. The defendant is a second husband. He and his wife made a grant in fee tail to a son of his wife by her earlier husband. The son died without heir of his body. The second husband entered and claimed the reversion as tenant by the curtesy. A daughter of the earlier marriage brought mort d'ancestor and claimed that the final concord by which the son of the first marriage was granted the fee tail and by which the defendant claimed reversion should not avail the defendant. The court decided for the defendant.

<sup>321</sup> 1 *RCR* 213 (1198).

<sup>322</sup> 8 *CRR* 18–20 (1219).

mort d'ancestor explained that a plaintiff, the son of the grantor, was the closer heir to decedent, his aunt who had held her *maritagium*.<sup>323</sup> Childless in the marriage for which she had received the *maritagium*, she had remarried and had had a child who soon died. Her second husband as tenant by curtesy had alienated to the defendant. The jury concluded that she had died seised. The plaintiff recovered, not as heir to the grantor of *maritagium*, but as heir to the donee, his aunt.

On the plea rolls there are rare cases of grantors bringing actions of covenant or actions to enforce final concords to protect or to recover their reversions.<sup>324</sup> Although grantors put clauses restraining alienation into their grants in fee tail,<sup>325</sup> few attempts to enforce restraints against alienation against, presumably, a tenant-in-tail appear on the plea roll. This is a little odd, because it is not hard to find attempts by means of writs *de fine facto* or covenant to enforce restraints against alienation against tenants for life.<sup>326</sup> In 1206, a grantor used *de fine facto* to claim his reversion from a collateral heir of the grantee.<sup>327</sup> The parties settled. In 1243, a grantor sued a woman for alienating, contrary to their agreement, land which had been given with her to her husband in *maritagium* and which ought to revert to the grantor.<sup>328</sup> The defendant denied that she had made such a covenant.

A grantor could always bring a writ of right and explain that his right rested on a grant in fee tail which gave him the reversion. Evidence of this use of the writ of right survives from the first decade of the thirteenth century.<sup>329</sup> As Milsom has explained,

<sup>323</sup> JUST 1/1046, m.56d (1251–2).

<sup>324</sup> For actions to enforce fines see H. G. Richardson and G. D. Sayles (eds.), *Select Cases of Procedure without Writ under Henry III* (Selden Society, vol. 60, 1941), cxxvi–cxliv.

<sup>325</sup> Above, pp. 26–7.

<sup>326</sup> *BNB*, No. 36 (1219); *BNB*, No. 153 (1222); 11 *CRR*, No. 1028 (1223); 13 *CRR*, No. 301 (1230); *BNB*, No. 398 (1230); 15 *CRR*, No. 180 (1233). See 2 *CRR* 97 (1202); 3 *CRR* 24 (1203); and *Berkshire Eyre*, No. 392 (1248) for attempts to enforce other final concords or agreements restraining alienations.

<sup>327</sup> 4 *CRR* 81–2 (1206).

<sup>328</sup> 17 *CRR*, No. 2236 (1243).

<sup>329</sup> 4 *CRR* 2 (1205); 6 *CRR* 140 (1211); 8 *CRR* 73, *BNB*, No. 61 (1219); 11 *CRR*, No. 2655. C. M. A. McCauliff has claimed that “the earliest example of the writ of formedon in the reverter found on the curia regis rolls dates from the fifteenth year of John’s reign, 1213.” She cites 7 *CRR* 36 (1213); C. M. A. McCauliff, “The English Medieval Marriage Portion from Cases of Mort d’Ancestor and Formedon,” *Villanova Law Review* 38 (1993), 971. I think she

writs of entry developed out of writs of right as Chancery fashioned new writs based on particular issues pleaded in proceedings initiated by writs of right.<sup>330</sup> This general explanation serves in the particular case of writs of entry for a reversion. A writ of entry allowed a reversioner to focus his writ on the key points of his claim. Tracing the development and use of writs of entry for reversions is a little complicated because there is evidence of three different writs of entry available to a reversioner plus a writ of escheat. A few plaintiffs used a kind of writ of entry *ad terminum qui preterit* on the theory, apparently, that since the tenant-in-tail or in *maritagium* had died without an heir of her body she had held the land only for her life.<sup>331</sup> This rarely used writ did not have a future. Secondly, there was a writ of entry in the reverter, which spoke of escheat.<sup>332</sup> This writ said that a defendant had no entry except through the tenant-in-tail and that the land ought to revert to the plaintiff as his escheat because the tenant-in-tail had died without issue. Thirdly, there was a writ of entry in the reverter, which did not speak of escheat.<sup>333</sup> This writ simply said that the defendant had no entry except through the tenant-in-tail and that the land ought to revert to the plaintiff because the tenant-in-tail had died without issue. In addition, there was a plain writ of escheat, which was not a writ of entry.<sup>334</sup> This writ

is mistaken for two reasons. First, an earlier, similar, entry in the same dispute first appears in 1211: 6 *CRR* 159 (1211). Secondly, neither entry suggests that the plaintiff used a writ of formedon in the reverter rather than a writ of right followed by pleadings that explained the plaintiff's entitlement because of a grant in *maritagium* and the fact that the woman grantee had died without an heir of her body.

<sup>330</sup> Milsom, *Legal Framework*, 97–102; Milsom, *Historical Foundations*, 146–9.

<sup>331</sup> JUST 1/62, m.16, m.24d (1232); JUST 1/233, m.36 (1254).

<sup>332</sup> *BNB*, No. 487 (1231); 17 *CRR*, No. 2281 (1243); KB 26/143, m.6 (Mich. 1250); JUST 1/561, m.26d (1257); JUST 1/567, m.39 (1257); KB 26/160, m.51d (Mich. 1258). *Casus Placitorum* 30.

<sup>333</sup> 8 *CRR* 296 (1220); *BNB*, No. 105 (1220); 11 *CRR*, No. 442 (1223); 11 *CRR*, No. 1435 (1224); 15 *CRR*, No. 839 (1233); *BNB*, No. 822 (1233); 18 *CRR*, No. 1212 (1244); JUST 1/1050, m.50d (1268); JUST 1/365, m.38, m.87d (1271); JUST 1/483, m.66d (1271–2); JUST 1/60, m.12d (1272).

<sup>334</sup> 15 *CRR*, No. 752 (1233); *Berkshire Eyre*, No. 307 (1248); KB 26/160, m.51d (Mich. 1258); KB 26/142, m.21d (Trin. 1240) (also recorded at KB 334/141, m.22d); CP40/17, m.16 (Mich. 1276); JUST 1/482, m.36d (1245); JUST 1/231, mm.30d, 31d (1248); JUST 1/561, m.9 (1250); *ibid.*, m.67d (1250); JUST 1/566, m.5 (1250); JUST 1/234, m.31d (1254); JUST 1/233, m.34 (1254); JUST 1/778, m.17d (1256); JUST 1/556, m.26d; *ibid.*, m.39; JUST 1/57, m.11 (1262); JUST 1/342, m.2 (1247). *Early Registers of Writ* 94.

said that the land ought to escheat to the plaintiff because the tenant-in-tail had died without issue. Putting to one side the rare use of the writ of entry *ad terminum qui preterit*, the important difference seems to have been between the two writs that mentioned escheat and the writ of entry in the reverter that did not – between, that is, the escheat writs and the plain writ of entry in the reverter. There is no evidence of a chronological development from one type of writ to another, although the writ of entry in the reverter that mentioned escheat seems to have fallen away over time.<sup>335</sup>

The choice between the two types of writs seems to have turned on whether the tenant-in-tail had died seised of the land claimed as a reversion. A manuscript of *Brevia Placitata* has a plaintiff counting on a writ of escheat that the tenant-in-tail had died seised and without an heir of his body.<sup>336</sup> A manuscript of *Casus Placitorum* prescribes a writ of escheat in the writ of entry form for the case in which the grant had been *maritagium* and the surviving husband, tenant by curtesy, had sold the land.<sup>337</sup> And in 1240, a plaintiff brought escheat for a reversion and claimed that the defendant intruded into the land after the death of the tenant-in-tail.<sup>338</sup> It was a good defense to an action on a writ of escheat that did not concern *maritagium* or fee tails that the tenant had not died seised.<sup>339</sup> In a case brought on a formedon in the reverter in the Gloucester Eyre of 1268–9 the defendant objected to the writ on the grounds that it was of the same nature as escheat, which required the tenant-in-tail to have died seised, but the tenant-in-tail had not died seised.<sup>340</sup> The plaintiff, in response, changed his count to allege that the tenant-in-tail had died seised.

It is difficult to date the introduction of the two types of writs, because the plea roll entries do not always clearly distinguish words of a writ from words of the plaintiff's pleading.<sup>341</sup> The

<sup>335</sup> This view differs somewhat from that of Milsom. Milsom, "Formedon Before De Donis," 222.

<sup>336</sup> *Brevia Placitata* 203.

<sup>337</sup> *Casus Placitorum* 30.

<sup>338</sup> KB 26/142, m.21d (Trin. 1240) (also recorded at KB 26/141, m.22d).

<sup>339</sup> e.g. 16 CRR, No. 2104 (1242); JUST 1/231, m.3 (1248); JUST 1/561, m.12 (1250); KB 26/145, m.183 (Mich. 1251); KB 26/176, m.18 (Mich. 1266); JUST 1/483, m.2 (1271–2).

<sup>340</sup> JUST 1/275, m.52 (1268–9).

<sup>341</sup> See Milsom, *Legal Framework*, 97–101.

earliest recorded use of a plain writ of entry in the reverter was 1220,<sup>342</sup> possibly 1219.<sup>343</sup> In the 1220 case a grantor used a plain writ of entry in the reverter against the husband of the grantor's daughter who had held *maritagium* and had died without an heir of her body. Writs of simple escheat date from a little later,<sup>344</sup> as do writs of entry in the reverter in the escheat form.<sup>345</sup> The writ of formedon in the reverter consolidated the two earlier types of writ by leaving out words of entry and of escheat and thus making it irrelevant whether the tenant-in-tail had died seised. The earliest appearance of formedon in the reverter is that discovered by Paul Brand used on the 1257 Norfolk Eyre to claim a remainder.<sup>346</sup> Cases brought on writs of formedon in the reverter appear fairly frequently in the 1270s and 1280s.<sup>347</sup> The new writ did not drive out the earlier writs of escheat and entry.

<sup>342</sup> 8 *CRR*, 296, *BNB*, No. 105 (1220).

<sup>343</sup> *BNB*, No. 61 (1219). Milsom read this case as the earliest writ of entry for a reversion: Milsom, "Formedon Before De Donis," 223. The words of entry, however, are preceded by the phrase "*unde dicunt*," which suggests that what follows was said by the plaintiffs in their pleading rather than in their writ. The plea roll makes this more clear: the plaintiffs' allegation of the defendant's entry appears as an afterthought introduced in pleading in that it is set off by "*Dicunt etiam . . .*": 8 *CRR* 73 (1219). The case is otherwise notable for being perhaps the first case brought by a reversioner after the death of the grantee's heir.

<sup>344</sup> 15 *CRR*, No. 752 (1233).

<sup>345</sup> *BNB*, No. 487 (1231).

<sup>346</sup> JUST 1/567, m.42; Brand, "Formedon in the Remainder Before De Donis," 228–9.

<sup>347</sup> JUST 1/616, m.13 (1261–2); KB 26/195, m.39 (Mich. 1268); JUST 1/1050, m.53d (1268); JUST 1/275, m.7d, m.52 (1268–9); KB 26/208A, m.20 (Trin. 1272); JUST 1/84, m.7, m.13d (1272); JUST 1/238, m.16 (1272); JUST 1/60, m.11d, m.12d, m.14, m.15d (1272); JUST 1/538, m.6 (1274); CP40/8, m.4 (Hil. 1275); CP40/11, m.46 (Mich. 1275); CP40/17, m.97d (Mich. 1276); JUST 1/8, m.13d (1276); JUST 1/1055, m.41 (1279–80); JUST 1/763, m.22, m.73 (1280); CP40/36, m.84d (Mich. 1280); JUST 1/1062, m.7, m.21d, m.32a (1280); JUST 1/758, m.17d, m.39d, m.39 (1280); JUST 1/664, m.10, m.13d (1280–1); JUST 1/783, m.52d (1280–81); CP40/38, m.13 (Hil. 1281); JUST 1/147, m.2d (1281) (also recorded at JUST 1/148, m.4 and JUST 1/151, m.3d.) and m.7 (1281); JUST 1/151, m.3 (1281), m.12 (also at JUST 1/148, m.13), and m.12d (also at JUST 1/148, m.13 (1281)); JUST 1/1000, m.10, m.26, m.37, m.45, m.14d, m.38d (1281) (also at JUST 1/1005, m.38d); CP40/42, m.68d (Mich. 1281); JUST 1/485, m.6, m.25d, m.56d (1281); JUST 1/111, m.15 (1284); JUST 1/502A, m.17 (1284); JUST 1/457, m.1d, m.8 (1284–5); JUST 1/956, m.14d (1285); JUST 1/619, m.7, m.20d, m.27 (1285) (also at JUST 1/622, m.20d); JUST 1/242, m.15d, m.57 (1285); JUST 1/704, m.21 (1285).

*(b) Formedon in the descender*

As in the case of a grantor claiming a reversion, an heir under an entail could take the land to which he was entitled and eject its possessor. The heir's entitlement was a good defense against an assize of novel disseisin unless the person ejected had been in possession for some time.<sup>348</sup> Most of the cases of novel disseisin are brought by men claiming curtesy and the issue is whether they have had a child entitling them to curtesy.<sup>349</sup> Self-help would probably not have been defensible against the heir general who had entered as heir. But this is speculation by analogy to mort d'ancestor, to be discussed shortly. I have not been able to find a case in which an heir general bought novel disseisin against an heir under an entail.

If the land was vacant and the heir under an entail entered, his entitlement was a good defense to mort d'ancestor brought by the heir general.<sup>350</sup> If, however, someone else had gotten in, whether an heir under an entail could use mort d'ancestor is not a simple question. For one thing, the answer depends upon who has gotten in. If the defendant is the grantor or his heir too hastily claiming the reversion, the plaintiff could use the assize.<sup>351</sup> The same is true if the defendant is a second husband claiming curtesy or an independent entitlement to the land.<sup>352</sup> If the plaintiff claiming under an entail was also the heir general, there was no difficulty.<sup>353</sup> If, however, the defendant was the heir general, he could raise two objections to the assize: that he and the plaintiff claimed by the

<sup>348</sup> 3 *Bracton* 15–16 (citing 12 *CRR*, No. 1377 (1225) and *Lincs. & Worcs.*, No. 1282 (1220)), 38.

<sup>349</sup> *Yorks.*, No. 309 (1218–19); *Gloucs.*, No. 534 (1221); JUST 1/233, m.3d (1254). See *BNB*, No. 885 (1232), which does not involve curtesy. See also 4 *CRR* 80–1 (1206) where a daughter claimed that the grantor's son intruded *vi et armis*.

<sup>350</sup> 3 *Bracton* 286, 309–10 (citing *Gloucs.*, No. 1125 (1221)). *Shropshire Eyre*, No. 33 (1256); JUST 1/202, m.5 (1268); JUST 1/482, m.9d (1245); JUST 1/956, m.2 (1285). In JUST 1/231, m.29 (1248) the heir general, a son of the first marriage, succeeded in mort d'ancestor against a son of a second marriage claiming under an entail created upon the second marriage. The jury found that the decedent had died seised of fee simple, not fee tail.

<sup>351</sup> JUST 1/343, m.2 (1261); JUST 1/567, m.33d (1257).

<sup>352</sup> JUST 1/1046, m.10d (1251); JUST 1/57, m.4d (1262). See 2 *CRR* 234 (1203), which seems to have been a case of a daughter against her mother's second husband who claimed that the land had been *his* mother's *maritagium*.

<sup>353</sup> 1 *CRR* 244 (1200); JUST 1/84, m.20d (1272).

same descent and that he was the closer heir. The first objection was a reason why the assize did not lie. The second objection presented an issue for the assize. In a case in which the heir special is in and the heir general brings an assize Bracton wrote that the assize would not go forward because the parties claimed by the same descent, but that the assize would be converted into a jury to inquire into the form of the gift to the decedent.<sup>354</sup> It is far from obvious why the same conversion should not take place in the reverse situation, where the heir general is in and the heir special brings an assize. The evidence on the point, however, is sparse. In 1251 a man brought mort d'ancestor on the death of his mother.<sup>355</sup> The defendant was his older half-brother from their mother's first marriage. The plaintiff, however, claimed that the land he sought had been given to his mother and her second husband, his father, and the heirs of their bodies. The defendant denied the grant and the assize agreed. Perhaps the assize was permitted to proceed because the defendant failed to object to its doing so. In a case in the Northamptonshire Eyre of 1261–2, the defendant heir general objected to the assize for the two reasons available to him as heir general.<sup>356</sup> The plaintiff set forth the fee tail under which she claimed the land, argued that the defendant ought to be viewed as a stranger, and asked for judgment whether his exception ought to bar her. She later withdrew from her writ. A report of a like case in the *Casus Placitorum* has the defendant responding that the plaintiff's explanation of the entail on which she bases her claim pertains to a writ of right.<sup>357</sup> Judgment is given to the defendant and the plaintiff is told to bring her writ of right. The *Brevia Placitata* reports a case in which a son brings mort d'ancestor on the death of his mother, who had held jointly with the plaintiff's father, to them and the heirs of their bodies.<sup>358</sup> The defendant was the plaintiff's stepfather who was holding as tenant by curtesy. The defendant vouched his two daughters by the plaintiff's mother. They objected to the assize on the grounds that they and the plaintiff claimed by the same descent. The justices held that the assize does not lie, perhaps, however,

<sup>354</sup> 3 *Bracton* 309–10 (citing *Gloucs.*, No. 1125 (1221)).

<sup>355</sup> JUST 1/1046, m.1d (1251).

<sup>356</sup> JUST 1/616, m.13 (1261–2).

<sup>357</sup> *Casus Placitorum* 71–2, No. 16.

<sup>358</sup> *Brevia Placitata* 196–7.

because the defendant was entitled to curtesy. But the report has one of the justices later saying that when the plaintiff's stepfather dies, the plaintiff had better get on the land before his stepsisters, because if they enter before he does, he will never get them out.

The heir special had, of course, his writ of right.<sup>359</sup> The most important writ of entry for the heir would have been the *cui in vita* writ. If the entail had been to his father who alienated the land, the heir would be barred by his father's warranty. He might have had a better chance if the land had been his mother's *maritagium* alienated by his father. But, as we saw earlier, it was not available.<sup>360</sup> Perhaps by analogy to *cui in vita*, a similar writ of entry was created for an heir not seeking to revoke an alienation. He is challenging the claim to curtesy by his mother's second husband. In 1225, an heir, somewhat oddly, used a writ of entry in the reverter for this purpose.<sup>361</sup> In 1231, however, a plaintiff used a writ of entry that explained that the defendant had no entry except through the plaintiff's mother who held only for her life, for she held in *maritagium* to herself and her husband and the joint heirs of their bodies.<sup>362</sup> I have found no case in which an heir brought a writ of entry to set aside an alienation of his mother's *maritagium* by his mother's second husband as tenant by curtesy. In this case, however, the heir had mort d'ancestor.<sup>363</sup>

The earliest writs of formedon in the descender that I could find appeared in 1268 and were used to claim remainders after a life estate<sup>364</sup> or a fee tail.<sup>365</sup> For example, in one 1268 case Richard Burnel claimed land that William Burnel gave to Roger Burnel and the heirs of his body and which "*post mortem ipsius Roberi ad prefatum Ricardum descendere debuit per formam donacionis quam predictus Willelmus eidem Rogeri inde fecit eo quod idem Rogerus obiit sine herede de corpore suo procreato.*"<sup>366</sup> The plaintiff might have been claiming a reversion, rather than a remainder, but given

<sup>359</sup> e.g. 1 *RCR* 227 (1200); 1 *CRR* 30 (1196); 3 *CRR* 120 (1204); 4 *CRR* 145 (1206); 9 *CRR* 2 (1220); *BNB*, No. 855 (1234); 16 *CRR*, No. 1962 (1242); *JUST* 1/242, m.34d (1285).

<sup>360</sup> Above, pp. 61–2.

<sup>361</sup> *BNB*, No. 1071 (1225).

<sup>362</sup> 14 *CRR*, No. 1067, *BNB*, No. 487 (1231).

<sup>363</sup> Above, p. 62.

<sup>364</sup> *KB* 26/195, m.8 (Mich. 1268); *JUST* 1/1050, m.40 (1268).

<sup>365</sup> *KB* 26/195, m.7d (Mich. 1268).

<sup>366</sup> *Ibid.*

the existence of writs of formedon in the reverter since 1257, it seems unlikely that the plaintiff would not have used the better-fitting writ. A similar argument applies to the 1268 case involving life estates. Writs of formedon in the descender continued to be used to claim remainders after life estates or fee tails.<sup>367</sup> A remainder was a displaced reversion. But where the remainderman was not the heir of the grantor, the writ of formedon in the reverter and the pleading on the writ, which asserted that the plaintiff was the grantor's heir, would not fit the case. Descender did not fit the case either, but descender invoked the powerful rhetoric of inheritance.

The earliest use of formedon in the descender by an heir under an entail that I could find occurred in 1272.<sup>368</sup> Three cases in the years 1271 to 1275 suggest that the use of formedon in the descender might well have been fairly new. In the 1271–2 Lincolnshire Eyre, two daughters and their nephew brought a writ of *aiel* based on their father's seisin and pleaded that the land was given to the daughters' parents jointly and their issue.<sup>369</sup> The defendants objected to the writ on the grounds that the land was the mother's *maritagium* and that therefore the plaintiffs should base their claim on her seisin, not on their father's. In 1274, the same plaintiffs brought a formedon in the descender against some of the same defendants.<sup>370</sup> The entry stops after the plaintiffs' count. In 1275, the plaintiffs tried another formedon in the descender against the same defendants as were named in the 1274 case.<sup>371</sup> The defendants could not object to the writ as they did to the writ of *aiel*. They pleaded to an issue for a jury. The plaintiffs' shift from *aiel* to descender shows an advantage of descender in that a plaintiff on a descender writ need not base his claim on the seisin of a single ancestor but could plead that an ancestral couple took seisin under a joint grant. The plaintiffs' move from *aiel* to

<sup>367</sup> JUST 1/483, m.13d (1271–2) (fee tail); JUST 1/84, m.7 (1272) (life estate); JUST 1/8, m.13d (also at JUST 1/10, m.16) (life estate); JUST 1/114, m.3 (1284) (also at JUST 1/111, m.4d) (life estate).

<sup>368</sup> KB 26/206, m.28 (Hil. 1272).

<sup>369</sup> JUST 1/483, m.50 (1271–2). The grantees had three daughters, one of whom died leaving a son. The three had to sue together, but the grandson could not use *mort d'ancestor*. Therefore, they used a writ of *aiel*.

<sup>370</sup> CP40/5, m.36d (Mich. 1274).

<sup>371</sup> CP40/8, m.53 (Hil. 1275), noted by Milsom in his, "Formedon Before De Donis," 228–9.

descender and their two tries with the descender writ also suggests that lawyers in 1271 might not have been familiar with the uses of the descender writ. Formedon in the descender permitted an heir special under a grant in fee tail to recover the land from the heir general in possession.<sup>372</sup> He was barred by his ancestor's warranty from setting aside alienations. Cases of formedon in the descender appear with some frequency in the 1270s and 1280s, but not as frequently as do cases of formedon in the reverter.<sup>373</sup>

(c) *Formedon in the remainder*

Although a remainderman ought to have been able to take the land to which he was entitled and eject the wrongful possessor, there is no evidence of their doing so. Nor does Bracton mention the possibility. Bracton does say that if a remainderman enters the land, his entitlement is a good defense against actions to oust him.<sup>374</sup> In 1220, a man claiming a remainder defended a writ of right but failed for two reasons: he had brothers better entitled than himself and he lacked written evidence of the grant giving his ancestor a remainder.<sup>375</sup> In later cases, a remainderman withstood assizes of mort d'ancestor.<sup>376</sup>

If someone else had gotten on the land, a remainderman was pretty much without a remedy. Bracton held that he could use neither a writ of right nor mort d'ancestor.<sup>377</sup> The reason for his disqualification goes to the problem lawyers and judges had with remaindermen both before and after *De Donis*: he could not claim his remainder by descent from an ancestor who was seised of the land and if he could claim by descent he need not mention the grant that gave him the remainder. Bracton expressed the position of a remainderman by saying that he did not succeed to the land by hereditary right but by the form or *modus* of the gift.<sup>378</sup> The same could be said for a reversioner, except that a reversioner or

<sup>372</sup> Milsom, "Formedon Before De Donis," 226–7 citing CP40/8, m.53 (Hil. 1275); KB 26/206, m.28 (Hil. 1272).

<sup>373</sup> e.g. KB 26/206, m.28 (Hil. 1272); CP40/7, m.42d (Hil. 1275); CP40/9, m.54d (Pas. 1275); CP40/15, m.39 (Trin. 1276); JUST 1/1005, m.9d (1281).

<sup>374</sup> 2 *Bracton* 201.

<sup>375</sup> 8 *CRR* 213–15, *BNB*, No. 86 (1220),

<sup>376</sup> JUST 1/175, m.25 (1244); JUST 1/176, m.8 (1249); JUST 1/460, m.2d (1284).

<sup>377</sup> 2 *Bracton* 200–1.

<sup>378</sup> *Ibid.*, 200.

his ancestor had been seised of the land. Then, too, a reversioner as grantor was in the position of a lord claiming his escheat. A remainderman had neither support. The lack of a remedy for remainderman might explain a conveyancing practice. As seen above, a grantor sometimes put the condition that the remainderman be alive when the grantee of the entail dies without an heir of his body.<sup>379</sup> Frequently, the remainderman is the younger brother or sister of the grantee. The remainderman could claim by inheritance upon the death of his older sibling without an heir of his body. The same is true if there is a series of reminders limited to successively younger children. The possible claim by inheritance from the grantee might explain the use of formedon in the descender to recover remainders. The point of entailing a remainder to follow a fee tail would not, of course, be to designate who succeeds the grantee in fee tail but to designate who succeeds the remainderman should he come to possession: his issue and not the heir general. Another frequent type of remainder was to the right heirs of the grantee.<sup>380</sup> Under such a conveyance, the remainderman could claim by inheritance and forget about the grant.

The plight of a remainderman moved Bracton to say that there was a writ for his case, but he did not supply a sample of such a writ.<sup>381</sup> Formedon in the remainder did not appear until 1279.<sup>382</sup> Paul Brand has shown that beginning in the late 1250s remaindermen could put their claim in terms of a formedon in the reverter.<sup>383</sup> That a remainderman would speak the language of reversion is not surprising. Grantors frequently spoke of the land reverting to a remainderman.<sup>384</sup> Bracton used no other language in his sample grants of remainders.<sup>385</sup> In the 1260s, remaindermen

<sup>379</sup> Above, pp. 18–19.

<sup>380</sup> *Cornwall Fines*, 10–11, No. 21 (1201); *Kent Fines*, 90, No. 95/13/113 (1227), and 101, No. 95/15/154 (1227); *Lancashire Fines*, 56–8, No. 32 (1229); CP25(1)213/9/5 (Suffolk, 1231–2); *Somerset Fines*, 146, No. 67 (1249), 178, No. 168 (1256), and 183, No. 15 (1259); *Sussex Fines*, II, 67, No. 742 (1269).

<sup>381</sup> 2 *Bracton* 201.

<sup>382</sup> JUST 1/1075, m.18, transcribed in Brand, “Formedon in the Remainder Before De Donis,” 231–2; JUST 1/914, m.6d (1279) (also at JUST 1/918, m.44).

<sup>383</sup> Brand, “Formedon in the Remainder Before De Donis,” 228–30.

<sup>384</sup> e.g. *Kent Fines*, 39–40, No. 95/7/1022 (1205); *Essex Fines*, I, 39, No. 195 (1205); CP25(1)187/5/32 (Oxfordshire, 1251).

<sup>385</sup> e.g. 2 *Bracton* 200.

also used formedon in the descender.<sup>386</sup> A note in *Casus Placitorum* illustrates this use of descender.<sup>387</sup> A man had three sons and granted his second son part of his land in fee tail, remainder to the third son. Upon the second son's death without issue, the first son entered. The point of the note is that the third son has formedon in the descender to recover, here, against the heir general. Cases in the plea roll seem to fit this note, although it is seldom clear who the defendant is.<sup>388</sup> In cases in which the writ speaks of the deceased tenant having had only a life estate, the plaintiff in his count will explain that the decedent was granted the land in fee tail but died without issue.<sup>389</sup> In other cases, however, the plaintiff claims a fee tail<sup>390</sup> or a fee simple after a life estate.<sup>391</sup>

Whichever writ he used, the plaintiff frequently proffered a charter or a fine as evidence of the form of the gift giving him a remainder.<sup>392</sup> Written evidence of the grant does not seem, however, to have been required, unless the defendant had written evidence that the grant was otherwise.<sup>393</sup> Before *De Donis*, instances of a plaintiff using formedon in the remainder are rare. Perhaps, as A. W. B. Simpson has suggested, the writ was not yet a writ of course.<sup>394</sup> This fact and the use of formedon in the descender to recover remainders would help to explain why *De Donis* ignores remainders. Then, too, given that a remainder was a displaced reversion, those who made *De Donis* might have thought that their protections of reversions would automatically extend to remainders.

<sup>386</sup> Above, p. 78.

<sup>387</sup> *Casus Placitorum* 30(2).

<sup>388</sup> JUST 1/483, m.13d (1271-2).

<sup>389</sup> JUST 1/322, m.10d (1262). The defendant might also explain that the plaintiff is claiming a remainder in fee tail: JUST 1/8, m.3d (1276-7).

<sup>390</sup> KB 26/195, m.7d (Mich. 1268).

<sup>391</sup> JUST 1/114, m.3 (1284).

<sup>392</sup> JUST 1/567, m.42 (1257); JUST 1/322, m.10d (1262); JUST 1/912A, m.6 (1262); KB 26/195, m.8 (Mich. 1268); JUST 1/1050, m.40 (1268).

<sup>393</sup> JUST 1/114, m.3 (1284).

<sup>394</sup> A. W. B. Simpson, *A History of the Land Law* (Oxford: Clarendon Press, 2nd edn, 1986), 80, 82.

## THE GROWTH OF THE “PERPETUAL” ENTAIL

Four years before *De Donis* the court held that a donee of land in fee tail could alienate that land as soon as he had a child.<sup>1</sup> In the absence of an alienation, neither the birth of issue to the donee, nor the survival of that issue, nor even that issue's coming into possession of the land under the grant destroyed the reversion or remainder limited after the fee tail. *De Donis* sought to change the law on alienations without changing the law on fee tails where there was no alienation. In both cases, however, the statute did not specify the ultimate duration of a fee tail. In the first years after its enactment the statute was read to restrain alienation by the donee of an entail whether or not he had a child.<sup>2</sup> At this time, in the absence of an alienation, a fee tail was thought to last until the entry of the third heir. A petition to the Acton Burnel parliament had taken this position two years before the enactment of *De Donis*.<sup>3</sup> By about the third decade of the fifteenth century *De Donis* restrained alienation by the donee and by every generation of his issue. Whether or not there had been an alienation in fact discontinuing an entail, the right to the entail lasted indefinitely – as long as there were issue of the donee. This chapter traces the growth of the indefinite entail.

The duration of an entail was measured in generations of lineal descent from the donee. As in the case of *maritagium*, generations of descent were counted in degrees, with the donee being in the

<sup>1</sup> See Chapter 1, above, pp. 31–2.

<sup>2</sup> This chapter deals with the statutory restraint on alienation without regard to the methods of alienating land that barred claims under an entail. The statutory restraint was modified by the doctrine of assets by descent. That doctrine and other methods of barring entails, other than the common recovery, are discussed in Chapter 4.

<sup>3</sup> Chapter 1, above, p. 36.

first degree.<sup>4</sup> Sometimes it will be convenient to speak of the first generation in lineal descent from the donee as the first heir, the second generation as the second heir, and so on. This way of speaking will be familiar to readers of Glanvill and Bracton, but was not used in the fourteenth century.<sup>5</sup> Thus, an entail that ended at the second degree ended when the first heir entered the land under the entail, but an entail that ended after the second degree ended at the death of the first heir.

Those legal historians who have ventured opinions about the growth of the indefinite entail have been misled by the anachronistic assumption that a fee tail was a monolithic entity that had a single duration for all purposes.<sup>6</sup> Chapter 1 showed that before *De Donis* the courts treated cases of alienation differently from cases of succession. *De Donis* did not change this practice. There were, then, two questions. First, which generation of issue after the donee could alienate the land free of *De Donis*? Secondly, in the absence of alienation, at which generation of descent from the donee did the entail end? The ending of an entail could mean different things depending upon the grant in fee tail. If the fee tail were followed by a reversion or a remainder, these interests would be destroyed. If the fee tail was a tail male or was limited to the issue of a specific marriage, once the entail ended the heir general of the last holder in fee tail would succeed to the land. Until the third decade of the fifteenth century these two questions did not always have the same answer.

Part 1 offers a reading of *De Donis* from contemporary commentary on the statute. These interpretations, based as they are on the distinction between alienation and succession, help to reveal the intent of the drafter and help to show that the maker of the statute was not as confused as has sometimes been supposed. Part 2 traces

<sup>4</sup> See Chapter 1, above, pp. 43–51, for the duration of *maritagium* in the thirteenth century.

<sup>5</sup> See Chapter 1, above, pp. 43–4, for Glanvill and Bracton on the duration of *maritagium*.

<sup>6</sup> Plucknett, *Concise History*, 552–6; Plucknett, *Legislation of Edward I*, 132–5; T. F. T. Plucknett, *Statutes and their Interpretation in the Fourteenth Century* (Cambridge: Cambridge University Press, 1922), 51–2; Holdsworth, *History of English Law*, III 114–17. Simpson, *A History of the Land Law*, 83–5 follows the traditional approach as does S. J. Payling, “Arbitration, Perpetual Entails and Collateral Warranties in Late-medieval England: A Case Study,” *Journal of Legal History* 13 (1992), 33.

the development of the indefinite entail in cases of alienation. The duration of an entail for this purpose was the duration of the statutory restraint on alienation. The statutory restraint on alienation was closely related to the form and reach of the descender writ. By the form of the descender writ I mean how the plaintiff was to set forth his relationship to the donee in a well-formed descender writ. By the reach of the descender writ I mean the number of generations of issue from the donee who could use the descender writ. The rules governing all three matters – the duration of entails, the form of descender writ, and the reach of the descender writ – were established by the Council acting through Chancery. Part 3 traces the development of the indefinite entail for the continued existence of the reversion or a remainder limited after an entail.

#### 1. READING DE DONIS

After *De Donis* lawyers created a history of the law before the statute. No doubt because a form of the writ was included in the statute, some lawyers thought that formedon in the descender was created by *De Donis* and that only formedon in the reverter had existed before the statute.<sup>7</sup> But other lawyers knew that descender had antedated the statute.<sup>8</sup> That descender had been created by *De Donis* and had not existed earlier was thought to be a reason why the statute applied only to alienations by tenants-in-tail made after the statute. The conclusion was sound however questionable the reasoning. Although there was the slight, occasional suggestion that the statute would apply only to fee tails created after its enactment,<sup>9</sup> the firm rule was that the statute applied to alienations

<sup>7</sup> *Waleton v. Verdon*, JUST 1/805, m.32d (1293); *Charetter v. Waltham*, JUST 1/544, m.9d (1294), YB (RS) 21–2 Edw. I 320 at 323 (1294); *Maners v. Randolph*, Mich. 4 Edw. II, 22 S.S. 40 (1310); *Camoys v. Warden of St. Nicholas*, Mich. 9 Edw. II, 45 S.S. 10 (1315). To the suggestion that formedon in the reverter was given by *De Donis* Chief Justice Bereford claimed that the writ was the most ancient writ next to the writ of right: *Langeton v. Worksleigh*, Trin. 12 Edw. II, 81 S.S. 101 (1319).

<sup>8</sup> *Camoys v. Warden of St. Nicholas*, Mich. 9 Edw. II, 45 S.S. 10 (1315) (Hingham).

<sup>9</sup> *Taperoed v. de Marenny*, CP40/102, m.89d (Mich. 1293); *Maners v. Randolph*, Mich. 4 Edw. II, 22 S.S. 40 (1310) (Scrope).

made after *De Donis* whether the entail had been created before or after the statute.<sup>10</sup>

From its preamble, lawyers learned that before *De Donis* a donee could alienate as soon as he had had a child.<sup>11</sup> That the lands claimed by a plaintiff had been alienated before the statute was a good and frequent answer to actions brought on the formedon writs.<sup>12</sup> In accordance with the lawyers’ legal history of the time, defendants who pleaded an alienation before the statute sometimes pleaded, or were forced to plead, that the tenant-in-tail who had alienated the land had had a child by the time of his alienation.<sup>13</sup> In one case, Higham insisted that the tenant-in-tail’s issue had to have been alive when the tenant alienated the land.<sup>14</sup> But in descender cases it seems to have been a good enough answer that the tenant-in-tail had alienated after the birth of issue.<sup>15</sup> In some reverter cases the argument was made that the birth of issue after alienation would have destroyed the reversion.<sup>16</sup> Most frequently, the plea rolls record only a blank answer that the land had been alienated before the statute.

The official history of the law before the statute fits a simple

<sup>10</sup> e.g. *Taperod v. de Mareny*, CP40/102, m.89d (Mich. 1293); JUST 1/1102, m.29 (1294); YB (RS) 21–2 Edw. I. 320 at 321 (1394); *De Bride v. Morel*, CP40/206, m.199 (Trin. 1314); *Twenge v. Horneby*, CP40/283, m.54 (Mich. 1330); CP40/411, m.218d (Mich. 1362).

<sup>11</sup> YB (RS) 30–1 Edw. I 168 (1302); YB Hil. 8 Edw. III, f. 11, pl. 32 (1334); *Penrose v. Marley*, YB Pas. 6 Ric. II, 2 Ames 240 (1383).

<sup>12</sup> e.g. *Launde v. Curzon*, CP40/91, 284d (Mich. 1291) YB (RS) 21–2 Edw. I 567; *Pykehale v. Coverham*, JUST 1/1102, m.24d (1294); CP40/130, m.279 (Mich. 1299); *Nevill v. Shepene*, CP40/164, m.105 (Trin. 1307); *De Bride v. Morel*, CP40/206, m.199 (Trin. 1314); *Furnyvall v. Eyleford*, CP40/206, m.100 (Trin. 1314); *Coffyn v. Friskneye*, CP40/283, m.375 (Mich. 1330); CP40/300, m.388 (Mich. 1334); *Morekan v. Menby*, CP40/336, m.601 (Mich. 1343); CP40/388, m.88d (Mich. 1356); CP40/411, m.213d (Mich. 1362).

<sup>13</sup> *Taperod v. de Mareny*, CP40/102, m.89d (Mich. 1293); *Pykehale v. Coverham*, JUST 1/1102, m.24d (1294); YB (RS) 30–1 Edw. I 169 (1302); *Laxton v. Laxton*, CP40/183, m.408d (Mich. 1310); *Toffard v. Maynard*, CP40/183, m.436d (Mich. 1310); *Colby v. Spenser*, YB Trin. 4 Edw. II, 42 S.S. 60 (1311); *Neton v. Warden of the Hospital of St. Mary Chichester*, CP40/283, m.341 (Mich. 1330); YB Hil. 6 Edw. III, f. 20, pl. 35 (1332).

<sup>14</sup> BL Add. Ms. 31826, f. 67, CP40/95, m.65 (Trin. 1292).

<sup>15</sup> Whether an alienation was effective before the statute could be a tricky question. Where husband and wife had been granted a joint entail and the husband had alienated before the statute and the wife confirmed the grant after the statute, the alienation, it seems, was effective as of before the statute. YB (RS) 20–1 Edw. I 300 (1292).

<sup>16</sup> See Chapter 1, above, p. 24.

story about what the statute did: it prevented donees from alienating land received in fee tail. Although this simple reading of *De Donis*, as is shown below, was good for about the first fifteen years after the statute, *De Donis* was more complicated. The crucial operative passage of the statute was less than clear, as two phrases in it seemed to be at odds with each other. The passage is quoted below with one phrase in italics and the other in bold print.

And therefore the lord king . . . has laid down that the will of the donor . . . shall be observed; so that *those to whom a tenement is given upon condition shall not have the power of alienating the tenement so given in such a way that it will not remain to the issue of those to whom the tenement was so given after their death or to the donor or to his heir if issue fails, whether because there was no issue at all or there was issue but it failed by death without an heir of such issue.*<sup>17</sup>

The phrase in italics says that the donee no longer has power to alienate. Assuming that by “the donee” is meant the person or persons who received livery of seisin, the italicized phrase can be read to imply that issue of the donee may alienate the entailed land. The phrase in bold print, however, seems to give the reason why the donee may not alienate. The point is to preserve the reversion if the donee has no issue or if he has issue and the issue fails for want of an heir of the issue.<sup>18</sup> Conveyances spoke of the heir of issue in order to convey the idea that a reversion was not to fall in until the donee’s issue, after however many generations it took, had failed<sup>19</sup> – but if this is the reason for prohibiting alienations by the donee, the reason goes far beyond prohibiting alienations only by the donee. Preservation of the reversion would require prohibiting alienation by the donee and his issue indefi-

<sup>17</sup> 13 Edw. I, c. 1 (1285), *Statutes of the Realm*, I, 71–2. The text uses the translation provided in Baker and Milsom, *Sources of English Legal History*, 49, except that clarifying, and therefore interpretative, additions have been omitted.

<sup>18</sup> Legal historians have thought that the word “issue” in this passage was used in a limited sense to mean the first generation of issue rather than in an extended sense to mean all subsequent generations issuing from the donee. Plucknett, *Concise History*, 552, citing Updegraff, “The Interpretation of ‘Issue’ in *De Donis*,” 200–20. It would be more accurate to say that in its first two occurrences in the phrase in bold print the word “issue” is used in its extended sense, which is later explained by using the word in the next two occurrences in its limited sense.

<sup>19</sup> Chapter 1, above, at pp. 19–20.

nately. Yet the statute, on its terms, says only that the donee does not have the power to alienate.

Although the passage is not a model of clarity, the apparent tension between the two phrases for modern readers derives in large part from bringing to the text the assumption that an entail was always thought to be a single entity for all purposes. As Chapter 1 showed, however, questions of alienation were treated differently from questions of succession.<sup>20</sup> Although the court decided in 1281 that the donee could alienate as soon as he had a child,<sup>21</sup> in cases in 1269 and 1285 the court decided that neither the donee’s having a child nor the entry of the first heir destroyed a reversion.<sup>22</sup> A petition to the Acton Burnel parliament in 1283 took the position that in the case of a grant in *maritagium* the reversion would not be destroyed until the third heir, whose homage would destroy the reversion.<sup>23</sup> The unexercised power to alienate did not extinguish the reversion. If the maker of the statute was aware of what was going on in the courts and what had been put before parliament two years earlier, and he seemed to be aware of the 1281 case, he might well have set himself the difficult task of using very few words to overrule the 1281 case without touching the principle expressed in the 1269 and 1285 cases or even in the 1283 petition.<sup>24</sup> No one would have wished *De Donis* any shorter. Using too few words to do the job well, the maker of the statute tried to impose a restraint on alienation without having that restraint govern the duration of entails where there is no alienation. In neither case, however, did the statute specify the ultimate duration of a fee tail.

In the years immediately after the statute, commentators were aware of the tension between the two parts of the crucial passage. One commentator was content pretty much to point out the two

<sup>20</sup> Chapter 1, above, at pp. 20–37.

<sup>21</sup> JUST 1/1000, m.12d, JUST 1/1005, m.31 (1281) discussed in Chapter 1, above, pp. 31–2.

<sup>22</sup> KB 26/190, m.6 (Trin. 1269); JUST 1/619, m.11, JUST 1/620, m.5, JUST 1/622, m.6d (1285) discussed in Chapter 1, above, pp. 34–6. For a case in which the plaintiff claimed a reversion after the death of the first heir in the entail without issue see *Andethlegh v. Berentyn*, JUST 1/242, m.15d (1285).

<sup>23</sup> Chapter 1, above, p. 36.

<sup>24</sup> The maker of the statute is not known. Plucknett’s belief that Chief Justice Hengham drafted the statute (Plucknett, *Legislation of Edward I*, pp. 132–3), seems to have been mistaken. Simpson, *A History of the Land Law*, 83, n. 6.

contrary possible readings.<sup>25</sup> This commentator read the phrase in italics, that the donee was restrained from alienating, to mean that the donee's issue remained at the "ancient law" before the statute and could alienate. He recognized, however, that some people thought that the phrase in bold meant that the issue could not alienate. On this point, he was certain that the reversion would continue until the fourth degree, especially where the donees were husband and wife, which might be an oblique reference to *maritagium*. The difficulties broached by this commentator were simplified by another commentator, who avoided the conflict between the two phrases by the simple expedient of keeping them separate from each other. According to this commentator, "*primus exitus . . . potest alienare set quant ad ius reversionis non extinguuntur ante quartem gradum*"<sup>26</sup> ("The first issue can alienate but the right of reversion is not extinguished before the fourth degree"). Already, commentators reflect the use of the rule of the third heir (fourth degree) from *maritagium* to supply a limit to entails left open by the phrase in bold print: a limit to entails for the preservation of reversions.<sup>27</sup> For this purpose remainders would be treated like displaced reversions. The petition to the 1283 parliament, which involved a grant in *maritagium*, had presupposed that a reversion would remain alive until the fourth degree, the third heir.<sup>28</sup> As important as the particular interpretation with respect to the duration of fee tails, the commentary reflects the structure of thought that would govern the question of the duration of entails for more than the next century. The duration of the statutory restraint on alienation would be treated differently from the duration of fee tails for the continued existence of a right to the reversion or remainder.

## 2. THE STATUTORY RESTRAINT ON ALIENATION AND THE DESCENDER WRIT

Legal historians who have speculated about the duration of entails have not looked at the plea rolls. Yet the best evidence for the

<sup>25</sup> BL Add. Ms. 31826, ff. 226v–227.

<sup>26</sup> BL Add. Ms. 31826, f. 227v.

<sup>27</sup> BL Stowe Ms. 386, f. 120v.

<sup>28</sup> Chapter 1, above, p. 36.

duration of an entail at any given time are the descender cases on the plea rolls. If, for example, one finds a plaintiff using a descender writ to set aside an alienation by the donee's second heir, one infers that the statutory restraint on alienation lasted through the second heir, the third degree. If the plaintiff is the fourth heir from the donee, one infers that the descender writ reaches to the fourth heir. The descender writ would not have been fully effective unless its reach was one generation longer than the statutory restraint on alienation. The record of plaintiff's writ and count on the plea rolls allows one to determine the reach of the descender writ in any given case. Fortunately, given the dominant, though not exclusive, rule governing the proper form of a descender writ, one can also tell from the plea roll record of plaintiff's writ and pleading which heir under the entail, according to the plaintiff, had been the last heir seised under the entail. Whether the plaintiff is mistaken does not matter because what is important is that he was able to obtain from Chancery and to use a descender writ to set aside an alienation by the generation of issue he alleges to have been the last generation of issue seised under the entail.

The rule almost always observed for a well-formed descender writ required a plaintiff to make himself heir to his last ancestor to have been seised under the entail. Although application of the rule could be rather complicated, a simple example will suffice to show how the rule worked. Suppose there was a grant in fee tail to the plaintiff's grandfather. Suppose further that the grandfather had alienated the land. Under the last ancestor rule, the plaintiff in his descender writ would trace the descent from his grandfather to himself by saying that the right descended from the grandfather to the father as son of the grandfather and from the father to the plaintiff as son of his father and cousin and heir of his grandfather. The plaintiff would not say that his father was heir to his grandfather nor that the plaintiff was heir to his father, because his father had never been seised. Instead, the plaintiff would say that he was heir to his grandfather, the last ancestor to have been seised of the entail. If the plaintiff's father had been seised and had alienated the land, the plaintiff would describe his father as son and heir of the grandfather and himself as son and heir to his father.

Chancery created the last ancestor rule in the late 1290s when it

was working out the form of the descender writ for heirs beyond the first generation of issue from the donee. The rule was important because it enabled Chancery to regulate both the duration of the statutory restraint on alienation and the reach of the descender writ. Plucknett asserted that "it was not parliament but the courts who created the perpetually enduring entail."<sup>29</sup> This statement is wide of the mark. It overlooks Chancery. Chancery created the indefinite entail for the donee's issue by extending the reach of the descender writ and by making the writ available to challenge alienations by issue increasingly distant from the donee. Chancery clerks could implement government policy on these matters because of Chancery's last ancestor rule. In order to obtain a descender writ in the proper form, the plaintiff would have to tell the clerk (a) what generation of descent the plaintiff was from the donee and (b) what generation of issue had last been seised of the entail. If either the plaintiff or the last ancestor to have been seised was too distant from the donee, the the plaintiff simply would not be given a writ. And if the plaintiff got a writ out of Chancery, the justices never quashed the writ on the grounds that the plaintiff was too distant from the donee or that the plaintiff's last ancestor to have been seised had been seised after the entail had come to an end. Those who disagreed with government decisions to extend the reach of the writ or the duration of the entail did not, with one unsuccessful exception, appeal to the justices. They petitioned parliament. The parliamentary petitions of the 1330s and early 1340s were responses to extensions of both the descender writ and the entail in 1330.<sup>30</sup>

Using the last ancestor rule to interpret the plea roll evidence enables one to divide the growth of the indefinite entail for the donee's issue into four stages or periods: 1285 to 1309, 1310 to 1329, 1330 to the early 1420s, and after the early 1420s. Before taking up the duration of entails and the reach of the descender writ in each of these periods, it is helpful to consider briefly the interaction between Chancery and the justices on the validity and the proper form of writs. It will also be helpful to describe the development of the basic form of descender writ.

<sup>29</sup> Plucknett, *Legislation of Edward I*, 135.

<sup>30</sup> The parliamentary petitions are discussed below at pp. 115–16.

*(a) Interaction of Chancery and the courts*

Both the reach of the descender writ and the duration of entails for donee's issue were controlled by Chancery. In the Yearbooks one sees Chancery decisions in the form of writs sometimes debated and almost always upheld. In the relevant period – 1290 to 1340 – there was no sharp or clear break between Chancery officials and the Council or between the justices and the Council.<sup>31</sup> It is not always possible, however, to determine in the case of a specific decision about a particular writ whether the Council made the decision, or approved a Chancery proposal, or merely condoned an earlier decision. Chancery spoke with the authority of the Council. The justices were seldom willing to overrule a decision taken in Chancery. When they did overrule a Chancery position, they were seldom able to have their decision stick. And the points won, as it were, by the justices had little substantial significance. The thesis that Chancery controlled the duration of entails for the donee's issue parallels Robert Palmer's thesis that the King's Council and Chancery made a conscious decision to introduce writs of trespass on the case.<sup>32</sup> The evidentiary arguments for the two theses are similar: infrequent challenges to the new writs and complete judicial acceptance of the new writs. Palmer sees the creation of writs of trespass on the case as implementing a substantive governmental policy of making the lower orders fulfill their obligations.<sup>33</sup> However that might be, the new writs, which permitted royal jurisdiction to expand at the expense of local jurisdictions, fit a pattern or policy of expanding central government into local affairs.<sup>34</sup> The extension of the descender writs and the duration of fee tails for the donee's issue does not seem to have furthered any ulterior substantive or structural government policy. Perhaps more than curiously, however, the turning points in the growth of the indefinite descender writ and the indefinite

<sup>31</sup> J. F. Baldwin, *The King's Council in England During the Middle Ages* (Oxford: Clarendon Press, 1913), 75–83, 237–46, 313–14.

<sup>32</sup> Robert Palmer, *English Law in the Age of the Black Death 1348–1381* (Chapel Hill: North Carolina University Press, 1993), 139–51.

<sup>33</sup> *Ibid.*

<sup>34</sup> G. Harriss, “Political Society and the Growth of Government in Late Medieval England,” *Past & Present* 138 (1993), 46–50; W. M. Ormrod, “Edward III and the Recovery of Royal Authority in England 1340–1360,” *History* 72 (1987), 4–19.

entail occurred in the early years of new reigns: 1310, 1330, and the 1420s. The significance, if any, of this timing remains a mystery.

The best evidence of Chancery control over these matters are the patterns of descender cases that appear on the plea rolls. If in a given period, say 1310 to 1329, no plaintiff beyond the third heir from the donee brings a descender writ, it is probably because claimants beyond the third heir are not getting descender writs out of Chancery. And if in a given period, say 1330 to about 1420, the plaintiffs always make themselves heirs to persons in the first four degrees of descent from the donee, it is probably because claimants who wish to allege an alienation or an entry after the fourth degree are not getting writs out of Chancery. The pattern of plea roll evidence presents an interpretative problem. Although the evidence supports the conclusion that Chancery controlled the reach of the descender writ and the duration of entails for the donee's issue, the evidence does not always unequivocally reveal what rule governed Chancery action. This uncertainty arises from the possibility that at a given period of time the Chancery policy might have been more generous than that needed by any plaintiff. Where, for example, there are statements that an entail lasts until the fourth degree (third heir) but the cases on the plea rolls have the donee or the first heir as the last ancestor to have been seised, neither type of evidence is automatically better evidence of what the law was at that time. Each type of evidence might present a picture of the law at different moments of its operation: the abstract rule or policy and the run of cases well within the outer limits of the abstract rule or policy.

Another type of evidence supports the inference of Chancery control. The royal justices never rejected a Chancery writ on the grounds that either the writ supposes a too long-lasting entail or a too distant relation of the plaintiff to donee. More generally, that Chancery had formulated a new writ was dispositive that the writ was good.<sup>35</sup> In 1291, an abbot brought a new writ to protect free chase on his demesne.<sup>36</sup> The defendant objected that every new

<sup>35</sup> See Palmer, *English Law in the Age of the Black Death*, 139–51, for the judicial acceptance of writs of trespass on the case.

<sup>36</sup> YB (RS) 22–3 Edw. I 526 at 528–9 (1294). The plea roll record is CP40/91, m.247d (Mich. 1291). I am grateful to Dr. Paul Brand for bringing the plea roll record to my attention.

writ should be provided by the common council of the realm and alleged that the Council had not provided the plaintiff's writ. The plaintiff, citing *in consimili casu*,<sup>37</sup> argued that the writ should not abate unless the defendant gave him a better writ. No judgment is recorded. In 1440, a plaintiff brought a writ of account against a woman as his "*receptrix*."<sup>38</sup> Fortescue unsuccessfully challenged the writ on two grounds: that Chancery had never before issued a writ of account against a "*receptrix*" and that women could neither serve nor be liable as receivers. The justices seem to have taken as their task not so much deciding whether the writ was good as finding reasons why the Chancery decision to issue the writ conformed to the common law. They saw no reason why at common law a woman could not serve and be actionable as a receiver.

In debates about the proper form of a writ, the opinion of the Chancery clerks was often decisive. For example, where a plaintiff brought descender for an entailed remainder limited after the dower of the donor's mother, Belknap argued that having mentioned the dowager the writ had also to say a word about her husband.<sup>39</sup> Justice Thorp responded that the Chancery clerks thought the writ good: "*Per que il fuit agarde bon.*" Where the issue was the proper form of the writ *sur cui in vita*, Justice Hillary reported that the Chancery clerks thought that the plaintiff's writ was not in the proper form, because in *sur cui in vita* in the *post* the *cui ipsa* phrase should be in the middle of the clause and the *per* phrase at the end.<sup>40</sup> The court quashed the writ because it had the phrases the other way around. In another case of *cui in vita*, this one in 1500 involving the plaintiff's jointure, the question was whether the writ had to specify the grant that gave the plaintiff her jointure.<sup>41</sup> Over Kebell's argument that the writ need not mention the grant creating jointure because the action was based on the husband's alienation, the court, having examined the Chancery register of writs, abated the writ for failing to be in the approved Chancery form.

There could be disagreement between the justices and Chancery

<sup>37</sup> 13 Edw. I, st. 1, c. 24 (1285), *Statutes of the Realm*, I, 83.

<sup>38</sup> YB Mich. 19 Hen. VI, f. 4, pl. 10 (1440).

<sup>39</sup> YB Mich. 41 Edw. III, f. 27, pl. 25 (1367).

<sup>40</sup> YB (RS) 16(1) Edw. III 194 (1342).

<sup>41</sup> YB Mich. 16 Hen. VII, f. 9, pl. 1 (1500).

over the validity of a writ, especially when a writ was based on a statute. In 1310 there was a question whether chapter 7 of the Statute of Gloucester, which gave an immediate action to the reversioner if a widow made certain alienations of her dower, would be extended to benefit a remainderman if a life tenant alienated in fee.<sup>42</sup> In one case, the court abated a writ brought by a remainderman.<sup>43</sup> The plaintiff complained to Chancery. The clerks of Chancery are said to have caused Chief Justice Bereford to come to Chancery and explain why he abated the writ. Bereford argued that the writ was not maintainable by statute. But Bordelby, master of Chancery, said that the writ was "*consimili casu*" under chapter 7 of Gloucester. Bereford responded: "Blessed be he who made the statute. Make the writ and we will maintain it." A report of another similar case in the same year has Bereford abating a writ for a remainderman under chapter 7 of Gloucester and has Bereford discussing the statute with Bordelby, Osgoodby, and other "examiners" of the Chancery.<sup>44</sup> According to this report, Chancery added to the writ "by form of the statute provided in like case." Perhaps the story of the Bereford-Bordelby meeting was good enough to be put in the reports of two cases or perhaps two meetings with Bereford were in fact necessary to get him to toe the line. In 1317, when a plaintiff brought *cessavit* against a life tenant, Bereford questioned the writ on the grounds that neither the Statute of Gloucester nor the Statute of Westminster II supported the writ.<sup>45</sup> But he did not quash the writ. He accepted the Chancery decision to issue the writ.

There could also be disagreement between the justices and their courts over the validity of a writ. In 1310, a defendant objected to the plaintiff's writ of ravishment of ward in that the plaintiff was guardian in socage and that there was no such writ by common law or by statute.<sup>46</sup> Chief Justice Brabazon, however, adjudged

<sup>42</sup> 6 Edw. III, c. 7 (1278), *Statutes of the Realm*, I, 48.

<sup>43</sup> *Devereux v. Tuchet*, YB Hil. 3 Edw. II, 20 S.S. 16 (1310).

<sup>44</sup> *Stirkeland v. Brunolfshead*, YB Pas. 3 Edw. II, 20 S.S. 106 (1310).

<sup>45</sup> *Upton v. Lowesley*, YB Mich. 11 Edw. II, 65 S.S. 26 (1317); 6 Edw. I, c. 4 (1278), *Statutes of the Realm*, I, 48; 13 Edw. I, c. 21 (1285), *Statutes of the Realm*, I, 82-3.

<sup>46</sup> *Frowyk v. Leukenore*, YB Hil. 3 Edw. II, 19 S.S. 157 (1310). The relevant statutes were 20 Hen. III, c. 6 (1336), *Statutes of the Realm*, I, 3, and 13 Edw. I, c. 35 (1285), *Statutes of the Realm*, I, 88-9, which provided remedies for guardians by knight service.

the writ to be good. He cited "*in consimili casu*" and reasoned that the writ had been given by the "*comune consayl de la chauncellerie*."<sup>47</sup> Given his political career, Brabazon, chief justice of King's Bench, might well have been speaking from personal knowledge. Similar objections to the writ in the following year were similarly overruled.<sup>48</sup> But in 1312, in the Common Pleas, the justices took a different tack. A plaintiff brought a writ of ravishment of ward against a de facto guardian in socage and the writ spoke of force and arms against the king's peace.<sup>49</sup> Scrope objected to the phrase "force and arms." Willoughby explained that the statutory writ used the phrase "against the King's peace." Consistency with that phrase and with other trespass writs was thought to require the use of the phrase "force and arms." He also argued that the writ was in the form provided by Chancery. Scrope responded that the clerks of Chancery could not add words to a writ provided by statute. Chief Justice Bereford agreed and ruled that the writ was bad. No mention was made of Brabazon's decision two years earlier.

Occasionally, the justices held that a writ out of the standard Chancery form was nevertheless good. Where, for example, executors brought a writ of debt in the *detinet* form on an obligation to pay on a sale of their testator's goods, a defendant objected that the writ should have been in the *debet et detinet* form.<sup>50</sup> The question was whether the obligation should be treated as the testator's, because the goods sold had been his, or as the executor's, because they sold the goods to the defendant. Although the Chancery clerks agreed with the defendant that the writ should have been in the *debet et detinet* form, the court nevertheless upheld the writ.

Strict adherence to the forms of Chancery could expose a plaintiff to the clerical errors of the Chancery clerks. A fifteenth-century Yearbook report sheds light on how a plaintiff went about getting a writ so as to protect himself from clerical errors. In a case of descender, the plaintiff, the second heir, made himself heir to the first heir but failed to make the first heir the heir to the

<sup>47</sup> YB Hil. 3 Edw. II, 19 S.S. 157 at 160 (1310). The statute is 13 Edw. I, c. 24 (1285), *Statutes of the Realm*, I, 83-4.

<sup>48</sup> *Dyne v. Caneun*, YB Trin. 4 Edw. II, 42 S.S. 148 (1311).

<sup>49</sup> YB 5 Edw. II, 33 S.S. 94 (1312).

<sup>50</sup> YB (RS) 17-18 Edw. III 354 (1343).

donee.<sup>51</sup> To counter Billyng's objection based on the last ancestor rule, Littleton produced a "titling" of the writ that he had shown the Chancery clerk. The "titling" had the writ in the proper form. The error lay with the Chancery clerk. Justice Prisot, suggesting that he might accept the clerk's titling of the writ, refused to accept Littleton's. He wanted the clerk brought before him. In 1469, a plaintiff in *scire facias* to enforce a remainder created by final concord claimed in his count a tail male.<sup>52</sup> His writ did not mention that the entail was restricted to male heirs. The final concord had so restricted the entail. Because the Chancery clerk had had the final concord before him when he wrote out the writ, the plaintiff was not harmed by the clerical error.

The justices could permit a plaintiff in his count to vary from his standard form of writ if there were no better writ available to fit the details of his claim.<sup>53</sup> For example, although the descender writ spoke of a grant in fee tail, the writ could also be used where the alleged fee tail had been created by devise.<sup>54</sup> A plaintiff's counting on the devise was not an impermissible variance from his writ in the standard form. A descender writ could also be used to claim a sergeanty in a church although the standard writ did not fit the plaintiff's matter snugly.<sup>55</sup> As Justice Stonor declared: "We shall not abate their writ if no other writ will serve his purpose." Chancery reluctance to deviate from its standard forms need not be fatal to the plaintiff. If there were a writ available, the plaintiff, of course, was required to use that writ.<sup>56</sup>

Where there was leeway in how best to put the plaintiff's matter into the standard form of writ, the views of the justices would control. For example, from time to time the issue arose whether in

<sup>51</sup> YB Mich. 28 Hen. VI, f. 4, pl. 10 (1449).

<sup>52</sup> YB Trin. 9 Edw. IV, f. 15, pl. 12 (1469).

<sup>53</sup> YB (RS) 20-1 Edw. I 168 (1292); YB (RS) 30-1 Edw. I 34 at 34-5 (1302).

<sup>54</sup> YB (RS) 15 Edw. III 372 (1341).

<sup>55</sup> YB (RS) 18 Edw. III 338 (1344).

<sup>56</sup> e.g. YB (RS) 20-1 Edw. I 226 (1292); YB (RS) 34-5 Edw. I, 130 (1306); *Sale v. Bromley*, Pas. 8 Edw. II, 41 S.S. 138 (1315); YB Mich. 21 Edw. III, f. 45, pl. 63 (1348). In *Fen v. Somercotes*, YB Mich. 3 Edw. II, 19 S.S. 90 (1309), the plaintiff brought a writ which combined elements of *sur cui in vita* with descender to claim land alienated by the second husband of his ancestor. He lost because there was a writ for his case - alienations by second husbands. In the printed register there is a *sur cui in vita* writ for entailed lands: *Register*, f. 233b. The case might be a rare instance of the justices refusing to accept a Chancery innovation.

a descender writ the plaintiff had to name each person in the descent from the donee to plaintiff. The question was quite narrow, in that after 1310 or so it arose only with regard to an unnamed ancestor who was of the same degree in descent as was an ancestor named in the writ. In the early fourteenth century, the rule was that even if the unnamed ancestor had never been seised, omitting him was a fatal flaw.<sup>57</sup> By the later fourteenth century, however, the rule was the opposite: an ancestor who never gained estate and who was of the same degree as another ancestor who had been seised, and therefore named in the writ, did not have to be included in the writ.<sup>58</sup> The later and looser rule did not undercut the function of the last ancestor rule, for under the looser rule the writ itself would tell how many degrees in descent there had been from the donee to the last ancestor to have been seised of the entail and from the donee to plaintiff. The judicial influence on the shaping of writs operated largely within the limits set by Chancery forms and policies.

(b) *Development of the descender writ and the last ancestor rule*

The duration of fee tails for the issue of the donee was related to the form and reach of the descender writ. One therefore must understand some basic rules governing the form of the writ and the form of pleading on the writ. In pleading, the plaintiff ordinarily followed his writ. He alleged that the donor had been seised and he then set forth the gift in fee tail. Most importantly, he based his claim on the seisin of the donee by laying the esplees in the donee during the reign of a specified king.<sup>59</sup> In one 1292 case, it was debated whether the plaintiff had to produce written evidence of the grant in fee tail.<sup>60</sup> Although the decision in that case is not

<sup>57</sup> *Le Bret v. Tolthorpe*, Mich. 4 Edw. II, 22 S.S. 27 (1310); *Monford v. Tregoz*, Trin. 4 Edw. II, 42 S.S. 59 (1311); Note, Trin. 4 Edw. II, 42 S.S. 157 (1311).

<sup>58</sup> YB Trin. 49 Edw. III, f. 20, pl. 4 (1375); YB Mich. 12 Hen. IV, f. 1, pl. 2 (1410). Justice Kirton was willing to accept a writ that failed to name an ancestor who attained estate but who was of the same degree as an ancestor named in the writ: *Leverov v. Anon.*, YB Mich. 2 Ric. II, 1 Ames 85 (1378). His position seems to have been peculiar. See YB Pas. 46 Edw. III, f. 9, pl. 5 (1369).

<sup>59</sup> YB Hil. 4 Edw. III, f. 4, pl. 7 (1330); YB Mich. 5 Edw. III, f. 69, pl. 127 (1331); YB RS 13–14 Edw. III 304 (1339); YB Hil. 50 Edw. III, f. 1, pl. 3 (1376).

<sup>60</sup> *Brok v. Westwick*, CP40/96, m.216d (Mich. 1292), BL Add. Ms. 31826, ff. 59–60; BL Harley Ms. 25, ff. 81v–82v. I am grateful to Dr. Paul Brand for these citations and for a transcription of the report in the Harley manuscript.

known, a Yearbook note of the same year teaches that written evidence of the grant was not necessary in cases of descender or reverter.<sup>61</sup> This became the rule. Written evidence of the grant was not required because the plaintiff based his claim on the donee's seisin.<sup>62</sup> Having established that this ancestor, the donee, had been seised in fee tail, the plaintiff traced descent from the donee to himself. Here he followed, sometimes supplementing, the matter of his writ.<sup>63</sup> The plaintiff's allegations of the donor's seisin, the grant in fee tail, and the donee's seisin were traversable, and were often traversed, by the defendant. Common answers to formedon in the descender were that the donor had not been seised<sup>64</sup> or that there had been no grant, or that the grant had been in fee simple, not fee tail,<sup>65</sup> or that the donee had not been seised.<sup>66</sup> The defendant could also dispute the descent from donee to plaintiff.<sup>67</sup>

The first two decades after *De Donis* saw Chancery experiment with the form of the descender writ. Out of this experimentation came the last ancestor rule. In crafting the developed descender

<sup>61</sup> YB (RS) 20–1 Edw. I 130 (1292).

<sup>62</sup> e.g. YB (RS) 21–2 Edw. I 344 (1294); YB (RS) 13–14 Edw. III 168 (Mich. 1339).

<sup>63</sup> There were two styles of tracing descent from donee to plaintiff. In one, the plaintiff traced the descent of the right; in the other, the descent of the land. The former was preferred. *Novae Narrationes*, 95–6, B173–4.

<sup>64</sup> YB (RS) 30–1 Edw. I 177 (1292); YB Mich. 17 Edw. II, f. 506 (1323); *Betterby v. Mikelconton*, CP40/375, m.248 (Mich. 1353); *Ramondby v. Malton*, CP40/400, m.138 (Mich. 1359); *Havet v. Bishop of Winchester*, YB Hil. 8 Ric. II, 4 Ames. 192 (1385); YB Pas. 3 Hen. IV, f. 17, pl. 13 (1402).

<sup>65</sup> The most common form of answer was that the alleged donor did not give the land as the writ supposed. In 1331 it was objected that this answer could mean either that the donor did not give at all or that he did not give in fee tail. YB Mich. 5 Edw. III, f. 40, pl. 25 (1331). Justice Herle nevertheless instructed the clerks to enter the standard form of answer on the roll. For sample cases of the standard form of answer see CP40/132, m.175 (Hil. 1300); JUST 1/1174, m.5 (1302); CP40/258, m.300 (Mich. 1325); CP40/283, m.40d (Mich. 1330); CP40/336, m.140d (Mich. 1343). If the defendant had denied the grant generally and the jury found that the grant had been in fee simple, the judgment would be for the defendant: *Dacre v. Le Feure*, YB Hil. 9 Edw. II, 45 S.S. 91 (1316). The defendant could deny specifically that the grant had been in fee tail or *maritagium*, e.g. CP40/81, m.76d (Hil. 1290); CP40/85, m.19 (Mich. 1290); CP40/107, m.56 (Hil. 1294); CP40/183, m.238d (Mich. 1310); CP40/206, m.94 (Trin. 1314); CP40/235, m.211d (Trin. 1320); CP40/258, m.297d (Mich. 1325); CP40/283, m.413d (Mich. 1330).

<sup>66</sup> CP40/236, m.146d (Mich. 1320).

<sup>67</sup> e.g. *Spemel v. Wilton*, YB Mich. 7 Edw. II, 34 S.S. 95 (1313); *Cestre v. Harlement*, CP40/336, m.331d (Mich. 1343); *Waleys v. Revot*, CP40/375, m.327d (Mich. 1353).

writ Chancery and lawyers worked by analogy to other writs. In the simple case of the donee's immediate issue claiming the entail given to his parent, mort d'ancestor supplied the closest analogous writ. In more complicated cases the plaintiff was a more distant descendant from the donee. For these cases, there was no single analogous writ. Rather, Chancery and lawyers thought in terms of the writ of right, the writs of cosinage, and the writs of entry. There were competing views as to which of these writs provided the controlling analogy for the form of a descender writ. Once the decision was made to permit a plaintiff to use a descender writ to set aside alienations by the donee's issue, the last ancestor rule, borrowed from the possessory writs of mort d'ancestor and cosinage, became the dominant rule governing the form of the descender writ. In this situation, the rule was important, because it enabled Chancery to police the duration of fee tails.

Descender writs before *De Donis* were used by the first generation of issue. In this case, the descender writ supplemented mort d'ancestor in that it served the heir under an entail where the heir general had entered onto the land.<sup>68</sup> After *De Donis*, the first generation of issue could also use descender to challenge an alienation by the donee. In this case, the plaintiff's relationship to the donee would be within the range of relationship between plaintiff and decedent permitted by the rule limiting the use of mort d'ancestor to the decedent's child, sibling, niece, or nephew. After the statute there developed a school of thought that descender was the exclusive remedy for the first generation of issue even where mort d'ancestor might apply. A note a few years after the statute held that if the donee had died seised and a stranger entered, the heir in the tail had to use descender.<sup>69</sup> Mort d'ancestor would not work because it supposed that the donee had died seised of a pure fee. Early in the fourteenth century, the exclusivity of descender was again asserted.<sup>70</sup> Although it is not clear whether descender was the exclusive remedy for heirs in an

<sup>68</sup> Chapter 1, above, pp. 76–80.

<sup>69</sup> BL Add. Ms. 31826, f. 225.

<sup>70</sup> YB (RS) 30–1 Edw. I 128 (1302) the plea roll record for which is JUST 1/117A, m.3d (1302) (defendant demurs in mort d'ancestor on the grounds that the plaintiff has descender. Neither the report nor the record indicate the result); YB 6 Edw. II, 34 S.S. 44 (1312) (Bereford, C.J., says Hengham took the position that the heir in tail could never use mort d'ancestor).

entail, it was a Yearbook commonplace that descender had been given in lieu of mort d'ancestor. Lawyers deployed the analogy in support of all sorts of argument.<sup>71</sup> Two arguments are of special interest. It was said that, as in mort d'ancestor, a plaintiff in descender need not mention a sibling who did not survive the plaintiff's ancestor or who did not become seised of the land.<sup>72</sup> More importantly, as in mort d'ancestor, a plaintiff in descender had to make himself heir to his last ancestor to have been seised of the entail.<sup>73</sup> Although the common analogy to mort d'ancestor could support or rationalize the last ancestor rule, the development of the rule was more complicated.

Once it was decided that issue beyond the first generation might use a descender writ there arose the question how to form such a descender writ. Although some lawyers thought that the writ of right provided the controlling analogy, Chancery departed from the writ of right by borrowing key elements of the possessory writs of cosinage and the hybrid writs of entry. In a writ of right, the plaintiff would assert that an ancestor had been seised of the land and would trace descent from that ancestor to himself. In tracing descent from his ancestor, the plaintiff would name each intervening ancestor through whom the right descended to him. He would also make each person in the descent the heir of the preceding person. Analogies to the writs of entry and the possessory writs of cosinage justified departures from this form of the writ of right.

From the writs of entry there came the idea that in tracing descent to himself the plaintiff need not mention an ancestor who was never seised and thus never attained estate.<sup>74</sup> Although this analogy was not always followed, in 1318 Chief Justice Bereford

<sup>71</sup> e.g. YB 2 Edw. II, 17 S.S. 159 (1308–9) (formedon has same period of limitation as mort d'ancestor); YB 2 Edw. II, 17 S.S. 170 (1308–9) (as with mort d'ancestor, if the plaintiff had been seised after the last ancestor to have been seised, she could not use descender); YB 4 Edw. II, 42 S.S. 183 (1310–11) (if last the ancestor to have been seised had died seised, then descender is a possessory writ like mort d'ancestor; otherwise descender is a writ of right); YB Mich. 4 Edw. II, f. 56, pl. 66 (1330) (counterplea to a voucher to warranty in descender should be treated as in mort d'ancestor).

<sup>72</sup> *Le Bret v. Tolthorpe*, YB Mich. 4 Edw. II, 22 S.S. 27 (1310).

<sup>73</sup> YB (RS) 30–1 Edw. I 14 (1302); YB 3 Edw. II, 22 S.S. 10 (1310).

<sup>74</sup> *Altercrouch v. Frost*, YB Trin. 3 Edw. II, 20 S.S. 159 (1310); *Scaldeford v. Abbot of Vaudey*, YB Mich. 4 Edw. II, 22 S.S. 30 (1310); *Paramore v. Gedding*, YB Mich. 7 Edw. II, 36 S.S. 92 (1313); YB Hil. 12 Edw. II, 70 S.S. 28 (1319).

accepted the analogy for the sake of simplifying the descender writ.<sup>75</sup> Also from the writs of entry there came the notion that a plaintiff to a formedon writ should specify the defendant’s entry on to the land. In a case in 1294, concerning an alienation before *De Donis*, the validity of the alienation depended upon who had alienated to whom.<sup>76</sup> As the parties focused on the defendant’s entry, it was remarked that the writ “passes from the nature of a formedon to the nature of a writ of entry.”<sup>77</sup> On at least two occasions Chancery gave plaintiffs hybrids between formedon writs and writs of entry. In a 1299 case, a plaintiff brought a writ of formedon in the reverter that also alleged that the defendant had no entry other than through the donee’s husband who had alienated while tenant by the curtesy.<sup>78</sup> In 1309, the court abated a writ that combined elements of formedon in the descender with *sur cui in vita*.<sup>79</sup> These experimental grafts of words of entry on to the formedon writs recall the development of formedon in the reverter out of writs of entry before *De Donis*.<sup>80</sup> They had no future.

The writs of cosinage provided the most important model for the descender writ. In forming his writ of cosinage, a plaintiff made himself heir to his last ancestor to have been seised of the land.<sup>81</sup> Chancery borrowed this rule for the descender writ. The influence of the writs of cosinage on the shaping of the descender writ can be traced through cases on the plea rolls. In 1292, a plaintiff used a writ of *aiel* to recover land given as his grandmother’s *maritagium* where the grandfather, after the death of the grandmother and the first heir, had given the land to the plaintiff’s uncle.<sup>82</sup> The choice of *aiel* in this case helped to make sure that the plaintiff would come within chapter 3 of the Statute of Gloucester,

<sup>75</sup> *Normanby v. Normanby and atte Welle*, YB Mich. 12 Edw. II, 65 S.S. 97 (1318).

<sup>76</sup> YB (RS) 21–2 Edw. I 566 (1294).

<sup>77</sup> *Ibid.*

<sup>78</sup> CP40/131, m.177d (Mich. 1299).

<sup>79</sup> *Fen v. Somercotes*, YB Mich. 3 Edw. II, 19 S.S. 90 (1309).

<sup>80</sup> See Chapter 1, above, pp. 72–4.

<sup>81</sup> YB (RS) 32–3 Edw. I 248 (Trin. 1304); *Perves v. Foxley*, YB Mich. 3 Edw. II, 19 S.S. 105 (1309); *Sagor v. atte Welle*, YB 5 Edw. II, 63 S.S. 279 (1311); *Lucy v. Plukenet*, YB Mich. 6 Edw. II, 34 S.S. 206 (1312); *Lymsey v. Abbot of Westminster*, YB Trin. 6 Edw. II, 36 S.S. 31 (1313).

<sup>82</sup> *Baret v. Baret*, JUST 1/408, m.12d (1292).

which referred to writs of *aiel*.<sup>83</sup> His grandfather's warranty would not be an automatic bar to his action. In another case in 1292, the plaintiff's descender writ made him cousin and heir to the donees of a grant in *maritagium* without setting forth in detail his relationship to the donees.<sup>84</sup> In his count, however, he traced descent from the donees to their son, from the son to his son, and from this grandson to the plaintiff as heir and made each person in the descent heir to the preceding person. If one supposes (and this is not entirely clear) that the donee had alienated, then the plaintiff's writ, as opposed to his count, used a version of the last ancestor rule and omitted ancestors who had not attained an estate. Plaintiffs in 1293, 1294, 1298 and 1299 also used a writ in this style, which jumped from donee to plaintiff as cousin and heir of the donee.<sup>85</sup> Unfortunately, in these cases the record does not disclose the relation of the the plaintiff to the donee. In 1292, a second heir formed his writ in accordance with a different version of the last ancestor rule.<sup>86</sup> The donees had alienated, but he described the intervening heir as daughter and heir to the donees and himself as cousin and heir to the donees. Other forms of the descender writ tracked the count on a writ of right in which each person in the descent was made heir to the preceding person. Plaintiffs in 1297, 1299, and 1302 used descender writs in this form.<sup>87</sup> In 1302, when a plaintiff used a descender writ that jumped from the donee to himself as cousin and heir to the donee and supplied the intervening heir in his count, Mutford successfully objected that the writ should have described his father as son and heir of the donee and plaintiff as son and heir of his father.<sup>88</sup> The report includes the comment that Hervy and Westcote thought either the plaintiff's or Mutford's form of writ was good.

The last ancestor rule became important once it was decided

<sup>83</sup> 6 Edw. III, c. 3 (1278), *Statutes of the Realm*, I, 47. The statute would make the plaintiff warrant his grandfather's grant only to the extent that he had assets by descent. For the application of Gloucester to grants in fee tail see Chapter 4, below, pp. 224–7.

<sup>84</sup> *Imayne v. Pyrye*, CP40/95, m.65 (Trin. 1292).

<sup>85</sup> *Oweyn v. Oweyn*, JUST 1/805, m.16d (1293); *Hoton v. Berleye*, CP40/103, m.1d (Hil. 1294); *Poynt v. le Ken of Brackley*, CP40/122, m.6 (Hil. 1298); *Svafham v. Palefreur*, JUST 1/96, m.62 (1299).

<sup>86</sup> *Morpathe v. Mulcastre*, JUST 1/136, m.28 (1292).

<sup>87</sup> *Le Poer v. Le Poer*, CP40/118, m.49d (Pas. 1297); *Belegrave v. Cusinton*, CP40/126, m.159 (Hil. 1299); *Wormle v. Bacun*, CP40/130, m.74d (Mich. 1299).

<sup>88</sup> YB (RS) 30–1 Edw. I 234 (1302).

that a plaintiff could use a descender writ to set aside an alienation made by the donee’s issue. The earliest evidence of this use of the descender writ comes in 1299,<sup>89</sup> where the plaintiff’s writ followed the form of a writ of right. Within five years, Chancery had established the last ancestor rule. A note from 1303 explains that where the first heir dies before the donees and a stranger enters after their death, the writ for the second heir should describe the first heir as son and heir to the donees and the plaintiff as cousin to the donees.<sup>90</sup> The reason why the writ mentions cosinage, says the note, is that the first heir had not attained estate. If he had attained estate and had alienated, the writ should not make the plaintiff cousin to the donee but son and heir to the first heir. Yet the note reports the objection that words of cosinage should not be introduced into the descender writ lest the impression be given that the plaintiff is the collateral heir of the donee. In 1304, a writ following the last ancestor rule was upheld over the objection that it should have been in the alternative form – it should have made each person in the descent heir to the preceding person.<sup>91</sup> In 1306, a writ following the last ancestor rule was upheld over the objection reported in the 1303 note – that the words of cosinage made the plaintiff the collateral heir of the donees.<sup>92</sup>

In the first decade of the fourteenth century the last ancestor rule emerged as the dominant rule for the form of the descender writ.<sup>93</sup> Although sometimes complicated to apply,<sup>94</sup> the last

<sup>89</sup> *Wormle v. Bacun*, CP40/130, m.74d (Mich. 1299), discussed below, p. 109.

<sup>90</sup> BL Add. Ms. 31826, f. 147 (1303). This form of writ also appears in a case in 1310: *Hemeringham v. Hemeringham*, CP40/183, m.238d (Mich. 1310).

<sup>91</sup> YB (RS) 32–3 Edw. I 24 (Hil. 1304).

<sup>92</sup> YB (RS) 34–5 Edw. I 320 (Mich. 1306).

<sup>93</sup> YB (RS) 34–5 Edw. I 396 (Hil. 1307); CP40/163, m.134 (Pas. 1307); CP40/171, m.123d (Trin. 1308); CP40/173, m.187d (Mich. 1308); CP40/180, m.211 (Hil. 1310).

<sup>94</sup> The complications arose from the quality of an ancestor’s seisin. Where the plaintiff claimed by a descent through daughters, there could be complications if one of the daughters had entered the whole of the inheritance. See YB Mich. 43 Edw. II, f. 27, pl. 9 (1369) for Fynchden’s explanation adopted by this footnote. She entered part as heir and part as abator. For the part she entered as heir, she was ancestor seised of the entail. For the part she entered as abator, it would depend upon the order of the deaths of the daughters whether she would ever become seised under the entail. Another complication arose where an ancestor had entered under a grant by an earlier ancestor. If the grant had been for the life of the earlier ancestor, then upon his death the later ancestor became seised of the entail: YB Hil. 43 Edw. III, f. 7, pl. 21 (1369). If the grant had been to the later ancestor when he was underage, at the death of the earlier ancestor the

ancestor rule was generally enforced until the 1430s.<sup>95</sup> During the period of experimentation there was also some adherence to an alternative form of descender writ, based on the count in a writ of right, in which each person in the descent is made heir to the preceding person. It is hard to determine the status of this alternative form. In at least nine cases between 1312 and 1433 the justices upheld writs in the alternative form over objections invoking the last ancestor rule.<sup>96</sup> In these cases, the duration of the entail was not at stake. In 1325, for example, the plaintiff, the third heir, used the alternative form.<sup>97</sup> The defendant, asserting that the plaintiff's father had never been seised, invoked the last ancestor rule. Chief Justice Stonor went to the Chancery clerks, who affirmed the last ancestor rule but could not explain to Stonor's satisfaction the reason for the rule. On the next day, Stonor upheld the writ. The case went to a jury on the issue whether the land had been alienated before the statute. It would seem that the issue was whether the first heir had alienated the land. Although the defendant's objection was relevant to when the alienation had taken place, it did not go to the duration of entails after *De Donis*. In 1334, a plaintiff, sister to the second heir, used the alternative form.<sup>98</sup> To the objection under the last ancestor rule that the plaintiff's brother had never been seised, Justice

later ancestor was in under the entail, because the grant when underage was ineffective: YB Mich. 38 Edw. III, f. 24 (1364). If the grant had been in fee simple to the later, adult, ancestor, then the later ancestor did not become seised under the entail at the death of the earlier ancestor because he was considered to be in by his better estate, the fee simple: YB Trin. 27 Edw. III, f. 5, pl. 20 (1353).

<sup>95</sup> e.g. YB 3 Edw. II, 22 S.S. 10 (1310); *Bukenham v. Payne*, 4 Edw. II, 22 S.S. 148 (1310); JUST 1/682, m.39 (1329–30); 6 Edw. III, f. 12, pl. 6 (1332); *Norchard v. Byggenhull*, CP40/292, m.423 (Mich. 1332); YB Mich. 10 Edw. III, f. 49, pl. 22 (1336); YB (RS) 14–15 Edw. III 138 (Mich. 1346); YB Trin. 27 Edw. III, f. 5, pl. 2 (1353); YB Mich. 38 Edw. III, f. 24 (1364); YB Hil. 43 Edw. III, f. 7, pl. 21 (1369); YB Mich. 43 Edw. III, f. 27, pl. 9 (1369); YB Trin. 11 Hen. IV, f. 72, pl. 7 (1410); *Stokele v. Oxebrigge*, CP40/629, m.313 (Pas. 1419).

<sup>96</sup> *Pomeroy v. Raleye*, YB Pas. 5 Edw. II, 31 S.S. 174 (1312); *Le Fraunceys v. De La Hay*, YB 12 Edw. II, 81 S.S. 99 (Trin. 1319); YB Mich. 19 Edw. II, f. 625 (1325); *Barre v. Hales, Northamptonshire Eyre*, I, 459 (1329–30); YB Hil. 8 Edw. III, f. 11, pl. 31 (1334); YB (RS) 13–14 Edw. III 132 (1339); YB Pas. 39 Edw. III, f. 10 (1365); YB Hil. 48 Edw. III, f. 7, pl. 13 (1374); YB Hil. 11 Hen. VI, f. 20, pl. 16 (1433).

<sup>97</sup> YB Mich. 19 Edw. II, f. 625 (1325).

<sup>98</sup> YB Hil. 8 Edw. III, f. 11, pl. 31 (1334).

Herle said that the plaintiff had an election whether to mention an ancestor who had not been seised, which is not precisely on point. At any rate, Herle upheld the writ.

In the 1334 case and in a later case the reason given in defense of the alternative form was that the plaintiff did not base his claim on the seisin of the last ancestor to have been seised but on the seisin of the donee.<sup>99</sup> Under both the last ancestor rule and the alternative form, the plaintiff made himself, through the chain of descent, heir to the donee. Just the opposite reason was given in 1433 when there was an extended discussion whether a plaintiff had to follow the last ancestor rule.<sup>100</sup> The plaintiff, the fourth heir, had used the alternative form although his father, the third heir, had not been seised. Rolf invoked the last ancestor rule and brought "the register" of writs into court as authority for the rule. Justice Paston simply rejected the register: "there are many rules in the register that are not taken for law here." In the opinion of the court, the writ was good because the plaintiff had made himself, through the chain of descent, heir to the last ancestor to have been seised. In none of the cases as reported did anyone mention the duration of fee tails. Yet there is no point to the rule other than to keep track in the writ of what generation of issue was last seised and thereby permit the Chancery clerk, or the defendant, to object that the entail had ended at or before the entry of that ancestor. By 1433, however, entails had become perpetual for the donee's issue. There was no longer any good reason for the rule. Nor, as far as the evidence of the plea rolls suggests, was the rule any longer followed as a matter of routine. Robert Constable, in his 1489 reading on Westminster II, explained the last ancestor rule but went on to explain and to collect Yearbook precedents for the alternative form.<sup>101</sup>

(c) *The growth of perpetual restraint on alienation*

(i) 1285–1309

Commentary shortly after *De Donis* held that only the donee was restrained from alienating land received in fee tail.<sup>102</sup> This reading

<sup>99</sup> *Ibid.*; YB Pas. 39 Edw. III, f. 10 (1365).

<sup>100</sup> YB Hil. 11 Hen. VI, f. 20, pl. 16 (1433).

<sup>101</sup> *Readings and Moots*, I, 188.

<sup>102</sup> Above, pp. 88–9.

would have the statute change the law of the 1281 case permitting alienation after the birth of issue.<sup>103</sup> This reading of the statute could rest on the surviving-child conception of family grants under which they were completed when the first heir took possession.<sup>104</sup> The persistence of this reading of *De Donis* into the 1340s might be explained by the fact that the surviving-child conception of family grants was deeply entrenched. More expansive readings of *De Donis* might well have been counter to an important social norm. Throughout the period up to the 1340s the most frequent plaintiff to a descender writ was the first heir. The restricted reading of *De Donis* found support in the run of cases. But it is not clear whether the run of cases itself reflected lawyers' understandings of *De Donis*.

By 1292 the descender writ was available to the second heir.<sup>105</sup> As already shown, this extension of the descender writ led to a period of experiment with the form of the writ.<sup>106</sup> In this period – 1285 to 1309 – the descender writ did not extend beyond the second heir. Two manuscript notes fit the plea roll evidence. A manuscript note from the 1290s explains that in the fourth degree (the third heir) the fee is pure and the form of the gift is extinguished.<sup>107</sup> The conclusion drawn is that issue in the fourth degree should bring a writ of right. The note is unclear in that it does specify who might have alienated the land. If the second heir died seised, one might expect the recommendation to have been mort d'ancestor. Read in light of the plea roll evidence, however, it is reasonable to suppose that the note assumed that the donee had alienated. If so, the note teaches the reach of the descender writ. The writ is not available to the third heir. This reading squares with another manuscript note from 1300, which shows a shift toward the writs of cosinage. This note recounts an exchange between a would-be plaintiff and a Chancery clerk.<sup>108</sup> The plaintiff is in the fourth degree and explained that neither his grandfather nor his father sued to recover the entailed land because neither survived the plaintiff's great-grandfather, who apparently

<sup>103</sup> Chapter 1, above, pp. 31–2.

<sup>104</sup> Chapter 1, above, pp. 31, 47–50.

<sup>105</sup> *Morpath v. Mulcastre*, JUST 1/136, m.28 (1292).

<sup>106</sup> Above, pp. 101–4.

<sup>107</sup> BL Add. Ms. 31826, f. 152v.

<sup>108</sup> *Ibid.*, f. 169.

had died seised. The Chancery clerk told the plaintiff that he must use a writ of cosinage. In both notes, the choice of writ turns on the estate a plaintiff can claim, not on the estate enjoyed by the last ancestor to have been seised. Yet earlier we saw that the choice between mort d’ancestor and descender turned on the estate held by the deceased ancestor.<sup>109</sup> That seems generally to have been the case: land recovered in an action on a descender writ did not for the reason of the writ necessarily come to the plaintiff in fee tail. Rather, whether a plaintiff recovered fee tail depended upon whether he was within the statutory restraint on alienation.

The first attempts to use a descender writ to set aside an alienation by the first generation of issue appears in 1297. In that year John le Poer brought descender against William le Poer. His writ set forth a grant to his grandfather and traced descent to his father and from his father to himself in the manner of a writ of right.<sup>110</sup> He received license to withdraw from his writ. One infers that the alienation was by the plaintiff’s father, because in 1302 the plaintiff brought descender against the same defendant for about the same land based on the same grant and the same descent to himself.<sup>111</sup> This time the defendant answered that the plaintiff’s father had alienated before *De Donis*. This answer formed the issue for the jury. The plaintiff probably withdrew in 1297 because he could not at that time set aside an alienation by the first generation of issue. The peculiar form of another descender writ in 1297 suggests that in this case, too, the plaintiff was trying to set aside an alienation by the first generation of issue. The writ sets forth a grant to the plaintiff’s grandparents but instead of tracing descent from the grandparents, the writ asserts that after the death of their daughter and heir, the plaintiff’s mother, the land ought to descend to the plaintiff as daughter and heir.<sup>112</sup> The plaintiff received license to withdraw from her writ. The form of the writ might have merely been a blunder, but it might also have been an attempt to form a writ to set aside an alienation by the plaintiff’s mother. The plaintiff and a Chancery clerk might have been working from the idea that a descender writ had to set forth a

<sup>109</sup> Above, p. 100.

<sup>110</sup> CP40/118, m.49d (Pas. 1297).

<sup>111</sup> CP40/144, m.52 (Mich. 1302), YB (RS) 30–1 Edw. I 14 (Mich. 1302); BL Add. Ms. 31826, f. 180v (1302).

<sup>112</sup> *Jerdeburgh v. Belesby*, CP40/116, m.40 (Hil. 1297).

grant in fee tail and one generation of descent between the generation that alienated and the plaintiff. The writ would also fit a version of the last ancestor rule. The writ – whether blunder or ingenious – was not a success.

The first case of descender used to challenge an alienation by the first generation of issue comes in 1299. Hugh de Wormle brought descender against two defendants, Richard Bacun and his wife Florence and Sybil, widow of Philip de Wormle.<sup>113</sup> The plaintiff's writ set forth the grant to his grandmother Joan and traced descent to Philip de Wormle as son and heir and from Philip to plaintiff as son and heir. Richard and Florence sought a view, but Sybil, claiming her dower, vouched Richard and Florence to warranty on the grounds that Philip had alienated to them and they held the reversion to her dower. The writ followed the last ancestor rule. Whenever a plaintiff challenges an alienation by the next preceding generation there is no difference between a writ formed according to the last ancestor rule and a writ formed according to the alternate rule of making each person heir to the next preceding person. In the 1299 case the pleadings reveal that the first heir had alienated and no one objected to the plaintiff's writ or action. Similarly in the 1302 case previously mentioned, a second heir challenged an alienation made by the first heir.<sup>114</sup> The writ made each person heir to the next preceding person in the descent. No one objected to the writ or the action. By 1306, the last ancestor rule was in place.<sup>115</sup> In subsequent cases during this period it is fair to infer that where the plaintiff is second heir and makes each person heir to the preceding person in the descent, he is probably challenging an alienation by the first heir. Unfortunately, the pleadings in these cases do not permit one to confirm or deny this inference. The defendant pleads that he does not hold the land claimed<sup>116</sup> or that the alienation took place before *De Donis*.<sup>117</sup> The evidence is neither as plentiful nor as helpful as one would like, but it seems that between 1297 and 1299 Chancery extended the statutory restraint on alienation by at least one generation.

<sup>113</sup> CP40/130, m.74d (Mich. 1299).

<sup>114</sup> Above, p. 108.

<sup>115</sup> Above, pp. 103–5.

<sup>116</sup> CP40/173, m.140 (Mich. 1308).

<sup>117</sup> CP40/173, m.155d (Mich. 1308).

*(ii) 1310 – 1329*

The first clear case of a third heir bringing descender was in 1310.<sup>118</sup> A case on the plea roll for Easter Term 1309 might be an earlier case.<sup>119</sup> In the 1309 case, the plaintiffs were two sisters and damage to the plea roll makes it impossible to tell whether they were daughters or sisters of the second heir. In the 1310 case, the donee had been the plaintiff’s last ancestor seised of the entail. Use of the descender writ by third heirs during this period was not frequent,<sup>120</sup> nor in the litigated cases did the entail in descender cases extend to the second heir. The donee or the first heir were made the last ancestor to have been seised. In a case of novel disseisin in 1324, however, the plaintiff was the third heir in an entail, who entered at the death of the second heir.<sup>121</sup> The defendant claimed title by a final concord made by the second heir. Although the final concord could not bar the plaintiff’s action, the defendant wanted to use it to bar the plaintiff’s right of entry and thus force the plaintiff to his descender writ. No one expressed any difficulty with the idea that the entail continued through the entry of the third heir.

Early in this period, however, it could seem still worth fighting the extension of the entail to the first heir. Herle and Scrope took up this lost cause in the famous case of *Belyng v. Anon*.<sup>122</sup> The plaintiff, a second heir, used a writ varied from the last ancestor rule in order to signal an alienation by the first heir. The writ made the plaintiff’s father son to the donees but the plaintiff son and heir to his father. Herle and Scrope for the defendant argued that *De Donis* restrained alienations by the donee, not by his issue. Chief Justice Bereford announced that the maker of the statute supposed that fee tails had the same duration as *maritagium*. In one report he says that the fee tail is pure in the fourth degree. In another report he says that it is pure after the fourth degree, thus

<sup>118</sup> *Malechere v. Malechere*, CP40/183, m.150 (Mich. 1310). Except as stated in the following sentence of the text no case of a third heir using a descender writ appears on the plea rolls for 1307, 1308, or 1309.

<sup>119</sup> CP40/176, m.234d (Pas. 1309).

<sup>120</sup> For example, in the last three years of the period there was only one case by a third heir in each of the last two years. CP40/275, m.341d (Mich. 1328); CP40/279, m.345 (Mich. 1329).

<sup>121</sup> YB Trin. 17 Edw. II, f. 551 (1324).

<sup>122</sup> YB Pas. 5 Edw. II, 31 S.S. 176 (1312); YB Trin. 5 Edw. II, 33 S.S. 225 (1312).

adding a generation to fee tails and *maritagium*. The second report might reflect nothing more than a slip of the tongue or of the pen, but later the standard learning was that fee tails and *maritagium* ended after the third heir, not upon his entry.

Plucknett's account of this case has Chief Justice Bereford finally revealing the secret of the statute.<sup>123</sup> There might be something to Plucknett's claim. Justice Bereford's remark might reveal an oral tradition that connected a petition to the parliament of 1283, which asserted that the reversion after a grant of *maritagium* lasted until the third heir, at least where there was no alienation, and the enactment of *De Donis* two years later.<sup>124</sup> Bereford drew on that tradition, if such there was, in cases of succession to give a reason for the Chancery decision taken over a decade earlier to extend the statutory restraint on alienation beyond the donee. The difference between the two reports makes it hard to say precisely how far Chancery had extended the statute. Bereford's analogy to *maritagium* gives a clue to what might have been Chancery thinking on the subject. Commentary shortly after the statute read the statute to mean that entails lasted until the third heir in cases of succession.<sup>125</sup> In *Belyng*, Bereford explains that cases of alienation will not be treated differently. If Bereford's remark reflects the earlier Chancery decision, then the decision established a uniform rule for both succession and alienation. The uniform rule, however, did not last long.

(iii) 1330–circa 1420

In this period the descender writ became available to any generation of the donee's issue, but the statutory restraint on alienation was extended only to the fourth heir, the fifth degree.

The extension of the descender writ occurred in 1330 and caused a stir. In 1330 a fourth heir brought a descender writ.<sup>126</sup> In 1331, another fourth heir brought descender.<sup>127</sup> And another in

<sup>123</sup> Plucknett, *Legislation of Edward I*, 132–3.

<sup>124</sup> For the petition to the parliament of 1283, see Chapter 1, above, p. 36.

<sup>125</sup> Above, pp. 88–9.

<sup>126</sup> *London v. London*, CP40/281, m.120 (Pas. 1330). No case by a fourth heir was found on the plea rolls for 1327, 1328, or 1329.

<sup>127</sup> *Rysheton v. Radecliff*, CP40/286, m.301d (Trin. 1331), CP40/293, m.255 (Hil. 1333).

1332.<sup>128</sup> In Easter Term 1333 a fifth heir brought descender.<sup>129</sup> For this case there is a Yearbook note.<sup>130</sup> The note reports that the defendant objected to the writ on the grounds that the fee tail became pure after the fourth degree. There are two things worth noting about this argument. First, it takes the more expansive report of Bereford’s statement in the *Belyng* case of 1312 as the settled rule for the duration of entails. Secondly, it relies upon the idea that the choice of writs turns on the estate to be recovered by the plaintiff, not the estate held by the last ancestor to have been seised. The justices reject this second point. They uphold the writ but permit the defendant the answer that the plaintiff’s last ancestor to have been seised had been seised after the entail had ended. The plea roll record shows that the plaintiff, following the last ancestor rule, had made himself heir to the first heir. The defendant denied the grant and the case went to a jury on that issue.

In both the 1330 and 1332 cases, the plaintiff’s writ made each person in the descent from the donee the heir of the preceding person. Since one does not know whether plaintiffs formed their writs according to the last ancestor rule or used the alternate form, and there is no further information in the recorded pleadings, one cannot tell for sure which of a plaintiff’s ancestors had been last seised of the entail. If plaintiffs had shaped their writs according to the last ancestor rule, then these cases would be the first cases in which *De Donis* was extended through the fourth degree (the third heir). The writs would pass the first, but not the second, point of the objection lodged by the defendant in the 1333 case. In the 1331 case it is clear that the plaintiff’s writ followed the last ancestor rule and that the second heir had been the last ancestor seised of the entail. Given the doubts about the 1330 and 1332 cases, this 1331 case is the first clear case of *De Donis* being extended beyond the first heir in a case of descender. At any rate, the reach of *De Donis* expressed by the defendant in the 1333 case was from at least this time forward the general understanding of

<sup>128</sup> *Penebrugge v. Penebrugge*, CP40/292, m.555 (Mich. 1332), CP40/293, m.303 (Hil. 1333).

<sup>129</sup> *Heckington v. Ryby*, CP40/294, m.115d (Pas. 1333).

<sup>130</sup> YB Pas. 7 Edw. III, f. 18, pl. 21 (1333). One can be fairly sure that this note is the report for the plea roll case because there is only one descender case brought by a fifth heir on the plea rolls for 1333.

the duration of the entail for donee's issue: the entail lasted until after the fourth degree, the third heir.

That the learning in the report of the 1333 case was a new development is made clear in a remark by Justice Cambridge on the Northamptonshire Eyre of 1329–1330.<sup>131</sup> The case was descender by the first heir. The defendant produced a charter with warranty by the plaintiff's older brother who had been seised during the life of the father. The defendant argued that the warranty was at common law in part because once the issue of the donee was seised the statutory restraint on alienation was removed.<sup>132</sup> To Scarborough's argument that the statute applied to the issue of the donee, Justice Cambridge responded that on this view the heir in the sixth degree could no more alienate than the donee, but that was not true.<sup>133</sup> A little later Cambridge came back to his point. He declared that if tenants-in-tail continue in possession as far as the fourth degree, the heir in the fifth degree can have formedon, presumably in lieu of mort d'ancestor,<sup>134</sup> but if the heir in the fourth degree alienates, the law is entirely different. Why the law should be entirely different is not, however, clear. Cambridge might have been separating the two functions of descender – to substitute for mort d'ancestor where a tenant-in-tail had died seised and to recall alienations made by a tenant-in-tail. At any rate, he supposes that the heir in the fourth degree, the third heir, can alienate free of *De Donis*. His remark is consistent with the narrower report of Bereford's statement in *Belyng*. In the 1333 case, the justices simply do not make a distinction between the third heir dying seised and the third heir alienating. In either case, subsequent issue can bring descender. At some point between 1312 and 1333 a generation had been added to the duration of entails, perhaps by nothing more than a confusion of words by Bereford or the reporter.

The learning of the 1333 case is rehearsed by Justice Fyncheden in 1371.<sup>135</sup> In a case of descender brought on a grant of *maritagium*,

<sup>131</sup> *Lobalm v. Templer, Northamptonshire Eyre*, II, 653.

<sup>132</sup> A more subtle argument was made by Shareshull: that the elder brother was not seised in the entail because he was seised during the life of his father, the donee of the entail. *Ibid.*, at 656.

<sup>133</sup> *Ibid.*, at 657.

<sup>134</sup> *Ibid.*

<sup>135</sup> YB Trin. 45 Edw. III, f. 19, pl. 22 (1371).

Fyncheden reasons that after the fourth degree *maritagium* becomes a plain fee tail so that issue of the donees beyond the fourth degree should use an ordinary descender writ, as opposed to one which describes the grant as *maritagium*, if the alienation sought to be set aside occurred before the end of the *maritagium*. Fyncheden thus contemplates the continuation of *maritagium* beyond the fourth degree as fee tail for the tenurial status of issue after the fourth degree and for the preservation of the reversion. The statutory restraint on alienation, however, ends after the fourth degree for *maritagium* and fee tails. The plaintiff's choice of writ turns on the estate held by the ancestor who alienated to the disadvantage of the plaintiff.

Yet in a 1366 case, lawyers speak as if the choice of writ turned on the estate to be recovered.<sup>136</sup> Justice Wychingham presented a case of novel disseisin: a donee in fee tail had two sons, the elder of which had issue and died during the life of his father and the younger of which entered at his father's death. The land descended in the younger son's line until the fourth degree for some eighty years. The fourth heir (fifth degree) of the elder line entered, where, according to Wychingham, he could have had an action on a writ of cosinage. The mention of cosinage as opposed to descender suggests that the fourth heir does not have fee tail. The third heir is the last to have fee tail for the purpose of recovering the land after an alienation or an entry.

Although in the period from 1333 to the 1420s one can find descender cases brought by fifth and sixth heirs, they make themselves heirs to one of the first three heirs.<sup>137</sup> They thus keep within the duration of the entail established in the 1333 case and recited by Fyncheden in 1371. Either there were no plaintiffs who wished to claim a discontinuance by an ancestor beyond the third heir or there were such plaintiffs and they were not getting writs out of Chancery. It seems most probable that the choice of descender writ turned on the estate held by the last ancestor to have been seised of the entail, not the estate to be recovered by the plaintiff.

<sup>136</sup> YB Pas. 40 Edw. III, f. 24, pl. 26 (1366).

<sup>137</sup> CP40/416, m.337d (Mich. 1363); CP40/429, m.246 (Mich. 1367); CP40/429, m.396 (Mich. 1367); CP40/429, m.375 (Mich. 1367); CP40/539, m.385 (Mich. 1395); CP40/629, m.129d (Pas. 1418); CP40/651, m.103 (Mich. 1423) (sixth heir).

The indefinite extension of the descender writ in 1330, 1331, and 1332, and the extension of *De Donis* to the fourth heir, provoked a petition to the York parliament of Hilary Term 1333.<sup>138</sup> The petition requested clarification as to what degree in descent from the donee may alienate the land free of *De Donis*. The petition is not evidence of prolonged uncertainty about *De Donis*. It is a response to a change by Chancery in the reach of the descender writ and the statutory restraint on alienation. That the receivers of parliamentary petitions at this time were senior Chancery clerks and that decisions on petitions were made by the Council might have been facts not lost on the petitioner.<sup>139</sup> The defendant's objection in the 1333 case shows how the reach of the writ could be tied to the duration of fee tails. The petition might also have been a response to the apparent confusion whether the statutory restraint on alienation ended at or after the third heir. The position taken by the justices in Easter Term 1333 could have been as much a response to the defendant's specific objection in that case as to the parliamentary petition. Justices Stonor, Scrope, Aldburgh, and Denum sat on the panel that heard petitions for the Hilary Term 1332 parliament, which were held over for the 1333 parliament.<sup>140</sup> The justices could easily have taken the case in Easter Term 1333 as an opportunity to clarify the law.

The first years of the 1340s saw three more petitions to parliament on the reach of *De Donis*. One petition in 1341 or 1343 requested parliament to clarify that *De Donis* prohibited only alienations by the donee so that an alienation by the first heir would end the entail for all purposes.<sup>141</sup> The petition was rejected on the grounds that it was founded on "false reason." The other two petitions, in 1343 and 1344, requested clarification on what

<sup>138</sup> H. G. Richardson and G. O. Sayles (eds.), *Rotuli parliamentorum Anglie Hactenus Inediti 1299-1373* (Camden Society, 3rd ser., vol. 51, 1935), 227, 230. The petition might have been deferred from the Lenten and December parliament of 1332 at which no petitions were reviewed. H. G. Richardson and G. O. Sayles, *The English Parliament in the Middle Ages*, (London: Hambledon Press, 1981), essay XXI, 73.

<sup>139</sup> Richardson and Sayles, *English Parliament*, essay XXII, 381; D. Rayner, "The Forms and Machinery of the 'Commune Petition' in the Fourteenth Century," *English Historical Review* 56 (1941), 563-6.

<sup>140</sup> 2 *Rot. Parl.* 68. Richardson and Sayles, *English Parliament*, essay XXI, 73.

<sup>141</sup> Ancient Petition, No. E496 in G. O. Sayles (ed.), *Select Cases in the Court of King's Bench Under Edward I* (3 vols., Selden Society, vol. 58, 1939), III, p. cxxx.

generation of issue could alienate the land.<sup>142</sup> These petitions were received, not as requests for clarification, but as requests for a change in the law. The response to the 1343 petition was that the law would not be changed. The 1344 petition was given to the justices to consider against the next parliament. Nothing was done. The government was apparently satisfied with the position taken by the justices in 1333: any degree of issue could bring descender but *De Donis* reached no further than the fourth degree. These petitions, like the petition of 1333, were attempts to change the law, to reverse the decision taken at the turn of the century to extend *De Donis* through the third heir. The reaction to that decision was delayed because it was not until the 1330s that litigants began to take practical advantage of the extended reach of *De Donis*.

Yearbook cases from the 1330s and 1340s have been taken as evidence that at this time the entail had become perpetual. At best, however, the cases show that the entail had become indefinite for the preservation of the reversion or remainders, not for the donee's issue attempting to set aside an alienation by an earlier heir in the entail. In a 1330 case, the plaintiff's descent from the donees is not clear.<sup>143</sup> The defendant produced a release with warranty made by the plaintiff's brother while the defendant was in possession. The issue was whether the brother's warranty was at common law or under *De Donis*, in which case it barred the plaintiff only to the extent that he had received assets by descent from his releasing brother.<sup>144</sup> Shardelow asserted that the statute restrains only the donee from alienating. On this theory, the brother's warranty would be at common law. Stonor, however, pointed out that the statute restrains alienations that prejudice the reversion. He then argued that the statute applies to the donee's issue as much as to the donee, without making explicit how many generations of issue thus come under *De Donis*. The defendant then pleaded that the plaintiff had assets by descent from his

<sup>142</sup> 2 *Rot. Parl.* 142, No. 47 (1443); 2 *Rot. Parl.* 149, No. 10 and p. 150, No. 10 (1444).

<sup>143</sup> YB Trin. 4 Edw. III, f. 29, pl. 4 (1330) cited by Holdsworth, *History of English Law*, III, 114, n. 6, 115, n. 6, 116, n. 4 and Simpson, *A History of the Land Law*, 84, n. 11.

<sup>144</sup> For the doctrine of assets by descent see Chapter 4, below, pp. 199–212.

brother. Stonor's statement need only defeat Shardelow's ancient point.

In a 1344 case, one John de Helton had granted land to his son Thomas in tail male.<sup>145</sup> Thomas had a son, also named Thomas. This second Thomas died without an heir of his body. A male heir of the donor entered. The sisters of the second Thomas entered and ousted the male heir of the donor. He brought novel disseisin. The question was whether the entry of the first heir ended the entail so that the sisters inherited or whether the reversion was still there. Except that the entail was a tail male, the case is the same as the 1285 case in which the justices held that in this type of case, the reversioner or remainderman takes the land, not the collateral heir.<sup>146</sup> But did the tail male make a difference? Justice Stonor reasoned that since *De Donis* did not mention grants in tail male, they did not come under the statute. The case was at common law. The sisters therefore inherited. But this reasoning did not control the outcome. The court decided that the tenements were revertible.<sup>147</sup> Moubray argued that a fee tail is still revertible after twenty generations of issue after the donee, a statement that does not go to alienations. Moubray's remark echoes a similar remark by Justice Basset four years earlier. In a case on formedon in the reverter the question arose whether the plaintiff had to mention issue in the entail who had been seised of the entail.<sup>148</sup> Basset cut short the quibbling by saying that even if twenty generations had been seised of the entail, a plaintiff to formedon in the reverter need mention only the donees. In *Helton*, Moubray might be merely repeating a legal cliché.

In stating the case Skipwyth pointed out that the defendant's position meant that any fee tail came to an end with the seisin of the first heir, but, he argued, the law is the reverse: the second, third, and fourth issue in line "shall have the same advantage as the first."<sup>149</sup> It is not clear what he meant by "the same

<sup>145</sup> Baker and Milsom, *Sources of English Legal History*, 53–6 provides the best edition of this report. The Yearbook edition, YB (RS) 18–19 Edw. III 194–207 (Mich. 1344) is cited by Holdsworth, *History of English Law*, III, 116, n. 5, Simpson, *A History of the Land Law*, p. 84, n. 11, and Plucknett, *Concise History*, 554, n. 1.

<sup>146</sup> See Chapter 1, above, pp. 35–6.

<sup>147</sup> Baker and Milsom, *Sources of English Legal History*, p. 56.

<sup>148</sup> YB (RS) 14–15 Edw. III 136 (1340).

<sup>149</sup> Baker and Milsom, *Sources of English Legal History*, 55.

advantage." If he meant that the fourth heir will have his descender writ as much as the first heir, he is merely stating the law as revealed in the 1333 case. In a 1350 case, Justice Shardelow speaks of the third and fourth heirs having formedon in the descender.<sup>150</sup> It is noteworthy that both Skipwyth in *Helton* and Shardelow in the 1350 case stop at the fourth heir. Although fifth heirs also bring descender in this period, they do so infrequently. Lawyers aware of the run of cases could well speak of the fourth heir's descender as a sufficiently accurate statement of the limit to the descender writ, knowing that the entail lasted through the third heir as far as the statutory restraint on alienation was concerned. In *Helton*, Greene, remarking that the statute provides a remedy for the issue, refers to the phrase in the troublesome passage of *De Donis* that was addressed to reversions.<sup>151</sup> His remark does not seem to go to the power of alienation, which would have been beside the point in *Helton*.

In a 1346 case, the plaintiff was the second heir.<sup>152</sup> The defendant produced the deed of the plaintiff's uncle with warranty. There was some discussion whether the plaintiff's uncle had been the plaintiff's father's older or younger brother. If he had been the older brother then he had been in the line of descent from donee to plaintiff and the warranty would be governed by *De Donis*. Otherwise, the warranty would be at common law. It seems that he was the younger brother, because the plaintiff asserted as an issue for the jury that his uncle had had two daughters. The point was that the warranty bar descended to the daughters, not to the plaintiff. The discussion of whether the uncle was the older or younger brother began with the defendant's assertion that the uncle was issue in the entail and, therefore, his alienation was governed by *De Donis* as much as alienation by the donee. The ultimate duration of entails was not, and need not have been, raised.

These cases do not provide evidence as to the duration of the fee tail beyond the fourth degree when it comes to the power of

<sup>150</sup> YB Trin. 24 Edw. III, f. 57, pl. 45 (1350).

<sup>151</sup> The phrase printed in bold in the text, above, p. 87.

<sup>152</sup> YB (RS) 20(2) Edw. III 202 (Mich. 1346) cited by Holdsworth, *History of English Law*, III, 116, n. 4 and by Simpson, *A History of the Land Law*, 84, n. 12.

alienation. The 1333 position rehearsed by Fyncheden in 1371 held into the fifteenth century.

*(iv) 1420 and after*

A Yearbook case of 1410 has been cited as evidence that by that time the entail lasted beyond the fourth degree.<sup>153</sup> A plaintiff brought descender for land given in *maritagium* and traced descent to himself by “*plusors*” degrees. The defendant answered that the land had been alienated before the statute. At this point Hill observed that according to the descent in the plaintiff’s writ and pleading, the *maritagium* had become pure by “*plusors*” degrees and had become a common entail. The plaintiff’s writ, he argued, should not have mentioned *maritagium*. Hankford argued that the writ should mention *maritagium* because the donees had received *maritagium* and their seisin was the basis of the action. The peculiar nature of *maritagium* makes this report a little hard to understand. *Maritagium* had a double nature in that it was both a special kind of entail and free of services. The objection to the descender writ that mentioned *maritagium* was in line with Fyncheden’s analysis in 1371. If the tenant in *maritagium* alienates, after the *maritagium* is ended his issue brings a descender writ that does not mention *maritagium*. The reason for not mentioning *maritagium* is that the plaintiff does not recover the land free of service. The reason for using a descender writ is that at the time of the alienation, alienations were restrained by *De Donis*. A reading circa 1420 makes this point rather clearly: that the choice between a *maritagium* writ and a plain descender writ turns on the services to be owed by the plaintiff upon recovery.<sup>154</sup> A commentary on conveyances reaches the complementary point that if a stranger enters on the death of a tenant in *maritagium*, his issue has descender; but if the entry takes place after the *maritagium* has ended, the issue has mort d’ancestor.<sup>155</sup> It might well be significant that in the 1410 report the discussion is not about the end of *maritagium* as the end of the statutory restraint on alienation, but is about the tenurial position of the tenant-in-tail after

<sup>153</sup> YB Mich. 12 Hen. IV, f. 9, pl. 15 (1410) cited by Plucknett, *Concise History*, 554, n. 2 and by Simpson, *A History of the Land Law*, 84, n. 13.

<sup>154</sup> *Readings and Moots*, I, lxx.

<sup>155</sup> BL Royal Ms. App. 85, f. 7–7v. I am grateful to Professor John Baker for making a transcription of this passage available to me.

the end of *maritagium*. The issue for the jury is whether the alienation took place before *De Donis*, which makes it unclear which generation had alienated the land. The 1410 case is not sound evidence that the statutory restraint on alienation had become indefinite by that time.

The clearest evidence that in practice the statutory restraint on alienation lasted beyond the third heir would be a plea roll case in which the plaintiff’s writ, formed under the last ancestor rule, made the plaintiff heir to the fourth heir. For that one has to wait until the 1420s.<sup>156</sup> In 1422, a fourth heir brought descender and made herself heir to her brother, also a fourth heir.<sup>157</sup> But it is not clear whether she formed her writ according to the last ancestor rule or used the alternative form. Consequently, one cannot tell, and there are no other helpful indications on the plea roll, whether she based her claim on an alienation by her brother. In 1424, in a case in which he clearly followed the last ancestor rule, a fourth heir made himself heir to a fourth heir.<sup>158</sup> The rather complicated descent from donee to plaintiff that made it possible for one heir in the fifth degree to form his writ on an alienation by another heir in the fifth degree is best left for a footnote.<sup>159</sup>

Further, indirect, evidence that the statutory restraint on alienation became perpetual in the 1420s comes from two readings at the Inns of Court – one in about 1420 and the other in about 1433. The reading of about 1420 explained the tenurial significance of a plaintiff beyond the fourth degree using a plain descender writ to recover land alienated by a tenant in *maritagium*.<sup>160</sup> The anonymous reader goes further to say that a plaintiff beyond the fourth

<sup>156</sup> The statement in the text is based on a search of the Common Pleas plea rolls from and including Trinity Term 1420 through Trinity Term 1424, and Easter Term 1420, 1419, 1418, 1417, Trinity Term 1416, 1415 and Easter Term 1414.

<sup>157</sup> *Burcestre v. Whitecastre*, CP40/647, m.213 (Mich. 1422).

<sup>158</sup> *Gifford v. Goundrey*, CP40/654, m.105 (Trin. 1424).

<sup>159</sup> The alleged grant was to Robert Gifford and his wife Katherine. The plaintiff traced descent from Robert and Katherine to (1) Nicholas as son and heir, from Nicholas to (2) John as son and heir of Nicholas, from John to (3) Roger as son and heir of John, from Roger to (4) Henry as son and heir of Roger, from Henry to (4) Alvered brother and heir of Henry, from Alvered to (2) Benedict brother (but not heir) of John son of Nicholas, from Benedict to (3) Henry as son (but not heir), from Henry to (4) plaintiff as son of Henry and cousin and heir of Alvered. Because of the resort to Benedict, brother of the second heir, the plaintiff is the fourth heir (fifth degree) from the donee. He alleged that Alvered, a fourth heir (fifth degree) was last seised of the land.

<sup>160</sup> *Readings and Moots*, I, 1xx.

degree uses a plain descender writ also because the land is now an entail and, the implication is, will be recovered as such.<sup>161</sup> That the development of the perpetual statutory restraint on alienation was fairly recent can be gathered from the reading from about 1433.<sup>162</sup> This anonymous reader repeats the lesson of the 1420 reading that after the fourth degree the plaintiff uses a plain descender writ to recover land given in *maritagium*, because the land is then a common entail and will be recovered as such. But this reader also observes that some say that after the fourth degree *maritagium* becomes fee simple, which it had done before the statutory restraint on alienation became perpetual. The inclusion of the older view suggests that the change has been fairly recent and that not everyone has come to share the new view of the law.

It was also in 1433, as seen above, that the justices rejected the last ancestor rule as the preferred rule for the descender writ.<sup>163</sup> Where in later cases the plaintiff is beyond the fourth heir and makes each person in the descent heir to the preceding person, he might well be using the alternative form forcefully endorsed by the justices in 1433. In other cases, however, the plaintiffs clearly used the last ancestor rule. In some of these cases, the fourth heir was the last ancestor to have been seised of the entail.<sup>164</sup>

The change of the 1420s meant that a grant in fee tail, no matter how ancient, would now be treated as never having escaped the statutory restraint in alienation. The prospect that no alienation of a fee tail was or would be free of *De Donis* might well have given lawyers an incentive to create an artificial means of cutting off old and perpetual claims. In 1440 common recoveries began to appear on the plea rolls.<sup>165</sup>

<sup>161</sup> Ibid.

<sup>162</sup> Ibid., at cxxx–cxxxii.

<sup>163</sup> Above, p. 106.

<sup>164</sup> CP40/702, m.135 (Trin. 1436) (fourth heir alleges another fourth heir to have been last ancestor seised); CP40/756, m.320 (Hil. 1450) (fifth heir alleges another fifth heir to have been the last ancestor seised); CP40/756, m.422d (Hil. 1450) (fourth heir alleges another fourth heir to have been last ancestor seised). For other cases brought by fifth or sixth heirs see CP40/699, m.336d (Mich. 1435) (fifth); CP40/700, m.146d (Hil. 1436) (fifth); CP40/700, m.107d (Hil. 1436) (fifth); CP40/703, m.111d (Mich. 1436) (fifth); CP40/703, m.453 (Mich. 1436) (fifth); CP40/738, m.429 (Trin. 1445) (sixth); CP40/739, m.376d (Mich. 1445) (sixth); CP40/740, m.440 (Hil. 1446) (fifth); CP40/753, m. 335, 421 (Pas. 1449) (sixth); CP40/760, m.377 (Hil. 1451) (sixth).

<sup>165</sup> Chapter 5, above, pp. 252–4.

### 3. THE DURATION OF ENTAILS FOR REVERSIONS AND REMAINDERS

In cases of succession the question was at what generation after the donee did the fee tail become fee simple. At that point a reversion or remainder limited after the entail would be destroyed. If the entail were a tail male or was restricted to the issue of a specified marriage, when the entail became fee simple these limitations would end. Although the duration of entails for reversions was similar to that for remainders, remainders presented a number of special difficulties. There were special requirements in pleading on a writ of formedon in the remainder and the formedon writ was not the only means of bringing an action to secure a remainder. Apart from the methods for recovering remainders, the difficulties presented by remainders can be grouped under two headings.<sup>166</sup> First, grants in the form "to A in fee tail, remainder to the right heirs of A" posed a difficulty where A's issue was also his heir. The difficulty was seeing a difference between A's issue taking as A's issue under the entail and A's issue taking as A's right heir under the remainder. Although entails lasted until the third heir for purposes of succession, shortly after, if not before, *De Donis* there was resistance to this idea in the case of grants in the above form. The resistance expressed a hostility to entails. Secondly, there was the difficulty presented by contingent remainders and their destructibility.

#### (a) *Reversions*

The form of reverter writ in use before *De Donis* did not change because of the statute. The simplest writ said that the donor, the plaintiff's ancestor, had made a grant in fee tail and that the land so granted ought to revert to the plaintiff, the donor's heir, in that the donee had died without an heir of his body. In his count, the plaintiff would lay the esplees in the donor during the reign of a

<sup>166</sup> For discussions of these topics see Holdsworth, *History of English Law*, III, 107-11, 132-6; Plucknett, *Concise History*, 562-6; Simpson, *A History of the Land Law*, 95-9; A. D. Hargreaves, "Shelley's Ghost," *Law Quarterly Review* 213 (1938), 70.

designated king.<sup>167</sup> The donor's seisin was the basis for the plaintiff's claim. The plaintiff would then allege the grant in fee tail. Both the seisin of the donor and the form of the grant were traversable and were frequent issues in cases on the reverter writ.<sup>168</sup> If the defendant had a written evidence of a grant by the donor not in fee tail, the plaintiff could not simply maintain his writ.<sup>169</sup> He had to answer the deed. On this point cases on formedon in the reverter differed from cases on formedon in the descender. In descender cases, the plaintiff could aver his writ, and the defendant's written document, ordinarily a charter, was merely evidence for the jury.<sup>170</sup>

For the duration of entails, the important point of pleading a claim to a reversion was how to plead the end of the entail that preceded the reversion. There were two schools of thought. On one view, the plaintiff had to trace the descent to the last person seised of the entail and assert that he had died without an heir of his body.<sup>171</sup> In a 1315 case a plaintiff was given a hard time for tracing the descent of the entail to issue who had never been seised of the entail.<sup>172</sup> The case suggests that a plaintiff ought to stick to persons who were seised of the entail. On another view, a plaintiff need only assert that the donee or the first taker of the entail had

<sup>167</sup> e.g. BL Add. Ms. 31826, ff. 235v, 239; Bodleian, Hatton Ms. 28, f. 87v; Bodleian, Rawlinson Ms. D. 913, f. 106; YB Trin. 4 Edw. II, 42 S.S. 72 (1311); *Novae Narrationes*, 9, A18; 95, B172; 236, C163.

<sup>168</sup> For case in which the defendant denied donor's seisin see, e.g. *Bathon v. Dunekeswell*, CP40/82, m.76d (Pas. 1290); YB (RS) 21–2 Edw. I 168 (1293); CP40/164, m.122d (Trin. 1307). For cases in which the defendant denies the grant in fee tail see, e.g. *Montecute v. De La Lynde*, CP40/64, m.114d (Mich. 1286); *Chapman v. Angelthorpe*, JUST 1/572, m.47d (1286); *Basset v. le Leche* CP40/81, m.76d (Hil. 1290); *Suthkevelingworth v. Prat*, CP40/85, m.19 (Mich. 1290) also at CP40/86, m.53 (Mich. 1290); *Thurlebere v. Malleston*, CP40/107, m.56 (Hil. 1295); *Haylane v. Haylane*, CP40/206, m.94 (Trin. 1314); *Chapelegh v. Bourne*, CP40/294, m.101 (Pas. 1333).

<sup>169</sup> *Urlesco v. Urlesco*, CP40/133, m.253 (Mich. 1299); BL Add. Ms. 31826, f. 104v; *Molens v. Sampson*, YB Trin. 9 Edw. II, 45 S.S. 122 (1316); YB Trin. 4 Edw. III, f. 28, pl. 1 (1330); YB (RS) 14 Edw. III 282 (Trin. 1340). But if the plaintiff produces a deed of the grant, that will not keep the defendant from a jury even if he does not produce a deed showing a contrary grant: BL Add. Ms. 31826, f. 102v.

<sup>170</sup> BL Add. Ms. 31826, f. 102f; YB Mich. 13 Edw. II, f. 397 (1319); YB (RS) 13–14 Edw. III 168 (1339).

<sup>171</sup> YB (RS) 34–5 Edw. I 358 (1306); *Wonerville v. Stanford*, YB Mich. 9 Edw. II, 45 S.S. 12 (1315); YB (RS) 18–19 Edw. III 142 (1344).

<sup>172</sup> *Wonerville v. Stanford*, YB Mich. 9 Edw. II, 45 S.S. 12 (1315).

died without an heir of his body.<sup>173</sup> Although plaintiffs traced descent to the first and even to the second heir in the entail,<sup>174</sup> in the overwhelming majority of cases the plaintiff merely said that the donee had died without issue and left it at that. As Belknap explained in 1375, in formedon in the reverter the writ and pleading supposed that the last heir in the entail had died without issue.<sup>175</sup> It was for the defendant to say that the donees of the entail had issue living, that the entail had not yet ended, and, therefore, that the plaintiff could not claim the reversion or remainder.<sup>176</sup> Since the plaintiff could plead either that the donee or first taker of a preceding entail had died without an heir of his body or could assert the same for the last tenant-in-tail to have been seised of the entail, one cannot trace on the plea rolls the duration of fee tails for reversions and remainders as one can for descender. But the rules for pleading the preceding entail also

<sup>173</sup> YB (RS) 14–15 Edw. III 136 (1340); YB Mich. 26 Edw. III, f. 21, pl. 24 (1352). This was also said to be the manner of pleading that a bastard had died without an heir of his body: YB (RS) 21–2 Edw. I 364 (1294).

<sup>174</sup> (a) Reverter cases in which the plaintiff traced descent to first heir in the entail: BL Add. Ms. 31826, f. 82v; YB(RS) 34–5 Edw. I 358 (1306); *Melling v. Kirkeby*, CP40/139, m.28d (Trin. 1301); *Gray v. Chauncy*, CP40/183, m.332d (Mich. 1310); *Gelhampton v. Galyot*, CP40, 258, m.172 (Mich. 1325); CP40/279, m.344 (Mich. 1329); CP40/282, m.86d (Trin. 1330); CP40/283, m.2d (Mich. 1330); CP40/298, m.268 (Pas. 1333); YB Trin. 7 Edw. III, f. 34, pl. 34 (1333); YB (RS) 14–15 Edw. III 136 (1340); YB (RS) 15 Edw. III 370 (1341); *Lestrop v. Richmond*, CP40/499, mm.313d, 357 (Mich. 1385); CP40/613, m.137 (Pas. 1414); CP40/629, m.110 (Pas. 1418); CP40/633, m.140d (Pas. 1419). (b) Reverter cases in which the plaintiff traced descent to second heir in the entail: CP40/613, m.127 (Pas. 1414); CP40/654, m.318d (Trin. 1424). (c) Remainder cases in which the plaintiff traced descent to the first heir of a preceding entail: *Saltmarsh v. Redeness*, YBB Hil. 10 Edw. II, 54 S.S. 35, Mich. 11 Edw. II, 61 S.S. 12 (1317); *Norreys v. Ireland and Holland*, YB Mich. 14 Edw. II, 104 S.S. 34 (1320); *Carbonel v. Reppes*, CP40/359, m.79d (Mich. 1349); CP40/629, m.125 (1418). (d) Remainder cases in which the plaintiff traced descent to second heir in a preceding entail: *Walop v. Wayte*, CP40/594, m.106 (Trin. 1409); CP40/622, m.394d (Trin. 1416); *Giford v. Wymond*, CP40/633, m.324 (Pas. 1419).

<sup>175</sup> YB Mich. 49 Edw. III, f. 34 (1375).

<sup>176</sup> (a) Reverter cases in which the defendant pleads that entail is not yet ended: *Palgrave v. Dreu*, JUST 1/572, m.30d (1286); *Burndysse v. Banco*, JUST1/828, m.8d (1286); CP40/176, m.77 (Pas. 1309); *Gelhampton v. Galyot*, CP40/258, m.172 (Mich. 1325); *Gunz v. Hyneton*, CP40/283, m.401 (Mich. 1330); CP40/287, m.37 (Mich. 1331); *Lestrop v. Richmond*, CP40/499, mm.313d, 357 (Mich. 1385). (b) Remainder cases in which the defendant pleaded that a preceding entail had not yet ended: *Wylberton v. Clerk*, CP40/145, m.161d (Mich. 1303); *Ercehedene v. Ercehedene*, YB Hil. 2 Ric. II, 1 Ames 94 (1379); CP40/651, m.140 (Mich. 1423).

meant that it did not matter much to Chancery or the courts how long the entail had gone on before the reversion or remainder fell in.

Commentary soon after the enactment of *De Donis* borrowed the rule of the third heir from *maritagium* to set a limit to entails where there was no alienation.<sup>177</sup> The analogy to *maritagium* had plausibility because in each case when the third heir entered the status of his holding changed. In the case of *maritagium*, services were now due. In the case of an entail, he now held in fee simple. To readers of Glanvill and Bracton, the entry of the third heir into land given as *maritagium* meant that the donor lost the reversion.<sup>178</sup> This was the position taken in a petition to the 1283 parliament.<sup>179</sup> Applying this understanding of *maritagium* to entails meant that there would be no difference between grants in *maritagium* and marriage grants, say by the groom's father, in fee tail. The analogy to *maritagium* made more sense in the case of reversions or remainders than it did as a limit to the statutory restraint on alienation.

Given the rules for pleading the extinction of the entail in cases to recover a reversion or a remainder, the extension of entails beyond the third heir for the preservation of reversions or remainders cannot be traced on the plea rolls or in the Yearbooks as it can for descender. There is a hint, however, that by the second decade of the fourteenth century the duration of entails was perpetual as far as reversions or remainders limited after entails were concerned. In 1316, one Robert Pygot brought a writ of cosinage on the seisin of his cousin, his uncle's son, against the abbot of St. Agatha's.<sup>180</sup> The abbot explained that he had entered on the death of the plaintiff's cousin as reversioner in a grant to the plaintiff's uncle in fee tail. The plaintiff made the usual argument that the entry of the first heir in the entail destroyed the reversion. Once, however, he admitted the deed creating the fee tail Chief Justice Bereford dismissed his case. The report of the case includes a comment by Bereford: the right to the reversion continues as long

<sup>177</sup> BL Add. Ms. 31826, ff. 226v–227, 227v, 237, 264v–265.

<sup>178</sup> *Glanvill* 92–3, discussed in the text at Chapter 1, above, pp. 43–4; 2 *Bracton* 77, 226, discussed in the text at Chapter 1, above, p. 44.

<sup>179</sup> Chapter 1, above, p. 36.

<sup>180</sup> *Pygot v. Abbot of St. Agathos*, YB Mich. 10 Edw. II, 52 S.S. 132 (1316).

as the entail remains in the lineal blood of the donee.<sup>181</sup> Bereford's remark is probably a truism, perhaps intended to remind the apprentices that succession to fee tails was limited to the lineal heirs of the donee. It is worth comparing Bereford's remark with his interpretation of *De Donis* four years earlier in *Belyng v. Anon.*<sup>182</sup> His remark here brings out rather clearly that when in *Belyng* he spoke of the entail lasting until the third heir, as in the case of *maritagium*, he was speaking of the statutory restraint on alienation, not of the preservation of reversions. The analogy to *maritagium* had served to limit entails for the reversion or the remainder, but that limit for that purpose was being relaxed at roughly the time of *Belyng*. In 1340, the plaintiff to a reverter writ traced descent to the first heir in the entail and asserted that he had died without issue.<sup>183</sup> Thorp, applying the last ancestor rule of the descender writ, complained that the plaintiff had not made the first generation of issue heir in the entail, and if the first generation of issue had not been seised, then the plaintiff should not have mentioned him. Justice Basset rejected Thorp's argument: even if the first heir had been seised there was no need to mention him nor even if there had been twenty generations seised, there was no need to mention any of them, except the donees. As seen above, Basset's statement implying that twenty generations in the entail did not destroy the reversion was picked up four years later by Moubray in *Helton v. Kene.*<sup>184</sup> The cases of the 1330s and 1340s cited as evidence that entails were at this time perpetual for all purposes are only evidence of perpetual entails for the preservation of the reversion or remainder.<sup>185</sup>

The growth of indefinite entails raised, as we have seen, the question of what became of *maritagium* when it ceased to be *maritagium* at the fourth heir. A replevin case in 1336 shows the justices a little perplexed by the question.<sup>186</sup> To a defendant's avowry for 20 shillings of rent in arrear the plaintiff produced a charter by which his ancestor had received the land free of service

<sup>181</sup> *Ibid.*, at 138.

<sup>182</sup> Above, pp. 110–11.

<sup>183</sup> YB (RS) 14–15 Edw. III 136 (1340).

<sup>184</sup> Baker and Milsom, *Cases and Materials in English Legal History*, 56. The case is discussed in the text, above, pp. 117–18.

<sup>185</sup> Above, pp. 116–19.

<sup>186</sup> YB Pas. 10 Edw. III, f. 25, pl. 46 (1336).

in *maritagium*. The first question was whether the *maritagium* had ended. Justice Shardelow observed that under old law *maritagium* was purified after the fourth degree, which was not quite the old law under which *maritagium* ceased to be free of services at the fourth degree or the third heir. Stoufford agreed with Shardelow that *maritagium* is purified before the fifth degree. These remarks are evidence that a generation had been subtly added to *maritagium*, as it had to entails, for the issue of the donee. Although it was not clear whether the *maritagium* had in fact ended, the justices warily broached the second question: what estate did a plaintiff hold if the *maritagium* had ended? Justice Stonor said that the plaintiff's understanding was that he held fee simple but discharged of services. But the plaintiff responded that it was up to the court to say what estate he held under the charter of *maritagium*. The justices did not stay for an answer and the case went off on other issues.

In 1371, however, it was clear, at least to Justice Fyncheden, that after the fourth degree *maritagium* became fee tail.<sup>187</sup> Thus, after the fourth degree, the issue will have an ordinary formedon in the descender if the alienation sought to be set aside occurred before the end of the *maritagium*. The end of *maritagium* occurred at the same time as the end of an entail for the statutory restraint on alienations. But the end of *maritagium* did not mean that the reversion limited after a grant in *maritagium* would be destroyed. The *maritagium* became an ordinary entail and the reversion was preserved. This view was already in place by 1343, for in that year a report mentions a remainder limited after *maritagium* and the conveyance creating the remainder had to have been made some years before the case.<sup>188</sup> Justice Fyncheden's lecture in the 1371 cases sheds light on the 1410 case discussed earlier in connection with the duration of entails for the donee's issue.<sup>189</sup> Readings in the fifteenth century repeat Fyncheden's lesson of 1371: after the fourth degree *maritagium* becomes a plain fee tail.<sup>190</sup> Yet, as late as

<sup>187</sup> YB Trin. 45 Edw. III, f. 19, pl. 22 (1371) discussed above, pp. 113–14.

<sup>188</sup> YB (RS) 17–18 Edw. III 342 (1343). Robert Constable, however, in his 1489 reading at Lincoln's Inn teaches that a remainder cannot be limited after *maritagium*. *Readings and Moots*, I, 175–6. *Maritagium* must have reversion to the donor and, after *Quia Emptores*, the remainderman must hold of the chief lord of the fee.

<sup>189</sup> YB Mich. 12 Hen. IV, f. 15, pl. 9 (1410) discussed above, pp. 119–20.

<sup>190</sup> *Readings and Moots*, I, lxx (c. 1420), cxxx (1430).

about 1455, a manuscript can speak of *maritagium* becoming fee simple at the fourth degree.<sup>191</sup>

(b) *Remainders*

The writs and pleadings to recover a remainder were a little complicated. There were three writs available to recover remainders. If the remainder had already come into possession and the remainder was in fee tail, the preferred writ was formedon in the descender.<sup>192</sup> If the remainder had not yet come into possession, there were two writs available to the plaintiff. He could bring formedon in the remainder, and if the remainder had been created by final concord, he could, as provided in Westminster II, chapter 45, use *scire facias* to enforce the fine.<sup>193</sup> In the fourteenth century, *scire facias* appears to have been used as frequently as formedon in the remainder.

Actions on the formedon writs presented the problem of where to lay the esplees – on whose seisin did the plaintiff base his claim. In formedon in the descender to recover a remainder that had come into the possession of a plaintiff’s ancestor, the plaintiff could lay the esplees in that ancestor as he would ordinarily on a descender writ.<sup>194</sup> In one case, however, where the claimed remainder followed an entail, it was said that the better practice would be to lay the esplees in the donee of the first entail as well as in the plaintiff’s ancestor in the second entail.<sup>195</sup> Plaintiffs also laid the esplees in both the donor and in the ancestor who had come into possession of the claimed remainder.<sup>196</sup> In formedon in the remainder, the question was whether the plaintiff should lay the esplees in the donor or in the donee of the first estate, whether

<sup>191</sup> CUL Ms. Add. 2994, f. 161v. I am grateful to Professor John Baker for making a transcription of this passage available to me.

<sup>192</sup> *LeVyneter v. Essex*, Mich. 12 Edw. II, 65 S.S. 166 (1318); YB Pas. 5 Edw. III, f. 17, pl. 14 (1331); YB Pas. 8 Edw. III, f. 19, pl. 13 (1334); YB Trin. 9 Edw. III, f. 22, pl. 15 (1335); YB (RS) 16(2) Edw. III 170 (1342); *Bradelegh v. Bradelegh*, CP40/429, m.99 (Mich. 1367); *Speke v. Holland*, CP40/651, m.498 (Mich. 1423). Occasionally one finds the use of formedon in the remainder: YB Pas. 7 Edw. III, f. 17, pl. 17 (1333); YB Mich. 8 Edw. III, f. 56, pl. 16 (1334).

<sup>193</sup> 13 Edw. I, c. 45 (1285), *Statutes of the Realm*, I, 93–4.

<sup>194</sup> e.g. YB Pas. 8 Edw. III, f. 19, pl. 13 (1334).

<sup>195</sup> YB (RS) 11–12 Edw. III 266 (1337).

<sup>196</sup> YB Mich. 8 Edw. III, f. 59, pl. 16 (1334); *Ward v. Radsley*, CP40/400, m.252d (Mich. 1359); *Bylane v. Belam*, CP40/539, m.138 (Mich. 1395).

life estate or entail, created by the grant. There was authority for both positions.<sup>197</sup> The prudent plaintiff did both.<sup>198</sup> It is hard to find a plaintiff who got into trouble for laying the esplees in more persons than might be strictly necessary. The claimed remainder might be fee simple, in which case the plaintiff had to lay the esplees in the donor,<sup>199</sup> wherever else he might lay them.<sup>200</sup> The defendant in any case could deny that the donor had been seised<sup>201</sup> or that the grant created the claimed remainder.<sup>202</sup>

The uncertainty over where to lay the esplees arose because the requirement to lay the esplees in someone did not fit a claim for a remainder that had not yet come into possession. A remainderman's claim differed from the claims made in reverter or descender in that a remainderman did not claim by descent from the donor or the donee. He based his claim on the form of the gift limiting the remainder. At first it was not clear that he needed a writing of the grant that created the remainder.<sup>203</sup> By the beginning of the fourteenth century, however, the plaintiff had to produce a writing that showed the grant limiting a remainder.<sup>204</sup>

<sup>197</sup> Esplees in donor: BL Add. Ms. 31826, f. 239; YB Trin. 17 Edw. II, f. 555 (1324); *Druweys v. Druweys*, CP40/281, m.226 (Pas. 1330). Esplees in donee: YB Hil. 18 Edw. II, f. 596 (1325); YB Mich. 27 Edw. III, f. 8, pl. 24 (1353); YB Mich. 9 Hen. VI, f. 53, pl. 38 (1430).

<sup>198</sup> e.g. YB Pas. 5 Edw. III, f. 17, pl. 14 (1331); *Tudy v. Myrield*, CP40/300, m.199d (Mich. 1334); YB (RS) 11–12 Edw. III 114 (1337); *Thoraldthorp v. Mayor and City of York*, CP40/400, m.156 (Mich. 1359); *Del Ashe v. Layland*, CP40/429, m.494d (Mich. 1367); *Badele v. Atteloo*, CP40/539, m.117 (Mich. 1395); *Novae Narrationes*, 241, C168.

<sup>199</sup> YB (RS) 11–12 Edw. III 80 (1337); *Weston v. Abbot of Circencester*, CP40/429, m.203 (Mich. 1367); *Yonge v. Stok*, CP40/539, m.461d (Mich. 1395).

<sup>200</sup> For a case of a remainder in fee simple where the plaintiff laid the esplees in both the donor and the donee see CP40/429, m.49 (Mich. 1367). For a case of a remainder in fee simple where the plaintiff laid the esplees in the donee in fee tail see YB Pas. 5 Edw. III, f. 35, pl. 6 (1331).

<sup>201</sup> e.g. YB (RS) 20(1) Edw. III 382 (1346); YB Mich. 30 Edw. III, f. 18 (1356); *Earl of Arundel v. Prior de Michelham*, CP40/416, m.321 (Mich. 1363); *Shelweyk v. Side*, CP40/441, m.278 (Hil. 1371).

<sup>202</sup> e.g. *Mainfeld v. Brumpton*, JUST 1/1102, m.37 (1294); *Whitehurst v. Whitehurst*, CP40/276, m.169 (Hil. 1329); *Sturing v. Rattedale*, CP40/277, m.142 (Pas. 1329); YB Pas. 29 Edw. III, f. 29 (1355); *Pykering v. Warde*, CP40/429, m.481 (Mich. 1367); YB Pas. 44 Edw. III, f. 8, pl. 7 (1370).

<sup>203</sup> Bodleian, Rawlinson Ms. D. 913, f. 106 (no writing necessary).

<sup>204</sup> e.g. BL Add. Ms. 31826, f. 232v; *Bures v. Abbot of Fecamp*, YB Mich. 8 Edw. II, 37 S.S. 204 (1314); YB Hil. 14 Edw. II, f. 424 (1321); YB Hil. 17 Edw. II, f. 526 (1324); YB Mich. 18 Edw. II, f. 571 (1324); YB Trin. 18 Edw. II, f. 621 (1325); YB Pas. 7 Edw. III, f. 17, pl. 17 (1333); YB Mich. 7 Edw. III, f. 47, pl. 17 (1333); YB (RS) 14–15 Edw. III 150 (1340); CP40/396, m.161d (Mich.

In 1301 a remainderman sued the heir of the donor.<sup>205</sup> When the defendant asked for the plaintiff to show written evidence of the grant, the plaintiff explained that the defendant had the charter as executor. The defendant, however, successfully argued that he claimed by lineal descent from the donor, but the plaintiff was a “stranger.” For that reason, the plaintiff needed written evidence of the grant in remainder. A defendant on the Nottinghamshire Eyre of 1329–30 recited this argument, which by then had probably become the standard argument.<sup>206</sup>

A plaintiff’s writ and pleading had to conform to the deed evidencing the creation of the claimed remainder.<sup>207</sup> The requirement of a writing substituted, in part, for the ancestral seisin that grounded claims in descender and reverter. Laying the esplees in the donor would serve to establish, not the source of the plaintiff’s claim by descent as in descender or reverter, but the donor’s capacity to make the grant. Unless he had a different deed, the defendant could not answer that the particular deed produced by the plaintiff had not created the remainder.<sup>208</sup> The defendant had to deny more generally that the grant had been as alleged in the plaintiff’s writ. Yet the deed was said not to be the basis for the plaintiff’s claim as it would be in an action for a rent charge<sup>209</sup> or in debt on an obligation.<sup>210</sup> All this left the basis for the plaintiff’s

1358). If the plaintiff used descender to claim a remainder that had come into the possession of his ancestor, there was some question whether he had to produce a writing of the grant. YB (RS) 15 Edw. III 198 (1341). The argument for requiring a writing was that without the writing one did not know whether the plaintiff’s ancestor had been seised under the fee tail. But this argument would have required a writing in descender.

<sup>205</sup> *Neuton v. Swyne*, CP40/135, m.330d (Mich. 1301), BL Stowe Ms. 386, f. 127r. I am grateful to Dr. Paul Brand for bringing this case to my attention.

<sup>206</sup> JUST 1/682, m.33 (1329–30).

<sup>207</sup> Discrepancy between writ and writing could be fatal: YB Mich. 8 Edw. III, f. 59, pl. 16 (1334); YB Mich. 27 Edw. III, f. 8, pl. 24 (1353); YB 14 Hen. VI, f. 1, pl. 2 (1435–6). If there were no better writ available in Chancery, the discrepancy would not harm the plaintiff: YB Mich. 7 Edw. III, f. 64, pl. 63 (1333). Minor differences would be tolerated: YB (RS) 11 Edw. III 512, 578 (1338).

<sup>208</sup> YB (RS) 18 Edw. III 194 (1344); YB Mich. 21 Edw. III, f. 49, pl. 79 (1347). The defendant could take issue with the plaintiff’s deed if the defendant produced a different deed: YB Hil. 10 Edw. III, f. 1, pl. 6 (1336).

<sup>209</sup> The analogy to actions for a rent charge were rejected in YB (RS) Edw. III 194 (1344); YB Mich. 21 Edw. III, f. 49, pl. 79 (1347).

<sup>210</sup> The analogy to debt on an obligation was rejected in YB 14 Hen. VI, f. 1, pl. 2 (1435–6).

claim straddling the donor's seisin and the grant. As a practical matter, the issue for the jury would not focus on the plaintiff's deed unless the defendant could present another deed to the jury.

The requirement of a writing in formedon in the remainder gave plaintiffs an additional reason to use *scire facias* to claim remainders created by final concord. *Scire facias* gave plaintiffs speedier mesne process and removed the delays a defendant had in formedon in the remainder.<sup>211</sup> A plaintiff could use *scire facias* only if the final concord had not been previously executed; only if, that is, the plaintiff's ancestor in the remainder had not been seised of the remainder.<sup>212</sup> If the plaintiff's ancestor had been seised, the plaintiff had to use descender.<sup>213</sup> *Scire facias* was in this respect the equivalent of formedon in the remainder. The requirement that the fine not have been previously executed meant that *scire facias* could not substitute for descender.<sup>214</sup> But it remains a mystery why it was not used more frequently to recover reversions.<sup>215</sup>

Grants in the form "to A and the heirs of his body, remainder to the right heirs of A" presented a difficulty. Grants in this form were frequently made with good reason.<sup>216</sup> Suppose A wishes to

<sup>211</sup> YB (RS) 14 Edw. III 76 (1340) (aid is granted in *scire facias* but neither voucher to warranty nor other delays); YB Trin. 12 Edw. II, 81 S.S. 137 (1319) (no essoins in *scire facias*).

<sup>212</sup> YB Mich. 14 Edw. II, f. 413 (1320); YB Hil. 6 Edw. III, f. 9, pl. 26 (1332); YB Hil. 7 Edw. III, f. 3, pl. 6 (1333); YB (RS) 14 Edw. III 262 (1340); YB (RS) 20(1) Edw. III 438 (1346); YB Mich. 25 Edw. III, f. 91, pl. 4 (1351); YB Trin. 49 Edw. III, f. 22, pl. 7 (1375); YB Hil. 50 Edw. III, f. 6, pl. 13 (1376); YB Trin. 7 Hen. IV, f. 16, pl. 8 (1406). For the general principle applicable to all final concords see *Hereford v. Hereford*, YB 3 Edw. II, 19 S.S. 155 (1310). In 1384 Justice Holt attributed the rule that *scire facias* could not be used to execute a fine where the plaintiff's ancestor had been seised to Justice Bereford: YB Pas. 7 Ric. II, 3 Ames 143 (1384).

<sup>213</sup> YB (RS) 14–15 Edw. III 280 (1341); YB (RS) 15 Edw. III 282 (1341); *Purle v. Bishop of London*, CP40/375, m.184 (Mich. 1353); YB Trin. 41 Edw. III, f. 13, pl. 4 (1367); YB Hil. 42 Edw. III, f. 5, pl. 11 (1368).

<sup>214</sup> YB Trin. 45 Edw. III, f. 18, pl. 13 (1371); YB Pas. 7 Ric. II, 3 Ames 143 (1384). For stray cases in which *scire facias* substituted for descender see *Craft v. Ossington*, YB Pas. 5 Edw. II, 31 S.S. 204 (1312) (the reporter expresses surprise); YB Mich. 34 Edw. III, f. 64, pl. 67 (1360).

<sup>215</sup> For cases in which *scire facias* was used to recover a reversion, see YB Trin. 12 Edw. II, 81 S.S. 127 (1319); YB Pas. 21 Edw. III, f. 12, pl. 6 (1347); YB Trin. 26 Edw. III, f. 10, pl. 7 (1352); *Clavering v. Acadian*, CP40/429, m.311 (M. 1367); *Saint Laud v. Hale*, CP40/441, m.335d (Trin. 1371); CP40/654, m.301 (Trin. 1424).

<sup>216</sup> See Simpson, *A History of the Land Law*, 97–8. Simpson is quite right that A wanted both the benefit of an entail and to avoid the disadvantage of entails.

marry B and agrees to provide B with jointure. He can do so by granting land to a strawman who regrants to A and B and the heirs of their two bodies. If the grant stopped there either A's lord or A's strawman would have the reversion. Wishing to avoid this result, A has his strawman limit a remainder to A's right heirs. A might be required to make some such grant by B or her family. They wish to assure B's children succession to the land. If it is A's first marriage, B's daughter by A would be protected against a son of a subsequent marriage by A. If it is A's second marriage, B's issue is protected from A's heirs by his earlier marriage. Grants in this form thus protected the children of the specified marriage from claims by the children of other marriages.

Yet grants in this form raised a question: did A's issue take under the entail or under the remainder? In an effort to avoid this question in 1320 the court rejected a proffered final concord in the troublesome form.<sup>217</sup> But this case seems to have been an anomaly. Equally anomalous was a 1325 case in which the issue of the tenant-in-tail claimed as remainderman in fee simple.<sup>218</sup> The grant was by final concord to Thomas for life, remainder to his son Thomas in fee tail, remainder to the right heirs of Thomas the father. When Thomas the father died, his son Thomas entered. By final concord, he resettled the land on himself and his wife and his heirs. After his death his daughter sought to recover against his wife. The daughter did not claim under the entail, but under the remainder as the right heir of Thomas the father. Arguments by Denum that when Thomas the son entered, he entered as remainderman and right heir to his father go nowhere. The key issue for the court was whether Thomas the son's warranty was restrained by *De Donis* because he was tenant-in-tail or remained at common law because the plaintiff was not claiming as issue under the entail but as heir in the remainder. Why she claimed the remainder is not clear. This is the only case I have found in which the issue of a tenant-in-tail could elect whether to claim as issue or as remainderman.

Ordinarily, the court took the position that the remainder did not fall in until the preceding entail had ended at the extinction of

But the marriage context of such grants helps to understand that there was nothing dubious about such grants.

<sup>217</sup> YB Mich. 14 Edw. II, 104 S.S. 114 (1320).

<sup>218</sup> *Bardwich v. Brayboef*, YB Mich. 18 Edw. II, f. 574 (1325).

the donee's issue. The argument, however, was made that when the issue of the donee in tail enters, he does so as the donee's right heir. There are two ways of understanding this argument. The argument could rest on the premise that once the donee's issue enters the fee tail is concluded, so the issue is the right heir of the donee. The argument could also rest on the premise that in this form of grant the entail is merged into the fee simple remainder so that the donee's issue enters as right heir to the donee. In the fourteenth and fifteenth centuries, the argument was taken in the first sense and the repeated response was that the remainder does not fall in until the entail is ended – until the donee dies without issue.<sup>219</sup> Where, for example, a father granted an entail to his child with remainder to the right heirs of the father, upon the father's death his child and heir continued to hold the fee tail, not the remainder. Nor did the fee tail merge into the fee simple.<sup>220</sup> In a 1317 case of formedon in the remainder the grant had been to one Margery Saltmarsh and the heirs of her body with remainder to her right heirs.<sup>221</sup> The plaintiff was Margery's nephew. Margery had had a son, Robert, who had died without issue. The question of pleading was whether the plaintiff should have mentioned Robert at all and, if so, whether he should claim as Robert's heir. Scrope argued that Robert had been Margery's right heir and, for that reason, the plaintiff had to claim as heir to Robert. The plaintiff, apparently successfully, argued that Robert had only fee tail and that the plaintiff had no action for his remainder while there was issue in the entail alive. The duration of the entail was left an open question.

<sup>219</sup> Simpson believes that the merger theory was adopted in the fifteenth century. Simpson, *A History of the Land Law*, 98, n. 52. He cites Richard Hall's 1481 reading: *Readings and Moots*, I, 149. Hall put the case of a grant to a man in fee tail, remainder to his right heirs. The man dies without issue. The man's brother has mort d'ancestor, as opposed presumably to formedon in the remainder. Hall also says that if the man had granted a rent charge, the brother would take subject to the charge, "which proves that he died seised in his demesne of fee simple." Hall's case is probably a special case in that the donee died without issue. If the man had issue surviving him, the issue would take a fee tail. The donee's rent charge would not bind his issue but would bind the remainderman. Hall's argument does not get him quite where he wants to go.

<sup>220</sup> *Rasen v. Furnival*, YB Pas. 3 Edw. II, 20 S.S. 140 (1310); YB Mich. 24 Edw. III, f. 36, pl. 45 (1350); YB Trin. 38 Edw. III, f. 17 (1364).

<sup>221</sup> *Saltmarsh v. Redeness*, YB Hil. 10 Edw. II, 54 S.S. 33, YB Mich. 11 Edw. II, 61 S.S. 12 (1317).

A 1350 case replayed the *Saltmarsh* case.<sup>222</sup> There had been a final concord granting a joint fee tail to husband and wife with remainder to the right heirs of the wife. The couple had a son who had three daughters, all of whom died without issue.<sup>223</sup> The wife remarried and had a son. Upon the death of the last granddaughter without issue, the wife’s cousin, her aunt’s daughter, entered. The son by the second marriage brought *scire facias* for the remainder. The defendant’s strategy was to give the last granddaughter fee simple and exclude the plaintiff on the grounds that he was heir in the half blood, whose claim was inferior to the defendant’s as heir in the whole blood. For if the remainder were executed on its terms, the plaintiff, the wife’s son, was closer heir than the defendant, her cousin. The defendant used two arguments to give the last granddaughter fee simple: the old argument that on his entry the first heir had fee simple and that the granddaughters took as the right heirs of their grandmother. Neither argument worked.<sup>224</sup> As Justice Shardelow observed, the first estate, the entail, lasts as long as there is issue at whatever time or degree it ends, then the remainder begins. Shardelow also speaks of the entail being perpetual.

In *Cauntele’s Case* (1345) the grant was to a husband and wife for their lives, two successive remainders in fee tail to their sons, remainder to the right heirs of the husband.<sup>225</sup> After the sons died without issue, a daughter of the husband by another marriage entered and granted her remainder to the defendant. The wife attorned and granted to the plaintiff. When the wife died, the defendant ousted the plaintiff who brought novel disseisin. He argued that the second son had survived his father and that he then had fee simple. The plaintiff was his uncle and of the whole blood, while the daughter was of the half blood. Skipwyth, for the defendant, pointed out that the second son had never been in possession. He argued that the fee simple was “*suspensif*” until the entails ended. Although the parties settled, the report relates that

<sup>222</sup> *Hampton v. Peyto*, CP40/363, m.29 (Mich. 1350). The two Yearbook reports of the case differ in the descent of the entail. The second report tracks the plea roll record. YBB Mich. 24 Edw. III, f. 30, pl. 5; f. 62, pl. 61 (1350).

<sup>223</sup> The first Yearbook report, YB Mich. 24 Edw. III, f. 30, pl. 5 (1350), has the three women as sisters to the first heir.

<sup>224</sup> The plea rolls record shows that the plaintiff defaulted and the defendant, accordingly, was sent without day.

<sup>225</sup> YB (RS) 19 Edw. III 346 (1345).

the court believed that the plaintiff would have lost. Similarly a 1353 case involved a grant to husband and wife in fee tail, remainder to the right heirs of the husband.<sup>226</sup> They had a son. The wife died and the husband remarried. By his second wife he had a son, the defendant. The son of the first marriage entered after the deaths of both his parents, but died without issue. His uncle entered and was ousted by the son of the second marriage. The uncle brought novel disseisin and claimed that when the son of the first marriage had entered, he had fee simple. The uncle was the closer heir because he was of the whole blood. But the court ruled that the plaintiff take nothing because the remainder begins when the entail ends and not before. The son of the first marriage had only the fee tail. In a similar case in 1413, Hals successfully argued that the fee simple was suspended until the fee tail ended.<sup>227</sup>

Closely related to the principle that a remainder did not fall in until the preceding entail came to an end was the principle against merging estates. Where there was a grant to A for life, remainder to B in tail, remainder to A's right heirs, a grant by A would not defeat B's entail.<sup>228</sup> The resistance to the merger of estates is also exemplified in a case in 1376.<sup>229</sup> The grant was to A for life, remainder to B and his wife C in joint entail, remainder to B in tail, remainder to the defendant in tail. C died without issue. B married the plaintiff and died without issue. The plaintiff sued the defendant for her dower. If her husband B had been seised under the joint entail with his first wife, the plaintiff would not have dower. If he had been seised under the next entail to himself alone, the plaintiff would have dower. The court decided that he had been seised under the second entail. In reaching this conclusion, the justices did not have to decide whether, after the death of his first wife, B was in under the second entail or whether he was tenant-in-tail after possibility of issue extinct, which estate merged with the second entail. The policy against the merger of estates also meant that if a donor of a fee tail released his right to

<sup>226</sup> Lib. Ass. 37 Edw. III, pl. 4 (1353).

<sup>227</sup> YB Hil. 14 Hen. IV, f. 35, pl. 12 (1413).

<sup>228</sup> YB Mich. 24 Edw. III, f. 62, pl. 61 (1350); Lib. Ass. 29 Edw. III, pl. 50 (1365).

<sup>229</sup> YB Hil. 50 Edw. III, f. 4, pl. 9 (1376).

the tenant-in-tail, the release destroyed the reversion, but not the fee tail.<sup>230</sup>

In some cases, the effort to keep estates separate and distinct broke down. For example, in a 1368 case in which A, B, and C were brothers, the grant was to A for life, remainder to B in tail, remainder to C in fee simple.<sup>231</sup> A rendered his estate to B. B and C died without issue. A entered, but did he resume his life estate or did he enter as heir to C? In another difficult case, the grant was to A in tail, remainder to the right heirs of A.<sup>232</sup> If A has a son by his first wife and a son by his second wife and the first son enters after his father's death and dies without issue, does the second son take the entail or the remainder? The difficulty here, apparently, was that the second son was heir to his father but only heir in the half blood to the last person seised under the entail. Strangeways, solved the difficulty by avoiding it: he asserted that the second son had both fee tail and fee simple.

Contingent remainders moved from the realm of doubt to acceptance, mainly because of their usefulness in practice. There were two types of contingent remainder: a remainder that was to take effect upon the fulfillment of a condition precedent and a remainder to a person not ascertained at the time of the grant. The first type of contingent remainder was every remainder limited after an entail, for the remainder was conditioned on the preceding entail coming to an end. Other than this rather common situation, there were very few cases involving conditional remainders. One form of grant that appeared in litigation was a resettlement of land on a father for his life, remainder to his daughter if she outlives her father for her life, remainder to the father's right heirs.<sup>233</sup> Curiously, the conveyancer thought explicit words of condition were necessary in limiting the life estate to the daughter. The father had exempted the daughter from liability for waste. After the father's death, his heir alienated the remainder and the purchaser sought to have the daughter attorn to him, which she was willing to do as long as he acknowledged her exemption from

<sup>230</sup> YB Mich. 24 Edw. III, f. 62, pl. 61 (1350). See Chapter 4, below, pp. 230–1.

<sup>231</sup> YB Pas. 42 Edw. III, f. 9, pl. 11 (1368).

<sup>232</sup> YB 7 Hen. V, f. 2, pl. 2 (1419–20).

<sup>233</sup> YB Mich. 24 Edw. III, f. 20, pl. 29 (1350). A report of an identical case, which might be another report of the same case, is YB Mich. 23 Edw. III, f. 32, pl. 17 (1349).

liability for waste. The justices decided that the purchaser of the remainder was bound by the exemption from liability for waste because his seller, the father's heir, was so bound.

Another form of grant was for A, a woman, to grant to B and his wife C for their lives, but if A dies without an heir of her body, then after the deaths of B and C remainder to the heirs of the bodies of B and C.<sup>234</sup> The plaintiff, the issue of B and C, brought formedon in the remainder after the deaths of A, B, and C. The defendant argued that the remainder was against the law ("*contra legem*"), but the plea roll record does not give his reasons. Perhaps he thought that the grant could lead to so much confusion that it ought not to be allowed. The justices took the legal question under advisement but no judgment is recorded. If one supposes that the grantor was mother of C, her intention becomes clear. She is trying to provide a marriage grant which will become a fee tail if she dies without a later child surviving. This form of grant combined both types of contingent remainder, because the remainder in the issue of B and C was a conditional remainder in an unascertained person.

The more common contingent remainder was a remainder limited to an unascertainable person. This type of remainder was frequently used in practice. In the typical resettlement by grant-regrant transaction, the original holder would receive back either (a) a life estate followed by one or more remainders in fee tail, followed by a remainder to his right heirs or (b) a fee tail, which might be followed by one or more remainders in fee tail, followed by a remainder to his right heirs. The right heir of the holder of the first estate was not known at the time of the regrant. And this at first raised eyebrows. In 1304, when a final concord gave a husband and wife a joint entail and limited the remainder to the right heirs of the husband, the reporter expressed surprise in that the remainder was not limited to any particular person.<sup>235</sup> In 1309–10, when a final concord granted land to A for life, remainder to B in tail, remainder to the right heirs of A – all to be held of the chief lord – Justice Bereford asked who was to do homage.<sup>236</sup> The reporter would not stay for an answer. No one

<sup>234</sup> JUST 1/682, m.57d (1329–30).

<sup>235</sup> YB (RS) 32–3 Edw. I 328 (1304).

<sup>236</sup> YB 2 Edw. II, 19 S.S. 4 (1309–10).

could do homage at the time of the grant, for A had only a life estate and if B did homage, A would lose his life estate and A's heirs would be the remainder.

There was no clear and consistent view on this type of contingent remainder. According to one school of thought, the fee simple had to vest in some person at the time of livery of seisin.<sup>237</sup> More frequently, however, it was said that the fee simple could be in suspense until the preceding estate came to an end.<sup>238</sup> The idea of the fee simple in suspense was useful in accounting for the fee simple so as to keep the ultimate remainder distinct from preceding estates. This having been said, there was little practical difficulty where the ultimate remainder limited to right heirs was limited to the right heirs of someone who took the first estate in the settlement.<sup>239</sup> In 1345, it was decided that one could not make a release by final concord to husband and wife in joint entail, remainder to the right heirs of the husband, no doubt because the person receiving a release had to be in possession and the unascertained right heir of the husband was not in possession.<sup>240</sup> But one could grant and render land in that form.<sup>241</sup> In the same year a useful arrangement was rejected as unsuitable for a final concord because of the difficulty with contingent remainders. A husband and wife holding in right of the wife wished to grant land for their own lives and to make sure that the reversion was in the heirs of the wife.<sup>242</sup> Believing that the reversion had to come back to the heirs of both husband and wife, the justices would not permit either a reversion or a remainder to be limited to the heirs of the wife.

The debate whether an ultimate remainder in fee simple could be in suspense took place with conveyances which limited a remainder to the right heirs of someone who did not take any prior estate. The typical form of grant was to A for life or in fee tail,

<sup>237</sup> e.g. YB Hil. 14 Hen. IV, f. 31, pl. 43 (1413) (Hankford).

<sup>238</sup> *Saltmarsh v. Redeness*, YB Hil. 10 Edw. II, 54 S.S. 35 (1317); YB (RS) 19 Edw. III 345 (Mich. 1345) (Skipwith); YB Mich. 24 Edw. III, f. 62, pl. 61 (1350) (Shardelow); YB Hil. 40 Edw. III, f. 9, pl. 18 (1366); YB Hil. 14 Hen. IV, f. 35, pl. 12 (1413); YB 7 Hen. V, f. 1, pl. 1 (1419–20).

<sup>239</sup> See Cavendish's remarks in YB Mich. 38 Edw. III, f. 26 (1364).

<sup>240</sup> YB (RS) 18–19 Edw. III 564 (1345).

<sup>241</sup> *Ibid.*

<sup>242</sup> YB (RS) 19 Edw. III 102 (1345). The form of the proposed fine was "H and W to A for the lives of H and W remainder or reversion to the right heirs of W."

remainder to the heirs of B. If B were dead at the time of the grant, there was no difficulty because B's heir would be ascertainable. If B were alive, was the remainder void or was the fee simple in suspense? It was clear that a remainder limited to a non-existent person was void. Fyncheden gave the example of a remainder limited to B's son when B has no son.<sup>243</sup> In one strange case, land was settled on A and his wife B for their lives, remainder to their son C by name in tail, remainder to their son D by name in tail, remainder to the right heirs of A. At the time of the settlement neither C nor D were alive. They were born later and given the names reserved for them, as it were, by the settlement. The remainders were void at least for the purpose of deciding whether B, surviving her husband, could pray aid of the right heir of A.<sup>244</sup> One might say that a remainder to an unascertained person not the heir of a person taking an earlier estate in the settlement was void. But even that attempt to state a general rule misses the mark in that lawyers did not reason mechanically from abstract rules. They instead considered the state of affairs at the time at which a question arose in litigation. For example, where the grant was to A for life, remainder to the right heirs of B, if A prays aid of B's heir, B being dead, it did not matter that B had been alive at the time of the grant.<sup>245</sup> And where the grant was to A in tail remainder to the right heirs of B, B's right heir could bring detinue of charter even though B had been alive at the time of the grant.<sup>246</sup> The remainder was not void but in suspense. In 1489, Robert Constable tried to sum up the doctrine by saying that a grant to A for life, remainder to the right heirs of B, was good if B were dead at the time of the grant or died during A's life.<sup>247</sup> But this attempt at a general rule did not quite capture what the court was doing in practice.

But what if B is alive when A dies? In 1364 Justice Moubray put the case of a grant to A in tail, remainder to the heirs of the body of B, remainder to C in fee simple. If B is alive when A dies without issue, C has formedon in the remainder, because B's issue

<sup>243</sup> YB Pas. 39 Edw. III, f. 10 (1365).

<sup>244</sup> YB Mich. 10 Edw. III, f. 45, pl. 8 (1336).

<sup>245</sup> YB Mich. 27 Edw. III, f. 11, pl. 40 (1353); YB Trin. 11 Hen. IV, f. 74, pl. 14 (1410).

<sup>246</sup> *Salmon v. Wille*, YB Pas. 11 Ric. II, 5 Ames 283 (1388).

<sup>247</sup> *Readings and Moots*, I, 177.

is not ascertainable when the prior estate comes to an end.<sup>248</sup> Moubray's reasoning went without challenge. His reasoning helps to clarify the narrow issue of *Faryngton v. Darell*.<sup>249</sup> This case involved a devise by A to his wife B for life, remainder to his son C in tail male, remainder to A's next male heir in tail male, remainder to A's right heirs. B entered, C died without issue during B's life, then B died seised. A's granddaughter by his daughter entered as A's right heir and had issue, a son. The question was whether the great-grandson had the second remainder in tail male. One issue was whether the remainder in tail male to A's nearest heir male was void because that person was unascertainable at the time of the devise. Although Justice Martin and Serjeant Rolf were ready to accept that the remainder would be good as long as there was an heir male ready to hold at the end of the preceding estate, Justice Paston asserted that this conclusion could not be proven by reason. And Chief Justice Babington observed that it had been the point of a case mooted in the Inns of Court. Neither the earlier cases accepting the remainder as good as long as the remainderman was ready to take at the end of the prior estate nor Justice Moubray's inference that the contingent remainder would be destroyed if the remainderman could not be ascertained at the end of the prior estate had yet become entrenched doctrines. Although the justices appear to have been willing to say that the remainder was destroyed and could not be revived, the fact that the settlement was made by devise gave them pause. A devise, they believed, deserved greater respect than an *inter vivos* conveyance.

<sup>248</sup> YB Mich. 38 Edw. III, f. 26 (1364).

<sup>249</sup> YB Trin. 9 Hen. VI, f. 23, pl. 19 (1431); YB Mich. 11 Hen. VI, f. 12, pl. 28 (1432). Baker and Milsom, *Sources of English Legal History*, 70.

## LIVING WITH ENTAILS

S. F. C. Milsom has lamented how little is known about entails from the fourteenth to the seventeenth centuries.<sup>1</sup> As a partial remedy, his chapter studies grants in fee tail made in the fourteenth and fifteenth centuries. One's first question might well be how frequently was land granted in fee tail. Getting a sense of the frequency of entails is important to forming a picture of overall conveyancing practice, but more important, and more accessible, is getting a sense of the situations that led to the entailing of land. It is a mistake to speak of entails as if they were all of the same type – there were different types of grants in fee tail. The aim is to organize the plethora of conveyances into the main types of entail and the main types of situation in which the parties to a conveyance created an entail.<sup>2</sup>

Perhaps the most frequent use of entails in the fourteenth century was in marriage settlements in which the groom or his father settled land on the groom and bride in joint fee tail, known as jointure. The first part of this chapter explores the change in marriage settlement from a grant of land in *maritagium* from the bride's family to a payment of a marriage portion in money in exchange for jointure. The second part of this chapter explores the use of entails – how frequently land was given in fee tail and the characteristic situations in which grants were made in fee tail.

<sup>1</sup> Milsom, *Historical Foundations*, 178.

<sup>2</sup> For the idea of situation type see K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown Inc., 1960), 268–85.

1. THE CHANGE FROM *MARITAGIUM* TO JOINTURE

During the period from about 1200 to about 1320 the typical property settlement made upon marriage changed. In the old form of settlement, the bride's father gave the groom land in *maritagium* with his daughter.<sup>3</sup> The groom granted his wife dower at the church door where the marriage was solemnized.<sup>4</sup> The bride's dower could be the common law one-third share or designated lands as nominated dower. If the groom had no land at marriage, his father might consent that the groom grant dower out of his father's lands.<sup>5</sup> Dower *assensu patris* could be one-third of all the father's lands, or one-third of designated lands, or all of designated lands. In the new form of marriage settlement, the bride's father gave the groom or his father a marriage portion in money. In exchange for the marriage portion the groom or his father settled land on the groom and bride in joint fee tail. A widow had this jointure and her common law dower in the other lands her husband had held during marriage, as long as those lands were inheritable by children of the marriage.

Thus both sides of the typical marriage settlement changed. *Maritagium* became marriage portion. Jointure was added to dower. But the two changes did not happen at the same time.<sup>6</sup> Neither change happened quickly. Marriage portions had begun to replace *maritagium* by the 1230s but probably did not become the typical or standard contribution by the bride's family until the end of the thirteenth century. Jointure began to be added to dower in the 1270s but did not become the typical or standard contribution by the groom or his family until the second decade or so of the fourteenth century. At that time, marriage agreements pre-

<sup>3</sup> *Maritagium* is discussed in Chapter 1, above, pp. 37–69.

<sup>4</sup> J. Biancalana, "Widows at Common Law: the Development of Common Law Dower," *The Irish Jurist* 23 (n.s.) (1988), 288–92.

<sup>5</sup> *Ibid.*, at pp. 318–22.

<sup>6</sup> J. Bean, "Landlords" in E. Miller (ed.), *The Agrarian History of England and Wales. Volume III: 1348–1500* (Cambridge: Cambridge University Press, 1991), 549–50; K. B. McFarlane, *The Nobility of Later Medieval England* (Oxford: Clarendon Press, 1973), 64–5; S. Payling, "The Politics of Family: Late Medieval Marriage Contracts" in R. H. Britnell and A. J. Pollard (eds.), *The McFarlane Legacy: Studies in Late Medieval Politics and Society* (New York: St. Martin's Press, 1995), 23, 30.

scribed the new form of settlement.<sup>7</sup> Grants of *maritagium* continued to be made but they were infrequent.<sup>8</sup>

Historians have not explained why or how the change in marriage settlement took place. The statement that comes closest to an explanation is K. B. McFarlane's observation that the new form of settlement meant that daughters who did not inherit no longer dispersed their family's lands.<sup>9</sup> A landholder with sons and daughters could give money instead of land with his daughters and thereby leave his lands intact for his eldest son. Although true, this observation is not much of an explanation. At best, it explains the change from *maritagium* to marriage portion, but does not say why the change happened when it did and not a century earlier or later. And if it explains why the bride's father would prefer to give money rather than land, it does not explain why the groom, in a land-hungry society, was willing to accept money rather than land. McFarlane's observation overlooks the addition of jointure to dower. Yet, jointure could also disperse family lands. A father who gave lands in jointure parted with land, and if he or his son remarried with further grants in jointure their lands would no longer be in tact.<sup>10</sup> The dispersal of lands consequent upon jointure probably did not last as long as the dispersal of lands consequent upon *maritagium*, but it is not at all clear that landholders in the thirteenth through the fifteenth century calculated risks and uncertainties into a future beyond the deaths of those living at the time. Rather than viewing marriage portions as a defensive strategy for the protection of family lands one does better to view marriage portions as an acquisitive strategy for the purchase of a son-in-law with land. McFarlane was well aware of the importance for landholders of providing their daughters with marriage portions suited to the family's acquisitive aspirations.<sup>11</sup> In Payling's words "the marriages of non-inheriting daughters

<sup>7</sup> *Langley Cartulary*, No. 91 (1311); *Langley Cartulary*, No. 485 (1324); *Boarstall Cartulary*, No. 361 (1330); *Hyllle Cartulary*, No. 44 (1331); *Tropenell Cartulary*, I, 117 (1351).

<sup>8</sup> *Calverley Charters*, I, No. 98 (1309); *Cartulary of St. Frideswide*, No. 672 (c. 1330); *Hyllle Cartulary*, No. 325 (late 14th century); *Tropenell Cartulary*, II, 148–9 (early 14th century), 233–4 (1391).

<sup>9</sup> McFarlane, *Nobility*, 64.

<sup>10</sup> C. Carpenter, *Locality and Polity: A Study of Warwickshire Landed Society 1401–1499* (Cambridge: Cambridge University Press, 1992), pp. 107–13.

<sup>11</sup> McFarlane, *Nobility*, 84.

played a crucial role in extending a family's political and social horizons."<sup>12</sup>

An explanation of the change in marriage settlement should explain both the change from *maritagium* to marriage portion and the addition of jointure to dower. Three conditions in the period 1200 to 1320 led to the change from *maritagium* to marriage portion: (1) greater monetization of socioeconomic transactions, (2) the development of a market for wardships and marriages, and (3) increased indebtedness of landholders. The increased indebtedness of landholders helps to explain why grooms or their fathers were willing to accept money rather than land from the bride's family.

The addition of jointure to dower was really the substitution of jointure for dower *assensu patris*. This change came later and was slower to develop than the change to marriage portion. It took landholders some time to overcome the inertia of tradition, to learn that the groom's contribution could be a grant other than dower. But more than the inertia of tradition accounts for the slowness of the change. Dower *assensu patris* meant that the groom's father did not part with land until, at the earliest, his son died. And if his son survived him, he did not part with land at all during his life. On the other side of the transaction, dower *assensu patris* provided the bride and her father no assurance that her children of the marriage would inherit any of their father's lands. If the groom had a son by an earlier marriage, and that son survived his father, that son, not the children of the bride, would be the groom's heir. If the groom had a daughter by the bride, the bride died, and the groom had a son by a later marriage, that son, if he survived his father, would exclude the bride's daughters. And if the groom had daughters by a later marriage, those daughters would share with the bride's daughters. Jointure provided the simplest protection of the issue of the marriage from claims by children of the groom's earlier or later marriages. It took time and, perhaps, money to persuade fathers of grooms to part with more than dower *assensu patris*. A grant of jointure had the advantage that if the groom died leaving a widow and underage

<sup>12</sup> Payling, "Late Medieval Marriage Contracts," 23; S. Payling, *Political Society in Lancastrian England: The Greater Gentry of Nottinghamshire* (Oxford: Clarendon Press, 1991), 80-1.

children the lord did not have wardship of that land. Both parties to the marriage contract benefitted from avoiding wardship. When jointures created in marriage settlements begin to appear so do spousal jointures. A spousal jointure was not created pursuant to a marriage agreement. A husband and his wife could create a spousal jointure by taking title to land jointly in fee simple or fee tail or by resettling land on themselves jointly in fee simple or fee tail. Both types of jointure reduced the chances of wardship. Given the paucity of surviving marriage contracts one difficulty in determining when jointure became the standard contribution of the groom at marriage is that it is frequently hard to tell whether a couple who held land jointly did so because of marital or spousal jointure.

The change in marriage settlement required two changes, a change from *maritagium* to marriage portion and a shift from dower *assensu patris* to jointure plus common law dower. But the change can also be viewed as having two moments. First, marriage settlements became monetized. Secondly, the two changes in marriage settlement took place. The next section discusses the monetization of marriage settlements and is followed by a section tracing the transformation from old to new marriage settlement.

(a) *The monetization of marriage settlements*

The change from *maritagium* to marriage portion was itself part of an increased use of money in socioeconomic transactions in the late twelfth and thirteenth centuries. The thirteenth century did not see a sudden or dramatic shift toward greater monetization. Money payments were not uncommon in Anglo-Saxon England<sup>13</sup> and there is further evidence of money payments at the time of the Domesday Book and thereafter in the eleventh and twelfth centuries.<sup>14</sup> There was, however, a fairly steady and cumulative growth in the number and the kinds of money transactions. Matthew Mayhew has estimated that the per-capita money supply increased nominally nine-fold between 1086 and 1300 and

<sup>13</sup> F. M. Stenton, *Anglo-Saxon England* (Oxford: Clarendon Press, 1943), 152, 635.

<sup>14</sup> A. L. Poole, *From Domesday Book to Magna Carta 1087–1216* (Oxford: Clarendon Press, 1954), 44–5; R. W. Lennard, *Rural England, 1086–1135* (Oxford: Oxford University Press, 1966), 176–80.

doubled in real terms.<sup>15</sup> Although an increase in money supply does not automatically mean an increase in the kinds of transactions conducted by means of money,<sup>16</sup> a greater availability of money was a precondition for the monetization of transactions. Economic historians have largely focused on the connection between monetization and the commercialization of English society viewed in terms of markets, money payments for labor services, and the commutation of services owed for land into money payments.<sup>17</sup> The work of Peter Coss and of Scott Waugh shows that in the thirteenth century tenurial relationships, which had by that time a strong money component, were beginning to be supplemented by and perhaps replaced in importance by grants of money rents to military retainers and seigneurial officials.<sup>18</sup> It is not surprising that marriage transactions would also be monetized in the course of the thirteenth century.

Viewed as an episode in the increasing monetization of English social relations, the change from *maritagium* to money portion still requires explanation. Why and how were marriage contracts monetized? Beginning in the 1180s there developed a market for the marriages of royal wards – heirs and heiresses.<sup>19</sup> Some of the purchases were for resale, but others were for consummation.<sup>20</sup> The market for the marriages of heirs and heiresses was not confined to royal wards. Other lords also sold the wardship and marriages of the heirs or heiresses who came into their hands by the deaths of tenants by knight service. Tenants began to create what Waugh has called “artificial lordships.”<sup>21</sup> They arranged for someone other than their lord to have the marriage of their son or

<sup>15</sup> N. Mayhew, “Modelling Medieval Monetisation” in R. H. Britnell and B. M. S. Campbell (eds.), *A Commercializing Economy, England 1086 to c. 1300* (Manchester: Manchester University Press, 1995), 55–77, esp. 72.

<sup>16</sup> M. M. Postan, “The Rise of a Money Economy” in M. M. Postan, *Essays on Medieval Agriculture and General Problems of the Medieval Economy* (Cambridge: Cambridge University Press, 1973), 32–5; Mayhew, “Modelling,” 75.

<sup>17</sup> e.g. R. H. Britnell, *The Commercialisation of English Society 1000–1500* (Cambridge: Cambridge University Press, 1993), 36–52.

<sup>18</sup> P. R. Coss, “Bastard Feudalism Revised,” *Past & Present* 125 (1989), 27–64; S. Waugh, “Tenure to Contract: Lordship and Clientage in Thirteenth Century England,” *The English Historical Review* 401 (1986), 811–39.

<sup>19</sup> T. Keefe, “Proffers for Heirs and Heiresses in the Pipe Rolls: Some Observations on Indebtedness in the Years before the Magna Carta (1180–1212),” *Haskins Society Journal* 5 (1993), 99–109.

<sup>20</sup> Waugh, *Lordship of England*, 207–21.

<sup>21</sup> Waugh, “Tenure to Contract,” 825.

daughter with some land. These artificial lordships were frequently marriage contracts in which the landholder in effect sold the marriage of his son or daughter to someone whose child or other relative was to marry the landholder's son or daughter. At this point we are on the way to monetized marriage settlements. But we are not there yet. We are only to the point of money playing a role in the sale of marriages. There is a difference between selling the wardship of someone else's child or purchasing the marriage of a ward for one's own child and selling the marriage of one's own child.

In many instances of monetized marriage settlements, the parent who sold the marriage of his or her child was in debt. Social and economic historians of the thirteenth century have collected a large body of evidence showing that thirteenth-century landholders, especially small and medium-sized landholders, were frequently in debt.<sup>22</sup> Indebtedness by small and medium-sized

<sup>22</sup> K. Biddick, *The Other Economy, Pastoral Husbandry on a Medieval Estate* (Berkeley and Los Angeles: University of California Press, 1989), 50–77; D. Carpenter, "Was There a Crisis of the Knightly Class in the Thirteenth Century? The Oxfordshire Evidence," *English Historical Review* 377 (1980), 735–9, 745–6; P. R. Coss, "Sir Geoffrey de Langley and the Crisis of the Knightly Class in Thirteenth Century England," *Past & Present* 68 (1975), 3–34; C. Dyer, *Standards of Living in the Later Middle Ages: Social Change in England c. 1200–1520* (Cambridge: Cambridge University Press, 1989), 34–41; B. Harvey, *Westminster Abbey and its Estates in the Middle Ages* (Oxford: Clarendon Press, 1977), 169–71, 190–2; R. H. Hilton, *A Medieval Society: The West Midlands at the End of the Thirteenth Century* (London: Weidenfeld and Nicholson, 1966), 50–2; J. C. Holt, *The Northerners: A Study in the Reign of King John* (Oxford: Clarendon Press, 1961), 169–70; E. King, "Large and Small Landowners in the Thirteenth Century," *Past & Present* 47 (1970), 33–45; C. H. Knowles, "The Resettlement of England after the Barons' War, 1264–67," *Transactions of the Royal Historical Society*, 5th ser., 32 (1982), 34–6; S. Lloyd, "Crusader Knights and the Land Market in the Thirteenth Century" in P. R. Coss and S. D. Lloyd (eds.), *The Thirteenth Century II* (Woodbridge: The Boydell Press, 1988), 128–36; M. M. Postan, *Medieval Economy and Society* (Berkeley and Los Angeles: University of California Press, 1972), 163–5; S. Raban, "The Land Market and the Aristocracy in the Thirteenth Century" in D. Greenway, C. Holdworth, and J. Sayers (eds.), *Tradition and Change: Essays in Honor of Marjorie Chibnall, Presented by her Friends on the Occasion of her Seventieth Birthday* (Cambridge: Cambridge University Press, 1985), 239–61; H. G. Richardson, *The English Jewry Under the Angevin Kings* (London: Methuen and Co., 1960), 83–108; R. Stacey, *Politics, Policy and Finance under Henry III, 1216–1245* (Oxford: Oxford University Press, 1987), 216–17; R. Stacey, "Jewish Lending and the Medieval English Economy" in Britnell and Campbell, *A Commercializing Economy*, 88–97; Waugh, *Lordship of England*, 26; S. Waugh, "Reluctant Knights and Jurors: Respite, Exemptions, and Public Obligations in the Reign of Henry II," *Speculum* 58 (1983), 950–1.

landholders and the elusive knightly class was not new in the thirteenth century, but there is little evidence of landholder indebtedness before the 1180s. In the early 1180s Walter Map complained of abbeys that took advantage of knights in debt by driving hard bargains for the purchase of advowsons.<sup>23</sup> Also in the 1180s the *Dialogue of the Exchequer* discussed at some length collection from crown debtors, including collection from debtors whose lands were already gaged to secure other debts.<sup>24</sup> Historians have noticed landholder indebtedness in the later twelfth century.<sup>25</sup> Kathleen Biddick has argued that by the late twelfth century landholders entered a structure of indebtedness in which they received cash advances for future crops.<sup>26</sup> Again, the change from the twelfth to the thirteenth century was not sudden or dramatic.<sup>27</sup> Debt, however, has an unwanted tendency to accumulate over time. The evidence points to debt becoming more chronic and widespread as the thirteenth century progressed. It was in 1258, not in 1215, that the barons complained of Jews transferring their debts and the land pledged as security to magnates and other powerful persons.<sup>28</sup> Rodney Hilton's evidence of indebtedness comes from the end of the century.<sup>29</sup> Edmund King's study of small and large landowners associated with Peterborough Abbey shows that larger landholders began to have financial difficulties later in the century.<sup>30</sup> Sandra Raban's evidence

<sup>23</sup> Walter Map, *De Nugis Curialium*, M. R. Jones (ed.), revised by C. N. L. Brooke and R. A. B. Mynors (Oxford: Clarendon Press, 1983), 73.

<sup>24</sup> *De Necessariis Observantiis Scaccarii Dialogus qui vulgo dicitur Dialogus de Scaccario*, trans. C. Johnson (London: Thomas Nelson and Sons, 1950), 109–16.

<sup>25</sup> D. Crouch, *The Image of Aristocracy in Britain, 1000–1300* (London: Routledge, 1992), 147–8; Thomas, *Vassals*, 158–60; Keefe, "Proffers for Heirs and Heiresses," 99–109.

<sup>26</sup> Biddick, *Other Economy*, 50–3.

<sup>27</sup> E. Miller, "England in the Twelfth and Thirteenth Centuries: An Economic Contrast?" *Economic History Review*, 2nd ser., 24 (1971), 1–14 cautions against exaggerating the differences between the two centuries.

<sup>28</sup> "Petitions of the Barons," § 25 in Stubbs (ed.), *Select Charters*, 377. Little wonder that Jews were selling debts and the lands pledged to secure those debts. They had paid the tallage of 20,000 marks reported on them in 1239–42 almost entirely in cash: Stacey, *Politics, Policy and Finance*, 155–6. They probably sold debts to pay the tallage in or to replenish their depleted working capital.

<sup>29</sup> Hilton, *Medieval Society*, 50–2.

<sup>30</sup> King, "Large and Small Landowners," 33–45.

of aristocratic debt comes from the late thirteenth and early fourteenth centuries.<sup>31</sup>

Not everyone, of course, was in debt and being in debt did not inevitably lead to financial and social collapse.<sup>32</sup> Some knightly families enjoyed the high standard of living that can come with prosperity.<sup>33</sup> Royal and seigneurial officials could rise financially and socially or use their official incomes to maintain the economic and social positions of themselves and their families.<sup>34</sup> Royal clerks were among the active money lenders in the later thirteenth century.<sup>35</sup> If the rebellious barons defeated at Evesham lost their lands and became indebted, the victors became wealthy. The change from *maritagium* to marriage portion required that one party to the marriage contract have the money, or the credit, to pay or to promise the marriage portion. The other party had to prefer money to land. Most landholders in the thirteenth century had two uses for the comparatively large sums of money involved in marriage settlements: they could purchase land or they could pay their debts. It is unlikely that a landholder would prefer money to land if he were going to use the money to purchase land anyway. Debt drove the monetization of marriage settlements.

One finds fathers of grooms paying fathers of brides for the marriage of their daughters with their inheritances or with grants of *maritagium* or grants in fee tail as substitutes for *maritagium*. For example, in 1200 Geoffrey Canceis agreed with Alan Martel that Geoffrey would give his daughter Margaret to Alan with all of Geoffrey's land in Normandy and specified land in England.<sup>36</sup> Alan would marry Margaret in six years. If Geoffrey had a son in that time or Alan decided not to marry Margaret, then Alan would return Margaret to Geoffrey, but would retain the lands for sixteen years. Alan would pay Geoffrey's debts owed to Jews in the amount of 140 marks. Geoffrey would not gage his other lands without Alan's consent. In 1220 when Henry d'Oilly sought the

<sup>31</sup> Raban, "Land Market and the Aristocracy," 259–61.

<sup>32</sup> Carpenter, "Knightly Class," 736.

<sup>33</sup> R. F. Treharne, "The Knights in the Period of Reform and Rebellion, 1258–67," *Bulletin of the Institute of Historical Research* 21 (1946–8), 1–12; Carpenter, "Knightly Class," 737.

<sup>34</sup> Waugh, "Reluctant Knights," 972–5.

<sup>35</sup> R. Bowers, "From Rolls to Riches: King's Clerks and Moneylending in Thirteenth-century England," *Speculum* 58 (1983), 60–71.

<sup>36</sup> 1 *CRR* 212 (1200).

reversion on a grant of *maritagium* from his son-in-law, Maurice Gaunt, who was not entitled to curtesy, Gaunt responded that he had received the land in *maritagium* with Henry's daughter, Maud, on the condition that he hold the land until he had paid Henry's debt to the crown in the amount of 1,200 marks.<sup>37</sup> Henry agreed with Maurice's answer but added that the debt was to be paid in twelve years, more than eight years had elapsed, and Maurice had not begun to pay the debt. The parties then bickered over who paid whom, when. Other cases that reveal payments by husbands for grants of *maritagium* do not mention the indebtedness of the bride's father.<sup>38</sup> In a variation on the theme, in a case in 1240–1 a groom's father sued a woman for the return of money and chattels given to her to pay her debts as part of an agreement that she marry his son.<sup>39</sup> The marriage did not take place. The case resulted in the sheriff of Oxfordshire supervising a repayment plan.

Where the father of the groom purchased a grant of *maritagium* from the bride's father, money went from groom to bride and land went from bride to groom. Once things got turned around so that money went from bride to groom and land went from groom to bride we have the new form of settlement. Two types of marriage settlement moved in the direction of the new form. The groom or his father might purchase land from the bride's father and give it to the couple in joint fee tail. A case in 1272 reveals a transaction similar to this form of settlement. The bride's father granted the groom land as payment of a debt and the marriage took place later.<sup>40</sup> The point of the case was that the bride did not have *maritagium*; her second husband was not entitled to curtesy. Litigation in 1297 involved a marriage contract calling for the bride's uncle to grant land to the groom's mother who was to resettle the land on the uncle for life, remainder in joint fee tail on the couple.<sup>41</sup> In this type of settlement the land might come out of the groom's father as dower *assensu patris*. In 1253 when a widow sued for her dower *assensu patris*, the jury found that her mother

<sup>37</sup> 9 *CRR* 334–6 (1220).

<sup>38</sup> 17 *CRR*, No. 853 (1242); JUST 1/1046, m.48 (1251–2); JUST 1/652, m.12 (1292).

<sup>39</sup> 16 *CRR*, No. 1465 (1240–1).

<sup>40</sup> KB 26/207, m.26 (Pas. 1272).

<sup>41</sup> CP40/121, mm.295–295d (Mich. 1297).

had given land to the groom's father in order that he permit his son to endow his bride with that land.<sup>42</sup>

More frequent was the settlement in which the bride's father purchased land from the groom or his father and granted the land back as *maritagium*. This form of settlement comes close to the new form of settlement in that money goes from bride to groom and land goes from groom to bride. But the land is routed through the bride's father, and takes the form of *maritagium* instead of being given directly by the groom's father to the couple. Perhaps the parties to this form of settlement were more comfortable with grants of *maritagium* than with the new form of settlement. An example of this form of settlement is found in a case in 1279.<sup>43</sup> The groom sold land to his bride's brother who resettled the land on groom and bride in joint fee tail. When the groom died, his heirs brought mort d'ancestor against his widow and her brother, but lost when the transaction was made clear to a jury. The earliest evidence I have found for this form of settlement is a case in 1225.<sup>44</sup>

In the new form of marriage settlement the father of a bride paid money to the groom or his father for the marriage with his daughter and a grant of land. In the 1230s and 1240s there were a number of cases of prohibition in which the case in ecclesiastical court was permitted to continue because the plaintiff sought to recover a promised marriage portion.<sup>45</sup> Some of the cases involved both grants of land in *maritagium* and promises to pay marriage portions.<sup>46</sup> Later, actions of debt were brought to recover promised marriage portions.<sup>47</sup> Although a grant of land in *maritagium*

<sup>42</sup> KB 26/149, m.2 (Trin. 1253).

<sup>43</sup> JUST 1/918, m.18d (1279).

<sup>44</sup> *BNB*, No. 1683 (1225). In two other cases plaintiffs alleged this form of settlement. In one case the jury found against the plaintiff. JUST 1/482, m.6 [1245]) and in the other case the parties settled (JUST 375, m.92 (1293-4)).

<sup>45</sup> 13 *CRR*, No. 2712 (1230); 14 *CRR*, No. 575, *BNB*, No. 442 (1230); *BNB*, No. 646 (1231); *BNB*, No. 683 (1232); 17 *CRR*, No. 838 (1242); 17 *CRR*, No. 2403 (1243).

<sup>46</sup> 14 *CRR*, No. 1387, *BNB*, No. 550 (1231); *BNB*, No. 629 (1231).

<sup>47</sup> JUST 1/363, m.6 (1262-3); JUST 1/877, m.2d (1279); JUST 1/914, m.5 (1279); JUST 1/763, m.41d (1280); CP40/82, m.97 (Pas. 1290); YB (RS) 20-1 Edw. I 366 (1292); JUST 1/134, m.43d (1292-3), YB (RS) 21-2 Edw. I 593 (1294). In a case in 1287, the defendant raised the objection that the plaintiff had to bring his action to recover a promised marriage portion in ecclesiastical court, lest he recover twice, once in ecclesiastical court and once in the King's Court: JUST 1/832, m.23 (1286-7), CP40/69, m.129d (Mich. 1287). The court put the

had to be completed in the grantor's life, a promise of a marriage portion could be set forth as a debt to be paid by the grantor's executors. The debt could be collected in ecclesiastical court.<sup>48</sup> These cases show that money marriage portions were the subject of litigation as early as the 1230s but they do not reveal the terms of the marriage contract. Nor do other cases involving payments to a father for the marriage of his son supply details of the marriage contract. In 1201, a son recovered in mort d'ancestor against his would-be father-in-law when the assize jury agreed with his claim that the defendant had no right or entry into the land except by his father who had given him the land with the plaintiff so that the plaintiff marry the defendant's daughter.<sup>49</sup> In 1253, John Mansell, a royal official, sued John de Senevill for withdrawing from his wardship and getting married without Mansell's permission.<sup>50</sup> Mansell claimed that he had purchased the marriage and wardship from Senevill's father and had been in seisin for eight years. Senevill added that Mansell was to have acquitted his father of debts to Jews in the amount of 100 marks and was to have married him to Mansell's sister or other close relative. The purchase by a bride's father or relative of a husband with land could merge into the purchase of a gage and thus a loan to the groom's father. In 1261, Edmund de Swinbrook sued Roger de Harpden in covenant for ejectment from the manor of Harpden.<sup>51</sup> Edmund claimed that his father had paid Roger 50 marks for the marriage of Roger's eldest son William to Edmund's sister Agnes and for a nine-year term in the manor of Harpden, Oxfordshire. If William when of age did not accept the marriage arranged for him, the term of years in Harpden was to continue until the money was recouped. After two and a half years,

case aside for judgment. In two later cases the court agreed with the defendant and told the plaintiff he had to sue in ecclesiastical court: CP40/113, m.139 (Trin. 1296); CP40/131, m.46d (Mich. 1301).

<sup>48</sup> 14 *CRR*, No. 1387, *BNB*, No. 550 (1231); 17 *CRR*, No. 993 (1242); 17 *CRR*, No. 1210 (1242). In the first case cited the court held that a woman's second husband could not sue for the marriage portion due on her first marriage where she had not sued during her life. A deathbed attempt to give land as satisfaction of a promise to pay a money marriage portion could fail if seisin were not transferred in the donor's lifetime: JUST 1/460, m.d (1284).

<sup>49</sup> 2 *PKY*, No. 675 (1201).

<sup>50</sup> KB 26/149, m.9 (Trin. 1253).

<sup>51</sup> JUST 1/701, m.8 (1261). For another case that mentions a grant of a son and land by a groom's father to the bride's father see JUST 1/1045, m.2 (1246).

however, Roger ejected Edmund. The defendant conceded the covenant and the breach. Edmund recovered the six and a half years remaining in his term.

(b) *From old to new marriage settlement*

The basic transaction of money marriage portion with bride for groom with land went through four overlapping stages of development. First, the bride's father gave land in *maritagium* plus money and the groom's father undertook to have his son give the bride dower *assensu patris*. In 1236, Humphrey de Bohun, earl of Hereford, arranged for his daughter Alice to marry Roger, son and heir of Ralph de Toeni.<sup>52</sup> Bohun was to give Roger £40 of land in *maritagium* and pay Ralph 200 marks. Ralph would give his son £40 of land for him to give as dower to Alice. Both fathers would retain their lands until the marriage took place. Toeni's grant to his son "*ad dotandum*" his bride was a form of dower *assensu patris*. The appearance of dower *assensu patris* in this and in other marriage settlements approximating the new form of settlement makes one wonder how many of the other cases of dower *assensu patris* on the plea rolls involved similar marriage settlements. The plea roll entries in cases of dower *assensu patris* seldom reveal the term of the marriage settlement but rather, and understandably, focus on the widow's claim to dower. In one case, however, there is a hint that there was more to the alleged grant of dower *assensu patris*.<sup>53</sup> The defendant, the deceased husband's father, answers that the bride's father has not kept his agreement ("*conventio*"). This attempt to justify his refusal to deliver dower fails. Having acknowledged his charter granting dower, the defendant cannot raise breach of covenant by the plaintiff's father because her father's agreement, according to the justices, "*in nullo tangit*" ("in no way concerned") her.<sup>54</sup>

In the second stage, the grant of land in *maritagium* drops out.

<sup>52</sup> *Beauchamp Cartulary*, Nos. 379, 380.

<sup>53</sup> 11 *CRR*, No. 2814 (1229).

<sup>54</sup> Another example of this type of settlement is the marriage of Roger son of William de Huntingfeud, to Joyce, daughter of John de Engayne: *Close Rolls, 1272-1279*, 571-2 (1279). William will give Joyce £40 land in dower and John will give Roger £20 land in *maritagium* with Joyce. John will give William 300 marks for the marriage.

The bride's father gives a money marriage portion and the groom's father undertakes to have his son give his bride dower *assensu patris*. In 1267 Robert de Vere, earl of Oxford, and Roger Montgomery entered into an agreement for the marriage of the earl's eldest son Robert to Margaret, Roger's daughter.<sup>55</sup> The earl, a supporter of the defeated Simon de Montfort, had lost his land to Roger and had agreed to redeem them for a payment of 4,000 marks. Robert and Roger came to an agreement for the payment of 2,500 of the 4,000 marks.<sup>56</sup> Roger's marriage portion with his daughter Margaret was forgiveness of 1,000 of the 4,000 marks owed by Robert. Robert was to give his son power to endow Margaret with £100 worth of land in specified places in the event that the groom died before his father. If he outlived his father, Margaret was to have her one-third share in her husband's lands inherited from his father. Provisions were made in the event that bride or groom died before coming of age. There are other examples of this type of settlement, the latest of which examples was made in 1305.<sup>57</sup>

<sup>55</sup> *Charter Rolls*, II, 90–1.

<sup>56</sup> *Ibid.*, at 89–90.

<sup>57</sup> (a) JUST 1/956, m.31 (1285). A marriage agreement dated 1250. Bride's father pays 20 marks and gives additional 8 marks for groom to purchase land in *maritagium*. Groom's father consents to his son's endowing his bride out of all of his father's lands.

(b) *Charter Rolls*, I, 438–9 (1252). Marriage of Gilbert son of Richard de Clare, earl of Gloucester and Hertford, to Alice, daughter of Hugh le Brun and niece of William de Valence and Aymer de Valence, bishop elect of Winchester. Aymer and William to pay 5,000 marks. Richard to give £200 as Alice's dower to Aymer and William.

(c) *Patent Rolls, 1266–1272*, 623 (1272). Marriage of Nicholas, son of Nicholas de Cryoill to Margery, daughter of Gilbert Peche. Nicholas with father's assent to give Margery the manor of Benehale, Suffolk, as dower.

(d) *Patent Rolls, 1272–1279*, 487–8 (1278). Marriage of John, son of Robert FitzRoger and Hawisia, daughter of Robert de Tybetot. John to dower Hawisia with £100 of land. When John reaches the age of twenty his father is to enfeoff him of that land. Tybetot is bound to pay Robert FitzRoger 600 marks, of which 400 is to be retained if Hawisia dies under the age of thirteen without an heir of her body.

(e) *Close Rolls, 1279–1288*, 68 (1280). Marriage of Robert, son of Robert de Tateshal to Eve daughter of Robert de Tybetot. Robert to endow Eve with his father's assent of £100 of land in the manors of Tost and Thid, Lincolnshire, and Holewell, Leicestershire. Robert de Tybetot to pay 600 marks for the marriage.

(f) *Close Rolls, 1288–1296*, 144 (1290). Marriage of John, son of William de Vescy to Clemencia, daughter of Henry III count of Avaugour in Brittany and kinswoman of Queen Eleanor. William promises to endow Clemencia with £250

In the third stage of development, a grant in jointure is added to the grant of dower *assensu patris*. In 1243 Elias de Witfield agreed with Simon de Leukenor that Elias' son and heir Henry would marry Simon's daughter Sybil.<sup>58</sup> Simon gave Elias 140 marks. Henry with his father's consent ("*voluntate et licencia*") would endow Sybil with the manor of Ropford, Oxfordshire, so that she would have the manor as dower whether or not her husband survived his father. Elias would grant the manor to Henry and his heirs by Sybil. Simon would take custody of the manor until Henry came of age for the sustenance of the couple until their marriage. Elias agreed that he would in future ("*decetero*") not give land to the Jews nor alienate any land. He further undertook to make Henry's children by Sybil his heirs of all of his lands, except two specified parcels.

Five things are worth noting about this agreement. First, the money marriage portion purchases a son-in-law with dower *assensu patris*. Secondly, although the grant to the husband is in fee tail it is not quite jointure, for it is not to Henry and Sybil and the heirs of their bodies, nor to Henry and Sybil in fee simple. A grant of dower *assensu patris* does not by itself assure that the children of the marriage are protected against the children of a subsequent or earlier marriage of the groom. Limiting the inheritance to Henry's heirs by Sybil, however, protects Sybil's children from claims by children Henry might have from a later marriage. The life estate in Sybil in the form of dower when added to the limited fee tail given to Henry has the same effect as a joint fee tail in Henry and Sybil. The point is that the parties have not seen that a joint fee tail could have the same effect as dower plus a special fee tail in the groom. They are still working with dower and fee tails and are putting the pieces together to achieve their goals: a life estate in the wife and protection for her children of the marriage. Thirdly, Simon has Elias undertake to make the

of land. If William dies before his son, Clemencia to have common law dower in all of the land John inherits from William. For Clemencia's parentage see J. C. Parsons, *The Court and Household of Eleanor of Castile in 1290* (Toronto: Pontifical Institute, 1977), 47.

(g) *Patent Rolls, 1301-1307*, 327 (1305). Marriage of John, son of John de Mohun to Christiana, daughter of John de Segrave, lord of Segrave. John de Mohun the father to provide dower in 100 marks for land and is to leave to his son £600 of land clear of debt. John de Segrave to pay £400 for the marriage.

<sup>58</sup> 17 *CRR*, No. 1514 (1243).

children of Henry and Sybil his heir, not only for the manor of Ropford but for all of his lands. It is not clear what Elias can do to execute his undertaking. A few decades later, he might resettle the land on himself for life with remainder to Henry and the heirs of his body by Sybil. If this conveyancing strategy had come to the minds of the parties they might have mentioned it. Again, the parties are not sufficiently aware of the ways in which fee tails might be manipulated to achieve desired results. Incidentally, both the vague undertaking by Elias and the life estate–entail settlement would not preclude Sybil from her common law dower in Elias' other lands that descend to Henry and thence to Henry's children by Sybil. Fourthly, Elias' undertaking in future not to gage or sell lands suggests that he was in financial difficulties if not in debt. Protection of his lands so that they have a good chance of descending to Sybil's children and Simon's grandchildren was not only a matter of protecting their descent from remarriages by Elias or Henry but also of protecting them from Elias' creditors. Fifthly, although the parties are cobbling together dower *assensu patris* and a special fee tail in the groom and are thus achieving the same effect as jointure, the contract, given its date of 1243, is precocious. It will take a few decades before others discover how fee tails might be combined with dower *assensu patris* to provide jointure.

In a complicated transaction in 1275, Queen Eleanor arranged a marriage between Maud de Fiennes (sister of William de Fiennes) and Humphrey de Bohun (grandson of Humphrey de Bohun, earl of Hereford).<sup>59</sup> William was to pay £1000 as marriage portion to Queen Eleanor who would pay the sum to Bohun. Humphrey, the grandfather, gave his grandson a charter authorizing him to endow Maud with one-third of the grandfather's lands. The grandson gave his bride one-third of his own lands and the one-third authorized by his grandfather. The grandfather gave the castle and manor of la Hay to the king, who granted it to the grandson and Maud and the heirs of their bodies, remainder to the right heirs of the husband.

In the Fiennes–Bohun contract there was both a grant of dower *assensu patris* and a grant in jointure. The two grants could be combined in that land assigned as dower *assensu patris* could turn

<sup>59</sup> *Charter Rolls*, II, 190–2.

into jointure if the groom survived his father. An inquisition *post mortem* taken in 1298 reveals that Roger de Nodariis gave land to his son Roger jointly with his wife Joan on the condition that if Roger the son should die before his father, Joan was to hold the land as the whole of her dower, but if Roger survived his father, he and Joan were to hold the land jointly.<sup>60</sup> In 1305 Robert, son of Walter lord of Wodeham, agreed with John Butecourte that his son Robert would marry John's daughter, Joan.<sup>61</sup> Robert the father was to arrange for the couple to be enfeoffed of the manor of Shering, Essex, on the condition that if Robert the son died before his father, Joan was to hold the manor for her life as all of her dower, but if Roger the son survived his father, Robert and Joan were to hold the manor jointly in fee tail, remainder to the right heirs of Robert the father. The efforts to have dower *assensu patris* turn into jointure if the groom survives his father do not spell out what is to happen if the groom does not survive his father yet has issue of the marriage surviving him. There is no protection for the issue of the marriage in that situation, protection that a grant of jointure would provide. Incidentally, the bride's acceptance of the designated dower *assensu patris* in the event that her husband dies before his father, does not preclude her common law dower if her husband survives his father.

In the fourth stage, the grant of dower *assensu patris* drops out. The money marriage portion purchases a son-in-law and a grant of land in joint fee tail to bride and groom. One step toward removing dower *assensu patris* as a grant of land was to convert that grant into an obligation to pay money. Dower *assensu patris* protected the bride if her husband died before her husband. An obligation undertaken by the groom's father to pay money to the bride if the marriage ended before the death of her father-in-law could serve the same purpose. The obligation was, in effect, to return all or part of the marriage portion. In 1302, a woman sued her father-in-law under just such an obligation when her marriage ended in divorce.<sup>62</sup>

Beginning in about 1280 there is evidence of the new form of marriage settlement. In 1279–80 Thomas de Multon granted land

<sup>60</sup> 3 *IPM*, No. 473, 365 (1298). See *ibid.*, 366.

<sup>61</sup> *Patent Rolls, 1301–1307*, 320 (1305).

<sup>62</sup> CP40/144, m.236d (Mich. 1302).

to his son Thomas and his wife in joint fee tail before their marriage.<sup>63</sup> In 1280 when Philip de Belvaco, son of Master Simon, the king's surgeon, married Matilda daughter of Philip le Tayllur, Master Simon granted the couple lands in London in joint fee tail. In 1283 John Danyell granted his son and heir Richard and Joan, daughter of Matthew de Knyveton, whom Richard was to marry, various lands jointly, though whether in fee tail or fee simple is not clear.<sup>64</sup> In 1291 Simon de Divileston gave his son and heir Thomas and Lucy daughter of William Heyron his manor of Divileston in joint fee tail for the service of paying 24 marks annually during Simon's life and paying all of Simon's debt to Aaron the Jew, as was agreed between Simon and Lucy's father William Heyron.<sup>65</sup> This conveyance by a groom's father might have been made some time after the marriage.<sup>66</sup> Unfortunately, it is not clear whether or not the grants of jointure were accompanied by dower *assensu patris*. The grant out of the groom's parent could be called, or perhaps take the form, of free *maritagium*.<sup>67</sup> And the bride's father could give land in *maritagium* in exchange for jointure from the groom's father.<sup>68</sup>

It is hard to determine when the developed form of new marriage settlement began to be used with some frequency. Inquisitions *post mortem* in Edward I's reign, especially after 1280, fairly frequently report that tenants-in-chief died holding land jointly with their wives. Similarly, after 1280 escheators are ordered fairly frequently to give lands held by tenants-in-chief jointly with their wives to their widows. But it is seldom clear whether the tenant-in-chief and his wife held jointly because of a marriage settlement or because of a later spousal resettlement on husband and wife. In a number of instances the inquest jury reported that the father of the decedent had enfeoffed his son and his son's wife jointly.<sup>69</sup>

<sup>63</sup> 3 *IPM*, No. 285 (1295) reporting a grant made in 1279–80.

<sup>64</sup> *Close Rolls, 1279–1288*, 111, 112 (1280).

<sup>65</sup> *Patent Rolls, 1281–1292*, 60 (1283).

<sup>66</sup> For other grants by a groom's father to his son and daughter-in-law jointly, where grants might have been marriage settlements see *Close Rolls, 1279–1288*, 349 (1285), 426 (1286).

<sup>67</sup> 2 *IPM*, No. 10 (1284); 2 *IPM*, No. 695 (1288); 3 *IPM*, No. 531 (1299).

<sup>68</sup> *Close Rolls, 1296–1302*, 256–7, 265, 3 *IPM*, No. 524 (1299) (marriage of Hugh Braunteston to Margaret Yatyingdene); *Langley Cartulary*, No. 91 (1311).

<sup>69</sup> 2 *IPM*, No. 326 (1279) (reporting a grant made in Henry III's reign); 2 *IPM*, No. 375 (1281) (reporting a grant made in Henry III's reign); 2 *IPM*, No. 638

Similarly, orders to escheators sometimes reveal that the decedent's father had enfeoffed the decedent and his wife jointly.<sup>70</sup> Although these paternal enfeoffments are of the type a groom's father would make pursuant to the new form of marriage settlement, not all of these paternal enfeoffments were made pursuant to marriage contracts. The state of the evidence does not permit more than a surmise that it was not until the second decade or so of the fourteenth century that the new form of marriage settlement became the standard form.

It remains to consider how the parties to the new form of marriage settlement could protect the settlement in the courts. The protection of grants of land in *maritagium* was discussed in Chapter 1. Here the focus will be on grants from the groom's side of the agreement. Where the groom and his father agreed to provide the bride with dower *assensu patris*, she had her writ to secure her dower granted to her at the wedding.<sup>71</sup> Where the groom or his father settled jointure upon the groom and bride, the groom might defeat jointure by alienating the land during the marriage. The writ of entry *cui in vita*, originally designed to protect a woman from her husband's alienation of her inheritance or *maritagium*, was adapted for jointure so that a widow could use the writ to set aside her husband's alienations of land given to him and to her as jointure.<sup>72</sup> The lineal heirs of the couple were

(1287); 2 *IPM*, No. 776 (1290); 3 *IPM*, No. 97 (1293); 3 *IPM*, No. 339 (1296); 3 *IPM*, No. 348 (1297).

<sup>70</sup> *Close Rolls, 1272–1279*, 555 (1279); *Close Rolls, 1279–1288*, 457 (1287); *Close Rolls, 1288–1296*, 53 (1289), 98–9 (1290), 231 (1292); *Close Rolls, 1307–1313*, 190 (1310), 191 (1310), 305 (1311), 491 (1312).

<sup>71</sup> Biancalana, "Widows at Common Law," 318–22.

<sup>72</sup> e.g. YB (RS) 21–2 Edw. I 60 (1293); *Beysin v. Segrave*, YB Pas. 5 Edw. II, 33 S.S. 85 (1312); *De la Hay v. Workesley*, CP40/283, m.17d (Mich. 1330); *Iarpville v. Erie*, CP40/318, m.105d (Pas. 1339); *Harold v. LeClerk*, CP40/319, m.249 (Trin. 1339); *Notingham v. Notingham*, CP40/320, m.321d (Mich. 1339); *Walton v. Staynford*, CP40/320, m.562 (Mich. 1339); *Foulflode v. Paneseye*, CP40/336, m.212 (Mich. 1343); *Presteson v. Stokton*, CP40/416, m.280d (Mich. 1363). A register of writs from the 1260s supplies a writ *cui in vita* for a widow who had been given lands jointly with her husband: *Early Registers of Writs*, 99. The rubric above the writ says that the writ was for the situation in which a husband alienates his wife's inheritance. Although this writ might be an early instance of a *cui in vita* writ to recover jointure, there are three reasons for believing otherwise: the writ does not describe the grant as a joint fee tail; the rubric points to the case of a woman's inheritance; and a woman might be given her inheritance by the lord of the fee upon her marriage.

protected by *De Donis*. As Payling has argued, by protecting the issue of the marriage from both alienations by the father and entries by the heir general *De Donis* protected the interest of a bride's father in giving a marriage portion,<sup>73</sup> because his interest was in his descendants by his daughter. As for facilitating the grant of jointure, *Quia Emptores* was also important, for where the groom did not have a father living to make a grant of land in jointure, he could provide his bride with jointure only by conveying the land to a strawman who conveyed back to the groom and bride in joint fee tail. *Quia Emptores* removed the tenurial complications from grant-regrant transactions.<sup>74</sup>

## 2. THE FREQUENCY AND USE OF ENTAILS

Historians have written of the increasing popularity of fee tails, and of fee tails male, in the fourteenth and fifteenth centuries.<sup>75</sup> Inadvertently or not, the impression left might be that most conveyances came to be made in fee tail or, what is not the same thing, most land came to be held in fee tail. Although it is fairly clear that most conveyances gave the grantee fee simple, not fee

<sup>73</sup> Payling, "Late Medieval Marriage Contracts," 30–1. I think that Payling goes a bit too far when he says that the effect of *De Donis* "was thus to complete the decline of the *maritagium* for the bride's issue could no longer be disinherited of their mother's jointure and so no longer required the security given to them by a settlement of lands by the bride's father to which they were inheritable but to which their father's issue by a later wife were not": *ibid.*, 51. Three points come to mind. First, Payling does not concern himself with alienation by the husband. Until chapter 3 of the Statute of Gloucester (1278) the bride's issue had no remedy against alienation by their father of their mother's *maritagium*. See Chapter 1, above, pp. 60–3. Secondly, once the formedon in the descender writ was available, the bride's issue was protected from the heir general by another marriage of the husband even if the bride's issue was not the first of the two claimants to enter the land. See Chapter 1, above, pp. 76–80. Thirdly, no statute completed the decline of *maritagium*. *Maritagium* had in many cases become marriage portion before the groom's grant took the form of joint fee tail. Nor could it be accurate to say that any statute completed the transition from dower *assensu patris* to jointure. All this having been said, Payling is certainly right to point to *De Donis* as providing important protection for the new form of marriage settlement.

<sup>74</sup> J. M. W. Bean, *The Decline of English Feudalism, 1215–1540* (Manchester: Manchester University Press, 1968), 113–14.

<sup>75</sup> e.g. M. Keen, *English Society in the Later Middle Ages, 1348–1500* (London: Penguin Books, 1990), 177; Bean, "Landlords," 550.

tail, it is impossible to determine how much land was held in fee tail or even what proportion of the land held by landholders was held in fee tail at any given time. What one can try to do is to get a sense of how frequently land was put into fee tail and what circumstances and motives led to the entailing of land. The question of frequency is, of course, tied to that of the particular deployments of entails, but the artificial separation of the two questions might ease exposition.

(a) *The frequency of fee tails*

One method of getting a sense of the relative frequency of grants in fee tail is to consider the proportion of final concords that created fee tails. Although in the fourteenth and fifteenth centuries final concords were sometimes actually used to settle disputes over land,<sup>76</sup> much more frequently a final concord was merely a means of conveyance.<sup>77</sup> The proportion of final concords used to convey fee tail, as opposed to fee simple or life estates, gives some indication as to the frequency with which grantors conveyed fee tail. A study of final concords can also help in understanding the motives for creating fee tails. For the historian, final concords have the advantage that they survive in manageable numbers. They raise, however, the question of how representative they were of the larger world of conveyancing.

There were a number of different types of final concord and much technical learning on the matter.<sup>78</sup> The subject can be simplified into three basic types of final concord. First, there was the fine *sur cognisans de droit tantum* with release. This was the final concord counterpart to a release or quitclaim. As in the case of any release, the person receiving the release, the conusee, had to

<sup>76</sup> See *Tropenell Cartulary*, II, 116–18, where arbitrators in 1404 order disputants to enter into a final concord.

<sup>77</sup> C. A. F. Meekings, "Introduction" in C. A. F. Meekings (ed.), *Abstracts of Surrey Feet of Fines 1509–1558* (Surrey Record Society, vol. 19, 1946); C. Rawcliffe, "Introduction" in H. J. H. Garratt and C. Rawcliffe (eds.), *Derbyshire Feet of Fines 1323–1546* (Derbyshire Record Society, vol. 11, 1985).

<sup>78</sup> The discussion of the forms of final concords is based on Meekings, "Introduction" and G. J. Turner, "Introduction," G. J. Turner (ed.), *Feet of Fines relating to the County of Huntingdon, 1194–1603* (Cambridge Antiquarian Society, No. 37, 1913).

be in possession of the lands at the time of the fine.<sup>79</sup> Secondly, there was the fine *sur cognisans de droit come ceo que il ad de son done*. This form of fine recorded an earlier transfer of land from grantor, conusor, to grantee, conusee. Thirdly, there was the fine *sur done, grant, et render*. In this form of fine, A acknowledged the right of B in return for which B granted and rendered the land back to A. This form of fine enabled a grant-regrant transaction to be recorded in a single document. For the purpose of creating entails the second and third, and especially the third, form of fine were the more important. The second form was used to record marital grants in fee tail. The third was used to create spousal settlements in fee tail or to give the parent landholder a life estate and his or her child a remainder in fee tail.

One advantage of a final concord was that it made the conveyance a matter of record. As such, a final concord bound the parties to the fine and their heirs.<sup>80</sup> Until the 1360 statute of non-claim,<sup>81</sup> a final concord also bound a third party, not suffering certain incapacities, who failed to put in his claim within a year and a day from the day on which the fine was levied.<sup>82</sup> Another advantage of a final concord was that, outside boroughs, a married woman could be bound in her conveyance of her inheritance, *maritagium*, or jointure only by final concord. The justices would question the woman, separately from her husband, in order to determine whether she consented to the transfer.<sup>83</sup> One disadvantage of using a final concord was that a final concord cost more than a conveyance simply by charter. Nor could a final concord be used honestly to transfer lands in quantities of less than an acre,

<sup>79</sup> YB (RS) 34–5 Edw. I 434 (Hil. 1307) (*per Herle*).

<sup>80</sup> e.g. *Mymekan v. Mymekan*, YB Mich. 9 Edw. II, 45 S.S. 37–43 (1315); *Bagendon v. Pleshey*, YB Hil. 11 Edw. II, 61 S.S. 163 (1317).

<sup>81</sup> 34 Edw. III, c. 16 (1360), *Statutes of the Realm*, I, 368. For earlier petitions for the statute see 2 *Rot. Parl.*, 142, No. 48 (1343) and 203, No. 20 (1348).

<sup>82</sup> e.g. *Bernard v. LeFevre*, YB Hil. 11 Edw. II, 61 S.S. 182–8 (1317); *Bradeston v. Bradeston*, CP40/273, m.30 (Pas. 1328); YB Trin. 7 Edw. III, f. 37, pl. 41 (1333); YB (R.S.) 13 Edw. III, 82–99 (Mich. 1339). The incapacities were youth, imprisonment, insanity, and being beyond the four seas. The origin of this rule is a little mysterious. Bracton mentions it (4 *Bracton* 353–9). And it appears in a statute of uncertain date which probably was not a statute (*Statutes of the Realm*, I, p. 214).

<sup>83</sup> For an example of a woman refusing consent to a final concord see YB Mich. 4 Edw. II, 22 S.S. 151 (1310). A woman could not, however, consent to an alienation of her dower. Biancalana, “Widows at Common Law,” 307–8.

because Chancery did not issue writs specifying smaller parcels of land.<sup>84</sup> Consequently, the lands mentioned in fines are measured in acres, not selions as one finds in charters. The probable exclusion of small transactions from final concords means that a survey of final concords underrepresents sales in fee simple, for the truly small transactions were almost always sales of land. And, as we will see, purchasers seldom took title in fee tail. Another disadvantage of final concords was that a final concord of entailed land was, in the word of *De Donis*, null.<sup>85</sup> If they learned that a final concord involved entailed land, the justices rejected the final concord.<sup>86</sup> The justices were, however, seldom able to screen out final concords of entailed lands. The effect, if any, of such final concords could present a difficult issue in later litigation over the land.

The justices of Common Pleas inspected proposed fines and rejected those that did not fit accepted forms or would be a source of later difficulties. There was thus a difference between the forms of conveyance outside of court and the forms accepted for final concords. Judicial restrictions on the acceptable forms of final concords does not, however, render a survey of final concords unrepresentative of the larger world of conveyances, because judicial objections as to form were for the most part on a level of detail which did not affect the types of estates that could be granted by final concord. Two examples might make this clear, in addition to being of interest on their own. In 1320 the justices rejected a fine *sur done, grant, et render*, in which the regrant would be to one John in fee tail, remainder to his right heirs.<sup>87</sup> The justices objected on the grounds that if John's issue were also his heir, he would have both fee tail and fee simple. Seeking to keep successive estates separate from each other, the justices required the fine to be modified to limit a remainder to John's son,

<sup>84</sup> If the parties inflated the amount of land so that they could use a final concord, they risked creating a discrepancy between the land transferred and the land described in the fine. When the fine was used in litigation, the opposing party could answer that the land in dispute did not pass by the fine. The maker of the fine, or the party claiming through him, would have to trust that a jury would ignore the discrepancy.

<sup>85</sup> 13 Edw. I, c. 1 (1285), *Statutes of the Realm*, I, 72.

<sup>86</sup> YB Mich. 12 Edw. II, 65 S.S. 21 (1318).

<sup>87</sup> YB Mich. 14 Edw. II, 104 S.S. 114 (1320).

Thomas, before the remainder to John's right heirs. One wonders whether the modification would be successful for the purpose. In either form, a survey of final concords could count the fine as a grant in fee tail. A fine could limit an entail jointly to a married couple with a remainder to the right heirs of the husband or the wife.<sup>88</sup>

A grant by final concord to a husband and wife could not take the form "to the husband and the wife and their heirs." A grant in this form would be changed so as to be limited to the heirs of the husband or the heirs of the wife or to give the couple a joint entail. The reason for rejecting grants to "husband and wife and their heirs" was to avoid confusion as to whether the grantor had given fee tail or fee simple.<sup>89</sup> Grants in this form, however, can be found in cartularies.<sup>90</sup> Bracton had interpreted a grant to husband and wife and their heirs to be a grant in fee tail.<sup>91</sup> This form of grant, contrary to Bracton's interpretation, was probably thought to give fee simple. Frequently the grant is to the husband and wife and their heirs and assigns. Whether a grant spoke of heirs of the body, reserved a reversion, or limited a remainder were taken to be signs of a grant in fee tail.<sup>92</sup> At any rate, the requirement that a final concord include a limitation to the heirs of the husband or the wife would not render final concords unrepresentative by under-representing grants of fee simple to married couples.

Comparison of final concords with secular cartularies suggests that a survey of final concords probably underrepresents grants of fee tail to sons or brothers and to daughters or sisters outside the context of the recipient's marriage. It is shown below that almost all grants of fee tail by final concord were made as a marital, a spousal, or an estate-planning settlement. Seldom was a final concord used to convey fee tail to an individual. Perhaps some of the comparatively few grants to individuals were indeed grants to

<sup>88</sup> BL Add. Ms. 31826, f. 137; YB Pas. 6 Edw. III, f. 17, pl. 24 (1332).

<sup>89</sup> e.g. YB (RS) 21-2 Edw. I 3 (Pas. 1293).

<sup>90</sup> *Berkeley Cartulary*, BL Harley Ms. 265, ff. 7-7v, 20v, 24-24v, 26, 34v-35.

<sup>91</sup> 2 *Bracton* 80, 96.

<sup>92</sup> YB Mich. 10 Edw. II, 52 S.S. 46 (1316); YB Hil. 5 Hen. V, f. 6, pl. 13 (1418). A form of grant that Bracton took to be a conditional fee simple - to A and his heirs if A has an heir of his body with a reversion to the donor if A dies without an heir of his body - was held to grant a fee tail because of the reversion limited in the grant. 2 *Bracton* 68-9; Lib. Ass. 37 Edw. III, f. 219, pl. 15 (1353).

sons or daughters and the relation of the parties did not appear on the fine. More likely, however, fee tails to younger sons or daughters were thought not to warrant the trouble and added security of a fine. Marital settlements executed contracts between families. Spousal and other resettlements tended to reduce the chance of wardship. In these cases, a final concord could prove its worth. A grant to a younger son or daughter did not require the solemnity of a final concord.

Table 3.1 presents the results of a survey of the final concords from seven counties – Essex, Derbyshire, Lancashire, Somerset, Staffordshire, Sussex, and Warwickshire, during the period from 1301 to 1480.<sup>93</sup> These counties were selected on a pragmatic basis. They are the only counties (a) for which there are printed copies or, more frequently, calendars of final concords for the entire period from 1301 to 1480 and (b) the calendars are sufficiently detailed as to reveal the terms of the conveyance. The use of unprinted final concords would have consumed too much time. Although the seven counties include three contiguous north Midlands counties, no county or group of counties presented substantial differences from any of the other in the pattern of types of conveyance or the comparative rise and decline in the number of final concords over time. The numerous final concords of Essex balance the final concords from the north Midlands. Table 3.1 divides the final concords into three groups – those that conveyed fee tail, those that conveyed fee simple, and other conveyances – for each decade. Four types of conveyance were counted as a conveyance of fee tail: a conveyance in fee tail to one or more persons, none of whom were married to another grantee; a conveyance to a husband and his wife in fee tail; a conveyance of one or more life estates followed by one or more remainders in fee tail; and a conveyance to a parent or parents and their child with the fee tail in the child. The same four types of conveyance in fee simple were counted as a conveyance in fee simple. The category of other conveyances was a convenient place to put grants of life estates and grants into mortmain.

Table 3.1 presents evidence that the number of final concords declined in the period from 1301 to 1480. The decline was not steady and continuous but occurred in discrete steps. If a serious

<sup>93</sup> See the Appendix to this chapter for all tables mentioned in the text.

reduction in the number of fines be taken to be a reduction of about 20 percent or more, then, putting aside the odd decade of 1311–20, in which there was an unusually high number of final concords, there were four serious reductions in the number of final concords.<sup>94</sup> The first occurred in the decade 1351–60; the second occurred in the two decades 1371–90; the third in the decade 1411–20; and the fourth, in the decade 1451–60. In each instance, both the higher number of final concords before and the lower number after the decline continued for some time so that it is not likely that the discrete declines are the result of presenting the data in decades, as opposed to other time periods, or in the choice of decades. The steps downward in the number of final concords were real.

The first serious decline in the number of final concords, that of 1351–60, came in the decade following the outbreak and spread of plague in 1348–9. The decline in population was certainly a factor in the decline of final concords, but cannot explain the specific nature of the decline in final concords in the decade 1351–60 – as Table 3.1 shows the total decline in the number of final concords in the sample was 247, of which 223 or 90 percent of the decline can be attributed to a decline in the number of grants in fee tail. One would expect a decline in population to affect all types of final concords more or less equally. The connection between a population decline and a lesser number of grants in fee tails is not obvious. Table 3.2 divides the grants in fee tail into the four subcategories of grants to individuals, grants of a life estate–remainder in fee tail, grants to a husband and wife in fee tail, and grants to a parent or parents and their child with a fee tail in the child. This latter type of grant was functionally similar to a life estate–entail grant where, as was frequently the case, parents held the life estate and their child had the remainder in fee tail. The decline in these two types of grants combined between the decades 1341–50 and 1351–60 account for a little more than half of the decline in fee tails in this period. The decline in these life estates–entail final concords can be attributed to the increased conveyances to feoffees to uses. A grant to feoffees to uses with instructions to

<sup>94</sup> The declines in the number of final concords discussed in the text occurred in all seven counties included in the survey. None of the declines can be attributed to bizarre events in one county.

provide jointure to one's widow and an entail to one's heir was functionally similar to a life estate–entail settlement. The feoffees are inserted between life estate and the remainder and are given other duties such as paying debts, making charitable bequests, providing marriage portions to daughters and portions to younger sons.<sup>95</sup> The declines in the number of fee tails granted to individuals and the number of fee tails granted to husband and wife can be attributed to the decline in population. The latter type of grant was usually a marriage settlement. A smaller population would have fewer marriages. But some of this decline, as well as the decline in life estate–entail grants is attributable to the increased deployment of uses. The shift to uses as well as the decline in population explains the downward step in the number of final concords in the decade 1351–60.

The second serious decline, that of 1371–90, came in the decades following the recurrences of plague in 1361–2, 1368–9, and 1374–5. Again, however, the decline in population does not explain the entire decline in the number of final concords. The decade 1361–70 saw an inexplicable rise in the number of transfers in fee simple. If this decade is ignored and the preceding decade compared with the decade 1381–90, when the decline in final concords is first pronounced, the number of final concords decline by 163. Of this decline, about half was in grants in fee simple and about half in grants in fee tail. Table 3.3 shows that the decline in grants in fee simple were grants to husband and wife. Although the number of grants in fee simple remained pretty much unchanged, Table 3.4 suggests that grants to one or two individuals declined substantially but that that decline was made up by the increase in grants to three or more individuals, especially by grants to four or more individuals. Grants to four or more individuals were more likely to have been grants to feoffees to uses. Grants to one or two individuals were more likely to have been sales. The statute of non-claims was likely to make final concords less valuable as a means of transacting a sale,<sup>96</sup> for the statute meant that third parties would no longer be barred by their

<sup>95</sup> J. Biancalana, "Medieval Uses" in R. Helmholz and R. Zimmerman (eds.), *Itinere Fiducia: Trust and Treuhand in Historical Perspective* (Berlin: Duncker and Humblot, 1998), 119–22.

<sup>96</sup> 34 Edw. III, c. 16 (1360), *Statutes of the Realm*, I, 368.

failure to register their claim. Heirs to the parties would continue to be bound. Barring strangers was probably more important to sales than to transfers to feoffees. The effect of the statute, then, was made up for by the increased enfeoffment to uses. The continuing and increasing number of feoffments to uses probably also explains the decline in grants to husband and wives in fee simple. These grants were not likely to be marital grants, for marriage settlements usually included a grant in joint fee tail. These grants were likely to be spousal settlements made some years after marriage as an estate-planning strategy. Once, however, enfeoffment to uses became more common, a husband could direct his feoffees to give his widow a life estate. The number of final concords to husband and wife in fee simple would decline. As for the decline in the number of grants in fee tail, Table 3.2 shows that the decline is about evenly divided between grants in the life estate-entail form and grants to husband and wife in fee tail. The decline in the former type of grant was the result of increased deployment of uses. The decline in the latter type remains a mystery, although spousal, as opposed to marital, settlements could take this form.

The next major decline, that of the decade 1411–20, was probably the result of a decline in the value of a final concord. Professor Bean, who noticed a decline in the number of final concords in the fifteenth century, suggested that the cost of final concords might have been a reason for their less frequent use.<sup>97</sup> This suggestion needs to be modified, because there is no evidence of an increase in the cost of final concords. The cost of a final concord by itself, however, is not determinative, because the cost of a final concord was a transaction cost. As a transaction cost, what was important was its cost relative to the value of the transaction or to the value of using that means of conducting the transaction. If land values fell and the cost of final concords remained constant, one would expect that a conveyance would have to include more land than previously in order to justify the cost of using a final concord. Some transactions once made by final concord would be made without them. Although land values did fall in the fourteenth and early fifteenth centuries, it is far from clear why the decline in land values should bring about a discrete

<sup>97</sup> Bean, "Landlords," 562.

decline in the use of final concords in the decade of 1411–20. One would, rather, expect a smoother descent. Another possibility is that the value of a final concord as a means of conducting a land transaction declined. The 1360 statute of non-claims made final concords less attractive but it is unlikely that the effect of the statute was delayed for a half century. There was, however, a case in 1406 which lessened the value of a final concord as a means of resettling land. *De Donis* provided that a fine of entailed land was “*in iure nullus*.”<sup>98</sup> Some lawyers read the statute to mean that a final concord would not bar a plaintiff to a formedon writ.<sup>99</sup> But this narrow view was not generally accepted.<sup>100</sup> By 1406, it was clear that a final concord did not bar a claim to entailed lands or to a reversion or a remainder. The question in the 1406 case was whether a final concord of entailed land discontinued the entail so that the issue in the entail did not have a right of entry but had to bring his formedon writ.<sup>101</sup> A husband and his wife held in fee tail. By final concord they had quitclaimed with warranty to feoffees. After the husband’s death, the feoffees by final concord granted the land to the wife for her life, remainder to the defendant’s mother. The plaintiff, the issue of the husband and wife, had entered upon the death of his mother, had been ousted by the defendant, and had brought novel disseisin. If the final concord to the feoffees had discontinued the entail, the plaintiff would be forced to his formedon writ. The plaintiff wanted to plead that the final concord was not a discontinuance because his mother, throughout both final concords, had never changed possession. The Statute of Fines seemed to take away precisely this plea.<sup>102</sup> The statute provided that one could not plead in avoidance of a fine that one’s ancestor had not changed possession at the time of the fine. The plaintiff argued that the Statute of Fines did not apply because *De Donis* had provided that fines of

<sup>98</sup> 15 Edw. I, c. 1 (1285), *Statutes of the Realm*, I, 72.

<sup>99</sup> *Brok v. Brok*, YB Pas. 12 Edw. II, 70 S.S. 100 (1319); YB Pas. 6 Edw. III, f. 20, pl. 35 (1332) (Schardelewe); YB Mich. 9 Edw. III, f. 28, pl. 12 (1335).

<sup>100</sup> *Walsham v. Walsham*, YB Mich. 8 Edw. II, 37 S.S. 52 (1314); *Ashway v. Pogey*, YB Pas. 10 Edw. II, 54 S.S. 101 (1317); *Stokebruere v. Harwedon, Northamptonshire Eyre*, II, 673 (1329–30); YB Pas. 6 Edw. III, f. 20, pl. 35 (1332); YB (RS) 14–15 Edw. III 254 (1340); YB (RS) 14–15 Edw. III 306 (1340–1).

<sup>101</sup> YB Mich. 8 Hen. IV, f. 7, pl. 12 (1406).

<sup>102</sup> 27 Edw. I, st. 1, c. 1 (1299), *Statutes of the Realm*, I, 128–9.

entailed lands were null. The parties argued the question whether *De Donis* applied only to cases brought on a formedon writ. They also argued whether the plaintiff's plea in avoidance of the fine would be good had the fine been executory as opposed to a fine *sur cognisans de droit*, which supposed an earlier, out-of-court conveyance. No resolution of the questions is reported. It is likely that the case was known to the bar because the plaintiffs were the duke of York and his wife and the countess of Salisbury and her husband. A reading in 1433 reports both positions – that the Statute of Fines takes precedence and that *De Donis* takes precedence.<sup>103</sup> The rather strong reminder that a final concord could not bar an entail and the uncertainty over whether a final concord could even discontinue an entail lessened the value of a final concord as a means of conveyance.

The fourth major decline in the number of final concords occurred in the decade 1451–60. At least some of this decline can be attributed to the invention and increased use of the common recovery, which first appeared in 1440.<sup>104</sup> The number of transactions conducted by common recovery, though rather low in the 1440s and 1450s, grew steadily until there were 240 transactions by common recovery in 1502.<sup>105</sup> There was not a simple shift from final concord to common recovery. Parties to a recovery not infrequently also obtained a final concord, but this was far from being always the case. Nevertheless, a shift, though partial, from fine to recovery helps to explain the decline in final concords in the decade 1451–60. The change from fine to recovery suggests a reason for the overall decline in the number of final concords: a final concord did not bar a fee tail. The decline in the number of final concords is itself evidence of the growing prevalence of holding land in fee tail, for the more land in fee tail, the less point in obtaining a final concord.

The decrease in the number of final concords in the fifteenth century could reflect a decline in the number of larger transactions on the land market. The fifteenth-century land market saw a constant traffic in small parcels of land.<sup>106</sup> These small transactions

<sup>103</sup> *Readings and Moots*, I, cxxxiv.

<sup>104</sup> Chapter 5, below, Table 5.1, p. 253.

<sup>105</sup> Chapter 5, below, Table 5.1, p. 253.

<sup>106</sup> A. J. Pollard, *North-eastern England During the War of the Roses* (Oxford: Clarendon Press, 1990), 83.

would not show up in final concords or common recoveries. If the number of larger transactions on the land market declined, one would expect a decline in the number of grants in fee simple other than settlements or grants to feoffees to uses. Settlements in fee tail and grants to feoffees should not decline or at least should not decline as much. The data conforms roughly to this pattern. For although the number of fines of all types declined, the greatest decline was in the subcategory of grants in fee simple to one or two unrelated grantees – the type of grant most likely to be a sale. Table 3.4, which includes final concords from only the counties of Essex, Staffordshire, and Warwickshire, shows that the decline in the number of grants in fee simple to one or two grantees in these three counties alone from the decade 1401–10 to the decade 1471–80 (111) accounts for 30 percent of the total decline in final concords in the same period – 374 – for all seven counties of the larger sample. It seems, then, that the decline in the number of final concords reflects a decline in the number of transactions on the land market, at least for parcels of lands so large as to make a final concord worthwhile. This line of argument fits with Christine Carpenter's observation that, until the end of the fifteenth century, parcels of land comprising at least a substantial segment of a manor were not coming on to the market.<sup>107</sup> Consequently, as Sandra Raban has shown, prices for this type of land were rising.<sup>108</sup> That the price rise did not lead to an increase in conveyances by final concords, which thereby became more affordable, indicates the comparative absence of a market for this type of land.

With a better understanding of final concords and their decline we can focus primarily on the creation of fee tails. Table 3.1 shows that the percentage of final concords creating fee tails declined in the three decades 1351–80. The high point for the creation of fee tails by fine was the period 1321 to 1340, when about 41 percent of final concords created fee tails. After 1360, the percentage of final concords creating fee tails was an average about 13 percent. Bean, surveying conveyances enrolled on the Patent Rolls, found that

<sup>107</sup> C. Carpenter, "The Fifteenth-century English Gentry and their Estates" in M. Jones (ed.), *Gentry and Lesser Nobility in Late Medieval Europe* (New York: St. Martin's Press, 1986), 38.

<sup>108</sup> S. Raban, *Mortmain Legislation and the English Church 1279–1500* (Cambridge: Cambridge University Press, 1982), 177–8.

the number of grants in fee tail fell between the period 1361–80 and the period 1421–40.<sup>109</sup> The evidence of final concords shows that the decline in the number of grants in fee tail began slightly earlier. Bean suggested that the decline in grants in fee tail was owing to a shift to uses. The analysis of the decline in the number of final concords after 1350 supports this explanation. As Table 3.2 indicates, the decline in the number of grants in fee tail appeared mainly as a decline in the number of life estate–entail settlements and the number of grants to husband and wife in fee tail. The shift to uses easily explains the lesser number of life estate–entail settlements. The increased deployment of uses also helps to explain the decline in grants to husband and wife in fee tail. Many of these conveyances were marriage settlements. But many were resettlements after marriage for the purpose of providing one’s spouse with jointure. The shift to uses would reduce the number of these latter settlements. Table 3.2 shows that the major decline in spousal settlements in fee tail occurred in the period 1351–80. Curiously, Table 3.3 shows that the major decline in spousal settlements in fee simple occurred in the decade 1381–90. The life estate–fee simple form of settlement, never very frequent, declined at the same period as the life estate–entail form of settlement and is also attributable to the shift to uses. By the same token the increase in the percentage of grants in fee simple reflect the increasing deployment of feoffees to uses. As Table 3.3 shows, the increase in grants in fee simple was an increase in grants to an individual or unrelated individuals. Table 3.4 provides evidence that increasingly either three or four or more grantees took title. In part, this reflects a change in conveyancing style – a tendency to take title with a number of co-feoffees. But in part this also reflects an increase in conveyances to feoffees to uses. On this line of analysis, final concords were not used very frequently to put land into uses until the fifteenth century. In the fourteenth century, a conveyance to feoffees was more likely than it was later to include the instructions to feoffees as a condition on the conveyance.<sup>110</sup> In the fifteenth century, the instructions to feoffees were more likely to be given in a separate writing. This development made final concords more useful as a means of

<sup>109</sup> Bean, “Landlords,” 554.

<sup>110</sup> Biancalana, “Medieval Uses,” 138–9.

granting land to feoffees, because conditions on a conveyance could not be made part of a final concord.

The decline in the use of final concords to create fee tails does not mean that there was a decline in the creation of fee tails. A shift to uses did not mean a shift away from entails so much as a difference in the manner of their creation. A fee tail would not be created by a holder of land using a final concord to conduct a grant-regrant transaction, but would be created by feoffees carrying out the instructions of a last will. Feoffees, apparently, seldom used final concords when they granted land in accordance with their instructions. Although some testators bequeathed land in fee simple,<sup>111</sup> many directed their feoffees to convey their lands to their heirs, sometimes also to their younger sons, in fee tail.<sup>112</sup> The evidence of lay cartularies and deeds tell the same story: more often than not grants by feoffees to the heir of their feoffor was in fee tail.<sup>113</sup>

Even if the shift to uses did not change the proportion of grants in fee tail, that proportion, at least of the grants made by final concord, did not exceed about 40 percent in any decade from 1301 to 1480. In other words, fee tails never became so popular as to

<sup>111</sup> e.g. *Testamenta Vestusta*, I, 279–80 (Leonard Hastings, 1455), 292–3 (John St. Nicholas, 1462), 298 (Lady Conyers, 1467), 307 (John Bishop, 1465), 322–3 (Henry Beaumont, 1471), 328 (John Lord Berners, 1474); *Early Lincoln Wills*, 37–8 (William de Burton, 1373); *Testamenta Eboracensia*, I, 247–9 (William Cheworth, 1398); *Register of Henry Chichele*, II, 191–5 (Thomas Howley, 1420), 261–2 (Ellen Cresswell, 1423), 605–6 (John Hodge, 1441).

<sup>112</sup> e.g. *Testamenta Vestusta*, I, 184–6 (Joan Lady Scales, 1415), 211 (Alice Lady Howard, 1426), 220–1 (Henry Brudenell, 1431), 243–4 (Henry Walpool, 1442), 245–6 (Simon Felbonge, 1443), 260–3 (Nicholas Carew, 1432), 272–4 (Thomas Lord Hoo and Hastings, 1455), 275 (Robert Wingfield, 1454), 282–4 (Edmund Brudenell, 1457), 284–6 (Joan, Lady Clinton, 1457), 289 (Alan Engeham, 1458), 308 (William Norton, 1468), 326 (Simon Monyn, 1471), 332–34 (William Sanders, 1473); *Early Lincoln Wills*, 79 (John de Thorp, 1375), 111 (Henry de Beaumont, 1413), 120–1 (Adam Friday, 1412), 154–5 (Robert Wynteringham, 1420), 169 (Henry Heth, 1446); *Testamenta Eboracensia*, II, 256–7 (Oliver Mirfeld, 1462), *Register of Henry Chichele*, II, 22–7 (William Ross, 1415), 66–8 (Richard Banks, 1415), 108–10 (John Daubriggecourt, 1417), 439–45 (John Woodhouse, 1431).

<sup>113</sup> *Berkeley Cartulary*, BL Harley Ms. 265, ff. 43v–44, 44–44v (1369); *Tropenell Cartulary*, I, 118–19 (grant to feoffees 1400, grant from feoffees 1411), 318–20 (grant to feoffees with instructions, 1437), *Tropenell Cartulary*, II, 283–4, 287 (grant to feoffees 1410, grant from feoffees 1413), *The Book of Bartholomew Bolney*, 13 (grant from feoffees 1426), 82 (grant from feoffees 1464), *Calverley Charters*, No. 294 (1394), No. 328 (1423), No. 368 (1457).

constitute a substantial majority, or even a majority, of grants. This conclusion gains support from such lay cartularies as *The Berkeley Cartulary*,<sup>114</sup> *The Hylle Cartulary*,<sup>115</sup> *The Book of Bartholomew Bolney*,<sup>116</sup> *The Tropenell Cartulary*,<sup>117</sup> *The Langley Cartulary*<sup>118</sup> and the cartularies of John Pyel and Adam Fraunceys.<sup>119</sup> Most of the deeds copied into these cartularies gave the grantee, or the grantee and his wife, fee simple. The deeds mentioned are not only the deeds received by the maker of the cartulary, which were in fee simple, but also the deeds in the chain of title.

That a substantial minority, but nevertheless a minority, of grants were made in fee tail in each decade of, say, the fourteenth century should not be allowed to generate a misleading understanding of the landholding situation in the fifteenth century. Grants in fee tail had a cumulative effect in the sense that once land had been granted in fee tail it remained subject to claims under the entail and to claims to the reversion or remainder limited after the entail. A grant in fee simple might be a grant of entailed land, the grantor merely ignoring the entail. Unless, however, claims under the entail were somehow barred, the claims were likely to survive as long as there were heirs to inherit the claim. Each grant in fee tail added to the total amount of land subject to claims. For most of the fourteenth century, the statutory restraint on alienation lasted through the fourth generation for the heirs in the entail.<sup>120</sup> The fee tail was perpetual for the reversioner.<sup>121</sup> The extension of the statutory restraint to perpetuity in the third decade of the fifteenth century meant that land which had been alienated after the third generation could now be claimed because the land had not become fee simple after all.<sup>122</sup> Even though the same parcels of land, the same manors, for example,

<sup>114</sup> BL Harley Ms. 265.

<sup>115</sup> R. Dunning (ed.) (Somerset Record Society, vol. 68, 1968).

<sup>116</sup> M. Clough (ed.) (Sussex Record Society, vol. 63, 1964).

<sup>117</sup> J. D. Davies (ed.), 2 vols. (Wiltshire Archaeological and Historical Society, 1908).

<sup>118</sup> P. R. Coss (ed.), 2 vols. (Dugdale Society, vol. 32, 1980).

<sup>119</sup> *A Calendar of Cartularies of John Pyel and Adam Fraunceys*, S. J. O'Connor (ed.) (Camden Society, 5th ser., vol. 2, 1993).

<sup>120</sup> Chapter 2, above, at pp. 111–19.

<sup>121</sup> Chapter 2, above, at pp. 122–8.

<sup>122</sup> Chapter 2, above, at pp. 119–21.

were often settled and resettled in succeeding generations, this practice would slow, but not stop, the cumulative effect of entailing land. The practice of resettling the same land each generation or so could, however, simply multiply the claims to that repeatedly used piece of land.

In speaking of fee tails it is important to distinguish between fee tails general and fee tails male. The latter form of fee tail restricted the descent of the land to the male issue of the donor and thus excluded females from the succession. Grand theories of the English law of property can run into error by supposing either that all fee tails were fee tails male or that the fee tail male became popular at an early date.<sup>123</sup> Payling has pointed out that the tail male remained the exception rather than the rule throughout the later medieval period.<sup>124</sup> The evidence of final concords supports this observation. Table 3.5 divides all four type of fee tails collectively into fee tails general and fee tails male for each decade from 1301 to 1480. Fee tails male reach 10 percent of fee tails in 1331–40, but never exceed about 20 percent. They reach that high point in only three decades: 1381–90, 1411–20, and 1471–80. The fee tail male was not more favored in any of three most frequent types of entails, the non-marital, the marital, and the life estate–entail, than in the others.

The fee tail male might have been slow in its limited development because for some time lawyers were not decided whether it came under *De Donis*. Although Chief Justice Scrope in the late 1320s had no doubt that *De Donis*, which did not mention them, protected tails male,<sup>125</sup> Justice Claver used an older understanding of the effect of the statute on fee tails generally to deny them protection. He reasoned that if a married couple held in tail male and had a son who succeeded them and he had a daughter, the daughter would take the land under the grant because the will of the donor was fulfilled upon the son's entry.<sup>126</sup> Three cases in the 1340s illustrate the continuing uncertainty attending fee tails

<sup>123</sup> e.g. E. Spring, *Law, Land, and Family* (Chapel Hill: North Carolina University Press, 1993), 27, 69, 71.

<sup>124</sup> S. J. Payling, "Social Mobility, Demographic Change, and Landed Society in Late Medieval England," *Economic History Review* 45 (1992), 57.

<sup>125</sup> *Man v. Skyrchit, Northamptonshire Eyre*, II, 710 (1329–30).

<sup>126</sup> *White v. Le Moigne, Northamptonshire Eyre*, II, 730 (1329–30).

male. In 1340, a plaintiff to formedon in reverter set forth a grant to a married couple and the heirs male of their bodies and pleaded that their son had died without an heir of his body.<sup>127</sup> This allegation was unnecessarily broad for a tail male but might reflect prudence in the face of uncertainty. In the 1344 case of *Helton v. Kene* the issue was whether the reversioner takes land given in tail male at the failure of male issue or whether the daughters of the last male issue will enjoy the land.<sup>128</sup> Significantly, this was not an easy question. The action of novel disseisin in which the issue arose had to be adjourned to Westminster. Justice Stonor argued that since fee tails male were not mentioned in *De Donis*, the matter was at common law, the conveyance was fee simple, and the daughters should have the land. The court ultimately decided otherwise, but Justice Stonor's views probably represented those of a portion of the Bar. A variation on *Helton* arose the following year.<sup>129</sup> In this case, land was given to a husband and wife and the heirs male of the body of the husband; they had two sons and the eldest son had two daughters. The father died, then the elder son, then the mother. The younger son entered, the daughters ousted him, he re-entered, the daughters brought novel disseisin. As one would expect after *Helton*, judgment was for the defendant. The reporter, however, had a question that suggests that the lesson of *Helton* had not been fully assimilated. He asked whether, if the eldest son had survived and had attained estate, the daughters would then succeed by the limitation "which in words, extends only to males."<sup>130</sup> A few years later, the fee tail male was fully accepted as a means of limiting descent to male issue.<sup>131</sup> Although greater clarity in the 1340s on the lawfulness and the nature of fee tails male might have contributed to the slight increase in their subsequent use, they never became a favored form of fee tail in the period under discussion.

<sup>127</sup> YB (RS) 14–15 Edw. III 136–9 (1340).

<sup>128</sup> YB Mich. 18 Edw. III, f. 45, pl. 52; 18 Lib. Ass., pl. 5 (1344). For an edition of the report and a summary of the record see Baker and Milsom, *Sources of English Legal History*, 53.

<sup>129</sup> YB (RS) 19 Edw. III 144–5 (1345).

<sup>130</sup> *Ibid.*

<sup>131</sup> *Carbonel's Case*, YB Mich. 33 Edw. III, *Fitzherbert*, Taile, pl. 5 (1359).

*(b) The use of entails*

Table 3.2 summarizes the use of final concords to create four types of entail: a grant to an individual, a grant to a husband and wife, a grant of a life estate, remainder in fee tail, and a grant to a parent or parents and their child with the fee tail in the child. The last type was a functional equivalent to a life estate–entail grant where parents held the life estate and their child held the fee tail. The use of this type of entail is similar to that of the life estate–entail settlement. Each type of grant served a different purpose and would be made in a different type of situation.

*(i) Grants outside the family*

Grants in fee tail to an individual or to apparently unrelated individuals were never a high proportion of grants in fee tail by final concord. This type of grant in fee tail was infrequently made because persons who acquired land seldom took title in fee tail. The evidence of the lay cartularies shows that the more frequent practice was to take title in fee simple. If the purchaser later wished to hold the land in fee tail, he would resettle the land on himself or on himself and his wife in fee tail. He might also resettle the land on himself or on himself and his wife for life, remainder to his child in fee tail.

One does, however, find grants in fee tail.<sup>132</sup> There were three overlapping reasons for making grants in fee tail outside of one's family. A grant in fee tail precluded succession by collateral heirs and could provide a reversion to the grantor. A grant in fee tail had some built-in restraint on alienation. After the statute of *Quia Emptores* a grant in fee tail was the only means of creating a tenurial relationship between grantor and grantee. The statute mandating that all transfers of land be made by substitution did not apply to leases, life estates, or fee tails.<sup>133</sup> The three reasons for making extra-familial grants in fee tail converge so that it is impossible to tell whether a particular reason was uppermost in the mind of the grantor when making a particular grant. Ecclesiastical lords might well have all three reasons in mind. The Bishop

<sup>132</sup> *Berkeley Cartulary*, BL Harley Ms. 265, ff. 39v, 51v; *Tropenell Cartulary*, II, 6, 118–19, 172–3; *Calverley Charters*, No. 223.

<sup>133</sup> 18 Edw. I, st. 1, c. 1 (1290), 1 *Statutes of the Realm*, 106; YB (RS) 21–2 Edw. I 640 (1294).

of Bath and Wells, for example, made a number of such grants, which enabled him to achieve all three purposes of making a grant in fee tail.<sup>134</sup> Missenden Abbey also made grants in fee tail.<sup>135</sup> Barbara Harvey has shown that the use of fee tails by Westminster Abbey was probably for the purpose of restraining alienation.<sup>136</sup> When the king granted land in fee tail and kept the reversion his purpose must have been to exclude collateral heirs of the donee.

McFarlane has shown that Edward I converted six earldoms from fee simple to fee tail.<sup>137</sup> On the marriages of his daughters, he converted the earldoms of Gloucester (and Hertford) and Hereford (and Essex) into fee tails to the married couple jointly. He also had the earls of Norfolk and Lincoln surrender their lands and earldoms and regranted them in fee tail. Curiously, where the grant was made on the marriage of his daughters, Edward did not keep the reversion but instead limited a remainder on the right heirs of the earl. Here, he conformed to the developing practice in making marital jointures. In the fourteenth century, additional earldoms were put into fee tail, but now into fee tail male.<sup>138</sup> Other grades of nobility were also granted as fee tail male.<sup>139</sup> What was special about these arrangements was not that they were in fee tail but that they were in the more restrictive fee tail male.<sup>140</sup> The outlook and practice that accorded with these grants in fee tail male seems to have been shared mainly by a particular social group – the higher nobility. And it was an outlook and practice members of the nobility were not always willing to press upon others. Thomas Beauchamp, earl of Warwick from 1330 to 1369, resettled his lands in tail male. He also made grants out, but these tended to be either life estates or in fee tail – not tail male.<sup>141</sup> It would have been advantageous to make grants in the more restrictive tail male, but the outlook and practice lower down the social scale was to take title most often in fee simple or in a general fee tail, which did not exclude daughters from succession.

Edward I's policy toward the earls, if policy it was, was not

<sup>134</sup> *Cheddar Cartulary*, BL Harley Ms. 316, ff. 20v, 22–3, 23–23v, 25–25v.

<sup>135</sup> *Missenden Cartulary*, Nos. 302, 303, 304, 305.

<sup>136</sup> Harvey, *Westminster Abbey*, 118–19.

<sup>137</sup> McFarlane, *Nobility*, 272–3.

<sup>138</sup> *Ibid.* <sup>139</sup> *Ibid.*

<sup>140</sup> McFarlane sets up a contrast between fee simple and fee tail male, but does not consider general fee tails.

<sup>141</sup> *Beauchamp Cartulary*, BL Add. Ms. 28024, ff. 8, 10v, 11, 13v, 14v, 32.

confined to Edward I or to earls. He also converted the holdings of a number of other tenants-in-chief into fee tails or into life estate-entail grants.<sup>142</sup> Edward II's grants of land to Piers Gaveston and his wife Margaret were frequently in fee tail with the king keeping the reversion.<sup>143</sup> After the defeat of Thomas of Lancaster, Edward II rewarded his loyal followers with grants of the land forfeited by Lancaster and his adherents. These royal grants were frequently in fee tail or fee tail male with the king keeping the reversion.<sup>144</sup> Edward II also made other grants in fee tail.<sup>145</sup> It is hard to discern the reasons why some royal grants were fee tail and others were in fee simple. Yet distinctions were made. After the defeat of Thomas of Lancaster, grants to Hugh le Despenser, unlike other grants to Edward's supporters, tended to be in fee simple.<sup>146</sup>

The statute *Quia Emptores* enabled a lord who wished to maintain his seignery to make his grants in fee tail and retain the reversion. John Clyveden granted lands in fee tail to Robert Seward, his wife Margaret and the heirs of Robert's body.<sup>147</sup> Part of the grant was land that had escheated to Clyveden and part was land that had reverted to Clyveden after a life estate. A grant in fee tail enabled Clyveden to maintain his seignery. Bartholomew Bolney and his father John Bolney made a number of such grants.<sup>148</sup> They also included in these grants a right to re-enter should the grantee discontinue the entail. The grants were of fairly small parcels – a messuage and a few acres is most common – in manors of which Bolney held the seignery. Using a fee tail enabled Bolney to maintain in a real sense his lordship of the manor.

There remains the question why more grants were not made in fee tail. A purchaser would not wish to constrain his later lawful

<sup>142</sup> e.g. *Charter Rolls*, II, 198, 246, 252, 254, 261, 263, 327, 344–5, 346. *Charter Rolls*, III, 48, 50. For grants by Queen Eleanor in fee tail see, e.g. *Charter Rolls*, II, 234, 248, 261, 267.

<sup>143</sup> *Charter Rolls*, III, 111, 127, 129, 138, 139–40, 181.

<sup>144</sup> *Ibid.*, 441, 441–2, 442, 442–3, 443, 445–6, 449–50 (tail male).

<sup>145</sup> *Ibid.*, 121–2, 131–2, 159, 203, 205, 206, 242, 304, 315, 403, 406, 434, 437, 475 (tail male).

<sup>146</sup> *Charter Rolls*, III, 441, 443, 444(bis), 446, 450(bis). Some grants to Despenser were in fee tail or in the life estate-entail form. *Ibid.*, pp. 442, 450(bis).

<sup>147</sup> *Cheddar Cartulary*, BL Harley Ms. 316, f. 18v.

<sup>148</sup> *The Book of Bartholomew Bolney*, 1 (six grants), 6, 51, 64, 65, 66 (four grants), 67 (two grants), 68–9.

dealing with the land by accepting title in fee tail. He put land in fee tail either to complicate attempts to wrest the land from him or to control its devolution after his death. When he resettled the land in fee tail, he used a grant–regrant transaction and his strawman was seldom given the reversion. Instead, the ultimate remainder was in fee simple, frequently to his own right heirs. After about 1340 entails in such a grant as well as the fee simple remainder were held of the chief lord of the fee.<sup>149</sup> There might have been pressure from lords against subinfeudation by fee tail. If so, the lord’s interest here coincided with that of the purchaser. An explanation in terms of the relative bargaining power of the parties would not be persuasive without a further explanation of why purchasers systematically had greater bargaining power for almost two centuries. One is driven to posit a social norm, perhaps a working understanding of *Quia Emptores*, in favor of giving and receiving fee simple. Most sales of land involved members of the knightly and gentry class. It could well have been unacceptable for sellers to try to insist upon securing a seignery over their purchaser, except in the well-defined situation that resembled securing a tenant for a manor over which his “seller” had maintained the seignery.

(ii) *Grants within the family*

The most popular use of entails, and one that suffered least from the shift to uses, was a grant to husband and wife in fee tail. This type of grant could take three forms: to husband and wife and (a) the heirs of their two bodies, or (b) the heirs of the husband’s body, or (c) the heirs of the wife’s body. Table 3.6, which includes only the counties of Derbyshire, Somerset, Sussex, and Warwickshire, shows that the first form was by far the most frequently used. In this form of joint fee tail, the wife’s warranty would not

<sup>149</sup> Where the donor of a fee tail retained the reversion the grant was outside *Quia Emptores*. See YB Mich. 6 Edw. II, 38 S.S. 129 (1312–13); YB Pas. 4 Hen. VI, f. 19, pl. 6 (1426); YB Pas. 2 Edw. IV, f. 5, pl. 11 (1462) (exchange between Darby J. and Littleton). Where a grant in fee tail limited a remainder in fee simple in someone other than the donor of the fee tail, the tenant-in-tail held of the donor but the remainderman held of the lord of the fee: BL Add. Ms. 31826, f. 228v. See YB Pas. 7 Edw. II, 39 S.S. 120 (1314); YB 2 Edw. II, 19 S.S. 4 (1308–9). This rule began to change in the 1320s. See YB Hil. 18 Edw. III, f. 294 (1324). By the 1340s the rule was as stated in the text: YB (RS) 14–15 Edw. III 320 (1340–1); YB (RS) 19 Edw. III 152 (1345).

descend to the heir-in-tail collaterally to the entail.<sup>150</sup> These joint entails were probably marriage settlements. The latter two forms of joint entail would suit second marriages where the land was the inheritance of the spouse receiving the entail and that spouse had children from a previous marriage. These forms of entail would protect that spouse's children from the previous marriage while giving the other spouse jointure or its male equivalent. Although these forms were probably used in second marriages, that does not mean that they were used more frequently in second marriages than the more common form of joint entail. The degree to which parents were willing, or able, to protect the children of a previous marriage remains an open question. Joint grants to husband and wife were also made in fee simple. Table 3.7 sets forth the comparative frequency of joint grants in fee tail and in fee simple. With the exceptions of the decade 1301–10 and the two decades 1361–80, in which grants in fee simple were much more frequent than grants in fee tail, for most of the period the two types of marital grants were roughly equal in number.

The two types of marital grant – fee tail and fee simple – were usually made in two different types of situation. Although it is rare to find a purchaser taking title in fee tail with his wife, it is not rare to find him taking title in fee simple with his wife.<sup>151</sup> More frequently, however, a purchaser took title alone in fee simple and some time later, if at all, resettled the land on himself and his wife either in fee simple or fee tail. The cartulary evidence does not suggest that either form dominated the other in these spousal resettlements.<sup>152</sup> The final concords, however, suggest that taking title with one's wife in fee simple or spousal resettlements in fee simple together were sufficiently frequent to equalize the use of fee tails in marital settlements. One difficulty in understanding the evidence is the frequent inability to determine whether the spousal resettlement executed a marriage agreement or was independent of such agreement. If the groom's father was dead at the time of the

<sup>150</sup> For collateral warranty see Chapter 4, below, pp. 212–42.

<sup>151</sup> e.g. *Tropenell Cartulary*, II, 186, 192–3.

<sup>152</sup> Resettlements in fee simple: *Tropenell Cartulary*, I, 58–9, 121–2, 124–5, 155–6, 301–2; *Hylle Cartulary*, Nos. 12, 43, Resettlements in fee tail: *Book of Bartholomew Bolney*, 28; *Hylle Cartulary*, Nos. 4–6, 185–7, 319–20; *Tropenell Cartulary*, I, 142–3, 303–4; *Tropenell Cartulary*, II, 23, 176–7, 193–4, 283–4; *Berkeley Cartulary*, BL Harley Ms., f. 71v–72.

groom's marriage, the marital resettlement had to use a grant-regrant procedure just as if the man's resettlement was independent of a marriage agreement. And one could change his mind. In 1423, John Tropenell put a burgage in Sherston in feoffees. In 1428 he had the feoffees resettle the burgage on himself and Maud his wife and his heirs. In 1438 he resettled the burgage on himself and his wife Maud in fee tail.<sup>153</sup> Whether the resettlement was in fee tail or fee simple, the wife was given jointure, which was probably the main point of the transaction. Jointure reduced the chances of wardship.

Marital settlements, as opposed to later spousal resettlements, were almost exclusively made in fee tail. Part 1 discussed the double change from *maritagium* in land to marriage portion in money and from dower *assensu patris* to jointure. In the fourteenth century and later the typical marriage settlement included a joint fee tail to bride and groom. Sometimes, no doubt because of the limited land available for immediate settlement by the groom's father, the jointure was supplemented by a settlement of a life estate on the groom's father, remainder in joint entail in the bride and groom.<sup>154</sup> Table 3.7 shows that life estate-entail settlements were more popular than life estate-fee simple settlements. The former were used in marital settlements, and their use in that situation helps to explain their resistance to the increasing practice of substituting a feoffment to uses for a life estate-remainder settlement.

In spite of the change in marriage settlement, one can still find examples of grants in *maritagium*.<sup>155</sup> One can also find grants by a bride's father to the groom and bride in fee tail.<sup>156</sup> These grants differ from *maritagium* in that service is reserved to the donor. It is unclear, however, whether these latter grants were made because of marriage or were a later sale to the son-in-law and his wife.

Within families, grants in fee tail to individuals were made to younger sons or brothers and to daughters or sisters. In the late

<sup>153</sup> *Tropenell Cartulary*, II, 169–70, 172–3.

<sup>154</sup> *Calverley Charters*, Nos. 353, 378.

<sup>155</sup> *Hylle Cartulary*, No. 325; See Payling, "Late Medieval Marriage Contracts," 28, n. 27.

<sup>156</sup> *Hylle Cartulary*, No. 151; *Tropenell Cartulary*, I, 104–5; *Tropenell Cartulary*, II, 233–4; *Berkeley Cartulary*, BL Harley Ms. 265, f. 137v–138.

twelfth and thirteenth centuries grants to younger sons were an important reason for using a fee tail,<sup>157</sup> and this practice continued into the fourteenth century.<sup>158</sup> Sometimes grants to younger sons were made in fee simple.<sup>159</sup> It does not appear, however, that final concords were used for these grants. By the fifteenth century, a younger son or brother was likely to receive, if anything, something less than even a grant of land in fee tail. More frequently than not he was given a life estate, an annuity for life, or a lump sum of money.<sup>160</sup> The earlier practice did not completely die out, especially in wealthier families.<sup>161</sup> One also finds land in fee tail given to daughters or to sisters by grant<sup>162</sup> or by last will.<sup>163</sup> These grants were seldom made by final concord. The usual practice,

<sup>157</sup> Chapter 1, above, pp. 16–17.

<sup>158</sup> *Berkeley Cartulary*, BL Harley Ms. 265, ff. 1, 5–5v, 14v, 42–42v; *Tropenell Cartulary*, II, 21, 224–5, 237–8; *Calverley Charters*, No. 211, No. 350 (grandson).

<sup>159</sup> *Berkeley Cartulary*, BL Harley Ms. 265, ff. 2, 2v, 4v, 75, 112v–113; *Cheddar Cartulary*, BL Harley Ms. 316, f. 10v; *Tropenell Cartulary*, II, 242; *The Book of Bartholomew Bolney*, 10 (grant to brother's widow for her life, remainder in tail to nephew).

<sup>160</sup> Life estates: *Testamenta Vetusta*, I, 381–3 (John Shirley, 1485), 420 (Robert Tailboys, 1495), *Early Lincoln Wills*, 99 (Philip de Despenser, 1401), 136–7 (William de Roos, 1414), *Register of Henry Chichele*, II, 191–5 (Thomas Hawley, 1420), 546–47 (John Radcliff, 1436), *Testamenta Eboracensia*, II, 9–10 (Robert Playse, 1429), *Testamenta Eboracensia*, III, 263 (William Neville of Thornton Bridge, 1481), 304–10 (Henry Percy, earl of Northumberland, 1491). Annuities or lump sums: *Testamenta Vetusta*, I, 230–1 (John Lord Greystock, 1434), 292–3 (John St. Nicholas, 1462), 381–3 (John Shirley, 1485 – for youngest sons), *Early Lincoln Wills*, 114 (John de Copuldyk, 1408), *Register of Henry Chichele*, II, 191–5 (Thomas Hawley, 1420), *Testamenta Eboracensia*, II, 220–4 (Thomas Cheworth, 1458), 260–1 (John Tempest, 1463), *Testamenta Eboracensia*, III, 273–8 (Hugh Hastings, 1482). Pollard, *North-eastern England*, 82–3; S. Wright, *The Derbyshire Gentry in the Fifteenth Century* (Derbyshire Record Society, vol. 8, 1983), 26–7.

<sup>161</sup> *Testamenta Vetusta*, I, 282–4 (Edmond Brudenell, 1457), 289–90 (Ann Burgess, 1458), 332–4 (William Sanders, 1473), 362–8 (Thomas Littleton, 1481), 368–75 (William Lord Hastings, 1481), *Testamenta Vetusta*, II, 418–19 (Alexander Clifford, 1494), *Early Lincoln Wills*, 163–4 (John Sapcote, 1434), 186–7 (William Lord Lovell, 1455), *Register of Henry Chichele*, II, 389–90 (Thomas Payneys, Lord St. John, 1428), 439–45 (John Woodhouse, 1431), 568–71 (John Darrell, 1438), 611–15 (John Seyntleger, 1441), 382–6 (Thomas Colpeper, 1429). See Bean, “Landlords,” 556–7.

<sup>162</sup> *Berkeley Cartulary*, BL Harley Ms. f. 35v–36; *Tropenell Cartulary*, I, 81 (granddaughter), *Tropenell Cartulary*, II, 12–13.

<sup>163</sup> *Early Lincoln Wills*, 120–1 (Adam Friday, 1412), 140–1 (Robert de Sutton, 1414), 184 (Thomas Hadstoke, 1455), *Register of Henry Chichele*, II, 145–9 (Edmund Thorp, 1417), 191–5 (Thomas Hawley, 1420).

however, was to bequeath one's daughter a sum of money for her marriage portion,<sup>164</sup> or, sometimes, a life estate.<sup>165</sup>

In addition to marital grants and grants to younger children, fee tails were also used in what may be called, anachronistically, estate-planning settlements. By an estate-planning settlement I mean a settlement by means of a grant-regrant transaction arranged after marriage and after children had been born and designed to specify the devolution of land to the next generation. Every entailment of land controls its devolution, but estate-planning settlements differ from others in point of form and of timing. Unlike marital settlements, they were made later in life. Children could be named. And estate-planning settlements probably included lands not given in marital grants or grants to younger children. The estate-planning settlement changed with the turn to uses. Instead of making the settlement themselves, landholders increasingly gave their lands to feoffees with instructions to make the desired settlement after the landholder's death.

The most popular form of estate-planning settlement in the fourteenth century was the life estate-entail settlement. The current holder took back a life estate for himself or for himself and his wife and limited a remainder in fee tail on his son or on his son and his son's wife. The remainder in this form of settlement could be in fee simple or fee tail. Table 3.8, based on the final concords of seven counties, sets forth the number of each type of life estate-remainder settlement for each decade from 1301-1480. The more frequent practice was to entail the remainder.<sup>166</sup>

<sup>164</sup> e.g. *Testamenta Vetusta*, I, 272-4 (Thomas Lord Hoo and Hastings, 1455), 282-4 (Edmund Brudenell, 1457), 292-3 (John St. Nicholas, 1462), *Testamenta Vetusta*, II, 400-2 (John Fogge, 1490), *Early Lincoln Wills*, 98-9 (Hugh le Despenser, 1400), 187 (John Mortymer, 1453), *Register of Henry Chichele*, II < 272-5 (John Rookwood, 1423), 517-18 (John Hill, 1434), 546-7 (John Radcliff, 1436), 611-15 (John Seyntleger, 1441), *Testamenta Eboracensia*, I, 105-6 (John Constable, 1378), 203-4 (Thomas Fayrefax, 1394), 254-5 (Thomas Darcy, 1399), 356-7 (John Lord Darcy, 1409), *Testamenta Eboracensia*, II, 256-7 (Oliver Myrfield, 1462), 260-1 (John Tempest, 1463), *Testamenta Eboracensia*, III, 217-18 (William Ryther, 1475), 273-8 (Hugh Hastings, 1482).

<sup>165</sup> *Early Lincoln Wills*, 180 (William Brasse, 1454), *Testamenta Eboracensia*, II, 9-10 (Robert Playse, 1429).

<sup>166</sup> For examples from secular cartularies see *Tropenell Cartulary*, I, 262-5; *The Book of Bartholomew Bolney* 6, 9, 11, 43; *Hylle Cartulary*, No. 287; *Berkeley Cartulary*, BL Harley Ms. 265, ff. 44v, 45-45v; *Langley Cartulary*, Nos. 148, 151 (1470), *Cheddar Cartulary*, BL Harley Ms. 316, f. 30-30v.

The life estate–entail settlement can be divided into four versions or subtypes. The remainder could be limited to a married couple, or to a child of the life tenant, or to a stranger. There might be more than one life estate preceding the remainder in fee tail. Table 3.9 sets forth the evidence of final concords from the counties of Derbyshire, Somerset, Sussex, and Warwickshire as to these four versions of the life estate–entail settlement. The final concords do not always specify the relationship of the remainderman to the life tenant so that the frequency of putting the remainder in a stranger might be overcounted. Frequently, when the remainder was limited to a married couple, either the husband or the wife was the child of the life tenant. Some of these transactions were marriage settlements in which the donating parent or parents retained a life estate.<sup>167</sup> The two most frequent versions of the life estate–entail settlement were (a) putting the life estate in the parent and the entail in the child and (b) putting the life estate in the parent and the entail in a couple, one of whom was the child of the life tenant. These two forms differed mainly in whether the current holder's child was married at the time of the settlement. One reason for making settlements in this form was to avoid wardship. The named child took his remainder by purchase, not by inheritance.<sup>168</sup> As noted earlier, the life estate–remainder form of settlement was largely replaced by grants to feoffees to uses. The child would receive the entail from the feoffees, not from his parent's resettlement.

Discussion of estate-planning settlements cannot omit the use of fee tails for the purpose of disinheriting particular individuals. Tales of disinheritance are not hard to come by.<sup>169</sup> For example, Robert Etchingham, childless, settled his land on himself and his wife in tail with successive reminders in tail to his nephews, the children of his youngest brother, Richard.<sup>170</sup> This arrangement skipped Simon, Robert's next-youngest brother. Simon, the rector of Hurstmonceux, was not likely to have legitimate issue. Robert was using an entail to skip over his common-law heir and

<sup>167</sup> See *Langley Cartulary*, No. 81 (1311), *Calverley Charters*, Nos. 353, 378.

<sup>168</sup> Biancalana, "Medieval Uses," 132–3.

<sup>169</sup> Bean, "Landlords," 555–6; McFarlane, *Nobility*, 73–7; S. Waugh, *England in the Reign of Edward III* (Cambridge: Cambridge University Press, 1991), 101.

<sup>170</sup> N. Saul, *Scenes from Provincial Life, Knightly Families in Sussex 1280–1440* (Oxford: Clarendon Press, 1986), 87–8.

secure the inheritance in the next generation. After Richard's death, however, Simon recovered the lands in an assize of novel disseisin, a result that can only be explained by supposing the jury frowned upon the attempt at disinheritance. Entails joined with uses were a powerful combination of legal devices for disinheritance. For example, in 1407 William Waite granted to feoffees; in 1409, they granted to John Clark and Agnes (the widow of William Waite) for the life of Agnes, remainder to William, her son by William Waite in tail, remainder to William Waite's younger brother Robert in fee simple.<sup>171</sup> The settlement disinherited John, the son of William Waite and his first wife Margery. But Margery had been pregnant by John Holnbroke before she married William Waite. Bartholomew Bolney characterizes John, the son, as a bastard, a view shared, no doubt, by William Waite, but not by the law.<sup>172</sup> William Waite here used an entail to have the devolution of his land conform to lay, as opposed to legal, views of legitimacy. These two examples illustrate Bean's observation that frequently one can discover plausible reasons for a disinheritance.<sup>173</sup> A recurring difficulty, however, was the disinheritance of children of a first marriage upon a second marriage, without the sort of reason guiding William Waite. For example, lands were settled in fee tail on Henry Percy and his second wife Constance, but when Constance later remarried Philip FitzWaryn, the lands were resettled on Philip and Constance in fee tail with remainder to the right heirs of Constance.<sup>174</sup> Other examples of resettlements on second marriage to the disinheritance of the issue of a first marriage can be found in the sources and the literature.<sup>175</sup> It is hard, however, to get a sense of how frequently this type of disinheritance occurred.

Lastly, fee tails were used in the settlement of disputes. For example, after the death of Robert Ball, there were disputes between his brother Thomas and his widow Alice, who married John Westbury, over various lands – Hull Deverell, Maiden Bradley, East Codfield, and West Codfield, Wiltshire.<sup>176</sup> Arbitra-

<sup>171</sup> *The Book of Bartholomew Bolney*, 67.

<sup>172</sup> *Ibid.* <sup>173</sup> Bean, "Landlords," 556.

<sup>174</sup> *Tropenell Cartulary*, I, 307–8.

<sup>175</sup> McFarlane, *Nobility*, 66–8; Payling, *Political Society*, 208–11; Carpenter, *Locality and Polity*, 110.

<sup>176</sup> *Tropenell Cartulary*, II, 116–18.

tors decided that some of the lands should be settled on Alice and the heirs of the body of Robert Ball, remainder to John Westbury for life, remainder to John Westbury's son, John, for life, "reversion" to Thomas Ball and his heirs. As to the rest of the lands, Thomas Ball's remainder would follow immediately after life estate of John Westbury. By using an entail in his situation, the arbitrators were able to recognize the rights of Robert Ball's issue, if any, while securing Thomas Ball's reversionary interest in the form of a remainder. It is hard to see how this way of accommodating conflicting interests could have been achieved if the arbitrators had had only grants in fee simple to work with.

## APPENDIX

Table 3.1. *The results of a survey of the final concords from seven counties, Essex,<sup>177</sup> Derbyshire,<sup>178</sup> Lancashire,<sup>179</sup> Somerset,<sup>180</sup> Staffordshire,<sup>181</sup> Sussex,<sup>182</sup> and Warwickshire,<sup>183</sup> during the period from 1301 to 1480.*

	Fee tail		Fee simple		Other		Total
	No.	%	No.	%	No.	%	
1301-1310	286	23.01	812	65.43	143	11.52	1,241
1311-1320	552	32.60	980	57.89	161	9.51	1,693
1321-1330	497	41.80	604	50.80	88	7.40	1,189
1331-1340	482	40.50	647	54.37	61	5.13	1,190
1341-1350	387	36.50	611	57.75	60	5.67	1,058
1351-1360	164	20.22	605	74.60	42	5.18	811
1361-1370	108	12.74	690	83.37	50	5.90	848
1371-1380	70	9.40	635	85.23	40	5.37	745
1381-1390	85	13.12	529	81.64	34	5.25	648
1391-1400	88	15.04	462	78.97	35	5.98	585
1401-1410	79	13.21	492	82.27	27	4.52	598
1411-1420	44	10.30	365	85.48	18	4.22	427
1421-1430	54	13.37	333	82.43	17	4.21	404
1431-1440	43	11.32	325	85.53	12	3.16	380
1441-1450	62	17.97	265	76.81	18	5.22	345
1451-1460	34	14.17	198	82.50	8	3.33	240
1461-1470	20	10.26	167	85.64	8	4.10	195
1471-1480	24	10.71	190	84.82	10	4.46	224

- <sup>177</sup> *Feet of Fines for Essex* [1182–1422], R. Kirk and E. Kirk (eds.), 3 vols. (Colchester: Essex Archeological Soc., 1899–1949), *Feet of Fines for Essex* [1423–1540], P. Reaney and M. Finch (eds.) (Colchester: Essex Archeological Soc., 1964).
- <sup>178</sup> “‘Pedes Finium’ for the County of Derby 1300–1305,” Hardy and Page (eds.), *Journal of Derbyshire Archeological and Natural History Society* 14 (1892), 1–16; “‘Pedes Finium’ for the County of Derby 1304–1313,” C. Kerry (ed.), *Journal of Derbyshire Archeological and Natural History Society* 15 (1893), 1–19; “‘Pedes Finium’ for the County of Derby 1312–1318,” C. Kerry (ed.), *Journal of Derbyshire Archeological and Natural History Society* 17 (1896), 95–113; “‘Pedes Finium’ for the County of Derby 1317–1324,” C. Kerry (ed.), *Derbyshire Archeological and Natural History Society* 18 (1897), 1–17; *Derbyshire Feet of Fines, 1323–1546*, H. J. H. Garrett and C. Rawcliffe (eds.) (Derbyshire Record Society, vol. 11, 1985).
- <sup>179</sup> *Final Concords of the County of Lancashire 1196–1307*, W. Ferrer (ed.), (Lancashire and Cheshire Record Society, vol. 39, 1899), *Final Concords of the County of Lancashire 1308–1377*, W. Ferrer (ed.), (Lancashire and Cheshire Record Society, vol. 46, 1902), *Final Concords of the County of Lancaster 1377–1500*, W. Ferrer (ed.) (Lancashire and Cheshire Record Society, vol. 50, 1905).
- <sup>180</sup> *Pedes Finium commonly called Feet of Fines for the County of Somerset, Edward I*, E. Green (ed.) (Somerset Record Society, vols. 6, 12, 17, and 22, 1892, 1898, 1902, and 1906).
- <sup>181</sup> *Calendar of Final Concords or Pedes Finium, Staffordshire 1272–1327*, G. Wrottesley (ed.) (Wm. Salt Archeological Society, 1911), 27–111; *Calendar of Final Concords or Pedes Finium, Staffordshire 1327–1547*, G. Wrottesley (ed.) (Wm. Salt Archeological Society, vol. 11, 1890), 127–295.
- <sup>182</sup> *An Abstract of Feet of Fines relating to the County of Sussex, 34 Henry III – 35 Edward I*, L. F. Salzman (ed.) (Sussex Record Society, vol. 7, 1908), *An Abstract of Feet of Fines relating to the County of Sussex, 1307–1509*, L. F. Salzman (ed.) (Sussex Record Society, vol. 23, 1916).
- <sup>183</sup> *Feet of Fines of Warwickshire, 1284–1344*, E. Stokes and L. Drucker (eds.) (Dugdale Society Publications, vol. 15, 1939), *Feet of Fines of Warwickshire, 1345–1509*, L. Drucker (ed.) (Dugdale Society Publications, vol. 18, 1943).

Table 3.2. *The results of a survey of the final concords from seven counties, Essex, Derbyshire, Lancashire, Somerset, Staffordshire, Sussex, and Warwickshire, during the period from 1301 to 1480.*

	Fee tail		Life estate/ entail		Husband and wife entail		Husband, wife child entail	
	No.	%	No.	%	No.	%	No.	%
1301–1310	51	17.8	88	30.8	145	50.7	2	0.7
1311–1320	67	12.1	186	33.7	287	52.0	13	2.4
1321–1330	53	10.7	198	39.8	239	48.1	7	1.4
1331–1340	40	8.3	194	40.2	237	49.2	11	2.3
1341–1350	31	8.0	160	41.3	177	45.7	19	4.9
1351–1360	8	4.9	60	36.6	93	56.7	3	1.8
1361–1370	4	3.7	23	21.3	78	72.2	3	2.8
1371–1380	7	10.0	19	27.1	43	61.4	1	1.4
1381–1390	9	10.6	22	25.9	52	61.2	2	2.4
1391–1400	5	5.7	24	27.3	59	67.0	0	0
1401–1410	4	5.1	29	36.7	46	58.2	0	0
1411–1420	4	9.1	11	25.0	29	66.0	0	0
1421–1430	6	11.1	16	29.6	32	59.3	0	0
1431–1440	3	7.0	10	23.3	30	69.8	0	0
1441–1450	7	11.3	22	35.5	33	53.2	0	0
1451–1460	6	17.6	14	41.2	14	41.2	0	0
1461–1470	2	10.0	10	50.0	8	40.0	0	0
1471–1480	8	33.3	7	29.2	9	37.5	0	0

Table 3.3. *The results of a survey of the final concords from seven counties, Essex, Derbyshire, Lancashire, Somerset, Staffordshire, Sussex, and Warwickshire, during the period from 1301 to 1480.*

	Fee simple to individuals		Life estate/ fee simple		Husband and wife fee simple		Husband, wife child fee simple	
	No.	%	No.	%	No.	%	No.	%
1301–1310	479	59.0	59	7.3	261	32.1	13	1.6
1311–1320	612	62.4	65	6.6	287	29.3	16	1.6
1321–1330	373	61.8	42	7.0	176	29.1	13	2.2
1331–1340	420	64.9	24	3.7	198	30.6	5	0.8
1341–1350	432	70.7	24	3.9	145	23.7	10	1.6
1351–1360	444	73.4	23	3.8	133	22.0	4	0.7
1361–1370	555	80.4	7	1.0	124	18.0	4	0.6
1371–1380	513	80.8	4	0.6	113	17.8	5	0.8
1381–1390	442	83.6	9	1.7	76	14.4	2	0.4
1391–1400	384	83.1	5	1.1	72	15.6	1	0.2
1401–1410	437	88.8	9	1.8	41	8.3	5	1.0
1411–1420	319	87.4	5	1.4	39	10.7	2	0.5
1421–1430	301	90.4	3	0.9	28	8.4	1	0.3

Table 3.3 (*contd*)

	Fee simple to individuals		Life estate/ fee simple		Husband and wife fee simple		Husband, wife child fee simple	
	No.	%	No.	%	No.	%	No.	%
1431-1440	288	88.6	5	1.5	32	9.8	0	0
1441-1450	233	87.9	7	2.6	24	9.1	1	0.4
1451-1460	175	88.4	7	3.5	15	7.6	1	0.5
1461-1470	150	89.8	4	2.4	12	7.2	1	0.6
1471-1480	175	92.1	6	3.2	9	4.7	0	0

Table 3.4. *Includes final concords from Essex, Staffordshire, and Warwickshire.*

	Simple 1, 2		Simple 3		Simple 4 or more		Total
	No.	%	No.	%	No.	%	
1301-1310	253	100.0	0	0	0	0	253
1311-1320	379	100.0	0	0	0	0	379
1321-1330	217	100.0	0	0	0	0	217
1331-1340	270	100.0	1	0.4	0	0	271
1341-1350	289	97.6	6	2.0	1	0.3	296
1351-1360	248	93.6	12	4.5	5	1.9	265
1361-1370	333	92.8	16	4.5	10	2.8	359
1371-1380	264	81.7	32	9.9	27	8.4	323
1381-1390	187	71.4	22	8.4	53	20.2	262
1391-1400	134	58.8	35	15.4	59	25.9	228
1401-1410	148	54.4	52	19.1	72	26.5	272
1411-1420	70	38.9	83	18.3	77	42.8	180
1421-1430	56	40.0	21	15.0	63	45.0	140
1431-1440	59	38.3	32	20.8	63	40.9	154
1441-1450	51	43.2	20	16.9	47	39.8	118
1451-1460	36	33.0	12	11.0	61	56.0	109
1461-1470	30	35.7	14	16.6	40	47.6	84
1471-1480	37	37.8	8	8.2	53	54.1	98

Table 3.5. *The results of a survey of the final concords from seven counties, Essex, Derbyshire, Lancashire, Somerset, Staffordshire, Sussex, and Warwickshire, during the period from 1301 to 1480.*

	Fee tail		Fee tail male		Total
	No.	%	No.	%	
1301–1310	284	99.3	2	0.7	286
1311–1320	540	97.8	12	2.2	552
1321–1330	457	92.0	40	8.0	497
1331–1340	431	89.4	51	10.6	482
1341–1350	341	88.1	46	11.9	387
1351–1360	136	82.9	28	17.1	164
1361–1370	93	84.1	14	15.9	107
1371–1380	61	87.1	9	12.9	70
1381–1390	68	80.0	17	20.0	85
1391–1400	77	87.5	11	12.5	88
1401–1410	70	88.6	9	11.4	79
1411–1420	35	79.5	9	20.5	44
1421–1430	46	85.2	8	14.8	54
1431–1440	35	81.4	8	18.6	43
1441–1450	56	90.3	6	9.7	62
1451–1460	28	82.4	6	17.6	34
1461–1470	17	85.0	3	15.0	20
1471–1480	19	79.2	5	20.8	24

Table 3.6. *Includes final concords from Derbyshire, Somerset, Sussex, and Warwickshire.*

	Husband and wife and heirs of their bodies		Husband and wife and heirs of body of husband		Husband and wife and heirs of body of wife		Total
	No.	%	No.	%	No.	%	
1301–1310	5	45.5	2	18.2	4	36.4	11
1311–1320	123	83.7	22	15.0	2	1.4	147
1321–1330	111	86.0	18	14.0	0	0	129
1331–1340	116	93.5	5	4.0	3	2.4	124
1341–1350	58	86.6	8	11.9	1	1.5	67
1351–1360	36	92.3	2	5.1	1	2.6	39
1361–1370	41	85.4	4	8.3	3	6.3	48
1371–1380	17	89.5	2	10.5	0	0	19
1381–1390	22	81.5	4	14.8	1	3.7	27
1391–1400	37	92.5	2	5.0	1	2.5	40
1401–1410	24	96.0	0	0	1	4.0	25
1411–1420	16	84.2	1	5.3	2	10.5	19
1421–1430	18	85.7	2	9.5	1	4.8	21

Table 3.6 (*contd*)

	Husband and wife and heirs of their bodies		Husband and wife and heirs of body of husband		Husband and wife and heirs of body of wife		Total
	No.	%	No.	%	No.	%	
1431-1440	15	83.3	3	16.7	0	0	18
1441-1450	17	81.0	2	9.5	2	9.5	21
1451-1460	6	50.0	1	8.3	5	41.7	12
1461-1470	5	83.3	0	0	1	16.7	6
1471-1480	3	75.0	1	25.0	0	0	4

Table 3.7. *The results of a survey of the final concords from seven counties, Essex, Derbyshire, Lancashire, Somerset, Staffordshire, Sussex, and Warwickshire, during the period from 1301 to 1480.*

	Husband and wife fee tail		Husband and wife fee simple		Total
	No.	%	No.	%	
1301-1310	145	35.7	261	64.3	406
1311-1320	287	50.0	287	50.0	574
1321-1330	239	57.6	176	42.4	415
1331-1340	237	54.5	198	45.5	435
1341-1350	177	55.0	145	45.0	322
1351-1360	93	41.2	133	58.8	226
1361-1370	67	35.1	124	64.9	191
1371-1380	43	27.6	113	72.4	156
1381-1390	52	40.6	76	59.4	128
1391-1400	59	45.0	72	55.0	131
1401-1410	46	52.9	41	47.1	87
1411-1420	29	42.6	39	57.4	68
1421-1430	32	53.3	28	46.7	60
1431-1440	30	48.4	32	51.6	62
1441-1450	33	57.9	24	42.1	57
1451-1460	14	48.3	15	51.7	29
1461-1470	8	40.0	12	60.0	20
1471-1480	9	50.0	9	50.0	18

Table 3.8. *The results of a survey of the final concords from seven counties, Essex, Derbyshire, Lancashire, Somerset, Staffordshire, Sussex, and Warwickshire, during the period from 1301 to 1480.*

	Life estate/Tail		Life estate/Simple		Total	
	No.	%	No.	%	No.	%
1301–1310	88	7.1	59	4.8	147	11.9
1311–1320	185	10.9	65	3.8	250	14.7
1321–1330	198	16.7	42	3.5	240	20.2
1331–1340	194	16.3	24	2.0	218	18.3
1341–1350	160	15.1	24	2.3	184	17.4
1351–1360	60	7.3	23	2.8	83	10.1
1361–1370	23	2.7	7	0.8	30	3.5
1371–1380	19	2.5	4	0.5	23	3.0
1381–1390	22	3.4	9	1.4	31	4.8
1391–1400	24	4.1	5	0.9	29	5.0
1401–1410	29	4.9	9	1.5	38	6.4
1411–1420	11	2.5	5	1.2	16	3.7
1421–1430	16	3.9	3	0.7	19	4.6
1431–1440	10	2.6	5	1.3	15	3.9
1441–1450	22	6.3	7	2.0	29	8.3
1451–1460	14	5.8	7	2.9	21	8.7
1461–1470	10	5.1	4	2.1	14	7.4
1471–1480	7	3.1	6	2.7	13	5.8

Table 3.9. *Includes final concords from Derbyshire, Somerset, Sussex, and Warwickshire.*

	Life estate: couple		Life estate: child		Life estate: stranger		Life estate: entail		Total
	No.	%	No.	%	No.	%	No.	%	No.
1301–1310	8	20.0	27	67.5	5	12.5	0	0	40
1311–1320	34	36.2	45	47.9	9	9.6	6	6.4	94
1321–1330	43	39.8	35	32.4	22	20.4	8	7.4	108
1331–1340	39	46.4	40	47.6	7	8.3	8	9.5	84
1341–1350	28	36.4	37	48.1	3	3.9	9	11.7	77
1351–1360	7	25.0	14	50.0	2	7.1	5	17.9	28
1361–1370	8	5.0	5	31.3	1	6.3	2	12.6	16
1371–1380	2	20.0	5	50.0	2	20.0	1	10.0	10
1381–1390	5	29.4	7	41.2	3	17.6	2	11.8	17
1391–1400	2	22.2	6	66.6	1	11.1	0	0	9
1401–1410	10	55.6	7	38.9	1	5.6	0	0	18
1411–1420	1	25.0	3	75.0	0	0	0	0	4
1421–1430	4	66.7	2	33.3	0	0	0	0	6
1431–1440	1	20.0	3	60.0	1	20.0	0	0	5

Table 3.9 (*contd*)

	Life estate: couple		Life estate: child		Life estate: stranger		Life estate: entail		Total No.
	No.	%	No.	%	No.	%	No.	%	
1441-1450	3	37.5	4	50.0	2	12.5	0	0	8
1451-1460	3	30.0	3	30.0	2	20.0	2	20.0	10
1461-1470	1	20.0	3	60.0	0	0	1	20.0	5
1471-1480	1	33.3	1	33.3	0	0	1	33.3	3

## BARRING THE ENFORCEMENT ENTAILS OTHER THAN BY COMMON RECOVERY

The common recovery was an especially strong device for barring entails. Its strength lay not only in its being effective but also in its being easy to use and certain to work. The greater ease and sureness of the recovery becomes apparent when it is compared to other means of barring entails available in the mid-fifteenth century. This chapter explores those other means of barring entails.

To bar an entail meant to prevent anyone with an otherwise good and valid claim under an entail from successfully enforcing his interest under a grant in fee tail. A claimant under an entail who brought an action to enforce his interest might be barred in three ways. First, an heir under an entail might be barred because his ancestor under the entail had granted the land to another with warranty. If the heir under the entail was also that ancestor's heir general, which was frequently the case, the ancestor's warranty would descend to the heir. At common law, the descent of the ancestor's warranty would bar the heir completely from undoing his ancestor's grant. But under *De Donis*, the heir under the entail was barred only to the extent that lands in fee simple had descended to him from his ancestor. This was the doctrine of assets by descent. Secondly, an ancestor of claimant might have granted or released his right to the land with warranty. If the ancestor's warranty descends to the claimant outside, as it were, of the terms of the grant in fee tail, which is the basis of the claimant's claim, the warranty was said to be collateral. A collateral warranty was at common law and, therefore, a complete bar. Collateral warranties could bar not only heirs under an entail but reversioners or remaindermen as well. Thirdly, a tenant-in-tail might arrange to lose the entailed land in a collusive action in the King's Court. Depending upon its nature, the judgment in the collusive action could bind his heirs.

## 1. THE DOCTRINE OF ASSETS BY DESCENT

*(a) Background*

The obligation to honor the warranty of an ancestor had two components. If the ancestor's grantee lost the land in litigation, the ancestor's heir had to provide *escambium*, lands of equal value in exchange for the lands lost. The ancestor's warranty also barred the heir from an action to recover the lands. The obligation to give *escambium* was limited to lands that descended from ancestor to heir.<sup>1</sup> Thus in dower cases, the husband's heir was obligated to warrant both the widow her dower and the husband's grantee.<sup>2</sup> If the widow's claim was for her common law one-third share, the heir's conflicting warranty obligations were reconciled by having the heir provide the widow dower to the extent he had lands by descent from his ancestor, the husband. The husband's grant and grantee were thus protected. If the heir did not have lands by descent from the husband, the widow recovered against her husband's grantee. Another resolution was possible where the heir had land by descent from the husband: the widow could recover against the grantee and the grantee could be given *escambium*. The resolution actually chosen avoided re-arranging landholding at the death of the widow. But the actual resolution also exemplified a principle of protecting, to the extent consistent with outstanding obligations, completed grants. A widow's action in *cui in vita* for inheritance or *maritagium* which her husband had granted away also illustrates the limit to the warranty obligation of providing *escambium*. The defendant to the action could vouch the husband's heir, frequently his son by the plaintiff, to warrant his father's grant. The son's obligation to provide *escambium* was limited to the lands he had received by inheritance from his father.<sup>3</sup>

The second component of the warranty obligation, the warranty bar, was not ordinarily limited to the lands an heir received by inheritance from the ancestor who made a grant with warranty. Nor could the warranty bar be thus limited without introducing

<sup>1</sup> e.g. JUST 1/1000, m.45 (Wiltshire, 1281). Bailey, "Warranties of Land in the Thirteenth Century, part 1," 293-4.

<sup>2</sup> For warranty in dower cases see Biancalana, "Widows at Common Law," 310-31.

<sup>3</sup> See Chapter 1, above, pp. 59-60.

chaos, which might be reduced to the order of a system akin to *retrait lignager*.<sup>4</sup> Yet the warranty bar could not be absolute. The warranty bar had to be removed where there was something wrong with the grant – either the grant was not completed by livery of seisin or the ancestral grantor lacked the capacity to make a grant (i.e. he had been under age or insane).<sup>5</sup> The principle that the warranty obligation did not bar an heir from taking back a bad grant made by his ancestor was difficult to apply where a father granted away his wife's inheritance or *maritagium*. As seen above, this case gave Bracton more than a little trouble.<sup>6</sup> The son who tried to set aside such a grant had two good arguments why his father's warranty should not bar him. The father's grant was wrongful in that the land was not his to grant away and the ancestral holder of the land, his mother, had never made a grant with warranty. Bracton rejected these arguments, at least for the availability of *cui in vita* for the son, and seemed to be reporting and rationalizing the practice of Chancery not to issue *cui in vita* to sons. The arguments, however, did not go away. They were given operation in chapter 3 of the Statute of Gloucester in 1278.<sup>7</sup> The statute provided that one who claimed as the heir of a female ancestor who had died seised would not be barred by her husband's grant except to the extent that the heir had lands by descent from the husband-grantor.<sup>8</sup>

The principle of the statute appeared in scattered cases before the enactment of the statute. In 1219, the prior of Thurgarton sought an advowson on the basis of a charter by the defendant's father.<sup>9</sup> The defendant answered that the advowson was his

<sup>4</sup> For *retrait lignager* see S. White, *Custom, Kinship, and Gifts to Saints* (Chapel Hill: North Carolina University Press, 1988); J. de Laplanche, *La Réserve Coutumière dans l'Ancien Droit Français* (Paris: Société Anonyme du Recueil Sirey, 1925).

<sup>5</sup> Thus the point of certain writs of entry was to override the apparent warranty obligation that descended to the plaintiff.

<sup>6</sup> Chapter 1, above, pp. 60–2.

<sup>7</sup> 6 Edw. I, c. 3 (1278), *Statutes of the Realm*, I, 47.

<sup>8</sup> *Ibid.*; *Tony v. Cheshunt*, YB Pas. 5 Edw. II, 33 S.S. 103–6 (1312) (Denum); *Whittesley & Sedgford v. Laurence*, YB Mich. 8 Edw. II, 37 S.S. 135–40 (1314) (Bereford, C. J.).

<sup>9</sup> *Prior of Thurgarton v. Hulmo, Lincs & Worcs.*, No. 908 (1219). In a warranty of charter case on the Yorkshire Eyre of 1218–19, the Gloucester principle appears to have been rejected: *Prior of Ormsly v. Vavassour, Yorks.*, No. 255 (1218–19). The prior brought warranty of charter to force the defendant to warrant his father's charter and claimed 20 shillings as damages because the defendant took

mother's inheritance. The prior argued that the defendant had sufficient assets by descent from his father to warrant his father's charter. The defendant alleged that, his father being alive, he had no assets by descent from his father. The prior lost the case because he admitted that the advowson was the mother's inheritance and that the defendant's father was still alive. In 1248, a son brought mort d'ancestor on his mother's seisin; whether it was *maritagium* or inheritance is not clear.<sup>10</sup> He was not barred by his father's charter because he had no assets by descent from his father. The results of the other cases in which the Statute of Gloucester principle appeared do not present such clear evidence of the strength of the principle. In a 1230 case,<sup>11</sup> the parties settled and in a 1261–2 case,<sup>12</sup> the plaintiff withdrew from his writ, which is, perhaps, a sign of settlement. Four cases over some sixty years do not permit one to go so far as to say that Gloucester merely codified a pre-existing rule or principle. Yet the basic idea of the statute was not invented on the spot. In cases decided after the statute, the court treated the statute as new law. In 1281, when a plaintiff invoked the statute as a reason why he was not barred by his ancestor's charter, the court accepted the counter-argument that the conveyance had been made before the statute.<sup>13</sup>

The idea that the warranty of a tenant-in-tail would not bar his heir also appears in a stray case before either Gloucester or *De Donis*. In the Gloucestershire Eyre of 1268–9, Henry Aky brought formedon in the reverter for rent which his father had given his brother Roger in fee tail.<sup>14</sup> The defendant produced Roger's charter with warranty and argued that Henry was barred because he was seised of tenements of greater value by descent from Roger. The defendant specified the lands he had in mind and the case went to a jury on that issue. It is worth noting that, as far as the

his plough beasts. The defendant denied that he had to warrant the charter on the grounds that the land was his mother's inheritance. Since his father could not alienate his mother's inheritance, the defendant argued, he need not warrant his father's charter. As if this argument went for nil, the defendant denied the damages to the plaintiff and produced suit. He was ordered to wage his law on the denial of damages.

<sup>10</sup> *Raundelun v. Croce, Berkshire Eyre*, No. 196 (1248).

<sup>11</sup> *Abbot of Lulleshull v. Pauntolf*, 13 CRR, No. 2761 (Hil. 1230).

<sup>12</sup> JUST 1/616, m.10 (1261–2).

<sup>13</sup> JUST 1/1005, m.6 (1281). See BL Harley Ms. 25, f. 69v (1309). I am grateful to Dr. Paul Brand for making a transcription of this report available to me.

<sup>14</sup> *Aky v. De La Morne*, JUST 1/275, m.52 (1268–9).

plea roll record discloses, the plaintiff did not have to argue for the doctrine of assets by descent. Whether there was argument on the point does not appear in the record. The defendant appears to accept the doctrine and to fit his answer to the doctrine. Given this case, it is not surprising that the doctrine of assets by descent attached to grants by tenants-in-tail after *De Donis*. In later law, however, the warranty would be said to be collateral and would be effective to bar the reversion.

(b) *Inventing the doctrine of assets by descent for De Donis*

A muted tradition among legal historians attributes the doctrine of assets by descent under *De Donis* to an equitable or expansive reading of Gloucester.<sup>15</sup> This traditional view is mistaken. There were two separate doctrines of assets by descent – one under Gloucester for grants by a husband of his wife’s inheritance or *maritagium* and one under *De Donis* for grants by a tenant-in-tail. Some confusion might arise because Gloucester could be useful to an heir under an entail. In two types of cases brought on a descender writ, the plaintiff might invoke Gloucester or its principle for the doctrine of assets by descent and not the doctrine under *De Donis*. First, the minor extension of Gloucester: the grant was in *maritagium* or to a woman in fee tail, or to a woman and her husband and the heirs of the woman’s body. The woman’s husband makes a grant with warranty. Their child brings descender

<sup>15</sup> Plucknett attributed the doctrine to an expansive reading of Gloucester (Plucknett, *Concise History*, 618), but without much evidence. The case he cites, YB (RS) 34–5 Edw. I 388 (1306), does not mention Gloucester. Simpson, also citing this case, attributes the doctrine that the warranty of a tenant-in-tail was not a complete bar to his issue to “a generous interpretation of the statute of Gloucester”: Simpson, *A History of the Land Law*, 127. Holdsworth followed Reeves in the belief that the doctrine of assets by descent was “probably an extension” of chapter 3 of Gloucester: Holdsworth, *History of English Law*, III, 117, n. 7. The case cited, however, does not mention Gloucester: *Holwell v. Abbot of Warden*, YB Trin. 5 Edw. II, 33 S.S. 132 (1312). A defendant in a dower action vouched to warranty a tenant-in-tail, who refused to warrant the defendant lest his doing so meant that he would be foreclosed from an action against the defendant as his ancestor’s grantee of land held in fee tail. The court in this case, and others, required the vouchee to warrant but saved him his action. For a similar case, in which Gloucester is mentioned and distinguished, see *Tony v. Cheshunt*, YB Pas. 5 Edw. II, 33 S.S. 103–6 (1312). Milsom, wisely more cautious, accepts the “possibility” that the doctrine derived from Gloucester: Milsom, *Historical Foundations*, 180.

and invokes Gloucester, not the doctrine under *De Donis*, because his father's warranty descends to him collaterally to the entail given his mother. Secondly, the harder case, the converse case: the grant is to a man in fee tail or to a man and wife and the heirs of the man's body. The man makes a grant and after his death his widow releases to the grantee with warranty. Their child brings descender and, again, invokes Gloucester, not the doctrine under *De Donis*, because his mother's warranty descends to him collaterally to the entail given his father. In both cases, the plaintiff must argue that his case comes within the equity, not the words, of Gloucester. As these cases involve collateral warranties, they are discussed in the next part of this chapter.<sup>16</sup>

There are, however, three points worth making now. First, simply that these cases indeed involved collateral warranties. The doctrine of assets by descent under *De Donis* had to do with lineal warranties. The invocation of Gloucester in these cases is not evidence that Gloucester had anything to do with the modification of lineal warranties by the doctrine of assets by descent, other than serving as an example of how warranties might be preserved but modified. Secondly, in the case of a mother's warranty, even though the Council thought that Gloucester should be interpreted, or explained, to cover the case, the justices never so extended the statute.<sup>17</sup> It is hard to see how justices who believed that the equity of Gloucester did not extend to maternal warranties could hold that the equity of Gloucester covered all entails. Thirdly, the notion that the equity of one statute can serve as the equity of a statute enacted later so boggles the mind that interpretative charity cautions imputing the idea, without good reason, to otherwise intelligent lawyers.

The two different doctrines of assets by descent were kept separate. In 1313, Justice Inge said that *De Donis* restrains alienations in two ways: the donee of a grant in fee tail may not alienate the fee tail land and if he does alienate the land his issue is not barred unless he has assets by descent.<sup>18</sup> No mention of Gloucester. A year or so earlier, Justice Herle clearly treated Gloucester and *De Donis* as two different statutory modifications of common

<sup>16</sup> Below, pp. 224–7.

<sup>17</sup> Below, pp. 225–7.

<sup>18</sup> YB Mich. 6 Edw. II, 34 S.S. 43 (1312–13).

law warranty.<sup>19</sup> But in 1347, Greene suggested that the doctrine under *De Donis* derives from the equity of Gloucester.<sup>20</sup> This statement should be read in the context of developments beginning in the 1320s when debate centered on whether the warranty of a tenant-in-tail, as opposed to the first donee, also came within the doctrine of assets by descent.<sup>21</sup> In that period, some fifty to seventy years after the enactment of *De Donis*, lawyers attempted to reconstruct the doctrine from a statutory text that did not mention the doctrine. Greene's desperate grasping for some, for any, statutory text was and remained a minority and mistaken view.

The doctrine of assets by descent was invented for lineal warranties under *De Donis* in the early 1290s. There is evidence that at first *De Donis* was read to eliminate any warranty obligation by the issue of the donee. In 1291 a plaintiff brought descender based on a grant to her mother and father and the heirs of their bodies.<sup>22</sup> The defendant answered that the mother had survived the father and had granted to the defendant with warranty. The plaintiff acknowledged her mother's charter but asserted that the charter should not bar her because it was made after *De Donis*. The case went to a jury to find whether the grant had been made before or after the statute. Significantly, neither party mentioned assets by descent. If the jury found that the grant had been made after *De Donis*, the plaintiff would recover without regard to whether she had assets by descent. In another 1291 case the fact that the alienation was made after *De Donis* was pleaded to remove a warranty bar to the plaintiff's recovery on a descender writ.<sup>23</sup> In these cases, *De Donis* was read to remove completely the warranty bar.

In the following year, the plaintiff to a descender writ pleaded that he should not be barred by his father's charter because he had nothing by descent from his father.<sup>24</sup> The defendant countered with the assertion that the plaintiff's plea was irrelevant because the father had alienated before "the statute of the lord King lately

<sup>19</sup> YB 5 Edw. II, 63 S.S. 36 (1311–12).

<sup>20</sup> YB Mich. 21 Edw. III, f. 28, pl. 4 (1347).

<sup>21</sup> e.g. YB (RS) 15 Edw. III 388 (Mich. 1341).

<sup>22</sup> *Gregory v. Chandos*, CP40/88, m.76d (Hil. 1291).

<sup>23</sup> *Westercrofte v. Brunnan*, CP40/91, m.202d (Mich. 1291).

<sup>24</sup> *Tufforth v. John son of Paul*, CP40/95, m.31 (Trin. 1292).

promulgated at Westminster about tenements thus alienated.”<sup>25</sup> On that issue the case went to the jury. Verdict and judgment were for the defendant. Also in 1292, in a learning exercise a father alienated his wife’s *maritagium* before *De Donis* and the wife, in widowhood, confirmed the grant after *De Donis*.<sup>26</sup> May the child of the couple recover by descender? The reporter argues that the issue should recover because the confirmation, made after *De Donis*, was not good. He reasons that by *De Donis* a final concord was not effective to bar the issue and, *a fortiori*, a confirmation would not be good. He reports, however, that the attorney, who, perhaps, was conducting the exercise, took a different view. Although a final concord would not bar the issue, a confirmation was good to bar the issue even if he had no assets by descent. In his mind, the confirmation related back to the grant made before *De Donis*. The implication is that the confirmation, if it did not relate back to the grant, would be good as long as the issue had assets by descent, although it is not clear from whom.

In cases in 1293,<sup>27</sup> and 1294<sup>28</sup> in which the plaintiff counters the defendant’s attempt to assert a warranty bar by saying that the grant with warranty was made after *De Donis*, no mention is made of the doctrine of assets by descent. One cannot rule out the possibility that mention of the doctrine was merely omitted, but it seems more likely that the doctrine had not yet become firmly attached to *De Donis*. By 1296, the doctrine of assets by descent was firmly in place.<sup>29</sup> The evidence from the early 1290s shows a

<sup>25</sup> Ibid. “*Statutem domini Regis ultimo edito apud Westmonasterium de tenementis sic alienatis.*”

<sup>26</sup> YB (RS) 20–1 Edw. I 300 (1292).

<sup>27</sup> *Hanlaye v. Wysbrod*, JUST 1/805, m.26 (Staffordshire, 1293). The plaintiff brought descender on a grant to his parents and the heirs of their bodies. The defendant produced a charter by the plaintiff’s mother made after the death of the plaintiff’s father. The plaintiff pleaded that when she made the charter his mother had remarried. On that issue, the case went to a jury. The plaintiff later withdrew. The pleading moves of the parties make sense if one supposes that the mother’s alienation took place before *De Donis*.

<sup>28</sup> *Malton v. Pykering*, JUST 1/1102, m.29 (1294). In another 1294 case a defendant who pleaded a grant with warranty made sure to plead that the grant had been made before *De Donis*: *Pykehale v. Coverham*, JUST 1/1084, m.61 also recorded in JUST 1/1102, m.24d (Yorkshire, 1294).

<sup>29</sup> CP40/115, m.141 (Mich. 1296). For other early cases illustrating the doctrine see CP40/164, m.12 (Trin. 1307); YB 2 Edw. II, 17 S.S. 79 (1308–9); *Piddle v. Comyn*, YB 2 Edw. II, 19 S.S. 11 (1308–9); *Lilleburn v. Draper*, YB Hil. 4 Edw. II, 26 S.S. 67 (1310–11); YB 4 Edw. II, 42 S.S. 183 (1310–11).

transition from reading *De Donis* as a complete prohibition on alienations and thus a complete removal of the warranty bar to reading the statute as removing the warranty bar to the extent that the issue has no assets by descent from the grantor.

A report in 1292, probably of a learning exercise, helps in understanding how the doctrine came to be attached to *De Donis*.<sup>30</sup> The defendant to an action of descender vouched the plaintiff to warrant his father's grant. The defendant's move is a little strange. One would expect him to plead the father's warranty as a bar to the plaintiff. Milsom has suggested that the defendant was trying to set up a claim to *escambium*.<sup>31</sup> Milsom is on the right track. In a report from the years 1278–89, a defendant sought to bar the plaintiff by his father's warranty.<sup>32</sup> The plaintiff's action is not disclosed in the report. The defendant, as was usual, argued that the plaintiff was barred by his father's warranty because if the defendant had been sued by a third party, the plaintiff would have to warrant the defendant. The plaintiff works the defendant's argument against him. The plaintiff says that were he vouched by the defendant he could either enter into the warranty or give the defendant *escambium*, but he has no assets by descent with which to give the defendant *escambium*. Therefore, he concludes, he is not barred by his father's charter. Somewhat surprisingly, the defendant is made to vouch the plaintiff to warranty. The plaintiff recovered against the defendant, who recovered back against the plaintiff to the extent that he had assets by descent from his father. The report does not disclose the nature of the plaintiff's claim. But if his claim were by inheritance from his father, the judgment was merely a round-about way of giving judgment for the defendant. If his claim were by inheritance from his mother, one is puzzled why the plaintiff did not simply invoke the doctrine of assets by descent under Gloucester. If, however, the claim were descender on a grant to this father, the report begins to make better sense. The plaintiff is barred only to the extent that he has assets by descent with which to give *escambium* to the defendant.

At any rate, this report helps one to understand the 1292 learning exercise. In the learning exercise the defendant starts off

<sup>30</sup> YB (RS) 20–1 Edw. I 302 (1292). I am grateful to Dr. Paul Brand's identification of the report as a learning exercise.

<sup>31</sup> Milsom, *Historical Foundations*, 180.

<sup>32</sup> *Earliest English Law Reports*, II, 330.

by vouching the plaintiff. He pre-empts the long argument of the earlier report which resulted in the defendant having to vouch the plaintiff. Here, the defendant concedes that the warranty bar is no stronger than the duty to give *escambium*.<sup>33</sup> In so doing, he must believe that *De Donis* did not override the duty to give *escambium*.<sup>34</sup> That, of course, might have been the point he was trying to make. Once that point was established, the doctrine of assets by descent could appear to avoid either the defendant vouching the plaintiff, the plaintiff recovering from the defendant, and the defendant in the same judgment recovering back from the plaintiff to the extent he had other assets by descent or the plaintiff recovering from the defendant and the defendant bringing an additional action for *escambium*.<sup>35</sup> The point also arose the other way around. The issue of a tenant-in-tail is vouched to warranty and resists entering into the warranty lest he is barred from a future action for the entailed land.<sup>36</sup> He is made, subject to having assets by descent, to warrant the defendant and his future action is saved to him. Returning to the 1292 case, the reporter reasoned that the father's deed will not bar the heir because the father's grant is contrary to the form of the gift to him, unless something descended from the father to the plaintiff. The reporter combines

<sup>33</sup> There is a little room to quibble with this reading. The defendant asserting a warranty bar frequently said that if he were impleaded by another the plaintiff would have to warrant him. The defendant might have been confused and might have been trying to assert a warranty bar. He is taken, however, to have vouched the plaintiff.

<sup>34</sup> Justice June believed that the duty to give *escambium* was the core obligation from which arose the warranty bar: YB Trin. 7 Hen. VI, f. 43, pl. 21 (1429).

<sup>35</sup> Milsom, *Historical Foundations*, 180. Milsom put the case of the defendant bringing *warrantia cartae* against the plaintiff. Justice Paston drew a tighter circle: if a defendant vouched the plaintiff and the plaintiff entered into the warranty he would be both plaintiff and warrantor and could satisfy his own claim with land by descent in fee simple: YB Hil. 19 Hen. VI, f. 59, pl. 26 at f. 60 (1441), YB Trin. 19 Hen. VI, f. 78, pl. 7 (1441). Justice Paston's analysis is close to the result in the report from 1278–89. Chief Justice Stonor had a similar analysis in a case in which a defendant vouched the plaintiff but thought vouching the plaintiff was “inconvenient”: YB Mich. 18 Edw. II, f. 563 (1324).

<sup>36</sup> For the vouchee making his entry into the warranty subject to his having assets by descent see YB (RS) 21–2 Edw. I 250 (1293); YB (RS) 21–2 Edw. I 537 (1294); BL Add. Ms. 31826, f. 101. For cases of warrantor's reluctance lest he lose his action see *Walewayn v. Boteler*, YB 2 Edw. II, 19 S.S. 7 (1308–9); *Tony v. Cheshunt*, YB Pas. 5 Edw. II, 33 S.S. 103 (1312); *Halwell v. Abbot of Warden*, YB Trin. 5 Edw. II, 33 S.S. 132 (1312); YB Mich. 15 Edw. II, f. 441 (1321); YB Mich. 18 Edw. II, f. 563 (1324).

the earlier doctrine – grants contrary to *De Donis* do not bind the issue of the grantor – with the emerging doctrine of assets by descent.

The invention of the doctrine at this time probably depended upon the fact that at this time the restraint on alienation imposed by *De Donis* extended only to the original donee.<sup>37</sup> That meant that the donee's issue recovered lands in fee simple from the donee's grantee. If the issue already had lands in fee simple by descent from the donee and if the issue had to give *escambium* to the grantee, then the issue would recover fee simple lands from the grantee and give him back other fee simple lands of equal value. It could well seem to make no difference precisely which lands the issue and which the grantee ended up holding in fee simple as long as they were of equal value. Once the statutory restraint on alienation included the issue who sought to set aside his ancestor's grant, there would be a difference between (a) permitting the issue to recover from the grantee and then making him give the grantee *escambium* and (b) applying the doctrine of assets by descent. In the first case, the issue would recover lands in fee tail and give the grantee lands in fee simple. There would be no change in the amount of land held in fee tail. Under the doctrine of assets by descent, the issue would retain land in fee simple and so would the grantee. There would be a reduction in the amount of land held in fee tail. Once the doctrine of assets by descent was in place, later extensions of the statutory restraint on alienation would have this unintended, perhaps even unnoticed, result. More importantly, the original circumstances under which the doctrine had been invented would no longer obtain. The common sense reason for the doctrine under *De Donis* would be lost from view. Lawyers then, and legal historians later, could well be mystified as to how the doctrine became part of the law of *De Donis*.

As the reach of *De Donis* was extended beyond the original donee, the application of the doctrine of assets by descent to alienations with warranty by issue in the entail was not automatic. Beginning in the 1320s there was resistance to applying the doctrine to alienations by the first issue in the entail. This resistance paralleled the contemporaneous resistance to extending

<sup>37</sup> See Chapter 2, above, pp. 106–9.

the reach of *De Donis* beyond the original donee.<sup>38</sup> It is at this time, when the question was whether the doctrine applied to every issue in an entail, that the doctrine as a modification of *De Donis* ran into the difficulty that *De Donis* said nothing about warranties. In 1325, the second issue in an entail brought descender to set aside a grant made by the first issue.<sup>39</sup> The defendant produced the charter with warranty of the first issue and pleaded that the plaintiff had assets by descent. The plaintiff quoted relevant portions of *De Donis* to show that the doctrine of assets by descent was not in the statute. She, therefore, was not barred at all. She thus wished to return to the time, before the doctrine was introduced, when *De Donis* overrode the donee's warranty completely. In two cases in the 1329–30 Northamptonshire Eyre the parties debated whether the doctrine of assets by descent applied to alienations by the first heir in the entail.<sup>40</sup> In 1331, a defendant made just the opposite argument from that made by the plaintiff in 1325. He argued that the warranty was at common law because the words of the statute did not help the plaintiff.<sup>41</sup> His argument would either destroy the doctrine of assets by descent completely or limit it to alienations by the donee. In the latter application, the argument was another method of resisting the extension of the entail beyond the donee. Justice Herle, however, said that it was “the usage of the law” that a deed by one through whom the plaintiff claimed an entail would not automatically bar the plaintiff. The defendant dared not demur, but pleaded assets by descent.

It is at this time, when lawyers and judges were rebuilding the doctrine from the ground up, that some saw in Gloucester a statutory foundation for the doctrine. Many lawyers, however, were no doubt willing to rely, with Justice Herle, on the doctrine under *De Donis* being a usage of the law. In 1341, Pole had no trouble keeping the doctrine of assets by descent under *De Donis* separate from the doctrine under Gloucester.<sup>42</sup> The view that the

<sup>38</sup> See Chapter 2, above, pp. 110–19.

<sup>39</sup> *Wayland v. Saxmundham*, CP40/258, m.193 (Mich. 1325).

<sup>40</sup> *White v. Le Moigne et al.*, *Northamptonshire Eyre*, II, 730, notes from the record of which are at *ibid.* at 599; *Berneville v. Talyngton*, *Northamptonshire Eyre*, II, 739.

<sup>41</sup> YB Pas. 5 Edw. III, f. 14, pl. 5; f. 19, pl. 23 (1331).

<sup>42</sup> YB (RS) 15 Edw. III 388 (Mich. 1341).

doctrine under *De Donis* was a usage of the law had some support in oral tradition. In 1341 there was a remarkable exchange between Thorp and Sharesull.<sup>43</sup> The issue was whether the warranty of a tenant-in-tail, descending to the heir of the donor, would bar recovery of the reversion. If *De Donis* governed the warranty of the tenant-in-tail, the doctrine of assets by descent would apply. Otherwise, the warranty would be a complete bar. Sharesull argued that *De Donis* would not control: the statute prohibited alienation by a tenant-in-tail, and that only for the benefit of the issue in the tail. Thorp pointed out that Sharesull's unqualified statement would do away with the doctrine of assets by descent. Sharesull then recalled that he and Hillary had made such a plea on the Northamptonshire Eyre because they had no other plea. When the case was adjourned to Westminster, Justice Herle said that the strongest case against their view, and for the doctrine of assets by descent, was that Justice Hengham had construed the statute to include the doctrine of assets by descent. There was, then, some fifty years after the invention of the doctrine, an oral tradition that traced the doctrine to a construction of *De Donis* at the time of its enactment.

In 1447 Greene, observing that *De Donis* said nothing about warranties, asserted that the doctrine of assets of descent was by "equity of the law."<sup>44</sup> He thus came close to Justice Herle's "usage of law." But then, as if moving to surer ground, he brought in the equity of Gloucester, which, unlike *De Donis*, spoke of warranties limited to the heir's assets by descent. Thereafter, explanations of the doctrine are not frequent. The foundation of the doctrine was not a question one pursued too deeply. The judicial creation of the doctrine in the 1290s, though not entirely lost to memory, could not be reconstructed in the new circumstances in which many heirs under entails would not recover lands in fee simple, but would recover lands in fee tail. A reading at the Inns of Court early in the fifteenth century attributed the doctrine to the equity of Gloucester.<sup>45</sup> Some lawyers thus subscribed to the Gloucester myth.

<sup>43</sup> *Ros v. Graa*, YB Mich. 15 Edw. III, RS 15 Edw. III 388 (1341).

<sup>44</sup> YB Mich. 21 Edw. III, f. 28, pl. 4 (1347).

<sup>45</sup> Reading c. 1420, *Readings and Moots*, I, lxxi.

*(c) Applying the doctrine*

The doctrine required the court to settle issues that rose in applying the doctrine. The court had to decide what counted as assets by descent. As early as 1306 the doctrine was sufficiently in place to be open to attempts at manipulation.<sup>46</sup> In that year in a case of formedon in the descender the jury found that the plaintiff's ancestor three days before his death had conveyed to the plaintiff all his land in fee simple so that the plaintiff might deny that he had anything by descent from the ancestor. The court had little trouble treating the lands as coming to the plaintiff by descent. Whether the plaintiff had assets by descent was determined at any time before his action, not simply at the time of the action.<sup>47</sup> This rule, as Chief Justice Bereford explained, was to prevent plaintiffs from collusively divesting themselves of lands they had inherited in fee simple.<sup>48</sup> A more difficult question was raised by Belknap in 1369.<sup>49</sup> The defendant produced a charter by the plaintiff's father and pleaded assets by descent. Belknap for the plaintiff argued that the king had held the father's lands for a debt owed the king. After the father died, the king had committed the lands to the son under a stipulation that the profits were to pay the outstanding debt. Belknap's point was that the doctrine required lands by descent to be profitable to the heir and thus of value. The lands held without profit to the heir should not count as assets by descent. No decision is recorded.

The court also had to deal with the situation in which a plaintiff pleaded that he had no assets by descent but the jury found he had assets, though less than the land he sought to recover. At first, it seems, the court was uncertain whether to bar the plaintiff completely for having made a false plea or to bar the plaintiff only to the extent that he had assets by descent. On the Northamptonshire Eyre of 1329–30 the court barred a plaintiff as to two pence of his claim because he had tenements worth two pence by descent.<sup>50</sup> Somewhat later the court barred another plaintiff

<sup>46</sup> YB (RS) 34–5 Edw. I 386 (1306).

<sup>47</sup> e.g. YB Hil. 4 Edw. II, 26 S.S. 66 (1310–11).

<sup>48</sup> *Whittesley & Sedgford v. Laurence*, YB Mich. 8 Edw. II, 37 S.S. 135 at 137 (1314).

<sup>49</sup> YB Hil. 43 Edw. III, f. 9, pl. 27 (1369).

<sup>50</sup> *Ellesden v. Myte, Northamptonshire Eyre*, II, 524 (1329–30).

completely for having pleaded falsely.<sup>51</sup> This position was not especially harsh because the plaintiff need plead only that he had insufficient assets by descent. But in later cases the court changed its mind and barred the plaintiff only to the extent that it was found he had assets by descent.<sup>52</sup> The related problem of allocating the effect of insufficient assets among multiple defendants was solved in a straightforward manner. The question was put to Shardelow that if the plaintiff demands a carucate of land from each of three defendants and has a carucate by descent, is he barred against all three defendants?<sup>53</sup> The answer, as perhaps expected, is that he is barred by equity from one-third against each defendant. The plaintiff thus had some incentive to bring all his actions of descender together.

The doctrine encountered a special problem in the case of an exchange of lands. Suppose that a tenant-in-tail grants entailed land to another in exchange for land in fee simple. The grant of lands in an exchange carried warranty.<sup>54</sup> When the tenant-in-tail dies, if the fee simple lands received in the exchange descend to his issue, the issue is barred because he has assets by descent.<sup>55</sup> Thus two tenants-in-tail who exchange their entailed lands could each bar their issue, because each would receive lands in fee simple.<sup>56</sup> Where a tenant-in-tail exchanged entailed land for land in fee simple, as long as the lands exchanged were of equal value and the tenant-in-tail did not dispose of the lands received, the immediate issue of the tenant-in-tail was not harmed. Subsequent issue, however, will have lost the entailed lands and might not inherit the fee simple lands received in the exchange. The problem came where the fee simple lands received were either not of equal value to the fee tail lands granted away or were fictitious – the extreme case of unequal value. These cases raised the question of how an

<sup>51</sup> YB Mich. 21 Edw. III, f. 28, pl. 4 (1347).

<sup>52</sup> YB Mich. 22 Edw. III, f. 55, pl. 16 (1348).

<sup>53</sup> YB Pas. 1 Edw. III, f. 8, pl. 11 (1327).

<sup>54</sup> *Bainton v. Higham, Kent Eyre*, II, 27 S.S. 61 (1313–14).

<sup>55</sup> *Clerk v. Mushel*, YB Mich. 4 Edw. II, 22 S.S. 155 (1310); *Northamptonshire Eyre*, II, 584 (1329–30); Lib. Ass., 45 Edw. III, pl. 6 (1371).

<sup>56</sup> Land in fee tail could also be exchanged for land in fee tail, so that both, as stipulated in the exchange, remained fee tail, e.g. YB Pas. 3 Edw. III, f. 19, pl. 16 (1329). The conveyancing and tenurial difficulties of an exchange of fee tail lands for fee tail lands were avoided in this case because the king was the grantor of both fee tails.

heir might reject his ancestor's valuation of the exchanged lands as equal to the fee tail lands granted away. The heir could not complain directly of an unequal exchange. In 1310, when a man was vouched to warranty on the basis of his ancestor's exchange, he tried to plead that his ancestor had received only three selions in the exchange.<sup>57</sup> Justice Stanton said that this plea could not be put on the roll. The heir had to plead that he had not been seised of the land received in exchange.<sup>58</sup> This requirement meant, of course, that if the heir had taken possession of the lands received in the exchange he could not later change his mind. If the heir believed that the exchange was a fiction, he could plead that his ancestor had received nothing in exchange.<sup>59</sup>

In order to make an unequal exchange of lands an effective means of barring an entail, one would have to preclude the heir from denying that he had been seised of the lands received in the exchange. In a 1435 case a defendant tried to do just this.<sup>60</sup> An heir in tail brought descender against his father's grantee. The defendant produced the father's charter as evidence of the exchange. The plea roll record reveals that the exchange was of an entailed seventy-six acres of arable, eighteen acres of pasture, and fifty acres of moor for an unspecified pasture in fee simple, which, the plaintiff said, was not of equivalent value.<sup>61</sup> The defendant tried to make the plaintiff answer his father's deed rather than plead that the plaintiff had never been seised of the lands received in the exchange. Ordinarily, an heir could avoid his ancestor's deed only by alleging either that it was not in fact his father's deed or that nothing had passed by the deed.<sup>62</sup> Neither plea would be available in the case of an unequal exchange, for in that case the deed would be the ancestor's deed and lands had passed under the deed. That was the difficulty. In the 1435 case, according to the Yearbook report, the court permitted the plaintiff the usual form of pleading: that after the death of his ancestor the plaintiff had

<sup>57</sup> *Clark v. Mushel*, YB Mich. 4 Edw. II, 22 S.S. 155 (1310).

<sup>58</sup> *Northamptonshire Eyre*, II, 584 (1329–30) (descender; defendant pleads that plaintiff was seised after his ancestor's death); YB 4 Edw. II, 26 S.S. 135 (entry *dum fuit infra etatem*); *Bygot v. Belet*, YB Pas. 3 Edw. II, 20 S.S. 128 (1310) (*sur cui in vita*).

<sup>59</sup> *Bainton v. Higham, Kent Eyre*, II, 27 S.S. 61 (1313–14).

<sup>60</sup> YB 14 Hen. VI, f. 2, pl. 7; 14 Hen. VI, f. 3, pl. 15 (1435).

<sup>61</sup> *Ashefield v. Hethe*, CP40/699, m.104 (Mich. 1435).

<sup>62</sup> e.g. YB (RS) 12–13 Edw. III 106 (1338–9).

not accepted the exchange and had never entered the land. But the plea roll record reveals that the case went to a jury on the different issue of whether the plaintiff's father had died seised of the land received in exchange for the entailed land. Forcing such a case to this issue for the jury meant that the heir was forced to accept his ancestor's valuation.

Further evidence that fictitious or unequal exchanges were used in the fifteenth century as a method of manipulating the doctrine of assets by descent to bar entails is provided by a Yearbook entry in 1473.<sup>63</sup> Littleton is reported discussing a case he had in arbitration where a manor held half in fee tail and half in fee simple was exchanged for another manor in fee simple. The tenant-in-tail died and his issue entered into the manor received in the exchange. The issue, significantly, was whether the exchange was voidable in whole or in part. This way of putting the question supposes, perhaps, that the exchange of the fee tail half for half of the other manor was voidable. Littleton's opinion was that the whole exchange was voidable. The exchange, he reasoned, might have been for the ease and pleasure one of the parties took in part of the manor. The remark rather strongly hints that the two manors were not of equal value. The inclusion of fee simple land with fee tail land in the exchange might merely have been to disguise the disentailing purpose of the transaction.

It is not surprising that conveyancers might use unequal exchanges as a means of disentailing lands, especially in the fifteenth century. Fairly regularly in the fourteenth century in descender cases the defendant answered by producing a charter with warranty by the plaintiff's ancestor and pleading assets by descent.<sup>64</sup> It becomes harder to find defendants invoking the doctrine in the fifteenth century. There were probably two reasons for this

<sup>63</sup> Mich. 13 Edw. IV, f. 3, pl. 8 (1473).

<sup>64</sup> e.g. YB Mich. 19 Edw. II, f. 627 (1325); *Weyland v. Saxmundham*, CP40/258, m.193 (Mich. 1325); *Comyn v. Byroren et al.*, CP40/258, m.212 (Mich. 1325); *Dunning v. Duraunt*, CP40/258, m.297 (Mich. 1325); CP40/274, m.54 (Trin. 1328); CP40/275, m.265d (Mich. 1328); CP40/277, m.225d (Pas. 1329); CP40/279, m.194d (Mich. 1329); CP40/282, m.23 (Trin. 1330); CP40/283, m.460 (Mich. 1330); CP40/285, m.177d (Pas. 1331); CP40/286, m.68 (Trin. 1331); CP40/292, m.295 (Mich. 1332); YB Mich. 7 Edw. III, f. 50, pl. 23 (1333); CP40/298, m.144d (Pas. 1334); CP40/300, m.248d (Mich. 1334); CP40/336, m.440d (Mich. 1343); CP40/392, m.92d (Mich. 1357); CP40/396, m.302 (Mich. 1358); CP40/400, m.148d (Mich. 1359); CP40/411, m.208 (Mich. 1362); CP40/429, m.421 (Mich. 1367); CP40/29, m.139 (Pas. 1418).

decline in the use of the doctrine. The tendency to use fee tails for the devolution of property, and the cumulative effect of this practice for more than a century, meant that fewer defendants could assert that a plaintiff had lands in fee simple by descent. The increasing frequency with which landholders put land into uses, also as a strategy to control the devolution of their lands, with instructions to their feoffees to convey fee tail also meant that heirs would be less likely than a century earlier to have fee simple lands by descent. An unequal exchange supplied the lands in fee simple required by the doctrine. If the tenant-in-tail had been seised of the lands he received in the exchange, then an unequal exchange, the inequality of which could not be challenged by the heir, assured the grantee that he could plead the exchange as giving the heir assets by descent.

The 1435 case occurs only five years before common recoveries begin to appear on the plea rolls.<sup>65</sup> It was a short step from an unequal or fictitious exchange to the common recovery. In a common recovery a tenant-in-tail gives land to his grantee and receives fictional land of equal value from his warrantor. Both the exchange and the recovery manipulate the doctrine of assets by descent. An exchange thus has affinities with recoveries understood on the recompense theory, but the earliest recoveries did not rely entirely on that theory.<sup>66</sup> And the 1435 case proved to be an embarrassment to the developed recovery.<sup>67</sup>

## 2. THE DOCTRINE OF COLLATERAL WARRANTY

As Payling has observed, collateral warranties “are neither simple to define nor straightforward in their operation. Their clearest definition is a negative one . . .”<sup>68</sup> The usual negative definition of a collateral warranty is that a collateral warranty was a warranty that was not a lineal warranty.<sup>69</sup> A lineal warranty was one that

<sup>65</sup> Chapter 5, below, Table 1, p. 253.

<sup>66</sup> See Chapter 5, below, pp. 262–8.

<sup>67</sup> See Chapter 5, below, pp. 297–8.

<sup>68</sup> S. J. Payling, “Arbitration, Perpetual Entails and Collateral Warranties in Late-medieval England: A Case Study,” *Journal of Legal History* 13 (1992), 47.

<sup>69</sup> Milsom, *Historical Foundations*, 180–1; Simpson, *A History of the Land Law*, 128–29; Plucknett, *Concise History*, 618–19; Holdsworth, *History of English*

descended to a claimant by the same line of descent as that by which the claimant set up his claim.<sup>70</sup> For example, suppose A's father grants land to B with warranty. If after his father's death A claims the land by descent from his father, his father's warranty also descends to him and along the same line of descent as he uses to set up his claim. A collateral warranty descended to a claimant by a different route from that by which the claimant used to set up his claim. At this point, it is important to recognize that the idea of collateral warranty had two applications: one application was to bar claims generally and the other was to bar claims under an entail. The difference between the two applications was the difference between how a claimant would set up his claim. In the case of a claim not involving an entail, a claimant would use the rules of inheritance to set up his claim. Suppose that B disseised A's father but the father's younger brother released with warranty to B and died without issue so that A is his heir. A's claim to the land is by descent from his father; his uncle's warranty also descends to him, but collaterally to his claim by descent from his father. A is barred by his uncle's warranty.

Collateral warranties to bar claims under an entail were complicated. A claimant set up his claim under the terms of the grant in fee tail. A warranty that descended to a claimant outside the terms of the entail was a collateral warranty. And it remained a collateral warranty if it was not affected by the statutes of Gloucester or *De Donis*. In the sense of being unaffected by statute, collateral warranties were said to be at common law. For this reason, a collateral warranty was a complete bar and did not depend upon the claimant not having assets by descent from the ancestor who had discontinued the entail. In order to determine whether a warranty given by the claimant's ancestor was collateral to the claimant one has to ask two questions. First, did the warranty descend to the claimant outside the terms of the grant in fee tail the claimant used to set up his claim? If not, the warranty is lineal. If so, did a statute – Gloucester or *De Donis* – nevertheless modify the warranty by the doctrine of assets by descent? If not, the warranty was collateral, was at common law, and was a complete

*Law*, III, 117–18; H. W. Elphinstone, "Notes on the Alienation of Estates in Tail," *Law Quarterly Review* 6 (1894), 282.

<sup>70</sup> Payling, "Collateral Warranties," 47.

bar. Some examples will illustrate the main variety of cases arising in connection with entails.

- (1) *Lineal warranty*. Suppose a grant to A's father in fee tail. He alienates with warranty. A's claim is as issue of his father under the grant in fee tail and his father's warranty descends to him as heir and issue of his father. The warranty is lineal. The warranty comes under *De Donis* and the doctrine of assets by descent.
- (2) *Fraternal collateral warranty*. Suppose a grant to A's father in fee tail. A's father alienates with warranty. His younger brother releases with warranty to the grantee and dies without issue. A's claim is as issue of his father under the grant in fee tail. His uncle was not a tenant-in-tail through whom A makes his claim. His uncle's warranty descends to A outside the terms of the grant in fee tail A uses to set up his claim and is not restrained by *De Donis* and the doctrine of assets by descent. The uncle's warranty is collateral and a complete bar.
- (3) *Paternal collateral warranty*. Suppose a grant to A's mother in fee tail. A's father alienates with warranty. A's claim is as issue under the entail to his mother. A's father was not a tenant-in-tail through whom A makes his claim. His father's warranty descends to him outside the terms of the grant in fee tail and does not come under *De Donis* and the doctrine of assets by descent. But Gloucester might apply to the father's warranty. If so, the Gloucester doctrine of assets by descent applies to the warranty.
- (4) *Maternal collateral warranty*. Suppose a grant to A's father in fee tail. He alienates with warranty. After his death A's mother in widowhood releases with warranty to the grantee. A's claim is as issue under the entail to his father. A's mother was not a tenant-in-tail through whom A sets up his claim. His mother's warranty descends to him outside the terms of the grant in fee tail and does not come under *De Donis* and the doctrine of assets by descent. Whether the warranty is at common law, and thus a complete bar, depends upon whether Gloucester applies to the mother's warranty.
- (5) *Collateral warranty to bar the reversion*. Suppose A's father grants land in fee tail to A's older brother. The older brother alienates with warranty and dies without issue so that A is his

heir. If A claims the reversion, his brother's warranty descends to him outside the terms of the grant setting forth the reversion, because A claims the reversion as his father's, not his brother's, heir. But A's brother was tenant-in-tail when he made the grant. Does *De Donis* and the doctrine of assets by descent help A? If so, the warranty is not collateral.

- (6) *Collateral warranty to bar a remainder.* Suppose a grant to A's older brother in fee tail, remainder to A in fee tail or fee simple. The older brother alienates with warranty and dies without issue so that A is his heir. If A claims the remainder under the terms of the grant in fee tail limiting a remainder, his brother's warranty descends to him outside the terms of the grant setting forth the remainder. He claims, not as his brother's heir, but as remainderman. Does *De Donis* and the doctrine of assets by descent help A because his brother was tenant-in-tail when he made the grant? If so, the warranty is not collateral.

Two things are to be noticed about these examples. First, whether the warranty is lineal or collateral depends upon the interpreted reach of a statute. In the third and fourth examples whether a father's warranty of lands entailed on one's mother or a mother's warranty of lands entailed on one's father is collateral depends upon the interpreted reach of Gloucester. In the other examples, whether the warranty descends collaterally depends upon the interpreted reach of *De Donis*. Thus, collateral warranties are warranties not modified by statute. This point is as important as it is obvious. It is important because the doctrine of collateral warranties to bar entails depended upon both (a) the rules of warranty at common law and (b) the interpretative reach of *De Donis* and Gloucester. Neither the law of common law warranties nor the effect of *De Donis* and Gloucester on warranties was static during the period from 1285 to the middle of the fifteenth century. In 1286, a collateral warranty was held to be no bar at all at common law.<sup>71</sup> Three decades later there were both types of collateral warranties – those that barred claims at common law and those that, unaffected by *De Donis* or Gloucester, remained at common law and barred claims under an entail. Secondly, fraternal and

<sup>71</sup> JUST 1/63, m.21 (Buckinghamshire, 1286), which was related to JUST 1/63, m.22d (1286).

maternal collateral warranties depended upon the idea that a release or quitclaim with warranty would bar not only the person giving the release or quitclaim but also that person's heirs. This idea required that inheritable warranty obligations be detached from grants of land. And this idea required in turn the tenurial world created by the statute *Quia Emptores*.<sup>72</sup>

The history of collateral warranties to bar entails can be divided into five parts: the foundational idea that a warranty in a release could descend as a bar to a collateral heir; the decision that Gloucester modified a father's warranty of land entailed to one's mother but not a mother's warranty of lands entailed to one's father; the decision that in the case of a grant with warranty by a tenant-in-tail *De Donis* and the doctrine of assets by descent would not benefit reversioners and remaindermen; the development of collateral warranties to bar the issue under an entail. Once the mechanics of collateral warranties are better understood one can turn to the difficult question of how useful were they as a means of barring entails.

#### (a) *Releases and warranty*

The most frequent type of collateral warranty and the one that caused the greatest concern was a fraternal collateral warranty. This type of collateral warranty could be used to bar claims by issue under an entail or claims in general. In the simplest case of an entail, the tenant-in-tail alienates and his younger brother releases with warranty. If the younger brother dies without issue, his warranty descends collaterally to the issue of the tenant-in-tail. More generally, a man is disseised and his younger brother releases with warranty to the disseisor. The man's lineal heir is barred by the warranty of his uncle descending to him collaterally. What appears odd in these cases is that the younger brother giving the release had never been seised of the land and did not, indeed could not, grant the land to him who received the release. Yet the warranty in the release would descend just as if there had been a grant.

Moreover, the person protected by the younger brother's warranty does not, and cannot, trace his title to the younger brother.

<sup>72</sup> 18 Edw. I, st. 2 (1290), *Statutes of the Realm*, I, 106.

In one case, his title is by grant from the tenant-in-tail and in the other his title is by disseisin. In the early twelfth century, the duty to warrant land was a duty of lordship.<sup>73</sup> Even after the duty of warranty became a legal idea in Henry II's reign, an heir had the duty to warrant his ancestor's grants, not his ancestor's releases, and especially not of lands of which his ancestor had never been seised.<sup>74</sup> The principle, articulated by Glanvill, was that a man had a duty to uphold and to maintain his father's grants.<sup>75</sup> The warranty obligation continued to be a duty of lordship. The grantee is the man of the grantor-lord. The grantor's heir inherits the seignery which includes the duty of warranty.<sup>76</sup> The beneficiary of the warranty can trace his title to the heir's ancestor. In this world, the effect of the warranty bar could be expressed by a rule against being both lord and heir.<sup>77</sup> If one inherits the seignery the warranty obligation prevents one from also inheriting the land.<sup>78</sup> In a world in which warranty was a matter of lordship and of grants, fraternal collateral warranties could not exist, because they did not rise from a grant of land; they arose from a release. Neither the warrantor nor his heir was the lord of the person who received the release with warranty, and he could not trace title to the warrantor or his heir.

The statute *Quia Emptores* put an end to the world of tenurial relationships that precluded raising a collateral warranty on a release. After *Quia Emptores* only the king and grantors of fee tails could be both grantor and lord of their grantees. All others were no longer the lords of their grantees. Yet a grantee would demand and would receive the grantor's warranty in order to bar claims by the grantor's heirs. For a time after *Quia Emptores* some lords required grantees to obtain licenses to take up the lands granted to

<sup>73</sup> Hyams, "Warranty and Good Lordship," 437. The authority for the later law of warranty is Bailey, "Warranties of Land in the Thirteenth Century," parts 1 and 2, and Bailey, "Warranties of Land in the Reign of Richard I."

<sup>74</sup> See Biancalana, "For Want of Justice," 490-4.

<sup>75</sup> *Glanvill* 74.

<sup>76</sup> The text discusses the case of subinfeudation. In the case of substitution, the grantor surrenders land to his lord, who grants the land to the grantee. It is not clear how frequently free tenants transferred land in this manner, but I suspect, having read Milsom, that the lord's acceptance and warranty was vital to the grantee.

<sup>77</sup> Chapter 1, above, pp. 14-16.

<sup>78</sup> Or as Chief Justice Weyland put it in 1286: "*La seignurye et le heritage en une persone ne puet demorer*": *Earliest English Law Reports*, II, 231 at 236.

them.<sup>79</sup> This practice came to an end in 1315.<sup>80</sup> In many cases the grantee probably did not obtain the warranty of his lord. Warranty was frequently severed from lordship and from tenurial relationships. Inheriting a warranty obligation no longer meant inheriting the lordship or seignery. If A grants land to B and his heirs, B does not hold of A. He holds of A's lord. A's warranty descends to A's heir, but not the seignery. The same is true if A's younger brother releases to B with warranty and dies without issue. Because A's heir and B's heir are the same person, B's warranty descends to A's heir. He inherits the warranty without the seignery. Because *Quia Emptores* severed the descent of the warranty from the descent of the seignery, it could appear that the person giving the release with warranty need have nothing in the land he is warranting, as he would have to have were he retaining the seignery. The beneficiary is not the man of the person who gives him a release with warranty, but neither is he the man of his grantor. Before *Quia Emptores*, whenever a defendant pleaded warranty as a bar, he was asserting that there was a tenurial relationship between himself as man and the plaintiff as lord. He had to trace title to the plaintiff's ancestor in order to show the tenurial relationship. After *Quia Emptores*, a defendant who pleaded warranty as a bar could not assert that there was a tenurial relationship between himself and the plaintiff. There could appear to be no reason why the defendant must trace his title to the person who raised the warranty. Before *Quia Emptores*, only a lineal warranty could bar a plaintiff, because only if the warranty were lineal would it be the case that the plaintiff had inherited the seignery, not the right to the land in demesne. After *Quia Emptores*, the plaintiff did not inherit the seignery, unless his ancestor's grant had been in fee tail. It could appear that a collaterally descending warranty is as much a bar as a lineally descending warranty, because in neither case would the plaintiff inherit a seignery.

The reversal in the law of collateral warranties that took place in the three decades following *Quia Emptores* thus required the introduction of three new ideas. First, a release with inheritable warranty could be given by one who had nothing in the land when

<sup>79</sup> See Bean, *Decline of English Feudalism*, 86–92.

<sup>80</sup> 1 *Rot. Parl.* 298 (1315).

he gave the release. Secondly, the beneficiary of the warranty need not trace his title to the person who gave the release. Thirdly, a warranty that descended collaterally was as binding as a lineally descending warranty. The introduction of these ideas can be traced in the cases in the three decades following *Quia Emptores*.

The first idea was to allow one who had nothing in the land at the time of giving a release nevertheless to give a release with an inheritable and binding warranty. In 1291, when a plaintiff brought formedon in the reverter and the defendant produced a release with warranty of the donor of the fee tail, the plaintiff pointed out that the donor had given the release during the life of the tenant-in-tail.<sup>81</sup> At that time the donor had no present right to the reversion. This argument against the validity of the release was good enough to make the plaintiff's allegation that the donor gave the release during the life of the tenant-in-tail a question of fact for the jury.

In 1305, one John brought a writ of right and traced descent from his father Adam, to Stephen the eldest son, to Robert the next eldest, to himself.<sup>82</sup> The defendant produced Stephen's release. The plaintiff replicated that Stephen had made the release during Adam's life when he had not been seised and before any right to the land had accrued to Stephen. The issue for the jury was whether Stephen had made his release before or after Adam's death. Here, the release did not depend upon Stephen's having been seised but on his having had a right when he made his release. But also in 1305, the defendant to a writ of *aeil* answered that the plaintiff's father had enfeoffed him with warranty.<sup>83</sup> The plaintiff sought to plead that his father had never been seised so that he could enfeoff the defendant, probably because he died before the grandparent on whose seisin the plaintiff based his claim. Justice Mallore cut off that plea by saying that the defendant intended to rebut the plaintiff by reason of the warranty. The plaintiff tried to argue that without a completed grant, which was principal, there could be no warranty, which was accessory to the grant. But Mallore responded that the grant could be defeasible and the warranty still be good. Also in 1305 in a case of reverter on

<sup>81</sup> *Le Brun v. Ducket*, CP40/89, m.7 (Pas. 1291).

<sup>82</sup> YB (RS) 32-3 Edw. I 414 (1305).

<sup>83</sup> YB (RS) 32-3 Edw. I 382 (1305).

a grant in *maritagium* the defendant produced the release with warranty of his grandmother.<sup>84</sup> The plaintiff's argument that the plaintiff's grandmother had not been seised of the land when she made the release went nowhere. In the following year, one who was vouched to warranty sought to counter his charter granting the lands to the defendant by saying that he never had anything in the land nor had the defendant ever been seised by that charter.<sup>85</sup> The vouchee to warranty accepted that he had put the defendant in seisin. His argument was that the charter would not bind him unless the defendant had been seised under the charter. In deciding that the vouchee was bound to warrant the defendant, Justice Bereford told the story of a man who purchased land and received from his seller a charter without warranty. Some time later, the purchaser bought another charter from his seller, this one with a warranty obligation. The latter charter was good to bind the seller to warranty even though nothing had passed to the purchaser under that charter. The warranty here is somewhat separated from the transfer of seisin. When the seller gave his purchaser the charter with warranty the seller had nothing in the land.

In 1308 or 1309, in a case of reverter, the plaintiff claimed by descent from his mother, the grantor of the fee tail.<sup>86</sup> The defendant produced the release of the plaintiff's mother. The plaintiff responded that the tenant-in-tail had outlived his mother. Justice Scrope pointed out that the plaintiff's replication could have two meanings: that the tenant-in-tail, not the defendant, was seised at the time of the release or that the defendant was seised at the time of the release, and his mother, because the tenant-in-tail was still alive, had nothing at the time of the release. Scrope advised the plaintiff to take the first meaning. The plaintiff followed Scrope's advice. Although here the donor had once been seised, Scrope's guidance of the plaintiff suggests that the only requirement for a release to be valid and inheritable was that the party receiving the release be in possession at the time of the release. The person giving the release need not have a right to the land. This case is the reverse of the 1291 case.

<sup>84</sup> YB (RS) 34–5 Edw. I 100 (1305).

<sup>85</sup> YB (RS) 34–5 Edw. I 332 (1306).

<sup>86</sup> *Cressy v. St. Lo*, YB 2 Edw. II, 17 S.S. 152 (1308–9).

Yet there lingered some doubt when the release was the plaintiff's own. In 1310 it was said that if a defendant to descender produces the plaintiff's own release, it is a good plea for the plaintiff to say that his ancestor under the entail had been seised when the plaintiff gave the release.<sup>87</sup> The case note, however, acknowledged that according to some the release was good because the plaintiff had a "tailed" right when he gave the release. But the result was different where there was a warranty. In 1316, when a son brought *sur cui in vita* for his mother's inheritance which her second husband had alienated, the defendant produced the plaintiff's own release.<sup>88</sup> The plaintiff argued that the release was no bar because he had made it during his mother's life, when he had nothing to release. Chief Justice Bereford, however, held that the warranty in the release, not the release itself, barred the plaintiff. A note explains that if there had been no warranty in the release, the plaintiff would not have been barred, because at the time of the release he had had nothing – his mother then being alive.<sup>89</sup> One might well have thought that the warranty in the release could be no better than the release itself. Once one sees warranty as a sort of abstract commitment detachable from the validity of a conveyance, then Bereford's conclusion and the explanatory note begin to make sense. The only remnant of a traditional grant that remained as a requirement for a release to raise a warranty was that the person to whom the release was made had to be seised at the time of the release.<sup>90</sup>

The second step was for the beneficiary of a warranty not to have to trace his title to the person who created the warranty. In 1305 a plaintiff brought entry *sur disseisin* on the seisin of his uncle.<sup>91</sup> The facts of the case were that one Maud had disseised the plaintiff's uncle. She later married and her husband granted the land to one Nicholas. The plaintiff's uncle released to Nicholas. After her husband's death Maud recovered the land by *cui in vita* and died seised. Her son and heir, the defendant in the case, entered. Nicholas' heir released to him. The defendant

<sup>87</sup> *Bardenay v. Danby*, YB Pas. 3 Edw. II, 20 S.S. 101 (1310).

<sup>88</sup> *Hankworth v. Anon.*, YB Mich. 10 Edw. II, 20 S.S. 100 (1316).

<sup>89</sup> *Ibid.* Similarly, YB Mich. 5 Edw. III, f. 65, pl. 114 (1331).

<sup>90</sup> *Wyke v. Pottere*, CP40/336, m.512 (Mich. 1343); *Lord Seymour v. Prior of Montecute*, YB Trin. 7 Ric. II, 3 Ames 16 (1383).

<sup>91</sup> YB (RS) 34–5 Edw. I 66 (1305), 356 (1306).

pleaded both releases – the uncle’s release to Nicholas and the release by Nicholas’ heir. The plaintiff argued that his uncle had not been seised after Maud had recovered the land from Nicholas, the person to whom his uncle had given his release. In his mind, the recovery should destroy the release. The plaintiff’s argument was also that the release proffered by the defendant was not to anyone from whom the defendant traced his title. The plaintiff nevertheless had to deny his uncle’s release. Here the uncle had once been seised. His release extinguished not only his own claim but also the claim of his heirs.

The last step was to bar a claimant by a warranty created by an ancestor other than the ancestor on whose seisin the claimant based his claim. In 1286, when a plaintiff claimed the reversion on an entail granted by his grandfather, the defendant produced the charter with warranty of the donor’s brother.<sup>92</sup> The plaintiff argued that his great uncle was “*extra rectam lineam*” of descent and that the warranty was “*collateralis*” and therefore no bar. The justices agreed. In a 1294 case, the plaintiff to a writ of entry *sur disseisin* claimed that the defendant had no entry except through the plaintiff’s father who had disseised the plaintiff’s brother, on whose seisin the plaintiff based his claim.<sup>93</sup> The plaintiff argued that his father’s warranty should not bar him because he did not make his claim as his father’s heir nor did he have anything by descent from his father. Justice Mettingham ruled, however, that the plaintiff was barred by his father’s warranty. In this case, the warranty descended lineally from father to son, but the plaintiff tried to have the court see that the warranty descended collaterally to his claim. The background rule at this time must have been that a collateral warranty was no bar at all. But the plaintiff’s father had been seised and had made a grant. His son had to warrant his father’s grants. In 1305 when a plaintiff tried to recover the reversion on a grant in *maritagium* the defendant produced a deed with warranty from the plaintiff’s grandmother.<sup>94</sup> The plaintiff argued that her deed should not bar him because he did not claim the reversion through her. But Justice Hengham ruled that the plaintiff was barred because the case did not come within the

<sup>92</sup> JUST 1/63, m.21 (Buckinghamshire, 1286), which was related to JUST 1/63, m.22d (1286).

<sup>93</sup> YB (RS) 21–2 Edw. I 356 (Middlesex, 1294).

<sup>94</sup> YB (RS) 34–5 Edw. I 100 (1305).

Statute of Gloucester. This case resembles those decided in the thirteenth century in which a reversioner was barred by the warranty of a tenant-in-tail who happened to be the reversioner's ancestor.<sup>95</sup> The unexpected consequence of free-floating warranties is illustrated by a case of 1312.<sup>96</sup> A woman brought *sur cui in vita* for her grandmother's inheritance and alleged that the defendant had no entry except through one Walter le Pestour to whom the plaintiff's grandfather had conveyed the land. She traced descent from her grandmother to her father to herself. The defendant produced Walter le Pestour's deed with warranty. Walter was the plaintiff's grandmother's brother who died without issue. The warranty descended to the plaintiff through her grandmother who survived her brother Walter. The plaintiff was certainly not making her claim through Walter but, in a sense, against him.

By the second decade of the fourteenth century lawyers had worked their way toward accepting a collaterally descending warranty as a bar. In 1311, the case was that a man gave land in *maritagium* with his sister; the sister's husband granted back a life estate; and the donor, now life tenant, alienated with warranty.<sup>97</sup> When the life tenant died, the sister and her second husband brought *cui in vita*. The defendant pleaded her brother's charter with warranty as a bar to her claim. She argued that because she claimed an entail, the doctrine of assets by descent applied to her brother's warranty. The usual argument would be that because the person who granted with warranty held fee tail, the doctrine of assets by descent applied to him. The case was still, apparently, awaiting judgment two years later.<sup>98</sup> In a discussion in a 1314 case Justice Herle explained that if a tenant-in-tail is disseised and his brother gives a charter with warranty to the disseisor, the tenant's issue will be barred.<sup>99</sup> The brother of the tenant-in-tail had never been seised. The plaintiff did not trace his claim to the brother and the defendant did not trace his title to him.

<sup>95</sup> Chapter 1, above, pp. 28–9.

<sup>96</sup> *Folenree v. Roys*, YB Pas. 5 Edw. II, 33 S.S. 49 (1312).

<sup>97</sup> *Gascelyn v. Rivere*, YB Trin. 4 Edw. II, 42 S.S. 10 (1311); YB Hil. 4 Edw. II, 26 S.S. 49 (1311).

<sup>98</sup> In a report of *Bordesdene v. Bordesdene*, YB Mich. 7 Edw. II, 36 S.S. 188 at 191 (1313) Scrope seems to refer to *Gascelyn v. Rivere* as if it had been decided in the defendant's favor, but Denum said that the judgment was "still reserved."

<sup>99</sup> *Walsham v. Walsham*, YB Mich. 8 Edw. II, 37 S.S. 52 at 67 (1314).

In the three decades following *Quia Emptores* doctrines of releases and warranties were adapted to the new tenurial word created by the statute. By the second decade of the fourteenth century a release by someone with no right to the land could descend to that person's heir to bar his recovery from someone who could not trace title to the person who gave him the release.

(b) *Gloucester and collateral warranty*

In two types of cases heirs under an entail invoked the Statute of Gloucester in order to counter collateral warranties. In the first type of case, the grant had been in *maritagium*, or to a woman in fee tail, or to a woman and her husband and the heirs of the woman's body. The woman's husband had granted the land or had released with warranty. When the issue brought descender to undo the grant, the grantee produced the husband's charter with warranty. The plaintiff invoked Gloucester. Although the warranty descended lineally from father to son, the descent of the warranty was collateral to the plaintiff's claim. A case in 1311 illustrates this straightforward use of Gloucester to block this type of collateral warranty.<sup>100</sup> The plaintiff brought descender on a grant to his mother in fee tail. The defendant's first line of defense was that the couple had alienated after issue was born and before *De Donis*. But the wife could not be bound by her own deed, let alone by her husband's deed, during marriage. The defendant then produced a deed with warranty by the plaintiff's father. The plaintiff pleaded that he had no assets by descent. The plaintiff's pleading was under Gloucester and blocked his father's warranty, which was collateral to his claim based on descent from his mother.

A 1317 case provides another example.<sup>101</sup> The plaintiff brought descender on a grant in fee tail to his grandmother. The defendant produced a deed from the plaintiff's grandfather to the defendant's parents in fee tail. Since the grandfather was not in the line of descent of the entail, the defendant was asserting a collateral warranty. In order to defeat that warranty, the plaintiff invoked Gloucester: the grandfather made the grant while tenant by the

<sup>100</sup> *Colby v. Spenser*, YB Trin. 4 Edw. II, 42 S.S. 60 (1311).

<sup>101</sup> *Mauleverer v. Broughton*, YB Mich. 11 Edw. II, 61 S.S. 34 (1317).

curtesy. Scrope argued that Gloucester applied only to the writs mentioned in the statute and the statute did not mention formedon in the descender. Herle, however, reasoned that Gloucester applied where land was held in fee tail as well as where land was held in fee simple. Descender, he reasoned, was given in lieu of mort d'ancestor, which was mentioned in the statute, so Gloucester should apply to the case. *De Donis*, he said, did not change Gloucester. The parties went to a jury on the issue of whether the plaintiff had assets by descent from the grandfather.

The second type of case proved to be more difficult and more contentious.<sup>102</sup> The grant is to a man in fee tail or to a man and his wife and the heirs of the man's body. The man makes a grant and, after his death, his widow releases with warranty. The issue is whether the mother's warranty comes under Gloucester as did the father's. In 1286, when a defendant asserted that the plaintiff was barred from claiming under a joint entail to his parents because his mother had released with warranty to the defendant, the issue was whether she had done so in widowhood or when she was remarried.<sup>103</sup> There was no mention of assets by descent under Gloucester or under *De Donis*. In 1296, when a plaintiff again brought descender on a joint entail to his parents, the defendant pleaded the warranty of the plaintiff's mother as a bar.<sup>104</sup> The plaintiff replied that his mother's warranty should not bar him because he was not claiming by descent from his mother but from his father and that he had nothing by descent from his mother. "*Per statutum domini Regis*" he asked for judgment whether by the deed of one from whom he had received no benefit he ought to be barred. The case went to a jury whether he had assets by descent from his mother, and the jury found that he did not. From the vantage of later law, the plaintiff was a little confused. He should have argued that his mother was a donee, her warranty was lineal,

<sup>102</sup> BL Harley Ms. 25, f. 69v (1309) reports a case that might be of either type. The brief report has a plaintiff bring descender, the defendant produce a charter of the plaintiff's ancestor, the plaintiff plead assets by descent, and the defendant plead that the ancestor's alienation took place before Gloucester. The case goes to a jury on that issue. The defendant's plea that the alienation occurred before Gloucester obviated discussion whether the statute applied in this case. Nor do we know the identity of the plaintiff's ancestor. I am grateful to Dr. Paul Brand for bringing this report to my attention and for a transcription of the report.

<sup>103</sup> *Langetoft v. Pounteyre*, JUST 1/63, m.21d (Buckinghamshire, 1286).

<sup>104</sup> *Parco v. Morgan*, CP40/115, m.189 (Mich. 1296).

and he had no assets by descents from her. By arguing that he was claiming on the seisin of his father, he made his mother's warranty collateral to his claim to the entail. In later law, a collateral warranty would be a complete bar. But at this point in time it was not clear whether a collateral warranty was any bar at all. Hence, his attempt to make his mother's warranty collateral was not a blunder. His invocation of a statute as the basis for the doctrine of assets by descent is beautifully imprecise. He might be reversing himself and treating his mother as a donee, in which case the statute invoked is *De Donis*. But he might have been arguing that Gloucester should apply to a widow's grant of her husband's lands just as it applied to a husband's grant of his wife's lands. If so, the justices accepted this extension of Gloucester.

The question of a mother's warranty arose in a case in 1304 brought on a writ of right by a plaintiff who had earlier tried descender.<sup>105</sup> There had been a grant in *maritagium* to his grandfather with his grandmother. The grandfather had alienated the land and, after his death, the grandmother had by final concord acknowledged the right of the grantee.<sup>106</sup> Herle, for the plaintiff, argued that Gloucester should apply to the grandmother's warranty just as it would apply to the grandfather's grant of the grandmother's inheritance. Justice Bereford observed that the plaintiff was not within Gloucester, but went on to say that there was as much need for a statute for the plaintiff's case as there was for Gloucester. Bereford's sympathies were not widely shared. In the following year, a plaintiff brought entry *ad terminum qui preteriiit* on a lease made by his grandfather.<sup>107</sup> The defendant produced the charter of the plaintiff's grandmother to bar his action. Although the plaintiff argued both that he was not barred by the warranty of one through whom he did not claim the land – that a collateral warranty was no bar at all – and that he had no

<sup>105</sup> *Tauney v. St. Omers*, YB (RS) 32–3 Edw. I 282 (1304). The plaintiff might have lost his descender case because the writ did not reach the third heir when he brought his action.

<sup>106</sup> The case is a little strange because the plaintiff based his claim on the seisin of his grandfather in order to avoid basing his claim on his grandmother's seisin, for if he took his claim from his grandmother's seisin her grant of her *maritagium* would bar him. He could not in an action on the right have his claim on the joint seisin of grandmother and grandfather, as he could in descender.

<sup>107</sup> YB (RS) 34–5 Edw. I 100 (1305).

assets by descent, neither argument was successful. Justice Higham held that the plaintiff was not within Gloucester and that at common law an heir was barred by the warranty of his ancestor.

In 1313 there was a complicated case of maternal warranty.<sup>108</sup> Land was granted to one Ada and her second husband for their lives. Some time later, the reversion to the life estate was granted to Ada's son, John of Bordesdene, and his wife in "*maritagium*." Ada granted with warranty to one William Bordesdene, who granted a life estate to Robert Garton and his wife Denise. Upon Ada's death, John of Bordesdene brought a writ of entry under chapter 7 of Gloucester to recover the land alienated by his mother while life tenant. Her warranty was pleaded as a successful bar even though the plaintiff had no assets by descent from his mother. According to Scrope, the plaintiff should have sued before his mother's death, for at that time her warranty had not yet descended to him.<sup>109</sup> John of Bordesdene in 1315 appealed by petition to parliament.<sup>110</sup> His case and his complaint to parliament involved the combination of two types of collateral warranty – maternal warranty and the warranty of the holder of preceding estate used to bar a remainder. The parliament rolls record as an answer to this petition that the Council believed that Gloucester covered maternal warranties of paternal land and that this explanation should be made of the statute. The interpretative explanation was never made. The court did not extend Gloucester. Maternal warranties continued to be collateral warranties.<sup>111</sup> In the case of a joint grant to husband and wife and the heirs of their two bodies, the warranty of either spouse would, of course, be lineal.

(c) *Collateral warranties to bar remainders and reversions*

In the second decade of the fourteenth century the court began to deal with the question whether a charter with warranty by a tenant-in-tail would bar his heir who claimed a remainder under the same conveyance. The argument, which was eventually successful, was that the warranty was collateral to the protection of *De*

<sup>108</sup> *Bordesdene v. Bordesdene*, YB Mich. 7 Edw. II, 36 S.S. 188 (1313).

<sup>109</sup> *Ibid.*, 189.

<sup>110</sup> 1 *Rot. Parl.* 336, No. 3 (1315).

<sup>111</sup> e.g. YB (RS) 18–19 Edw. III 260 (1344).

*Donis*. This argument could rest on the fact that *De Donis* did not mention remainders. At first, the court treated remainders in fee simple differently from remainders in fee tail. The remainder in fee simple could be to a named remainderman or to the right heirs of someone given an earlier estate for life or in fee tail. The court had a somewhat easier time accepting the bar to remainders in fee simple than the bar to remainders in fee tail.

In a case in 1317 Scrope argued that if the tenant-in-tail had alienated with warranty, the plaintiff claiming the remainder in fee simple would be barred as heir of the tenant-in-tail.<sup>112</sup> Scrope's remark, though off the point of the case in which it was made, is the first sign of the idea that the warranty of a tenant-in-tail could bar the remainderman in fee simple. The matter was debated at some length in the 1324 case of *Bardwich v. Brayboef*.<sup>113</sup> By final concord Thomas Brayboef had settled land on himself for life, remainder to his son Thomas in tail, remainder to his own right heirs. After his father's death, Thomas resettled the land on himself and his wife and his heirs. When Thomas the son died without issue, his sister Florence brought *scire facias* against her brother's widow and claimed the remainder as her father's right heir. Under her brother's resettlement she had a claim as his heir, but only after the death of his widow. By claiming the remainder she might cut out her brother's widow. Her brother's grant out for the resettlement had been with warranty. Did that warranty bar his sister from the remainder? Florence argued that the warranty was no bar, because *De Donis* restrained alienations by a tenant-in-tail and Thomas had been tenant-in-tail when he granted with warranty.<sup>114</sup> There were, however, two decisive reasons why the warranty was a bar: Florence claimed as collateral heir to her brother and *De Donis* did not protect remainders.<sup>115</sup> In a slightly later case another reason was given: *De Donis* did not protect those

<sup>112</sup> *Saltmarsh v. Redeness*, YBB Hil. 10 Edw. II, 54 S.S. 35 at 36, Mich. 11 Edw. II, 61 S.S. 12 (1317). The plaintiff claimed a remainder as the right heir of the donee in tail after the death without issue of the first heir. The question was whether the plaintiff in his count had to show how he was right heir of the tenant-in-tail and if so whether he had to mention the first heir. The case was complicated in part because the remainder was limited to the donee's right heirs lineally descending without ability to alienate. See *ibid.*, 37.

<sup>113</sup> YB Mich. 18 Edw. II, f. 574 (1325).

<sup>114</sup> *Ibid.*, f. 575 (Denum and Bassett).

<sup>115</sup> *Ibid.*, f. 576 (Toudby).

who claimed fee simple.<sup>116</sup> Although the conclusion that remainders, at least those in fee simple, were not protected by *De Donis* would alone have been sufficient to decide the case, that Florence was collateral heir to her brother was also thought to be important. Justice Scrope reasoned that had her brother alienated without warranty, she would not be barred, but that his warranty barred her.<sup>117</sup> In one sense, a daughter or younger son is the collateral heir of the eldest son. But in tracing descent from their father the claim of a sister or younger son went through the eldest son. In that sense, the warranty would be lineal. If, however, the father's settlement and his son's resettlement be taken as the reference points, then it could appear that her claim was directly as her father's right heir and collateral to her brother's fee tail. A claim through her brother would bring her under his resettlement, which would postpone her right until the defendant's death. In subsequent cases, the warranty of a tenant-in-tail barred a remainderman claiming fee simple.<sup>118</sup>

The court had a more difficult time where the remainder to be barred was in fee tail. In another 1317 case Chief Justice Bereford confused Gloucester and *De Donis*. The plaintiff sought to recover a remainder in tail as issue of the remainderman.<sup>119</sup> The defendant produced a deed with warranty from the plaintiff's ancestor, who had been tenant of the entail preceding the remainder claimed by the plaintiff. One could argue that the ancestor's warranty was modified by *De Donis* because he was a tenant-in-tail when he made the grant. One could also argue that his warranty was collateral because the plaintiff did not claim by descent through him, but in virtue of the remainder. The case went to a jury on the issue of whether the plaintiff had assets by descent from the ancestor. In 1333, where the case involved a remainder in fee

<sup>116</sup> *La Baunk v. Bisshopesden*, CP40/283, m.291d (Mich. 1330) the report for which is YB Mich. 4 Edw. III, f. 56, pl. 65 (1330).

<sup>117</sup> YB Mich. 18 Edw. II, f. 547 at f. 576 (1325)

<sup>118</sup> YB Pas. 6 Edw. III, f. 20, pl. 38 (1332); YB Mich. 7 Edw. III, f. 47, pl. 17 (1333); YB (RS) 20(1) Edw. III 382 (1346); YB Hil. 30 Edw. III, f. 4, pl. 2 (1356); *Slyngesby v. Aldeburgh*, CP40/429, m.402 (Mich. 1367); *Skymmer v. Bray*, CP40/452, m.371 (Mich. 1373); *Assheby v. Statebury*, CP40/613, m.123 (Pas. 1414). For an odd case in which the tenant-in-tail alienated with warranty but the defendant to *scire facias* pleaded not the warranty, but the idea that seisin by the remainderman of the first entailed remainder ended the fee tail, see *Carbonel v. Reppes*, CP40/359, m.79d (Mich. 1349).

<sup>119</sup> *Le Norreys v. Le Norreys*, YB Pas. 11 Edw. II, 61 S.S. 280 (1317).

simple, Scot offered the opinion that had the remainder been in fee tail, the warranty of the tenant-in-tail under an earlier entail would be no bar.<sup>120</sup> Shardelow disagreed: no remainder, whether fee simple or fee tail, was protected by *De Donis*. As late as 1367 a plaintiff repeated Scot's point, but to no avail.<sup>121</sup> Even though the tenant-in-tail who had alienated had issue who died without issue and the remainderman claimed only fee tail, the warranty was said to be at common law.

There were two methods of barring a reversion: by release from the donor or his heir or by a grant with warranty from the tenant-in-tail. If the reversioner was the heir of the tenant-in-tail the warranty in the latter case was collateral to the reversioner's claim and to the statutory restraint on alienation.

The release of the donor creating the entail to the donee or tenant-in-tail barred the reversion.<sup>122</sup> This was pretty straightforward. The release of the donor's heir posed the question whether the heir had to have been seised. In 1296, the defendant to a reverter writ claimed that the seisin of the donor's heir ended the entail.<sup>123</sup> His warranty was clearly at common law. The case went to a jury on the question of whether the donor's heir had in fact been seised. In other cases, a defendant as late as 1329 asserted that the donor's heir had been seised when he created the warranty.<sup>124</sup> The donor's release with warranty posed the question whether the release with warranty ended the entail. In 1311 Chief Justice Bereford held that the donor's charter did not extinguish the entail, only the reversion.<sup>125</sup> If the defendant produced the

<sup>120</sup> YB Mich. 7 Edw. III, f. 47, pl. 17 (1333).

<sup>121</sup> YB Pas. 41 Edw. III, f. 11, pl. 10 (1367).

<sup>122</sup> *Fannel v. Serlby*, Mich. 7 Edw. II, 34 S.S. 167 (1313); *Brokmunton v. De La Forde*, CP40/206, m.72d (Trin. 1314); YB 17 Edw. II, f. 524 (Hil. 1324); *Malghuin v. Serleby*, CP40/336, m.447 (Mich. 1343); *Garwyntone v. Blere et al.*, YB Hil. 10 Ric. II, 4 Ames 292 (1387). The principle antedated *De Donis*: *Dyke v. Setheville*, CP40/42, m.68d (Mich. 1281). A case in 1289 involved a curious grant in *maritagium*: *Hales v. Pyrun*, JUST 1/1006, m.29 (1289). The grant was in *maritagium* but to the assigns of the couple if they died without an heir of their bodies. After the donor's death, his widow confirmed to the donees of the *maritagium*; and after the death of the husband donee, his widow granted to the defendant. There were thus two reasons why the plaintiff could not recover.

<sup>123</sup> CP40/115, m.58d (Mich. 1296).

<sup>124</sup> *Whyleby v. Tunby*, CP40/277, m.142d (Pas. 1329); *Whyleby v. Sutton*, CP40/277, m.142d (Pas. 1329).

<sup>125</sup> *Le Pestur v. Ry*, Trin. 4 Edw. II, 42 S.S. 67 (1311).

donor's charter showing that the grant had been fee simple, the plaintiff could not merely affirm his writ and have a jury decide whether the grant had been fee simple or fee tail. The plaintiff had to deny that the charter was his ancestor's deed,<sup>126</sup> unless he produced a conflicting charter.<sup>127</sup> The alienee of the tenant-in-tail might obtain the release of the donor, in which case the donor's heir was barred from the reversion.<sup>128</sup> A case in 1291 shows how the lawyers at that time were more concerned than they later would be about what the person making a release had in the property at the time of the release.<sup>129</sup> The plaintiff argued that the donor had released to the alienee during the life of the tenant-in-tail and at that time had no right to the reversion. His release, therefore, was a nullity. The case went to a jury on that issue.

A release by the widow or a relative of the donor could create a collateral warranty against the lineal heir of the donor. An early attempt at collateral warranty occurred in a case of reverter. In 1286, the defendant to a reverter writ produced the charter with warranty of the donor's brother and sought to bar the plaintiff, the donor's grandson.<sup>130</sup> The plaintiff argued that his great-uncle was not in line of descent and that his warranty was collateral and no bar. The justices agreed. In 1298, a defendant produced the release of the donor's widow and argued that the release meant that tenant-in-tail then had fee simple.<sup>131</sup> The plaintiff denied the deed and the jury returned a verdict in favor of the defendant.<sup>132</sup> With respect to the donor's heir, the collateral warranty bar could

<sup>126</sup> *Pocok v. De Lande*, CP40/164, m.132d (Trin. 1307); *Le Pestur v. Ry*, YB Trin. 4 Edw. II, 42 S.S. 67 (1311); *Penebrigge v. Pennebrigge*, YB Mich. 6 Edw. II, 38 S.S. 113 (1312–13); *Molins v. Sampson*, YB Trin. 9 Edw. II, 45 S.S. 122 (1316); YB Trin. 7 Edw. III, f. 34, pl. 34 (1333); YB (RS) 14 Edw. III 282 (1340); YB (RS) 16(2) Edw. III 510 (1342); YB Trin. 27 Edw. III, f. 5, pl. 15 (1353); YB Trin. 42 Edw. III, f. 19, pl. 1 (1368).

<sup>127</sup> See YB Trin. 7 Edw. III, f. 34, pl. 34 (1333).

<sup>128</sup> YB (RS) 21–2 Edw. I 316 (1294); *Wodenton v. Buckenhale*, CP40/164, m.35d (Trin. 1307); *Lynn v. Meryet*, CP40/336, m.477 (Mich. 1343), the report for which seems to be YB (RS) 17–18 Edw. III 346 (1343).

<sup>129</sup> *Le Brun v. Duket*, CP40/89, m.7 (Pas. 1291).

<sup>130</sup> JUST 1/63, m.21 (Buckinghamshire, 1286), which was related to JUST 1/63, m.22d (1286).

<sup>131</sup> CP40/123, m.74d (Pas. 1298).

<sup>132</sup> The record might be in error. The defendant, it records, produced both the husband's charter of entail and the widow's release. The plaintiff took issue that the charter was not his father's, which would, it seems, defeat his own claim. More likely, the plaintiff denied that the release was his mother's deed.

be said to end the entail as far as he was concerned. The donor's release would not, however, end the entail for the issue of the donee.

The question whether a collateral warranty would bar the reversion arose more frequently in cases in which the defendant produced the charter with warranty of the tenant-in-tail and the plaintiff was his heir.<sup>133</sup> This situation could arise where the grant in fee tail was an intra-family grant. The issue in these cases was whether the statutory restraint on alienation by the tenant-in-tail protected only the issue in the entail or the reversioner as well. If the statute protected only the issue in the entail, the warranty of the tenant-in-tail would be collateral to the statute as far as the reversioner was concerned. It would be at common law and thus bar the reversion. If the statute also protected the reversion, the doctrine of assets by descent would apply. It would be unlikely that the reversioner had assets by descent in fee simple from the tenant-in-tail who had died without issue. The question seems first to have arisen in the late 1320s and 1330s, after, that is, the similar issue had been pretty much resolved against remainders.<sup>134</sup> It was, however, easier to say that the statutory restraint on alienations by a tenant-in-tail did not protect remainders, because *De Donis* never mentioned remainders. *De Donis* does say that the donee may not alienate so as to prevent the reversioner from receiving his reversion if the donee dies without issue or the issue dies without issue. The question was debated at some length in cases in the 1330s and 1340s, without apparent conclusion in those cases.<sup>135</sup> In a case in 1353, when a defendant pleaded a deed by the tenant-in-tail as a bar, the plaintiff "dared not" demur in law but traversed the deed.<sup>136</sup> This case is some evidence that the question had been resolved against the reversioner. But in a similar case in 1367 judgment on the question was put off several times without conclusion.<sup>137</sup> The difference between the 1353 and the 1367 cases is probably not simply that

<sup>133</sup> For cases of this type before *De Donis* see Chapter 1, above, pp. 28–9.

<sup>134</sup> e.g. YB Hil. 18 Edw. II, f. 590 (1325); *De La Ware v. Melton*, YB Trin. 3 Edw. III, f. 22, pl. 5 (1329); YB Mich. 5 Edw. III, f. 44, pl. 42 (1331).

<sup>135</sup> CP40/278, m.34 (Trin. 1329); YB Mich. 6 Edw. III, f. 56, pl. 65 (1332); YB Hil. 10 Edw. III, f. 14, pl. 34 (1336); YB (RS) 15 Edw. III 388 (1341).

<sup>136</sup> YB Mich. 27 Edw. III, f. 7, pl. 9 (1353).

<sup>137</sup> *Cromwell and Falevill v. Northburgh*, CP40/429, m.632 (Mich. 1367).

the plaintiff's lawyer in the 1353 case was timid. The difference probably has to do with the generation of descent of the tenant-in-tail whose warranty was in question. The record of the 1367 case makes clear that the charter with warranty was made by the donee of the entail. The report of the 1353 case attributes the charter with warranty to the tenant-in-tail, who might not be the donee. If he were not the donee, the extension of the statutory restraint on alienation through the third heir need not have applied so as to protect reversions. A charter by the donee, as in the 1367 case, would have presented a harder question, for the statute on its terms restrained alienations by donees.

I could find no clear resolution to the question. As entails were increasingly created by means of grant-regrant transactions, the issue would seldom arise because the reversioner would seldom be related to the donee in tail. Entails thus created usually did not create reversions. They left a remainder to the right heirs of one who had taken an earlier estate whether for life or in tail. The issue might have lost practical importance before it received a judicial resolution.

(d) *Collateral warranties to bar the issue*

Although the more frequent types of collateral warranties used to bar the issue in an entail were fraternal and maternal collateral warranties, the release with warranty by the donor who created the entail could also be a collateral bar to the issue. Chief Justice Bereford declared in 1311 that the donor's charter in fee simple to the donee in tail did not destroy the entail.<sup>138</sup> Yet, if the donor released with warranty to the grantee of the tenant-in-tail and the issue in the entail was the heir of the donor, the issue was barred.<sup>139</sup> The warranty descended to the issue independently of the entail and the donor's warranty was not restrained by *De Donis*. This type of warranty bar could arise only in entails created by intra-family grants. The more entails were created by grant-regrant transactions the less opportunity there would be for the issue in the entail to be the heir of the donor.

<sup>138</sup> *Le Pestur v. Ry*, YB Trin. 4 Edw. II, 42 S.S. 67 (1311).

<sup>139</sup> YB Pas. 6 Edw. III, f. 16, pl. 19 (1332); *Parage v. Baly*, CP40/300, m.385 (Mich. 1334) (release by wife of donor).

The release with warranty by the brother or the widow of the donee in tail to the donee's alienee would descend collaterally to the issue and thus bar his recovery. Since the brother or the wife of the donee was not the donee, *De Donis* did not restrain their warranties. And once it was decided that Gloucester did not apply to the wife's release with warranty of her husband's inheritance, there was no legal hindrance to her warranty barring her issue in the entail.<sup>140</sup> The release of the donee's brother first appears in a remark by Herle in 1314. Lawyers put the following case. The brother of the donee in tail enters after the death of the donee and alienates with warranty.<sup>141</sup> Herle says that the issue of the donee is barred. But Scrope says that this case awaits judgment. A case in the following year shows the principle of fraternal collateral warranty to be almost in place.<sup>142</sup> A plaintiff brought *sur cui in vita* for his mother's inheritance that his father had granted to his sister, who had granted to the defendant with warranty. The plaintiff argued that his sister's warranty should not bar him because she was out of the line of descent. The defendant successfully argued that her warranty nevertheless descended to the plaintiff. It was further held that even though the sister had seisin by a grant from her father of the mother's inheritance, the plaintiff did not come within Gloucester. As the protection of *De Donis* extended to include the first three heirs in descent from the donee, there arose the question whether the warranty of the brother of an heir in the entail could bar either his brother or his nephew in the entail. The case of most concern was that in which the brother or uncle whose warranty was put forth as a bar was also issue of the donee. As such, he was arguably within the entail and his warranty restrained by *De Donis*.

The point of reference, at least in the first instance, for determining whether an heir of the donee was collateral to a plaintiff who brings descender was the form of the descender writ. In the 1329–30 Northamptonshire Eyre a defendant pleaded the warranty of the plaintiff's older brother, who had been seised during the life of his parents, the donees, had alienated with warranty,

<sup>140</sup> YB (RS) 34–5 Edw. I 100 (1305).

<sup>141</sup> *Walsham v. Walsham*, YB Mich. 8 Edw. II, 37 S.S. 52 at 67 (1314). Notice how Herle avoids a difficult issue by positing that the brother was in seisin and made a grant.

<sup>142</sup> Anon., YB Pas. 8 Edw. II, 41 S.S. 163 (1315).

and had died without issue before his parents.<sup>143</sup> The plaintiff was his collateral heir in the sense that a younger brother is collateral heir to his older brother. What is more, because he had died before his parents, the plaintiff, following the last ancestor rule for framing the descender writ, would not name him in his descender writ.<sup>144</sup> If the form of the descender writ determined who was lineal issue in the entail, the older brother in this case was collateral to the entail. This case was apparently too difficult for judgment, for none is recorded. In a similar case in 1330 it was held that the warranty of an older brother who never attained estate was lineal and came under the doctrine of assets by descent.<sup>145</sup> And in 1346, it was explained that the warranty of one not named in the plaintiff's writ remained at common law unless the plaintiff shows that the unnamed ancestor would have been entitled to the entail had he survived his parent in the entail.<sup>146</sup> In 1378, Justice Kirton made the same point.<sup>147</sup> In his reading in 1489, Robert Constable appears to have taken the opposite view. Where the elder brother dies before the father, the warranty of the elder brother is collateral to the younger brother. There is, however, a problem with the text of the reading at this point. One manuscript has Constable speaking nonsense: that the warranty is collateral because the younger brother will mention his older brother, which he may do in 1489 because the last ancestor rule was no longer strictly enforced at that time.<sup>148</sup> A second manuscript has the reverse of the Yearbook learning.<sup>149</sup> But here Constable omits the possibility that if the plaintiff does not mention the elder brother, he may nevertheless respond to the assertion of a collateral warranty by showing how the warranty is lineal. At the time of Constable's reading, the younger brother could abandon the last ancestor rule and name his elder

<sup>143</sup> *Loholm v. Templer, Northamptonshire Eyre*, II, 653 (1329–30).

<sup>144</sup> For the last ancestor rule see Chapter 2, above, at pp. 98–106.

<sup>145</sup> YB Trin. 4 Edw. III, f. 29, pl. 4 (1330).

<sup>146</sup> YB (RS) 20(2) Edw. III 202 (1346).

<sup>147</sup> *Levierow v. Anon*, YB Mich. 2 Ric. II, 1 Ames 85 (1378). Fitzherbert refers to a case in 1351 for the same point. *Fitzherbert*, Garraunte, No. 73. Accord, Littleton, *Tenures*, section 708.

<sup>148</sup> *Reading and Moots*, I, 183. If the word "lineal" were replaced with the word "collateral," the passage would be correct. Could there have been simple confusion?

<sup>149</sup> *Ibid.*, 183, n.1.

brother.<sup>150</sup> The main purpose of the last ancestor rule was to police the duration of the statutory restraint on alienation, not to determine whether a warranty was collateral or lineal.

Using the plaintiff's writ to determine at least in the first instance who was collateral to the entail meant that the warranty of the plaintiff's younger brother, who died conveniently before the plaintiff and without issue, would be a bar.<sup>151</sup> In cases brought by the second heir in the entail, which appear with some frequency in the later fourteenth century, plaintiffs resisted being barred by their uncles' warranty on the grounds that the uncle was issue of the donee and thus within the entail.<sup>152</sup> According to the form of the plaintiff's writ, however, the uncle, the father's younger brother, was not issue through whom the entail descended. In 1384, Chief Justice Belknap ruled that the plaintiff's uncle was not issue for the purpose of the warranty.<sup>153</sup> In the fifteenth century avuncular collateral warranties barred the issue-in-tail.<sup>154</sup> One does not come across many cases of maternal collateral warranties.<sup>155</sup> The frequent use of joint entails or entailed jointures could well explain the infrequent appearance of this type of collateral warranty.

A petition in the 1376 parliament asked that the Statute of Gloucester be extended to all collateral warranties at common law so that a plaintiff would be barred by a collateral warranty only if he had assets by descent.<sup>156</sup> The petition did not focus on the use of collateral warranties to bar entails. Rather, the petition put the case of a man who is disseised and his collateral ancestor releases with warranty to the disseisor. The petition puts the most egregious case of a collateral warranty, for it is one thing for a collateral ancestor to warrant the disseisor of a lineal ancestor, but quite another for a collateral ancestor to warrant one's own

<sup>150</sup> See Chapter 2, above, p. 106.

<sup>151</sup> YB Pas. 9 Edw. III, f. 16, pl. 29 (1335). The report described the person whose warranty was pleaded as "*puisne frere*" and as "*cosin*" of the plaintiff. The location does not permit one entirely to rule out the possibility that the person in question was the younger brother of the donee.

<sup>152</sup> YB Mich. 38 Edw. III, f. 21 (1361); Mich. 46 Edw. III, f. 32, pl. 36 (1372).

<sup>153</sup> *Gifford v. Lambourn*, YB Mich. 8 Ric. II, 3 Ames 84 (1384).

<sup>154</sup> e.g. *Bures v. Prephale*, CP40/618, m.413 (Trin. 1415); *Stotske v. Oldhall et al.*, CP40/755, m.445 (Mich. 1449); *Levenham v. Boynton*, CP40/761, m.348 (Pas. 1451).

<sup>155</sup> For an example see *Thurston v. Goodhard*, CP40/736, m.137 (Hil. 1445).

<sup>156</sup> 2 *Rot. Parl.* 334, No. 77 (1376).

disseisor.<sup>157</sup> The petition cannot, however, be taken as evidence of hostility to collateral warranties used to bar entails, nor yet for the frequency with which they were obtained as a bar to entails.

Two special uses of collateral warranties to bar the issue in an entail deserve mention. If the issue in an entail were sisters sharing the inheritance, which is to be expected somewhat less than a fifth of the time,<sup>158</sup> the alienation with warranty by one sister was lineal to her issue but collateral to the issue of her sisters.<sup>159</sup> Likewise, where the heir of one of two sisters has entered the entire land and has alienated with warranty, his warranty was lineal to his aunt, the other sister, for one-half of the land and collateral for the other half.<sup>160</sup> This is because the aunt takes one-half from her sister, where the warranty is lineal, and the other half from her father, where her nephew's warranty is collateral. In such a case, the nephew's warranty has become detached from the title he had in the land when he raised the warranty.

The other special application of collateral warranties was in the case of a tail male. Where land was held in tail male, the daughter of the donee or other tenant in the entail became an ideal person to raise a collateral warranty, especially if she were conveniently situated in a convent and thus likely to die without legitimate issue.<sup>161</sup> In such a case, she clearly was not issue under the entail and her warranty would descend at common law. But a tail male could raise difficulties for getting a collateral warranty to work. In 1441, Fortescue put the following case.<sup>162</sup> A man is given land in tail male. He has two sons, alienates the land, and a collateral

<sup>157</sup> For instances of the egregious case see Lib. Ass., 11 Edw. III, pl. 24 (1337); YB (RS) 19 Edw. III 114 (Pas. 1345); Lib. Ass., 26 Edw. III, pl. 8 (1352); Lib. Ass. 26 Edw. III, pl. 33 (1352).

<sup>158</sup> See E. A. Wrigley, "Fertility Strategy for the Individual and the Group" in C. Tilly (ed.), *Historical Studies of Changing Fertility*, (Princeton: Princeton University Press, 1978), 135. Wrigley's calculation was for the likelihood of at least one daughter surviving and no sons.

<sup>159</sup> *York and Norreys v. Priory of St. Trinity*, CP40/724, m.433 (Hil. 1442). Each plaintiff was the son of a daughter of the donee in tail. One of the daughters of the donee released with warranty. Unable to deny her deed, the plaintiffs lost, because the plaintiff whose mother released her warranty was lineal. Because the other plaintiff was barred, the defendant went without day. See YB Hil. 19 Hen. VI, f. 59, pl. 26 (1441) and Littleton, *Tenures*, section 710.

<sup>160</sup> See *Tropenell Cartulary*, I, 297-8.

<sup>161</sup> See *Saint Martin v. Barynton*, CP40/756, m.427 (Hil. 1450) for an example of a daughter's collateral warranty used to bar a tail male.

<sup>162</sup> YB Hil. 19 Hen. VI, f. 59, pl. 26; Trin. 19 Hen. VI, f. 78, pl. 7 (1441).

warranty is made to the alienee. The donee dies. The collateral warranty descends to the eldest son who has a daughter and dies. Is the younger son barred by the collateral warranty? Fortescue thought that the younger son was not barred, because he could claim the entail directly from his father and need not mention his elder brother in his writ.<sup>163</sup> Fortescue here neatly tries to turn the structure of the writ under the last ancestor rule against the collateral warranty. Another reason why the younger son is not barred would be that the collateral warranty descended to the eldest son's daughter and thus did not descend to the younger son as a bar. Chief Justice Newton and Justices Paston and Ayscough disagreed with Fortescue. They held that once the collateral warranty had descended to the elder son, the entail was utterly annihilated. In other words, one descent of the warranty to a person under the entail destroyed the entail. But it is not clear why the warranty should not descend to the eldest son's heir, his daughter, as it would at common law. Their position betrays a purpose to end entails beyond what the technical rules of warranties and their descent would allow.<sup>164</sup> This attitude supported the development of the common recovery contemporaneously with the 1441 case.<sup>165</sup>

<sup>163</sup> YB Hil. 19 Hen. VI, f. 59, pl. 26 at f. 61. The text discusses the simpler version of the case. In the more complicated version, the younger son enters on the alienee, dies seised, and his son enters as heir, who is, according to Fortescue, remitted to the earlier entail. This version of the case raises the possibility that the younger son's entry terminated the warranty. For this doctrine see YB Trin. 30 Edw. III, f. 8 (1356); *Couland v. Alle Stokke*, CP40/503, m.303 (Mich. 1386); *Tremalesy v. Colyn*, YB Mich. 11 Ric. II, 5 Ames 90 (1387); YB Trin. 3 Hen. VI, f. 50, pl. 15 (1425).

<sup>164</sup> They might have been concerned with situations that could resemble contingent remainders. Suppose, to vary Fortescue's case, the father had a son and daughter and that the son had a daughter and the daughter had a son. Would the grandson not be barred? According to Fortescue's analysis he would not. But in this case, it appears that the entail went into abeyance for a generation and could thus resemble keeping a contingent remainder alive beyond the termination of the prior estate. Indeed, the hypothetical case resembles *Faryngton v. Darrell*, YB Trin. 9 Hen. VI, f. 23, pl. 19 (1431), in which Justice Paston reasoned that a contingent remainder would be destroyed if the remainderman was not ascertained and ready to take at the end of the prior estate.

<sup>165</sup> For the contemporaneous development of the common recovery see Chapter 5, below, pp. 251–61.

*(e) Using collateral warranties as a bar*

Collateral warranties present the difficult question of how useful were they as a bar to interests under an entail. This question has two parts: how frequently did purchasers of entailed land try to set up collateral warranties and how frequently were they ultimately successful in barring an interest under the entail. Without an extensive survey of fourteenth- and fifteenth-century conveyances one cannot answer these questions with a great deal of confidence. But there is evidence that collateral warranties were sought by purchasers and were pleaded with some frequency.

A. W. B. Simpson has argued that collateral warranties were uncertain of effect and not frequently met in practice.<sup>166</sup> They were uncertain in that, putting to one side the warranting widow, a collateral warranty usually required the grantor's younger brother or son to release with warranty and to die without issue. The uncertainty attendant upon collateral warranties did not mean, however, that they were not frequently sought in practice. Payling has provided evidence that collateral warranties were indeed used fairly frequently.<sup>167</sup> There is additional evidence in support of Payling's conclusion.

The view that collateral warranties were not used frequently because their effects were uncertain emphasizes that to be effective the tenant-in-tail making a grant must have a requisite relative, his relative must release with warranty, he must die without issue, and he must be so related to the future claimant to the land as to have the warranty descend collaterally to that claimant. Perhaps the major obstacle to using collateral warranties was that one's grantee might not have a properly situated relative willing to release with warranty. Yet none of this reasoning *a priori* means that grantees did not try to obtain releases with warranties which they hoped would prove to be suitably collateral. The effort expended in obtaining collateral warranties depended, no doubt, on the ease of obtaining one in a particular case and the value of the transaction. Grantees were probably inclined to seek a collateral warranty more frequently than one might suppose, because obtaining releases was part of any land transaction and there was

<sup>166</sup> See Simpson, *A History of the Land Law*, 128-9.

<sup>167</sup> Payling, "Collateral Warranties," 50.

no better security of title available for the effort than a collateral warranty.

Payling has noted that Thomas Tropenell, busy acquiring lands in Wiltshire, sought and obtained collateral warranties on at least three occasions.<sup>168</sup> What is also worth noting is the lengths to which Tropenell sometimes went to secure a collateral warranty. In connection with his purchase of Great Chalfield, Tropenell noted:

Memorandum that William Rous' alienation with a warranty of the manor of East Chalfield, son and heir to Isowde Rous, sister to Joan Beaushyn, daughter to Sir Philip Fitz Waryn, knight, and to Constance his wife shall be collateral to the said Joan his aunt and to her heirs in the tail for the one half of the said manor of East Chalfield . . .<sup>169</sup>

There follows an explanation of the collateral warranty. Then there is the reminder: "and every collateral warranty is a bar."<sup>170</sup> Bartholomew Bolney was also a collector of collateral warranties. On three occasions *The Book of Bartholomew Bolney* carefully notes that a particular warranty will bar all collateral heirs.<sup>171</sup> Purchasers did not always know in advance whether a particular release giving a collateral warranty would turn out to be what would be needed in a future dispute. Rather, they collected a reasonable range of releases and hoped for the best.

The invention of the common recovery provided, if not a more simple, a more certain method of obtaining secure title. But even after the invention of the common recovery purchasers continued to obtain collateral warranties.<sup>172</sup> On two occasions Thomas Tropenell secured a collateral warranty and a common recovery.<sup>173</sup> On one occasion Bartholomew Bolney used both a collateral warranty and a common recovery.<sup>174</sup> In 1477, John Harwood recovered the manor of Tilney, Norfolk, from John Broughton.<sup>175</sup> Broughton also secured, by final concord, the

<sup>168</sup> *Tropenell Cartulary*, I, 265–72 (Great Chalfield); *Tropenell Cartulary*, II, 348–52 (Durnford); *Tropenell Cartulary*, II, 22–3. In two of these instances Tropenell also secured common recoveries: *Tropenell Cartulary*, I, 359–60 (Great Chalfield); *Tropenell Cartulary*, II, 351–2 (Durnford).

<sup>169</sup> *Tropenell Cartulary*, I, 297–8.

<sup>170</sup> *Ibid.*, 298.

<sup>171</sup> *The Book of Bartholomew Bolney*, 26, 36, 75.

<sup>172</sup> See Chapter 6, below, p. 334.

<sup>173</sup> *Tropenell Cartulary*, I, 359–60; *Tropenell Cartulary*, II, 351–2.

<sup>174</sup> *The Book of Bartholomew Bolney*, 75–7.

<sup>175</sup> CP40/863, m.335d (Hil. 1477).

quitclaim with warranty of Broughton and his wife Anne,<sup>176</sup> the release of Broughton's father,<sup>177</sup> and the release of Broughton's brother.<sup>178</sup> As the land was once held by Broughton's great-grandmother, the father's and the brother's release, more clearly the latter, were probably designed to set up collateral warranties. In Trinity Term of 1453 William Gascoigne recovered from William Brocas the manor of Ouston, Yorkshire.<sup>179</sup> In May of that year William Brocas' son, probably his younger son, quit-claimed the manor to William Gascoigne and his co-feoffees with warranty and a caveat that the warranty shall only bar him and shall not extend to recovery of the value.<sup>180</sup> This caveat was one method of shaping a collateral warranty so that it protected the warrantor from claims of *escambium*. Payling has shown that the preferred method of protecting the warrantor was to structure the warranty so that the duty to give *escambium* was limited to a particular individual, such as the abbot of Westminster, who was extremely unlikely ever to claim the property.<sup>181</sup> The attention given to shaping a safer and more serviceable warranty clause is itself evidence that grantees sought collateral warranties. And they came in handy. It is not too difficult to find cases on the plea rolls and in the Yearbooks of the fourteenth and fifteenth centuries in which a defendant pleads a collateral warranty in bar of the plaintiff's claim under an entail.<sup>182</sup>

<sup>176</sup> CP25(1)170/193/60.

<sup>177</sup> *Close Rolls, 1476-1485*, No. 385.

<sup>178</sup> *Ibid.*, No. 391.

<sup>179</sup> CP40/770, m.333d (Trin. 1453).

<sup>180</sup> *Close Rolls, 1447-1454*, 434.

<sup>181</sup> Payling, "Collateral Warranties," 52.

<sup>182</sup> e.g. JUST 1/23, m.62 (1330-1); *Parage v. Baly*, CP40/300, m.385 (Mich. 1334); *Newmarche v. Bingham*, CP40/452, m.345d (Mich. 1373); *York and Noreys v. Prioress of St. Trinity*, CP40/724, m.433 (Hil. 1442); *Thoresby v. Goodhand*, CP40/736, m.137 (Hil. 1445); *Stotske v. Oldhall et al.*, CP40/755, m.445 (Mich. 1449); *St. Martin v. Boynton*, CP40/40, m.427 (Hil. 1450); *Lavenham v. Boynton*, CP40/761, m.348 (P 1451); *St. Martin v. Boynton*, CP40/765, m.427 (Hil. 1450); *Stotske v. Oldhall et al.*, CP40/755, m.445 (Mich. 1449); *Thoresby v. Goodland*, CP40/736, m.137 (Hil. 1445); CP40/737, m.123 (Pas. 1445); *York v. Prioress of St. Trinity*, CP40/724, m.433 (Hil. 1442). For Yearbook entries see YB Pas. 9 Edw. III, f. 16, pl. 29 (1335); YB (RS) 20(2) Edw. III 202 (Mich. 1346); YB Mich. 38 Edw. III, f. 21 (1361); YB Trin. 42 Edw. III, f. 19, pl. 1 (1368); YB Mich. 46 Edw. III, f. 32, pl. 36 (1372); *Servis v. Merring*, YB Mich. 22 Hen. VI, f. 12, pl. 16 (1443); YB Mich. 21 Hen. VII, f. 39, pl. 57 (1505); YB Mich. 3 Hen. VII, f. 13, pl. 14 (1487); YB Mich. 22 Hen. VI, f. 12, pl. 16 (1443); YB Pas. 2 Edw. IV, f. 7, pl. 16 (1462).

The discussion of collateral warranties to bar entails has understandably focused on the barring of claims by the issue under an entail. Another important use of collateral warranties was to bar remainders. Many entails were followed by remainders. One typical form of grant in fee tail limited a remainder to the right heirs of a person who took an earlier estate in the conveyance. Another typical form of grant limited successive remainders to the siblings of the first tenant-in-tail. In both of these cases, the warranty of the tenant-in-tail had a high probability of descending collaterally to the remainderman. No search for suitably positioned and sterile relatives was necessary to set up a collateral warranty. It is not hard to find cases on the plea rolls or in the Yearbooks of the fourteenth and fifteenth centuries in which a collateral warranty is pleaded to bar a remainder.<sup>183</sup>

Yet there was also a certain frustration with the intricacies of collateral warranties. As already noted, in a judicial discussion in 1441 of a collateral warranty to bar a tail male, only Fortescue was willing to follow the logic of warranties and their descent to its limited conclusion.<sup>184</sup> Justices Newton, Paston, and Ayscough were looking for a definitive method of barring entails and thought they had it in a collateral warranty that descended once. In their view, the single descent of a collateral warranty would end the entail and perhaps remainders or reversions dependent upon the entail. But it was precisely this simple ending of entails in every case that collateral warranties could not provide. For that, one needed the common recovery.

### 3. BARRING ENTAILS BY JUDGMENT

A third method of barring an entail was by judgment. When a plaintiff brought his formedon writ or *scire facias* on a final concord, the defendant might plead that he, or another, had

<sup>183</sup> YB Trin. 4 Edw. III, f. 29, pl. 4 (1330); *Labaunk v. Bishopesden*, CP40/283, m.291d (Mich. 1330); YB Mich. 4 Edw. III, f. 56, pl. 65 (1330); YB Pas. 6 Edw. III, f. 20, pl. 38 (1332); YB Mich. 7 Edw. III, f. 47, pl. 17 (1333); *Bovil v. Reppes*, CP40/359, m.79d (Mich. 1349); *Calkingham v. Peregunt*, CP40/429, m.402 (Mich. 1367); *Giffard v. Lambourn*, YB Mich. 8 Ric. II, 3 Ames 84 (1384); *Horpele v. Cok*, CP40/503, m.344 (Mich. 1386); *Hangford v. Anon.*, YB Hil. 11 Ric. II, 5 Ames 182 (1388); YB Hil. 19 Edw. IV, f. 9, pl. 16 (1480).

<sup>184</sup> Above, pp. 237–8.

recovered the land by judgment and that the judgment was a bar to the plaintiff's action for the entail.<sup>185</sup> The plaintiff at that point could either falsify the recovery or accept the judgment but avoid its significance as a bar to his action. If the plaintiff could falsify the judgment, the defendant would have to relitigate the basis for the earlier judgment. If the plaintiff could not falsify the judgment, he might plead that the judgment should nevertheless not bar him because the issue decided by the earlier judgment did not defeat the entail under which he claimed the land. This latter course usually led to an issue of fact for the jury.

Our main interest is in the ability of a tenant-in-tail to manufacture a judgment as a bar to the entail. We are therefore mainly concerned with a plaintiff's ability to falsify a judgment against a tenant-in-tail pleaded as a bar. That ability depended upon the reason for the judgment and the issue decided by the judgment. The reason for the judgment might be the defendant's default, or the defendant's concession of the plaintiff's claim, or a jury verdict. A judgment on a jury verdict might be on a subsidiary point such as whether the defendant held the land on the day the plaintiff purchased his writ, or on the main point: the plaintiff's title. Because in *formedon* or *scire facias*, to enforce an entail the plaintiff's title derived from the grant in fee tail, the strongest judgment as a bar to such a plaintiff would be a judgment rendered on a verdict contradicting the grant in fee tail.

Let us begin, however, with the weaker judgment as a bar. Chapter 4 of Westminster II provided a remedy for certain tenants, including tenants in fee tail, who lost their land by default judgment.<sup>186</sup> They could bring an action authorized by statute to

<sup>185</sup> In another type of case the defendant alleged that a third party recovered by judgment from the defendant while the plaintiff's writ was pending. Even if the defendant were correct, the judgment would not destroy the entail under which the plaintiff claimed the land but would only bar his action against the particular defendant. For examples of this type of case see Anon., YB Trin. 5 Edw. II, 33 S.S. 226 (1312); YB Pas. and Trin. 14 Edw. II, f. 439 (1322); YB Hil. 10 Edw. III, f. 4, pl. 8 (1336); YB (RS) 11–12 Edw. III 362 (Hil. 1338); *Eton v. Rokle*, CP40/336, m.86d (Mich. 1343); YB (RS) 17–18 Edw. III 400 (Mich. 1343); YB (RS) 19 Edw. III 136 (Trin. 1345); YB (RS) 20(2) Edw. III 28 (Trin. 1346); YB Pas. 41 Edw. III, f. 10, pl. 8 (1367).

<sup>186</sup> 13 Edw. I, c. 4 (1285), *Statutes of the Realm*, I, 74–5. For sample cases brought under the statute see YB (RS) 20–1 Edw. I 451 (1292); CP40/151, m.46d (Pas. 1304); YB Hil. 5 Edw. III, f. 4, pl. 16, Mich. 6 Edw. III, f. 35, pl. 1 (1331–2); YB Trin. 9 Edw. III, f. 22, pl. 16 (1335).

make the winner of the default judgment plead his right to the land. If the default judgment were collusive, the winner of the default judgment would have no right he could plead to defend the judgment. On its words, the statute applied to a tenant-in-tail who lost by default judgment, not to his issue. Soon after its enactment, however, the statute was broadened by judicial interpretation. A manuscript note put the case of a tenant-in-tail about to lose the entailed land by default judgment. His issue under the entail seeks to be received to defend the entail.<sup>187</sup> The issue will not be received, says the note, but he will have his descender writ. The note makes sense as long as the issue will not be barred by the default judgment. The statute has been extended to protect the issue of a tenant-in-tail. In 1310, there arose the question whether the statute could be used against the grantee of the winner of a default judgment against the tenant-in-tail.<sup>188</sup> On the one hand, as Chief Justice Bereford observed, it would be hard on the issue of the tenant-in-tail not to allow him to sue the current tenant on the land. But it would also be hard on the current tenant to make him defend a judgment to which he was not a party. In 1337, it was held that the statute could not be used against the grantee.<sup>189</sup> Justice Hillary reasoned that if the action were not brought before the winner of the default judgment had granted the land away, the opportunity to sue under the statute was lost by laches. The statute could be used against the heir of the winner of the default judgment.<sup>190</sup>

The statute was read to protect reversioners and remaindermen from default judgments by a tenant-in-tail. In 1304 a reversioner tried to use the statute to set aside a default judgment against a tenant-in-tail who died without issue.<sup>191</sup> The defendant argued that the plaintiff, as reversioner, was outside the statute, which spoke of tenants-in-tail. No judgment is recorded. But in 1329, when a plaintiff brought descender the defendant pleaded as bar a default judgment in *cui in vita* brought by the donor's widow

<sup>187</sup> BL Add. Ms. 31826, f. 231r. For an attempt to extend the statute to protect the reversioners from a default judgment by the tenant-in-tail, see YB (RS) 32–3 Edw. I 97 (1304).

<sup>188</sup> *Walding v. Fairfax*, YB Mich. 4 Edw. II, 22 S.S. 104 (1310).

<sup>189</sup> YB (RS) 11–12 Edw. III 126 (Trin. 1337).

<sup>190</sup> YB Mich. 41 Edw. III, f. 30, pl. 34 (1367).

<sup>191</sup> YB (RS) 32–3 Edw. I 97 (1304).

against the grantee of the tenant-in-tail. Although again no judgment is recorded,<sup>192</sup> Justice Herle distinguished the case from one in which the tenant-in-tail himself suffered a default judgment. He rather strongly implied that had the judgment been against the tenant-in-tail the plaintiff, although a reversioner, would have the benefit of the statute. Justice Herle's position seems to have been adopted as a general rule for default judgments suffered by tenants-in-tail.<sup>193</sup>

A judgment against a tenant-in-tail on his admission of the plaintiff's claim probably was no bar to his issue in the entail. As a general matter, the justices were reluctant to render judgment on the defendant's concession, especially where things looked suspicious. In 1340, a defendant appeared on the first return day and traversed the plaintiff's action.<sup>194</sup> A writ to summon a jury was issued. A third party, producing a final concord that showed that the defendant had only a life estate and he held the reversion, prayed to be received to defend the action. He alleged collusion between the plaintiff and defendant. Justice Stonor, suspicious because the defendant had appeared without delay, delayed a decision until the next day. The concern was that a verdict for the plaintiff would disinherit the third party. But Justice Thorp reasoned that the third party would have *scire facias* to enforce the fine. Shardelow and Pole reasoned that the third party might enter and defend the entry for the reasons he asked to be received. In a 1365 case of formedon in the descender against a poor man and his wife, the defendant conceded the plaintiff's action, but the justices withheld judgment.<sup>195</sup> They inquired into the plaintiff's right and found that the plaintiff had brought descender against someone else, that the case had been postponed because of the nonage of the defendant's warrantor, and that the plaintiff had no title to or estate in the land before the beginning of the law term. The plaintiff objected: the justices were simply to render judgment. Chief Justice Thorp, however, told the plaintiff that parliament

<sup>192</sup> YB Pas. 3 Edw. III, f. 16, pl. 17 (1329).

<sup>193</sup> See *Stapledon v. Berkelegh*, CP40/375, m.123d (Mich. 1353) (remainder); YB Hil. 6 Hen. IV, f. 2, pl. 2 (1405) (reverter); *Herlyngton v. Wylcotes*, CP40/594, m.292 (Trin. 1409) (descender); YB Trin. 3 Hen. VI, f. 55, pl. 33 (1425). But see YB Hil. 14 Edw. II, f. 415 (1321).

<sup>194</sup> YB (RS) 14 Edw. III 106 (1340).

<sup>195</sup> YB Mich. 39 Edw. III, f. 35 (1365).

had instructed the justices not automatically to render judgment on the defendant's concession where the matter looked suspicious and that the plaintiff could sue to the King's Council. In another case twenty years later, the justices also withheld judgment until they satisfied themselves that the plaintiff indeed had the superior claim to the land.<sup>196</sup>

Although a confessed judgment by a tenant-in-tail was probably no bar to his heir in the entail, the matter does not seem to have been litigated. In a 1378 case, the plaintiff to a descender writ sought to use an earlier judgment rendered on the defendant's admission to estop the defendant from challenging the plaintiff's pleading of his descent from the donee.<sup>197</sup> Chief Justice Belknap reasoned that the earlier judgment was taken on the grant in fee tail, not on the plaintiff's pleading of descent. The defendant could now, in the later action, take issue with the plaintiff's descent from the donee in tail. One might think that the estoppel would work in the proper case. If a tenant-in-tail brought descender against his grantee, the grantee denied that there had been a grant in fee tail, and the tenant-in-tail agreed the judgment might estop the tenant-in-tail and his issue from later claiming the fee tail. What stood in the way of a confessed judgment binding the heir of a tenant-in-tail was that the heir would not be bound by the faint pleading of his ancestor. If the tenant-in-tail agreed with the grantee that had been no grant in fee tail but the tenant-in-tail had a charter of the grant in fee tail, his admission would be faint pleading and his heir could falsify the judgment.<sup>198</sup> In the fifteenth century, one finds a number of cases of descender in which defendants concede the plaintiff's right.<sup>199</sup> Since these cases began to appear with some frequency after entails had become perpetual, the plaintiff would recover the land under the form of

<sup>196</sup> *Farnham v. Croydoun*, YB Hil. 8 Ric. II, 3 Ames 211 (1385).

<sup>197</sup> *Levierow v. Anon.*, YB Mich. 2 Ric. II, 1 Ames 85 (1378).

<sup>198</sup> YB Mich. 19 Hen. VI, f. 39, pl. 82 (1440) (*per* Fortescue); Littleton, *Tenures*, section 688. In the cited case, Fortescue argued that even a verdict could be set aside by proof of tenant pleading.

<sup>199</sup> e.g. CP40/696, m.120 (Hil. 1435); CP40/700, m.13d, m.139d (Hil. 1436); CP40/700, m.126 (Hil. 1436); CP40/712, m.437 (Hil. 1439); CP40/716, m.115d (Hil. 1440); CP40/738, m.429d (Trin. 1445); CP40/749, m.125 (Pas. 1448); CP40/757, m.112 (Pas. 1450); CP40/759, m.429d (Mich. 1450); CP40/760, m.2 (Hil.1451). For earlier examples from the fourteenth century see CP40/336, m.590d (Mich. 1343); CP40/375, m.218 (Mich. 1353); CP40/399, m.307d (Trin. 1359).

the entail he had pleaded in his writ and count. These cases thus created entails in the plaintiffs. Perhaps the cases were used by feoffees to uses to render the land in fee tail according to their instructions. But it is not certain what the parties were doing to these cases.

The strongest bar was a judgment on a jury verdict that denied the right of the tenant-in-tail. If the judgment were against the donor of the fee tail and the grant in fee tail came between the seisin on which the judgment was based and the judgment itself, then neither the heir in the entail<sup>200</sup> nor the reversioner<sup>201</sup> could enforce the intervening grant against the holder of the judgment. It was precisely this sort of judgment that the parties to a common recovery sometimes manufactured.<sup>202</sup> The grantee would bring a *precipe* writ *quia dominus suus remisit curiam suam* or a writ of entry *sur disseism* and plead an ancestor's seisin earlier than the grant in fee tail. Common recoveries, however, did not use jury verdicts. In the cases in which a judgment against a donor is pleaded, the plaintiff does not allege collusion. One would not have to make specific allegations about the donor. But the entail would have to be put before the jury and the jury would have to find as a matter of fact that there was no entail. In 1311, where a defendant pleaded a judgment in novel disseisin against a plaintiff who brought reverter, Chief Justice Bereford distinguished between a judgment in which an entail was shown to the jury and the jury rendered a verdict on whether the tenant-in-tail had good title and a verdict that one of the parties had been disseised.<sup>203</sup> The former verdict went to the title of the tenant-in-tail; the latter, to freehold. In order to deprive the issue of a right entry, the judgment should be executed by the sheriff.<sup>204</sup> As Justice Prisot argued in 1455, a

<sup>200</sup> *Belgrave v. Lawrence and Barry*, YB Pas. 8 Edw. II, 41 S.S. 165 (1315); YB Mich. 6 Edw. III f. 53, pl. 56 (1332); YB Mich. 7 Edw. III, f. 61, pl. 53 (1333); YB (RS) 14 Edw. III 42 (Pas. 1440), 14–15 Edw. III 214 at 221 (Mich. 1340) (*per* Shardelow, but Thorp, Wiloughby, Shareshull, and Aldeburgh disagree); YB (RS) 18 Edw. III 280 (Trin. 1344); YB Hil. 27 Hen. VI, f. 8, pl. 9 (1449).

<sup>201</sup> YB Hil. 9 Edw. III, f. 9, pl. 23 (1335); YB (RS) 17–18 Edw. III 574 (Hil. 1344).

<sup>202</sup> See Chapter 5, below, pp. 265–7 and 280–2.

<sup>203</sup> *Hasseholt v. Haselholt*, YB Pas. 4 Edw. III, 26 S.S. 171 (1311). *Accord*, *Grandison v. Scoland, Kent Eyre*, II, 186, *Kent Eyre*, III, 119 (1313–14).

<sup>204</sup> YB Mich. 7 Hen. IV, f. 17, pl. 13 (1405) (issue may enter where there is a false recovery against tenant-in-tail without execution).

tenant-in-tail was barred forever by a verdict that the donor never gave the fee tail.<sup>205</sup> The best way to manufacture such a judgment would be to have the tenant-in-tail bring descender against his grantee, have the grantee deny that the grant was in fee tail, and have a jury render the needed verdict.<sup>206</sup> In the fifteenth century the issue might complain to the chancellor.<sup>207</sup> The only remedy at law for the issue would be a writ of error or attain.<sup>208</sup> This position was not clearly reached, however, until 1473.<sup>209</sup> There were three problems. First, the ability to bring attain might not descend to the issue. In 1443 Fortescue put the case in which a man who has a son by his first marriage remarries and receives land entailed to him and his second wife and their issue.<sup>210</sup> They lose the entailed land by a false verdict. Their issue under the entail cannot bring attain, because the husband's heir is his son by his first marriage. The heir has attain in this case, not the issue under the entail. But here the issue can falsify the recovery in an ordinary action on a descender writ. Secondly, the jurors who rendered the false verdict might all be dead, in which case the issue would not have attain.<sup>211</sup> In the 1443 case Fortescue thought that where all the jurors are dead, the judgment could be falsified without attain.<sup>212</sup> Yelverton, for reasons of finality, took the opposite position – that once the jurors had died, the judgment could no longer be questioned. It was this position that the court adopted in 1473. Thirdly, the heir might falsify the judgment on the ground that his ancestor had pleaded faintly. In the case of a tenant-in-tail who brings descender against his grantee and the grantee denies that the grant was in fee tail, the tenant might have a charter of the grant in fee tail. His not putting forth the charter would be faint pleading. According to Fortescue, the tenant's heir

<sup>205</sup> YB Mich. 34 Hen. VI, f. 2, pl. 6 (1455) (Prisot J.).

<sup>206</sup> Robert Palmer provides evidence of two such arrangements: Palmer, *English Law in the Age of the Black Death*, 125–6, 125, n. 85.

<sup>207</sup> e.g. C1/39/144 (1432–43).

<sup>208</sup> See 4 Hen. VI, c. 23 (1402).

<sup>209</sup> YB Mich. 13 Edw. IV, f. 2, pl. 4 (1473).

<sup>210</sup> YB Mich. 22 Hen. VI, f. 28, pl. 42 (1443). See YB Mich. 13 Edw. IV, f. 2, pl. 4 (1473).

<sup>211</sup> At least two jurors must be alive for their to be an action of attain: YB 12 Hen. IV, f. 109, pl. 18 at f. 10 (1410) (Strene, J.).

<sup>212</sup> For another, inconclusive, case, in which a party sought to falsify a recovery had on a verdict where the jurors had died, see YB Mich. 19, Hen. VI, f. 39, pl. 82 (1440).

could falsify the recovery.<sup>213</sup> Justices Paston and Aycough disagreed with Fortescue, but Littleton also thought that the heir could falsify the judgment in spite of the verdict.<sup>214</sup>

The difficult question, of course, is how easy was it to manufacture the required verdict. There is a fair amount of evidence that late-medieval juries were manipulated – “labored” was the word used – to render a desired verdict.<sup>215</sup> No doubt, arranging for the appropriate verdict was easier when both parties to the litigation wanted the same verdict. The anecdotal evidence of jury manipulation is not sufficient to assess how frequently juries could be labored to break entails. It seems unlikely, given the time, expense, and required influence, that jury manipulation could be used in anything like a routine manner to bar entails.

<sup>213</sup> YB Mich. 19 Hen. VI, f. 39, pl. 82 (1440).

<sup>214</sup> Littleton, *Tenures*, section 688.

<sup>215</sup> e.g. Payling, “Collateral Warranties,” 41–2 (manipulation of inquest *post mortem*); S. J. Payling, “Inheritance and Local Politics in the Later Middle Ages: The Case of Ralph, Lord Cromwell, and the Heriz Inheritance,” *Nottingham Medieval Studies* 30 (1986), 65–9 (manipulation of assize jury).

## THE ORIGIN AND DEVELOPMENT OF THE COMMON RECOVERY

This chapter traces the development of the common recovery from its beginning in 1440 to 1502. There were a handful of recoveries in most years of the 1440s and about a dozen in each year of the 1450s. Thereafter the number of recoveries grew more or less steadily. By 1502, when there were 240 recoveries, the recovery was a well-established means of conveying land. Part 1 of this chapter presents the evidence about the origin and the increasing frequency of recoveries.

The procedure of a common recovery was fairly simple. Suppose A holds land in fee tail but wishes to grant the land to B and to bar the entail. A grants the land to B and then B brings an action for the land against A in the Court of Common Pleas. A denies B's right and vouches a warrantor who enters into the warranty and defends the action. The grantee-plaintiff, B, pleads against the warrantor, who denies B's right. Either the plaintiff or the warrantor then requests and receives a continuance. On the day appointed to resume the case, the warrantor absents himself. The court gives a default judgment for B against A and for A against the defaulting warrantor. The plaintiff, B, might or might not sue out a writ to execute the judgment.

Each step in the basic procedure required a decision by the parties. The parties had to select a writ with which to bring the action, had to decide how to plead the writ, and had to choose a warrantor. A further decision was whether to execute the judgment. Each step of the procedure changed in the first century or so of the common recovery. The changes in the procedure of the common recovery paralleled changes in the doctrinal reasons why a recovery effectively barred a fee tail. Part 2 traces the changes in procedure and doctrine of the common recovery.

The basic common recovery could be made slightly more

complicated: the first warrantor could vouch another warrantor. There was no limit to the number of warrantors who could be successively vouched to warranty, but in most cases by far in which there were more than one warrantor there were only two. This more complicated form of recovery will be called the double voucher recovery. Part 3 discusses the reasons for using a double voucher recovery.

#### 1. THE ORIGIN AND GROWTH OF COMMON RECOVERIES

Identifying the first common recovery requires a clarification of terms. Lawyers came to use the phrase "common recovery" or "common assurance" probably because when the phrase was in use the same person appeared as warrantor in all recoveries. He was known as the common vouchee. In this sense, common recoveries did not begin until there was a common vouchee. The first common vouchee, Robert King, did not appear regularly in recoveries until 1470.<sup>1</sup> Although the appearance of a common vouchee is certainly evidence of greater routinization of the procedure, it does not identify the origin of recoveries.

More important than the appearance of the common vouchee was the use of a vouchee to warranty who defaulted. The defaulting warrantor was crucial, because if the defendant-grantor held a fee tail and defaulted, his issue in the entail had a statutory remedy to set aside the default judgment, unless the plaintiff could indeed prove his superior title.<sup>2</sup> This, of course, he could not do. If a default judgment was to be used to secure the plaintiff's title someone other than the grantor-defendant had to default in the action. A vouchee to warranty seemed made for the job. As early as 1292 a defendant to a writ of formedon in descender pleaded a recovery in an action in which a vouchee to warranty had defaulted.<sup>3</sup> Thereafter, cases in which judgment is

<sup>1</sup> e.g. CP40/834, m.230d (Hil. 1470); CP40/834, m.346d (Hil. 1470); CP40/835, m.260d (Pas. 1470); CP40/835, m.347d (Pas. 1470); CP40/836, m.111d (Trin. 1470).

<sup>2</sup> See Chapter 4, above, pp. 243–5.

<sup>3</sup> JUST 1/134, m.22 (Cumberland, 1292). More precisely than stated in the text, the defendant's warrantor pleaded a recovery in an action in which a warrantor had defaulted. For a thirteenth-century judgment on the default of a warrantor see *Berkshire Eyre*, No. 300 (1248).

rendered on a warrantor's default appear in the reports from time to time.<sup>4</sup> They are not frequent. Nor is it clear that in these cases the warrantor defaulted by design. There are, after all, many possible reasons, including his death, why a warrantor might fail to appear on the appointed day.

The effect of a default judgment against a warrantor was certainly known to lawyers. The invention of the common recovery occurred when lawyers manufactured a default judgment by a warrantor and began to do so routinely. The evidence of the origin of common recoveries is a series of fairly frequent cases in which the warrantor defaults by design. The first case in the series is the first common recovery. Table 5.1 sets forth the number of recoveries in each year from 1435 through 1454 and in arbitrarily chosen years thereafter.

As Table 5.1 sets forth, land was recovered on the default of a warrantor in 1436. On the plea roll for Michaelmas Term of that year there is an entry recording that one Thomas Gill the previous Easter Term had brought a writ of right *quia dominus suus remisit curiam suam* against Henry Trout and his wife Joan, Robert Fort and his wife Isabel, and Simon Campe and his wife Alice for three messuages and a substantial amount of land in Lodeswell and Church Stowe, Devon.<sup>5</sup> The Forts and the Campes had failed to appear. The sheriff had been ordered to take two-thirds of the messuage and lands into the king's hand and to summon all three couples to appear on the quindene of Michaelmas. Now Henry and Joan say that they were sole tenants on the day of the writ. They ask Thomas to plead against them. He pleads his own seisin in the reign of Henry IV. The defendants vouch to warranty one John Cleyer, who is present and who enters into the warranty. Thomas pleads against him; Cleyer receives an imparlance and

<sup>4</sup> YB Hil. 5 Edw. II, 31 S.S. 106 (1311); YB Mich. 6 Edw. II, 38 S.S. 125 (1312–13); YB Hil. 8 Edw. II, 41 S.S. 54 (1315); YB Mich. 10 Edw. II, 52 S.S. 124 (1316) (warrantor claims he defaulted because he was in prison at the time of summons); YB Mich. 14 Edw. II, 104 S.S. 80 (1320); YB Mich. 19 Edw. II, f. 631 (1325); *Northamptonshire Eyre*, II, 750 (1329–30); YB Mich. 8 Edw. III, f. 57, pl. 11 (1334); YB Hil. 9 Edw. III f. 1, pl. 1 (1335); YB Mich. 9 Edw. III, f. 39, pl. 51 (1335); YB (RS) 13–14 Edw. III, 200 (Mich. 1339); YB (RS) 14 Edw. III 104–5 (Pas. 1340); YB (RS) 14 Edw. III 200 (Mich. 1340); YB Trin. 45 Edw. III, f. 18, pl. 14 (1371); CP40/452, m.607 (Mich. 1373); YB Mich. 48 Edw. III, f. 29, pl. 16 (1374); YB Mich. 10 Hen. VI, f. 2 pl. 7 (1431).

<sup>5</sup> CP40/703, m.314d (Mich. 1436).

Table 5.1. *Recoveries of land on default of warrantors, 1435–1502*<sup>6</sup>

Year	Recoveries	Transactions
1435	0	0
1436	1	1
1437 <sup>7</sup>	0	0
1438	0	0
1439	0	0
1440 <sup>8</sup>	1	1
1441	3	2
1442	0	0
1443	1	1
1444 <sup>9</sup>	3	3
1445	0	0
1446	6	1
1447	2	2
1448	0	0
1449	4	4
1450	2	2
1451	1	1
1452 <sup>10</sup>	2	2
1453	14	6
1454	11	9
1457	12	12
1462	28	21
1464	27	24
1467	32	29
1470	30	29
1472	70	59
1477	45	41
1482	78	72
1488	105	80
1492	92	74
1497	108	84
1502	240	216

<sup>6</sup> Table 5.1 sets forth the number of recoveries in terms of actions and of transactions. There were three reasons why it sometimes took more than one recovery to carry out a single transaction. First, the scope of the writ might not be wide enough to be used for all the parcels of land in a transaction. A writ of right or a *precipe* writ *quia dominus suus remisit curiam suam* could include only the lands held of single lord. A writ of entry *sur disseisin* in the *post* could include only the lands within a single county. Secondly, the grantor might hold different parcels in different ways. He might not have the same co-feeoffees for each parcel. Some parcels might be held by feeoffees to his use. A separate writ would be necessary for each parcel or group of parcels held in a particular arrangement by the grantor-defendant. Thirdly, if the transaction were an exchange, at least two recoveries would be necessary to carry out the exchange.

<sup>7</sup> The plea roll for Hilary Term 1437, CP40/704, was unfit for production.

<sup>8</sup> The plea roll for Michaelmas Term 1440, CP40/719, was unfit for production.

<sup>9</sup> The plea roll for Michaelmas Term 1444, CP40/735, was unfit for production.

<sup>10</sup> The plea roll for Michaelmas Term 1452, CP40/767, was unfit for production.

defaults. Once defendants decided to come to court, the case follows the form of later recoveries. It is, perhaps, more than curious that the lands involved in the case were located in Devon. In two early recoveries – one in 1440<sup>11</sup> and the other in 1444<sup>12</sup> – the plaintiff was William Hindstone, a lawyer with ties to Devon, who recovered lands in Devon.

Although it might be said that this case was the first common recovery, the record reads as if the parties were not clear about what they were doing. They seem to have been confused in Easter Term and then to have regrouped in Michaelmas Term with a clearer idea of what they wanted to accomplish. All this supposes that they set out to manufacture a judgment for the plaintiff on default of the defendant's warrantor. And that is far from obvious. After 1440 there are recoveries in every year except three. If the 1436 case was intended to be a recovery and the lawyers were making it up as they went along one might expect recoveries in the years immediately following 1436. On the other hand, the writ used in 1436 and the presence of the warrantor are signs of a common recovery. Cases begun by writ of right *quia dominus suus remisit curiam suam* appear rarely on the fifteenth-century Common Pleas rolls other than in cases that are common recoveries. Ordinarily, vouching to warranty was to delay proceedings as the warrantor is summoned. In common recoveries, however, the warrantor is almost always there, although his eye is on the exit. Unfortunately, I have been unable to find information about the context of the case, which might help to determine whether the case was a common recovery.

Recoveries, though infrequent, appear fairly regularly on the plea rolls of the 1440s. Evidence about the earliest recoveries in the 1440s makes it almost certain that lawyers were manufacturing default judgments against warrantors. Consider eight of the first ten transactions conducted by common recovery in that decade. The first recovery, that of 1440, saw William Hindstone recover a messuage and thirty acres in Dunstan, Devon.<sup>13</sup> Hindstone returned as a plaintiff to another recovery in 1444, again involving lands in Devon.<sup>14</sup> Hindstone was a lawyer, later a serjeant, with

<sup>11</sup> CP40/716, m.119 (Hil. 1440).

<sup>12</sup> CP40/734, m.425 (Trin. 1444).

<sup>13</sup> CP40/716, m.119 (Hil. 1440).

<sup>14</sup> CP40/716, m.425 (Trin. 1444).

ties to Devon.<sup>15</sup> These recoveries look very much like a lawyer purchasing lands in his native county. In another recovery, in 1444, the plaintiff was John Wydeslade, filacer of Common Pleas for Devon and Cornwall.<sup>16</sup> In one of the transactions in 1447, Edmund Ingaldesthorp recovered the manor of Milksham, Gloucestershire, from John Onlopen, another lawyer, who, by final concord, quitclaimed the manor to Ingaldesthorp the following year.<sup>17</sup> In four of the first ten recoveries of the 1440s, one of the parties was a lawyer. Members of the legal profession began using common recoveries in part to serve themselves.<sup>18</sup>

In one of the transactions in 1441 Ralph, Lord Cromwell, treasurer, recovered the manors of Gonalston and Widmerpole, Nottinghamshire, and South Wingfield and Tibshelf, Derbyshire, from a group of feoffees who vouched Henry Pierpont as the defaulting warrantor.<sup>19</sup> The recoveries helped to settle a dispute between Cromwell and Pierpont.<sup>20</sup> Pierpont defaulted by design. In a recovery in 1444 the defendant was Richard Prior, clerk of the privy seal.<sup>21</sup> These recoveries are examples of royal officials taking advantage of the new device. In the other transaction in 1441, the prior of Newhall, Surrey, recovered lands for his priory and an inquisition *quale ius* returned, as they almost always did, that there was no evasion of the Statute of Mortmain.<sup>22</sup> The transaction achieved by six recoveries in 1446 settled a dispute between John Savage and his half-brother Richard Peshale.<sup>23</sup> Curiously, in these recoveries plaintiff and warrantor chose trial by battle. The same champions were named in all six recoveries. And in all six, the

<sup>15</sup> E. W. Ives, *The Common Lawyers of Pre-Reformation England* (Cambridge: Cambridge University Press, 1983), 45, 505; Baker, *Serjeants*, 518.

<sup>16</sup> CP40/734, m.336 (Trin. 1444); Ives, *Common Lawyers*, 295; M. Hastings, *The Court of Common Pleas in Fifteenth Century England* (Ithaca, N.Y.: Cornell University Press, 1971), 261–8.

<sup>17</sup> CP40/747, m.586 (Mich. 1447). For Onlopen's appearance as a lawyer in Common Pleas see CP40/764, m.739 (Hil. 1452).

<sup>18</sup> For a later example of lawyers serving themselves with a new legal device see L. Bonfield, "Marriage, Property, and the 'Affective Family,'" *Law and History Review* 1 (1983), 297.

<sup>19</sup> CP40/720, m.340 (Hil. 1441); CP40/920, m.340d (Hil. 1441).

<sup>20</sup> For an account of the dispute and its settlement see Payling, "Inheritance and Local Politics."

<sup>21</sup> CP40/733, m.302 (Pas. 1444); *Patent Rolls 1441–1446*, 319.

<sup>22</sup> CP40/722, m.339 (Trin. 1441); YB Trin. 20 Hen. VI, f. 4, pl. 38 (1442).

<sup>23</sup> CP40/743, mm.409, 410, 413, 417 (repeated on m.636), 418, 628 (Trin. 1446). See below, Appendix to Chapter 6, III, A, 2.

same warrantor, not the champion, defaulted on the day appointed for battle. The reasonable inference is that the warrantor defaulted by design.

Although the invention, or concoction, of the common recovery required legal imagination, the basic ingredients of a recovery had been set before lawyers in the two decades preceding 1440. In 1425, when a defendant defaulted in an action on a writ of right and the justices learned that he held a fee tail, the justices were reluctant to render judgment, even though the defendant's issue had a statutory remedy to set aside the default judgment.<sup>24</sup> The power of a judgment on a writ of right was made clear. Most by far of the recoveries suffered before 1490 used a writ of right. Six years later, in 1431, in what may be a precursor of common recoveries, the defendant to an action on a writ of right vouched a warrantor who defaulted.<sup>25</sup> The justices discussed the nature of the judgment to be given for the defendant against the vouchee. There was no question but that the judgment in favor of the plaintiff would be a final judgment. The question was whether the judgment in favor of the defendant against the vouchee would be a final judgment or common judgment also known as a simple judgment. A final judgment was more serious. The court gave a final judgment only after the defendant had joined the mise – that is, had denied the plaintiff's specific claim.<sup>26</sup> A final judgment determined right: it declared that the plaintiff and his heirs were to hold the land quit of the defendant and his heirs forever.<sup>27</sup> A common or simple judgment awarded the plaintiff seisin. With these differences between the two types of judgment in mind, one is in a better position to understand the arguments against rendering a final judgment for the defendant. Justice Markham argued that the court could not award a final judgment because the vouchee's warranty was a matter of contract, not a matter of real right. He and Justice Strangeways argued that the court could not render a final judgment for the defendant because a final judgment had to specify the lands recovered, but the judgment against the

<sup>24</sup> YB Trin. 3 Hen. VI, f. 55, pl. 33 (1425).

<sup>25</sup> YB Mich. 10 Hen. VI, f. 2, pl. 7 (1431).

<sup>26</sup> YB (RS) 11–12 Edw. III 51 (Pas. 1337); YB (RS) 14 Edw. III 104 (Pas. 1340); YB Mich. 44 Edw. III, f. 28, pl. 7 (1370); YB Mich. 26 Hen. VIII, f. 8, pl. 6 (1534).

<sup>27</sup> YB Mich. 9 Edw. III, f. 37, pl. 41 (1335).

vouchee could only be for lands equal in value to those the defendant had lost to the plaintiff. Justice Strangeways also argued that if the defendant had lost lands he had held in fee tail a final judgment would give him a better estate – fee simple – than the one he had lost.<sup>28</sup> Where the defendant held fee tail, the lands he recovered from the vouchee were to come to him in fee tail. If the defendant later alienated the lands thus recovered from a vouchee, his issue had formedon in the descender.<sup>29</sup> The court awarded a common judgment for the defendant against his vouchee. A case in 1339 had reached a similar decision.<sup>30</sup> The practice of giving common judgments for defendants in recoveries against vouchees continued into the sixteenth century.<sup>31</sup>

In 1435 it was decided that if a tenant-in-tail granted the entailed lands in exchange for lands of lesser value, the issue could plead that he had not accepted the exchange and had not been seised after his ancestor's death.<sup>32</sup> From this decision one could infer two practical instructions for making a common recovery: make the exchange by judgment of the court so that the issue could not object to the valuation of lands given in exchange, and, to be safe, leave the judgment against the vouchee for the issue to execute. Put the three cases together and one arrives at the common recovery: an action on a writ of right in which the defendant vouches a warrantor who defaults and the court renders a final judgment for the plaintiff but only a common judgment that the vouchee exchange lands of equal value with the defendant for the lands lost by the defendant.

<sup>28</sup> In accord with Justice Strangeways' point it was said in the report of a case in 1335 that the plaintiff would not receive a final judgment if the defendant held only a life estate: YB (RS) 13–14 Edw. III 200 (Mich. 1339).

<sup>29</sup> *Brooke*, Formedon 75.

<sup>30</sup> YB (RS) 13–14 Edw. III 200 (Mich. 1339). But in this report it was said that the plaintiff would not have received a final judgment had the defendant held only a life estate.

<sup>31</sup> YB Mich. 26 Hen. VIII, f. 8, pl. 6 (1534).

<sup>32</sup> YBB 14 Hen. VI, f. 2, pl. 7; 14 Hen. VI, f. 3, pl. 15 (1435); *Ashefeld v. Hethe*, CP40/699, m.104 (Mich. 1435). The plea roll records that the issue for the jury was whether the tenant-in-tail had died seised for the land received in exchange. The Yearbook reports that the issue for the jury was whether the issue had accepted the exchange and, after the death of the tenant-in-tail, had become seised of the lands received in the exchange. For the purpose of reconstructing the legal ideas lawyers continued into the common recovery the Yearbook report is the better evidence. The reports circulated among the profession. The plea rolls did not.

If the parts of the common recovery had been explained in the two decades preceding the appearance of the first common recovery, there were at least three motives to assemble the parts into a procedure to bar entails. In the early 1420s it was clear that the restraint of alienation imposed by *De Donis* on tenants-in-tail continued until the donee's issue became extinct.<sup>33</sup> This meant that ancient entails would never be alienable of their own accord. If the fourth generation of issue in the fifteenth century wished to alienate entailed land, he could not do so. When combined with the already limitless reach of the descender writ, it could well seem that no past disposition of land in fee tail would ever be free of dispute or litigation.<sup>34</sup>

The development of the indefinitely enduring entail and the limitless reach of the descender writ provided slightly different motives for the invention of the common recovery. In the case of a sale of land, the seller wanted to be able to transfer the land clear of the entail. His purchaser wanted to be able to take the land clear of the entail not only for his own enjoyment but also for eventual resale. Where a recovery was used to transfer lands to a strawman to resettle it back on the grantor or to transfer land to feoffees to uses, the new settlement was unlikely to be effective if old entails continued to provide the basis for claims against the new settlement.

Both of these major uses of common recoveries – sale and resettlement – reveal a new insistence on better, which is to say less disputable, title to land.<sup>35</sup> In one of the earliest uses of the recovery, Ralph, Lord Cromwell, sought to end a dispute that arose over a settlement made more than a century earlier.<sup>36</sup> Long-standing disputes over land were nothing new. What was new was a new attitude in favor of finding ways to secure legal title and end disputes once and for all. Something of this attitude was reflected in the 1441 case involving a collateral warranty to bar a tail male.<sup>37</sup> Justices Newton, Paston, and Ayscough were unwilling to apply the technicalities of warranty and its descent. If the collateral

<sup>33</sup> Chapter 2, above, pp. 119–21.

<sup>34</sup> For the limitless reach of the descender writ see Chapter 2, above, pp. 111–16.

<sup>35</sup> The uses of the common recovery are discussed in Chapter 6, below.

<sup>36</sup> Above, p. 255.

<sup>37</sup> YBB Hil. 19 Hen. VI, f. 59, pl. 26; Trin. 19 Hen. VI, f. 78, pl. 7 (1441), discussed at Chapter 4, above, pp. 237–8.

warranty descended once, the entail was barred permanently, even if it would not descend to the claimant under the entail. This attitude goes a long way toward illuminating the motivation to invent the common recovery – a plausible device to bar an entail, forever.

Closely related to this attitude in favor of finality was another attitude prevalent in the fifteenth century: a disposition to avoid litigation at common law. Historians have explained the increase in arbitration, or at least in recorded arbitrations, in the later fourteenth and fifteenth centuries in terms of the benefits of arbitration over litigation at common law.<sup>38</sup> Arbitration promised speedier resolution of disputes, consideration of the equities as well as the relevant but often complicated legal rules, and more durable settlements. The growth of Chancery as a court in the fifteenth century is also evidence of a disposition to avoid, where possible, litigation in the common law courts. The Chancery procedures, chiefly of *subpoena*, inquisition, and specific performance, were viewed as advantageous alternatives to common law litigation. The invention of the common recovery shared this disposition to avoid litigation – a common recovery was in almost all cases a sure bar to future claims under an entail, no doubt because there was a consensus in the legal profession that a recovery was a sure bar. One seldom finds challenges to common recoveries on the plea rolls or in the Yearbooks or in Chancery records. Litigation under an entail was not worth pursuing once one learned that the other side had a common recovery as the basis of title. The feigned litigation of a common recovery prevented real litigation later. The parties to the first recoveries could not know that recoveries would virtually preclude future litigation of claims based on settlements extinguished by the common recovery. At most they would hope that recoveries would have this effect. The invention of common recovery was an avenue to the medieval landholder's Holy Grail: indisputable title. After some

<sup>38</sup> For late medieval arbitration see C. Rawcliffe, "The Great Lord as Peacekeeper: Arbitration of English Noblemen and their Councils in the Later Middle Ages" in J. A. Grey and H. G. Beale (eds.), *Law and Social Change in British History* (London: Royal Historical Society, 1984), 34; E. Powell, "Arbitration and the Law in England in the Late Middle Ages," *Transactions of the Royal Historical Society* 33 (5th ser., 1983), 49; I. Rowney, "Arbitration of Gentry Disputes of the Later Middle Ages," *History* 26 (1982), 367.

experience, when lawyers learned that a common recovery did preclude future litigation and that neither the common law courts nor equity would upset a common recovery, there was strong reason to suffer common recoveries. This motive for suffering a recovery probably accounts for the significant growth in the number of recoveries beginning in the 1480s.

In addition to the motives of ending ancient claims and preventing future litigation of recent claims, there was probably a third motive for inventing the common recovery: dissatisfaction with final concords. A final concord could not bar an entail. In having one's grantor suffer a common recovery one did not have to trust the grantor's assertion that he held fee simple. One need not care very much how he held the land. It was not clear whether a final concord could even discontinue an entail so as to put the issue in the entail to his formedon writ.<sup>39</sup> A recovery was sure to do this much, and more. Apart from their inability to convey lands out of entail, there appears to have been, though this remains mysterious, a dissatisfaction with final concords. The number of final concords were decreasing as the number of recoveries were increasing.<sup>40</sup> Although there does not seem to have been a simple switch from one device to the other, for the parties to a recovery not infrequently also entered into a final concord, there was some replacement of final concords by recoveries. It is not clear to what extent this replacement can be attributed solely to the power of a recovery to bar an entail. It might be that a recovery was cheaper than a final concord, for the amount of lands transferred by recovery was frequently smaller than the amount transferred by final concord. But the cost of each procedure remains unknown.

Legal historians have been aware that, *pace* Coke, recoveries did not begin with *Taltarum's Case* in 1472.<sup>41</sup> The evidence presented in Table 5.1 above, dates the origin of recoveries a bit earlier than recent legal historians have thought.<sup>42</sup> The new device spread

<sup>39</sup> Chapter 3, above, pp. 169–70.

<sup>40</sup> Chapter 3, above, p. 170.

<sup>41</sup> For Coke's attribution of the recovery to *Taltarum's Case* see *Chudleigh's Case*, Coke, *Reports*, I, 120a at 131b (1589); *Mildmay's Case*, Coke, *Reports*, VI, 40a at 41b (1605); *Mary Portington's Case*, Coke, *Reports*, X, 35b at 37b (1610). *Taltarum's Case* is discussed below pp. 268–76.

<sup>42</sup> J. H. Baker, "Introduction," *Spelman's Reports*, II, 204 (The recovery was "well known by 1472"). Simpson has dated the recovery to "around the middle

from Common Pleas to the London Hustings Court. The earliest common recovery on the surviving rolls of the Hustings Court appears in 1455.<sup>43</sup> But Table 5.1 also suggests the possibility that *Taltarum's Case* might have made recoveries more popular. The annual number of recoveries in the decade 1472 to 1482 was significantly higher in most years than it was in the preceding decade. It is not clear, however, how much of that increase can be attributed to the judicial discussion of recoveries in *Taltarum's Case*. The increase in the number of recoveries itself increased in the sixteenth century. Table 5.1 by itself might leave the impression that 1502 was an exceptional year for common recoveries, but Table 5.2 (in part 3 of this chapter, below) shows that the volume of common recoveries remained high. For example, in Michaelmas Term 1512 alone there were 106 recoveries compared with 240 recoveries in all of 1502.

## 2. DEVELOPMENT OF PROCEDURE AND DOCTRINE

The basic form of a recovery did not change from the earliest recoveries of the 1440s to the developed practice of the sixteenth century, but the specific manner of taking the individual steps in the procedure changed during that period. The writ most frequently used in recoveries changed as did the pleading under the writs. The choice of vouchee to warranty changed as the common vouchee was introduced, and the decision whether to execute the judgment also changed by the 1530s. The changes in procedure reflected changes in the doctrinal understanding of why a recovery was effective to bar an entail. The principal source for describing the procedural steps of a recovery are the plea rolls of the Court of Common Pleas. The principal source for the doctrinal theory of the recovery are Yearbook reports and readings at the Inns of Court. The first show us what lawyers did. The second tell us what lawyers thought they were doing. Sometimes it looks as if practice was ahead of theory. Other times it looks as if theory was

of the fifteenth century" and spoke of the 1472 *Taltarum's Case* as the first "clear indication" of the "acceptance" of the device: Simpson, *A History of the Land Law*, 129, 130–1.

<sup>43</sup> Hustings Rolls, Pleas of Land, No. 167, m.1, *Vyaby et al. v. Pynchon* (1455). The writ used was a writ of right patent.

ahead of practice. But we cannot be certain, not only because surviving reports might be incomplete but also because legal culture was largely an oral culture and ideas were probably circulating within the profession before they were articulated in arguments at Westminster.

Legal historians who have attempted to explain the doctrinal theory of the recovery have presented the developed theory as it appears in reports in the 1530s.<sup>44</sup> On this theory, the recovery barred the grantor's fee tail because he, as defendant in a recovery, received, in fiction, lands from his warrantor equal in value to those he lost to his grantee. The lands so received were called recompense. In the reports of the 1530s one watches lawyers and judges trying to get the recompense theory to come out right.

We shall return to the recompense theory, but the important point at the moment is that the recompense theory developed over time and was not exclusively the first theory of the recovery. The recompense theory first received extended discussion in the reports of *Taltarum's Case*,<sup>45</sup> which might explain Coke's attribution of the origin of the recovery to that case. But neither the doctrine of recompense nor its implications were worked out all at once. The changes in the procedure of the recovery brought the practice of the recovery into conformity with the emerging recompense theory. One might go further: changes in the procedure of recoveries are the best evidence that lawyers had begun to adopt the recompense theory and its implications.

(a) *From writ of right to writ of entry*

In the first half-century of recoveries – 1440 to 1490 – plaintiffs in the overwhelming majority of cases brought their actions with a writ of right. Beginning in Hilary Term 1490, the plaintiffs almost always used writs of entry *sur disseisin* in the *post*. The pleading appropriate to a writ of right differed, of course, from that appropriate to a writ of entry. The trend in each instance, however, was toward simpler and bolder fictions, fictions that did not pretend to verisimilitude. The change in writ was a decision made in

<sup>44</sup> Baker, *Introduction to English Legal History*, 319–20; Simpson, *A History of the Land Law*, 134–5; Milsom, *Historical Foundations*, 186–7.

<sup>45</sup> YB Mich. 12 Edw. IV, f. 14, pl. 16; f. 19, pl. 25; Mich. 13 Edw. IV, f. 1, pl. 1; CP40/844, m.631 (Mich. 1272).

Chancery. Chancery could make its decision that writs of entry would be the writ used in common recoveries because the supporting doctrine for the writ of entry was in place. The supporting doctrine was the recompense theory. The adoption of this theory meant that focus shifted from the nature of the plaintiff's writ and his alleged ancient right to the recompense owed by the vouchee to warranty. Once this change in doctrine had taken place, a plaintiff could use just about any writ for a real action and plead whatever he liked as long as the defendant vouched a warrantor sure to default.

(i) *The writ of right*

From 1440 to 1490 plaintiffs in recoveries used four main types of writ of right. The most frequently used type was the writ of right *quia dominus suus remisit curiam suam*. Although this writ was called a writ of right both in the plea rolls and in other documents, it was in the *precipe* form. It had been invented to comply with chapter 34 of Magna Carta, which had prohibited the use of *precipe* writs in cases in which a lord would lose his court.<sup>46</sup> Compliance with Magna Carta required that a plaintiff obtain from the lord of the fee a remission of his court to the king. Upon obtaining a remission of court from the lord of the fee, the plaintiff brought his action in the King's Court. Seigniorial remissions of court, in the form of writs to the king, survive from the fifteenth century. A sample of remissions of court can be so easily correlated with recoveries on the plea rolls that it seems reasonable to infer that plaintiffs indeed obtained remissions of court.<sup>47</sup> The

<sup>46</sup> M. Clanchy, "Magna Carta, Clause Thirty-four," *English Historical Review* 79 (1964), 542; N. Hurnard, "Magna Carta, Clause 34" in R. Hunt, W. Pantin, and R. Southern (eds.), *Studies in Medieval History Presented to Frederick Maurice Powicke* (Oxford: Clarendon Press, 1948), 157.

<sup>47</sup> (a) CP40/824, m.428d (Trin. 1467) with C271/9/7 (William Abbot of Kirkstall); (b) CP40/824, m.504 (Trin. 1467) with C271/9/12 (Jocosa Becheham, widow); (c) CP40/824, m.504d (Trin. 1467) with C271/9/13 (John Fust); (d) CP40/825, m.132 (Mich. 1467) with C271/9/15 (John Abbot of Bukfast); (e) CP40/842, m.129d (Pas. 1472) with C271/12/3 (Godfrey Hilton); (f) CP40/842, 136d (Pas. 1472) with C271/12/11 (the abbot of Chertsey); (g) CP40/842, m.213d (Pas. 1472) with C271/12/6 (Richard Darcy of Northfleet); (h) CP40/842, m.216 (Pas. 1472) with C271/12/7 (Thomas Stonor); (i) CP40/842, m.220d (Pas. 1472) with C271/12/1 (Walter Devereux); (j) CP40/842, m.326 (Pas. 1472) with C271/12/5 (John Abington); (k) CP40/843, m.125 (Trin. 1472) with C271/12/8 (Reginald Grey); (l) CP40/843, m.125d (Trin. 1472) with C271/12/20 (John Prior of Goldwell); (m) CP40/843, m.139 (Trin. 1472) with C271/12/19 (Walter

plea roll entries do not always name the lord who remitted his court, but remissions of court can sometimes be found for those recoveries as well.<sup>48</sup> Remissions of court were real, but their cost is unknown.

Secondly, sometimes a plaintiff in the first decade or so of common recoveries brought his action with a writ of right patent addressed to the lord of the fee. In 1446, for example, John, son of John Savage, brought six actions for land by writ of right patent against Richard Peshale, son and heir of Maud, widow of John Savage.<sup>49</sup> He had removed these cases from the lord's court to county court by "asserting" before the sheriff that the lord's court had failed to do him full right. One cannot tell from the plea roll how much of the ancient oath procedure for the removal of cases from seignorial to county court survived, or was reinvented, in the fifteenth century.<sup>50</sup> From county court, Savage had removed his cases into the Court of Common Pleas, no doubt by writ of *pone*. In the first decade or so of recoveries, the plaintiffs used the writ

Devereux); (n) CP40/843, m.160d (Trin. 1472) with C271/12/25 (Robert Fowler); (o) CP40/843, m.341d (Trin. 1472) with C271/12/13 (Richard, duke of Gloucester); (p) CP40/843, m.344 (Trin. 1472) with C271/12/21 (William, prior of Christ Church Canterbury); (q) CP40/843, m.369 (Trin. 1472) with C271/12/14 (John, duke of Norfolk); (r) CP40/843, m.401 (Trin. 1472) with C271/12/24 (Peter Courtenay, dean of the Chapel of St. Stephen's, Westminster); (s) CP40/843, m.405 (Trin. 1472) with C271/12/23 (Thomas, abbot of Westminster); (t) CP40/843, m.407 (Trin. 1472) with C271/12/12 (abbot of Peterborough); (u) CP40/843, m.406 (Trin. 1472) with C271/12/26 (Thomas, archbishop of Canterbury); (v) CP40/843, m.428 (Trin. 1472) with C271/12/16 (Richard Neel); (w) CP40/844, m.582 (Mich. 1472) with C271/12/28 (Peter Langford); (x) CP40/845, m.347 (H. 1473) with C271/12/50 (James Starley, prebendary of Finsbury in St. Paul, London); (y) CP40/845, m.351 (Hil. 1473) with C271/12/46 (Ralph Shelton).

<sup>48</sup> (a) CP40/824, m.152 (Trin. 1467) with C271/9/8 (William Hastings); (b) CP40/824, m.152d (Trin. 1467) with C271/9/9 (William Hastings); (c) CP40/824, m.341 (Trin. 1467) with C271/9/11 (John Hopton); (d) CP40/824, m.392 (Trin. 1467) with C271/9/10 (John Norton); (e) CP40/842, m.320 (Pas. 1472) with C271/12/4 (Robert Whitwell); (f) CP40/843, m.304 (Trin. 1472) with C271/12/17 (Edward, prince of Wales).

<sup>49</sup> CP40/743, mm.409, 410, 417 (repeated on m.636), 418, 628 (Trin. 1446).

<sup>50</sup> The plea roll entries say only that Savage asserted ("*ad prosecutionem predicti Johannis Savage filii etc. asserentis coram . . .*") the seignorial failure of justice before the sheriff and thus do not reveal whether he used the ancient oath procedure to remove his cases from seignorial to county court. For the ancient oath procedure see Biancalana, "For Want of Justice," 454–65; M. Cheney, "A Decree of Henry II on Defect of Justice" in D. Greenway, C. Holdsworth, and J. Sayers (eds.), *Tradition and Change: Essays in Honour of Marjorie Chibnall* (Cambridge: Cambridge University Press, 1985), 187–93.

of right patent only a few times.<sup>51</sup> The writ continued to be used only where the land was held of an honour or manor held by the king or of the Duchy of Lancaster.<sup>52</sup>

Thirdly, if the land were held of the crown directly, the plaintiff used a writ of *precipe in capite*, which was called a *breve de recto in capite*. Occasionally, this writ was used for land held of an honour or the Duchy of Lancaster.<sup>53</sup> Since this writ was procedurally easier to use than was the writ of right patent, it is difficult to understand why plaintiffs used the writ of right patent for land held of a royal honor, manor, or the Duchy of Lancaster. Fourthly, in a few cases, the plaintiff used a writ of right for an advowson in gross.<sup>54</sup> Otherwise an advowson would be included in the writ for the relevant manor.<sup>55</sup>

Plaintiffs used a writ of right because they sought to bar a later action to recover the land. In the hierarchy of writs, the writ of right was highest and strongest. Whether or not the land was

<sup>51</sup> CP40/769, m.478 (Pas. 1453); CP40/770, mm.336d, 445, 454d (Trin. 1453); CP40/784, m.339d (Hil. 1457); CP40/786, m.315 (Trin. 1457).

<sup>52</sup> CP40/747, m.318 (Mich. 1447) (honour of Mandeville); CP40/770, m.324d (Trin. 1453) (honour of Nottingham); CP40/770, m.440 (Trin. 1453) (honour of Wallingford); CP40/771, m.613 (Mich. 1453) (honour of Tutbury); CP40/784, m.120d (Hil. 1457) (honour of Wallingford); CP40/825, m.429d (Mich. 1467) (honour of Wallingford); CP40/879, m.421 (Hil. 1482) (honour of Mandeville); CP40/881, m.358d (Trin. 1482) (honour of Balon); CP40/883, m.343 (Hil. 1483) (honour of Huntingdon); CP40/887, m.166d (Hil. 1484) (Duchy of Lancaster); CP40/904, m.111 (Pas. 1488) (Duchy of Lancaster); CP40/906, m.119d (Mich. 1488) (Duchy of Lancaster, honour of Leicester); CP40/910, m.402 (Mich. 1489) (honour of Peverel); CP40/910, m.405 (Mich. 1489) (honour of Leicester); CP40/910, m.410 (Mich. 1489) (honour of Peverel); CP40/910, m.607 (Mich. 1489) (royal manor of Weston Turvyle). For a case in which the little writ of right was used for land held in ancient demesne see CP40/911, m.320 (Hil. 1490). The defendant did not remove the case but brought a writ of false judgment which he pleaded faintly and lost.

<sup>53</sup> CP40/805, m.129 (Trin. 1462) (Duchy of Lancaster); CP40/805, m.129d (Trin. 1462) (Duchy of Lancaster); CP40/805, m.324 (Trin. 1462) (Duchy of Lancaster); CP40/805, m.324d (Trin. 1464) (honour of Peverel); CP40/813, m.435d (Mich. 1464) (honour of Wallingford).

<sup>54</sup> CP40/743, m.413 (Mich. 1446); CP40/906, m.340 (Mich. 1488); CP40/924, m.151 (Pas. 1493); CP40/940, m.311 (Pas. 1497); CP40/959, m.344 (Hil. 1502). In at least one case, a plaintiff recovered an advowson by a writ *precipe in capite*, CP40/861, m.110d (Hil. 1477).

<sup>55</sup> e.g. CP40/845, m.333 (Hil. 1473); CP40/861, m.353 (Hil. 1477); CP40/864, m.408 (Mich. 1477); CP40/902, m.142d (Mich. 1487); CP40/903, m.352 (Hil. 1488); CP40/920, m.138d (Pas. 1492); CP40/922, m.320 (Mich. 1492); CP40/926, m.335d (Mich. 1493); CP40/960, m.148d (Pas. 1502); CP40/961, m.414 (Trin. 1502); CP40/962, m.343d (Mich. 1502).

entailed, a recovery on a writ of right had the greatest preclusive effect. If the land were entailed, one might expect the heir, the remainderman, or the reversioner to use a formedon writ in any future action to recover the land. Although there was authority that the formedon writs were also writs of right, a recovery on a writ of right would preclude any later action.<sup>56</sup> The preclusive effect of a recovery on a writ of right is illustrated by a 1425 case.<sup>57</sup> The plaintiff had brought a writ of right; the defendant chose trial by battle; on the day for battle the defendant defaulted. The plaintiff sought judgment on the defendant's default, but the justices had somehow been informed that the defendant held as tenant-in-tail. The justices were reluctant to grant judgment lest the issue-in-tail be barred. Over an argument that the default judgment would not bar the issue, because he had his statutory remedy, the court took the matter under advisement. The case illustrates both a solicitude for entails and the belief in the power of a judgment on a writ of right.

The writ of right required only that the plaintiff assert that he or his ancestor had been seised of the land. If he asserted in his writ that his ancestor had been seised, the plaintiff in his pleading or count had to trace the descent of the right to the land from that ancestor to himself. Given the fictional nature of the action, the plaintiff could have asserted in his writ that an ancestor had been seised of the land and could have traced descent from that ancestor to himself in his count. Perhaps the safest course would have been for the plaintiff to have alleged that his ancestor had been seised of the land before the grant in fee tail or, if the land was not entailed, before the defendant or his ancestor had ever had seisin. Billyng argued as much in a 1459 case in which the defendant pleaded a recovery against the plaintiff's ancestor on a writ of right *quia dominus remisit curiam suam* in bar against the plaintiff's action on a formedon in the descender.<sup>58</sup> In the recovery, the plaintiff had pleaded his own seisin during the time of the then king. Billyng argued that the recovery bound only the defendant to the recovery, not his issue, because the plaintiff's seisin, the basis of his

<sup>56</sup> YB Pas. 40 Edw. III, f. 21, pl. 6 (1366); YB Trin. 12 Hen. IV, f. 1, pl. 2 (1410); YB Hil. 18 Edw. IV, f. 23, pl. 6 (1479).

<sup>57</sup> YB Trin. 3 Hen. VI, f. 55, pl. 33 (1425).

<sup>58</sup> YB Trin. 37 Hen. VI, ff. 31–2, pl. 15 (1459). Similarly, YB Mich. 21 Hen. VI, f. 17, pl. 32 (1442); YB Mich. 21 Edw. IV, f. 52 pl. 15 (1481).

recovery, came after the grant in fee tail under which the defendant to the recovery held the land. For a recovery to bar the defendant's issue, the plaintiff would have to plead seisin, his own or an ancestor's, earlier than the seisin of the donee under the grant in fee tail.<sup>59</sup> In a few of the earlier recoveries on writs of right, the plaintiffs pleaded ancestral seisin, which might have been attempts to have their right antedate the grant in fee tail or the defendant's ancestral seisin. The plaintiffs alleged seisin in an ancestor in the time of Henry III,<sup>60</sup> in the time of Edward I<sup>61</sup> (perhaps in these cases to antedate *De Donis*), in a great-great-grandfather in the time of Edward III,<sup>62</sup> or in a great-grandfather,<sup>63</sup> grandfather,<sup>64</sup> or father.<sup>65</sup> But in almost all recoveries suffered on a writ of right, the plaintiff rested his claim on his own seisin during the reign of the then king. When the plaintiff thus ignored the cautious advice on how to plead his writ of right, he might have been constrained by conscience to have his assertions of fact be true. If the defendant-grantor had transferred the land to him, as was probably the case, the plaintiff had in fact been seised in the reign of the then king. From a legal point of view, however, it is not clear whether in such a case they were relying upon the strength of the writ itself to make the recovery effective or were already beginning to rely upon the recompense due to the defendant from the defaulting warrantor. They might, of course, have been relying on both.

There were inconveniences in using a writ of right. With the most frequently used type of writ, the writ of right *quia dominus suus remisit curiam suam*, the plaintiff had to obtain a remission of court from the lord of the fee. The writ *precipe in capite* was

<sup>59</sup> In a 1340 case Shardelow asserted that "if tenant recover by right elder than the commencement of an entail, it seems to me that every lower action is taken away": YBB (RS) 14 Edw. III 42 (Pas. 1340), (RS) 14-15 Edw. III, 214 at 221 (Mich. 1340). This broad statement was contradicted by Thorp, who asserted that if the entail had been created by final concord one would have *scire facias*, and if it had been created by deed one would have formedon. Justices Willoughby, Shareshull, and Aldeburgh agreed with Thorp.

<sup>60</sup> CP40/880, m.479 (Pas. 1482).

<sup>61</sup> CP40/805, mm.324, 324d (Trin. 1462); CP40/884, m.11 (Pas. 1483).

<sup>62</sup> CP40/835, m.374 (Pas. 1470).

<sup>63</sup> CP40/813, m.356 (Mich. 1464).

<sup>64</sup> CP40/811, m.211 (Hil. 1464); CP40/811, mm.342, 343 (Hil. 1464).

<sup>65</sup> CP40/836, m.152d (Trin. 1470); CP40/841, m.104 (Hil. 1472).

simpler. But apart from the steps required to obtain a writ of right, the use of writs of right presented the inconvenience of having to use a different writ for each parcel of land held of a different lord. Examples are easily found in the plea rolls. In 1462, James Boneython and Walter Buttokesyde brought two writs to recover two parcels of land in Cornwall from Henry Bodrigan. Two writs were necessary because one parcel was held by lords and the other was held of the king.<sup>66</sup> In 1472, Thomas Howard, John Tymperley, and Thomas Heigham recovered manors and lands in Norfolk from William Berkley. Although all the land lay not only in Norfolk but in the same villis in Norfolk, two writs were required, because some of the land was held of the duchess of York and the remainder was held of the bishop of Norwich.<sup>67</sup> Also in 1472, Simon Burton, Oliver Sutton, William Brisco, and John Clark recovered manors and lands in Northamptonshire from William Mulso, Richard and Alice Burton, Thomas and Anne Louth, and Thomas and Elizabeth Beaufitz. The plaintiffs brought three actions, one for the lands held of Henry Boteler, one for the land held of the duke of Norfolk, and one for the land held of Peterborough Abbey.<sup>68</sup> The multiplication of seignorial remissions of court and of writs and actions meant added expense and effort. Some savings could be achieved by suing out a single writ for all land in a single county based on two or more remissions of court.<sup>69</sup> This combining of remissions of court was not, however, a frequent practice.

*(ii) The recompense theory and Taltarum's Case*

The use of the writ of right depended upon its preclusive nature as the most high and solemn writ for the recovery of land. Cautious plaintiffs tailored their pleading so that their claim was based on seisin prior to the grant in fee tail. In recoveries on a writ of right,

<sup>66</sup> CP40/805, mm.110, 110d (Trin. 1462).

<sup>67</sup> CP40/841, mm.195, 195d (Hil. 1472).

<sup>68</sup> CP40/843, mm.369, 369d, 407 (Trin. 1472).

<sup>69</sup> e.g. CP40/863, m.312 (Trin. 1477); CP40/910, m.353 (Mich. 1489). The lords of a fee could in fact be a group of persons or joint tenants, in which case the plea rolls record that the lords "*remiserunt curiam suam.*" When, however, as in the cited cases, the plea roll entry records that more than one lord "*remiserunt curias suas,*" one infers that there were more than one remissions of court. In CP40/863, m.312 (Trin. 1477), the entry records that the lords, without identification, "*separatim remiserunt curias suas.*"

the function of a warrantor was no more than to have him, rather than the defendant, default. The warrantor's default meant that the defendant's issue did not have a statutory remedy to avoid the default judgment. At some point before 1472, the theory of why a recovery was effective to bar an entail began to change. The emphasis shifted from the nature of the writ and, strictly speaking, the plaintiff's pleading on the writ to the recompense owed to the defendant by the defaulting warrantor. When a warrantor defaulted, the court rendered a double judgment: the plaintiff was to recover the land in litigation from the defendant and the defendant was to recover lands of equal value from the warrantor. This second judgment provided the recompense from warrantor to defendant. Under the recompense theory, if the defendant to a recovery was a tenant-in-tail, his issue had a claim to the recompense – lands of equal value to the entailed lands lost in the recovery. The defendant's issue did not have a claim against the plaintiff to the recovery. That, of course, was the point: to have the issue chase the warrantor.

The earliest sign of the recompense theory of a recovery comes in two Yearbook entries for Easter Term 1465. The two reports are probably of the same case. One report says that if a tenant for life vouch to warranty and his vouchee default, the reversioner has no remedy.<sup>70</sup> The other report records John Heydon's "clear" opinion that if in such a case the tenant recover in value and the reversioner recover in value, the judgment will bar the reversioner in that the recovery in value enures to his benefit.<sup>71</sup> It went without saying that judgment extinguished the life tenant's interest. For that one could rely on the writ, here a *precipe quod reddat*, and the fact that the life tenant did not default but vouched a defaulting warrantor. The reversioner, however, was not a party to the action. In order to reach the conclusion that he is bound, Heydon must suppose recompense comes from the vouchee to warranty and, somehow, goes to the reversioner. If one puts this case together with Billyng's argument that recovery on a writ of right binds only the current tenant-in-tail unless the plaintiff had pleaded ancestral seisin prior to the first donee's seisin under the grant in fee tail, then it begins to appear that

<sup>70</sup> YB Pas. 5 Edw. IV, f. 2, pl. 11 (1465).

<sup>71</sup> YB Pas. 5 Edw. IV, f. 2, pl. 19 (1465).

lawyers moved to a recompense theory as the means of saying that the issue of a tenant-in-tail, who would no more be parties to the action than the reversioner, would also be barred by a recovery.<sup>72</sup> The problem, at least for some justices, was how to make sure the recompense coming from the defaulting warrantor would reach the requisite persons – issue in the entail and reversioner or remainderman.

The recompense theory was debated at some length in in *Taltarum's* or *Talcarn's Case* in 1472.<sup>73</sup> *Taltarum's Case* was an action for forceable entry under the statute of 5 Richard II.<sup>74</sup> The case is a little difficult because the two Yearbook reports give slightly different versions of the pleadings. Yet a reasonable version of the facts can be gleaned from the two reports and the plea roll record. Thomas Trevistarn granted land in Cornwall to one William Smith in fee tail. William had two sons, Humphrey and Robert. Upon William's death, Humphrey, the elder son, entered the land and was seised in fee tail. Probably as a marriage settlement, Humphrey conveyed the land to one Tregos who reconveyed to Humphrey and his wife Jane and the heirs of their bodies, remainder to Humphrey's right heirs. Humphrey and Jane had no children. Jane died. Humphrey, at this point a tenant-in-tail after possibility of issue extinct, suffered a recovery to Thomas Talcarn or Taltarum. The judgment in the recovery was not executed; as a matter of record Talcarn had never taken possession. Talcarn conveyed the land to Henry Hunt. After Humphrey's death, his nephew John Smith, son of Humphrey's younger brother Robert, claiming the land as issue under the Trevistarn entail, ousted Hunt.<sup>75</sup>

Hunt brought the action of forcible entry against John Smith. Hunt would get a judgment in his favor if he could show either that the Trevistarn entail had been destroyed in the recovery to Talcarn or that the Trevistarn entail had been discontinued. In the former case, Smith would have no right under the entail. In

<sup>72</sup> Above, pp. 266–7.

<sup>73</sup> YB Mich. 12 Edw. IV, f. 14, pl. 16; f. 19, pl. 25 (1272); CP40/844, m.631 (Mich. 1472). The report uses the name Taltarum; the record, Talcarn.

<sup>74</sup> 5 Ric. II, st. 1, c. 7 (1381), *Statutes of the Realm*, II, 20–1.

<sup>75</sup> Smith might have claimed as Humphrey's right heir the remainder under the Tregos entail, but he took the position that the recovery to Talcarn destroyed the entail. The contingent remainder in Smith would also have been destroyed.

the latter, Smith would have no right of entry. There are two Yearbook reports of the case, a short report that conforms to the plea roll record and a long report that departs from the plea roll record but has more extensive discussion by the justices. According to the short report and the plea roll record, Smith justified his entry by pleading the Trevistarn grant in fee tail to William Smith and tracing descent from William, through Robert, to himself. He thus excluded Humphrey. Hunt responded by explaining that Humphrey had succeeded William and that Humphrey had suffered the recovery to Talcarn. Hunt made no mention of Humphrey's grant-regrant transaction with Tregos. Smith then pleaded that Humphrey had not been seised at the time of the recovery and that Talcarn had not been seised in virtue of the recovery. Hunt demurred as to the sufficiency of Smith's pleading. The demurrer raised two issues: could Smith, who was Humphrey's heir, plead that Humphrey had not been seised under the Trevistarn entail at the time of the recovery, and did the fact that Talcarn never took possession as a matter of record mean that the entail had not been discontinued so that Smith had a right of entry. No judgment is recorded. It is important to recognize that according to the short report and the plea roll record neither Hunt nor Smith mention Humphrey's grant-regrant transaction with Tregos. The reason for their omitting to mention this transaction is not hard to understand. If Hunt mentioned the transaction, he would be showing precisely why Humphrey was not seised under the Trevistarn entail at the time of the recovery to Talcarn. If Smith mentioned the transaction, he would be showing precisely why he did not have a right of entry – the grant-regrant transaction had discontinued the Trevistarn entail.

The longer report of the two, however, has Smith pleading the Tregos transaction in response to Hunt's pleading the recovery to Talcarn. There are two things strange about this. First, as noted above, Smith pleading the Tregos transaction in the forceable entry action would be self-defeating in that it would show why he did not have a right of entry. Secondly, in neither report do any of the justices discuss the significance of the Tregos transaction, although its significance would be crucial to deciding the case. A Yearbook note soon after *Taltarum's Case* reports that a plaintiff brought descender, the defendant pleaded a recovery in

bar, and the plaintiff showed that the defendant to the recovery had been seised under a different entail at the time of the recovery.<sup>76</sup> The plaintiff won his case. It makes a great deal of sense to suppose that the descender action was Smith against Hunt. In the context of the descender action, Smith would plead the Tregos transaction because doing so would show that Humphrey had not been seised under the Trevistarn entail, but under the Tregos entail, at the time of the recovery to Talcarn. On this reading, some of the pleading in the descender action was included in the report of the forcible entry action.

Returning to the demurrer in *Taltarum's Case*, the forceable entry action, the justices discuss whether an heir to the defendant in a recovery can plead that the defendant had not been seised of the entail at the time of the recovery. They cannot agree, perhaps because the details as to why Humphrey was not seised at the time of the recovery had not been put before them. They also discuss whether the judgment in the recovery alone and without execution is sufficient to discontinue the entail and deprive Smith of a right of entry. Surprisingly, they cannot agree. The question was important because the practice at the time was not to sue execution of the judgment in recovery.<sup>77</sup> If the judgment alone discontinued the entail, issue under the entail would be driven to their action. Recoveries would be more valuable. Given the descender action and assuming that action was indeed Smith against Hunt, either the justices in the forceable entry action were at least tending toward a decision that the recovery discontinued both entails, although it only barred the later entail, or Smith believed that the justices would come to that decision.

Smith never argued that the recovery to Talcarn was inherently ineffective to bar an action or that it was inherently fraudulent. He made the narrower argument that Humphrey had not been seised of the Trevistarn entail at the time of the recovery so that the recovery could not bar that entail, the one on which he based his claim. This argument was hardly an attack on recoveries. Smith's attorney was unwilling, perhaps unable, to undermine the entire practice of using recoveries to convey land out of fee tail. At any rate, the justices assumed that a recovery could be effective to bar

<sup>76</sup> YB Mich. 13 Edw. IV, f. 1, pl. 1 (1473).

<sup>77</sup> See below, pp. 291–9.

an entail. They were not going to upset the growing practice of the previous thirty years. They devoted their debate to rival explanations of why, and in what form, a recovery was effective. They focused on the consequences of the warrantor's default. The discussion of this point is the earliest extended discussion of the recompense theory. Earlier, there was a tendency to suppose that the defendant to a recovery in fact received from the warrantor lands of equal value in fee simple.<sup>78</sup> If the defendant alienated the fee simple lands so received, his heir would have his formedon, but there was some question whether the heir would have to plead specially that the lands he claimed had been received by his ancestor in substitution for the entailed lands.<sup>79</sup> In *Taltarum's Case* the plaintiff suggested only the possibility that John Smith had received recompense from the warrantor and argued that it would be unjust for Smith to undo the recovery and receive both the entailed lands and the recompense. In as much as the defendant had told the court that Robert King was the vouchee in the recovery and it is likely that King was known at this time for his frequent service as vouchee, the justices probably had a good idea that recompense had not and would not in fact reach John Smith. If the justices had let the effectiveness of a recovery depend upon the traversable fact of whether the defendant to a recovery received recompense, there would have been no common recovery in the form known to legal history, because every heir could traverse the receipt of recompense by his ancestor.

The justices assumed that recompense, if not already received, was receivable by the issue. If one thought that the recompense duplicated the grant in fee tail lost in the recovery, then all interests under that grant would be barred. There was some support for this position.<sup>80</sup> The issue in the entail could demand lands of equal value from the warrantor. When the entail ended, the reversioner or the remainderman could do likewise. In the case of an entail followed by a reversion, the only way in which the warrantor's recompense could be said to duplicate the grant in fee tail lost in the recovery is if the warrantor was the donor of the

<sup>78</sup> YB Mich. 7 Ric. II, 3 Ames 83 at 85 (1383).

<sup>79</sup> YB Mich. 11 Hen. IV, f. 68, pl. 39 (1409).

<sup>80</sup> Lincoln's Inn, Hale Ms. 188, f. 52v; YB Mich. 7 Ric. II, 3 Ames 83 (1283); YB Mich. 11 Hen. IV, f. 68, pl. 39 (1409).

grant, or his heir – only then could the reversion be preserved.<sup>81</sup> Perhaps for this reason, Chief Justice Bryan and Justice Nele believed that the recompense had to come from the donor of the land in fee tail or his heir. The recompense could then be an exact substitute for the original grant in fee tail. Justices Choke and Littleton, with more regard for actual practice, believed that a recovery would work as well if a stranger, as opposed to the donor, were the defaulting warrantor. Because of the default judgment, the warrantor owed recompense to the defendant and to anyone claiming through him. This view raised the difficulty that it explained how issue in an entail might be barred, because the issue claimed through his ancestor, the tenant-in-tail who was defendant to the recovery. But reversioners and remaindermen did not claim through the tenant-in-tail. The Choke–Littleton theory had the advantage of making it substantially easier to obtain a recovery.

Although they had different theories of a recovery, the justices nevertheless agreed that the defaulting warrantor owed recompense with respect to only one entail, the one held by the defendant at the time of the recovery. When Humphrey had conveyed to Tregos for the purpose of receiving the land back entailed on himself and his wife, Humphrey had discontinued the Trevistarn entail. Although these facts were not clearly pleaded in *Taltarum's Case*, they were crucial to Smith's ultimate success. At the time of the recovery, therefore, Humphrey was in possession only under the Tregos entail. No matter what one thought about the effectiveness of Humphrey's recovery to bar an entail, it could not bar the Trevistarn entail, because Humphrey was not in possession under that entail. The warrantor's recompense compensated him for the loss only of the Tregos entail, the one under which he was in possession. The recovery would not bar John Smith, who claimed under the Trevistarn entail.

This learning, at any rate, came to be the standard meaning given to *Taltarum's Case*. Matters were not so clear at the time the

<sup>81</sup> One might say that if the warrantor were not the donor, his recompense could give the reversioner a remainder in fee simple. But this possible solution would run into two difficulties. First, the reversioner would have to claim as remainderman, not as reversioner. Secondly, the form of the recompense would be different in cases in which the entail was followed by a reversion from its form in cases in which the entail was followed, ultimately, by a remainder in fee simple.

case was decided. No doubt Humphrey thought that the recovery to Talcarn could destroy both entails. Hunt, less confident, probably thought he was avoiding trouble by omitting mention of the Tregos entail. Shortly after *Taltarum's Case*, reflecting upon the force of a recovery suffered in 1458, Bartholomew Bolney wrote:

Note however that many think that this recovery is no obstacle to claiming any of those tenements by virtue of ancient entails; unless this Thomas Lyvet [the defendant to the recovery] had been seised of the tenements at the time of the recovery by reason of the entails in question. Inquiry must therefore be made as to the law, and if it be so, then a view must be requested, etc.<sup>82</sup>

Bolney appears to have been worried by a change in the law. Eventually lawyers would come to think that if the tenant-in-tail were put in the position of the vouchee to warranty, then all of his titles and entails would be extinguished by a recovery.<sup>83</sup> Although some lawyers appear to have adopted this idea at the time of *Taltarum's Case*, exemplified by their use of double voucher recoveries, the idea was far from being widespread in practice until years later.<sup>84</sup>

The recompense theory was not yet so deeply entrenched as to be the standard explanation of the common recovery. Three years after *Taltarum's Case* the justices had another opportunity to discuss the efficacy of a recovery. They never mentioned the recompense from the defaulting warrantor. The question in the case was whether a recovery of an entailed rent charge gave the plaintiff fee simple.<sup>85</sup> A granted a rent charge out of a manor A held to B in fee tail. B's son suffered a recovery to C. When C distrained for the rent, A brought trespass. C justified his entry on the grounds of the recovery and that the grant of the rent charge authorized distraint for arrears. A argued that C also had to plead that B had issue alive. Holding that the recovery gave C fee simple would have been rather hard on A. If B's issue had died out, there would no longer be a rent charge, because the entail would have come to its end. If C had fee simple, the rent charge would never

<sup>82</sup> *The Book of Bartholomew Bolney*, 82–3.

<sup>83</sup> Below, pp. 299–312.

<sup>84</sup> Below, pp. 299–312.

<sup>85</sup> YB Mich. 15 Edw. IV, f. 6, pl. 11; f. 8, pl. 13 (1475).

end. Genney for the defendant, seconded sometimes by Justice Choke, argued that the recovery was good to give C fee simple. They were intent on maintaining the power of a recovery come what may. Chief Justice Bryan and Justices Nele and Littleton were more sensitive to the special nature of a rent charge. The background assumption for both sides was that if the recovery had been of the manor, instead of the rent charge, the recovery would be good to give C fee simple. In that case, one would have no difficulty saying that the entail had ended with the recovery. But in the case of a rent charge, if the entail had ended, no rent would be owing. The case was further complicated by judicial indecision whether a tenant-in-tail of a rent charge could discontinue the entail, even if he granted with warranty. If a tenant-in-tail could discontinue an entailed rent charge, his issue would have to bring his formedon in the descender to recover the rent charge. He could not use self-help. So it was not clear whether the recovery would bar the issue of the tenant-in-tail. In their discussion, the justices did not consider the recompense due from the warrantor. The closest they came, and perhaps it was close enough, was that Chief Justice Bryan reasoned that a grant by a tenant-in-tail with warranty and assets descending to his issue would bar the issue. It would take another fifteen years or so for the recompense theory to become so well established that lawyers could give up using writs of right in their recoveries.

*(iii) The writ of entry*

In Hilary Term 1490, lawyers began to use the writ of entry *sur disseisin* in the *post* as the new standard writ for recoveries. This writ and, rarely, the writ of entry *ad terminum qui preterit*,<sup>86</sup> had been used earlier, but the change from writ of right to writ of entry took only a single term. Of the eleven recoveries suffered in Trinity Term 1489, only two were on writs of entry and the remainder were on writs of right. Of the seventy-nine recoveries in Michaelmas Term 1489, the plaintiffs used a writ of entry in only five and a writ of right in the remainder. But of the thirteen recoveries suffered in Hilary Term 1490, six were on writs of

<sup>86</sup> CP40/838, m.153d (Hil. 1471); CP40/844, m.156d (Mich. 1472); CP40/862, m.420 (Pas. 1477); CP40/864, m.432 (Mich. 477); CP40/865, m.345d (Hil. 1478); CP40/866, mm.356d, 360d (Pas. 1478); CP40/903, m.134 (Hil. 1488).

entry, four were on writs of right, and three were on writs of *precipe in capite*. Of the four of the recoveries on writs of right, three had been begun the preceding term. All of the thirteen recoveries suffered in Easter Term 1490 were on writs of entry as were all twenty-seven recoveries suffered during Hilary Term 1491. The change to the writ of entry did not mean that writs of right ceased to be used altogether, but their use became rare. The writ of entry *sur disseisin* in the *post* became the standard writ used in recoveries. Exceptions were seldom made for lands held of the king. The writ of right *in capite* also almost vanished from use. With the writ of entry, lawyers and their clients ceased to care who was lord of the fee.

Chancery instituted the writ of entry as the writ to use in common recoveries. That Chancery required, in almost all cases, that the plaintiff use a writ of entry explains how the changeover to the new writ took place quickly. And Chancery had an incentive to having lawyers use a writ of entry, namely that Chancery exacted an additional charge for a writ of entry. The price varied with the annual value of the land described in the writ. At the bottom of surviving writs there is recorded the amount paid for the writ. On the dorse of the writ there is a record of the attorney's oath as to the maximum annual value of the land. These records of payments and valuations do not appear on writs of right. From a sample of the writs of entry used in recoveries it is difficult to reconstruct a precise schedule of fees. There does not seem to have been more than a rough practice of charging more for writs concerning more valuable lands. For example, one plaintiff paid half a mark for a writ concerning lands valued at not more than £6 per year<sup>87</sup> but another plaintiff in the same term paid one mark for a writ concerning lands also valued at not more than £6 per year.<sup>88</sup> Yet another plaintiff paid ten shillings for a writ concerning lands valued at not more than six marks per year.<sup>89</sup> One thing seems clear: no additional charge was exacted for writs concerning lands

<sup>87</sup> CP52/251/11/8/3/1/1 (Wiltshire), *Henry Sutton v. Roger Neuberg and Elizabeth his wife*, CP40/924, m.153d (Pas. 1493).

<sup>88</sup> CP52/251/11/8/3/1/1 (Middlesex), *Roger Wright v. Thomas Haselrigge*, CP40/924, m.149d (Pas. 1493).

<sup>89</sup> CP52/238/11/5/1/7 (Oxfordshire); *John Pytcher and Sybil his wife v. Edmund Hampden, Thomas Gate, Thomas Baud, Henry Makeney, Henry Dene and John Wylmot*, CP40/910, m.593d (Mich. 1489).

valued at less than 40 shillings.<sup>90</sup> This exemption from paying a fee for a writ helps to explain the numerous recoveries involving fairly small pieces of land.

The change to the writ of entry reflected the change in beliefs why a recovery was effective. Robert Brudenell explained the new theory of the recovery at the Inner Temple in the autumn of 1491. Recoveries were effective, not because of the nature of the writ used and thus the strength of the judgment rendered, but because the defendant recovered from the vouchee lands equal in value to those rendered to the plaintiff. "Thus the final judgment is not the bar, but the recompense; and therefore such recovery by writ of right or writ of entry in the *post* is all one."<sup>91</sup> Brudenell's statement suggests that he felt it to be necessary for him to correct a mistaken, older, understanding of why a recovery was effective. The final judgment to which Brudenell refers is the judgment between plaintiff and defendant, not the judgment between defendant and vouchee. The latter judgment was a "simple" or

<sup>90</sup> e.g. CP52/239/11/5/2/4 (Leicestershire), *Ralph Shirley v. John Spede*, CP40/911, m.311 (Hil. 1490) (no charge, lands valued at not more than 40s.); CP52/251/11/8/3/3 (Kent), *Richard Mugge, Alexander Culpeper and Richard Mugge v. John Bolton*, CP40/924, m.117 (Pas. 1493) (no charge, land valued at not more than 33s., 4d.); CP52/251/11/8/3/3, *John Payn and James Potte v. Geoffrey Doveney and John Dampont*, CP40/924, m.303 (Pas. 1493) (no charge, lands valued at not more than 30s.); CP52/251/11/8/3/5 (Warwickshire), *John Smith and Robert Handy v. Geoffrey Shirlok and Agnes his wife*, CP40/924, m.202 (Pas. 1493) (no charge, land valued at not more than 28s., 8d.); CP52/242/11/6/2/4 (Northamptonshire), *Edward Saunders, Thomas Wallys and Humphrey Belcher v. Simon Bishoptre and Alice his wife*, CP40/915, m.331d (Hil. 1491) (no charge, lands valued at not more than 28s.). A sample of other writs with their charges and valuations is: CP52/251/11/8/3/2/2 (Buckinghamshire), *Henry Colet, Robert Brudenell, Thomas Wyndowet, Thomas Bradbury and Nicholas Alwyn v. Richard Pole and Ralph Assheton*, CP40/924, m.148 (Pas. 1493) (charge of 40s., land valued at not more than £20); CP52/251/11/8/3/3 (Surrey), *Richard Merland v. John Scrace*, CP40/924, m.151d (Pas. 1493) (charge of 20s., land valued at £9); CP52/251/11/8/3/3 (Sussex), *Thomas Rowys and John Payn v. William Knottesford*, CP40/924, m.154 (Pas. 1493) (charge of 16s., 8d., land valued at £8 6s. 8d.); CP52/251/11/8/3/5 (Warwickshire); *Richard Wolmer v. Richard Carter*, CP40/924, m.202d (Pas. 1493) (charge of one-half mark, land valued at not more than 6 marks); CP52/242/11/6/2/3 (Coventry), *John Smith, Henry Smith, John Porter and Thomas Bond v. George Ruyton*, CP40/915, m.321 (Hil. 1491) (charge of one-half mark, land valued at not more than 5 marks); CP52/251/11/8/3/3 (Devon), *William Laurens v. Richard Laurens*, CP40/924, m.152d (Pas. 1493) (charge of one-half mark, land valued at not more than 5 marks).

<sup>91</sup> *Readings and Moots*, I, 219.

“common” judgment, not a final judgment.<sup>92</sup> But it was the latter judgment that gave the defendant recompense from the warrantor. Brudenell referred to *Taltarum’s Case* as the authority for his explanation why a writ of entry was as good as a writ of right for a recovery.<sup>93</sup>

The recompense theory that supported the change in writs had been discussed by the justices eighteen years before the change in writ took place. There is no obvious explanation why the change in writs did not take place sooner. The financial incentive of Chancery to have parties use writs of entry does not explain why the change took place in 1490 and not some other year. The use of a writ of entry meant that the parties need not obtain remissions of court from the lord of the fee. Instead of using a separate writ for each parcel of land held of a different lord, a single writ could be used for all lands held in a single county. Without knowing the cost of obtaining remissions of court, the values of lands transferred in recoveries, and the fees paid to lawyers and vouchees it is impossible to understand the economics of the change in detail. Those parties who used a single recovery to accomplish a transaction involving lands worth less than 40 shillings per year probably found writs of entry cheaper to use than writs of rights. They did not pay an extra charge for their writs of entry but saved the cost of a remission of court. For those parties who used a single recovery to accomplish a single transaction involving lands worth more than 40 shillings per year, at some point the cost of a remission of court equalled the extra cost of a writ of entry. It is impossible to calculate how many of these parties found a writ of entry cheaper than a writ of right and how many found a writ of entry more expensive.

Parties who used more than one recovery to accomplish a single transaction would save money by using a writ of entry only if the total cost of all remissions of court and legal fees necessary for actions on writs of right for a single transaction was less than the incremental cost of a writ of entry caused by combining the

<sup>92</sup> YB (RS) 14 Edw. III 200–1 (Mich. 1340); YB Mich. 10 Hen. VI, f. 2, pl. 7 (1432); YB Mich. 26 Hen. VIII, f. 8, pl. 6 (1534). The difference between a final and a simple judgment was that the lands subject to a final judgment were specified at the time of judgment.

<sup>93</sup> *Readings and Moots*, I, 219.

various parcels in different lordships into a single parcel for valuation for a writ of entry.

When one considers how few additional actions were made necessary by the fact that an action on a writ of right only included land in a single lordship the savings to the parties by the shift to writs of entry was not substantial. As Table 5.1 indicates, the total difference between actions and transactions for the years 1472, 1477, 1482, and 1488 was forty-six. There were, then, forty-six extra actions to accomplish transactions in these years. Fourteen, or about 30 percent, of these extra actions were necessary because of the limited scope of the writ of right. The change to the writ of entry could not have eliminated the need for the remaining thirty-two extra actions. Twenty-four of these, or 52 percent of the total, were necessary because different parcels of land lay in different counties. Five were necessary because the defendant held different parcels under different arrangements. In two transactions, the nature of the transaction required an additional recovery. And in one transaction, it is hard to tell why the parties used two recoveries. The fourteen extra actions attributable to the use of writs of right were, however, only about 4.7 percent of the 298 recoveries in these years. In the years 1492, 1497, and 1502 there were a total of sixty-eight extra actions. Fifty-three, or about 78 percent were necessary because different parcels of land lay in different counties. Another five were necessary because the defendant held different parcels under different arrangements. Eight were necessary because the parties used writs of right and held different parcels of land from different lords. In one transaction it is hard to see why the parties used two recoveries. It is difficult, if not impossible, to determine how many additional extra actions would have been necessary if there had been no change to the writ of entry. The best guess is that the change to writ of entry eliminated the need for 25 percent to 30 percent of the extra actions. Chancery in part redirected revenues from lords for remissions of court to itself for writs of entry and in part increased the overall cost of transactions by common recovery other than those involving lands valued at less than 40 shillings per year.

After the mid-1490s, pleadings on writs of entry became formulaic. What is interesting, however, are the attempts at verisimilitude made in many of the pleadings on the writs of entry. The form of the writ required the plaintiff to allege that the

defendant had no entry into the land except after the disseisin which a named disseisor had done to someone through whom the plaintiff claimed the land. The plaintiff therefore had to name a disseisor and a victim of the disseisin. Occasionally, the parties used a writ of entry in the nature of novel disseisin.<sup>94</sup> This writ, which simply named the defendant as the disseisor and the plaintiff as the victim, did not have great preclusive effect, because the plaintiff did not go further back in time than himself and the defendant. Two different versions of the writ were used. In one version, which corresponds to the form in the later Register of Writs, the plaintiff did not claim the land as his right and inheritance.<sup>95</sup> In the other, he made that claim.<sup>96</sup> In order to have greater preclusive effect, a plaintiff could use a writ of entry *sur disseisin* in the *post* which described the land as his right and inheritance and which named a prior holder of the land or an ancestor of the defendant as the disseisor or named an ancestor of the plaintiff as the victim of the disseisin or some combination of the two. Cautious parties to a recovery would have named the grantor of the fee tail as the disseisor and a contemporaneous ancestor of the plaintiff as the victim of the disseisin. This pleading strategy would have applied Billyng's theory of how to plead a writ of right to the pleading of a writ of entry. That plaintiffs in the 1490s bothered to allege either that their ancestor had been disseised or, more frequently, that a prior holder of the

<sup>94</sup> CP40/866, mm.358, 359d (Pas. 1478); CP40/910, m.593d (Mich. 1489); CP40/911, m.327d (Hil. 1490); CP40/924, m.303 (Pas. 1493).

<sup>95</sup> CP52/251/11/8/3/3 (Cambridgeshire); *John Payn and James Potte v. Geoffrey Dowenys and John Dampport*, CP40/924, m.303 (Pas. 1493): "*Precipe Galfrido Dowenys et Johanni Dampport quod iuste et sine dilations reddant Johanni Payn et Jacobo Potte tresdecim acras terre duas acras prati et medietatem unius acre bosei cum pertinentiis in Saweston et Pampeworth in que iidem Galfridus et Johannes Dampport non habent ingressum nisi post disseisinam quam iidem Galfridus et Johannes Dampport inde iniuste et sine iudicio fecerunt prefati Johanni Payn et Jacobo post primam transference domini Henrici Regis filii Regis Johannis in Gasconia ut dicunt. Et inde queruntur quod predicti Galfridus et Johannes Dampport eis deforciant. Et nisi fecerint . . .*" Compare *Registrum Brevium*, 229 (1687).

<sup>96</sup> CP52/238/11/5/1/7 (Oxfordshire); *Edmund Hampden, Thomas Gate, Thomas Daud, Henry Makeney, Henry Dene and John Wylmot v. John Pytcher, Sibill his wife, and John Glaswell* CP40/910, m.593d (Mich. 1489): "*Precipe Johanni Pytcher et Sibille uxori eius et Johanni Glaswell quod iuste et sine dilations reddant Edmundo Hampden [etc.] unum mesuagium [etc.] que clamant esse ius et hereditatem suam et in que iidem Johannes Pytcher [etc.] non habent ingressum nisi post disseisinam quam predicti Johannes Pytcher [etc.] inde iniuste et sine iudicio fecerunt prefati Edmundo Hampden [etc.] . . .*"

land or the defendant's ancestor had been the disseisor is a little surprising. Strictly speaking, the recompense theory of the recovery that was invoked by Brudenell as the basis for using writs of entry did not require the plaintiff to talk about the history of the land. The recompense from the vouchee on the default judgment made the recovery effective. Lawyers, however, were not prepared to rest solely on the recompense theory. Nor were they entirely comfortable with the change to writs of entry, for they talked about ancestral seisin and disseisin more in pleading writs of entry than they had when pleading writs of right.

The various versions of the writs of entry *sur disseisin* in the *post* used by lawyers in the 1490s can best be understood by looking first to the plaintiff's side of the action and then to the defendant's side. Plaintiffs most frequently named themselves as the victim of the disseisin. Much less frequently a plaintiff alleged that his father or mother had been disseised.<sup>97</sup> It was rare for a plaintiff to allege the disseisin of his grandfather<sup>98</sup> or great-grandfather.<sup>99</sup>

More importantly for the barring of entails, the plaintiff frequently alleged that an ancestor of the defendant or a prior holder of the land had committed the disseisin. The plaintiff occasionally identified the alleged disseisor as the father<sup>100</sup> or the grandfather<sup>101</sup> of the defendant. More often the plaintiff named as

<sup>97</sup> CP40/822, m.134d (Hil. 1467); CP40/840, m.228d (Mich. 1471); CP40/843, m.348d (Trin. 1472); CP40/844, m.308d (Mich. 1472); CP40/862, m.317 (Pas. 1477); CP40/864, m.108 (Mich. 1477); CP40/865, m.345d (Hil. 1478); CP40/879, m.302 (Hil. 1482); CP40/902, m.447 (Mich. 1487) (plaintiff's mother); CP40/915, m.117d (Hil. 1491); CP40/922, m.326d (Hil. 1491); CP40/920, m.103d (Pas. 1492); CP40/920, m.152d (Pas. 1492); CP40/922, m.330d (Mich. 1492); CP40/924, m.149d (Pas. 1493); CP40/924, m.151d (Pas. 1493).

<sup>98</sup> CP40/811, m.342 (Hil. 1464); CP40/911, m.311 (Hil. 1490); CP40/915, m.320 (Hil. 1491).

<sup>99</sup> CP40/774, m.323 (Trin. 1454); CP40/824, m.308d (Trin. 1467); CP40/883, m.360 (Hil. 1483). Sometimes the plaintiff is described as the heir of the victim of the alleged disseisin without further specification of the relationship: CP40/887, m.221 (Hil. 1484); CP40/915, mm.312, 374 (Hil. 1491). And sometimes the plaintiff and the victim of the alleged disseisin have the same surname without further specification of the relationship: CP40/885A, m.47 (Trin. 1483).

<sup>100</sup> CP40/915, m.321 (Hil. 1490); CP40/915, 331d (Hil. 1491); CP40/920, m.139d (Pas. 1492); CP40/922, m.124 (Mich. 1492); CP40/922, m.130d (Mich. 1492); CP40/926, mm.336d (Mich. 1493); CP40/926, m.431d (Mich. 1493); CP40/960, m.121 (Pas.1502).

<sup>101</sup> CP40/922, m.346 (Mich. 1492); CP40/924, m.149d (Pas. 1493); CP40/924, m.152d (Pas. 1493); CP40/924, m.153d (Pas. 1493).

disseisor a person with the same surname as the defendant but did not specify, either in his writ or in his pleading, the relationship between the defendant and the disseisor.<sup>102</sup> In most recoveries, however, the relationship between disseisor and defendant is not stated nor do they have the same surname. In these cases, at least before the later 1490s, it is reasonable to suppose that the plaintiff named as disseisor a predecessor to the defendant's title. For example, in 1477 William Scott and Robert Harding recovered one-third of the manor of Langton in Little Canfield, Essex, from Thomas Ormond and named Henry Fylongley, Walter Kebell, and John Bullers as disseisors.<sup>103</sup> Fifty years earlier Fylongley, Kebell, and Bullers were three of eight men who received one-third of Little Canfield, with other lands, from Joan Beauchamp, Lady Bergavenny.<sup>104</sup> In 1497, Roger Grantoff recovered lands and rent in Hilton and Hemingford, Huntingdonshire, from Nicholas Hughson and William Lane.<sup>105</sup> Grantoff named Gerard Delahay, who had formerly held the land, as the disseisor.<sup>106</sup> Similarly, in 1499 a group of the plaintiffs recovered the manors of Cowsden, Worcestershire, and Upper Arley, Staffordshire, from William Littleton.<sup>107</sup> They named Thomas Littleton, William's ancestor and the former holder of the manors, as the disseisor.<sup>108</sup> There are other examples of this practice.<sup>109</sup> The parties to recoveries sought to have their writ reflect the history of the land.

<sup>102</sup> CP40/822, m.134d (Hil. 1467); CP40/846, m.398 (Pas. 1473); CP40/863, m.320 (Trin. 1477); CP40/880, m.355d (Pas. 1482); CP40/882, m.547d (Mich. 1482); CP40/883, m.147 (Hil. 1483); CP40/902, m.117 (Mich. 1487); CP40/910, m.323 (Mich. 1489); CP40/910, m.403d (Mich. 1489); CP40/912, m.340 (Pas. 1490); CP40/912, m.332d (Pas. 1490); CP40/919, m.144 (Hil. 1492); CP40/920, m.289 (Pas. 1492); CP40/942, m.311 (Mich. 1497); CP40/949, m.480 (Trin. 1489); CP40/962, m.153 (Mich. 1502).

<sup>103</sup> CP40/863, m.316d (Trin. 1477).

<sup>104</sup> *Essex Fines*, IV, 13 (Mich. 1428).

<sup>105</sup> CP40/942, m.114 (Mich. 1497).

<sup>106</sup> *Close Rolls, 1485–1500*, No. 1029.

<sup>107</sup> CP40/947, m.349 (twice) (Hil. 1499).

<sup>108</sup> 4 *V.C.H.*, *Worcestershire*, 210; 3 *V.C.H.*, *Staffordshire*, 6.

<sup>109</sup> (a) In 1482, Robert Morton and John Harding recovered the manor of Knowle and other lands in Surrey from Robert Harding, John Mathew, Robert Hill, George Stiles, and Thomas Ringstone and named Thomas Newdigate as the disseisor: CP40/879, m.414d (Hil. 1492). Thomas had earlier held the manor: O. Manning and W. Bray, *The History and Antiquities of the County of Surrey*, 3 vols. (London: White Cochrane & Co., 1804–14), I, 537.

(b) In 1490, a group of the plaintiffs led by John Harpur recovered the manor of Thorp Mandevill, Northants, from William Harpur and named

In the mid 1490s plaintiffs began to name a fictitious person as the disseisor. The use of a fictitious disseisor indicates greater reliance upon the recompense theory of the recovery. Although various surnames – Hunt, Hert, Brown – appear to have been used, the most frequently used surname was Hunt. One finds various Hunts alleged to have committed disseisins all over England. In 1502, for example, in 50 of the 240 recoveries the alleged disseisor was a Hunt; in eleven he was a Brown; in another nine he was a Hert.<sup>110</sup> By Michaelmas Term 1512, and perhaps earlier, lawyers had settled upon the surname Hunt as the alleged disseisor in almost all recoveries.<sup>111</sup> Sometime later in the sixteenth century, the disseising Hunt was christened Hugh. With the development of a fictitious disseisor lawyers dropped any pretense of having the plaintiff's writ and pleading correspond to the history of the land in a recovery. All reliance was placed on the recompense theory.

(b) *The choice of warrantor: enter the common vouchee*

After he denied the plaintiff's claim, the defendant vouched a warrantor to defend the action. If the warrantor was not at hand he had to be summoned to appear the next term. In these cases, there is an entry on the plea roll for the term in which the case was begun and an entry on the plea roll, with a reference to the earlier

William Frebody, who had held the manor early in Henry VI's reign, as the disseisor. CP40/912, m.335d (Pas. 1490); J. Bridges, *History and Antiquities of Northamptonshire*, 2 vols. (London: T. Payne, 1791), I, 207.

(c) In 1492, a group of the plaintiffs led by Richard Knightly recovered the manors of Laughton, Leicestershire, and Mears Ashby, Northamptonshire, from Robert Throckmorton and John Turpin: CP40/920, mm.330d, 338 (Pas. 1452). The plaintiffs named Thomas Grene as disseisor. A line of Thomas Grene had held Laughton since the later fourteenth century: 5 *V.C.H.*, *Leicestershire*, 214.

(d) In 1493, William Pygot and Gilbert Stokwald recovered the manor of Steeple Morden, Cambridgeshire, from a group of the defendants and named John Dunstaple as disseisor: CP40/923, m.159 (Hil. 1493). In 1497, Lewis Pollard and John Kirton recovered Steeple Morden and other manors in Cambridgeshire from Thomas Hatfield and also named John Dunstaple as disseisor: CP40/940, m.234 (Pas. 1497). John Dunstaple probably held Brewes, which was one-half of Steeple Morden, from 1435 to 1459, when he was succeeded by his daughter, Margaret, who married Richard Hatfield, father of Thomas Hatfield: 8 *V.C.H.*, *Cambridgeshire*, 114.

<sup>110</sup> CP40/959–62 (1502).

<sup>111</sup> CP40/1001 (1512).

proceedings, for the term in which the warrantor appeared in court.<sup>112</sup> When a warrantor had to be summoned, it was most often the first warrantor in a double voucher recovery. But in by far the most cases, the warrantor was at hand, entered into the warranty, and defended the action.

In the developed recovery, almost all defendants vouched the same warrantor, known as the common vouchee. The first common vouchee who had this monopoly was Dennis Guyer who began to have a monopoly in the 1480s.<sup>113</sup> Guyer ceased to be common vouchee after Michaelmas Term 1487. During Hilary Term 1488 a Nicholas Buk served as common vouchee.<sup>114</sup> In Easter Term 1488, a Robert Bungey served as common vouchee.<sup>115</sup> In Trinity Term 1488, John Drakes became common vouchee and served at least until 1500.<sup>116</sup> Dennis Guyer had begun to appear regularly as warrantor in recoveries in the later 1470s. In the decade before Guyer monopolized the position, almost all recoveries had either Guyer or Robert King as warrantor. Robert King had become the most popular warrantor beginning in 1470. Very little is known about these men. A Robert King is described as a scrivener of Westminster in a 1492 case, but whether he was the common vouchee who appears on the plea rolls twenty years earlier is not clear.<sup>117</sup>

Before Robert King and Dennis Guyer together monopolized the position of common vouchee in the later 1470s, many persons served as warrantors in recoveries. Most of these persons served for only one transaction, but a few appeared as warrantor in several transactions. Thomas Avery appeared in at least ten recoveries;<sup>118</sup>

<sup>112</sup> e.g. CP40/833, m.113 (Mich. 1469); CP40/845, m.321 (Hil. 1473); CP40/879, m.153d (Hil. 1482); CP40/887, m.270 (Hil. 1484); CP40/911, m.356 (Hil. 1490); CP40/922, m.436 (Mich. 1492); CP40/941, m.92 (Trin. 1497); CP40/947, m.149 (Hil. 1499); CP40/959, m.323d (Hil. 1502); CP40/962, m.132 (Mich. 1502).

<sup>113</sup> Baker, "Introduction," *Spelman's Reports*, II, 205.

<sup>114</sup> CP40/903 (Hil. 1488).

<sup>115</sup> CP40/904 (Pas. 1488).

<sup>116</sup> CP40/905 (Trin. 1488); CP40/950 (Mich. 1499).

<sup>117</sup> CP40/919, m.302 (Hil. 1492).

<sup>118</sup> CP40/803, m.244d (Hil. 1462); CP40/804, m.323d (Pas. 1462); CP40/804, m.330 (Pas. 1462); CP40/813, m.139d (Mich. 1464); CP40/813, m.336d (Mich. 1464); CP40/813, m.351 (Mich. 1464); CP40/83, m.367 (Mich. 1464); CP40/813, m.435d (Mich. 1464); CP40/835, m.345 (Pas. 1470); CP40/835, m.356 (Pas. 1470).

Nicholas Brown in at least nine;<sup>119</sup> John Barowe in at least eight;<sup>120</sup> and others in fewer recoveries.<sup>121</sup> Little is known about these men. They served as warrantor because they were handy.

It is easy to suppose that in the many early recoveries in which a warrantor appears only in the recoveries required to accomplish a transaction, one of the parties selected the warrantor from among his acquaintances. In three actions in which Richard Maryot recovered the manor of Desburgh and lands in Desburgh, Northants, from Thomas Pulton, one John Grene of Desburgh served as warrantor.<sup>122</sup> In two recoveries by Humphrey Starky and Roger Townsend from different defendants, a Robert Jackson served as warrantor.<sup>123</sup> Perhaps Jackson was an associate of Starky or Townsend. In 1467, Thomas Kebell served as warrantor in two recoveries in which Richard Illingworth, chief baron of the Exchequer, obtained the manors of Tanworth and Upton, Hampshire, from Lord Henry Grey of Codnore.<sup>124</sup> The recoveries occurred at about the time Kebell gave his first reading at the Inner Temple.<sup>125</sup> Kebell's connection to Lord Grey was probably through Lord Hastings. By 1464, Lord Grey was a retainer of Lord Hastings<sup>126</sup> and the patronage of Lord Hastings was crucial to Kebell's success.<sup>127</sup> These warrantors, like the later common vouchees, were not selected for any quality other than availability.

<sup>119</sup> CP40/824, m.305 (Trin. 1467); CP40/824, m.308d (Trin. 1467); CP40/824, 392 (Trin. 1467); CP40/840, m.132d (Mich. 1471); CP40/840, m.148 (Mich. 1471); CP40/841, m.301 (Hil. 1472); CP40/842, m.129d (Pas. 1472); CP40/842, 136d (Pas. 1472); CP40/846, m.850 (Pas. 1473).

<sup>120</sup> CP40/812, m.47 (Pas. 1464); CP40/813, m.323 (Mich. 1464); CP40/813, m.323d (Mich. 1464); CP40/822, m.134d (Hil. 1467); CP40/823/ m.334 (Pas. 1467); CP40/841, m.322 (Hil. 1472); CP40/842, m.213 (Pas. 1472); CP40/843, m.125 (Trin. 1472).

<sup>121</sup> e.g. John Baron, CP40/861, m.137d (Hil. 1477); CP40/862, m.317 (Pas. 1477); CP40/863, m.356 (Trin. 1477); CP40/864, m.432d (Hil. 1477); CP40/865, m.338 (Hil. 1478). Robert Tilbury, CP40/834, m.159d (Hil. 1470); CP40/835, m.359d (Pas. 1470); CP40/835, m.374d (Pas. 1470).

<sup>122</sup> CP40/805, mm.324, 324, 324d (Trin. 1462). Three recoveries were necessary because the manor was held of the Hospital of St. John of Jerusalem in England; some of the land was held of the Duchy of Lancaster, and other land was held of the honour of Peverel.

<sup>123</sup> CP40/824, mm.152, 152d (Trin. 1467).

<sup>124</sup> CP40/823, mm.123, 134 (Pas. 1467).

<sup>125</sup> Ives, *Common Lawyers*, 45, 45 n.55.

<sup>126</sup> W. Denham, *Lord Hastings' Indentured Retainers* (Hamden, Conn.: Archeon Books, 1955), 146–8, 327.

<sup>127</sup> Ives, *Common Lawyers*, 100–3.

In a few early recoveries, however, it appears that a particular warrantor could well have been chosen for a purpose. Sometimes the identification of the warrantor on the plea rolls leaves the impression that he or his ancestor was otherwise involved in the history of the land. For example, one warrantor was identified as William Wythegar, son of Richard Wythegar, of West Fulls,<sup>128</sup> another as Robert Wyneard, son and heir of William Wyneard,<sup>129</sup> yet another as John Cook, cousin and heir to William Slate lately parson of Gidding.<sup>130</sup> In almost all other recoveries, the warrantor is not identified by reference to his ancestor. Perhaps in these cases the warrantor's ancestor had some connection, albeit unknown to us, with the land. They might have been the heirs of the strawman used to create the fee tail being barred in the recovery. It is curious that one would specify that John Cook was heir to a particular parson. The parson might have been a strawman in a grant-regrant transaction. If there be any truth to this speculation, then some parties to recoveries were following the Nele-Bryan theory of recompense. They were vouching the donor's heir.

In a few recoveries, the connection between the warrantor and the history of the land either appears on the plea rolls or is otherwise discoverable. In some recoveries, the warrantor had the same surname as the alleged disseisor.<sup>131</sup> In these recoveries, too, the parties could well have been following the Nele-Bryan theory by naming the grantor of the entail as disseisor and vouching his heir. In at least two recoveries, for a single transaction, the warrantor was identified as the heir of the grantor.<sup>132</sup> In another series of recoveries the warrantor had a claim to the land under an earlier settlement.<sup>133</sup> A third recovery is a little complicated. In 1473, Edward Bedyngfeld and Robert Couter recovered two

<sup>128</sup> CP40/791, m.341 (Mich. 1458).

<sup>129</sup> CP40/791, m.441d (Mich. 1458).

<sup>130</sup> CP40/803, m.133 (Trin. 1462).

<sup>131</sup> e.g. CP40/764, m.332d (Hil. 1452); CP40/879, m.302 (Hil. 1482); CP40/904, mm.353d, 355d (Pas. 1488); CP40/911, m.319 (Hil. 1490); CP40/919, m.117 (Hil. 1492); CP40/919, m.137 (Hil. 1492); CP40/919, m.323 (Hil. 1492); CP40/920, m.289 (Pas. 1492); CP40/920, mm.330d, 338 (Pas. 1492); CP40/922, m.358d (Mich. 1492); CP40/926, m.337d (Mich. 1493); CP40/926, m.421 (Mich. 1493); CP40/939, m.342 (Hil. 1497); CP40/946, m.108 (Mich. 1498); CP40/961, m.146 (Trin. 1502).

<sup>132</sup> CP40/811, mm.342, 343 (Hil. 1464).

<sup>133</sup> CP40/702, mm.340, 340a (Hil. 1441). The warrantor was Henry Pierpont and the recovery was by Ralph, Lord Cromwell. See above, p. 255.

manors and lands from Thomas Stoughton, citizen and fishmonger of London, and William Stoughton, perhaps Thomas' son.<sup>134</sup> Defendants vouched John Snoring who vouched Geoffrey Spirling, who defaulted. Seven years earlier, Spirling had conveyed the land to Alice Snoring, mother of John Snoring, for her life, remainder to the issue of her husband Geoffrey Snoring.<sup>135</sup> At that time, John Snoring, son of Alice and Geoffrey Snoring, was apprentice to Thomas Stoughton, fishmonger of London.<sup>136</sup> If one supposes that Spirling conveyed to Stoughton for the use of Alice for life, remainder to her husband's issue, the form of the 1473 recovery is understandable.<sup>137</sup> The defendant feoffee to uses vouched the *cestuy* who vouched a prior holder of the land for the purpose of extinguishing any claim by that holder. Putting someone with a colorable claim to the land in the position of ultimate warrantor in a recovery was not sophisticated practice. By the 1480s if one wanted to extinguish the claims of two persons, one was made the defendant and he vouched the other as warrantor, who vouched the common, or at the least a straw, vouchee.

If the defendant held only a life estate, or was a woman holding the land as her dower or jointure, or a man holding the land by curtesy, the defendant was not to vouch a warrantor. In theory, the defendant was to explain his or her position and pray aid of the remainderman or reversioner.<sup>138</sup> In a number of recoveries on the plea rolls, the defendant as life tenant or doweress prayed aid of the remainderman or reversioner who vouched the warrantor.<sup>139</sup>

<sup>134</sup> CP40/845, m.351 (Hil. 1473).

<sup>135</sup> *Close Rolls, 1461–1468*, No. 391.

<sup>136</sup> *Ibid.*

<sup>137</sup> Somehow Spirling got his hands on the lands of John Snoring, father of Geoffrey Snoring. *Ibid.*, Geoffrey Snoring was father of John Snoring of the recovery and husband of Alice Snoring. One possibility is that Spirling married the late John Snoring's widow and continued to hold the land she held in dower or jointure after she died. Alice was contemplating bringing an action against Spirling for her dower in the lands of John Snoring, her husband's father. *Ibid.*

<sup>138</sup> YB 14 Hen. VI, f. 25, pl. 74 (1435–6). See N. Doe, *Fundamental Authority in Late Medieval Law* (Cambridge: Cambridge University Press, 1990), 118–19.

<sup>139</sup> CP40/841, m.104 (Mich. 1472) (widow holding jointure, remaindermen); CP40/843, m.126 (Trin. 1472) (life tenant, remaindermen); CP40/865, m.425 (Hil. 1478) (life tenant, remaindermen); CP40/911, m.374 (Hil. 1490) (husband and wife life tenants, remaindermen); CP40/919, m.146d (Hil. 1492) (tenant by curtesy, remaindermen); CP40/926, mm.335, 335d (Hil. 1492) (life tenant,

Sometimes several persons appeared in response to an aid prayer and they collectively joined the action and vouched the warrantor. Instead of praying aid of reversioners or remaindermen, a defendant who was a life tenant was sometimes joined by the reversioner or remainderman<sup>140</sup> and sometimes vouched the reversioner or remainderman to warranty.<sup>141</sup> It is impossible to tell from the plea rolls alone how often life tenants and dowagers ignored their remainderman or reversioners, but occasionally with the assistance

remainderman); CP40/942, m.356 (Mich. 1497) (tenant after possibility of issue extinct, remainderman); CP40/947, m.359d (Hil. 1499) (life tenant, reversioner); CP40/947, m.360 (Hil. 1499) (life tenant, reversioner); CP40/961, 337d (Trin. 1502) (life tenant, reversioner); CP40/962, m.522 (Mich. 1502) (life tenant on demise from life tenant, remainderman).

<sup>140</sup> (a) CP40/846, m.323d (Pas. 1473), CP40/861, m.137d (Hil. 1477) (Alice Wareyn widow and Richard Wareyn, the defendants).

(b) In 1484, a group of the plaintiffs recovered the manor of Redinhale, Norfolk, from Elizabeth, widow of Thomas Brewes, and William Tyndale, son and heir of Thomas Tyndale: CP40/887, m.118d (Hil. 1484). Elizabeth held a life estate; Thomas, the remainder: *Close Rolls, 1476–1483*, No. 1202.

(c) CP40/960, m.132d (Pas. 1502) (Alice Woodward, widow, daughter of Thomas Burley, and Nicholas Woodward son of Alice, the defendants).

<sup>141</sup> (a) In 1482, a group of the plaintiffs recovered the manors of Golder and Rufford, Oxfordshire, from Elizabeth Boteler, widow of John Boteler, who vouched John Barantyne, who vouched the common vouchee: CP40/881, m.457 (Trin. 1482). John Barantyne was Elizabeth's son by her first husband, John Barantyne, who had died in 1474: 8 *V.C.H., Oxfordshire* 152.

(b) In 1492, John Bardfield recovered one-half of the manor of Shellowe Bowels, Essex, from William Brittell, who vouched John Gooze, who vouched the common vouchee: CP40/920, m.113 (Pas. 1492). In 1488, the manor had been settled by final concord on William Brittell for life, with a different set of remainders in fee tail for each half of the manor and with the same remainder in fee. John Gooze was a remainderman in tail under both sets of remainders in tail: *Essex Fines*, IV, 88.

(c) CP40/948, m.158 (Pas. 1499) (Agnes Hammes, widow, as defendant vouches Henry Hammes, who vouches the common vouchee).

(d) In 1502, John Shaa and Ralph Bukherd recovered lands and rents in various places in Hertfordshire from Agnes Westby, who vouched Richard Dyer, who vouched the common vouchee: CP40/959, m.122 (Hil. 1502). Richard Dyer was Agnes' son and heir apparent: *Close Rolls, 1500–1509*, No. 127.

(e) In 1502, a group of the plaintiffs recovered the manor of Stapleford Tawney, Essex, from Margaret Scot, widow, who vouched John Scot, who vouched the common vouchee: CP40/960, m.315 (Pas. 1502). In 1485, the manor had been settled on William Scot and his wife Margaret for their lives, with successive remainders in fee tail, and remainder in fee to the right heir of William. The first remainder in tail was settled on John Scot, eldest son of William and Margaret. William had died in 1491; Margaret would die in 1505, survived by her son John Scott. Philip Morant, *The History and Antiquities of the County of Essex*, 2 vols. (London: T. Osborne, 1768), I, 179.

of other evidence one can ascertain that a life tenant ignored the reversioner or remainderman. For example, in 1493 Richard Querington and Henry Shele recovered the manor of Budbridge and other lands in Hampshire from John Norbury and Richard Jay, serjeant at law. They vouched Elizabeth Bromshott who vouched the common vouchee.<sup>142</sup> Twelve years earlier, the manor had been settled on Elizabeth for her life with successive remainders in fee tail.<sup>143</sup> Elizabeth neither prayed aid nor vouched her remaindermen. Perhaps she did not feel an obligation to do so, because the recovery was benign. In 1510, a George Bromshott was seised of the land and sold it.<sup>144</sup> The use of aid prayer and its substitutes indicates a degree of family co-operation in suffering a recovery that belies the traditional picture of the defendants to recoveries acting purely from self-interest.

Once the warrantor appeared and entered into the warranty, the plaintiff pleaded against the warrantor who entered a general denial. Either the plaintiff or the warrantor, but most often the plaintiff, requested and received a continuance to another return day of the same term. One piece of evidence makes it appear as if accomplishing a recovery in a single term was the result of changes in rules of court in the 1490s or very early 1500s<sup>145</sup> but the plea rolls do not provide evidence of any change in the manner of continuances. Recoveries begun in one law term were sometimes not completed until the next law term, but the reason for the delay was to summon a warrantor or, in cases of aid prayers, the reversioner or remainderman.<sup>146</sup> Upon resumption of the case, the warrantor would be absent.

<sup>142</sup> CP40/923, m.108 (Hil. 1493).

<sup>143</sup> 5 *V.C.H.*, *Hampshire*, 142.

<sup>144</sup> *Ibid.*

<sup>145</sup> 22 Hen. VII, *Brooke*, Continuances, pl. 69, noted by Baker, "Introduction," *Spelman's Reports*, II, 205.

<sup>146</sup> There were two exceptions to the statement in the text. In one early recovery the warrantor received four continuances to successive law terms before he denied the plaintiff's claim: CP40/770, mm.324d, 336d, 445, 445d, 450d, 454, 454d (Trin. 1453) (seven recoveries, one transaction). In at least two transactions, the defendant defaulted, his wife was received the following term, and she vouched a warrantor: CP40/811, m.149 (Hil. 1464); CP40/811, mm.342, 343 (Hil. 1464).

*(c) Executing the judgment*

Upon the warrantor's default, the court gave judgment for the plaintiff against the defendant and for the defendant against the warrantor. If there were more than one warrantor, judgment would be given for each warrantor against the next following warrantor until the last warrantor. There were two exceptions to this practice. If the plaintiff were a church or a religious house the court rendered judgment but stayed its execution until, pursuant to chapter 32 of the Statute of Westminster II,<sup>147</sup> the court held an inquiry *quale ius*. The sheriff was to have a jury of twelve from the neighborhood say whether the plaintiff indeed had a right to the property in question.<sup>148</sup> The statute mandated the inquiry lest default judgments be used collusively to transfer land in violation of the Statute of Mortmain. The juries seem always to have returned that the plaintiff had the right to the land. The second exception was that if the lands had been leased for a term of years, upon the warrantor's default the termor, under chapter 11 of the Statute of Gloucester,<sup>149</sup> was to be received to protect his term.<sup>150</sup> Ordinarily, however, judgment followed the last warrantor's default.

Upon judgment, the parties could request a writ to the sheriff to execute the judgment. In theory, either the plaintiff alone could seek execution against the defendant or the defendant alone could seek execution against his warrantor,<sup>151</sup> but when execution was sought, the practice was to issue a single writ to the sheriff. The plea roll entry recorded the request for a writ and, most often, the sheriff's return. The sheriff would deliver seisin of the disputed lands to the plaintiff and seisin of lands of equal value from the warrantor to the defendant.<sup>152</sup> If there was more than one

<sup>147</sup> 13 Edw. I, c. 32 (1285), *Statutes of the Realm*, I, 87.

<sup>148</sup> e.g. CP40/722, m.339 (Trin. 1441); CP40/823, m.402 (Pas. 1467); CP40/903, m.110 (Hil. 1488); CP40/904, m.386 (Pas. 1488).

<sup>149</sup> 5 Edw. I, c. 11 (1278), *Statutes of the Realm*, I, 47.

<sup>150</sup> YB Trin. 21 Hen. VII, f. 25, pl. 1 (1506); YB Trin. 26 Hen. VIII, f. 2, pl. 3 (1529); YB Pas. 27 Hen. VIII, f. 7, pl. 20 (1536).

<sup>151</sup> e.g. YB 17 Edw. II, f. 523 (1323-4). See *Readings and Moots*, II, 51 for an argument which mentions separate executions by plaintiff and defendant.

<sup>152</sup> e.g. CP40/841, mm.195, 195d (Hil. 1472); CP40/879, m.153d (Hil. 1482); CP40/906, m.326 (Mich. 1488); CP40/909, m.310d (Trin. 1489); CP40/910, m.353 (Mich. 1439); CP40/915, m.321 (Hil. 1491); CP40/915, m.322d (Hil. 1491); CP40/920, m.123d (Pas. 1492); CP40/926, m.102 (Mich. 1493); CP40/961, m.422d (Mich. 1502).

warrantor, the sheriff delivered seisin of lands equal in value to those recovered by the plaintiff from each warrantor to the preceding one.<sup>153</sup> Curiously, the shrieval returns almost always report that the sheriff delivered seisin of land from the ultimate warrantor to either the defendant or the preceding warrantor. The reports of judgments executed against the ultimate warrantor are not in general terms but specify amounts of lands in named places, even when the ultimate warrantor was a common vouchee.<sup>154</sup> The amounts of land specified do not simply copy those claimed by the defendant. In at least one instance, however, an honest sheriff reported his inability to find lands held by the common vouchee.<sup>155</sup> In a few other instances, the plea roll version of the sheriff's report ends after the delivery of seisin from defendant to plaintiff with a tactful "etc."<sup>156</sup> The sheriffs participated in the fictional transfer of lands from the warrantor.

Until the 1530s the usual practice was not to execute the judgment in a recovery. But in the 1530s, and certainly by 1542, the practice changed: thereafter the parties routinely executed judgments in recoveries.<sup>157</sup> In order to understand the practice of not executing judgments and its reversal, one must appreciate that lawyers probably anticipated future attempts to upset the transfer of land by recovery. To take the simplest and strongest future claim, we can take the case of a tenant-in-tail suffering a recovery and his issue later attempting to upset the recovery. Lawyers had two concerns: whether the recoveror or the issue would be the plaintiff in the future action to maintain or to upset the recovery

<sup>153</sup> e.g. CP40/879, m.153d (Hil. 1482); CP40/882, m.545 (Mich. 1482); CP40/905, m.326 (Trin. 1488); CP40/906, m.326 (Mich. 1488); CP40/912, m.311 (Pas. 1490).

<sup>154</sup> CP40/879, m.153d (Hil. 1482) (3 messuages and 20 acres of land); CP40/906, m.326 (Mich. 1488) (3 messuages, 130 acres of land, 60 acres of pasture, 40 acres of marsh in Raynham, Kent); CP40/906, m.359 (Mich. 1488) (12 messuages, 2,000 acres of land and 500 acres of pasture in Cobham, Yeovill, and Bridgewater, Somerset); CP40/910, m.458 (Mich. 1489) (3 messuages, 300 acres of land, 200 acres of wood, 100 acres of pastures in Dinchurch and Thurlston, Warwickshire).

<sup>155</sup> CP40/842, m.320 (Pas. 1472).

<sup>156</sup> CP40/909, m.304d (Trin. 1489); CP40/910, m.119 (Mich. 1489); CP40/911, m.319 (Hil. 1490); CP40/915, m.374 (Hil. 1491).

<sup>157</sup> The recoveries entered on the plea roll for Michaelmas Term 1532, CP40/1075, were seldom followed by writs of execution but those entered on the plea roll for Michaelmas Term 1542, CP40/1115, were almost always followed by execution.

and whether the recovery itself would be effective, which is to say whether the issue could falsify the recovery. The first concern was important because of the advantages of being the defendant in litigation, but the second concern was crucial. The doctrinal issue that mattered for the first concern was whether judgment alone transferred or bound possession or whether execution was necessary to discontinue the entail and thus deprive the issue of his right of entry. The doctrinal issues that mattered for the second concern were more complicated because the effectiveness of a recovery depended upon the current theory of why a recovery was effective and the form of the recovery – single or classical double voucher recovery. There was some tension between the recompense theory of the recovery and the double voucher form of the recovery. The doctrine of the classical double voucher recovery drove the change to executing judgments, but this new practice created difficulties for the recompense theory. We will first consider the effect of execution on the positions of the relevant parties – recoveror and defendant's issue – in future litigation and then turn to changes in the theory of the recovery and the development of the double voucher recovery.

The decision whether to execute a judgment determined whether the recoveror or the tenant's issue would be the plaintiff in future litigation over the recovery. As a matter of fact, the defendant-grantor frequently transferred possession to the plaintiff-grantee. Sometimes after the recovery, when the grantee was in possession, the grantor gave the grantee a release and quitclaim,<sup>158</sup>

<sup>158</sup> Some examples are:

(a) In Easter Term 1477, John Horwood recovered the manor of Tilney, Norfolk, from John Broughton: CP40/862, m.335d (Pas. 1477). Later that year Broughton gave Horwood a release and quitclaim for Tilney: *Close Rolls, 1476–1485*, No. 385.

(b) In Easter Term 1483, Thomas Danvers recovered the manor of Henton, Oxfordshire, from John Barantyne: CP40/884, m.11 (Pas. 1483). In July of the same year, Barantyne's son gave Danvers a release and quitclaim for Henton and in November Barantyne gave Danvers a receipt for full payment of the purchase price and a release and quitclaim for Henton: *Close Rolls, 1476–1485*, Nos. 1109, 1193.

(c) In Hilary Term 1502, Robert Norwich and Edward Stubbs recovered to the use of Robert Drury the manor of Marlesford, Suffolk, from James Hamond and Thomas Ridnall, who vouched Richard Rokes, who vouched Thomas Rokes, who vouched the common vouchee: CP40/959, m.318 (Hil. 1502). In September 1503, Thomas and Richard Rokes, who were brothers, gave Robert Drury a receipt for sums paid for Marlesford and in November

and sometimes the release and quitclaim sought to set up a collateral warranty of the plaintiff.<sup>159</sup> But the point of a recovery was to transfer title and possession as a matter of record. In the fourteenth and early fifteenth centuries, a judgment without execution did not transfer possession as a matter of record.<sup>160</sup> Consequently, the defendant's issue could enter, for the defendant as a matter of record had died seised. The plaintiff would have to bring an action to get him out and would have to plead the recovery. It would then be up to the issue to falsify the recovery. If, however, the judgment in the recovery had been executed, and the issue entered, a simple assize of novel disseisin or substitute could get him out.<sup>161</sup> The issue would be forced to his formedon in the descender. Execution of the recovery would put the plaintiff-grantee in the position of the defendant in the subsequent action, which was no small advantage.

The view that a judgment alone did not transfer possession began to change in the middle of the fifteenth century. In a 1442 case, Yelverton argued that a judgment for plaintiff "destroyed" the possession of the defendant.<sup>162</sup> A Yearbook entry in 1467 noted that Nedeham and Littleton had argued that a judgment for the plaintiff disproves and disaffirms all title of the defendant.<sup>163</sup> Nele had asserted that in mort d'ancestor if the defendant had a deed from the ancestor he nevertheless had to traverse the point of the writ that the decedent had died seised, but if he had matter of record, like a recovery, he need not, because the heir was estopped

1503 they gave Drury, Norwich, and Stubbs a release and quitclaim for Marlesford: *Close Rolls, 1500–1509*, No. 200. Earlier, in February 1502, one William Rokes released and quitclaimed with warranty Marlesford to Norwich and Stubbs, perhaps to set up a collateral warranty: *Close Rolls, 1500–1509*, No. 123.

<sup>159</sup> (a) In Easter Term 1482, a group of the plaintiffs including William Weston recovered the manors of Pitney Lorty and Knoll, Somerset, from William Gunter: CP40/880 mm.332, 332d (Pas. 1482). In July 1484, Edmund Gunter, brother of William, released and quitclaimed with warranty all his rights in the two manors to William Weston: *Close Rolls, 1476–1485*, No. 1334.

(b) See note 158(c), above.

<sup>160</sup> *Mortimer v. Ludlow*, YB 2 Edw. II, 17 S.S. 43–7 (1308–9); YB 17 Edw. II, f. 523 (1323–4); YB Trin. 7 Hen. IV f. 17, pl. 13 (1406); Littleton, *Tenures*, section 688.

<sup>161</sup> YB Trin. 7 Hen. IV, f. 17, pl. 13 (1406).

<sup>162</sup> YB Mich. 21 Hen. VI, f. 17, pl. 32, at f. 18 (1442).

<sup>163</sup> YB Hil. 6 Edw. IV, f. 11, pl. 7 (1467).

from saying his ancestor had died seised.<sup>164</sup> The heir would have to plead that his ancestor had re-entered the land after the recovery. The heir to the plaintiff in a recovery could enter, even after three or four descents, because the recovery “binds the blood and disposes of the title.”<sup>165</sup>

The new view of the effect of a judgment coincided with the rise of common recoveries in the 1440s and supported the practice of not suing out execution. But by 1472, not all of the justices had adopted the new doctrine. One of the issues in *Taltarum's Case* was whether the issue of a tenant-in-tail who had suffered an unexecuted recovery could lawfully enter upon the recoveror.<sup>166</sup> The justices, however, could not agree whether execution of the judgment was necessary to terminate the defendant's possession as a matter of record. Justices Nele and Choke took the new view that a judgment bound the possession of the defendant to a recovery. His issue could not simply enter but had to bring his formedon writ. Chief Justice Bryan and Justice Littleton took the older view that in the absence of execution the possession was not affected. When the defendant had died, he had died seised, and the land descended to his heir, who could enter. At a reading at the Inner Temple in 1498, Frowyk announced that the modern view was that if a defendant to recovery disseises his recoveror and then dies seised, the recoveror could enter upon the defendant's heir, because the recovery “binds the blood,” “both after execution and before.”<sup>167</sup> This same hypothetical was put to the justices in 1537. Fitzherbert and Baldwin thought that the recoveror could lawfully enter, because the issue “cannot falsify the recovery, because of the recovery over in value.”<sup>168</sup> But Shelley disagreed, because the issue of the tenant-in-tail was remitted to his entail, which had not ended without execution.<sup>169</sup> The view that a judgment alone bound possession had not become the established position of the court.

At stake was the position of the parties in subsequent litigation. The practice of not executing judgments did not put plaintiffs in the better position in later litigation over the recovery. When lawyers were relying on the strength of the writ of right to make

<sup>164</sup> *Ibid.*           <sup>165</sup> *Ibid.*

<sup>166</sup> Above, pp. 290–2.

<sup>167</sup> *Port's Notebook*, J. H. Baker (ed.) (Selden Society, vol. 102, 1986), 158–9.

<sup>168</sup> *Dyer's Reports*, I, 38a (Trin. 1537).

<sup>169</sup> *Ibid.*

recoveries effective there was little reason not to execute the recovery. But when lawyers used the recompense theory to justify the effectiveness of recoveries, there was good reason to leave recoveries unexecuted.

If the effectiveness of a recovery depended upon the writ and the pleadings used in a recovery, the defendant's issue had but one means of falsifying the recovery: he had to plead that the defendant to the recovery was not seised of the land at the time of the recovery. He was outside the Statute of Westminster I because his ancestor did not default.<sup>170</sup> He could not complain that his ancestor pleaded faintly, because his ancestor had not pleaded at all; his ancestor had vouched a warrantor.<sup>171</sup> That the warrantor was an utter stranger to the land was irrelevant to the heir because the warrantor had entered into the warranty. It would have been up to the plaintiff in the recovery to object to the voucher to warranty, but of course the plaintiff had made no objection.<sup>172</sup> The heir could not plead that the recovery was suffered by a disseisor without undercutting his own claim to the land.<sup>173</sup> In the *Taltarum* litigation, though not in *Taltarum's Case* itself, the justices agreed that the heir could falsify a recovery by pleading that his ancestor, the defendant to the recovery, had not been seised of the land at the time of the recovery.<sup>174</sup> The judgment for the plaintiff and against the defendant made the recovery effective. There was little reason not to execute this judgment.

If the effectiveness of a recovery depended upon the recompense received or receivable from the warrantor, then the status of the judgment in favor of the defendant against the warrantor was important. Unlike the judgment against the defendant, the judgment against the warrantor was not a final judgment but a common judgment.<sup>175</sup> The judgment against the warrantor was

<sup>170</sup> Chapter 4, above, pp. 243–5.

<sup>171</sup> For the possibility of falsifying a judgment on the grounds that one's ancestor had pleaded faintly, see YB Mich. 9 Hen. VI, f. 41, pl. 17 (1430); YB Mich. 14 Edw. IV, f. 2, pl. 4 (1474); YB Mich. 14 Hen. VII, f. 10, pl. 20 (1498).

<sup>172</sup> *De Presentibus Vocates ad Warantum*, 20 Edw. I (1291–2); YB Mich. 20 Hen. VII, f. 1, pl. 3 (1504).

<sup>173</sup> For examples of this method of falsifying earlier judgments see YB Hil. 4 Hen. VI, f. 34, pl. 28 (1426); YB Mich. 9 Hen. VI, f. 41, pl. 7 (1430).

<sup>174</sup> Above, pp. 272–4.

<sup>175</sup> YBB (RS) 13–14 Edw. III 200–1, (RS) 14 Edw. III 104–5 (1340); YB Mich. 26 Hen. VIII, f. 8, pl. 6 (1535). But see *Dyer's Reports*, I, 56b (Trin. 1544).

not final, because it did not determine rights with respect to any specified land nor did the court know what legal estate the defendant had lost.<sup>176</sup> Within the terms of the distinction, the judgment against the warrantor would not become final until it was executed. A court therefore could render judgment that a plaintiff recover quit of the defendant and the vouchee, but that the defendant recover against the vouchee “but never quit in value.”<sup>177</sup> In the absence of execution, the vouchee remained with an open obligation to the tenant and his heirs. And that is precisely where the parties to a recovery wanted to put the warrantor and the tenant’s issue.

If the judgment had been executed, the issue could not plead that his ancestor had not received lands of equal value in exchange for the entailed lands lost in the recovery, because his mere allegation could not challenge a matter of record. But, as in the case of an exchange, the issue could deny both that his ancestor had died seised of the lands received from the warrantor and that, after his ancestor’s death, he had not accepted the exchange and did not occupy any of the lands received from the warrantor. An honest jury would have to agree. In 1435 there was a case of formedon in the descender in which the defendant pleaded an exchange with the plaintiff’s father, tenant-in-tail. The defendant produced a charter as evidence of the exchange of lands with warranty between himself and the plaintiff’s father in which the plaintiff’s father gave the entailed lands and received in return fee simple lands.<sup>178</sup> The defendant thus set up a defense of warranty with assets in descent. The plaintiff could deny neither the charter nor the exchange. The Yearbook report has the justices permitting the plaintiff to plead that he had not accepted the exchange and had not occupied the lands his father had received in the exchange. The plea roll record has the issue for the jury whether the ancestor had died seised of the lands received in exchange. Fitzherbert noted the case in his *Graunde Abridgement* in 1514–16 without comment.<sup>179</sup> It is not clear that the courts would have allowed a party to counterplead a judicially executed exchange as a party

<sup>176</sup> YB Mich. 10 Hen. VI, f. 2, pl. 7 (1432).

<sup>177</sup> Ibid.

<sup>178</sup> CP40/699, m.104 (Mich. 1435); YB Trin. 14 Hen. VI, f. 2, pl. 7; f. 3, pl. 15 (1436).

<sup>179</sup> *Fitzherbert*, Formedon, pl. 5.

could counterplead a voluntary exchange. But when Brooke (d. 1558) noted the 1435 case involving a voluntary exchange in his *Graunde Abridgement* he was a little surprised.<sup>180</sup> He observed that ordinarily warranty with assets in descent was sufficient to bar the heir without inquiring whether the heir had accepted and occupied the lands descending to him. No doubt he realized that if an heir could plead that he had not entered the lands received in an exchange by charter, he might be able to plead that he had not entered the lands his ancestor had received by the execution of a judgment against a warrantor. Perhaps lawyers in the fifteenth century feared as much. The simple means of blocking this pleading move was not to execute the judgment. The heir would be left without a means to falsify or to circumvent the recovery, other than to plead that his ancestor had not been seised at the time of the recovery. His remedy would be to bring *scire facias* to enforce the judgment against the judgment-proof warrantor. On the recompense theory, there was good reason not to execute a recovery.

The practice changed and beginning in the 1530s recoveries were executed because execution was necessary to the double voucher recovery. In the 1530s, there was some interest in working out the theory of the double voucher recovery.<sup>181</sup> To accomplish a classical double voucher recovery, the grantor conveyed to an agent of the grantee. The grantee was the plaintiff in the recovery. His agent was the defendant who vouched the real grantor, who vouched the common vouchee. Whether the judgment alone bound the possession of the defendant was no longer important. The defendant was agent of the plaintiff and had taken fee simple. What was important was to have a final judgment against the warrantor, the grantor, in order to extinguish his rights or titles. But judgment against a warrantor was not final until execution, for only then would the court know the value of the property lost by the defendant and only then would specific land move as a matter of record from second warrantor to first warrantor, the grantor. The plaintiff wanted execution to show that the warrantor-grantor had lost precisely the lands he had in fact conveyed. He did not want his heir to claim that his ancestor

<sup>180</sup> Brooke, *Recoverie in Value*, pl. 28.

<sup>181</sup> Brooke, *Taile*, pl. 32 (23 Hen. VIII) (1531–2).

had merely conveyed by deed the entailed land, for then the heir had his formedon. Lawyers sought execution of recoveries in order to obtain final judgment against the warrantor-grantor in a double voucher recovery. To be sure, as Table 5.2 indicates below, in the 1530s and 1540s only from a quarter to a third of recoveries were in the double voucher form. But the double voucher recovery was of great doctrinal interest and was thought to be the surest recovery. There was reason for lawyers to change their practice.

### 3. THE DOUBLE VOUCHER RECOVERY

The most important departure from the initial and simple form of the common recovery was the use of two or more warrantors. In almost all recoveries using multiple warrantors, the defendant vouched a warrantor, who vouched the common vouchee. The double voucher recovery became well known. Hamlet in the graveyard scene speaks of buyers of land with their double vouchers.<sup>182</sup> Less well known is how and why lawyers used the double voucher form. Legal historians have associated the double voucher recovery with *Taltarum's Case* (1472),<sup>183</sup> but that case left the double voucher recovery as a response to the conclusion that a recovery barred only the entail of which the defendant was seised at the time of the recovery. The response was not formulated in recorded doctrine until the 1530s,<sup>184</sup> and the double voucher recovery did not become dominant until four decades later. The doctrinal reasons for the double voucher recovery that have occupied legal historians were not the only reasons for the double voucher form. Nor was the classical double voucher recovery, in which grantor conveys to an agent of grantee who is defendant in the recovery, the only form of the double voucher recovery. The double voucher form was also used for the more simple and direct purpose of extinguishing the separate interests of different persons in the land being transferred by recovery. We can reach an understanding of the double voucher recovery by returning to *Taltarum's*

<sup>182</sup> *Hamlet*, Act V, scene 1.

<sup>183</sup> Hastings, *Court of Common Pleas*, 13; Milsom, *Historical Foundations*, 186–7; Simpson, *A History of the Land Law*, 135–7.

<sup>184</sup> *Brooke*, *Taile*, pl. 32 (23 Hen. VIII).

*Case* and the response formulated to make sure all of a grantor's titles were extinguished by a recovery. Then we can consider the plea roll evidence for the use of the double voucher recovery.

In *Taltarum's Case*, although the justices held different versions of a recompense theory, they nevertheless agreed that a recovery could bar only the one entail under which the defendant was in possession.<sup>185</sup> A tenant-in-tail in possession might have claims under more than one entail but he could be in possession under only one entail. A grant was necessary to create an entail. For a tenant-in-tail to receive a second entail by grant, he had to grant the land out and receive it back. But the grant-regrant transaction would discontinue his possession under the first entail. He had two entails but was in possession under only one. Each entail held by the defendant in possession could define a different class of heirs. The recompense coming from the warrantor could go to only one class of heirs, the class defined by the entail under which the defendant was in possession. The class of heirs defined by the discontinued entail did not have recompense. Therefore, on the recompense theory only one class of heirs and one entail could be barred. The discussion among the justices in *Taltarum's Case* did not go beyond this conclusion.

In the 1530s, when, apparently, there was some concern to work out the details of the recompense theory,<sup>186</sup> one also finds the earliest statements of the doctrinal support for the double voucher recovery.<sup>187</sup> In the classical double voucher recovery, the grantor, tenant-in-tail, conveyed the land to a strawman, often an agent, friend, or relative of the grantee. The grantee brought his action against the strawman who vouched the grantor, who in turn vouched the common vouchee. The grantor, tenant-in-tail, is thus not in possession at the time of the recovery. All of his entails have been discontinued, but in the absence of collateral warranty or lineal warranty with assets in descent, his heir has a good claim

<sup>185</sup> Above, pp. 272–4.

<sup>186</sup> *Brooke*, *Recoverie in Value*, pl. 27 (23 Hen. VIII); *Brooke*, *Recoverie in Value*, pl. 28, also *Brooke's New Cases*, 161 (1531–2) (disagreement between Common Pleas and Chancery whether remainderman bound); *Brooke*, *Recoverie in Value*, pl. 30 (30 Hen. VIII); *Brooke*, *Recoverie in Value*, pl. 33 (25 Hen. VIII).

<sup>187</sup> *Brooke*, *Taile*, pl. 32 (23 Hen. VIII).

under *De Donis*. As Brooke's entry for *Taltarum's Case* explains, the voucher of the tenant-in-tail binds all his titles, which is to say that the judgment against him as warrantor of the strawman-defendant binds all of his titles to the land and thus binds his heir.<sup>188</sup> But this result does not rely upon the recompense theory. Indeed, on the recompense theory taken seriously it is not clear how more than one entail could be barred, for if the tenant-in-tail had two entails and put them both at stake by accepting the voucher to warranty, the two entails might define different classes of issue. It is difficult to imagine the recompense from the common vouchee going to different classes of issue simultaneously. If the judgment were not executed, the issue under different entails might be able to pursue, but could never even in fiction recover, recompense from the common vouchee. The recompense theory is in trouble.

But execution was necessary in order to obtain a final judgment against the warrantor-grantor. Execution meant that the tenant-in-tail had not defaulted and that the common vouchee had fulfilled his duty to give recompense. Execution was a good defense to *scire facias* by the issue under the entail. But under the 1436 case, the issue could still plead that the ancestor had not died seised of the land received from the warrantor. Perhaps because of the difficulties with the recompense theory, statements of the reason for the double voucher recovery did not speak of recompense from the common vouchee but only of the judgment binding the first vouchee's titles.<sup>189</sup> The double voucher recovery did not rely upon the recompense theory. Rather, it relied upon the tenant-in-tail being in the position of warrantor, who did not default, and having his warranty obligation executed against him.

Suppose that an heir under the entail sued the grantee in an attempt to undo a double voucher recovery. The grantee could answer that he had received the land by judgment against one who was a stranger to the heir. He could point out to the heir that his ancestor had lost his title to the land by an executed judgment which enforced his obligation to warrant the defendant in the recovery. Once the warranty obligation had been enforced, there was an end of the matter for all titles held by the ancestor. The

<sup>188</sup> *Brooke*, *Fauxifier de Recoverie*, pl. 30.

<sup>189</sup> *Ibid.*; *Brooke*, *Taile*, pl. 32 (23 Hen. VIII).

ancestor had not conveyed the land nor had he lost it by default judgment. The court had taken it from him to satisfy a warranty obligation. That his ancestor had entered into an imprudent warranty obligation was the heir's bad luck. The argument worked for different heirs under different entails held by the tenant-in-tail who suffered the double voucher recovery. The requirement of having the ancestor's warranty obligation enforced was a strong reason to have execution of the judgment in a double voucher recovery. On this theory, the function of the common vouchee was not to provide recompense but simply to make sure that the grantor did not default. There is, however, some room for skepticism. Perhaps lawyers wishing to avoid the consequences of the recompense theory and the learning of *Taltarum's Case* were willing to believe that another procedural move, which could be thought to put all titles at stake, would be sufficient to bar the heir. The perceived benefits of the common recovery outweighed the flaws in the doctrinal basis for its effectiveness.

Plea roll evidence indicates that lawyers were using the classical double voucher form of recovery long before the doctrine was stated in the reports. But the plea roll evidence also indicates both that there were other reasons for using multiple vouchers to warranty and that the double voucher recovery did not become the dominant form until 1572 or a little earlier. Table 5.2 sets forth for selected years up to 1502 and for selected law terms from 1512 to 1622 the number of single, double, and triple voucher recoveries.

Clear examples of classical double voucher recoveries can be found as early as 1482. In Michaelmas Term of that year, John Hough and John Grene recovered one messuage, sixty-six acres of land and fourteen acres of meadow in Theydon Garnon and Theydon-atte-Mount, Essex, from William and Richard Isaac, who vouched Richard Pake who vouched a strawman.<sup>190</sup> In the same term, by final concord, Richard Pake and his wife Joan quitclaimed the same land to Hough and Grene for 100 marks.<sup>191</sup> William and Richard Isaacs were probably agents for Hough and Grene. If so, in the form of the classical double voucher, grantees were plaintiffs; their agents were defendants; and, grantor was

<sup>190</sup> CP40/882, m.142 (Mich. 1482).

<sup>191</sup> *Essex Fines*, IV, 81.

Table 5.2. *Double voucher recoveries 1462–1622*

	Single	Double	Triple	Total
1462	27 (100%)	0	0	27
1472	63 (90%)	6* (8.6%)	1 (1.4%)	70
1482	64 (82%)	14 (18%)	0	78
1492	77 (84%)	15 (16%)	0	92
1502	189 (79%)	48 (20%)	3 (1%)	240
Michaelmas 1512	77 (73%)	29 (27%)	0	106
Michaelmas 1522	74 (70%)	32 (30%)	0	106
Michaelmas 1532	58 (70%)	25 (30%)	0	83
Michaelmas 1542	41 (73%)	15 (27%)	0	56
Michaelmas 1552	38 (70%)	12 (22%)	4** (8%)	54
Michaelmas 1562	73 (57%)	53 (41%)	3 (2%)	129
Michaelmas 1572	58 (39%)	88 (59%)	4** (2%)	150
Trinity 1602	43 (28%)	107 (69%)	5 (3%)	156***
Hilary 1622	24 (14%)	137 (82%)	6 (4%)	167

\* Includes one recovery in which defendant prayed aid.

\*\* Includes one recovery with four vouchers to warranty.

\*\*\* In one recovery, there was a single voucher for part of the land and a double voucher for the remainder.

vouchee.<sup>192</sup> In Hilary Term 1490, William Cutlerd and John Hyndeson recovered the manor of Astwell and other lands in Northamptonshire from Robert Isham and Robert Yarum, who vouched Thomas Lovet.<sup>193</sup> Lovet had enfeoffed Isham and Yarum, who suffered the recovery to Cutlerd and Hyndeson, who demised the land to Joan Lovet, Thomas' wife, and others for Joan's life, with remainder in tail to Thomas and successive remainders to others.<sup>194</sup> In Easter Term 1497, Hugh Oldom and Edward Threle recovered the manors of Albourne, Beverington, Broadwater, and Launcing, Sussex, and Great and Little Milton, Oxfordshire, from William Gorge and Nicholas Adam, who

<sup>192</sup> If one supposes that in the classical double voucher recovery the defendant was agent of the plaintiff, then double voucher recoveries in which plaintiff and defendant had the same surname may well have been classical double voucher recoveries. CP40/841, m.330 (Hil. 1472); CP40/843, m.361d (Trin. 1472); CP40/912, m.311 (Pas. 1490); CP40/912, m.335d (Pas. 1490); CP40/920, m.289 (Pas. 1492).

<sup>193</sup> CP40/911, m.107 (Hil. 1490). Unless otherwise indicated, the ultimate warrantor mentioned in the text vouched the common vouchee.

<sup>194</sup> 1 *IPM, Henry VII*, No. 153.

vouched William Radmyld.<sup>195</sup> By final concord, Radmyld had conveyed the same manors to Oldom and Threle.<sup>196</sup> They then granted Radmyld a lease of the manors for a term of ninety-nine years or his death, with remainder to a group of feoffees to the use of John Shaa.<sup>197</sup> Instead of using a final concord to transfer the land to the ultimate grantee, grantors also used final concords to transfer the land to defendant to the recovery. In Easter Term 1497, William Eliot recovered the manor of Knoll and other lands in Wiltshire from Thomas Coke, Richard Elyot, and William Webb, who vouched John Sturmy.<sup>198</sup> By final concord, Sturmy and his wife Isabel had conveyed Knoll to Thomas Coke.<sup>199</sup> Similarly, in Michaelmas Term 1498, John Hutton and John Ropes recovered the manor of Covington and other lands in Cambridgeshire from John Chilton and William Larkin, who vouched William Danseth.<sup>200</sup> By final concord, Danseth had conveyed the manor to Chilton and Larkin,<sup>201</sup> although John Hutton was the ultimate grantee.<sup>202</sup> There are also other examples of classical double voucher recoveries.<sup>203</sup>

The classical double voucher recovery was only one of four types of double voucher recovery. In the second type, the defen-

<sup>195</sup> CP40/940, mm.232, 232d, 234d, 311, 312 (Pas. 1497).

<sup>196</sup> *Sussex Fines*, No. 3319.

<sup>197</sup> *Close Rolls, 1485–1500*, No. 994.

<sup>198</sup> CP40/940, m.113 (Pas. 1497).

<sup>199</sup> *Wiltshire Fines, 1377–1509*, No. 745.

<sup>200</sup> CP40/946, m.108 (Mich. 1498).

<sup>201</sup> *Cambridgeshire Fines* 23.

<sup>202</sup> 9 *V.C.H., Cambridgeshire*, 282.

<sup>203</sup> (a) In Hilary Term 1502, John Mordaunt, William Gascoigne, John Colle, and Robert Lagden recovered 2 tofts, 40 acres of land, 3 acres of meadow, and 10 acres of pasture in Depeden, Essex, from Thomas Sprat, William Cassell and William Jenour, who vouched Edmund Brudenell: CP40/959, m.314d (Hil. 1502). By final concord with proclamations Edmund and his wife Joan had conveyed the same lands to plaintiffs: *Essex Fines*, IV, 105.

(b) In Easter Term 1502, a group of the plaintiffs including Reginald Bray recovered the manor of Weston and other lands in Buckinghamshire from John Hall, who vouched John Wayte and his wife Agnes: CP40/960, m.304 (Pas. 1502). Hall was an agent of Bray (*Close Rolls, 1500–1509*, No. 166) to whom John and Agnes had conveyed the manor: 3 *V.C.H., Buckinghamshire*, 178.

(c) In Trinity Term 1502, Thomas Fenys and Richard Devenysh recovered the manor of Moorhall, Norfolk, from John Devenysh, who vouched Anne Massingbird: CP40/961, m.343d (Trin. 1502). Anne, daughter and heir of Thomas Massingbird, sold the manor to Fenys and Richard Devenysh for 100 marks and released and quitclaimed the manor to them with warranty: *Close Rolls, 1500–1509*, No. 182.

dant in transferring land to the plaintiff either outright or to change his own estate, vouched the former holder from whom the defendant had acquired the land. The former holder vouched the common vouchee. This type could be used to extinguish old claims to the land. In the third type, the defendant vouched someone, usually a family member, who had a claim to or interest in the land being transferred to the plaintiff. In the fourth type, the defendants were feoffees to uses who vouched their *cestuy que use*. A survey of these three types of double voucher recovery helps one to appreciate the flexibility of the common recovery in the hands of practicing lawyers.

The second type of double voucher recovery was so similar to the classical type that it is sometimes difficult to distinguish between instances of the two types. Yet the purpose of the second type of double voucher differed from that of the classical type. In the second type, grantor was in the position of the defendant and granted to the plaintiff either in an outright transfer or for the purpose of changing the estate of the grantor. He vouched a former holder from whom he had acquired the land. In recoveries of this type, two transfers were combined into a single recovery. The earlier transfer from vouchee to defendant was rendered more secure, as was the transfer from defendant to plaintiff. For example, in Michaelmas Term 1492 Robert Mome and Richard Willers recovered the manor of Stanton-by-Sapcote and other lands in Leicestershire from Thomas Kebell, Robert Selby and William Smith, who vouched Henry Grey of Codnore.<sup>204</sup> In August of 1492, Kebell had agreed to purchase Stanton-by-Sapcote from Grey<sup>205</sup> and by final concord Grey conveyed the manor to Kebell, Selby, and Smith to the use of Kebell and to perform his last will.<sup>206</sup> Robert Mome was Kebell's executor and a Marie Willers witnessed Kebell's last will.<sup>207</sup> The defendants were grantors; the plaintiff received the land as a means of changing the defendant's estate; and the defendant vouched the former holder from whom he had acquired the land. The voucher extinguished that holder's rights. In Hilary Term 1493, John Brode and John Hever recovered a messuage, a garden, lands, and rent in Buxsted,

<sup>204</sup> CP40/922, m.424 (Mich. 1492).

<sup>205</sup> Ives, *Common Lawyers*, 338.

<sup>206</sup> 1 *IPM*, *Henry VII*, No. 497.

<sup>207</sup> Ives, *Common Lawyers*, 431.

Framfield, Mayfield, and Woodfield, Sussex, from John Isley and others, who vouched Richard Coke.<sup>208</sup> In May 1492, Coke had sold the lands and rent to Isley for £60 and had promised to ensure the transfer by final concord or recovery.<sup>209</sup> It is not clear whether Brode and Hever took outright or for Isley. In Michaelmas Term 1497, John Cutte, Thomas Trigot and Robert Henryson recovered one-half of the manor of Medilmede, Essex, from Alveredus Rauson and Thomas Baxter, who vouched Robert Marshall and his wife Isabel.<sup>210</sup> Two years earlier, Robert and Isabel had conveyed one-half of Medilmede by final concord to Alveredus, Thomas, and Nicholas Rauson to hold to themselves and the heirs of Alveredus.<sup>211</sup> There are further examples of the second type of double voucher recovery.<sup>212</sup>

In a third type of double voucher recovery, the defendant-grantor vouched to warranty someone, often a member of his or

<sup>208</sup> CP40/923, m.137d (Hil. 1493).

<sup>209</sup> *Close Rolls, 1485–1500*, No. 601.

<sup>210</sup> CP40/942, m.311d (Mich. 1497).

<sup>211</sup> *Essex Fines*, IV, 96.

<sup>212</sup> (a) In Michaelmas Term 1498, Richard Brake and Edward Leuknore recovered the manor of Iping, Sussex, from John Goring, who vouched Reginald Bray and his wife Katherine and Henry Lovell and his wife Constance: CP40/946, m.146 (Mich. 1498). Katherine and Constance were co-heirs of Henry Hussee, who had transferred the manor to Goring: 4 *V.C.H.*, *Sussex*, 64.

(b) In Easter Term 1502, John Shelley, John Caryll, and John Stanney recovered the manors of More and Wintershill, Hampshire, from John Dawtry, John Ernley, and John Onley, who vouched Nicholas Taillard: CP40/960, m.344 (Pas. 1502). In 1500, Nicholas and his wife Alice quitclaimed Wintershill to Onley: 3 *V.C.H.*, *Hampshire* 300. The recovery effected a sale from Tallard to Onley while putting the lands in feoffees to Onley's use: *ibid.*

(c) In Easter Term 1502, Robert Cromwell, Henry Wykes, and William Bond recovered a messuage, a garden and land in Wandsworth, Surrey, from Walter Cromwell, who vouched John West: CP40/960, m.424 (Pas. 1502). In January of 1501 John West had released and quitclaimed the messuage, garden, and lands in Wandsworth to Walter Cromwell, Thomas Lane, Richard Merland, Stephen Hyll, and Henry Wykes: *Close Rolls, 1500–1509*, No. 57. The release and quitclaim suggests that Walter and the others were already in possession.

(d) In Michaelmas Term 1502, a group of the plaintiffs including William Smith, bishop of Lincoln, William Hody, and John Shaa recovered the manor of Barnesbury and other lands in Middlesex from a group of the defendants including Reginald Bray, who vouched John Bourchier, Lord Berners: CP40/962, m.414 (Mich. 1502). The defendants had been feoffees of Bourchier, but he sold the manor to Reginald Bray with an agreement that the feoffees were to stand seised to Bray's use: *Close Rolls, 1500–1509*, No. 217. Bourchier released and quitclaimed the manor to plaintiffs to the use of Reginald Bray: *ibid.* Having purchased the manor, Bray used the recovery both to secure his purchase and to change his estate.

her family, who had a claim to or an interest in the land. Recoveries in which the defendant was a life tenant and vouched, rather than prayed aid of, the reversioner or remainder were recoveries of this type. The close relationship between vouching to warranty and praying aid is illustrated by three recoveries in which William Winesburg, Richard Littleton, and William Wilkes recovered the manors of Bingley in Yorkshire, Plesley, which appears to have been in Derbyshire and Northamptonshire, and the advowson of Tearfall in Nottinghamshire, from Humphrey Peshale and his wife Margaret. In two of the recoveries, Humphrey and Margaret prayed aid of William Asteley, Margaret's son by her former husband Thomas Asteley.<sup>213</sup> In the third recovery, they vouched William Asteley, who vouched the common vouchee.<sup>214</sup> The third type of double voucher recovery was also used to extinguish less definite claims or interests than reversions or remainders. For example, in Hilary Term 1484, Henry Colet, an alderman of London, recovered the manor of Weston Turville and other lands in Buckinghamshire from John Whittington, who vouched Richard Whittington, who vouched John Verney and his wife Margaret, who vouched the common vouchee.<sup>215</sup> John and Richard Whittington were brothers of Robert Whittington, whose daughter Margaret had married John Verney.<sup>216</sup> The recovery extinguished the various Whittington claims in favor of the purchaser, Henry Colet.<sup>217</sup> This type of double voucher recovery was used to extinguish the claims of family members.<sup>218</sup> The third

<sup>213</sup> CP40/926, mm.335, 335d (Mich. 1493).

<sup>214</sup> CP40/926, mm.323 (Mich. 1493).

<sup>215</sup> CP40/887, m.145 (Hil. 1484).

<sup>216</sup> *Close Rolls, 1476-1485*, No. 845; 2 *V.C.H.*, *Buckinghamshire*, 300, 369-70.

<sup>217</sup> 2 *V.C.H.*, *Buckinghamshire*, 369-70.

<sup>218</sup> (a) In Hilary Term 1493, Robert Oliver, William Menwennek, and John Michell recovered the manor of Totell Gayton and other lands in Lincolnshire from William Willoughby who vouched Robert Willoughby, Lord Broke: CP40/923, m.229 (Hil. 1493). Anne Willoughby had died seised of the manor: 2 *IPM, Henry VII*, No. 710. Oliver, Menwennek, and Michell recovered the manor to the use of William, the defendant, and his heirs male: *ibid.* Robert Willoughby was either Anne's son or her grandson and heir: *ibid.*

(b) In Hilary Term 1497, Robert Constable, Robert Brudenell and others recovered one-half of the manors of Hosdens' Farm, Dynes Hall, and Caxton, Essex, from John Skidmore and his wife Anne, who vouched William Skidmore and his wife Alice: CP40/939, m.109d (Hil. 1497). Philip Skidmore or Scudamore had died in 1488 holding the lands of the recoveries entailed to himself and his wife Wenllyan, remainder to his right heirs. His daughter,

type of double voucher could be used to include the grantor's heir apparent in the position of first vouchee. For example, in Michaelmas Term 1502, a group of the plaintiffs recovered the manor of Bekesbourn and other lands in Kent from John Brooke, Lord Cobham, and his wife Margaret, who vouched Thomas Brooke, described on the plea roll as the son and heir apparent of John and Margaret.<sup>219</sup> The use of triple vouchers to warranty permitted the third type of double voucher recovery, used to extinguish the claims of family members, to be combined with the classical type. For example, in Hilary Term 1502, Robert Norwich and Edward Stubbs recovered the manor of Marlesford, Suffolk, from James Hamond and Thomas Ridnall, who vouched Richard Rokes, who vouched Thomas Rokes, who vouched the common vouchee.<sup>220</sup> Norwich and Stubbs were feoffees for Robert Drury, to whom Richard and Thomas Rokes, brothers, released and quitclaimed the manor in 1503.<sup>221</sup> One William Rokes also released and quitclaimed with warranty the manor to Stubbs and Norwich to the use of Drury, perhaps in an attempt to establish a collateral warranty.<sup>222</sup> The defendants in the recovery, in classical form, appear to have been agents of Drury. Richard Rokes, in the form of the third type of recovery, vouched his brother in order to extinguish his claim.

Anne, by his wife Wenllyan succeeded and married one John Skidmore: 1 *IPM, Henry VII*, Nos. 452, 453; Morant, *History of Essex*, II, 277–8; *V.C.H., Buckinghamshire*, III, 171. William Skidmore was Philip's heir general: 1 *IPM, Henry VII*, No. 454. By means of the recovery, Anne settled the lands on herself and her husband and the heir of their bodies: 3 *V.C.H., Buckinghamshire*, 171.

(c) In Hilary Term 1497, Andrew Windsor and others recovered the manor of Ashton [Theynes] and other lands in Somerset and 20 messuages and lands in various places in Gloucestershire from Robert Bowering and his wife Alice, who vouched William Juyn: CP40/939, mm.263, 265d (Hil. 1497). Alice was daughter of William Juyn; Robert Bowering was her first husband: J. Collinson, *The History and Antiquities of the County of Somerset*, 3 vols. (Bath: R. Cruttwell, 1791), 295. The recovery effected a marriage settlement for Alice.

<sup>219</sup> CP40/962, m.107 (Mich. 1502). An other example of this use of the third type of double voucher occurred in Hilary Term 1502. John Shaa and Ralph Bukherd recovered 42 messuages, lands, and rent in various places in Hertfordshire from Agnes Westley, who vouched Richard Dyer: CP40/959, m.122 (Hil. 1502). In a document dated 15 September 1501, Richard Dyer was described as Agnes' son and heir apparent: *Close Rolls, 1500–1509*, No. 127.

<sup>220</sup> CP40/959, m.318 (Hil. 1502).

<sup>221</sup> *Close Rolls, 1500–1509*, Nos. 123, 200.

<sup>222</sup> *Ibid.*, No. 123.

In the fourth and last type of double voucher recovery, the defendants were feoffees to uses and vouched the *cestuy que use*, who vouched the common vouchee. This type of recovery avoided the difficulties that could arise if either the feoffees or the *cestuy que use* acted alone: Neither could bind the other. Cases in Chancery in the fifteenth century illustrate various ways conveyancing problems could arise. Perhaps the simplest case was an allegation of breach of contract: the *cestuy que use* had agreed to sell the land to the plaintiff, but at the time for performance instructed his feoffees not to make the conveyance. The plaintiff sought an order to the *cestuy* to instruct his feoffees to perform the contract.<sup>223</sup> But most cases were more complicated. For example, a plaintiff alleged a sale by a *cestuy que use* and the failure of the feoffees to transfer the land. The feoffees responded that they were holding to use of the seller's father, whose last will instructed them to pay his debts and then to make an estate to his right heirs in fee tail, and for default of issue to sell the land and donate the proceeds for the good of his soul. The son indeed had sold the land to the plaintiff, but he did so before his father's debts had been paid and while he was underage.<sup>224</sup>

In another case, A owed B 90 marks for certain land and C and D went surety for him. They all agreed to convey the land to feoffees under the condition that if B paid A the 90 marks and held C and D harmless the feoffees would stand seised to the use of B but if he did not they would stand seised to the use of C and D, who could sell the land and use the proceeds to pay A his 90 marks. B died without paying the 90 marks. C and D have paid 40 of the 90 marks and have sold the land to E for 90 marks. Two of the three feoffees have agreed to convey to E, but the third is holding out.<sup>225</sup>

Chapter 1 of the Statute of 1 Richard III was an attempt to deal with the difficulties arising from the division of control between feoffees and a *cestuy que use*. The statute provided that grants and recoveries bound the grantor, his heirs, and his feoffees.<sup>226</sup> The statute created problems of its own and had the effect of transferring at least some litigation from Chancery to the common law

<sup>223</sup> C1/38/9.

<sup>224</sup> C1/50/68–71 (1479).

<sup>225</sup> C1/38/24.

<sup>226</sup> 1 Ric. III, c. 1 (1484), *Statutes of the Realm*, II, 477–8.

courts.<sup>227</sup> The statute provided an exception for such “right, title, action and interest” as a person had under an entail. The proper interpretation of this exception vexed bench and Bar. There were at least two views: that a fine or recovery by a *cestuy que use* barred his issue under an entail and that a fine or recovery by a *cestuy que use* was only good for his life, after which the feoffees could retake the land for his issue.<sup>228</sup> In Edward VI’s reign, Chancery decided that both the feoffees and the *cestuy que use* under an equitable entail would be bound if the feoffees suffered the recovery and vouched the *cestuy que use*.<sup>229</sup>

This form of recovery was the fourth type of double voucher recovery and examples of it can be found as early as 1468. In Hilary Term of that year Thomas Holbathe recovered the manors of Stagsden and Husborne Crawley, Bedfordshire, from William Hervy, who vouched John Fynaunce, who vouched William Fitz.<sup>230</sup> Hervy held the manors as feoffee to the use of Anne, wife of John Fynaunce, and her heirs, apparently her son, John Fynaunce.<sup>231</sup> Often, however, it is not possible to tell whether an instance of this type of recovery involved an equitable entail.<sup>232</sup>

<sup>227</sup> Milsom, *Historical Foundations*, 215–16; Baker, “Introduction,” 2 *Spelman’s Reports*, 195–6; J. L. Barton, “The Medieval Use,” 81 *Law Quarterly Review* (1965), 574–8.

<sup>228</sup> Baker, “Introduction,” 2 *Spelman’s Reports*, and sources there cited. For cases dealing with other difficulties related to equitable entails under the statute see YB Mich. 3 Hen. VII, f. 13, pl. 14 (1487); YB Mich. 21 Hen. VII, f. 32, pl. 20 (1505); YB Mich. 21 Hen. VII, f. 33, pl. 28 (1505); YB Pas. 14 Hen. VIII, f. 24, pl. 2 (1522); YB Trin. 19 Hen. VIII, f. 11, pl. 5 (1527); YB Trin. 19 Hen. VIII, f. 13, pl. 11 (1527); YB Trin. 26 Hen. VIII, f. 2, pl. 4 (1534); YB Pas. 27 Hen. VIII, f. 5, pl. 6 (1535); YB Trin. 27 Hen. VIII, f. 20, pl. 9 (1535); YB Mich. 27 Hen. VIII, f. 28, pl. 1 (1535); YB Mich. 27 Hen. VIII, f. 29, pl. 21 (1535); *Dyer’s Reports*, Mich. 33 Hen. VIII, pl. 17 (1541); *Dyer’s Reports*, Mich. 35 Hen. VIII, pl. 1 (1543); *Brooke*, *Recoverie in Value*, pl. 29; *Brooke*, *Feffements al Uses*, pl. 2; *Brooke*, *Feffements al Uses*, pl. 57.

<sup>229</sup> *Brooke*, *Feffements al Uses*, pl. 56.

<sup>230</sup> CP40/826, m.348 (Hil. 1468).

<sup>231</sup> *Close Rolls, 1468–1476*, No. 28.

<sup>232</sup> (a) In Hilary Term 1484, John Twynyhoo and John Underhill recovered a toft, land, and rent in Newenton and Over Gyting, Gloucestershire, from John Smith and William Warbilton, who vouched John, Lord Clinton and Say: CP40/887, m.205 (Mich. 1484). Smith and Warbilton were feoffees for the benefit of John Clinton, but it is not clear whether they held an equitable entail: *Close Rolls, 1476–1485*, Nos. 1182, 1196.

(b) In Trinity Term 1488, Richard Sutton and John Newport recovered in a single voucher recovery 2 messuages, lands, and rent in Stepney, Hackney and Stratford, Middlesex: CP40/905, m.141 (Trin. 1488). In the same term, Sutton

And often it is fairly clear that it did not.<sup>233</sup> The parties nevertheless had reason to use this type of recovery, for as helpful as the statute might have been in litigation, the cautious purchaser or grantee sought to avoid litigation.

and Newport recovered the manors of West Twyford and Hoxton and other lands in Middlesex from Richard Hayward, master of the Hospital of the Holy Cross at Winchester, Nicholas Lyster, Thomas Wells senior, and Roger Philpot, who vouched John Philpot: CP40/905, mm.145, 153 (Trin. 1488). The recoveries helped to execute a settlement upon the marriage of John Philpot to Elizabeth Cosyn, niece of Oliver King, secretary to the king. Sutton and Newport demised the recovered manors and lands to feoffees to the use of John and Elizabeth and their heirs: *Close Rolls, 1485–1500*, No. 302. Although it is fairly clear that Hayward, Lyster, Wells, and Philpot were feoffees of John Philpot, one does not know whether they held to an entailed use.

(c) In Easter Term 1493, John Gore and Thomas Hardy recovered a messuage and a garden in Spalding, Lincolnshire, from Henry Colet, Nicholas Alwyn, William Hariot, John Mayson, and Thomas Blench, who vouched John Toft: CP40/924, m.147 (Pas. 1493). In 1489, John Toft had given tenements in Spalding to the defendants, no doubt as his feoffees, but the terms of the use are unknown: *Close Rolls, 1485–1500*, No. 659.

(d) In Easter Term 1497, Thomas Kebell, John Mordaunt, Thomas Frowyk, and Robert Tuberville in a series of single voucher recoveries recovered the manors of Hoddesdon Bury, Great and Little Munden, Sawbridgeworth, and Wickham Hall, Hertfordshire, Lalford, Essex, and Market Overton, Rutland, from William Say, who in some cases held with others: CP40/940, mm.315d, 317, 317d, 320, 320d (Pas. 1497). In the same term, the same plaintiffs, sometimes without Mordaunt, recovered the manor of Hooks and Pinnacles, Essex, and the manors of Bedwell, Bennington, Little Berkhamstead, The Baas, Boxes, Geddings, Hailey, Langtons Marden Hill and Periers, Hertfordshire, from various groups of the defendants, each of which vouched William Say: CP40/940, mm.315, 318, 319, 319d (Pas. 1497). These groups of the defendants were feoffees of William Say. William Say was rationalizing his holdings by putting them in the hands of two groups of overlapping feoffees. But the terms under which the first group held are not known.

(e) In Easter Term 1502, a group of the plaintiffs including Richard Nykke, bishop of Norwich recovered the manors of Blunt's Hall and Faulkbourn, Essex, from a group of the defendants including Thomas Tyrell, who vouched Edmund Wiseman and his wife Alice and John Fortescue and his wife Philippa: CP40/960, mm.404, 420 (Pas. 1502). Alice was Philippa's grandmother and the recoveries helped to execute a three-party agreement among Thomas Tyrell, Edmund Wiseman and Alice his wife, and John Fortescue and Philippa his wife, whereby Edmund and Alice were to have the manors for their lives with remainder to John and Philippa and the heirs of Philippa's body: *Close Rolls, 1500–1509*, No. 168. The plaintiffs to the recoveries took to that use. Tyrell was included in the agreement probably because he was the representative of the feoffees, but the terms under which the defendants held are not known.

<sup>233</sup> (a) In Michaelmas Term 1487, Guy Fairfax and John Sulyard (justice of King's Bench) recovered the manor of Great Aston [Chetwynd Aston], one-half of the manor of Fadersham and other land in Shropshire from William Hussey (chief justice of King's Bench), Thomas Bryan (chief justice of

The multiple voucher recovery with its four types of variation made the recovery a flexible conveyancing device. It could be used as a means of securing simple transfers of land, or a means of securing two or more transfers of land simultaneously, or as a means of extinguishing various claims to the land being transferred, or as a means of avoiding in practice the doctrinal difficulties attendant upon transfer of land held by feoffees to uses. Legal historians who have discussed the classical double voucher recovery have overlooked the potential of multiple voucher recoveries and the ways in which that potential was exploited by practicing lawyers.

Common Pleas), William Hody (chief baron of the Exchequer), Thomas Sapcote, and John Crevequer, who vouched John Audley: CP40/902, m.390 (Mich. 1487). Audeley had enfeoffed Hussee, Brian, Hody, Sapcote, and Crevequer to the use of his last will: *IPM, Henry VII*, I, No. 604. Fairfax and Sulyard recovered the manors and land to the use of James Audeley, John's son and heir, and Joan his wife for their lives, remainder to the right heirs of John. Unless John had already declared an estate tail in his will, an equitable entail had not yet been created. Other recoveries between the same plaintiffs and the same or similar groups of the defendants, who also vouched John Audley, were part of the same transaction: CP40/902, m.449 (Mich. 1487) (one-half manor of Begworth, Gloucestershire); CP40/902, m.449d (Mich. 1487) (manor of Maningham super Wyham, Hereford); CP40/902, m.451 (Mich. 1487) (manors of Broughton Gifford and Ashton Gifford, Wiltshire); CP40/902, m.451 (Mich. 1487) (manor of West Rodden, Somerset).

(b) Perhaps in 1493, and certainly in 1495, the archbishop of Canterbury and others held the manor of Hanwell, Oxfordshire, and other manors and lands as feoffees to secure payment to the king of £5,000 by Edmund de la Pole to assure his title and inheritance forfeited by his father John, duke of Suffolk, and his uncle John, earl of Lincoln: *Patent Rolls, 1494–1509*, 256–61. In 1495, Edmund de la Pole nevertheless enfeoffed Thomas Frowyk, Edward Gelgate, John Williams, and John Spencer with Hanwell: *ibid.* In Hilary Term 1497, Henry Heydon, John Wendham, Edward Raleigh, and Humphrey Conyngesby recovered Hanwell from Frowyk, Gelgate, and Williams, who vouched Edmund de la Pole: CP40/939, m.149d (Hil. 1497). (Spencer had died between the time of the enfeoffment and the time of the recovery.) Heydon, Wendham, Raleigh, and Conyngesby also received Hanwell from Edmund by final concord: *Patent Rolls, 1494–1509*, 256–61. They took the manor on behalf of William Coope, to whom the king confirmed title in 1502: *ibid.* It is unlikely that Pole enfeoffed Frowyk and the other feoffees with an equitable entail. More likely, he enfeoffed them to remove the manor from the first group of feoffees for the purpose of sale.

## THE COMMON RECOVERY IN OPERATION

The invention of the common recovery in 1440 and the increasing use of recoveries thereafter pose three questions. First, in what types of land transactions did the parties use a recovery? Secondly, in these transactions what role did the recovery play? These questions are addressed in the first part of this chapter. And thirdly, what were the social attitudes toward using a recovery? This question is addressed in the second part of this chapter.

## 1. THE USES OF RECOVERIES

Understanding in what types of transactions the parties used a recovery requires that contexts be constructed for recoveries found on the plea rolls. In the period 1440 through 1502, the total number of transactions effected by means, in part, of a recovery is not known. Out of a sample of 1,169 transactions using recoveries in this period, contexts have been constructed for 334 transactions.<sup>1</sup> The 334 transactions are calendared in the Appendix to this chapter. All counties but four (Cheshire, Lancaster, Northumberland, and Westmorland) are represented in the sample. Transactions were classified into four main types: sales of land, transfers into mortmain, dispute settlements, and resettlements. The calendar of the 334 transactions in the Appendix gives reasons why a transaction was put in its category. Table 6.1 sets forth for each decade from 1440 to 1499 and for 1502 the number of transactions in each of these four main categories, the total number of transactions in the collection of 334 transactions for

<sup>1</sup> As was explained in Chapter 5 more than one recovery might be necessary for a single transaction. See Chapter 5, above, p. 253, n. 6.

Table 6.1.

	Sales		Transfers into mortmain		Dispute settlement		Resettlements		Collection total		Sample total
1440– 1449	6	60.0%	1	10.0%	3	30%	0	0	10	71.4%	14
1450– 1459	8	47.1%	0	0	4	23.5%	5	29.4%	17	48.6%	35
1460– 1469	13	44.9%	1	3.6%	3	10.3%	12	41.4%	29	32.6%	89
1470– 1479	22	46.8%	1	2.1%	5	10.6%	19	40.4%	47	24.1%	195
1480– 1489	47	51.6%	4	3.5%	6	6.6%	34	37.3%	91	30.3%	300
1490– 1499	20	29.0%	0	0	4	5.8%	45	65.2%	69	21.5%	320
1502	36	50.7%	2	2.8%	1	1.4%	32	45.1%	71	32.9%	216
Totals	152	45.5%	9	2.7%	26	7.8%	147	44.0%	334	28.6%	1169

each period, and the total number of transactions in the larger sample of 1,169 transactions for each period. The collection varies from being 71.4 percent of the larger sample in the decade 1440–9 to being only 21.6 percent of the larger sample in the decade of 1490–9. The larger sample includes all the recoveries on the plea rolls for the decade 1440–9 and for the year 1502. Unfortunately, it is not known what proportion of all recoveries on the plea rolls are included in either sample for other periods.

The 334 transactions included in the Appendix are simply the 334 transactions in the larger sample for which contexts could be constructed mainly from printed records and secondary sources. In a few cases the classification of a transaction was based on inferences from the identity of a party to the transaction or from the nature and amount of land involved in the transaction. For example, in the earliest recovery William Hindstone, a lawyer, recovered a messuage and 30 acres of land in Dunstan, Devon.<sup>2</sup> Given the known activity of lawyers on the later fifteenth-century land market, the small parcel of land involved in the transaction, and the fact that Hindstone hailed from Devon, it is reasonable to

<sup>2</sup> Appendix, I, B, 1.

infer that the transaction was a sale, although evidence in support of this inference could not be found.

Given the principle, if principle it be, of inclusion in the collection of 334 transactions there are biases stemming from reliance on printed sources and secondary materials to construct contexts for the recoveries. There is a bias toward transactions that involved at least a manor or a fraction of a manor. County histories such as the *Victoria County History* are organized by and concern themselves mostly with manors. Lands and tenements not described as a manor or a fraction of a manor were sometimes larger and economically more valuable than some manors, because in this period rather small agricultural units could be christened a manor. On the other hand, labeling an agricultural unit a manor had social and political significance, or pretension. At any rate, most transactions in the larger sample did not involve a manor or a fraction of a manor. For example, of the nineteen transactions in Michaelmas Term 1472 only five or 26.3 percent involved a manor or a fraction thereof. Of the twenty-two transactions in Michaelmas Term 1482, only six or 27.3 percent involved a manor. And of the twenty-six transactions in Michaelmas Term 1492 only eight or 30.8 percent involved a manor. Yet, five of the manorial transactions in Michaelmas Term 1472 appear in the sample of 334 but none of the transactions involving less than a manor. Four of the manorial transactions in Michaelmas Term 1482 appear in the sample of 334, but only one of the transactions involving less than a manor. And five of the manorial transactions in Michaelmas Term 1492 appear in the sample, but none of the transactions involving less than a manor. Most of the transactions involving less than a manor were not included in the collection of 334 transactions because contexts could not be constructed for these transactions. They could not be classified. The bias in favor of manors is probably a bias against sales transactions. Many of the transactions involving less than a manor involved comparatively small parcels of land. For example, a messuage, a garden, and an acre in Fairford, Gloucestershire;<sup>3</sup> a messuage and 81 acres of pasture in the parish of Morton Valence, Gloucestershire;<sup>4</sup> a messuage, a toft, 30 acres of land, and 6 acres of meadow in

<sup>3</sup> CP40/835, m.347d (Pas. 1470).

<sup>4</sup> CP40/835, m.374 (Pas. 1470).

Butswell, Leicestershire;<sup>5</sup> or, 45 acres in Sullington, Sussex.<sup>6</sup> The later fifteenth-century land market was marked by “the almost constant traffic in small parcels of land.”<sup>7</sup> But one cannot assume that all small transactions were sales because there were some that were not.<sup>8</sup> Although not all small transactions were sales, the exclusion of many small transactions from the sample for lack of documentation means that the collection of 334 transactions underrepresents sales.

On the other hand, reliance upon county histories such as the Victoria County History introduces a bias in favor of sales transaction. The authors of these histories were not interested so much in how a family held a manor as in when the manor changed hands by sale or marriage. Resettlements of a manor that did not result in the manor coming into a different family frequently go unnoticed or, at least, unreported. Hence, the bias in favor of sales transactions. Apart from this bias, reliance on county histories also means that, although one can infer from the fact that a manor remained in a family that the transaction was probably a resettlement, as opposed to a sale, one frequently cannot further classify the resettlement. One cannot tell whether the resettlement was a conveyance to feoffees to uses, a grant–regrant transaction, or a marriage settlement. To make matters worse, one cannot rule out the possibility that the point of the transaction was to use the land as security for a loan which was later paid off. The temporary alienation of the manor lay outside the interests of the county historians.

Reliance upon such printed sources as the *Calendar of Close Rolls* and the *Calendar of Patent Rolls* for documents from which to construct contexts for recoveries biases the sample in two ways. The helpful documents copied onto the close rolls tend to be releases, quitclaims, and agreements. There is a bias toward sales because purchasers were more likely to make public record of their transactions than would a landholder resettling land within his or her family. There is also a bias toward purchases by lawyers and

<sup>5</sup> CP40/841, m.322 (Hil. 1472).

<sup>6</sup> CP40/784, m.238 (Hil. 1457).

<sup>7</sup> Pollard, *North-eastern England*, 83.

<sup>8</sup> e.g. Appendix, II, 6; Appendix, III, A, 3; Appendix, IV, D, 19; Appendix, IV, E, 5.

royal officials and others who had easy access to the Chancery rolls.

In researching the contexts of the recoveries, the aim was to discover the purpose of the transaction in which recoveries played a role and the role of recoveries in those transactions. The transactions were then classified into categories and subcategories according to the purpose of the transaction. The collection of 334 transactions have been divided into four main types: sales, transfers into mortmain, dispute settlements, and resettlements. Fifteenth-century practice, however, did not always neatly fit this crisp classification. The double, sometimes multiple, voucher recovery allowed the parties to achieve two purposes with a single recovery. For example, a purchaser could simultaneously secure title to property and resettle that property in his feoffees. In this case, the feoffees would be the plaintiff to the recovery; the purchaser would be the defendant; and the seller would be vouched to warranty and would vouch the common vouchee. In the case of such a recovery, it seemed better to classify the transaction as a subcategory of sale rather than as a subcategory of resettlement. This classification assumes that the main reason for using a recovery in such a situation was to extinguish the title of the seller. This assumption is debatable, however, given the large number of recoveries used to resettle lands.

A landholder could also use a double voucher recovery to resettle land and simultaneously to extinguish the claim of a descendant of an earlier holder of the land. In this case, those who would take the land for the purpose of the resettlement would be the plaintiff to the recovery; the holder of the land would be the defendant; and the holder of the ancient claim would be vouched to warranty. Such transactions were classified as a subcategory of dispute settlement rather than as a subcategory of resettlement. This classification relies on the thought that a prime attraction of recoveries was their ability to extinguish claims and secure good legal title to current holders or to purchasers.

Classifying transactions into categories by their purpose depends upon the dichotomies – the series of oppositions – one thinks to have been important. The main opposition in the typology of transactions used in this chapter is between sales and resettlements. The market and the family, which is to say inheritance, were the two ways in which land, the most important

resource, circulated in fifteenth-century England. But here, also, the categories of market and family were not mutually exclusive. For example, in 1464 Elizabeth Wakehurst suffered a recovery of two Sussex manors to John Smith and William Colyn, who were agents for the purchaser, Thomas Etchingham.<sup>9</sup> Elizabeth was the daughter of Robert Etchingham, who had given the manors to Richard Wakehurst and Elizabeth upon their marriage. Although their precise relationship is not known, it appears that Thomas Etchingham and Elizabeth Wakehurst née Etchingham, were related to each other. The sale to Thomas was not a sale to a stranger. Unfortunately, it was seldom possible to determine whether there was a family relationship between purchaser and seller.

The category of sales includes a number of subcategories: sales of at least a fraction of a manor, sales of less than a manor, complicated sales, exchanges of land, grants of life estates, purchases for resettlements, purchases and resettlements, royal purchases and political transfers, and mortgages.<sup>10</sup> These subcategories reflect the various types of transactions on the fifteenth-century land market. The category of resettlements include subcategories for transfers into uses, transfers out of uses, marriage or spousal settlements, transfers within a family, and grant–regrant transactions. Unfortunately, more than half of the resettlements in the sample – 77 out of 147 – have to be classified as unidentified resettlements. This means that a more specific purpose of the transaction – whether it was a transfer into uses, or a grant out for a grant back, or a marriage or spousal settlement – could not be discovered. The reason for classifying the transaction as a resettlement at all was that the land in question remained in the family after the transaction. Next to these two main categories of sales and resettlements there is a third category: dispute settlement. Besides simple transfers to end a dispute over land, this category also includes recoveries that extinguished old claims,

<sup>9</sup> Appendix, IV, E, 4. The transaction is also discussed below, pp. 345–7.

<sup>10</sup> The inclusion of mortgages in the categories requires perhaps some explanation. The mortgages were sales with the right of the seller to repurchase the property. For this reason they were included as a subcategory of sales. Since there are only two known mortgages in the collection of 334 transactions, their inclusion in the category of sales does not mislead. Nor does an entirely separate category seem to be warranted.

resettlements that simultaneously extinguished old claims, and recoveries that facilitated partitions among heirs.

Given the main division between transfers on the market and transfers within a family, it is not clear what to do with transfers into mortmain. If the category of sales is to include only market transactions, the transfers into mortmain do not belong in the category of sales. If the category of resettlement is to include only dispositions within a physical, as opposed to spiritual, family, then transfers into mortmain do not belong in the category of resettlements. For these reasons, a separate category was created for transfers into mortmain.

The number of sales and the number of resettlements in the 334 transactions are about equal: 152 or 45.5 percent sales and 147 or 44 percent resettlements. Twenty-six or 7.8 percent of the transactions were one form or another of dispute resolution. And nine or 2.7 percent were transfers into mortmain. If the transactions within their categories and subcategories are grouped by decade, only two interesting variations appear. There are no mortgages until 1502. It is hard to say why recoveries were not used to effect mortgages, or were used so infrequently as to escape the sample, before 1502. Perhaps some of the unidentified resettlements were in fact mortgages, which did not result in the permanent departure of the lands in question from the holders at the time of recovery. Equally, if not more, intriguing, there are no resettlements in the first decade, the 1440s, of recoveries. The first resettlement transaction appears in 1452.

With the first known resettlement transaction in 1452 recoveries had begun to be used for all major types of land transactions. It had not taken lawyers long to discover that the recovery was a versatile conveyancing device. The transactions for which the parties used a recovery amount to some subset of the land transactions that took place in the last half of the fifteenth century. It is hard to think of a type of land transfer in which recoveries were not used either to extinguish the grantor's title or to put title in the ultimate grantee. This does not mean that the collection of 334 transactions is a representative sample of the set of land transfers in the period, because one does not know whether recoveries were used more frequently in some types of transactions than in others. Indeed, it is hard to say why the parties in some transactions used a recovery and those in other transactions of the same type did

not. The cost of a recovery, although unknown, does not seem to have been a deterrence. Most recoveries, as noted earlier, involved comparatively small parcels of land. A recovery had the power to end an entail. This power meant that a recovery could give a grantee in a land transaction the best possible legal title. But it is seldom possible to tell whether the grantor, whether he appeared as defendant or vouchee, held or claimed to hold under an entail. One great advantage of using a recovery rather than relying on a charter with livery of seisin or a final concord was that the grantee need not investigate whether or not the grantor held under an entail. Whatever the grantee's title, it would be extinguished by the recovery. Yet recoveries were not used in every land transaction. The decision to use a recovery, of course, depended upon the grantee's knowledge about the grantor's title, the grantee's attitude to risk, and the legal advice given on a particular occasion. But there is no discernable pattern in the decisions whether or not to use a recovery.

#### *(a) Dispute resolution*

Dispute resolution accounts for twenty-six or 7.8 percent of the transactions in the sample. These transactions include not only dispute resolutions but also the extinguishing of old claims, resettlements made simultaneously with extinguishing an old claim, and partitions among heirs. The power of a recovery to give the plaintiff good title and to extinguish the claims of the defendant and vouchees to warranty made recoveries especially suitable for the purposes of ending disputes. This was especially true where the claim to be ended was based on an entail. As we have had occasion to notice, some of the earliest recoveries were used to settle a dispute between Ralph, Lord Cromwell, and Henry Pierpont involving conflicting claims to the Heriz inheritance.<sup>11</sup> In this instance, the parties do not appear to have been entirely confident that the recovery alone would be sufficient. The Cromwell–Pierpont recoveries were preceded by collusive actions of novel disseisin with judgments for Cromwell and by collusive actions of attain, which would preclude Pierpont's heirs from bringing attain to overturn the judgments in the novel disseisin

<sup>11</sup> Chapter 5, above, p. 255; Appendix, III, A, 1.

actions.<sup>12</sup> In later uses of a recovery to end disputes reliance was placed, it appears, solely on the recovery.

Final concords might be used to resolve an actual dispute, but a final concord did not have the power to end an entail. If the settlement had one party simply convey the disputed property to another the recovery need not be supplemented by another means of conveyance. But in more complicated settlements, the terms of the settlement had to be set forth in another document. A final concord could be used for this purpose. In this type of case, the recovery merely cleared title, as it were, for the terms of the settlement. In 1467, William Stephens recovered the manor of Ashby de la Zouche, Leicestershire, from Richard Bingham and Margaret his wife, Thomas Ferrers, John Aston, and William Berkeley.<sup>13</sup> In 1462, Edward IV had granted the manor to William Hastings, Lord Hastings. The defendants to the recovery were the heirs of Joyce Burnel; they claimed the manor under a final concord of 1304. The recovery was a step in the resolution of the dispute. For in June 1467, shortly after the recovery, Stephens granted the manor to William Hastings in tail, remainder to Leonard Hastings, William's father, in tail male, remainder of one-half of the manor to William Berkeley, the defendant to the recovery, and his heirs, and split the other half equally among Margaret, wife to Richard Bingham, Ferrers, and Aston – the other defendants to the recovery. The recovery had wiped the slate clean for the settlement.<sup>14</sup>

Closely related to the resolution of current disputes was the use of recoveries to extinguish old claims to land. It is not clear why the parties decided upon a recovery at the particular time they did so. In 1478, Margaret Throckmorton recovered the manor of William Underwood, Buckinghamshire, from Robert Nevill.<sup>15</sup> In the fourteenth century John de Nowers had transferred the manor to Robert Onley whose daughter and heiress was Margaret, the plaintiff to the recovery. The defendant to the recovery was a descendent of John de Nowers. The recovery extinguished any

<sup>12</sup> CP40/720, m.137 (Hil. 1441); CP40/720, m.321 (Hil. 1441); Payling, "Inheritance and Local Politics," 80–5.

<sup>13</sup> Appendix, III, A, 5.

<sup>14</sup> For another example of a final concord used in tandem with a recovery to end a dispute, see Appendix, III, A, 9.

<sup>15</sup> Appendix, III, B, 2.

claim he might have had but it is not clear why the parties decided upon a recovery in 1478.

A recovery could also be used to extinguish more than one claim arising from previous dealings with a piece of property. In 1490, feoffees for William Hussey, chief justice of King's Bench, recovered the manor of Woodhead and Casterton Bridge, Rutland, from Geoffrey Sherard and his wife Joy, Thomas Sherard and his wife Margaret, John Browe and his wife Alice, and Maurice Berkeley.<sup>16</sup> Thirty years earlier, in 1460, John Browe had sold the manor of Woodhead to Thomas Blount. Geoffrey Sherard and Maurice Berkeley had been feoffees of Richard Blount. Margaret, wife to Thomas Sherard, was the heir general of John Browe who had sold the manor to Blount. John Browe was probably his male heir. The recovery removed the claims or interests of two previous holders of the manor.

The double voucher recovery could be used to resettle land while simultaneously extinguishing a claim to the land. Resettlement could thus provide the occasion for ending a claim. In 1482, Robert Morton and John Harding recovered the manor of Knowle, Surrey, from Robert Harding, Robert Hill, George Stiles, and Thomas Ringstone, all of which defendants vouched John Newdigate to warranty.<sup>17</sup> Newdigate then vouched the common vouchee. Newdigate was the great-great-grandson of the fourteenth-century holder of the manor.<sup>18</sup> The recovery served two purposes. It enabled Robert Harding to resettle the land in feoffees. He later bequeathed the manor to his nephew, Thomas Harding.<sup>19</sup> The recovery also ended Newdigate's ancient claim to the manor.

A recovery could also be used to prepare for a division among co-heiresses. In this type of transaction, the heiresses suffered a recovery to strawmen who resettled portions of the lands on each heiress. In three actions in 1497, three serjeants at law, Humphrey Conyngesby, John Yaxlee, and Robert Constable, recovered the manors of Swaledale, Yorkshire, Toynton, Lincolnshire, and Burley, Rutland, from William Stavely and his wife Alice, Joan Nevill, and Thomas Sapcote and his wife Joan.<sup>20</sup> The plaintiffs used a writ of entry *post disseisin* to allege that defendants had

<sup>16</sup> Appendix, III, B, 4.

<sup>17</sup> Appendix, III, C, 2.

<sup>18</sup> Manning and Bray, *History of Surrey*, I, 537.

<sup>19</sup> 3 *V.C.H.*, *Surrey* 88.

<sup>20</sup> Appendix, III, D, 6.

entered after the disseisin of John Fraunceys. Fraunceys had been a former holder of the land in right of his wife Isabel, whose daughters were the female defendants to the recoveries. The plaintiffs to the recoveries divided the manors among Isabel's three daughters.

(b) *Sales*

Sales account for 152 or 45.5 percent of the 334 transactions. Sales were divided into a number of subcategories.<sup>21</sup> The first subcategories of sales divide simple sales of land described as a manor or a part thereof from other simple sales of land. A simple sale is a transfer of fee simple in exchange for the purchase price. The reason for dividing sales involving at least a fraction of a manor from other sales is the belief among historians that there were separate markets for the two types of landed property. Certainly, there was a more active market for lands that did not amount to a manor. As is shown below, the sample of identified sales transactions using common recoveries suggests two further differences between the two markets for lands.<sup>22</sup> In addition to straightforward sales of at least a fraction of a manor and of lands less than a manor, the category of sales includes a number of other sale transactions that merit some explanation.

The category includes a subcategory of complicated sales: a sale of less than fee simple or a sale of fee simple with additional provisions between the parties. The seller might take back a life estate<sup>23</sup> or might convey a life estate to the remainderman.<sup>24</sup> These complicated sales were separated from sales of a life estate to one who had no other interest in the property.<sup>25</sup> A recovery might also execute part of a complicated exchange of lands and money between the parties.<sup>26</sup> This type of complicated sale was separated from the use of two recoveries to execute a simple exchange of lands between the parties.<sup>27</sup> One complicated sale illustrates how a purchaser could try to protect himself from dower claims by his seller's widow. In 1499 Reginald Bray purchased the manor of Cotesbrook, Northamptonshire, and

<sup>21</sup> See Appendix and the summary of the Appendix on p. 352, below.

<sup>22</sup> Below, pp. 325–9.

<sup>23</sup> Appendix, I, C, 4.

<sup>24</sup> Appendix, I, C, 1.

<sup>25</sup> Appendix, I, E.

<sup>26</sup> Appendix, I, C, 2.

<sup>27</sup> Appendix, I, D.

lands in Bedfordshire from John Markham.<sup>28</sup> Recoveries transferred title to Bray.<sup>29</sup> Markham also conveyed by a recovery to Bray and his feoffees the Lincolnshire manors of Sedgebrook and Allington.<sup>30</sup> The contract of sale included a provision that if Markham's widow recovered dower in the Northamptonshire and Bedfordshire property, Bray was to have the revenues of the Lincolnshire manors for her life. If she released her right to dower, Bray and his co-feoffees were to hold the Lincolnshire manors to Markham's use.

The subcategory of royal purchases and political transfers also deserves some explanation. Royal purchases, purchases by the king, is self-explanatory but a political transfer is illustrated by one transaction in the sample. In 1462, William Herbert recovered the castle and manor of Crickhowell in the Welsh Marches from Thomas Pauncefot.<sup>31</sup> In 1445, Henry VI had restored to Richard, duke of York, the lordship of Crickhowell, which was occupied by the Pauncefots. Edward IV, soon after his accession, transferred Crickhowell to Herbert, whose family had long served York. It is not clear whether the Pauncefots had remained in possession after 1445 as the tenant of York, whether they had resumed possession some time later, in which cases the recovery executed the transfer to Herbert, or whether the recovery served to extinguish a claim by the Pauncefots. At any rate, it is of some interest that Herbert secured his title by a recovery.

The subcategory of purchases and resettlements illustrates one use of the double voucher recovery. A single recovery could simultaneously extinguish the seller's title and resettle the lands for the purchaser. Those taking for the resettlement would be the plaintiff; the purchaser would be the defendant; and the seller would be the vouchee to warranty. The question arises why the recovery and transaction was structured in this way, for if a purchaser wished his feoffees to hold the land, he could, and not infrequently did, have the seller suffer a recovery to those feoffees.<sup>32</sup> These transactions need not involve a double voucher

<sup>28</sup> *Close Rolls, 1485–1500*, No. 1101: Appendix I, C, 3.

<sup>29</sup> The recovery involving the Bedfordshire lands is calendared in Appendix, I, C, 3. I could not find a recovery for the Northamptonshire manor.

<sup>30</sup> Appendix, I, C, 3. <sup>31</sup> Appendix, I, H, 1.

<sup>32</sup> Appendix, I, A, 28; I, A, 37; I, A, 40; I, A, 41; I, A, 59; I, A, 64; I, A, 69; I, A, 71; I, A, 72; I, A, 73; I, A, 77; I, A, 80.

recovery. There seem to have been two reasons for using a double voucher recovery. First, some time might have elapsed between the purchase and the purchaser's decision to resettle the land. Secondly, the purchaser might have been taking advantage of the implication of *Taltarum's Case* that all of the seller's titles would be extinguished only if he were in the position of vouchee, rather than defendant.<sup>33</sup> For this purpose, the recovery could either put the purchaser as plaintiff, his agent as defendant, and the seller as vouchee or the recovery could put the purchaser's feoffees as plaintiff, the purchaser as defendant, and the seller as vouchee. In August 1492 Thomas Kebell, serjeant at law, agreed to purchase the manor of Stanton-by-Sapcote, Leicestershire, from Henry Grey of Codnore.<sup>34</sup> In Michaelmas Term of that year Robert Mome and Richard Viller recovered the manor from Kebell, Robert Selby, and William Smith. The defendants vouched Henry Grey of Codnore who vouched the common vouchee. Mome was Kebell's executor. The parties might have used this form of recovery because Kebell had received the land in August or early September and then rather quickly decided that he wanted Mome, his executor, to hold the land. Alternatively, Kebell might have wished to have the benefit of *Taltarum's Case*. Instead of having Grey convey to a strawman who would then suffer the recovery to Kebell and vouch Grey to warranty, Kebell might have put himself in the role of the strawman. His doing so would have precluded the possibility of his agent going astray. From this view it becomes interesting to notice that all but one of the transactions classified as purchase and resettlement took place after *Taltarum's Case*.

Who were the purchasers in these sales transactions? Excluding exchanges, grants of life estates, royal purchases and political transfers, and mortgages, there are 141 sales transactions in the sample. In 129 of these transactions it was possible to assign an occupational or social status to the purchaser. Purchasers were classified as royal or seigneurial official, lawyer, merchant, noble, knight, gentry, or yeoman. The most frequent purchasers were royal or seigneurial officials, who account for thirty-five or 27.1 percent of the 129 transactions. Next come the lawyers who were purchasers in thirty or 23.3 percent of the 129 transactions.

<sup>33</sup> See Chapter 5, above, pp. 274–5.

<sup>34</sup> Appendix, I, G, 5.

Thirdly, there are merchants who made twenty-seven or 20.9 percent of the purchases. Together, these three groups account for ninety-two or 71.3 percent of the 129 purchases. These figures accord with the views of other historians that royal and seigneurial officials, lawyers, and merchants were the dominant purchasers on the fifteenth-century land market.<sup>35</sup> They were able to make the money that enabled them to purchase land as investments and as icons of upward social mobility. And lawyers, in particular would be aware of the recovery as a means of securing good title.

Members of landed society, however, were not inactive. Gentry below the status of knight made seventeen or 13.2 percent of the 129 purchases; knights made ten or 7.8 percent of the 129 purchases; nobles made nine or 7.0 percent of the 129 purchases; yeomen made one or 0.8 percent of the 129 purchases. Together, members of these groups made thirty-seven or 27.5 percent of the purchases. The comparatively high percentage of gentry purchasers fits the views of other historians who have found gentry purchasers adding to and consolidating their estates or making purchases in order to make grants to younger sons, which was becoming infrequent, or to endow chantries.<sup>36</sup>

Turning to sellers, it was possible to assign an occupational or social status to only 104 of the 141 sellers. The major reason why fewer sellers than purchasers could be identified is that most of the sellers in transactions involving less than a manor were not susceptible to identification. Only fourteen sellers in these transactions could be identified, but twenty-seven purchasers in similar transactions could be identified. Gentry below the status of knight made fifty-three or 51.0 percent of the 104 sales. Nobles made twenty or 19.2 percent of the sales. Knights made eleven or 10.6 percent of the sales. In one transaction, the seller styled himself a yeoman. Merchants made eight (7.7 percent), royal or seigneurial officials made six (5.8 percent), and lawyers made five (3.8 percent) of the 104 sales. Generally speaking, then, recoveries used to execute sales saw a transfer of land predominately from the gentry to merchant and bureaucratic professionals and officials.

<sup>35</sup> e.g. Payling, "Social Mobility," 65–7; Carpenter, *Locality and Polity*, 124–5 (royal and seigneurial officials and lawyers as purchasers); S. Thrupp, *The Merchant Class of Medieval London* (Ann Arbor: University of Michigan Press, 1948), 127–9 (merchants on the land market).

<sup>36</sup> Pollard, *North-eastern England*, 82–3; Wright, *Derbyshire Gentry*, 26–7.

Since the unidentified sellers are likely to be smaller landholders the conclusion based on the 104 identified sellers understates the presence of smallholders as sellers on the land market.

If the 141 sales transactions are divided between those involving at least a fraction of a manor and those involving less than a manor, two differences emerge between the two types of sales transactions. Although the samples are too small to support firm conclusions, the two differences are nevertheless suggestive of the differences between two segments of the land market. First, although most purchasers of manors were royal and seigneurial officials (thirty or 29.7 percent of 101), most purchasers of lands less than a manor were merchants (nine or 32.1 percent of twenty-eight), and lawyers (seven or 25 percent of twenty-eight). Royal officials could command greater resources. Merchants and lawyers were more likely to accumulate smaller holdings over a longer period. Secondly, a greater percentage of sales transactions involving lands less than a manor were between persons of the same occupational or social status. The evidence is, admittedly, weak in that only in eleven transactions involving less than a manor was it possible to identify both purchaser and seller. In six of these transactions, both parties were of the same occupational or social status. Of the eighty-nine sales involving at least a fraction of a manor in which it was possible to classify both parties, in only thirteen transactions were purchaser and seller of the same social occupational status. As one might expect, given their proportion of the population, most same-status transactions involving at least a fraction of a manor were transactions between members of the gentry. When it came to transactions involving less than a manor, the number of same-status transactions between members of the gentry was about the same as those between merchants.

The prevalence of smallholders and sellers on the land market suggests an important motive for sales using a recovery. Historians have identified indebtedness as an important motive for sales of land.<sup>37</sup> Sales from this motive appear in the sample. For example, in 1484 John Underhill recovered from John Cotes three messuages and lands in Weston-under-Wetherly and Honnington, Warwickshire.<sup>38</sup> The recovery probably executed one of Cotes'

<sup>37</sup> Carpenter, *Locality and Polity*, 133–4, 256–7; Wright, *Derbyshire Gentry*, 27.

<sup>38</sup> Appendix, I, B, 14.

various sales of land to pay the debts of a declining gentry family.<sup>39</sup> Indebtedness, or greater inability to deal with indebtedness, would explain the dominance of gentry among the known sellers of land in the sample sale transactions. They would be harder pressed by debts and therefore more inclined to sell lands. Sales of some lands were also made in order to purchase other lands. In 1482, Simon Wiseman suffered three recoveries to Richard and John Maudeley of lands and tenements in Bristol, Wiltshire, and Somerset.<sup>40</sup> In the same year he recovered one-half of the manor of Tasburgh, Norfolk, from John Palmer.<sup>41</sup> The two transactions allowed Wiseman to consolidate his holdings. Another reason sometimes given for selling land is a failure of heirs, perhaps especially a failure of sons.<sup>42</sup> For example, in 1450 John Noreys recovered the manor of Hampstead Ferrers, Berkshire, from William Ferrers of Chartley and his wife Elizabeth.<sup>43</sup> Ferrers had daughters but no sons.

Landholders in this period had growing reluctance to allow their lands to descend to female heirs.<sup>44</sup> Daughters would divide the inheritance. Settling the estate on a male heir would keep the estate intact and would keep the holder's name associated with the property. Although resettlement was a tactic to achieve this strategy, the line between resettlement and sale was not sharp and clear. In 1464 Elizabeth Wakehurst used a recovery to sell the remainder after her life to her kinsman Thomas Etchingham rather than have the estate descend by an entail to her two granddaughters.<sup>45</sup> Although the stronger motive for disinheriting her granddaughters was their elopement, the transaction also kept the estate intact. Etchingham was said to have paid £200 for the remainder, but the transaction was both a sale and a transfer within a family.

It is seldom possible to determine the relationship between lands sold and lands retained by a seller. As in the case of Simon

<sup>39</sup> Carpenter, *Locality and Polity*, 133–4.

<sup>40</sup> Appendix, I, B, 10. <sup>41</sup> Appendix, I, A, 36.

<sup>42</sup> Payling, "Social Nobility," 53. <sup>43</sup> Appendix, I, A, 4.

<sup>44</sup> McFarlane, *Nobility*, 76; P. Jeffries, "The Medieval Use as Family Law and Custom: The Berkshire Gentry in the Fourteenth and Fifteenth Centuries," *Southern History* 1 (1979), 69; E. Acheson, *A Gentry Community, Leicester in the Fifteenth Century* (Cambridge: Cambridge University Press, 1992), 161; Wright, *Derbyshire Gentry*, 42–4; Carpenter, *Locality and Polity*, 98–9, 258–9.

<sup>45</sup> Appendix, IV, E, 4, also discussed below, pp. 345–7.

Wiseman, one supposes that a seller would dispose of peripheral estates before jeopardizing his main holdings.<sup>46</sup> Although the old norm that a father was to sell purchased land before he sold inherited land was probably still alive, the sample sales transactions neither confirm nor contradict this reasonable hypothesis.<sup>47</sup> There is some evidence, admittedly ambiguous, that a wife's inheritance was a prime candidate for sale. In five of the sales transactions, it is fairly clear that the wife's inheritance brought to her marriage was put up for sale.<sup>48</sup> In another transaction, it appears that a grandmother's inheritance was the land sold.<sup>49</sup> In ten other transactions the recovery executing the sale was accompanied by a final concord in which the seller and his wife conveyed or quitclaimed to the buyer with warranty from the seller's wife and her heirs.<sup>50</sup> The significance of this warranty clause is ambiguous. If the land were held by the husband alone and in his own right in fee tail, the warranty clause would set up a collateral warranty against heirs of the wife who claimed the entail as heir of the husband.<sup>51</sup> But the warranty clause might also indicate that the land was held in right of the wife. The final concord, with judicial examination of the wife's consent, would remove doubt whether the wife had participated in the action against her husband and herself. And, of course, if the nervous purchaser wanted both a recovery and a final concord, in the case of the land being the wife's inheritance the warranty clause would have to be from the wife and her heirs. That the inheritance a wife brought to her marriage would be sold before her husband's patrimony comports both with the ideology of male inheritance in fifteenth-century society and indebtedness as a prime motive for selling land. Marrying an heiress could enable a man to pay his debts.

Turning to the role a recovery played in a sales transaction, one must consider both the use of double voucher recoveries and the use of other conveyance instruments such as releases and final

<sup>46</sup> Jeffries, "Berkshire Gentry," 58-9.

<sup>47</sup> McFarlane, *Nobility*, 71; Jeffries, "Berkshire Gentry," 60.

<sup>48</sup> Appendix, I, A, 6; I, A, 44; I, A, 65; I, A, 83; I, F, 2.

<sup>49</sup> Appendix, I, A, 25.

<sup>50</sup> Appendix, I, A, 17; I, A, 22; I, A, 25; I, A, 32; I, A, 56; I, A, 64; I, A, 70; I, A, 75; I, B, 13; I, C, 1.

<sup>51</sup> See Chapter 4, above, pp. 226-7.

concorde together with a recovery. There were three main reasons for using a double voucher recovery. First, as discussed earlier, a double voucher recovery could be used to make a purchase and to resettle the land simultaneously.<sup>52</sup> Secondly, under *Taltarum's Case*, putting the seller in the position of a vouchee to warranty had the recovery extinguish all of his titles to the land.<sup>53</sup> Some of the double voucher recoveries among the sales transactions appear to have been instances of this use of the double voucher recovery.<sup>54</sup> For example, in Michaelmas Term 1498 John Hutton and John Ropes recovered the manor of Covington, Cambridge-shire, from John Chilton and Walter Larkin, who vouched William Danseth, who vouched the common vouchee.<sup>55</sup> The transaction was a sale from Danseth to John and Thomas Hutton, for whom the plaintiffs were acting as agents. Also in Michaelmas Term, and in preparation for the recovery, Danseth had conveyed the manor to the defendants, Chilton and Larkin. The purpose of this conveyance was to put Danseth in the position of vouchee in the later recovery.

Thirdly, a double voucher recovery could be used to extinguish simultaneously the interests of more than one person.<sup>56</sup> In 1479, John Goldwell purchased the manor of Bradshaw, Suffolk, from Richard Illingworth and Thomas Fox.<sup>57</sup> Illingworth held a life estate and Fox, the reversion. In order to extinguish the sellers' interests Goldwell recovered the manor from Illingworth and his feoffees as defendants, who vouched Illingworth's son, who vouched Fox, who vouched the common vouchee. In 1502, Robert Drury purchased the manor of Marlesford, Suffolk, from the Rokes.<sup>58</sup> In doing so, he used two agents Robert Norwich and Edward Stubbs. The transaction had at least three steps. In Hilary Term, William Rokes released and quitclaimed to Norwich and Stubbs to the use of Drury. That same term, Norwich and Stubbs recovered the manor from James Hamond and Thomas Ridnall, who vouched Richard Rokes, who vouched Thomas Rokes, who vouched the common vouchee. Richard and Thomas were

<sup>52</sup> Above, pp. 324–5.

<sup>53</sup> Chapter 5, above, pp. 274–5.

<sup>54</sup> Appendix, I, A, 48; I, A, 74; I, A, 87. And possibly Appendix, I, A, 42; I, A, 77.

<sup>55</sup> Appendix, I, A, 74.

<sup>56</sup> Appendix, I, A, 22; I, A, 33; I, A, 39; I, A, 42; I, A, 77; I, A, 92.

<sup>57</sup> Appendix, I, A, 33.

<sup>58</sup> Appendix, I, A, 77.

brothers, but their relationship to William is not known. Almost two years later, Richard and Thomas released and quitclaimed to Drury, Norwich, and Stubbs and gave Drury a bill witnessing his purchase of the manor. They probably waited before taking this last step until Drury had paid the purchase price in full and had gone into possession. The interests of Hamond and Ridnall are not known. They might have been merely strawmen to put the Rokes in the position of vouchees or they might have been the Rokes' feoffees.

In 1482, Thomas Danvers purchased the manors of Golder and Rufford, Oxfordshire, from John Barantine.<sup>59</sup> John's mother, Elizabeth, was holding the manor either as jointure or as dower. The recovery had Danver's agents as plaintiffs, Elizabeth as defendant, and John Barantyne as vouchee, who vouched the common vouchee. This recovery anticipates the statute of 1495, which prohibited a widow holding dower or jointure from her husband's inheritance to suffer a recovery unless the heir consented as a matter of record or by instrument enrolled.<sup>60</sup> The heir's consent could be made a matter of record by having the widow vouch the heir to warranty. Further examples of double voucher recoveries structured to comply with the statute do not appear among the sales transactions. But the statute did not apply only to sales, and it is not hard to find double voucher recoveries tailored to the requirement of the statute. In a resettlement transaction in 1502 Margaret Scot, who held the manor and advowson of Stapleford Tawney, Essex, with her husband for their lives, remainder to their eldest son John Scot in tail male, suffered a recovery of the manor and advowson and vouched John Scot to warranty.<sup>61</sup> In an unclassified recovery in 1499, Agnes Hamme, widow, suffered a recovery of a messuage and lands in Stepney, Middlesex, and vouched Henry Hamme, probably the heir, to warranty.<sup>62</sup>

The alternative to vouching someone with an additional interest in the land was to have him appear by aid prayer. In 1502, Henry Colet and his co-feoffees recovered messuages and lands in Weldon, Great Weldon, and Little Weldon, Northamptonshire, from Edward Cumberford, who prayed aid of Thomas

<sup>59</sup> Appendix I, A, 41.

<sup>60</sup> 11 Hen. VII, c. 20 (1495), *Statutes of the Realm*, II, 583.

<sup>61</sup> Appendix, IV, A, 62.

<sup>62</sup> CP40/948, m.158 (Pas. 1499).

Cumberford.<sup>63</sup> Thomas then vouched the common vouchee. By using aid prayer, the interest of a life tenant and the remainderman or reversioner could both be ended at the same time. The distinction between when to vouch to warranty and when to pray aid does not seem to have been rigorously enforced, probably because the plaintiff to the recovery would not raise the point.<sup>64</sup>

A purchaser was seldom willing to rely on the recovery alone to transfer title. He also wanted a charter granting him the land, or a release and quitclaim, or a final concord. In some transactions, the seller would release to the purchaser or his agents after the recovery.<sup>65</sup> As was noted in the last chapter, the sheriff seldom executed the judgment in a recovery in this period.<sup>66</sup> The purchaser went into possession and received a release from his purchaser. The same might be achieved by a final concord that merely tracked the recovery – that is, conveyed the land from defendant, or vouchee, to plaintiff.<sup>67</sup> The final concord might also precede the recovery.<sup>68</sup> More interesting are the transactions in which the accompanying charter, release, or final concord did not merely track the recovery. There appear to have been three reasons for supplementing a recovery with additional instruments of conveyance that did not track the recovery. First, the recovery might be used primarily to extinguish the defendant's title rather than to place title in the plaintiff. A final concord could then convey the property from the plaintiff in the recovery to those whom the purchaser wanted to hold the land. For example, in 1477, John Horwood recovered the manor of Tilney, Essex, from John Broughton.<sup>69</sup> In June of that year Broughton quitclaimed the land by final concord to Thomas Rotherham, bishop of Lincoln, John Russell, bishop of Rochester, Thomas Hunston, John Horwood and the heirs of Horwood. The final concord acknowledged the title of Horwood's co-feoffees. In some transactions however, all the plaintiffs to the recovery were different from the grantees of the final concord. In 1479, Roger Lovet and his

<sup>63</sup> Appendix, I, B, 29.

<sup>64</sup> Chapter 5, above, pp. 288–90. See Doe, *Fundamental Authority*, 118–19 for the distinction between aid prayer and voucher to warranty.

<sup>65</sup> e.g. Appendix, I, A, 28; I, A, 77; I, A, 80; I, A, 87; I, B, 16; I, B, 18; I, B, 23.

<sup>66</sup> Chapter 5, above, pp. 291–9.

<sup>67</sup> e.g. Appendix, I, A, 4; I, A, 29; I, A, 45; I, A, 56; I, B, 11; I, B, 12; I, B, 24.

<sup>68</sup> e.g. I, B, 13. <sup>69</sup> Appendix, I, A, 25.

wife, Alice, sold the Cambridgeshire manor of Boxworth, called Overhall, to a Yorkshire merchant, William Copley.<sup>70</sup> By final concord they released and quitclaimed from themselves and the heirs of Alice to William Copley, Thomas Copley, Henry Langley, Edward Goldburgh, Thomas Rayner, and John Harryes. But they suffered a recovery to Thomas Wood, no doubt an agent of Copley. Why the plaintiff in the recovery differed from the grantee of the final concord is a mystery.<sup>71</sup>

Secondly, the supplementary instruments sometimes ended the interests of other persons than the defendant in the land. Returning to the Horwood–Broughton transaction, Horwood also received releases with warranty from John Broughton, *snr.*, the seller's father, and Thomas Broughton, the seller's brother.<sup>72</sup> The releases, however, were not sufficient to prevent later litigation over the transaction. Horwood later sued Broughton and his co-foffees in Chancery for the manor.<sup>73</sup> In 1482, when John Wyndham purchased the manor of Melton Constable, Norfolk, from John Ayscough, Wyndham not only recovered the manor from Ayscough but also obtained quitclaims with warranty from him and from Thomas and William Ayscough.<sup>74</sup> Their relationship to John Ayscough is not known. In 1492, Hugh Clopton purchased the manor of Little Wilmcote, Warwickshire, from Henry Lisle.<sup>75</sup> He had his feoffees recover the manor from Lisle and receive, by final concord, the release of Lisle and his wife Elizabeth, with warranty from Elizabeth's heirs. They also obtained the release with warranty of Henry's son, John Lisle.<sup>76</sup> The seller's son might also be included in the seller's release.<sup>77</sup> Sometimes purchasers went rather far afield to obtain releases to the lands they had purchased. Collecting the release of a remainderman was only good insurance.<sup>78</sup> When, however, John Morton, master of the Rolls, purchased the manor of Milbourne

<sup>70</sup> Appendix, I, A, 32.

<sup>71</sup> For another example of differences between recovery and final concord see Appendix I, A, 64.

<sup>72</sup> Appendix, I, A, 25.

<sup>73</sup> C1/52/17, 18, 19. The Broughtons were heirs and feoffees of Mary Stoneham. The Chancery suit turned on whether Mary Stoneham's will had been performed, only after which could the property be sold.

<sup>74</sup> Appendix, I, A, 43.

<sup>75</sup> Appendix, I, A, 64.

<sup>76</sup> For other releases by a seller's heir see Appendix, I, A, 37; I, A, 38.

<sup>77</sup> e.g. Appendix I, A, 70; I, A, 78.

<sup>78</sup> Appendix, I, A, 28.

Deverell, Dorset, from the heirs of Humphrey Stafford, he not only recovered the manor against the heirs and obtained their quitclaim with warranty, he also obtained the release of a nephew of the husband of one of the heiresses.<sup>79</sup>

Thirdly, by obtaining the releases of persons other than the seller the purchaser might hope to set up a collateral warranty to bar the seller's issue.<sup>80</sup> It was noted above that some releases with warranty by the seller's wife might have been attempts to set up collateral warranties.<sup>81</sup> Releases by the seller's brother could serve two purposes. If the seller died childless, his brother could well turn out to be his heir. The brother's release would bar him. If the land had been fee tail, the bar would be good to the extent that the brother had assets by descent. If the seller left children, the brother's warranty bar (if he died childless) would descend collaterally to the seller's issue. Returning once again to John Horwood's purchase of Tilney, Norfolk, from John Broughton, Horwood received the release of John's brother, Thomas.<sup>82</sup> When in 1482 Robert Morton purchased the Somerset manors of Pitney Lorty and Knolle from William Gunter, Morton's feoffees recovered the manors from Gunter.<sup>83</sup> Two years later one of Morton's feoffees obtained the release with warranty of William Gunter's brother and heir, Edmund. And a year after that, another feoffee obtained the quitclaim with warranty of Edmund's brother, Thomas. The latest example calendared in the Appendix of a seller getting the release of his purchaser's brother occurs in 1497.<sup>84</sup> One cannot conclude, however, that attempts to set up collateral warranties ended at this time and that conveyancers had come to rely entirely upon recoveries to end entails. In St. German's discussion of recoveries, the Student raises the related question of ending entails by collateral warranty.<sup>85</sup>

(c) *Resettlements and transfers into uses*

A third category of transaction contains resettlements including transfers in and out of uses. Of the 334 transactions, 147 or 44.0

<sup>79</sup> Appendix, I, A, 29.

<sup>80</sup> The use of both a recovery and collateral warranty is also discussed in Chapter 4, above, pp. 240-1.

<sup>81</sup> Above, p. 329.

<sup>82</sup> Appendix, I, A, 25.

<sup>83</sup> Appendix, I, A, 37.

<sup>84</sup> Appendix I, A, 71.

<sup>85</sup> *Doctor and Student* 172.

percent fall within this category. Unfortunately, in seventy-seven transactions the exact nature of the resettlement cannot be determined. The reason for classifying these transactions as resettlements is that the property in question did not leave the family. Where the plaintiff to the recovery is a single individual or two or three, one suspects that the plaintiff soon resettled the property on the defendant or vouchee – the current holder – of the lands. Where the plaintiff to the recovery is a large group, one suspects that they are feoffees holding to the use of the current holder and his last will. But these surmises are no more than that. A recovery to a single plaintiff could facilitate a transfer into uses.<sup>86</sup> The single plaintiff might or might not be one of the feoffees. Without more information a more precise classification is not possible.

Transactions that put land into uses account for twenty-two, or 6.6 percent of the 334 transactions. A man holding land in fee tail could not lawfully put land into uses without a recovery to end the entail. The heir under the entail, however, frequently accepted the transfer to uses because of the norm favoring last wills of land and because in most cases the transfer to uses did not permanently end the entail but only delayed the heir's entry into his inheritance under a grant in fee tail from his ancestor's feoffees. The use of recoveries to transfer land into uses rendered the feoffees' title more certain and thereby satisfied an increasing desire for greater clarity and certainty of title. In three transactions, the land was put into uses because the current holder was mentally defective and incapable of managing his property.<sup>87</sup> In some transactions, the plaintiffs to the recovery took as defendant's feoffee.<sup>88</sup> In others, the plaintiffs conveyed the lands to the defendant's feoffees.<sup>89</sup> Any legal reason for the difference between these forms is mysterious. In only three of the transactions putting land into uses did the parties use a double voucher recovery. In one of these transactions, the defendants to the recovery were probably the current feoffees.<sup>90</sup> They vouched their *cestuy que use*. The result of the transaction would be to put the land into new feoffees. In another transaction, because the defendants are only two individuals who vouch the holder, it is not possible to tell whether they

<sup>86</sup> e.g. Appendix, IV, B, 1.

<sup>87</sup> Appendix, IV, B, 3; IV, B, 6; IV, B, 10.

<sup>88</sup> Appendix, IV, B, 7; IV, B, 11; IV, B, 13.

<sup>89</sup> Appendix, IV, B, 5; IV, B, 19.      <sup>90</sup> Appendix, IV, B, 16(a).

are the holder's current feoffees or strawmen introduced to put the holder in the position of vouchee.<sup>91</sup> In the third transaction, the double voucher recovery extinguished various claims to the land.<sup>92</sup> In two transactions, the recovery conveyed land out of uses, either to the *cestuy que use* or to a new set of feoffees.<sup>93</sup>

A recovery could also be used to make a marriage or spousal settlement. A marriage settlement was a settlement of land on the couple at the time of their marriage.<sup>94</sup> A spousal settlement was a resettlement of land by one party in a marriage to provide a life estate to his or her spouse.<sup>95</sup> In either type of resettlement it was sometimes necessary to extinguish the interest of current feoffees and put the land in the hands of new feoffees or of strawmen who would hold or regrant the land in accordance with the terms of the desired settlement. The double voucher recovery lent itself to this purpose. The new feoffees or strawmen would be the plaintiff; the current feoffees would be the defendant; and the current holder, vouchee.<sup>96</sup> A double voucher recovery could also be used to eliminate various interests in order to clear title for the resettlement. For example, in 1497 nine individuals recovered the manor of Ashton [Theynes], Somerset, from Robert Bowering and his wife Alice, who vouched William Juyn, who vouched the common vouchee.<sup>97</sup> A few months later seven of the nine plaintiffs granted the manor back to Robert and Alice in tail, remainder to William Juyn. Alice was William's daughter.

In nineteen transactions, recoveries were used to transfer land from one member of a family to another.<sup>98</sup> Many of the transactions in this category were placed there because the grantor and grantee shared the same family name. Unfortunately, it was seldom possible to discover the circumstances or reasons for the transfer of property. In one transaction, Elizabeth Wakehurst, née Etchingham, transferred land to a Thomas Etchingham rather than have the lands descend to her granddaughters.<sup>99</sup> In another transaction, it appears that Edward, duke of Buckingham settled

<sup>91</sup> Appendix, IV, B, 15.                      <sup>92</sup> Appendix, IV, B, 13.

<sup>93</sup> Appendix, IV, C, 1; IV, C, 2.

<sup>94</sup> Appendix, IV, D, 6; IV, D, 8; IV, D, 10.

<sup>95</sup> Appendix, IV, D, 7; IV, D, 9; IV, D, 15.

<sup>96</sup> Appendix, IV, D, 7; IV, D, 8.

<sup>97</sup> Appendix, IV, D, 17.                      <sup>98</sup> Appendix, IV, E, 1-19.

<sup>99</sup> Appendix, IV, E, 4, discussed below, pp. 346-7.

land on his brother, Henry Stafford, later earl of Wiltshire.<sup>100</sup> This transaction seems to have shared lands received by will from Edward Stafford. The recovery would have cleared title for the transfer.

In six transactions recoveries were used to transfer land to strawmen who resettled the lands, usually on the defendant to the recovery.<sup>101</sup> Frequently, the resettlement was made by final concord.<sup>102</sup> At another time, at least some of these transactions would have been executed solely by final concord. A final concord, however, could not dock an entail. Conveyancers simply had a recovery precede the final concord and used the final concord to set forth the terms of the regrant.

#### (d) *Transfers into mortmain*

Recoveries were also used to transfer lands into mortmain. In nine or 2.7 percent of the 334 transactions a recovery was used for this purpose. The transaction could take one of two forms. In one form, the church or religious house was the plaintiff to the recovery and the donor was the defendant.<sup>103</sup> Upon the vouchee's default, the justices ordered an inquisition *quale ius* in order to determine whether the default judgment was a collusive evasion of the Statute of Mortmain. The inquisition always returned that the plaintiff had the right to the lands in question. In the second form, intermediaries – feoffees – took the position of the plaintiff and the donor was the defendant.<sup>104</sup> Either they or the defendant would obtain the necessary license for the transfer into mortmain.

## 2. SOCIAL ACCEPTANCE OF THE COMMON RECOVERY

Any attempt to reconstruct social attitudes towards the common recovery runs quickly into two main difficulties. First, there is very little evidence that anyone formed an opinion about recoveries independent from how they were used in a particular case or

<sup>100</sup> Appendix, IV, E, 19.

<sup>101</sup> Appendix, IV, F, 1–6.

<sup>102</sup> Appendix, IV, F, 1; IV, F, 2; IV, F, 4; IV, F, 5.

<sup>103</sup> Appendix, II, 1; II, 2; II, 5; II, 6.

<sup>104</sup> Appendix, II, 3; II, 4; II, 7; II, 8; II, 9.

in a defined class of cases. St. German's Doctor criticized common recoveries in part because he thought that the proceedings were a fraud on the court.<sup>105</sup> But after the first recoveries and certainly after the introduction of the common feoffee it is doubtful that any justice or clerk in Common Pleas failed to know what was going on. Knowledge precludes fraud. Nor does it appear that anyone shared the Doctor's abstract distaste for recoveries. In November 1481 Mary Barantyne asked her brother Sir William Stonor to prevail upon her husband, John Barantyne, not to sell his manor of Winnal and his lands in Henton, Oxfordshire.<sup>106</sup> Barantyne nevertheless sold the manor and lands and in 1482 suffered a recovery to his purchaser.<sup>107</sup> Mary objected to the sale, not to the recovery. Of course, lay people might not have been aware of the legal technicalities in a land transfer and probably would not have understood them well had they been aware, but they were quite capable of evaluating the practical consequences. Recoveries were transparent and were not evaluated independently from their use.

Secondly, once a recovery is viewed as merely a device for ending entails, inquiry into the attitudes toward recoveries collapses into inquiry into the attitudes toward ending entails. This inquiry is far from simple. Everything depended upon who was ending the entail, why, to whose disinheritance, and to whose benefit. As these four variables are replaced by particular persons, reasons or motives, and circumstances the variety of situations becomes rather large. Competing norms and values often came into play in each concrete situation. To say, as many historians have said, that normative notions of inheritance, and especially of male inheritance, were powerful in the later fifteenth century is to make an important beginning but no more than that.<sup>108</sup> Norms of inheritance in themselves were not simple and there were countervailing norms and values. Judgment, and attitude formation, quickly became rather complicated. Perhaps for this reason neither Chancery nor parliament, with one

<sup>105</sup> *Doctor and Student* 156–64.

<sup>106</sup> *The Stonor Letters and Papers*, II, No. 294.

<sup>107</sup> Appendix, I, A, 38.

<sup>108</sup> e.g. McFarlane, *Nobility*, 80–1; Wright, *Derbyshire Gentry*, 35–6; Pollard, *North-Eastern England*, 100; Carpenter, *Locality and Polity*, 258; Acheson, *Gentry Community*, 159–60; Jeffries, "Berkshire Gentry," 69.

exception, formulated rules to control or to limit the use of recoveries. Chancery rules and parliamentary statutes, requiring systematic applications, were ill suited to the variety of situations. Nor did the relevant norms and values lend themselves to the systematic ordering required for the formation of bureaucratically applied rules.

The best one can do is to try to get a sense of the variety of situations and how the norms of inheritance played out in those situations, often in interaction with other norms and values. And this endeavor leads to the second difficulty: the difficulty of evidence. Evidence of lay attitudes to entails and attempts to end entails is hard to come by. There are anecdotes of regret by purchasers of entailed lands and of those who suffered a recovery, but they are very few and very far between.<sup>109</sup> Evidence revealing lay attitudes toward entails is also rare. The value of the rare anecdotes, however, is that they reveal interaction between the law of entails and recoveries and social norms. In 1479 Hugh Unton informed Sir William Stonor that one Wagg was troubling a “true widow and bedewoman” of Stonor’s, Robert Oxlade’s mother, concerning the title of her property.<sup>110</sup> “And sir,” wrote Unton, “the land is entailed as fair as any can be unto the heir males and has been these 100 years.”<sup>111</sup> A few lines later in his letter to Stonor, Unton writes: “by parole she has enfeoffed your master-ship, M. Cotesmore, Harry Doget, me, and William Est.”<sup>112</sup> Unton apparently did not think that the widow’s enfeoffment of others, no doubt to her use, was contrary to the fair entail. The enfeoffment gave the feoffees the authority to act in her behalf and to protect the entail, although a lawyer might well have wondered whether she had discontinued the fair entail.

Last wills provide evidence that testators did not believe that a feoffment to uses of entailed lands was contrary to the entail. Testators sometimes instructed their feoffees to maintain the testator’s entail, an instruction that might occur to a careful testator who had transferred entailed lands to feoffees to uses. For example, Thomas Colpeper instructed his feoffees to maintain the

<sup>109</sup> Milsom, *Historical Foundations*, 188; Baker, “Introduction,” *Spelman’s Reports*, II, 206.

<sup>110</sup> *The Stonor Letters and Papers*, II, No. 253.

<sup>111</sup> *Ibid.*, at 91. <sup>112</sup> *Ibid.*, at 92.

settlement which had been entailed on himself and his wife.<sup>113</sup> There is also some evidence of testators delaying the operation of the entail in the belief that the delay was not contrary to the entail. Richard, earl of Salisbury instructed his feoffees to permit his executors to take the profits of certain lands “*michi talliat*” in order that the executor could pay Richard’s debts.<sup>114</sup> Other testators were more careful. Lady Margaret Zouche instructed her feoffees to use the profits of the lands and tenements of her inheritance “for they are fee simple but if it be the manor of Kirklyngton, the which to me is unknown. And if so be that it be tayed, I beseeche my feoffees to suffer my heirs to take the profit thereof and perform my will of the remnant of the lands.”<sup>115</sup> Testators frequently instructed their feoffees to sell lands in order to perform their last will. Sometimes the testator specified the lands to be sold; sometimes not. Thoughtful testators restricted their authorization of sales to the lands held in fee simple.<sup>116</sup> Entails were to be respected, although, perhaps, not as rigorously as strict law required.

The paucity of direct evidence about attitudes to entails means that one has to approach the matter indirectly. The growth in the number of recoveries is itself evidence of its growing social acceptance. From fourteen recoveries executing ten transactions in the entire decade of the 1440s, the number of recoveries grew to 240 recoveries executing 216 transactions in 1502 alone.<sup>117</sup> This growth in the use of recoveries required at least three things. First, knowledge of the technique had to spread through the legal profession. So little is known about the structure of the legal profession in the later fifteenth century that one cannot reconstruct this spread of legal knowledge.<sup>118</sup> Secondly, lawyers themselves had to accept the recovery so that they would recommend its use to their clients or not advise against its use if the suggestion

<sup>113</sup> *Register of Henry Chichele*, II, 382–6 at 385 (Thomas Colpeper, 1429).

<sup>114</sup> *Testamenta Eboracensia*, II, 239–46 at 243 (Richard, earl of Salisbury, 1461).

<sup>115</sup> *Testamenta Eboracensia*, II, 153–7 at 155 (Lady Margaret la Zouche, 1449).

<sup>116</sup> *Ibid.*; *Testamenta Eboracensia*, II, 239–46 at 245 (Richard, earl of Salisbury, 1461).

<sup>117</sup> Chapter 5, above, Table 5.1, p. 253.

<sup>118</sup> See L. Bonfield, *Marriage Settlements 1601–1704: The Adoption of the Strict Settlement* (Cambridge: Cambridge University Press), 60–71, for an excellent tracing of the spread of the strict settlement through the legal profession of the mid-seventeenth century.

to suffer a recovery came from the client. Even lawyers have been known to have scruples.<sup>119</sup> The first recoveries were to the lawyers William Hindstone and John Wydeslade, representing themselves in what were probably their purchases of land.<sup>120</sup> We do not know enough about the circumstances of the sellers, however, to determine how these transactions might or might not have fit under social norms and values. If these lawyers had no qualms when they should have had qualms we cannot generalize from them to other lawyers.

Thirdly, clients had to accept the recovery as a permissible conveyancing device. Anecdotes of client regret, infrequent as they are, are not unambiguous. For example, John Spelman's first recorded retainer involved a monk who regretted having suffered a recovery when he realized that his having suffered the recovery opened the way for female heirs to inherit the property.<sup>121</sup> Presumably his recovery docked a tale male. Perhaps he would not have regretted the reverse: a recovery that docked an entail and led to a resettlement in tail male. The use of a recovery to disinherit heirs merely raised the questions of which heirs were being disinherited, under what circumstances, and to whose benefit. It was increasingly acceptable to disinherit female heirs in order to transfer land to a male relative.<sup>122</sup> Doing so preserved the family land intact by avoiding partition among heiresses. But this preference for males was by no means universal.<sup>123</sup>

Grantors might try to prevent a tenant-in-tail from alienating by putting a condition against alienation in the grant. The willingness of grantors to condition their grants and the degree to which the law accommodated these restraints on ending entails casts some light indirectly on attitudes toward entails. In the

<sup>119</sup> In the mid 1470s Godfrey Grene informed Sir William Plumpton that the judges would give a widow, Ailmer's wife, no favor in her appeal because they understood that the defendants were not guilty and that the litigation was only Plumpton's maintenance. Grene reported that Guy Fairfax (king's serjeant) said openly at the bar that he knew that they were not guilty, and that he would labor their deliverance for alms, not taking a penny: *Plumpton Correspondence*, T. Stapleton (ed.) (London: Camden Society, vol. 4, 1st ser., 1839), 35.

<sup>120</sup> Chapter 5, above, pp. 254–5.

<sup>121</sup> Baker, "Introduction," *Spelman's Reports*, II, 206.

<sup>122</sup> See McFarlane, *Nobility*, 76–7; Wright, *Derbyshire Gentry*, 42; Carpenter, *Locality and Polity*, 248.

<sup>123</sup> Payling, "Social Mobility," 62.

thirteenth century some grantors put such conditions against alienation in their grants.<sup>124</sup> They do not appear, however, to have been a subject of litigation. In the later fifteenth century the use of conditions against alienation was so restricted in the law that conditions against alienation probably had limited practical value. The lawfulness of a condition against alienation by a tenant-in-tail depended upon who was given the right of entry for condition broken. In the case of a simple grant in fee tail that reserved a reversion to the donor and his heirs immediately after the entail, the donor could give himself and his heirs a right of entry if the tenant-in-tail or his issue alienated the land.<sup>125</sup> The reasons for this conclusion, however, were not free from trouble. The standard reason was that under *De Donis*, the tenant-in-tail was not to alienate the land so that the condition was according to law.<sup>126</sup> But the reversioner's entry would not preserve the entail. Indeed, it would leave the heir in the entail or the remainderman without recourse to their formedon writs by means of which they could resuscitate the grant in fee tail.<sup>127</sup> Once the entail had become perpetual earlier in the fifteenth century, the lands received in a formedon action would be entailed lands. Unless the reversioner who entered for condition broken were somehow bound to preserve the entail, the entail would be gone.<sup>128</sup> One might argue, as did Littleton, that the condition was good, because under *De Donis* the will of the donor, including that expressed in the condition, was to be observed.<sup>129</sup> But that mandate applied to the preservation of entails, not their destruction by the reversioner's entry. Despite the troubles with the reasons for the rule, the rule was held to be law by the justices, and the rule was extended in 1493 to the harder cases in which the donor did not reserve a

<sup>124</sup> Chapter 1, above, pp. 26–7.

<sup>125</sup> Lib. Ass., f. 201, pl. 11 (1360); YB Hil. 21 Hen. VI, f. 33, pl. 21 (1443) *per* Fulthorp and Ayscough; YB Hil. 8 Hen. VII, f. 10, pl. 13 (1493); YB Mich. 10 Hen. VII, f. 11, pl. 28 (1494); Littleton, *Tenures*, sections 362–4; Baker “Introduction,” *Spelman's Reports*, II, 206.

<sup>126</sup> YB Pas. 13 Hen. VII, f. 22, pl. 9 (1493) (for this date for this case see note 130, below) *per* Kebell; Littleton, *Tenures*, section 362.

<sup>127</sup> YB Pas. 13 Hen. VII, f. 22, pl. 9 (1493), *per* Danvers.

<sup>128</sup> Littleton saw that the reversioner's entry would destroy the entail and obliquely suggested that he might be bound to preserve the entail: Littleton, *Tenures*, section 364.

<sup>129</sup> Littleton, *Tenures*, section 362.

reversion at all but limited remainders ending with a remainder in fee simple.<sup>130</sup>

Where the grantor has given land in fee tail with remainders over he could not give the next remainderman a right of entry on condition that the preceding tenant-in-tail alienate the land. There were two main reasons for this position. First, there was a rule that a right of entry for condition broken could never be put in anyone other than the grantor.<sup>131</sup> Secondly, as soon as the tenant-in-tail alienated he destroyed the estate on which the remainder depended and thus destroyed the remainder.<sup>132</sup> So, when the remainderman might enter, he no longer had a remainder. This reasoning took the destructibility of remainders a bit far.

In order to understand the practical effects of these rules about conditions against alienations, one has to consider how entails were created. Doing so suggests that the permissible condition against alienation probably had limited practical value. A purchaser of land seldom took title in fee tail.<sup>133</sup> He took title in fee simple and later, if at all, resettled the land on himself or on himself and his wife in fee tail. Yet where a grantee took title in fee tail it was far from standard practice to insert a condition against alienation. Bartholomew Bolney and his father John made grants

<sup>130</sup> YB Pas. 13 Hen. VII, f. 22, pl. 9 (1493); YB Mich. 11 Hen. VII, f. 6, pl. 25 (1495). The first report, which appears in the printed Yearbooks in Easter Term 1498, probably belongs in Easter or Trinity Term 1493. The report has Townshend participating in the discussion although he died on 9 November 1493: Baker, *Serjeants*, 540. It has Rede speaking as a serjeant in Common Pleas although in 1498 he was a justice of King's Bench: Baker, *Serjeants*, 533. It has Fyneux participating although in 1498 he was chief justice of King's Bench: Baker, *Serjeants*, 513. The second report cited above says that in Trinity Term 1493 all the justices in Common Pleas had held that if land is given in fee tail, remainder to the donee's right heirs, on condition that if the tenant-in-tail alienate the donor or his heirs may enter, the condition and the right of entry are good. These are the facts of the case in the first report above. The second report also says that the condition in the case at bar was distinguished from a condition against alienation in a grant in fee simple. In the first report, Rede argued that, because the remainder to the donor's right heirs gave the donor fee simple, the condition was bad. Chief Justice Bryan, however, said that the remainder in fee simple does not fall in until the entail had ended, thus distinguishing the case at bar from a case of a condition against alienation in a grant of fee simple. The matter, says the second report, was well argued. This account fits the extended arguments of the first report.

<sup>131</sup> YB Hil. 21 Hen. VII, f. 11, pl. 12 (1506); Baker, *Introduction to English Legal History*, 320.

<sup>132</sup> YB Hil. 21 Hen. VII, f. 11, pl. 12 (1506).

<sup>133</sup> Chapter 3, above, pp. 177–80.

in fee tail with conditions against alienation.<sup>134</sup> The grants were of small parcels and in manors in which the Bolneys wished to preserve the seignery in themselves. More often entails were created by grant and regrant. It is unlikely that the person taking back an entail from his strawman would restrain his own future ability to alienate the land. Even if he was willing to tie his own hands in this way, it is unlikely that he would wish to give his strawman a right of entry. Feoffees to uses also created entails when they granted lands to their testator's heir or other children. It is not clear whether or how frequently they retained a right of entry. These situations, however, might have lain behind Littleton's suggestion that a donor who entered for condition broken had some obligation to preserve the entail.<sup>135</sup> The *Paston Letters* provides an example of a feoffees including a restraint against alienation in their grant.<sup>136</sup> A permissible condition against alienation did not work well in these grants.

A condition against alienation would have been useful in grants to younger sons. If anyone in the cadet line alienated, the land would return to the donor's heir, the main line. But in the later fifteenth century, fathers were no longer granting land in fee tail to their younger sons with the same frequency as they had earlier. They were granting life estates or annuities or cash portions.<sup>137</sup> The grants were increasingly made, not by the father himself, but by the father's feoffees. A father granting his eldest son and his son's bride a joint fee tail might put a condition against alienation in his grant. During the father's life, the condition would permit the father to enter should his eldest son or his son's widow alienate the land. But after the father's death, the right of entry would descend to the son who had the entail. That would not stop or cure his alienation. It would, however, prevent his widow from alienating, lest her father-in-law's heir enter. But the case of a widow alienating her jointure was dealt with by statute in 1495.<sup>138</sup>

<sup>134</sup> *The Book of Bartholomew Bolney*, 1, 6, 51, 64, 65, 66.

<sup>135</sup> Littleton, *Tenures*, section 364.

<sup>136</sup> *Paston Letters and Papers of the Fifteenth Century*, Norman Davis (ed.) 2 vols. (Oxford: Oxford University Press, 1971), 16–18.

<sup>137</sup> Wright, *Derbyshire Gentry*, 46–9; Pollard, *North-Eastern England*, 102–6; Carpenter, *Locality and Polity*, 215–19. See Acheson, *Gentry Community*, 153. The condition would be useful in the case of an entailed annuity.

<sup>138</sup> 11 Hen. VII, c. 20 (1495), *Statutes of the Realm*, II, 583 discussed below, pp. 350–1.

A more effective restraint on alienations became a part of marriage agreements in the later fifteenth century. Where the groom's father was alive at the time of the contract, the bride's father came to insist that the groom's father make no further alienations other than those stipulated in the marriage contract.<sup>139</sup> Breach of this agreement would result in heavy monetary penalties. The obvious point was to have the groom's father preserve his inheritance for his heir – the bride's father's son-in-law. The concern was not that the groom's father would sell his lands and dissipate the proceeds but that he might be too generous to daughters, younger sons, future wives and children by future wives. An agreement of this sort did not stop the groom's father from making alienations contrary to the agreement. Rather, it made the groom's father obtain the consent of the bride's father for any such alienation or face a dispute on the penalty.

Those who were adversely affected by a common recovery would get little comfort at common law. They might, however, complain to Chancery and in at least two instances such complaints were made. In neither case does it appear that Chancery came to the relief of the disinherited heir. The very paucity of surviving petitions to Chancery complaining of recoveries rather strongly suggests that the chancellor was not welcoming petitions of this kind. In one of the two instances there survives only the petitions, which do not provide much information about the circumstances of the case.<sup>140</sup> It is of some interest if only because it antedates *Taltarum's Case*. The gist of the complaint was that one Robert Knolles held land in fee tail, remainder in tail to Richard Knolles. Robert gave one William Brent a sixteen-year lease. Brent conveyed his leasehold to petitioner, John Goodyear. Robert then suffered a recovery which caused Goodyear to be ousted from his leasehold. Goodyear filed petitions in Chancery. One Thomas Knolles, claiming as heir of the remainderman, also petitioned the chancellor.

The second petition is accompanied by answers and, taken

<sup>139</sup> McFarlane, *Nobility*, 80–1, 277–8; Wright, *Derbyshire Gentry*, 31–2, 46–7; Payling, "Late Medieval Marriage Contracts," 33–5. See Carpenter, *Locality and Polity*, 114.

<sup>140</sup> C1/31/14, 145, 160. The petitions are addressed to George, archbishop of York. George Nevill was both archbishop of York and chancellor from 17 June 1465 to 20 June 1467 and from 29 September 1470 to 4 March 1471.

together, the petitions and answers give more information about the circumstances of the recovery and of the petitioners.<sup>141</sup> The case illustrates that a claim of disinheritance could raise difficult and delicate questions whether, in particular circumstances, disinheritance was not acceptable. In 1464 Elizabeth Wakehurst suffered a recovery of the manors of Dixster and Gatecourt, Sussex, to John Smith and William Colyn.<sup>142</sup> Smith and Colyn were agents for Thomas Etchingham, who purchased the remainder after Elizabeth's life. The recovery disinherited Elizabeth's granddaughters Margaret, wife to Richard Culpepper, and Elizabeth, wife to Nicholas Culpepper. In the early 1460s, Margaret and Elizabeth petitioned the chancellor to have Elizabeth give them the documents that proved their entitlement under the entail.<sup>143</sup> This petition, which seems to have gone nowhere, did not mention the recovery; perhaps it was launched before the recovery. After the recovery, they petitioned again and complained of the recovery. Their own petition alleges that one Robert Etchingham had settled the manors on himself for life, remainder in tail to Richard Wakehurst and his wife, Robert's daughter, Elizabeth, remainder to one William Etchingham in fee simple.<sup>144</sup> After Robert Etchingham's death, Richard Wakehurst purchased the remainder from William Etchingham. According to petitioners, Richard and Elizabeth now had a joint fee tail and Richard had the remainder in fee simple. Richard then conveyed to feoffees and made his will that Elizabeth was to enjoy the manors for her life and after her death the feoffees were to convey to the petitioners in fee tail. The petitioners do not suggest that

<sup>141</sup> C1/31/281, 282, 283, 284 (1465–7, 1470–1). The petition is addressed to the archbishop of York. George Nevill was archbishop of York and chancellor from 15 June 1465 to 20 June 1467 and from 29 September 1470 to 4 March 1471. Thomas Rotheram was archbishop of York and chancellor from 9 September 1480 to 10 May 1483. Dating the case to George Nevill's tenure as archbishop of York and chancellor supposes that petitioners filed their complaint soon after the recovery to which they took exception.

<sup>142</sup> Appendix, IV, E, 4.

<sup>143</sup> C1/27/218a, 218b. The petition was addressed to the bishop of Exeter. George Nevill was both bishop of Exeter and chancellor from 25 July 1460 to 17 June 1465.

<sup>144</sup> The relationship of this William Etchingham to the Thomas Etchingham who received the lands by means of the recovery is not known. If Thomas were William's heir, then Elizabeth was merely accelerating the remainder in the original settlement.

the conveyance to feoffees was contrary to the fee tail. It is not clear whether their claim is based on Richard's will or on the preexisting entail. The petitioners married the Culpeppers against the will and advice of the feoffees and, no doubt, against the will of Elizabeth. The feoffees had Elizabeth bring an action of *cui in vita* against them, which they conceded. Elizabeth then suffered the recovery and conveyed the manors, after her life, to Thomas Etchingham who, it is said, paid £200. The conceded *cui in vita* rendered the feoffees incapable of performing Richard Wakehurst's will. The recovery docked the entail created by Robert Etchingham's settlement. The Culpepper wives were entirely excluded from their inheritance.

Unfortunately, the relation of Thomas Etchingham to Elizabeth Wakehurst, née Etchingham, is not clear. He acted as her feoffee and was probably collateral to the entail created in Robert Etchingham's settlement. It is also not clear whether the claim of disinheritance by Margaret and Elizabeth would have found sympathetic ears in the later fifteenth century. Young women were not to run off with men against the will of their elders. And Elizabeth Wakehurst, under those circumstances, preferred a collateral male heir to her lineal, wayward, granddaughters. There was also the consideration that selling to Etchingham kept the property intact rather than divided among granddaughters and kept the property associated with the name of Etchingham. The chancellor's apparent decision not to decide the case, if consciously made, showed wisdom and tact. It is not clear how the case ought to have been decided. A wise chancellor would wish to endorse neither disinheritance nor elopement. Nor could he spell out the circumstances in which disinheritance was unconscionable and those in which it was acceptable. Legal rules would be too stiff and one-dimensional, and would be too mechanical, applied systematically, to do justice to the competing norms and values in any but the simplest, and therefore rarest, of cases.

In the 1520s St. German in his dialogue *Doctor and Student* had his Doctor of the civil laws criticize the common recovery as a fraud that disinherited heirs.<sup>145</sup> Although St. German wrote some two decades after the end of our period, his discussion of common recoveries nevertheless provides a useful vehicle for exploring the

<sup>145</sup> *Doctor and Student*, 156–74.

complicated issues raised by the use of recoveries. St. German's discussion of the common recovery has two parts. In the first part the Doctor launches an attack on recoveries used to sell entailed land and disinherit the heir under the entail.<sup>146</sup> In this part, the Student of the common law tries to defend recoveries. In the second part the Doctor and Student get down to particular cases.<sup>147</sup> Here, the Doctor is willing to accept the ending of entails by common recovery under certain circumstances. The Student now argues against recoveries. The reversal of positions was probably thought to create dramatic interest.

In the first part of the discussion the Doctor condemns recoveries in the abstract case of a tenant-in-tail who sells land to the disinheritor his heir. On this level of abstraction, the Doctor's views were probably representative. But abstract principles do not decide concrete cases. There were probably few concrete cases that fit the Doctor's abstract principle. It was highly unusual for a tenant-in-tail with an heir apparent under the entail to sell off his patrimony. The collection of 334 transactions calendared in the Appendix reveal few clear attempts to disinherit heirs under an entail. The efforts of Elizabeth Wakehurst have already been discussed.<sup>148</sup> In 1489, William Marquis Berkeley suffered recoveries in order to have lands resettled on himself in tail, remainder to the king in tail male, remainder to William's right heirs.<sup>149</sup> The point was to disinherit his brother, Maurice. Upon William's death, however, Maurice had little trouble obtaining the lands settled away from him. Every recovery no doubt disinherited someone. The question was whom and for what reason. As for sales of land, landholders were more inclined to sell when they were without lineal heirs.<sup>150</sup> Nor does the Doctor consider whether the proceeds of the sale were used to purchase other lands. Most transactions on the fifteenth-century land market and most common recoveries involved small parcels of land.<sup>151</sup> The sales were frequently of peripheral holdings and the purchases were frequently made to consolidate estates.<sup>152</sup>

An important consideration was the motive for a sale. Land came on the market in the fifteenth century when the seller needed

<sup>146</sup> *Ibid.*, 156–64.      <sup>147</sup> *Ibid.*, 165–74.

<sup>148</sup> Appendix, IV, E, 4, discussed above, pp. 346–7.

<sup>149</sup> Appendix, IV, F, 5.      <sup>150</sup> Above, p. 328.

<sup>151</sup> Above, pp. 323, 327–8.      <sup>152</sup> Above, pp. 328–9.

the proceeds to pay debts.<sup>153</sup> The Doctor and Student consider this situation in one of their concrete cases.<sup>154</sup> The Doctor's view is so restrictive as to cast doubt on whether it was representative at any time. The Student puts the case of a man who resettles land upon himself in fee tail and later falls into debt: may he in good conscience suffer a recovery to sell the land in order to pay his debts? The Doctor takes the view that, unless the man had committed himself otherwise, it is permissible for him to sell the lands lest he be imprisoned for debt. To reach this result, the Doctor imputes to the man an intent at the time of the settlement not to be bound by the entail if he should later incur debts. Curiously unwilling to impute an intent that the man's heir be able to sell if he should fall into debt, the Doctor concludes that the man's issue may not suffer a recovery to pay debts. The Student, supposing that there is a "secret intent" in a gift in fee tail that no alienation be made, does not see why even the man who created the entail can later sell the land in order to pay debts. The perceived need to put the question in terms of intent seems to preclude the views expressed from being representative. Given both the widespread use of entails and the fairly frequent sales of land to relieve indebtedness, it must have been acceptable to dock an entail in order to pay debts.

In another concrete case, the Doctor and Student take up the question whether a man may in good conscience suffer a recovery in order to provide jointure for his wife.<sup>155</sup> The Doctor persuades himself that the provision of jointures is consistent with *De Donis*. The point of the statute is to assure that the entailed lands descend to the issue. The delay of jointure is delay, not a denial, much as dower and curtesy are delays, not denials. Here the Doctor was not alone. An unknown correspondent wrote to Thomas Stonor in about 1469: "Brother, though I do make my wife the jointure of my tailed lands I desert not my heirs: wherefore in my reason I offend not."<sup>156</sup> The Student, however, argues that under *De Donis*, the issue is to have the entailed land upon the death of the tenant-in-tail. A recovery that provides otherwise, whether by delay or denial, is contrary to the statute. The Doctor's reasoning,

<sup>153</sup> Above, pp. 327–8.

<sup>154</sup> *Doctor and Student*, 116–68.

<sup>155</sup> *Ibid.*, 165–6.

<sup>156</sup> *The Stonor Letters and Papers*, I, No. 99.

if generalized by analogy, would support the use of recoveries in many of the situations in which they were in fact used, because on the principle forming the Doctor's view, recoveries that put land into feoffees for the use of the tenant's last will would be acceptable if the last will provided that the feoffees ultimately convey to the heir in tail. Similarly, recoveries used to make resettlements or make marriage settlements would be acceptable as long as the heir under the entail ultimately received the land. We have seen that putting land into feoffees was not thought to be contrary to an entail.<sup>157</sup> In these cases the feoffees were either to protect the entail or, probably, to make a grant in fee tail roughly tracking the earlier entail.

The Doctor's view of jointures would apply to jointures given on a first marriage as well as to those provided on subsequent marriages. The Doctor and Student do not discuss marriage settlements that disinherit the children of an earlier marriage. Although instances of such resettlements are not hard to find, it is nevertheless hard to say how frequently they were made.<sup>158</sup> What was fairly certain was that if the heir of the earlier marriage was male, he would resist his disinheritance. The disinherited heir's ability to maintain his fight and, frequently, to succeed is evidence of a social norm against discontinuing an entail in this situation.<sup>159</sup> This inference is stronger where the disinherited heir is able to recover his inheritance by arbitration, because arbitrators were guided more by social norms under the circumstances than by legal rules. If the heirs of the first marriage were female, their disinheritance presented a less sympathetic case. Perhaps for this reason, there was no categorical rule against marriage settlements that disinherited the children of an earlier marriage.

An alienation by a widow of her jointure was another matter. Her purpose in ending the joint entail did not matter, whether it was to include a second husband and her children by him or was for other reasons. In 1495, a statute prohibited widows from alienating their jointures unless they had the consent of the heirs as a matter of record or otherwise enrolled.<sup>160</sup> The heir's consent

<sup>157</sup> Above, pp. 339–40.

<sup>158</sup> McFarlane, *Nobility*, 66–8; Payling, *Political Society*, pp. 208–11; Carpenter, *Locality and Polity*, 110.

<sup>159</sup> Payling, *Political Society*, 208–11.

<sup>160</sup> 11 Hen. VII, c. 20 (1495), *Statutes of the Realm*, II, 583.

could be made a matter of record by suffering a recovery, vouching him to warranty, and having him vouch the common vouchee. This form of recovery was not unknown. On its terms, the statute applied only to jointures a widow enjoyed out of her husband's lands and not to her own inheritance or, what was rare in the late fifteenth century, to grants from her father. An exception was made in the case of the heir's consent, no doubt because there could be many situations – poverty of the widow, for example – in which her breaking the entail would be acceptable. It was given to the heir, however, to judge whether circumstances warranted his disinheritation.

Assuming that the statute expressed social attitudes about recoveries, it is worth observing that the statute was unique. Parliament made no other effort to restrict the use of recoveries. It was hard to identify a class of situations in which a recovery ought always to be prohibited. Also important to recognize is that the statute did not prohibit recoveries involving a widow's jointure but rather gave the heir the power to ignore a recovery suffered without his consent. Even in this type of case, the details of particular situations could vary so much that a categorical rule against recoveries would be impractical. This thought returns us once again to a theme of this chapter. Reconstructing the social attitudes, and the norms they expressed, about recoveries is tantamount to reconstructing the complicated norms of inheritance in the fifteenth century and their even more complicated competition with other norms and values. There seem to have been only two cases in which a recovery was clearly disapproved of: the sale of land that disinherited an heir of a major portion of his inheritance although the seller was not in debt and marriage settlements that disinherited a worthy male heir from an earlier marriage. The first case seldom, if ever, happened. And as for the second, who was to say whether the disinherited heir was worthy?

## APPENDIX TO CHAPTER 6

This Appendix calendars 334 transactions executed by common recovery between 1440 and 1502. The transactions are divided into the categories set forth in the summary below.

### SUMMARY

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Total transactions 334 (100%)		

The first paragraph of each entry sets forth the common recovery or recoveries used to effectuate the transaction. The plea roll citation is followed by the name of the plaintiff (P), the name of the defendant (D), and, where applicable, by the name of the vouchee or person prayed in aid when more than one vouchee was used or defendant prayed aid. There follows a statement of the lands transferred in the recovery.

The second paragraph of each entry gives information that is the basis for putting the transactions in its category or subcategory.

In the case of certain sales transactions, the third paragraph of the entry identifies the parties to the transaction by occupational or social status, unless that information has been given previously in the entry.

## I. SALES

### A. Simple sales – a manor or a fraction of a manor

1. CP40/747, m.586 (Mich. 1447). P: Edmund Ingaldesthorp, kn. D: John Onlopen. Land: Manor of Melksham, Wiltshire.

In Easter Term 1448 John Onlopen and his wife Joan by final concord released and quitclaimed the manor from themselves and the heirs of Joan to Edmund and his heirs. CP25(1)79/91/109. The fine probably attempted to set up a collateral warranty. Isabel, Marchioness Montagu died 20 May 1476 seised of Melksham. 1 *IPM, Henry VII*, No. 213. Isabel was daughter and co-heir of Edmund Ingaldesthorp and his wife Joan. 4 *Complete Peerage* 92; 1 *IPM, Henry VII*, No. 1085.

Onlopen was a lawyer who practiced in the Common Bench. e.g. CP40/746, m.339.

2. CP40/755, m.408d (Mich. 1449). P: William Westbury. D: Miles Windsor. Land: Manor of Hull Deverill and 12 messuages, 4 tofts, 5 carucates land, 12 a. meadow, 30 a. wood, and 6s. rent in Hull Deverill, Deverill, and Longbridge [Deverill], Wiltshire.

On 25 November 1449, Windsor quitclaimed the manor with warranty to Westbury. *Close Rolls, 1447–1454*, 162.

Westbury served as justice of the peace in Somerset and Wiltshire. *Patent Rolls, 1446–1452*, 594, 597. The William Westbury of the recovery is not the justice of King's Bench who died in 1448. Baker, *Serjeants*, 543.

3. CP40/755, m.596 (Mich. 1449). P: John Talbot, snr., kn., Henry Filongley, William Wulflete, clerk, and Richard Wright. D: John Medling, John Fulborn, John Ansty, jnr., and John Ansty son of the aforesaid John Ansty. Land: Manor of Dunmow, Essex.

On 20 February 1449, John Fulborn entered into a recognizance for 100 marks with Henry Filongley defeasible on the condition that Fulborn make estate to James Ormond or his nominees; Fulborn to receive 6 marks annually. *Close Rolls, 1447–1454*, 121.

Ormond, later earl of Wiltshire, was at this time a king's knight.

*Patent Rolls, 1446–1452*, 83. Fulborn was a citizen and haberdasher of London. *Ibid.*, 270.

4. CP40/756, m.331d (Hil. 1450). P: John Norreys, arm. D: William Ferrers of Chartley, kn., and Elizabeth his wife. Land: Manor of Hampstead Ferrers (also known as Hampstead Cifrewast) and 400 a. land, 30 a. meadow, 160 a. pasture, 140 a. woods, 2,000 a. heath, and rent of £20, 6 capons, 1 lb. cumin, 1½ lb. pepper in Hampstead Ferrers (also known as Hampstead Cifrewast), Aldworth, Crekham, Berkshire.

On 14 September 1448, William Ferrers of Chartley, childless, received license to grant the land in the recovery to Edmund Hungerford, John Norreys, William Catesby, John Pury, Edmund Brudenell, William Norreys, Thomas Torington, Thomas Bobham, and Richard Merbroke and the heirs of John Norreys. *Patent Rolls, 1446–1452*, 277–8. The transfer was apparently a sale for which the parties also entered into a final concord. 4 *V.C.H.*, *Berkshire*, 74.

John Norreys was a royal official serving as keeper of the great wardrobe in 1444–6. R. Griffiths, *The Reign of Henry VI* (London: Ernest Benn, 1981), 340–1.

5. CP40/744, m.323 (Trin. 1454). P: John Heydon. D: John Linacre. Land: Manor of Saxlinghams in Oulton, Norfolk.

The transaction was probably a sale to Heydon because he died seised of the manor in 1478. F. Blomefield, *An Essay Towards a Topographical History of the County of Norfolk*, 11 vols. (London: William Miller, 1805–10), VI, 373.

John Heydon was a Norfolk lawyer. Ives, *Common Lawyers*, 139.

6. CP40/784, m.120d (Hil. 1457). P: John Rogers, arm., William York, snr., William York, jnr., and William Halys. D: Thomas Winslow, arm., and Agnes his wife. Land: Manor of Wantage and 1 messuage, 1 cottage, 300 a. land, 40 a. meadow, 400 a. pasture, and 10 a. rent in Wantage, Berkshire.

The land was held in right of Agnes and the transfer was a sale to William York, snr., a merchant. CP25(1)13/86/14 (1457); 4 *V.C.H.*, *Berkshire*, 323. For later dealing with the manor by the York family see CP25(1)13/87/6 (1465).

William York, snr., was a royal servant and merchant at the Staple of Calais. *Patent Rolls, 1452–1461*, 226, 509, 529. Thomas Winslow served as justice of the peace and justice of gaol delivery. *Ibid.*, 186, 597.

7. CP40/804, m.114 (Pas. 1462). P: Richard Choke. D: William Botreaux, kn. Land: Manors of Standerwick and Rodden, Somerset.

On 23 April 1462 Botreaux gave Choke charters, with warranty, for the two manors in the recovery. In addition, Botreaux granted Choke an annual rent of £40 for various manors in Cornwall on the condition that the rent not be paid if Choke is not disturbed or impleaded about his possession of the two manors by Botreaux, his heirs or his assigns. Margaret Hungerford, Botreaux's daughter, quitclaimed with warranty the two manors to Choke. *Close Rolls*,

1461–1468, 144–6. Choke died seised of the manor of Standerwick. 1 *IPM, Henry VII*, No. 955.

Richard Choke was justice of Common Pleas. Baker, *Serjeants*, 505.

8. CP40/804, m.323d (Pas. 1462). P: John Barlow. D: Thomas Charleton, kn. Land: Manor of Marsworth and 1 toft, 20 a. land, and 4 a. meadow in Marsworth, Buckingham.

Charleton received the manor in 1446 from Sir John Cheyne and his wife Joan and, apparently, conveyed the manor by final concord to Barlow in 1460. 3 *V.C.H.*, *Buckinghamshire*, 392–4. The recovery seems to have completed a sale.

John Barlow had been yeoman of the crown. *Patent Rolls, 1452–61*, 32. Thomas Charleton served as justice of the peace and royal commissioner. *Ibid.*, 561, 671.

9. CP40/806, m.343d (Mich. 1462). P: John Sulyard. D: Walter Bradley. Land: Manor of Wetherden, Suffolk.

The transfer to Sulyard was apparently a sale. W. A. Copinger, *The Manors of Suffolk*, 7 vols. (Manchester: Taylor, Garnett, Evans & Co., 1905–13), VI, 240. Sulyard died seised with his wife Anne of the manor. 1 *IPM, Henry VII*, No. 439.

John Sulyard, a lawyer, was later justice of King's Bench. Baker, *Serjeants*, 539.

10. (a) CP40/823, m.123 (Pas. 1467). P: Richard Illingworth, kn. D: Henry Grey of Codnor. Land: Manor and advowson of Tanworth and 4 messuages, 1 toft, 1 dovecote, 6 bovales land, 25 a. meadow, 200 a. pasture, 100 a. woods, and 20s. rent in Tanworth, Hampshire.

(b) CP40/823, m.134 (Pas. 1467). P: Illingworth. D: Grey. Land: Manor of Upton and 4 messuages, 3 tofts, 1 dovecote, 6 bovales land, 25 a. meadow, 20 a. pasture, 100 a. woods, and £4 rent in Upton and Newman, Hampshire.

These recoveries seem to have been sales. See 3 *V.C.H.*, *Hampshire*, 383. On 8 July 1467, Thomas Bodulgate quitclaimed the two manors and the advowson to Richard Illingworth and his son Richard. *Close Rolls, 1461–1468*, 443.

Richard Illingworth was a lawyer. 3 *V.C.H.*, *Hampshire*, 383.

11. CP40/823, m.334 (Pas. 1467). P: John [de Vere], earl of Oxford. D: Thomas Fulthorpe, arm. Land: Manor of Tatingston, Suffolk.

John apparently purchased the manor and later lost it when he was attainted in 1472. *Patent Rolls, 1467–1477*, 590; Copinger, *The Manors of Suffolk*, VI, 104.

Thomas Fulthorpe was a yeoman of the crown. *Patent Rolls, 1461–1467*, 50; *Close Rolls, 1461–1468*, 47.

12. (a) CP40/824, m.504 (Trin. 1467). P: John Leuknore, arm., John Goring, John Apsle, jnr., and Thomas Covert. D: Nicholas Husee and Elizabeth his wife. Land: Manors of Hascombe and Dunhurst and 8 messuages, 200 a. land, 8 a. meadow, 100 a. pasture, 700 a. woods, and £4 rent in Hascombe, Bramley, and Dunhurst, Surrey.

(b) CP40/824, m.504d (Trin. 1467). P: Leuknore, Goring, Apsle, and Covert. D: Nicholas and Elizabeth. Land: Manor of Iping and 12

messuages, 8 gardens, 300 a. land, 20 a. meadow, 40 a. pasture, 40 a. woods, 200 a. heath, and 100s. rent in Ipyng, Sussex.

The transfer of Hascombe was a sale to Covert. 3 *V.C.H.*, *Surrey*, 102. A William Covert died seized of Hascombe in 1494. 1 *IPM*, *Henry VII*, No. 1002. And it was reported in 1503 that a John Covert had given Hascombe and Dunhurst to feoffees. 3 *IPM*, *Henry VII*, No. 822. It seems reasonable to suppose that Ipyng was part of the sale.

Thomas Covert was Sussex gentry. e.g. *Close Rolls, 1468–1476*, No. 680.

Nicholas Husee had been sheriff of Sussex and Surrey, victualler of Calais, and lieutenant of Guisnes Castle under Henry VI. Edward IV had seized Hascombe on the grounds that Husee had failed to render account since the change of dynasty. Edward pardoned Hascombe in 1467, which might explain the sale at that time. 3 *V.C.H.*, *Surrey*, 102.

13. CP40/826, m.318d (Hil. 1468). P: John Warsop. D: Theobald Gorges, kn. Land: Manor of Bradpole and 40 messuages, 200 a. land, 40 a. meadow, 20 a. wood in Bradpole, Dorset.

The transaction was probably a sale to Warsop, who died seized of the manor in 1474–5. J. Hutchins, *The History and Antiquities of the County of Dorset*, 4 vols. (London: Nichols & Sons, 3rd edn, 1861–70), II, 154. The manor later came to John Neuberg who died seized of Bradpole in 1485. 1 *IPM*, *Henry VII*, No. 39. Theobald Gorges died later in 1468. Hutchins, *History of Dorset*, II, 134.

14. CP40/826, m.348 (Hil. 1468). P: Thomas Holbathe. D: William Hery. First vouchee: John Fynaunce. Land: Manors of Stagsden and Husborne Crawley, Bedford.

The sale was from Fynaunce to John Stanford. See 3 *V.C.H.*, *Bedfordshire*, 97, 396–7. As Stanford's representative, Holbathe on 12 May 1469 received license to transfer Stagsden to feoffees for Stanford. *Patent Rolls, 1467–1477*, 157. William Hery was the feoffee of John Fynaunce's mother, Agnes, who had recently died. *Close Rolls, 1468–1476*, No. 28.

John Stanford was a royal official who served as controller of customs at the port of Poole and, later, as royal auditor. *Patent Rolls, 1467–1477*, 268, 344; *Patent Rolls, 1476–1485*, 480. John Fynaunce was also a royal official who served with the duke of Clarence when he was lieutenant of Ireland. *Patent Rolls, 1467–1477*, 344.

15. CP40/834, m.309 (Hil. 1470). P: Edmund Shaa, citizen and goldsmith of London. D: John Marney, kn., and Joan his wife. Land: Manors of Horndonhouse and Ardernhall, Essex.

In 1469, Marney and his wife Joan had conveyed the two manors, along with other manors in Essex, to Thomas Montgomery, Thomas Tyrell, Lewis Fitz Lowes, Thomas Cornwallis, William Lygon, Walter Brokhampton, John Rous, and John Throgmorton and the heirs of Thomas Tyrell. *Essex Fines*, IV, 67. This transfer by fine secured a debt to the king for £500 and to the use of Marney's last

will. *Patent Rolls, 1467-1477*, 344-5. A sale to Shaa might have helped Marney pay this debt. The transfer was probably a sale, because in 1479, by final concord, Henry Marney, son and heir of John Marney, quitclaimed the manors of the recovery to Edmund Shaa. *Essex Fines*, IV, 77.

16. CP40/837, m.59 (Mich. 1470). P: Thomas Rogers. D: Hugh Pakenham and John Hill, chaplain. Land: Manor of Smallbrook and 1 messuage, 20 tofts, 400 a. land, 60 a. meadow, 300 a. pasture, 40 a. wood, 100 a. heath, and 40s. rent in Warminster, Bugley, Bishopstowe, Great Sutton, Little Sutton, and Longbridge Deverill, Wiltshire.

Pakenham sold the manor to Rogers, who died in possession of the manor in 1498. 8 *V.C.H., Wiltshire*, 102.

Thomas Rogers was a lawyer, later created serjeant. Baker, *Serjeants*, 534.

Hugh Pakenham was of the Wiltshire gentry. e.g. *Close Rolls, 1476-1485*, No. 470.

17. CP40/840, m.132d (Mich. 1471). P: John Farendon, Richard Quartermain, arm., William Hampton, kn., citizen and alderman of London, Richard Fowler, Thomas Palmer, Guy Westcote. D: Richard Seymour, arm., and Isabel his wife. Land: Manor of Tetsworth called Wind Buffets Manor and 8 messuages, 200 a. land, 20 a. meadow, 40 a. pasture, and rent of 20s., 2 hens and  $\frac{1}{2}$  lb. pepper in Tetsworth, Oxfordshire.

In the same term the parties also entered into a final concord in which Seymour and his wife Isabel quitclaimed from themselves and the heirs of Isabel to the plaintiffs in the recovery and the heirs of Richard Fowler. CP25(1)191/29/15. The fine might have set up a collateral warranty. The manor acquired by Fowler was later in the possession of his widow, Joan. 7 *V.C.H., Oxfordshire*, 151.

Richard Fowler was chancellor of the Duchy of Lancaster. *Ibid.*

18. CP40/840, m.136 (Mich. 1471). P: Richard Boughton. D: Thomas Bellers. Land: Manor of Brownsover and 10 messuages, 10 virgates land, and 20 a. pasture in Brownsover, Warwickshire.

On 26 February 1472, Bellers quitclaimed the manor to Boughton. *Close Rolls, 1468-1476*, No. 842. The manor subsequently descended in the Boughton family. 6 *V.C.H., Warwickshire*, 66.

Boughton and Bellers were Warwickshire gentry connected through the affinity of Lord Grey of Groby. Carpenter, *Locality and Polity*, 648-9, 674, 676, 693-4.

19. CP40/842, m.216 (Pas. 1472). P: Humphrey Starkey and William Brayne. D: Edward Lymesy, arm. Land: Manor of Hever and 1 messuage, 2 tofts, 350 a. land, 2 a. woods, and rent of 20s. 8d., 30 hens, 140 eggs, and 2 bushels of barley in Isle, Northfleet, Singewell, Cobham, and Thorne, Kent.

The transaction was a purchase by Starky, later justice of Common Pleas and chief baron of the Exchequer. Baker, *Serjeants*, 538. At Starky's death, his feoffees were seised to the use of his last will, by

which will he devised the manor to his son, Richard, who died 6 July 1493. 3 *IPM, Henry VII*, No. 958.

Edward Lymesy was Kentish gentry. *Close Rolls, 1461–1468*, 68, 69; *Close Rolls, 1468–1476*, No. 660.

20. CP40/844, m.334d (Mich. 1472). P: Thomas Saint Leger, arm., and John Manory. D: Stephen Parker and Agnes his wife. Land: One-third of the manor of Wyke and 6 a. land, 20 a. pasture, 4 a. woods in Ashe, Surrey.

The manor had been divided into three shares in the fourteenth century. The recovery effected a sale from Parker to Manory. 3 *V.C.H. Surrey*, 393.

John Manory, who represented himself, was a lawyer practicing in the Common Pleas.

21. CP40/844, m.434d (Mich. 1472). P: Philip Courtenay, kn. D: Margaret, Lady Hungerford and Botreaux. Land: Manors of Botreaux Mallard (also known as Knowestone), Devon.

On 12 December 1472 Margaret confirmed with warranty her right in the manor to Courtenay, who had recovered the manor and was seised of it in fee. *Close Rolls, 1468–1476*, No. 1078. Courtenay died seised of the manor in 1489. 1 *IPM, Henry VII*, No. 461.

22. CP40/845, m.351 (Hil. 1473). P: Edmund Bedingfield, arm., and Robert Clere, kn. D: Thomas Stoughton, citizen and fishmonger of London, and William Stoughton. First vouchee: John Snoring. Second and last vouchee: Geoffrey Sperling. Land: Manor of Great Snoring and 1 messuage, 1 toft, 20 a. land, 20 a. meadow, 12 a. pasture, 15 a. heath, and 50s. rent in Great Snoring, Little Snoring, Thorpland, Thursford, Hindringham, Wighton, Warham, Stivekey, Dalling, Ringstead, East Barsham, Dersingham, and Fernmouth, Norfolk.

In Easter Term 1473, by final concord, John Snoring and his wife Juliana quitclaimed from themselves and the heirs of Juliana to plaintiffs of the recovery and Robert's heirs. CP25(1)170/192/39. The fine might have been an attempt to set up a collateral warranty. The plaintiffs of the recovery later transferred the lands to feoffees of Ralph Shelton, who had remitted his court for the recovery. 2 *IPM, Henry VII*, No. 225. John Snoring was son and heir of Geoffrey Snoring. Geoffrey Sperling or Spyrlling was probably Geoffrey Snoring's feoffee, for in 1466 he, at the request of John Snoring, granted a life estate in the manor to Alice Snoring, Geoffrey Snoring's widow. John Snoring was apprenticed to Thomas Stoughton. *Close Rolls, 1461–1468*, 391. The recovery thus cleared several interests in the lands in one fell swoop.

23. CP40/846, m.301 (Pas. 1473). P: Lawrence Herryes, John Pulter, and John Bele. D: Richard Paule. Land: Half of the manor of Argentein, Hertfordshire.

The recovery seems to have effected a sale to Pulter in that he is said to have died seised of the manor in 1487. 3 *V.C.H., Hertfordshire*, 184.

Pulter was of the Hertfordshire gentry. *Patent Rolls, 1467–1477*, 285, 340, 617.

24. CP40/846, m.398 (Pas. 1473). P: Simon Damme. D: Richard Ayscough, son and heir of Margaret Ayscough. Land: Manor of East Tudenham and 20 messuages and 30 a. land in East Tudenham, North Tudenham, Matshall, Matshallburgh, Boxtton, Brandon, Selbourne, Hockering, Calton, and Honingham, Norfolk.

Damme was an agent of William Paston who purchased the manor from Ayscough. Blomefield, *History of Norfolk*, X, 256; *The Paston Letters*, J. Gairdner (ed.), 3 vols. (London, 1872–85), II, 264–5; *ibid.*, III, 155.

25. CP40/862, m.335d (Hil. 1477). P: John Horwood, jnr. D: John Broughton. Land: Manor of Tilney and 1 mill, 1 dovecote, 268 a. land, 40 a. meadow, 76 a. pasture, 8 a. woods, 22 a. marsh and rent of £7 10s. 4d., 1 half-penny and 1 quarter-penny in Tilney, Tiringham, and Wiggshall, Norfolk

By final concord on 25 June 1477 Broughton and his wife Anna quitclaimed with warranty the land in the recovery to Thomas Rotheram, bishop of Lincoln, John Russell, bishop of Rochester, Thomas Hunston, and John Horwood, clerk of the privy seal, and the heirs of Horwood. CP25(1)170/193/60. On 28 December 1477 John Broughton the elder released and quitclaimed with warranty the lands of the recovery to Horwood. The release describes the land as formerly of Mary Stoneham, grandmother of this John Broughton. *Close Rolls, 1476–1485*, No. 385. On 10 October 1478, Thomas Broughton, brother of John Broughton, jnr., the defendant to the recovery, released and quitclaimed with warranty the lands of the recovery to Horwood. *Close Rolls, 1476–1485*, No. 391. This last release would set up a collateral warranty barring anyone who claimed from Mary Stoneham, John Broughton, snr., and John Broughton, jnr.

John Horwood was clerk of the privy seal. *Ibid.* John Broughton was gentry. *Ibid.*

26. CP40/863, m.316d (Trin. 1477). P: William Scot and Robert Harding. D: Thomas Ormond, arm. Land: One-third of the manor of Langton in Little Canfield, Essex.

In 1483 Scot and Harding acquired another portion of Langton in Little Canfield. *Essex Fines*, IV, 83. The real party in interest was Scot who in 1491 died seised of Langton. 1 *IPM, Henry VII*, No. 779. The inquisition refers to the recovery.

William Scot might well have been a descendant of Thomas Scot, a draper and alderman of London. Thrupp, *Merchant Class*, 364. Robert Harding was a citizen and goldsmith of London. *Essex Fines*, IV, 83.

27. CP40/864, m.115 (Mich. 1477). P: Richard Pygot. D: John Norton, kn. Land: Manor of Porters, Essex.

The transfer was a sale to Pygot who died seised of the manor. 5 *V.C.H., Essex*, 208.

At the time of the recovery Richard Pygot was king's serjeant. Baker, *Serjeants*, 533. John Norton had been a merchant of London. *Patent Rolls, 1467-1477*, 383.

28. CP40/864, m.408 (Mich. 1477). P: John Sturgeon, gen., John Pulter, gen., and Thomas Broughing, gen. D: Elizabeth widow of William Bustard. Land: Manor and advowson of Little Munden and 4 messuages, 200 a. land, 12 a. meadow, 20 a. pasture, 20 a. woods, and 40s. rent in Little Munden, Hertfordshire.

The plaintiffs were agents for William Say, Lord Say and Sele. Philip Thornberry had held the manor. On his death in 1457, his daughter Margaret had inherited the manor, which was settled on her daughter Elizabeth and her husband William Bustard with remainders to Thomas and John Thornberry. 3 *V.C.H., Hertfordshire*, 130. In 1481 Elizabeth released her rights to the plaintiffs to the recovery. *Ancient Deeds*, A5236. In 1486, John Thornberry released his rights to Sturgeon, Pulter, Broughing, and William Say. *Ancient Deeds*, D439. Say died seised of the manor in 1529. 3 *V.C.H., Hertfordshire*, 130.

29. CP40/864, m.423 (Mich. 1477). P: John Morton, clerk. D: John Colshull, kn., and Elizabeth his wife, Robert Willoughby, kn., and Thomas Strangeways and Eleanor his wife. Land: Manor of Milbourne Deverill (also known as Milbourne Cray) and 6 messuages, 1 water mill, 800 a. land, 20 a. meadow, 200 a. pasture in Milbourne St. Andrews and Rokemedede [Roke Farm], Dorset.

The defendants Elizabeth, Robert, and Eleanor were the heirs of Humphrey Stafford, earl of Devon. The defendants together by final concord in 1478 quitclaimed with warranty to Morton. CP25(1)51/62/24. Willoughby and Strangeways on 4 February 1478 released and quitclaimed with warranty to Morton, master of the Chancery Rolls, as did John Strangeways, Thomas' nephew. *Close Rolls, 1476-1485*, No. 299. Morton died seised of the manor. 2 *IPM, Henry VII*, No. 397.

30. CP40/865, m.338d (Hil. 1478). P: Robert Jakes. D: Thomas Heigham, snr., and Thomas Heigham, jnr. Land: One-quarter of the manor of Holdenby and 2 messuages, 2 tofts, 7 virgates of land, 10 a. meadow, 10 a. pasture and rent of one pair of spurs in Holdenby and Church Brompton, Northamptonshire.

Robert Jakes died seised of the land and rent in the recovery except that his inquisition *post mortem* reported five, rather than seven, virgates of land. 3 *IPM, Henry VII*, No. 208.

Robert Jakes was a royal official, a messenger of the Exchequer. *Patent Rolls, 1485-1494*, 192. Thomas Heigham, whose son was Richard Heigham, was of the Suffolk gentry. Ives, *Common Lawyers*, 465.

31. CP40/866, m.359 (Pas. 1478). P: William Chantry, dean of Newark College, Leicester, William Grymmesby, William Moton, Robert Mome, and Thomas Kebell. D: William Asheby, arm. Land: One-third of the manor of Lubbesthorpe, Leicestershire.

The transaction was probably a sale to William, Lord Hastings. Hastings died seised of at least one-third of Lubbesthorpe in 1483. J. Nichols, *The History and Antiquities of the County of Leicestershire*, 4 vols. (London: Nichols, Son, and Bentley, 1795–1811), IV, 37. The plaintiffs had acted as trustees for Hastings three years before the recovery. Ives, *Common Lawyers*, 95.

32. CP40/870, m.334 (Mich. 1479). P: Thomas Wood. D: Roger Lovet and Alice his wife. Land: Manor of Boxsworth called Overhall, Cambridgeshire.

Also in Michaelmas Term, defendants by final concord remitted and quitclaimed the land of the recovery from themselves and the heirs of Alice to Thomas Copley, William Copley, Henry Langley, Edward Goldburgh, Thomas Rayner, and John Harryes. CP25(1)30/100/19 (1479). Wood seems to have been an agent of William Copley, a Yorkshire merchant, who died seised of the manor. 1 *IPM*, *Henry VII*, No. 632. See also 9 *V.C.H.*, *Cambridgeshire*, 271–2.

33. CP40/870, m.356 (Mich. 1479). P: John Goldwell. D: John [Russell], bishop of Rochester, Nicholas Goldwell, John Bulman, and Richard Illingworth son of Ralph Illingworth. First vouchee: Ralph Illingworth, son and heir of Richard Illingworth. Second vouchee: Thomas Fox. Land: Manor of Bradshaw and 3 messuages, 300 a. land, 40 a. meadow, 100 a. pasture, 40 a. woods, and 100s. rent in Sproughton Wick, Ufford Wick, Bishop, Stoke by Ipswich, Branford, Whilton and Brokes by Ipswich, Suffolk.

The purchaser was John Goldwell. The sellers were Thomas Fox and Richard Illingworth, who had a life estate from Fox. See Copinger, *The Manors of Suffolk*, VI, 91–2.

John Goldwell was a citizen and mercer of London. *Patent Rolls, 1467–1477*, 9. Richard Illingworth was, at the time of recovery chief baron of the Exchequer. Thomas Fox was a London draper. *Close Rolls, 1461–1468*, 238.

34. CP40/879, m.342 (Hil. 1482). P: William Hastings, kn., Lord Hastings, John Catesby justice of the Common Bench, John Hugford, John Catesby, Richard Knightly, Richard Boughton, Thomas Kebell, Richard Henley, and Thomas Baker. D: John Hathewick, arm. Land: Manor and advowson of Oxshelf and 5 messuages, 1 toft, 10 virgates of land, and rent of one grain of pepper in Oxshelf, Warwickshire.

Hathewick apparently sold the land in the recovery to John Catesby of Lapworth, Warwickshire, for £200. *Ancient Deeds*, A8407; 5 *V.C.H.*, *Warwickshire* 125; Carpenter, *Locality and Polity*, 528.

John Catesby was a royal annuitant. *Ibid.* John Hathewick was of the Warwickshire gentry. *Ibid.*, 657.

35. CP40/879, m.346 (Hil. 1482). P: John Byconnell. D: Giles Daubeney, kn. Land: Manor of Mere and 3 messuages, 300 a. land, 20 a. meadow, 40 a. pasture, and 12 a. woods in Mere, North Curry, Newport, Wrantage, and Slough [Green], Somerset.

About a year after the recovery Byconnell received license to grant

the lands to the dean and chapter of Wells, who had remitted his court for the recovery. *Patent Rolls, 1476-1485*, 337. This transaction might have been a transfer into mortmain through Byconnell acting as agent.

John Byconnell was Somerset gentry and became a knight by 1486. *Close Rolls, 1476-1485*, Nos. 748, 822; *Close Rolls, 1476-1485*, No. 168.

36. CP40/880, m.112d (Pas. 1482). P: Simon Wiseman, arm. D: John Palmer. Land: One-half of the manor of Tasburgh, Norfolk.

The recovery seems to have effected a sale to Wiseman in that the half manor was in the Wiseman family in the sixteenth century. Blomefield, *History of Norfolk*, V, 215.

Simon Wiseman was Norfolk gentry who served as justice of the peace and member of parliament, and whose daughter married Gregory Adgore, serjeant at law. Ives, *Common Lawyers*, 452. John Palmer, who represented himself, was a lawyer.

37. (a) CP40/880, m.332 (Pas. 1482). P: Richard Leuknore, William Weston, Nicholas Culpepper, Thomas Oxenbridge, John Hydney, and John Gargrave. D: William Gunter. Land: Manor of Pitney Lorty, Somerset.

(b) CP40/880, m.332d (Pas. 1482). P. Leuknore, Weston, and Thomas Altoft. D: William Gunter, arm. Land: Manor of Knolle, Somerset.

The plaintiffs to the recoveries were feoffees for the purchaser, Robert Morton. 3 *V.C.H.*, *Somerset*, 52, 159. In 1484, William Gunter's brother, Edmund, who was William's heir, released both manors, with warranty, to William Weston. *Close Rolls, 1476-1485*, No. 1334. In the following year, Edmund's brother, Thomas, quitclaimed both manors, with warranty, to Thomas Oxenbridge and Thomas Altoft. *Close Rolls, 1485-1500*, No. 49. The quitclaim might have been an attempt to set up a collateral warranty.

Robert Morton, nephew to John Morton, later chancellor, archbishop of Canterbury, and cardinal, was keeper of the Chancery rolls. *Close Rolls, 1476-1485*, Nos. 593, 609, 913. William Gunter was of the Somerset gentry. *Close Rolls, 1468-1476*, No. 1069.

38. (a) CP40/880, m.479 (Pas. 1482). P: Thomas Danvers. D: John Barantyne, arm. Land: Manor of Winnal and 3 messuages, 200 a. land, 30 a. meadow, 100 a. pasture, 6 a. woods, 20s. rent in Winnal and Henton, Oxfordshire.

(b) CP40/884, m.11 (Pas. 1483). P: Danvers. D: Barantyne. Land: Manor of Henton, Oxfordshire.

On 28 November 1483, Barantyne gave Danvers a receipt for the purchase price of the land in the recovery, a release of all actions of debt, detinue, covenant or trespass, and a discharge in conscience or at law. *Close Rolls, 1476-1485*, No. 1193. On 5 July 1483 Barantyne's son, also named John, had released and quitclaimed to Danvers. *Ibid.*, No. 1109.

Thomas Danvers was a lawyer, elder brother of William Danvers, a

serjeant, and half-brother to Robert Danvers, justice of Common Pleas. Ives, *Common Lawyers*, 459. John Barantyne was of the Oxfordshire gentry. *Close Rolls, 1476-1485*, No. 1363.

39. CP40/881, m.153 (Trin. 1482). P: John Vavasour and William Marshall. D: Henry Molyneux, clerk, Robert Molyneux, James Molyneux, clerk, Thomas Filwin, William Ashton, kn., and Robert Newsome. First vouchee: Thomas Molyneux, arm. Land: Manor of Badsworth and 3 messuages, 200 a. land, 200 a. meadow, 200 a. pasture, 3s. rent in Pontefract, Badsworth, and Skelbrooke, Yorkshire.

In 1506, John Vavassour died seised of Badsworth. 3 *IPM, Henry VII*, No. 275.

John Vavassour was a serjeant at law and later justice of the Court of Common Pleas. Baker, *Serjeants*, 542.

40. CP40/881, m.358d (Trin. 1482). P: Henry Harling and Robert Parker. D: William Taverner and Alice his wife. Land: Manor of Newland next Writtle, Essex.

The plaintiffs were apparently agents and feoffees of John Berdefeld, because upon Berdefeld's death in 1497 his inquisition *post mortem* reported that Harling and Parker were seised of Newland and by Berdefeld's last will they were to permit Berdefeld's executors to use the revenues to school the children of his brother, Thomas, and such children of his sister, Alice Lightfoot, as he had taken into his keeping. 2 *IPM, Henry VII*, No. 1.

John Berdefeld was of the Essex gentry (*Close Rolls, 1476-1485*, Nos. 130, 1438), as was William Taverner (*ibid.*, No. 301).

41. CP40/881, m.457 (Trin. 1482). P: John Grime, Walter Cope, and John Wheler. D: Elizabeth Boteler, widow of John Boteler, kn. First vouchee: John Barantyne. Land: Manors of Golder and Rufford and 10 messuages, 6 tofts, 200 a. land, 40 a. meadow, 100 a. pasture, and 40 a. woods in Golder and Rufford, Oxfordshire.

Elizabeth's first husband was John Barantyne, whose son, also named John, joined her in the recovery as a vouchee to warranty. The plaintiffs were agents for Thomas Danvers, who later granted the manor of Golder to Magdalen College, Oxford. 8 *V.C.H., Oxfordshire*, 152.

Thomas Danvers was a lawyer. See no. 38, above.

42. CP40/881, m.512 (Trin. 1482). P: William Capel, arm., John Hungerford, and John Jakes. D: Richard Fitz Lowys and Alice his wife and William Ponde. First vouchee: Thomas Gladwin and Robert Troby. Second vouchee: Richard Fitz Lowys. Land: Manors of Porters, Crekers, and Umfraville and 20 messuages, 20 tofts, 100 a. land, 100 a. meadow, 200 a. pasture, 100 a. woods, and £10 rent in Stebbing, Great Saling, Little Saling, and Felstead, Essex.

The recovery effected a sale from Richard Fitz Lowys and his wife Alice to William Capel, the proceeds of which enabled Fitz Lowys to repurchase certain manors that he had alienated to Richard, duke of Gloucester. *Close Rolls, 1476-1485*, No. 995.

William Capel was a merchant of London. Thrupp, *Merchant Class*, 328. Richard Fitz Lowys was a member of the gentry. *Close Rolls, 1476-1485*, Nos. 995, 1184, 1322.

43. CP40/882, m.341 (Mich. 1482). P: John Wyndham, arm. D: John Ayscough, arm. Land: Manor of Melton Constable and 10 messuages, 10 bovates and 200 a. land, and 20 a. meadow in Melton Constable, Barningham, Briston, Burgh, Stody, and Gunthorpe, Norfolk.

On 2 November 1482 Ayscough released and quitclaimed with warranty to Wyndham, as did Thomas and William Ayscough. *Close Rolls, 1476-1485*, No. 938.

John Wyndham and John Ayscough were of the Norfolk gentry. *Ibid.*

44. CP40/883, m.343 (Hil. 1483). P: Thomas Hill. D: John Dyve and Joan his wife. Land: Manor of Washingley and 6 messuages, 100 a. land, 20 a. meadow, and 40 a. pasture in Great Stukeley, Little Stukeley, and Huntingdon, Huntingdonshire.

The manor appeared in Thomas Hill's inquisition *post mortem* after his death in 1485. 1 *IPM, Henry VII*, No. 120. John Dyve's wife Joan was sister and heiress of John Washingley: *ibid.*, 336.

Thomas Hill was a grocer and a citizen and alderman of London. *Patent Rolls, 1476-1485*, 291; Thrupp, *Merchant Class*, 349. John Dyve was of the Northamptonshire gentry. *Close Rolls, 1468-1476*, No. 923; *Close Rolls, 1476-1485*, No. 1427.

45. CP40/883, m.375 (Hil. 1483). P: John Sulyard, serjeant at law, Thomas Danvers, and William Danvers. D: Richard Hulcote and Margaret his wife and John Ernley. Land: Manor of Brouns in Harwell and 3 messuages, 1 carucate land, 20 a. meadow, 20 a. pasture, and 53s. 4d. rent in Harwell, Berkshire.

By final concord on 28 May 1484 Richard Hulcote and Margaret his wife, John Hulcote and Philippa his wife, and John Ernley quitclaimed with warranty the land of the recovery to Thomas and William Danvers and the heirs of Thomas. CP25(1)13/87/31; 3 *V.C.H., Berkshire*, 488. The defendant's claim to the manor is not clear.

Thomas Danvers was a lawyer. See no. 38, above. John Hulcote was of the Northamptonshire gentry. *Close Rolls, 1468-1476*, No. 1145, *Close Rolls, 1476-1485*, No. 247; *Close Rolls, 1485-1500*, No. 104.

46. CP40/887, m.145 (Hil. 1484). P: Henry Colet, citizen and alderman of London. D: John Whittington, arm. First vouchee: Richard Whittington, arm. Second vouchee: John Verney, arm., and Margaret his wife, daughter and heir of Robert Whittington. Land: Manor of Weston Turville (also known as Hide) and 200 a. land, 200 a. meadow, 20 a. pasture, and 20s. rent in Weston Turville, Halton, and Broughton, Buckinghamshire.

Richard Whittington held the manor, was attainted at the accession of Edward IV, but had given the manor to his brother John. *Patent Rolls, 1461-1467*, 121; 1 *IPM, Henry VII*, No. 111. Colet, the purchaser, see 3 *IPM, Henry VII*, No. 63, used vouchers to warranty to extinguish the various Whittington claims.

The Whittingtons were a London merchant family. Thrupp, *Merchant Class*, 374.

47. CP40/887, m.166d (Hil. 1484). P: John Winter. D: John Skerning. First vouchees: John Thyrlewynde, Joan Burden, and John Burden and Cecily his wife. Land: Manor of Frettenham and 40 messuages, 500 a. land, 30 a. meadow, 60 a. woods, and 16s. rent in Frettenham, Horstead, Croftwaite, Bylaugh, and Haynford, Norfolk.

By final concord in Easter Term, 1484, John Skerning and Margaret his wife, John Thyrlewynde, Joan Burden, and John Burden and Cecily his wife quitclaimed with warranty the land of the recovery to Winter. CP25(1)170/194/9. In preparation for the recovery John Thyrlewynde and Joan Burden had released and quitclaimed with warranty the land of the recovery to Skerning on 3 February 1484. *Close Rolls, 1476–1485*, No. 1181. See also Blomefield, *History of Norfolk*, X, 417.

John Winter was a merchant. *Patent Rolls, 1485–1494*, 366.

48. CP40/887, m.206 (Hil. 1484). P: Thomas Danvers and John Legh. D: William (Waynflete) bishop of Winchester. First vouchee: Maud widow of Gervaise Clifton, cousin and heir of Ralph Cromwell. Land: Manor of Kirby Bellers and 10 messuages, 8 tofts, 3 carucates land, 40 a. meadow, 200 a. pasture, 10 a. wood, and 100s. rent in Kirby, Leicester, Grimston, Holwell, East Well, Shalford, Melton Mowbray, Dalby, and Somersby, Leicestershire.

The plaintiffs and defendant to the recovery conveyed their interests to William Catesby and others to hold to the use of Catesby. *Close Rolls, 1476–1485*, No. 1209, 1211. Catesby thus purchased the manor from Ralph Cromwell's heir. Nichols, *History of Leicestershire*, II, 227; Ives, *Common Lawyers*, 109–10.

William Catesby was knight of the king's body. *Close Rolls, 1476–1485*, No. 1209.

49. (a) CP40/903, m.152d (Hil. 1488). P: John [de Vere], earl of Oxford, Henry Colet, Thomas Fitz William, Thomas Higham, and Richard Spencer. D: William [Berkeley], earl of Nottingham. Land: Manor of Harwich, Essex.

(b) CP40/903, m.343d (Hil. 1488). Identical to (a) except William, earl of Nottingham's wife Anne is also a defendant.

(c) CP40/903, m.159d (Hil. 1488). P: John, earl of Oxford, Colet, Fitz William, Higham, and Spencer. D: William, earl of Nottingham and Anne his wife. Land: Manor of Dovercourt, Essex.

(d) CP40/903, m.340d (Hil. 1488). Identical to (a). [Note the three attempts at a single recovery.]

The recoveries effected a sale to John, earl of Oxford. He transferred the manors to the king in 1544. *Essex Fines*, IV, 273. When William, earl of Nottingham's attempt to disinherit his brother Maurice, for which see IV, F, 5, below, was set aside by parliament the manors were already in the earl of Oxford's family and were saved to the earl. 6 *Rot. Parl.* 429–32 at 431.

50. CP40/903, m.352 (Hil. 1488). P: Reginald Bray, William Hody,

Edward Shaa, and Henry Colet. D: William, earl Marshall and Nottingham. Land: Manor and advowson of Haunce, Bedfordshire.

The indenture of sale and the defendant's receipt for the purchase price may be found at *Close Rolls, 1485-1500*, No. 294. The final concord of 9 February 1488 in which the defendant quitclaimed with warranty to the plaintiffs and the heirs of Reginald Bray is CP25(1)6/83/4. See also 2 *V.C.H., Bedfordshire*, 339-40.

Reginald Bray held numerous offices under Henry VII. S. B. Chrimes, *Henry VII* (London: Eyre Methuen, 1972), 110.

51. CP40/903, m.355d (Hil. 1488). P: William Tendale, arm. D: William Noreys, kn. Land: Manor of Redenhall, Norfolk.

Noreys had received the manor from Henry VII in tail male in 1486 after the attainder of William Catesby. *Patent Rolls, 1485-1494*, 129; Blomefield, *History of Norfolk*, V, 368. Tendale died on 22 February 1497, seised of the manor. 2 *IPM Henry VII*, No. 16.

By 1490, William Tendale had become a knight. See no. 61, below.

52. CP40/903, m.360 (Hil. 1488). P: Reginald Bray, kn., William Smith, Richard Emson, and William Coope. D: John [de la Pole], duke of Suffolk. Land: Manor of South Moreton and 65s. rent in West Witenham, Berkshire.

The duke, who had received the manor from his mother Alice, apparently sold to Bray. 3 *V.C.H., Berkshire*, 500, n. 67.

53. CP40/905, m.354d (Trin. 1488). P: Thomas Lovell. D: James Nesfields. Land: Manor of Newsham next Malton and 200 a. land, 100 a. meadow, 100 a. pasture, 6 a. woods and £3 rent in Helperthorpe, Kirkby-on-the-Wold, Littleburgh, and Amotherby, Yorkshire.

The transfer was probably a sale. 1 *V.C.H., Yorkshire, North Riding* 468, 467. After one Robert Constable died in 1501 his inquisition *post mortem* reported that Thomas Lovell had been seised of the manor and had suffered a recovery to feoffees who held to the use of Constable's last will. 2 *IPM, Henry VII*, No. 567.

Thomas Lovell was chancellor of the Exchequer, treasurer of the household, and treasurer of the chamber. Chrimes, *Henry VII*, 56, 122, 126.

54. CP40/905, m.450 (Trin. 1488). P: Reginald Bray, William Hody, Richard Emson, and William Coope. D: William, earl Marshall and Nottingham. Land: Manor of Bromeham, Bedfordshire.

The recovery effected an acquisition by Reginald Bray. 3 *V.C.H., Bedfordshire* 44, 301.

Reginald Bray was a royal official. See no. 50, above.

55. CP40/905, m.450d (Trin. 1488). P: Henry Percy, earl of Northumberland, Thomas FitzWilliam, Thomas Metham, William Rouhshowe, and Robert Wenslowe. D: William, earl Marshall and Nottingham. Land: Manors of Newsome, Brind, Thornton, and Gisthorp in Spaldingmoor and 60 messuages, 800 a. land, 400 a. meadow, 700 a. pasture, 300 a. woods, 3,000 a. moor, and £20 rent in Newsome, Brind, Thornton, and Gisthorp in Spaldingmoor, Yorkshire.

The recovery appears to have effected a sale to the earl of Northumberland, for the manor of Thornton was held to his use in 1489. 3 *V.C.H., Yorkshire, East Riding*, 183.

56. CP40/910, m.353d (Mich. 1489). P: John Legh and Edward Denny. D: John Young and Alice his wife. Land: Manor of Paddington and 30 a. land in Abingworth, Surrey.

By final concord also in Michaelmas Term 1489 defendants to the recovery quitclaimed with warranty from themselves and the heirs of Alice to the plaintiffs to the recovery and the heirs of Legh. CP25(1)232/77/14. On 4 October 1490 Young acknowledged receipt of the purchase price for the manor, *Close Rolls, 1485–1500*, No. 495, and on 3 November 1490 gave his release and quitclaim with warranty to Legh and Denny: *ibid.*, No. 438. See also 3 *V.C.H., Surrey* 133.

John Legh was a Surrey gentry who served as a justice of the peace. *Patent Rolls, 1485–1494*, 421. John Young seems to have been the son of the London grocer of the same name. Thrupp, *Merchant Class*, 376–7.

57. CP40/910, m.453 (Mich. 1489). P: William Courtenay, kn. D: Walter Raynell, arm., son and heir of Robert Raynell. Land: Manor of Butterleigh and 13 messuages, 20 a. land, 20 a. meadow, 40 a. woods, and 20 a. heath in Butterleigh, Devon.

On 1 April 1489 Raynell gave Courtenay, later earl of Devon, his charter with warranty for Butterly and entered into a bond for £800 defeasible if Raynell ensured the manor to Courtenay and delivered evidence of title. *Close Rolls, 1485–1500*, No. 459.

58. CP40/910, m.456d (Mich. 1489). P: Thomas Wood, Thomas Danvers, William Fisher, and William Rabbes. D: William Rokes, arm., and William Scull, arm. Land: Manor of Appledorefield, Kent.

The recovery appears to have effected a sale to Danvers, for in 1494 Danvers sold the manor to one Edward Denny. *Close Rolls, 1485–1500*, No. 800. The defendants' interest is not known.

Thomas Danvers was a lawyer. See no. 38, above.

59. CP40/910, m.517 (Mich. 1489). P: Thomas Radcliff, gen. D: Mary Kempe of Bordwell. Land: Manor of Hunston Hall, Suffolk.

Radcliff was apparently an agent of one Thomas Appulton, who acquired the manor. On 1 September 1489 one Henry Barough released and quitclaimed with the warranty the manor to Thomas Lovell, James Hobart, and Thomas Appulton. *Close Rolls, 1485–1500*, No. 440. Lovell, Hobard, and Appulton were seised to the use of Appulton at Appulton's death in 1507. 3 *IPM, Henry VII*, No. 435. Radcliff held other lands with Appulton to Appulton's use. *Ibid.*

60. (a) CP40/910, m.536d (Mich. 1489). P: Thomas Lovell. D: Edward [Lord] Dudley, kn. Land: Manor of Ryhall and 40 a. land, 20 a. woods, and 4s. rent in Ryhall, Rutland.

(b) CP40/910, m.536 (Mich. 1489). P: Thomas Lovell. D: Edward [Lord] Dudley. Land: Manor of Redlynch and 20 messuages, 20 tofts, 300 a. land, 40 a. meadow, 300 a. pasture, 100 a. woods, and 40s. rent in Redlynch, Wiltshire.

(c) CP40/910, mm.536–536d (Mich. 1489). P: Thomas Lovell. D: Edward [Lord] Dudley. Land: Manor of Burwell and 20 messuages, 20 tofts, 200 a. land, 200 a. meadow, 100 a. pasture, 6 a. woods, and 40s. rent in Burwell, Cambridgeshire.

The recovery of Ryhall effected a sale to Lovell. 2 *V.C.H., Rutland*, 270. Perhaps the other two recoveries also effected sales to Lovell.

Thomas Lovell was a royal official, see no. 53, above.

61. CP40/911, m.331d (Hil. 1490). P: Roger Townshend, kn. D: William Tendale, kn. Land: Manor of Raynham St. Martin and 1 mill, 100 a. land, 40 a. meadow, and 20 a. marsh in Raynham, Norfolk.

Townshend's inquisition *post mortem* reports that Tendale had enfeoffed Townshend, his wife, and others to the use of Townshend and his wife and Townshend's last will. 1 *IPM, Henry VII*, No. 1143.

Roger Townshend was justice of the Court of Common Pleas. Baker, *Serjeants*, 540.

62. CP40/919, m.146d (Hil. 1492). P: Edward, earl of Wiltshire, William Say, John Fisher serjeant at law, Thomas Kebell, serjeant at law, John Boteler, jnr., Richard Emson, Henry Harmon, and Thomas Haselwood. D: Thomas Lovet, snr., arm. Aid prayer: Thomas Lovet, jnr. Land: Drayton Manor in Battlebridge, Northamptonshire.

The recovery appears to have effected a sale to Edward, earl of Wiltshire, for about two years later he received license to convey the manor, less one acre, to feoffees. *Patent Rolls, 1485–1494*, 468.

Thomas Lovett was gentry with lands in Gloucestershire, Northamptonshire, and Oxfordshire. *Close Rolls, 1485–1500*, No. 877.

63. CP40/920, m.106 (Pas. 1492). P: Thomas Jermyn, James Hobart, John Aleyn, and Nicholas Palmer. D: Henry Tey, arm., and Margaret his wife, William Finden, kn., and Agnes his wife. Land: Manor of Rushbrooke and 20 messuages, 10 tofts, 400 a. land, 10 a. meadow, 200 a. pasture, 3 a. woods, and 20s. rent in Rushbrooke, Great Whelnetham, Little Whelnetham, Rougham, Henstead, Bradfield, Manewden, Bradfield Combust, Cockfield, and Dunkeston, Suffolk.

At his death in 1505 Jermyn and the other plaintiffs to the recovery held the manor to Jermyn's use and to the use of his last will. 3 *IPM, Henry VII*, No. 135.

In 1488 Thomas Jermyn, knight, was involved in another land transaction with John Aleyn and Henry Tey as co-feoffees. *Close Rolls, 1485–1500*, No. 329.

64. CP40/920, m.138 (Pas. 1492). P: William Purchase, Richard Higham, and Nicholas Pakenham. D: Henry Lisle. Land: Manor of Little Wilmcote and 1 messuage, 80 a. land, 2 a. meadow, and 2 a. woods in Bearley, Warwickshire.

In 1492, Lisle and his wife Elizabeth by final concord quitclaimed with warranty from themselves and the heirs of Elizabeth the land of the recovery to the plaintiffs of the recovery. *Warwickshire Fines*, III, 204–5, No. 2783. The fine might have set up a collateral warranty.

On 17 July 1492 John, son of Henry Lisle, also released and quitclaimed with warranty the lands of the recovery to the plaintiffs of the recovery. *Close Rolls, 1485–1500*, No. 635. The plaintiffs were probably feoffees for Hugh Clopton, who held it at his death in 1496. 2 *IPM, Henry VII*, No. 29. See 3 *V.C.H., Warwickshire*, 38; W. Dugdale, *Antiquities of Warwickshire* (London: Thomas Warren, 1656), 839.

Hugh Clopton was a Stratford merchant. Carpenter, *Locality and Polity*, 238.

Henry Lisle was of the Warwickshire gentry. *Ibid.*, 659, 679. They were associated in the town life of Stratford. *Ibid.*, 239, n. 194.

65. CP40/921, m.146d (Trin. 1492). P: John Ernley and Richard Hill. D: John Williams and Margery his wife. Land: One-half of the manor of Hunston and 50 a. land in Pagham, Sussex.

In 1493, the defendants to the recovery quitclaimed with warranty to the plaintiffs and the heirs of Ernley. *Sussex Fines*, III, No. 3285. The one-half of the manor had descended to Margery as granddaughter of John Benfield and would descend to Ernley's son, William. 4 *V.C.H., Sussex*, 157.

John Ernley, a lawyer, was later a serjeant and justice. Baker, *Serjeants*, 510.

66. CP40/922, m.101 (Mich. 1492). P: John Michell. D: William Bechele. Land: Manor of Tyes, Sussex.

From 1492 the manor descended in the Michell family. 7 *V.C.H., Sussex*, 160.

John Michell was a fishmonger and alderman of London. Thrupp, *Merchant Class*, 356.

67. CP40/923, m.324 (Hil. 1493). P: Richard Sutton and Robert Legh. D: John Holden and Anna his wife. Land: One-fifth of the manors of Oxney, Snodbeme, Stanstead, Offham, Badlesmere, Peckham, Hadlow, John Frances, Gold Hill, Marshalls, Coptgrove, Pepingstrawe, Ditton, Siffleton, and Brompton and one-fifth of 4 messuages, 280 a. land, 40 a. meadow, 300 a. pasture, 5 a. woods and 40s. rent in Hadlow, Ryarsh, West Peckham, Oxney, Snodbeme, Stanstead, Offham, Badlesmere, Peckham, Ditton, Brenchley, and Gold Hill, Kent.

On 9 February 1493 Holden released and quitclaimed to Sutton and Legh the manors, lands, tenements, rents, reversions, and services formerly of Richard Culpepper in Oxney, Kent, and acknowledged receipt of the purchase price from Sutton and Legh. *Close Rolls, 1485–1500*, No. 679.

John Holden was a London draper. *Ibid.*, No. 1181.

68. CP40/926, m.356 (Mich. 1493). P: William Lith, Oliver [King], bishop of Exeter, Reginald Bray, William Hody, Richard Evans, John Shaa, Humphrey Conyngesby, and William Coope. D: John Manningham, kn. Land: Manor of Old Ford and 14 messuages, 8 tofts, 14 gardens, 240 a. land, 50 a. meadow, 50 a. pasture, and 2 a. woods in Old Ford, Stepney, Hackney, and Stratford-atte-Bow, Middlesex.

The purchaser was John Shaa who by the time of his death in 1503 had enfeoffed others to the use of his last will. 2 *IPM, Henry VII*, No. 863.

John Shaa was a goldsmith and alderman of London. Thrupp, *Merchant Class*, 366.

69. CP40/939, m.149d (Hil. 1497). P: Henry Heydon, John Wendham, Edward Raleigh, and Humphrey Conyngesby, serjeant at law. D: Thomas Frowyk, serjeant at law, Edmund Gelgate, and John Williams of Frostenden. First vouchee: Edmund de la Pole, earl of Suffolk. Land: Manor of Hanwell and 5 messuages, 500 a. land, 20 a. meadow, 100 a. pasture, 10 a. woods, and 40s. rent in Hanwell, Oxfordshire.

The recovery effected a sale from de la Pole to William Coope or Cope, whose feoffees are the plaintiffs. When Henry VII permitted Edmund to recover the lands his brother John had forfeited for treason, Hanwell was one of the manors put in trust to secure to the king payment of £5,000. *Patent Rolls, 1494–1509*, 259–61. The sale to Coope received the king's permission, which also described the steps in the transaction, including this recovery. *Ibid.*

William Coope was cofferer of the royal household. *Close Rolls, 1485–1500*, No. 1088.

70. CP40/939, m.230 (Hil. 1497). P: John Breton, Thomas Marowe, Leonard Hyde, and Thomas Ingram. D: John Grey of Wilton, kn. Land: Manor of Libury and 10 messuages, 8 tofts, 246 a. land, 30 a. meadow, 90 a. pasture, 24 a. woods and rent of £6 12s., 1 half-penny, and 6 capons in Little Munden, Great Munden, Altwick, Ardeley, and Westmill, Hertfordshire.

On 22 February 1497, John Grey of Wilton, Florence his wife, and Edmund Grey his son and heir apparent released and quitclaimed from themselves and the heirs of Florence to the plaintiffs in the recovery and the heirs of John Breton the lands of the recovery. CP25(1)91/122/50. They were apparently feoffees of Richard Hill, who purchased the manor from John Grey of Wilton. The fine might have set up a collateral warranty. See 3 *V.C.H., Hertfordshire*, 132; *Close Rolls, 1485–1500*, No. 966.

Richard Hill was a London merchant. Thrupp, *Merchant Class*, 349–50.

71. (a) CP40/939, m.302d (Hil. 1497). P: Thomas Barowe, clerk, and William Gale, clerk. D: Edmund Carew, kn. Land: Manors of Moulsoford and Charlton and 1 messuage, 200 a. land, 200 a. meadow, 200 a. pasture, and 13s. 4d. rent in Moulsoford and Charlton, Berkshire.

(b) CP40/939, m.302d (Hil. 1497). P: Thomas Barowe and William Gale. D: Edmund Carew. Land: Manor of Ampport, Hampshire.

Plaintiffs to the recoveries were agents of Bartholomew Rede, goldsmith. On 8 April 1497 Edmund Carew released and quitclaimed with warranty the lands in both recoveries to Bartholomew Rede, Richard Higham, serjeant at law, Thomas Frowyk, serjeant at law,

John Shaa, John Rede, Christopher Elyot, Henry Woodcock, and Thomas Tychet. *Close Rolls, 1485–1500*, No. 986. On the same date, John Carew, Edmund's brother, released and quitclaimed with warranty the same lands to the same men. *Ibid.*, No. 1087. This release might have set up a collateral warranty against the lineal descendants of Edmund. Bartholomew Rede's inquisition *post mortem* reports that Frowyk, John Rede, Elyot, Woodcock, and Tychet were Bartholomew's feoffees holding the three manors of the two recoveries to the use of his last will. 3 *IPM, Henry VII*, Nos. 174, 346. See 9 *V.C.H., Hampshire*, 338; 3 *V.C.H., Berkshire*, 506; 4 *V.C.H., Berkshire*, 325.

72. CP40/941, m.84 (Trin. 1497). P: Robert Hawkins, Edward Horncliff, and Robert Elyngton. D: John Zouche of Zouche and Semer, kn. Land: Manors of Wotton and Ham and 200 a. land, 60 a. meadow, 200 a. pasture, 20 a. woods, and 20s. rent in Wotton, Ham, and Waddesdon, Buckinghamshire.

The recovery conveyed the lands to trustees who conveyed to Henry Colet and other trustees to hold to the use of Henry Colet and the performance of his last will. 3 *IPM, Henry VII*, No. 63; 4 *V.C.H., Buckinghamshire* 112.

Henry Colet was a mercer and alderman of London. Thrupp, *Merchant Class*, 332.

73. CP40/942, m.405 (Mich. 1497). P: Edmund Martin, clerk, and William Martin, arm. D: Nicholas Taillard. Land: Manor of Slepe and 160 a. land, 10 a. meadow, 20 a. pasture, 100 a. marsh, 100 a. heath, 4 a. woods, and 13s. 4d. rent in Lytchett Minster, Dorset.

William Martin's inquisition *post mortem* reports that he had been seised of the manor and had granted it to feoffees for a family settlement. 2 *IPM, Henry VII*, No. 962; 3 *IPM, Henry VII*, No. 381.

William Martin was a skinner and alderman of London. Thrupp, *Merchant Class*, 355.

74. CP40/946, m.108 (Mich. 1498). P: John Hutton and John Ropes. D: John Chilton and Walter Larkin. First vouchee: William Danseth. Land: Manor of Covington and 5 messuages, 106 a. land, 16 a. meadow, 20 a. pasture, 15 a. woods, and rent of 13s. 4d. and 2 capons in Covington, Elsworth, and Knapwell, Cambridge.

In preparation for the recovery in Michaelmas Term 1498 Danseth conveyed the land of the recovery by final concord to Chilton and Larkin. CP25(1)30/101/24. Hutton and Ropes were agents of John and Thomas Hutton. After John died, Thomas became sole beneficiary. 3 *IPM, Henry VII*, No. 2; 9 *V.C.H., Cambridgeshire*, 282.

John Hutton was a lawyer. Ives, *Common Lawyers*, p 303. William Danseth was of the Cambridgeshire gentry. 9 *V.C.H., Cambridgeshire*, 282.

75. CP40/949, m.402 (Trin. 1499). P: William [Smith], bishop of Lincoln, Reginald Bray, William Hody, Hugh Oldom, Humphrey Conyngesby, serjeant at law, Richard Emson, Robert le Straunge, and William Coope. D: Thomas Danvers and Sybil his wife. First vouchee: William Skull. Land: Manor, advowson, and hermitage of

Clewer and 20 messuages, 20 cottages, 600 a. land, 60 a. meadow, 200 a. pasture, 200 a. woods, and £15 rent in Clewer, Berkshire.

The recovery was one transaction in Reginald Bray's acquisition of Clewer from various persons with various interests in various parts of the manor. Thomas Danvers was Sybil Thorley's fifth husband. Her second husband was Thomas Rykes. Their son William died seised of one-half of Clewer in 1491 and was succeeded by his son John. 1 *IPM, Henry VII*, No. 710. Also in 1499, Bray acquired the interests of John Rykes, his wife Joan, his mother Elizabeth, and her then husband Charles Rippon as well as the reversionary interest of William Brocas. *Close Rolls, 1485-1500*, Nos. 1119, 1195; CP25(1)13/88/31; CP25(1)13/88/34; CP25(1)13/88/35; CP25(1)13/88/36. The other half of the manor belonged to William Skull, who with his son John and John's wife, Joyce, by final concord in Michaelmas Term 1499 conveyed with warranty the manor from themselves and the heirs of Joyce to the plaintiffs of the recovery. CP25(1)13/88/33. Including Joyce might have set up a collateral warranty against anyone claiming as lineal descendant of John Skull. It is not clear why Sybil was included in the recovery unless it was thought that doing so would bar descendants of herself and Thomas Rykes. See 3 *V.C.H., Berkshire*, 73.

Reginald Bray was a royal official: see no. 50, above. Thomas Danvers was a lawyer: see no. 38, above. William Skull was of the Berkshire gentry. 3 *V.C.H., Berkshire* 73.

76. CP40/959, m.105 (Hil. 1502). P: Henry Baker, John Shaa, Ralph Latham, Robert Latham, and John Heron. D: John St. Nicholas son and heir of Thomas St. Nicholas. Land: Manor of Norton and 200 a. land, 100 a. pasture, 30 a. woods and £6 rent in Norton, Lynsted, Teynham, Great Buckland, and Little Buckland, Kent.

The indenture of sale from defendant to Henry Baker may be found at *Close Rolls, 1500-1509*, No. 177.

In another sale to Henry Baker, this time by Thomas St. Nicholas, Baker is styled a yeoman and St. Nicholas a gentleman. *Close Rolls, 1485-1500*, No. 1148.

77. CP40/959, m.318 (Hil. 1502). P: Robert Norwich and Edward Stubbs. D: James Humand and Thomas Ridnall. First vouchee: Richard Rokes. Second vouchee: Thomas Rokes. Land: Manor of Marlesford and 10 messuages, 300 a. land, 40 a. meadow, 100 a. pasture, 160 a. woods, and £10 rent in Marlesford, Suffolk.

On 14 February 1502 William Rokes released and quitclaimed with warranty the land in the recovery to the plaintiffs of the recovery to the use of Robert Drury, his heirs and assigns. *Close Rolls, 1500-1509*, No. 123. On 1 November 1503, Thomas Rokes and his brother Richard gave Drury a bill witnessing the sale of Marlesford to Drury and released and quitclaimed, with warranty, the manor to Drury, Norwich, and Stubbs. *Ibid.*, No. 200. See also *ibid.*, Nos. 91, 975, 990 for further dealings between the Rokes and Robert Drury.

Robert Drury was a barrister of Lincoln's Inn. Ives, *Common*

*Lawyers*, 130. Thomas Rokes' daughter married Justice Richard Nele's son: *ibid.*, at 470.

78. CP40/959, m.359 (Hil. 1502). P: Edmund Dudley, Andrew Windsor, and John Caryll. D: Robert Johnson and John Durdaunt. Land: Manor of Hatherden and 1 messuage, 200 a. land, 20 a. meadow, 100 a. pasture, and 30 a. woods in Andover, Hampshire.

On 7 February 1502, Robert Johnson and Jane, daughter and heir apparent of John Durdaunt, entered into an indenture of sale with Edmund Dudley for the manor of Hatherden and all their lands in Andover, Hampshire. *Close Rolls, 1500–1509*, No. 143. On 5 June 1502 they released and quitclaimed to the plaintiffs in the recovery. *Ibid.*

Edmund Dudley was president of the King's Council: D. M. Brodie, "Edmund Dudley, Minister of Henry VII," *Transactions of the Royal Society* 15 (4th ser., 1932), 133–61. Durdaunt was of the Hampshire gentry: 4 *V.C.H. Hampshire* 353.

79. CP40/959, m.360 (Hil. 1502). P: John Dawetry. D: Richard Ridgedale. Land: One-quarter of the manor of Stubcroft and 120 a. land, 20 a. meadow, 120 a. pasture, 20 a. wood, and 20s. rent in East Wighting, Oryton, Stamerham, and Chilgrove, Sussex.

The recovery effected part of Dawetry's purchase of the manor. He purchased another one-quarter by another recovery, no. 86 below, and the remaining half by final concord. *Sussex Fines*, IV, No. 3323.

John Dawetry was collector of the customs at Southampton. *Patent Rolls, 1494–1509*, 205.

80. CP40/960, m.143d (Pas. 1502). P: Reginald Bray, John Shaa, Hugh Oldom, Henry Woodcock and John Rede. D: George Cheddington and Margaret his wife. Land: Manor of Quidhampton and 200 a. land, 40 a. meadow, 200 a. pasture, and 10 a. woods in Quidhampton and Elingdon, Wiltshire.

On 20 April 1502, Cheddington, referring to the recovery, released and quitclaimed with warranty the land in the recovery to the plaintiffs. *Close Rolls, 1500–1509*, No. 107. The manor was held in right of Margaret, daughter of William Collingbourne. 11 *V.C.H., Wiltshire*, 242. The plaintiffs took as feoffees of Bartholomew Rede, goldsmith, and were seised to his use and for the performance of his last will. 3 *IPM, Henry VII*, No. 200.

81. CP40/960, m.252d (Pas. 1502). P: William [Smith], bishop of Lincoln, Reginald Bray, William Hody, John Shaa, Hugh Oldom, Humphrey Conyngesby, serjeant at law, Richard Emson, William Coope, John Hall, and Nicholas Compton. D: Edmund Brudenell, arm. Land: Manor of Burnham and 10 messuages, 10 cottages, 300 a. land, 30 a. meadow, 100 a. pasture, 200 a. woods, and 19s. 1d. rent in East Burnham, West Burnham, Dorney, and Cippenham, Buckinghamshire.

The recovery effected a sale from Brudenell to Bray. The indenture of sale appears at *Close Rolls, 1500–1509*, No. 165. See 3 *V.C.H., Buckinghamshire* 177.

Reginald Bray was a royal official. See no. 50, above. Edmund Brudenell, of the Buckinghamshire gentry, was father of Justice Robert Brudenell. Ives, *Common Lawyers*, 454.

82. CP40/960, m.296 (Pas. 1502). P: William Drury, kn. D: Henry Baudes, gen. Land: Manors of Henstead and Blanstons, the advowson of Henstead, and 10 messuages, 3 tofts, 500 a. land, 60 a. meadow, 1,000 a. pasture, 40 a. woods, 300 a. heath, 60 a. marsh, and £5 rent in Henstead, Wrentham, Benacre, Sotterly, South Cove, Frostenden, Northales [Covehithe], Ridon, Uggeshall, Stoven, Kesslingland, Rushmere, Redisham, Great Redisham, Little Weston, and Beccles, Suffolk.

The indenture for this sale appears at *Close Rolls, 1500–1509*, No. 167.

Robert Drury was a lawyer: see no. 77, above.

83. CP40/960, m.304 (Pas. 1502). P: William [Smith], bishop of Lincoln, Reginald Bray, William Hody, John Shaa, Hugh Oldom, Humphrey Conyngesby, serjeant at law, Richard Emson, William Coope, John Cutte, and Nicholas Compton. D: John Hall, clerk. First vouchee: John Wayte and Agatha his wife. Land: Manor of Weston and 140 a. lands, 14 a. meadow, 40 a. pasture, 6 a. woods, and 10s. rent in Weston, Buckinghamshire.

The recovery effected a sale from John and Agatha Wayte to Reginald Bray. 3 *V.C.H.*, *Buckinghamshire*, 178. The manor was Agatha's inheritance. *Ibid.*

Reginald Bray was a royal official: see no. 50, above. John Wayte was of the Buckinghamshire gentry. *Close Rolls, 1485–1500*, No. 694. See I, F, 2, below.

84. CP40/960, m.312d (Pas. 1502). P: Richard Hungerford, arm. D: George Gaynesford, arm. Land: Manor and advowson of Hampton Poyle and 12 messuages, 30 a. meadow, 220 a. pasture, and 2s. rent in Hampton Poyle, Oxfordshire.

The recovery effected a sale from Gaynesford to Hungerford. See 6 *V.C.H.*, *Oxfordshire*, 161.

They were both Oxfordshire gentry. *Ibid.*

85. CP40/960, m.434d (Pas. 1502). P: Edmund Dudley, Andrew Windsor, John Covert and Richard Brammer. D: John Clinton, Lord Clinton and Say, and Anna his wife. Land: Manor of Hamsey next Lewes, Sussex.

The recovery effected a sale from Clinton to Dudley. 7 *V.C.H.*, *Sussex*, 84.

Edmund Dudley was president of the King's Council: see no. 78, above.

86. CP40/960, m.440d (Pas. 1502). P: John Dawetry. D: Richard Norton and Elizabeth his wife. Land: One-quarter of the manor of Stubcroft and 120 a. land, 20 a. meadow, 120 a. pasture, 20 a. wood and 20s. rent in East Wighting and Chilgrove, Sussex. See no. 79, above.

87. CP40/961, m.343d (Trin. 1502). P: Thomas Fenys and Richard

Devenish. D: John Devenish, kn. First vouchee: Anna Massingbird. Land: Manor of Moorhall and 1 messuage, 500 a. land, 100 a. meadow, 30 a. pasture, 200 a. woods, and 100s. rent in Moorhall, Ninfield, Ashburnham, Hoo, Cottesfield, and Worthing, Sussex.

On 2 July 1502 Massingbird entered into an indenture of sale for the manor to plaintiffs of the recovery and on 8 July 1502 she released and quitclaimed to them with warranty. *Close Rolls, 1500–1509*, No. 182.

Fenys was styled knight and Devenish, esquire. *Ibid.*

88. CP40/961, m.360 (Trin. 1502). P: William [Smith], bishop of Lincoln, George Nevill, Lord Bergavenny, Reginald Bray, John Shaa, John Boteler, serjeant at law, Richard Emson, William Coope, William Frost, and Edward Ferrers. D: Giles Daubeney, kn. [Lord Daubeney]. Land: Manor of Kempston Daubeney and 600 a. land, 200 a. meadow, 300 a. pasture, 140 a. woods, and 40s. rent in Kempston, Bedfordshire.

The recovery effected a sale from Daubeney to Nevill, who later conveyed to Reginald Bray. *Close Rolls, 1500–1509*, No. 201; 3 *V.C.H., Bedfordshire*, 298.

89. CP40/961, m.362 (Trin. 1502). P: Christopher Brown, arm, Thomas Badingfield, Edmund Badingfield, William Elmes, and Edward Browne. D: Thomas Burton, gen. Land: Manor of Tolthorp and 2 messuages, 1 dovecote, 2 water mills, 180 a. land and 21 a. pasture in Tolthorp and the hundred of Little Casterton and the advowson with 1 a. land appurtenant of Little Casterton, Rutland.

The recovery effected a sale from Burton to Christopher Brown, merchant. 2 *V.C.H., Rutland*, 239.

90. CP40/962, m.108d (Mich. 1502). P: William Say and Thomas Knighton. D: Thomas Baud. Land: Manor of Milkley and 10 messuages, 1 mill, 1 dovecote, 4 gardens, 1,000 a. land, 100 a. meadow, 600 a. pasture, 300 a. woods and £16 rent in Milkley, Standon, Puckeridge, Braughing, Munden, Great Wadesmill, and Shendish, Hertfordshire.

The indenture of sale from Baud to Say appears at *Close Rolls, 1500–1509*, No. 239. See 3 *V.C.H., Hertfordshire* 360.

The Baud family were Hertfordshire gentry. *Ibid.*

91. CP40/962, m.113d (Mich. 1502). P: John Ernley, William Copinger, Alfred Ransom, and John Jenour. D: Thomas Cornwall, kn. Land: Manor of Norton and 20 messuages, 400 a. land, 100 a. meadow, 400 a. pasture, 60 a. woods, 400 a. heath, and 30s. rent in Norton and Wilton, Northamptonshire.

Cornwall confirmed his sale to Ernley by final concord three years later. G. Baker, *History and Antiquities of Northamptonshire*, I, 2 vols. (London: Nichols & Son, 1822–41), 415.

John Ernley, a lawyer, was later serjeant and justice: see no. 65, above. Thomas Cornwall was knight of the king's body. *Close Rolls, 1485–1500*, No. 909.

92. CP40/962, m.313 (Mich. 1502). P: William [Smith], bishop of Lincoln, Reginald Bray, William Hody, John Shaa, Hugh Oldom,

Humphrey Conyngesby serjeant at law, Richard Emson, William Coope, John Cutte, and Nicholas Compton. D: Thomas Everdon and Alice his wife. First vouchee: Richard Everdon. Land: Manor of Bealgraves (also known as Everdon Manor) in East Hodden and 24 messuages, 5 tofts, 20 virgates land, 30 a. meadow, 40 a. pasture, 12 a. wood, and rent of 20s. and  $\frac{1}{3}$  lb. pepper in East Hodden, Brompton, and Pifford, Northamptonshire.

The transaction seems to have been a sale to Bray in that it resembles other sales to Bray.

Bray was a royal official: see no. 50, above. The Everdons were of the Northamptonshire gentry. *Close Rolls, 1485-1500*, No. 947.

93. CP40/962, m.455d (Mich. 1502). P: Edmund Tame. D: John Hussey, kn., and Margaret his wife. Land: Manor of Calmsden and 3 messuages, 300 a. land, 40 a. meadow, 20 a. pasture, and 10s. rent in Calmsden and Woodmancote, Gloucestershire.

Tame acquired the manor and later settled it on his wife, Katherine. See 7 *V.C.H., Gloucestershire* 154.

Edmund Tame was a burges of Burford, Oxfordshire. *Close Rolls, 1485-1500*, No. 1179.

#### *B. Simple sales – less than a manor*

1. CP40/716, m.119 (Hil. 1440). P: William Hindstone. D: John Danyell and Joan his wife. Land: 1 messuage and 30 a. land in Dunstan, Devon.

William Hindstone was a lawyer, created serjeant in 1453. Ives, *Common Lawyers*, 45; Baker, *Serjeants*, 518. The transaction was probably a purchase by Hindstone.

2. CP40/734, m.336 (Trin. 1444). P: John Wydeslade. D: Thomas Tremayn and Elizabeth his wife. Land: 3 messuages, 3 furlongs land, and 5 marks rent in Tregearle, Tregolan, Tresanek, Polnathe, Treuvan, Trewanowe, Tredwen, Trelay, and Tregelist, Cornwall.

This John Wydeslade was probably the chief prothonotary of Common Pleas, not the later filacer for Devon, Dorset, Somerset, and Bristol. See Hastings, *Court of Common Pleas*, 104 n. 38, 145. The transaction was probably a purchase by Wydeslade.

3. CP40/734, m.425 (Trin. 1444). P: William Hindstone and John Snape. D: Thomas Rynell and Joan his wife. Land: 1 messuage, 50 a. land, and 1 a. meadow in Riddenore, Devon.

William Hindstone was a lawyer, created serjeant in 1453: see no. 1, above. The transaction was probably a purchase by Hindstone.

4. CP40/784, m.122 (Hil. 1457). P: Richard Maryot. D: John Waren and Alice his wife. Land: 1 messuage and 1 toft in Northampton, Northamptonshire.

Richard Maryot was a lawyer of the Inner Temple. Ives, *Common Lawyers*, 385. The transaction was probably a purchase by Maryot.

5. CP40/785, m.135d (Pas. 1457). P: Richard Maryot. D: John Waren and Alice his wife. Land: 4 messuages in Northampton, Northamptonshire.

Richard Maryot was a lawyer of the Inner Temple. Ives, *Common Lawyers*, 385. The transaction was probably a purchase by Maryot.

6. CP40/803, m.139d (Hil. 1462). P: John Catesby. D: Eliam Wetnale. Land: 1 messuage, 66 a. land, and 1 a. meadow in Hughenden, Buckinghamshire.

John Catesby was a lawyer, created serjeant in the following year. Baker, *Serjeants*, 504. The transaction was probably a purchase of Catesby.

7. CP40/822, m.133d (Hil. 1467). P: Richard Nele, serjeant at law. D: Thomas Port of London and Thomas Baxter and Joan his wife. Land: 1 messuage, 3 tofts, 36 a. land, 8 a. meadow in Shepshed, Leicestershire.

Richard Nele, created serjeant in 1463, was a native of Shepshed, Leicestershire. Baker, *Serjeants*, 528; Ives, *Common Lawyers*, 472. The transaction was probably a purchase by Nele.

8. CP40/823, m.308 (Pas. 1467). P: Robert Wolveden. D: John Arundel of Talfern, arm. Land: 4 messuages, 300 a. land, 10 a. meadow, 100 a. pasture in Wolveden, Vian, and Ceiveras, Cornwall.

On 6 February 1467 Arundel quitclaimed to Wolveden with warranty. *Close Rolls, 1461–1468*, 393–4.

9. CP40/863, m.320 (Trin. 1477). P: Henry Foljambe, arm. D: Roger Daude. Land: 2 messuages, 4 tofts, 60 a. land, 10 a. meadow, and 4 a. wood in Whittington, Newbold, and Dunstan, Derbyshire.

Henry Foljambe was purchasing property in the area of Newbold in the later fifteenth century; this transaction was probably one of his purchases. Wright, *Derbyshire Gentry*, 27. The Foljambes were a knightly family. *Ibid.*, 203.

10. (a) CP40/880, m.336 (Pas. 1482). Richard Maudeley and John Maudeley. D: Simon Wiseman. Land: 10 messuages, 4 tofts, 1 dovecote, 10 gardens, 10 a. land, and 10 a. meadow in Bristol, Gloucestershire.

(b) CP40/880, m.336 (Pas. 1482). Richard and John. D: Simon. Land: 2 messuages, 60 a. land, 10 a. meadow in Warminster and Bishop's Straw, Wiltshire.

(c) CP40/880, m.355d (Pas. 1482). P: Richard and John. D: Simon. Land: 12 messuages, 8 tofts, 1 mill, 12 gardens, 400 a. land, 50 a. meadow, 20 a. wood, 10 a. moor in Yaldwell, Oggeshale, Fodington, Charleton, Chesterblade, and Stratton, Somerset.

The agreement of sale, including Wiseman's agreement to have a kinsman release with warranty, may be found at *Close Rolls, 1476–1485*, No. 918. The agreement for a kinsman's warranty was aimed at setting up a collateral warranty.

Richard Maudeley was a "clothman" of Croscombe, Somerset. *Close Rolls, 1485–1500*, Nos. 510, 542. Simon Wiseman was of the Norfolk gentry. See I, A, 36, above. For additional purchases by the Maudeleys from Wiseman see *Close Rolls, 1485–1500*, Nos. 762, 799.

11. CP40/880, m.352 (Pas. 1482). P: John Draper. D: John Twyncho and Agnes his wife, and Thomas Warner and Elizabeth his wife. Land: 21

messuages, 1 dovecote, 16 gardens, 1 carucate and 50 a. land, 20 a. meadow, 20 a. pasture, and 5s. 4d. rent in Wells, Wookey, Wookey Hole, Milton, and Westbury, Somerset.

Later in 1482, the defendants quitclaimed with warranty to the plaintiff. *Somerset Fines*, III, 154, No. 40.

12. CP40/882, m.142 (Mich. 1482). P: John Hough and John Green. D: William Isaac and Richard Isaac. First vouchee: Richard Pake. Land: 1 messuage, 66 a. land, 14 a. meadow in Theydon Garnon and Theydon-atte-Mount, Essex.

In Michaelmas Term 1482 Richard Pake and Joan his wife by final concord quitclaimed with warranty to plaintiffs and the heirs of Hough. *Essex Fines*, IV, 81, No. 152.

13. CP40/885A, m.331d (Trin. 1483). P: Thomas Hervy. D: Richard Lacy and Alice his wife. Land: 1 messuage, 120 a. land, 10 a. meadow, 10 a. pasture in Weston-under-Wetherley, Warwickshire.

A few years earlier the defendants had quitclaimed with warranty from themselves and the heirs of Alice to the plaintiff. *Warwickshire Fines*, III, 194–5, No. 2709.

14. CP40/887, m.118 (Hil. 1484). P: John Underhill. D: John Cotes, son of Thomas Cotes, arm., and Joy his wife. Land: 3 messuages, 3 tofts, 3 gardens, 160 a. land, 24 a. meadow, 8 a. pasture, 2 a. woods, and 6s. 8d. rent in Weston-under-Wetherley and Honningham, Warwickshire.

The Cotes were selling land at this time and the recovery probably effected one of their sales. See Carpenter, *Locality and Polity*, 133–4. Additional transfers to Underhill, these made by final concord, are at *Warwickshire Fines*, III, 198, No. 2723 (1483) and 203, No. 2735 (1491). The Underhills and the Cotes were Warwickshire gentry. Carpenter, *Locality and Polity*, 680–1.

15. CP40/904, m.356d (Pas. 1488). P: Reginald Bray, kn., William Hody, Richard Emson, and William Coope. D: William, earl Marshall and Nottingham, Edward Willoughby, and Robert Logge. Land: 1 messuage, 400 a. land, 5 a. meadow, 140 a. woods in Kensington, Middlesex.

The indenture of sale evidencing the earl's sale to Bray appears at *Close Rolls, 1485–1500*, No. 294.

Reginald Bray was a royal official: see I, A, 50, above.

16. CP40/906, m.113 (Mich. 1488). P: John Johnson. D: John Sleforth. Land: 2 messuages in Beverley, Yorkshire.

In April of the following year Sleforth quitclaimed with warranty to Johnson. *Close Rolls, 1485–1500*, No. 402.

Johnson and Sleforth were Beverley merchants. *Close Rolls, 1485–1500*, Nos. 489, 492.

17. CP40/906, m.326 (Mich. 1488). P: Thomas Wilkinson and William Heed. D: David Hopton, Richard Ansyn, and Walter Colman. First vouchee: Richard, Earl Rivers. Land: 2 messuages, 101 a. land, and 10 a. woods in Maidstone, Kent.

On 4 October 1488 John [Morton], archbishop of Canterbury

entered into an indenture of sale to purchase the lands of the recovery from Richard, Earl Rivers. *Close Rolls, 1485–1500*, No. 360. On 12 November 1489, Richard, Earl Rivers, referring to the recovery, released and quitclaimed with warranty to the plaintiffs of the recovery, probably Morton's agents. *Ibid.* The recovery used a writ of right for which the archbishop of Canterbury remitted his court. The defendants were probably the earl's feoffees.

18. CP40/906, m.443d (Mich. 1488). P: John Barfoot, clerk, Robert Alwether, clerk, and John Capel. D: Thomas Martin. Land: 1 messuage, 200 a. land, 20 a. meadow, 200 a. pasture, 6 a. woods in Bradfield and Rayne, Essex.

The plaintiffs were feoffees of William Capel, who on 19 November 1488 entered into an indenture of sale to purchase the lands from Thomas Martin and his wife Eleanor, with an option to undo the sale within a year. *Close Rolls, 1485–1900*, No. 511. On 6 July 1490, Martin released and quitclaimed with warranty to the plaintiffs. *Ibid.*

William Capel was a draper and alderman of London. Thrupp, *Merchant Class*, 328.

19. CP40/909, m.310d (Trin. 1489). P: William Johnson of Beverley, gen. D: John Sleforth. Land: 5½ messuages and 4½ gardens in Beverley, Yorkshire.

This appears to be another sale from Sleforth to the Johnsons. See no. 16, above.

20. CP40/910, m.105d (Mich. 1489). P: Ralph Okeover, arm. D: John Ireland, son and heir of Robert Ireland, gen. Land: 2 messuages, 28 a. land, 10 a. meadow, 104 a. pasture and 140 a. moor in Yeldersley, Derbyshire.

The transaction was probably a sale of part of the Irelands' holdings in Yeldersley. See Wright, *Derbyshire Gentry*, 204.

The Okeovers were a knightly family; the Irelands, gentry. *Ibid.*, 203, 204.

21. CP40/910, m.119d (Mich. 1489). P: William Basset, snr. D: John Ireland son and heir of Robert Ireland, gen. Land: 2 messuages, 42 a. land, 14 a. meadow, 170 a. pasture, 160 a. moor in Yeldersley, Derbyshire.

The transaction is probably another sale by John Ireland of Yeldersley. See preceding entry.

The Bassets and the Irelands were Derbyshire gentry. Wright, *Derbyshire Gentry*, 203, 204.

22. CP40/910, m.160d (Mich. 1489). P: William Harcourt and Thomas Jakes. D: Nicholas Pratt, clerk. Land: 14 messuages, 5 tofts, 200 a. land, 40 a. meadow, 60 a. pasture, 10 a. woods, and 40s. rent in Ibstock and Dadlington, Leicestershire.

The indenture of sale between Pratt and Harcourt appears at *Close Rolls, 1485–1500*, No. 380.

William Harcourt styled himself "esquire." *Ibid.*

23. (a) CP40/910, m.413 (1489). P: Robert White and William White. D:

John Sleforth. Land:  $1\frac{1}{2}$  messuages and 7 a. pasture in Beverley, Yorkshire.

(b) CP40/910, m.404d (Mich. 1489). P: Robert White and William White. D: John Sleforth. Land: 5 messuages in Kingston-on-Hull, Yorkshire.

On 26 March 1490, Sleforth released and quitclaimed with warranty the lands in the two recoveries to Robert White. *Close Rolls, 1485-1500*, No. 489.

Robert White was a merchant of Beverley (*ibid.*), as was Sleforth (see no. 16, above).

24. CP40/915, m.322d (Hil. 1491). P: William Reynold and Richard Boteler. D: Humphrey Conyngesby. Land: 1 messuage, 1 toft, 120 a. land, 10 a. meadow, and 100 a. pasture in Aston Cantlow, Warwickshire.

The transaction was a sale to Reynold. In the same term Conyngesby by final concord quitclaimed with warranty to the plaintiffs and Reynold's heirs. *Warwickshire Fines*, II, 203, No. 2733.

William Reynold was a lawyer. Ives, *Common Lawyers*, 123-4. Humphrey Conyngesby was a lawyer, later a serjeant. Baker, *Serjeants*, 506.

25. CP40/959, m.129d (Hil. 1502). P: John Long. D: Walter Wrottesley. First vouchee: John Kenne. Land: 7 messuages, 2 gardens, 40 a. land, 100 a. meadow, 100 a. pasture, 3 a. woods in Harwick and Minsterworth, Gloucestershire.

Although the interests of Wrottesley and Kenne are not clear, Long recovered the land to use of one William Trye, esq., to whom Long rendered the land on 5 May 1502. *Close Rolls, 1500-1509*, No. 369. For other dealings between Kenne and Wrottesley see *ibid.*, No. 90.

26. CP40/959, m.314d (Hil. 1502). P: John Mordaunt, William Gascoigne, John Colle, and Robert Lagden. D: Thomas Spratt, William Cassell, and William Jenner. First vouchee: Edmund Brudenell, arm. Land: 2 tofts, 40 a. land, 3 a. meadow, and 10 a. pasture in Debden, Essex.

Later in 1502 Brudenell and his wife Joan by final concord quitclaimed with warranty to plaintiffs and the heirs of Mordaunt. *Essex Fines*, IV, 105, No. 154.

John Mordaunt at the time of the recovery was king's serjeant and chief justice of Chester. Baker, *Serjeants*, 526. Edmund Brudenell of the Buckinghamshire gentry was father of Justice Robert Brudenell. Ives, *Common Lawyers*, 454.

27. CP40/959, m.341 (Hil. 1502). P: Richard Beauchamp, Lord St. Amands and Thomas Long. D: William Smith, yeoman. Land: 2 tofts, 50 a. land, 6 a. meadow, 10 a. pasture, fishery in the common bank called Ambersbury Bourn and pasture for 60 beasts in Great Amesbury, Childrington, Salterton, and Bulford, Wiltshire.

The recovery probably effected a sale to Beauchamp in that land in Amesbury and Childrington was sold in 1508 to pay annuities

devised in Richard Beauchamp's will. Thomas Long was one of his executors. *Close Rolls, 1500–1509*, No. 937.

28. CP40/959, m.343d (Hil. 1502). P: Henry Woodcock and John Mundy. D: William Clayton. Land: 1 messuage, 60 a. land, 4 a. meadow, 40 a. pasture, and 30 a. woods in Thundersley and Rayleigh, Essex.

According to the inquisition *post mortem* of John Shaa, the plaintiffs recovered the lands from Clayton to Shaa's use. 2 *IPM, Henry VII*, No. 679.

John Shaa was a London merchant. See I, A, 68, above.

29. CP40/961, m.377d (Trin. 1502). P: Henry Colet, Robert Brudenell, and John Agmondsham. D: Edward Cumberford. Aid prayer: Thomas Cumberford. Land: 6 messuages, 200 a. land, 40 a. meadow, 20 a. pasture, 20 a. wood, and 10s. rent in Great Weldon, Weldon, and Little Weldon, Northamptonshire.

Henry Colet's inquisition *post mortem* reports that Cumberford suffered the recovery to the use of Colet. 3 *IPM, Henry VII*, No. 62.

Henry Colet was a London merchant. See I, A, 72, above.

30. CP40/961, m.415 (Trin. 1502). P: William [Smith], bishop of Lincoln, Reginald Bray, John Shaa, Hugh Oldom, Humphrey Conyngesby, serjeant at law, Richard Emson, William Coope, John Cutte, and Nicholas Compton. D: Fulk Woodhill. Land: 15s. 4d. rent in Calesbroke, Northamptonshire.

The transaction probably was a purchase by Bray because in other recoveries to effect purchases Bray used the same plaintiffs as appear here.

Reginald Bray was a royal official. See I, A, 50, above.

31. (a) CP40/962, m.402d (Mich. 1502). P: William Coope, arm., William Copinger, and Thomas Birks. D: Richard Danvers, arm. Land: 6 a. meadow in Banbury and Grimsbury, Northamptonshire.

(b) CP40/962, m.402d (Mich. 1502). P: William Coope, arm., William Copinger, and Thomas Birks. D: Richard Danvers, arm. Land 4½ a. land and 5½ a. meadow in Banbury, Cropredy, Hardwick, and Bourton, Oxfordshire.

On 30 November 1502 Danvers quitclaimed the lands in both recoveries to plaintiffs to Coope's use for £37, 10s. *Close Rolls, 1500–1509*, No. 214.

William Coope was cofferer of the royal household. See I, A, 69, above.

32. CP40/962, m.517d (Mich. 1502). P: William [Smith], bishop of Lincoln, Reginald Bray, William Hody, John Shaa, Hugh Oldom, Humphrey Conyngesby, serjeant at law, Richard Emson, William Coope, John Cutte, and Nicholas Compton. D: William Breswell and Margery his wife. Land: 1 messuage, 22 a. land, 12 a. meadow, 30 a. pasture, and 18 a. wood in the parish of Sandhurst, Berkshire.

The transaction was probably a purchase by Bray because in other recoveries to effect purchases Bray used the same plaintiffs as appear here.

Reginald Bray was a royal official. See I, A, 50, above.

*C. Complicated sales*

1. CP40/784, m.339d (Hil. 1457). P: Thomas Littleton. D: John Spetchley, arm., and Maud his wife. Land: Manor of Spetchley and 20 messuages, 12 tofts, 3 carucates and 300 a. land, 40 a. meadow, 200 a. pasture, 20 a. woods, and 40s. rent in Spetchley, Worcestershire.

In 1454, Spetchley by final concord resettled the manor on himself for life, remainder to Thomas Littleton and his wife Joan and the heirs of Thomas. CP25(1)260/27/48. In 1459, Spetchley and his wife Maud by final concord quitclaimed with warranty from themselves and the heirs of Maud to Littleton. CP25(1)260/27/48. The recovery would have transferred Spetchley's life estate to Littleton, who later settled the manor on his wife and his son. 3 *V.C.H.*, *Worcestershire*, 525.

Thomas Littleton was a serjeant at law and later justice of Common Pleas. Baker, *Serjeants*, 523.

2. CP40/909, m.135d (Trin. 1489). P: Edmund Cornwall, kn. D: Richard Knightly, arm. Land: Manor of Weston-under-Wetherley, 1 mill, a fishery in the water of Weston, 200 a. land, 40 a. meadow, 80 a. pasture, 40 a. woods, and rent of 6s. 8d. and 1 halfpenny in Weston-under-Wetherley, Warwickshire.

The recovery effected part of a complicated exchange of lands and revenues between Cornwall and Knightly. The indenture is at *Close Rolls, 1485-1500*, No. 406. Cornwall's son later conveyed the manor to Edward Belknap. *Ibid.*, No. 1153.

3. (a) CP40/947, m.310 (Hil. 1499). P: William [Smith], bishop of Lincoln, Reginald Bray, William Hody, John Shaa, Hugh Oldom, Humphrey Conyngesby, serjeant at law, Richard Emson, William Coope, John Cutte, and Nicholas Compton. D: John Markham, arm. Land: 2 messuages, 80 a. land, 20 a. pasture, and 5s. rent in Farndish, Henwick, and Podington, Bedfordshire.

(b) CP40/947, m.315 (Hil. 1499). P: William [Smith], bishop of Lincoln, Reginald Bray, William Hody, John Shaa, Hugh Oldom, Humphrey Conyngesby, serjeant at law, Richard Emson, William Coope, John Cutte, Nicholas Compton, and Giles Daubeney of Daubeney. D: John Markham, arm. Land: Manors of Sedgebrook and Allington, Lincolnshire.

The indenture of sale evidencing Markham's sale to Bray of the lands in the first recovery appears at *Close Rolls, 1485-1500*, No. 1101. The second recovery effected an agreement to protect Bray against claims for dower by Markham's wife, Alice. If Alice claimed dower, Bray was to have the revenues of the two Lincolnshire manors during the interruption of his possession by Alice, but should Bray get Alice's valid release, the plaintiffs to the second recovery were to hold to Markham's use. See IV, A, 41, below.

Reginald Bray was a royal official. See I, A, 50, above. John Markham was of the Lincolnshire gentry: *Close Rolls 1485-1500*, No. 1028, which is also evidence of another sale by Markham.

4. CP40/962, m.152d (Mich. 1502). P: William Fitz William, John Howe, James Wilford, and Richard Fitz William. D: Robert Wittelbury, arm., and Anna his wife. Land: Manors of Milton and Marholm and the advowsons of the church and the chantry of Marholm and 40 messuages, 2 mills, 1,000 a. land, 100 a. meadow, 1,000 a. pasture, 200 a. woods, and 10s. 4d. rent in Castor, Etton, Maxsey, Newborough, Deepin Gate, and fishery and wharfage in the waters of the Gonwood, Northamptonshire.

The recovery effected the purchase by William Fitz William from Wittelbury. *Close Rolls, 1500–1509*, No. 263. Fitz William then granted the Wittelburys a joint life estate. *Ibid.* In 1509, Wittelbury's performance bond was cancelled at the request of Richard Clement who married Wittelbury's widow, Anna, who was an executrix of Wittelbury. *Ibid.* See also 2 *V.C.H., Northamptonshire*, 476, 500.

William Fitz William was a London merchant. *Close Rolls, 1500–1509*, No. 263.

#### D. Exchanges

1. (a) (i) CP40/904, m.312 (Pas. 1488). P: William Bukton, arm. D: Ralph Bygod, knight. Land: 24 messuages, 100 a. land, 238 a. meadow, 492 a. pasture, 3 a. wood, 20 a. marsh, and 20s. rent in Sutton, Stanford, Suttecotes, and Drypole, Yorkshire.  
 (ii) CP40/904, m.314 (Pas. 1488). P: Bukton. D: Bygod. Land: 20 a. land, 10 a. meadow, 100 a. pasture, 1 a. woods, and 13s. 4d. rent in Barowe, Lincolnshire.  
 (b) CP40/904, m.312d (Pas. 1488). P: Bygod. D: Bukton. Land: 25 messuages, 600 a. land, 46 a. meadow, 580 a. pasture, and 6s. rent in Westowe, Dogilby, Setrington, and Bukton, Yorkshire.
2. (a) CP40/915, m.385 (Hil. 1491). P: Christopher Throckmorton. D: Robert Handy and Margaret his wife. Land: 4 messuages, 200 a. land, 16 a. meadow in Bishop's Cleeve, Gotherington, Wodmancote, and Stoke Orchard, Gloucestershire.  
 (b) CP40/915, m.385 (Hil. 1491). P: Robert Handy. D: Christopher Throckmorton and Mary his wife. Land: 2 messuages, 12 a. land, 4 a. meadow, and 11 salt vats in Wick, Worcestershire.

#### E. Life estates

1. (a) CP40/902, m.431 (Mich. 1487). P: Richard Luthell and John Nethersole. D: William Warner. Lands: Manors of Foots Cray and Ruxley and advowson of St. Paul's Cray, Kent.  
 (b) CP40/902, m.431d (Mich. 1487). P: Richard Luthell and John Nethersole. D: Roger Tong and Denise his wife. First vouchee: William Warner. Lands: 60 a. land, 10 a. meadow, 60 a. pasture, 30 a. woods, and 10 a. moor in Foots Cray, Chislehurst, Ruxley, North Cray, and Bexley, Kent.

The recoveries appear to have resulted in the settlement of life estate on Roger Tong and Denise his wife in Denise's right for her life, because Warner's inquisition *post mortem* reports that he held the

reversion of one-half of Foots Cray and the reversion to 100 a. land, 100 a. pasture, 40 a. meadow, and 60 a. woods in Foots Cray, Chislehurst, St. Paul's Cray, Bexley, North Cray, and Ruxley, which the Tongs in right of Denise hold for Denise's life. 2 *IPM, Henry VII*, No. 876.

2. CP40/910, m.534d (Mich. 1489). P: John Fyneux, William Sutton, Richard Sutton, Geoffrey Downes, and James Downes. D: Edmund Dudley of Dudley. Land: Manors of Puck Shipton and Fifield and 2 messuages, 800 a. land, 44 a. meadow, 220 a. pasture, and 240 a. woods in Barford and Woodfalls next Downton, Wiltshire.

According to Joan Ingoldsthorpe's inquisition *post mortem*, Dudley suffered the recovery to the use of Geoffrey Downes for life, remainder to Joan Ingoldsthorpe and her heirs. 1 *IPM, Henry VII*, No. 1092.

3. CP40/961, m.421d (Trin. 1502). P: John Mulsho, Ralph Lane, Henry Durraunt, and Roger Gifford. D: Nicholas Vaus and Elizabeth his wife. Land: Manor of Loggys within the parish of Orlingbury and 12 messuages, 4 tofts, 400 a. land, 100 a. meadow, 100 a. pasture, and 40s. rent in Orlingbury, Northamptonshire.

The plaintiffs recovered to the use of Ralph Lane for his life. Lane quitclaimed to them and they demised the lands to him for life in 1505. *Close Rolls, 1500–1509*, No. 949.

#### *F. Purchases for settlements*

1. CP40/812, m.41d (Pas. 1464). P: Gilbert Debenham, arm., and Thomas Gardner. D: Robert Clifton, arm., and Elizabeth his wife. Land: Manor of Denton, Norfolk.

The recovery appears to have effected a purchase by Debenham for the purpose of settling a remainder, after the lives of Robert and Elizabeth, on Thomas Brewse and his second wife Elizabeth, sister and heiress of Debenham. Blomefield, *History of Norfolk*, V, 406.

Gilbert Debenham was steward of the duke of Norfolk. C. Ross, *Edward IV* (London: Eyre Methuen, 1974), 410. Robert Clifton was of the Norfolk gentry. *Close Rolls 1461–1468*, 242–3, 312, 316.

2. (a) CP40/959, m.106d (Hil. 1502). P: William [Smith], bishop of Lincoln, Reginald Bray, William Hody, John Shaa, Hugh Oldom, Humphrey Conyngesby, serjeant at law, Richard Emson, William Coope, John Cutte, and Nicholas Compton. D: John Wayte and Agatha his wife. Land: Manors of Cruchefield (also known as Lordesland) and 1 messuage, 200 a. land, 20 a. meadow, 100 a. pasture, 12 a. woods, and 40s. rent in Bray, Berkshire.

(b) CP40/959, m.116 (Hil. 1502). P: As in (a). D: John Wayte and Agatha his wife. Land: Manor of Boveney and 8 messuages, 200 a. land, 40 a. meadow, 100 a. pasture, 20 a. woods, 40s. rent and half of 1 messuage, 50 a. land, 6 a meadow, and 20 a. pasture in Boveney and Dorney, Buckinghamshire.

Agatha was one of Richard Lovell's two daughters and co-heiresses. The sale of Lordesland, Berkshire, was to Reginald Bray and feoffees

for a settlement on Edmund Bray. 3 *V.C.H.*, *Berkshire* 101. Perhaps the contemporaneous sale to Bray of Boveney, Buckinghamshire, was for the same purpose. 3 *V.C.H.*, *Buckinghamshire*, 176–7.

Reginald Bray was a royal official: see I, A, 50, above.

John Wayte was of the Buckinghamshire gentry: see I, A, 83, above.

### G. Purchases and resettlements

1. CP40/791, m.347d (Mich. 1458). P: Richard Pygot. D: John Byconnell and Joan his wife, William Carent, and Tristram Burnell. First vouchee: Thomas Horsey. Land: Manor of South Perrot, Dorset.

The sale is from Horsey to Byconnell, for Byconnell's inquisition *post mortem* reported that his feoffees, including William Carent, held to the use of Byconnell's wife. 2 *IPM*, *Henry VII*, No. 683. It is unclear, however, whether the sale to Byconnell was contemporaneous with or earlier than the recovery. See Hutchins, *History of Dorset*, II, 163.

John Byconnell was of the Somerset gentry and was a knight by 1486. See I, A, 35, above. The Horsey family were gentry with lands in Dorset, Hampshire, Somerset, and Wiltshire. *Close Rolls, 1461–1468*, 173. Richard Pygot was a lawyer, later serjeant, who probably made the resettlement. Baker, *Serjeants*, 533.

2. CP40/866, m.388 (Pas. 1478). P: Roger Townshend and William Donington. D: William Pykenham, John Sulyard, John Lapsham, John Walworth and Clemencia his wife. First vouchee: Robert Walton. Second vouchee: William Chertesy. Land: Manor of Terling Hall called Margerys, Essex.

The recovery appears to have effected a resettlement for Walworth either after or contemporaneously with his purchase from Chertesy, because in 1504 Andrew Chertesy, William's brother and heir, released and quitclaimed with warranty to James Hobart, Nicholas Goldwell, and Clemencia widow of John Walworth to the use of Clemencia and her heirs. *Close Rolls, 1500–1509*, No. 406.

3. CP40/904, m.320 (Pas. 1488). P: Thomas Salle, William Harper, Richard Danby, and Richard Congreve. D: John Broun, Richard Pole, Andrew Dymmock, and Richard Harper. First vouchee: John Cotes. Land: One-half of the manor of Latton Hall and 10 messuages, 1 mill, 100 a. land, 40 a. meadow, 12 a. pasture, and 40 a. woods in Latton, Essex.

When Thomas Bibbworth died seised in 1485 of Latton Hall his heirs were John Cotes and one Joan, wife of Thomas Barley. Latton Hall was apportioned to Cotes. 1 *IPM*, *Henry VII*, No. 72; 8 *V.C.H.*, *Essex*, 188; *Close Rolls, 1485–1500*, No. 61. On 16 December 1486, Cotes conveyed the land of the recovery to the defendants of the recovery and one witness to the charter was Richard Congreve, a plaintiff to the recovery. *Close Rolls, 1485–1500*, No. 333. After the recovery, Richard Harper, a defendant, was the beneficial owner and the plaintiffs to the recovery were, apparently, his feoffees. 8 *V.C.H.*, *Essex* 188.

Richard Harper was a receiver for Henry, duke of Buckingham. Ives, *Common Lawyers*, 109, n. 94. John Cotes was of the Warwickshire gentry. Carpenter, *Locality and Polity*, 133–4.

4. (a) CP40/910, m.452 (Mich. 1489). P: William Smith and Thomas Langland. D: Thomas Pultney, kn. First vouchee: Richard Cotes. Land: Manor of Cotes Devyle and 100 a. land, 40 a. meadow, 200 a. pasture, and 10 a. woods in Cotes Devyle, Leicestershire.  
 (b) CP40/911, m.356 (Hil. 1490). P: Richard Hawkins and Robert Darcy. D: William Smith and Thomas Langland. First vouchee: Thomas Cotes. Land: Manor of Cotes Devyle and 100 a. land, 40 a. meadow, 200 a. pasture, and 10 a. woods in Cotes Devyle, Leicestershire.

The point of the two recoveries seems to have been for Pultney to purchase the manor from Cotes and put it into the hands of his feoffees Hawkins and Darcy, for they in 1493 granted a life estate to Rose Pultney, widow of John Pultney, with remainder to the right heirs of Thomas Pultney. 3 *IPM*, *Henry VII*, No. 204.

The sales are additional sales by the struggling Cotes family of Warwickshire. Carpenter, *Locality and Polity*, 133–4. The Pultney family of Leicestershire were descendants of the fourteenth-century London merchant and had connections with Warwickshire. *Ibid.*, 240; Thrupp, *Merchant Class*, 361.

5. CP40/922, m.424 (Mich. 1492). P: Robert Mome and Richard Villers. D: Thomas Kebell, serjeant at law, Robert Selby, vicar of Thurssington, and William Smith. First vouchee: Henry Grey of Codnor, kn. Land: Manor of Stanton-by-Sapcote and 5 messuages, 1 toft, 100 a. land, 40 a. meadow, 40 a. pasture, 10s. rent and one-half of 3 messuages, 8 tofts, 200 a. land, and 100 a. meadow, 100 a. pasture in Stanton-by-Sapcote, Leicestershire.

In August 1492 Kebell had agreed with Henry Grey of Codnor to purchase Stanton-by-Sapcote. Ives, *Common Lawyers*, 338. Robert Mome was Kebell's executor and one Marie Villers witnessed Kebell's will. *Ibid.*, 431. The recovery effected both the purchase from Codnor and a resettlement by Kebell.

6. CP40/923, m.137d (Hil. 1493). P: John Brode and John Hever. D: John Isley, arm., Robert Morley, Thomas Rales, Thomas Adam, Walter Fuller, John Wigfill, Richard Swaynsland, and Richard Fichet. First vouchee: Richard Coke, cousin and heir of Richard Threle. Land: 1 messuage, 1 garden, 100 a. land, 20 a. meadow, 100 a. pasture, 20 a. wood, and 10s. rent in Framfield, Buxted, Woodfield, and Mayfield, Sussex.

The indenture of sale evidencing Coke's sale to Isley appears at *Close Rolls*, 1485–1500, No. 601.

7. CP40/960, m.278d (Pas. 1502). William [Smith], bishop of Lincoln, William Hody, John Shaa, Hugh Oldam, Humphrey Conyngesby, serjeant at law, Richard Emson, William Coope, John Cutte, and Nicholas Compton. D: Christopher Urswick, deacon of St. Mary and St. George within the Castle of Windsor, Reginald Bray, John

Langford, Christopher Bellington, William Restwold, Thomas Restwold, and William Aleyn. First vouchee: William Viall. Land: Manor of Haywards and 1 messuage, 80 a. land, 16 a. meadow, 20 a. pasture, 20 a. wood, and 5s. rent in the parish of Sonning, Berkshire.

According to the indenture of sale, Viall sold to one John Hall to the use of Reginald Bray. *Close Rolls, 1500–1509*, No. 166. See 3 *V.C.H., Berkshire*, 218.

Reginald Bray was a royal official. See I, A, 50, above.

8. CP40/960, m.344 (Pas. 1502). P: John Shelley, John Caryll, and John Stanney. D: John Dawtry, John Ernley, and John Onley. First vouchee: Nicholas Taillard. Land: Manors of More and Wintershill and 6 messuages, 160 a. land, 40 a. meadow, 100 a. pasture, 10 a. woods, 40 a. heath, 40 a. marsh, and £12 rent in Ambersham, East Brome, Farnhurst, and East Meon, Hampshire.

The recovery effected a sale from Taillard to Onley while putting the lands in feoffees to Onley's use. Taillard held in right of his wife Alice; they used a final concord to convey her interest. 3 *V.C.H., Hampshire*, 78, 300.

9. CP40/960, m.424 (Pas. 1502). P: Robert Cromwell, Henry Wykes, and William Bond. D: Walter Cromwell. First vouchee: John West. Land: 1 messuage, 1 garden, 16 a. land, and 2 a. woods in Wandsworth, Surrey.

In 1501, West released and quitclaimed with warranty the land in the recovery to Walter Cromwell, Henry Wykes, and others, which land Cromwell was buying from West. *Close Rolls, 1500–09*, No. 57.

Walter Cromwell was a brewer; John West was a yeoman of the crown. *Ibid.*

10. CP40/962, m.414 (Mich. 1502). P: William [Smith], bishop of Lincoln, William Hody, John Shaa, Hugh Oldom, Humphrey Conyngesby, William Coope, John Cutte and Nicholas Compton. D: Reginald Bray, Richard Emson, Nicholas Mattok, William Copinger, Alfred Rawson, and James Swetnam. First vouchee: John Bouchier, Lord Berners, kn. Land: Manor of Barnesbury and 10 messuages, 300 a. land, 100 a. meadow, 300 a. pasture, 10 a. woods, and 100s. rent in Islington, Middlesex.

On 20 September 1502 Bouchier entered into an indenture of sale for the land to Bray, acknowledged receipt of the purchase price, agreed that the present feoffees, the defendants to the recovery, were to stand seised to Bray's use, and further agreed to make a sure estate to Bray or his nominees as advised. *Close Rolls, 1500–1509*, No. 217. On 24 November 1502, Bouchier released and quitclaimed with warranty to the plaintiffs of the recovery. *Ibid.* See 8 *V.C.H., Middlesex* 53.

Reginald Bray was a royal official: see I, A, 50, above.

#### H. Royal purchases and political transfers

1. CP40/805, m.205 (Trin. 1462). P: William Herbert. D: Thomas Pauncefot. Land: The castle and manor of Crickhowell, Marches of Wales, Hereford.

In 1445, Henry VI restored to Richard, duke of York, the Mortimer lordship of Crickhowell, occupied by the Pauncefots. *Patent Rolls, 1441-1446*, 334; Griffiths, *Henry VI*, 674. William Herbert, whose family had served York for two generations, received much land and the offices of chief justice and chancellor of South Wales from Edward IV. In 1463, Crickhowell was made into a Marcher lordship for Herbert. *Patent Rolls, 1461-1467*, 268. On 15 June 1462 Pauncefot gave Herbert a charter with warranty for the land in the recovery and on 31 July 1462 Pauncefot gave Herbert a quitclaim with warranty. *Close Rolls, 1461-1468*, 149. It is not clear whether the Pauncefots remained in possession after 1445 as tenants of York, whether they resumed possession at some later time, or whether the recovery served to extinguish an older claim of Pauncefot.

2. CP40/863, m.473 (Trin. 1477). P: John [Alcock], bishop of Worcester, Anthony Woodville Earl Rivers, William Hastings, Richard Pygot, and William Husey. D: Thomas Beaufitz, Richard Chestre, snr., and Christopher Hewett. First vouchee: John Norbury. Land: One-half of half of the manor of Beaudesert and half of 4 messuages, 4 gardens, 2,000 a. land, 400 a. meadow, 10,000 a. pasture, 400 a. woods, and £12 rent in Beaudesert, Henley [in Arden], Whitley, and Ullenhall, Warwickshire.

The recovery effected Norbury's apparently forced sale to the king. 3 *V.C.H., Warwickshire*, 46. Norbury and his cousin, William Belknap, were obligated to the king by a bond of 2,000 marks, defeasible if they transferred their interests in the lands of the recovery to the plaintiffs of the recovery. *Close Rolls, 1476-1485*, No. 219.

3. CP40/959, m.346 (Hil. 1502). P: William [Smith], bishop of Lincoln, Reginald Bray, John Shaa, Roger Ormeston, Hugh Oldom, Henry Hornby, Humphrey Conyngesby, serjeant at law, Richard Emson, Edmund Dudley, and William Couter. D: Thomas Combe. Land: Manor of Blatchington and 1 messuage, 1,000 a. land, 20 a. meadow, 100 a. pasture, and 20s. rent in Blatchington and Blatchington Wayfield, Sussex.

The sale was to Edmund Dudley. *Close Rolls, 1500-1509*, No. 149. But Dudley and the other plaintiffs appear to have been feoffees for Henry VII. 7 *V.C.H., Sussex*, 242. By final concord Combe and his wife Elizabeth quitclaimed with warranty from themselves and the heirs of Elizabeth to the plaintiffs in the recovery. *Sussex Fines*, No. 3355. Since Combe held in tail male, 7 *V.C.H., Sussex*, 242, the fine probably set up a collateral warranty. Also by final concord, John Fyneux, chief justice of King's Bench, quitclaimed with warranty to the plaintiffs in the recovery. *Sussex Fines*, No. 3356. Fyneux might have been Combe's feoffee.

#### *I. Mortgages and debt transactions*

1. CP40/791, m.341 (Mich. 1458). P: Elizabeth, widow of Robert Carpenter. D: Thomas Levett. Land: Manors of West Fuller and

Catsfield Levett and 110 a. land and 10 a. meadow in West Fuller, Sussex.

The recovery was part of complicated dealings between Bartholomew Bolney and Thomas Levett, which dealings appear to have amounted to a mortgage. *The Book of Bartholomew Bolney*, 74–7. On 1 October 1458, Bartholomew, with his wife Eleanor and other co-feoffees, held the manors as feoffees to Levett's use, subject to a life estate held by Levett, his wife, Joan, and co-feoffees. On 12 October Levett released to Bolney. By indenture on 14 October Bolney gave the manors to Levett on condition that Thomas pay him £200 by the next Michaelmas. Elizabeth, the plaintiff to the recovery, was Bolney's aunt. After the recovery Elizabeth put the manors into feoffees. Although *The Book of Bartholomew Bolney* claims that the £200 were never paid (*ibid.*, 76), the manor of Catsfield Levett remained in the Levett family at least until the seventeenth century. See 9 *V.C.H., Sussex*, 241.

Although it is not clear why the parties structured the transaction as they did and involved Bolney's aunt, the core of the transaction was that Levett granted a land to Bolney, which land Levett would repurchase for £200. Alternatively, Levett mortgaged land to Bolney, which land Levett could redeem for £200.

2. CP40/960, m.311 (Pas. 1502). P: John Palmer, Thomas Coke, John Barnes, and John Bedyell. D: Humphrey Thorel. Land: Manor and advowson of Bepton and 23 messuages, 1 dovecote, 240 a. land, 40 a. meadow, 400 a. pasture, 120 a. woods, 50 a. heath, and 50s. rent in Bepton, Stedham, Didling, Waltham, and Over Waltham, Sussex.

Plaintiffs were feoffees of Edward Palmer seised to his use for his life and one year, thence to the use of Thorel and his heirs. Edward Palmer paid Thorel £126 and was to have the profits of the manor for three years, at which time Thorel could redeem the manor for £100. But Palmer could purchase the manor outright by paying Thorel a further £100. *Close Rolls, 1500–1509*, No. 163.

3. CP40/962, m.343d (Mich. 1502). P: John Onley, Roger Leuknore, John Ernley, and John Caryll. D: John Lisle. Land: Manor and advowson of Pulborough and 18 messuages, 18 gardens, 300 a. land, 30 a. meadow, 300 a. pasture, 300 a. woods, 20 a. marsh, and 40s. rent in Pulborough, Sussex.

The plaintiffs were feoffees of Onley who paid Lisle and his wife Margaret £106, 3s. 4d. for the lands. If Lisle repaid that amount within seven years, the plaintiffs would stand seised to the use of John and Margaret and the heirs of their bodies and for default of issue to the use of Lisle and his heirs. *Close Rolls, 1500–1509*, No. 13.

## II. TRANSFERS INTO MORTMAIN

1. CP40/722, m.339 (Trin. 1441), YB Trin. 20 Hen. VI, f. 38, pl. 4 (1443). P: Ralph Aderley, Prior of Newland next Guildford. D:

Thomas Sende. Land: 200 a. land, 5 a. meadow, 30 a. wood in Sende, Surrey. Inquisition *quale ius*.

2. CP40/823, m.402 (Pas. 1467). P: John, prior of the church of St. Peter and St. Paul, Bath. D: Margaret, widow of Robert Lord Hungerford and daughter and heir of William recently Lord Botreux. Land: Manors of Yvelton and Chelworth, and 20 messuages, 5 tofts, 400 a. land, 44 a. meadow, 50 a. pasture, 42 a. wood and one-quarter of a water mill in Yvelton and Chelworth, Somerset. Inquisition *quale ius*.

3. CP40/861, m.110d (Hil. 1477). P: Giles Lyngar. D: John Pilkington. Land: Advowson of Thornton in Craven, Yorkshire.

Edward IV granted the advowson to Pilkington and gave him license to grant the advowson to Fountains Abbey and for the abbey to appropriate the advowson. *Patent Rolls, 1467-1477*, 602.

4. CP40/882, m.545 (Mich. 1482). P: William Gifford and John Legh. D: Richard Maydewe president of Magdalen College, Oxford. First vouchee: Maud, widow of Robert Willoughby and cousin and heir of Ralph, Lord Cromwell. Land: Manor of Candlesby, Lincolnshire.

In 1477, William [Wayneflete], bishop of Winchester, Robert Radcliffe and Joan his wife, John Fortescue, Thomas Billings, Walter Moyle, and John Say had received license to transfer the manor to Magdalen College. *Patent Rolls, 1476-1485*, 48.

5. CP40/903, m.110 (Hil. 1488). P: Thomas Wilkinson, president, and the fellows of the royal college of St. Margaret and St. Bernard in Cambridge. D: John Doreward and Margery his wife. Land: Manors of Manehall and Crumpshall and 100s. rent in Houvyll, Essex. Inquisition *quale ius*.

6. CP40/904, m.386 (Pas. 1488). P: William the abbot and the Monastery of St. Mary of Coomb. D: Alice Wooley widow, John Gillot and Margaret his wife, and Agnes Gonue. Land: 3 messuages, 200 a. land, 20 a. meadow, 24 a. pasture, 12 a. wood, and 5s. 6d. and 1 half-penny rent in [roll damaged], Warwickshire. Inquisition *quale ius*.

7. CP40/910, m.547d (Mich. 1489). P: John Brown, Robert Harthorn, Thomas Danvers, and William Rabbes. D: Richard Roos. Land: Manor of Canes next North Weald, Essex.

In 1490, Roos and his wife Alice by final concord quitclaimed with warrant the manors of Canes and Norton Mandevyle to the plaintiffs of the recovery and the heirs of Danvers, who were apparently feoffees for Merton College, Oxford. *Essex Fines*, IV, 91, No. 45; 4 *V.C.H., Essex*, 152, 288.

8. CP40/959, m.310 (Hil. 1502). P: Richard [Fox], bishop of Winchester, Robert Willoughby, Giles Daubeney, Reginald Bray, Thomas Lovell, John Mordaunt, James Hobart, Richard Emson, and Thomas Lucas. D: William Eliot, Richard Eliot, and William Esington. Land: Manor and advowson of Fenne and the manor of Skreyng and 21 messuages, 1 mill, 1 dovecote, 1 garden, 620 a. land, 600 a. meadow, 1100 a. pasture, and £6 4s. rent in Fenne, Skreyng, Boston, Skirbeck, Frist, Butterwick, Benington and Sibsey, Lincolnshire.

As part of an agreement in 1504 between Henry VII and the abbot of St. Peter's, Westminster, the king gave the abbot the funds to purchase the lands of the recovery from William Esington. *Close Rolls, 1500-1509*, No. 389.

9. CP40/960, m.297 (Pas. 1502). P: Richard [Fox], bishop of Winchester, William Uvedale, Thomas Crays, John Walter, Thomas Welle, Christian Fauntleroy, and William Fletcher. D: William Halle. Land: Manor of Shipton Bellinger and 20 messuages, 10 tofts, 800 a. land, 500 a. pasture, and 100 a. woods in Shipton Bellinger, Hampshire.

The recovery effected a transfer to the bishop of Winchester who two years later transferred the lands in the prior and Convent of St. Swithins. 4 *V.C.H., Hampshire*, 512; C142/18/24.

### III. DISPUTE RESOLUTION

#### A. Dispute settlements

1. (a) CP40/720, m.340 (Hil. 1441). P: Ralph, Lord Cromwell. D: John [Kempe], archbishop of York, William [Alnwick], bishop of Lincoln, Thomas Chaworth, Richard Vernon, Nicholas Dixon, and John Tailboys. First vouchee: Henry Pierpoint. Land: Manors of Gonalston and Widmerpool, Nottinghamshire.

(b) CP40/720, m.340d (Hil. 1441). P: Ralph Cromwell. D: Kempe, Alnwick, Chaworth, Vernon, Dixon, and Tailboys. First vouchee: Pierpoint. Land: Manors of Wingfield and Tibshelf, Derbyshire.

The two recoveries settled a dispute between Cromwell and Pierpoint over the Heriz inheritance. See Payling, "Inheritance and Local Politics," 67-8.

2. (a) CP40/743, m.409 (Mich. 1446). P: John, son of John Savage. D: Richard Peshale, son and heir of Maud once the wife of John Savage. Land: One-half of the Manor of Dore, Derbyshire.

(b) CP40/743, mm.410-410d (Mich. 1446). P: Savage. D: Peshale. Land: 15 messuages, 3 tofts, 138 a. land, 7 a. meadow, 8 a. pasture, 200 a. woods and one-half of one-quarter of 200 a. heath in Repton, Milton, Ticknall, Stenson, and Twyford, Derbyshire.

(c) CP40/743, m.413 (Mich. 1446). P: Savage. D: Peshale. Land: Advowson of Checkley, Staffordshire.

(d) CP40/743, m.417 (1446). P: Savage. D: Peshale. Land: as in (g), below.

(e) CP40/743, m.418 (1446). P: Savage. D: Peshale. Land: 20 marks of rent from the Manor of Draycot, Staffordshire.

(f) CP40/743, m.628 (Mich. 1446). P: Savage. D: Peshale. Land: Manor of Rushton Spencer and 20 a. land and 100 a. moor in Warnford, Staffordshire.

(g) CP40/743, m.636 (Mich. 1446). P: Savage. D: Peshale. Land: 21 messuages, 356½ a. land, 18½ a. meadow, 347 a. pasture, 2 a. woods, and 2s. 10d. rent in Tene, Norfolk.

The recovery of Rushton Spencer settled a dispute between Savage and his half-brother Peshale. See 7 *V.C.H.*, *Staffordshire*, 225. The other recoveries probably did the same.

3. CP40/754, m.347 (Trin. 1449). P: William Betley and John Abell. D: William Burgeys. Land: 6 messuages, 1 mill, 300 a. land, 50 a. meadow, and 47s. 8d. rent in Coventry, Warwickshire.

The recovery probably helped to effect a settlement of a long-running dispute between Betley and Burgeys, for which see Carpenter, *Locality and Polity*, 402–10.

4. (a) CP40/770, m.324d (Trin. 1453). P: William Gull, John Leicester, Henry Gawetron, and Roger Docket. D: Richard Bingham and Margaret his wife, and Richard Willoughby. Land: Manors of Nowers Bradmore and Sutton Passeys and 40 messuages, 40 tofts, 600 a. land, 100 a. meadow, 40 a. woods, 200 a. pasture, and pasture for 25 cows and one bull, and 40s. rent in Wollaton, Bradmore, Sutton Passeys, Willoughby, and Oswald [Beck], Nottinghamshire.

(b) CP40/770, m.336d (Trin. 1453). P: Gull, Leicester, Gawetron, and Docket. D: Richard and Margaret Bingham and Richard Willoughby. Land: 3 messuages, 3 tofts, 7 bovates land in Carlton near Nottingham, Nottinghamshire.

(c) CP40/770, m.445 (Trin. 1453). P: Gull, Leicester, Gawetron, and Docket. D: Richard and Margaret Bingham and Richard Willoughby. Land: 1 message, 1 mill, 1 carucate land, and 20 a. meadow in Wigtoft, Lincolnshire.

(d) CP40/770, m.445d (Trin. 1453). P: Gull, Leicester, Gawetron, and Docket. D: Richard and Margaret Bingham and Richard Willoughby. Land: 1 message, 10 a. land, 2 a. 1 rod meadow in Carlton on Trent, Nottinghamshire.

(e) CP40/770, m.450d (Trin. 1453). P: Gull, Leicester, Gawetron, and Docket. D: Richard and Margaret Bingham and Richard Willoughby. Land: 1 message, 14½ a. land, 5 a. meadow in Sutton on Trent, Nottinghamshire.

(f) CP40/770, m.454 (Trin. 1453). P: Gull, Leicester, Gawetron, and Docket. D: Richard Bingham and Margaret his wife, widow of Hugh Willoughby and Richard Willoughby. Land: 8 messuages, 8 bovates land, 8 a. meadow, and 4 a. pasture in High Marnham, Low Marnham, Skegby, and Sutton on Trent, Nottinghamshire.

(g) CP40/770, m.454d (Trin. 1453). P: Gull, Leicester, Gawetron, and Docket. D: Richard Bingham and Margaret and Richard Willoughby. Land: Manor of Dunsby, Lincolnshire.

These recoveries effected a settlement between Richard Willoughby and his father Hugh's second wife Margaret Freville, by whom Hugh had eleven children. In his will, Hugh disinherited Richard in favor of Margaret and his children by her. Richard's opposition to this arrangement culminated in arbitration in which Richard recovered most of his inheritance but had to accept the loss of these lands settled on Margaret. See Payling, *Political Society*, 208–11.

5. CP40/823, m.336 (Pas. 1467). P: William Stephens. D: Richard Bingham and Margaret his wife, Thomas Ferrers, John Aston, and William Berkeley. Land: Manor of Ashby de la Zouche, Leicestershire.

James, earl of Wiltshire held the manor when he was taken prisoner at Towton. In 1462, Edward IV granted the manor to William Hastings, Lord Hastings. S. H. Skillington, "Ashby de la Zouche: Descent of the Manor," *Transactions of Leicestershire Archeological Society* 15, Part 1 (1927-8), 82-3. In February 1467, the defendants to the recovery, heirs of Joyce Burnel, claimed the manor based on a final concord of 1304. *Patent Rolls, 1461-1467*, 549. The dispute was resolved in June 1467 by having plaintiff of the recovery grant by final concord the manor to William Hastings in tail, remainder to Leonard Hastings, William's father, in tail male, remainder of one-half of the manor to William Berkeley and his heirs, one-third of the other one-half to Thomas Ferrers and his heirs, another one-third of his half to Margaret, wife of Richard Bingham, and her heirs, and the remaining third of this one-half to John Aston and his heirs. CP25(1)126/78/4. The recovery eliminated the claims of the Burnell heirs in preparation for the settlement of the dispute.

6. (a) CP40/843, m.126 (Trin. 1472). P: Edward Acton. D: Eleanor Stafford widow of Humphrey Stafford. Appearance by aid prayer: Joy, daughter of Eleanor, Thomas Stafford, and Humphrey Stafford. Land: Manor of Dodford and 20 messuages, [roll damaged] virgates land, 80 a. meadow, 100 a. pasture, 200 a. wood, and £12 rent in Fore, Claxthorp, Hartestone, Walton, and Brockhale, Northamptonshire.

(b) CP40/843, m.129d (Trin. 1472). P: Eleanor Stafford, widow of Humphrey Stafford. D: John Hathewick. Land: Manor of Dodford and 28 messuages, 500 a. land, 100 a. meadow, 200 a. pasture, 200 a. wood, and £12 rent in Dodford, Fore, Claxthorp, Hartestone, Walton, High Hayford, Low Hayford, Brockhale, Little Creton, Sprotton, Thorneby, Yelvertoft, and Honnington, Northamptonshire.

In June of 1472, Eleanor granted to John Hathewick and his wife Agnes an annual rent of £10 from the manor of Dodford. *Close Rolls, 1468-1476*, No. 909. This conveyance and the two recoveries were maneuverings in a complicated dispute over the manor, for which see Baker, *History of Northamptonshire*, I, 352-3.

7. CP40/864, m.453 (Mich. 1477). P: William Hopton, William Alyngton, Humphrey Starkey, John Sulyard, Andrew Doket, Richard Shaw, William Bond, and Thomas Lucy. D: Richard Harper and Elizabeth his wife, lately wife of John Skrene. Land: Manor of Olmstead Hall, Cambridgeshire.

John Skrene had died seised of the manor in 1474 but had no close kinsman. In 1475, Richard, duke of Gloucester, as lord, granted the manor to Sir Robert Chamberlain. Various claimants, basing their claims on descent from John Skrene's great-great-grandfather,

William Skrene, released their claim. The recovery effected the release of John's widow, Elizabeth. 6 *V.C.H.*, *Cambridgeshire*, 41.

8. CP40/887, m.118d (Hil. 1484). P: Francis, Viscount Lovell, William Catesby, James Hobart, John Brown, and Humphrey Conyngesby, serjeant at law. D: Elizabeth, widow of Thomas Brewes, and William Tyndale, son and heir of Thomas Tyndale. Land: Manor of Redenhall, Norfolk.

On 6 February 1484 William Catesby and William Tyndale, by means of mediation, settled their dispute over Redenhall by Catesby paying Tyndale £253, 6s. 8d. for the manor. *Close Roll, 1476-1483*, No. 1199. On 25 January 1484, Catesby also settled his dispute with Elizabeth, wife of Sir Thomas Brewes, by Catesby giving her 100 marks. *Close Rolls, 1476-1483*, No. 1202. Elizabeth, described as widow, might have been Thomas Tyndale's widow, who received it for life from his feoffee, with remainder to William. At any rate, the recovery effected the settlement.

9. CP40/906, m.454 (Mich. 1488). P: William Hody, William Smith, Richard Emson, William Coope, and Nicholas Compton. D: John Brocas and Anna his wife. Land: Manor and advowson of Freefolks and 1 messuage, 1 toft,  $2\frac{1}{2}$  virgates land, 10 a. wood in Freefolks, East Woodhay, Peryham, and Evydhampton, Hampshire.

Anna, wife to John Brocas, was joint heir with her sister Elizabeth, of John Rogers who had acquired the manor in 1441. 4 *V.C.H.*, *Hampshire*, 482-3. The manor had been assigned to Anna. Earlier in 1488, Reginald Bray and Henry Lovell had sued *scire facias* to enforce their interest under a 1347 final concord. CP40/903, m.154 (Pas. 1488). The plaintiffs to the recovery evidently took as feoffees for Bray who in 1503 bequeathed the manor to his nephew Richard Andrews who married Elizabeth Rogers. 4 *V.C.H.*, *Hampshire*, 482-3. The recovery, accompanied by final concord, effected a settlement of the litigation. CP25(1)207/36/3.

10. (a) CP40/960, m.404 (Pas. 1502). P: Richard [Nykke], bishop of Norwich, John Shaa, Philip Tilney, Thomas Bawde, Thomas Frowyk, serjeant at law, Adrian Fortescue, Anthony Fettiplace, Francis Asheldon, Thomas Tyrell of Hern, John Tyrell, John Barret, John Rawchester, John Colte, Lewis Pollard, Thomas Knyghton, John Wyseman, George Adgore, John Sprite, Thomas Wyseman, James Framingham, John Fastolf, and John Chauncerell. D: John Dunne, William Findern, Thomas Tyrell, Henry Tey, Robert Tyrell, Humphrey Tyrell, Robert Rawchester, William Barneys, and Robert Parker. First vouchee: Edmund Wyseman and Alice his wife, and John Fortescue and Philippa his wife. Land: Manor of Blunt's Hall and 4 messuages, 201 a. land, 14 a. meadow, 12 a. pasture,  $\frac{1}{2}$  a. woods, 1 mill, and rent of £4, 12s., 1 lb. pepper in Faulkbourn, Witham, Fairstead, Hatfield Peverell, Terling, Boreham, Black Notley, White Notley, and Rivenhall, Essex.

(b) CP40/960, m.420 (Pas. 1502). P: As in (a). D: As in (a). First vouchee: As in (a). Land: Manor and advowson of Faulkbourn and 4

messuages, 700 a. land, 60 a. meadow, 100 a. pasture, 100 a. woods, 1 mill, and £4 rent in Faulkbourn, Witham, Fairfield, Hatfield Peverell, Terling, Boreham, Black Notley, White Notley, and Rivenhall, Essex.

The plaintiffs were feoffees to execute a three-party agreement among Thomas Tyrell, a defendant to the recovery, John Fortescue and Philippa his wife, vouchees, and Edmund Wyseman and Alice his wife, vouchees. Edmund and Alice were to have the manors for life of Alice, with successive remainders, subject to annuity of £20 to Edmund, to John and Philippa and the heirs of her body, and to Thomas and his heirs. *Close Rolls, 1500–1509*, No. 168.

### B. Extinguishing old claims

1. CP40/841, m.301 (Hil. 1472). P: Robert Ingleton, Richard More, and Paul Dayrell. D: William Garnon. Land: Manor of Thornton and 60 a. woods in Westbury, Buckinghamshire.

In the fourteenth century Robert Chastillon held the manor. In 1418 John Chastillon and his wife Margaret conveyed to John Barton, jr., John Chastillon died without issue. In 1464, William Garnon claimed the manor as the heir of Robert Chastillon. His suit was quashed. In 1467, he quitclaimed to Robert Ingleton, the current holder of the manor. The recovery appears to have been designed to extinguish his claim. See 4 *V.C.H.*, *Buckinghamshire*, 244–5.

2. CP40/866, m.360d (Pas. 1478). P: Margaret Throckmorton. D: Robert Nevill. Land: Manor of Weston Underwood and 1 messuage, 2 carucates land, 10 a. meadow, 20 a. woods, and 60s. rent in Weston Underwood, Buckinghamshire.

In the fourteenth century John de Nowers transferred the manor to Robert Onley whose daughter and heiress, Margaret, the plaintiff, married Thomas Throckmorton, who died in 1472. 4 *V.C.H.*, *Buckinghamshire* 498–9. The defendant to the recovery was a descendent of John de Nowers. *Ibid.*, 345.

3. (a) CP40/882, m.336 (Mich. 1482). P: John Heyron and Thomas Moleyns. D: Robert Jurdain. Land: Manor of East Stoke, Dorset.

(b) CP40/882, m.351 (Mich. 1482). P: Heyron and Moleyns. D: Jurdain. Land: Manors of Chantmarle and Hewdon, Dorset.

Walter Chantmarle held the three manors and other properties. He had two daughters, Joan, who married John Cheverell, and Christine, who married John Jurdain. The manors in the recoveries were allocated to Joan and remained in the Cheverell family into Henry VII's reign. Christine and John Jurdain were allocated other properties. Hutchins, *History of Dorset*, IV, 5; 2 *IPM, Henry VII*, Nos. 316, 916. The recoveries therefore appear to have extinguished a Jurdain descendant's claim to the Cheverell share.

4. CP40/912, m.345d (Pas. 1490). P: William Hody, Reginald Bray, William Smith, Richard Emson, and David Philip. D: Geoffrey Sherard and Joy his wife, Thomas Sherard and Margaret his wife, John Browe and Alice his wife, and Maurice Berkeley. Land: Manors of Woodhead and Casterton Bridge and 40 a. land, 200 a. meadow,

1,000 a. pasture, 40 a. wood and £10 rent in Woodhead, Pickworth, and Casterton Bridge, Rutland.

In 1460 John Browe sold the manor of Woodhead to Thomas Blount. 2 *V.C.H.*, *Rutland*, 233. In 1486, a group of eight men led by Thomas Bryan, chief justice of Common Pleas, conveyed the manor to William Hussey, chief justice of King's Bench, Maurice Berkeley, and Geoffrey Sherard to the use of Richard Blount, snr., and his heirs. *Ancient Deeds*, B11780. The plaintiffs to the recovery apparently took title for William Hussey, for in his inquisition *post mortem* it was reported that Reginald Bray, seised of the manor, had enfeoffed William and others to William's use. 1 *IPM*, *Henry VII*, No. 1209. Margaret, wife to Thomas Sherard, was the heir general of the John Browe who had sold to Blount in 1460. B. Redlich, *History of Teigh* (Long Compton, 1926), 45. The recovery extinguished the Browe interests as well as the interests of the feoffees in the 1486 conveyance, but not, apparently, the Blount interests. The recovery was accompanied by final concord. T. Blore, *History and Antiquities of the County of Rutland* (Stanford: R. Newcomb, 1811), 106.

5. (a) CP40/923, m.135d (Hil. 1493). P: William Pygot and Gilbert Stokwold. D: John Fortescue, Henry Heydon, William Boleyn, Thomas Bawde, Robert Newport, Lewis Pollard, and Richard Baron. First vouchee: Thomas Hatfield, cousin and heir to John Dunstable. Land: 1 messuage, 200 a. land, 12 a. meadow, 30 a. pasture, 30 a. wood in Clothall, Rushden, Codred, and Wallington, Hertfordshire.

(b) CP40/923, m.159 (Hil. 1493). P: William Harris and Richard Reynold. D: As in (a). First vouchee: Hatfield. Land: Manor of Steeple Morden and 20s. rent in Littlington and Abingdon, Cambridgeshire.

(c) CP40/923, m.206d (Hil. 1493). P: Pygot and Stokwald. D: As in (a). First vouchee: Hatfield. Land: 2 messuages, 63 a. land, 18 a. meadow, 3 a. wood, 66s. 11d. and 1 halfpenny rent in Stratford Langthorn, and Leighton, Essex.

(d) CP40/923, m.214d (Hil. 1493). P: Pygot and Stokwald. D: As in (a). First vouchee: Hatfield. Land: Manors of Avenels and Calmore in Guilden Morden and 10 messuages, 20 tofts, 300 a. land, 12 a. meadow, 2 a. wood, 1 fish pond, and rent of 60s., 10d., 1 halfpenny, 6 capons, and 12 hens in Guilden Morden and Steeple Morden, Cambridgeshire.

At some time after 1484 Fortescue acquired the manors and lands from Thomas Oxenbridge. The manors and lands continued in the Fortescue family until at least 1517. Oxenbridge had acquired the manor and lands in 1484 from Thomas Hatfield, descendant and heir of John Dunstable, who had held from 1435. 8 *V.C.H.*, *Cambridgeshire*, 100, 114.

6. CP40/946, m.146 (Mich. 1498). P: Richard Brake and Edward Leuknore. D: John Goring. First vouchee: Reginald Bray and Katherine his wife, and Henry Lovell and Constance his wife. Land: Manor of Iping, Sussex.

John's father had probably purchased the manor some years earlier. Katherine and Constance were the co-heirs of Nicholas Husee, who formerly held the manor. 4 *V.C.H.*, *Sussex*, 64.

C. *Resettlements that also extinguish old claims*

1. (a) CP40/824, m.152 (Trin. 1467). P: Humphrey Starkey [serjeant at law] and Roger Townshend [serjeant at law]. D: Thomas Dymmock, kn., John Broghton, snr., arm., Robert Jugylton, Richard Maryot, John Turpin, and Thomas Reynes. Land: Manor of Ocle and 4 carucates land, 100 a. field, 30 a. woods, 300 a. pasture, and 100s. rent in Ocle, Bramham, and Thirley, Bedfordshire.

(b) CP40/824, m.152d (Trin. 1467). P: Starkey and Townshend. D: William Allington and Jane his wife, William Taillard and Elizabeth his wife, Henry Langley and Mary his wife, Roger Pierpoint, and Robert Gibbon. Land: Manors of Clifton, Ravenstone, advowson of Clifton, and 20 messuages, 6 carucates land, 100 a. field, 100 a. woods, 300 a. pasture, and £10 rent in Clifton, Ravenstone, Ginberton, Chickeley, Hardmore, Peter Hoo, Newport, and Weston, Buckinghamshire.

Sir John Reynes died in 1428. By his first wife, he had two sons and a daughter, but only his daughter, Joan, survived. Joan married John Ansty and had three daughters, Jane, who married William Allington, Mary, who married Henry Langley, and Elizabeth, who married William Taillard. By his second wife, Reynes also had a surviving daughter, from whom descended Pierpoint and Gibbon. By his third wife, Reynes had a son, on whom he settled all his manors and land in fee tail, remainder to Reynes' right heirs. G. Lipscomb, *The History and Antiquities of Buckinghamshire*, 4 vols. (London: J. W. Robins, 1847), IV, 104–5. Joan, Reynes' daughter by his first wife, claimed the Buckinghamshire properties unsuccessfully in 1440. 4 *V.C.H. Buckinghamshire*, 318. Reynes' son, John, died without issue in 1451. Thomas Reynes, Reynes' nephew, succeeded him. Lipscomb, *History of Buckinghamshire*, IV, 104–5. The second recovery would have extinguished the claims of the descendants of Reynes' daughters. Since the properties remained in the Reynes family, the recoveries probably effected a resettlement. The defendants to the first recovery, other than Thomas Reynes, were probably Thomas' feoffees.

2. CP40/879, m.414d (Hil. 1482). P: Robert Morton and John Harding. D: Robert Harding, John Mathew, Robert Hill, George Stiles, and Thomas Ringstone. First vouchee: John Newdigate. Land: Manor of Knowle and 4 messuages, 300 a. land, 12 a. meadow, 12 a. woods, and 5 marks rent in Holdhurst and Cranleigh, Surrey.

The recovery served a double purpose: to extinguish Newdigate's claim and to resettle the manor on Robert Harding's feoffees. Harding later bequeathed the manor to his nephew, Thomas Harding. See 3 *V.C.H.*, *Surrey*, 88; Manning and Bray, *History of Surrey*, I, 537; *Close Rolls, 1476–1485*, No. 805.

3. CP40/906, m.122 (Mich. 1488). P: Charles Nowell, Peter Egerton,

and Henry Clegg. D: William Stanley. First vouchee: Thomas Ecop and Emma his wife. Land: Manors of Hunsdon and Eastwick, Hertfordshire.

Richard III had granted Hunsdon to Stanley; upon his execution in 1495, the manor reverted to the crown. 3 *V.C.H.*, *Hertfordshire*, 328, 318. The recovery effected some sort of resettlement or served to extinguish claims by Thomas and Emma.

4. CP40/910, m.453d (Hil. 1489). P: Richard More and John Pygot. D: Thomas Pygot. First vouchee: Richard Hayton and Alice his wife. Land: Gifford's Manor, Buckinghamshire.

Thomas Pygot died seised of the manor in 1519. 3 *V.C.H.*, *Buckinghamshire*, 439. Margaret, daughter of John Gifford, brought the manor to her marriage with Robert Pygot, Thomas' father. The heirs of Thomas Gifford, Margaret's grandfather, are said to have quitclaimed their rights to Robert Pygot, Thomas' father. Perhaps Richard Hayton or his wife Alice was an heir of Thomas Gifford.

#### *D. Making partitions*

1. (a) CP40/770, m.440 (Trin. 1453). P: William Catesby and Richard Choke. D: John Talbot, Viscount Lisle, and Joan his wife, John Neuton and Isabel his wife, William Seward, Richard atte Yerde, Henry Lamb, John Light, Richard Parker, John Bakeston, John Auncell, Thomas Blakker, Thomas Throphill, Richard Sparkeford, John Payn, John Harryes, John Meryot, John Salford, John Milward, William Framton, Roger Somerden, Isabel Patte, Henry atte Ford, William atte Ford, and John Lottesham. Land: Manors of Ubley, Midsomer Norton, and Chilcompton, Somerset.

(b) CP40/770, m.541 (Trin. 1453). P: Catesby and Choke. D: Talbot and Joan his wife, Neuton and Isabel his wife, Seward, and William Fisher. Land: Manor of Littleton, Somerset.

(c) CP40/770, m.541d (Trin. 1453). P: Catesby and Choke. D: Talbot and Joan his wife, Neuton and Isabel his wife, William Seward, and Thomas atte Nashe. Land: Manor of Hinton Blewett, and Stone Easton, Somerset.

The recoveries effected an unknown resettlement, perhaps a division among Joan (wife of John Talbot), Isabel (wife of John Neuton), and William Seward. Joan and Isabel were daughters and coheirs of Thomas Cheddar, who had died in 1443. *Complete Peerage*, VIII, 57. Isabel died in 1498 seised of Ubley and Midsomer Norton (2 *IPM*, *Henry VII*, No. 91), and John Seward, son of William Seward, died in 1492 seised of Littleton and Hinton Blewett (1 *IPM*, *Henry VII*, No. 870).

2. CP40/771, m.443 (Mich. 1453). P: William Broun. D: Alice, widow of John Wakehurst. Land: Manor of Albury, Oxfordshire.

Thomas Baldington, who had held the manor, had three daughters, Agnes wife of William Broun, Alice wife of John Wakehurst, and Isabella who was dead by 1454. 5 *V.C.H.*, *Oxfordshire*, 10; 6 *V.C.H.*, *Oxfordshire* 172. Albury descended in the Broun family after Agnes'

marriage to William Broun. The recovery effected the allocation of Albury to Agnes. Baldington, Oxfordshire, was Alice's share of her father's lands. *Ibid.*

3. CP40/773, m.457d (Pas. 1454). P: Thomas Yong, Edmund Brudenell, Richard Heton and Thomas Daurysh. D: David Brekenocke and Margaret his wife, Miles Scull and Agnes his wife, Thomas Rekys, citizen and mercer of London, and Sybil his wife, William Warhillton and Robert Fowler. (William and Robert say they claim nothing. The other defendants vouch.) Land: Manor of Clewer and 1 messuage, 24 a. land, and 6 a. meadow in Clewer, Berkshire.

The defendants Margaret, Agnes, and Sybil were the three daughters of John Sifrewast, who died in 1441. The manor was divided among the three sisters. Margaret's issue died without issue before 1490. Sybil's son, William Rekys, died in 1491 seised of one-half of the manor. 1 *IPM, Henry VII*, No. 710. See 3 *V.C.H., Berkshire*, 73. The recovery probably effected the division.

4. CP40/812, m.256 (Pas. 1464). P: Thomas Boleyn. D: Nicholas Morley and Joan his wife, Nicholas Gerlington, John Morley, Richard Clapham, and Robert Lee and Joan his wife. Land: One-half of the manor of Glynde, Sussex.

The two Joans were the surviving daughters of John Waleys. The dispute over the partition of the manor arose when Nicholas Morley purported to purchase John Waleys' interest and to appoint Thomas Boleyn as feoffee to his wife's use. The dispute was put before the chancellor in the early 1460s. This recovery appears to have settled the dispute by securing in Joan Morley's feoffee only one-half of the manor. C1/27/58, 9; C1/28/431; *Sussex Fines*, III, No. 3127, 3141.

5. (a) CP40/863, m.305 (Trin. 1477). P: Thomas Martin and John Saunders. D: Edward Courtenay and Elizabeth his wife, and Halnoth Mauleverer and Jane his wife. Land: 6 messuages, 1 mill, 200 a. land, 26 a. meadow, and 150 a. heath in Stavon, Stavon Mill, Basent, and Hale, Cornwall.

(b) CP40/863, m.312 (Trin. 1477). P: Edward Courtenay. D: Halnoth Mauleverer and Jane his wife. Land: Manors of Boconnek, Glyn, Penpont, Bradok, Tynten, Perkeer, and Dysard and 176 messuages, 2,300 a. land, 5,200 a. meadow, 980 a. wood, 2,000 a. heath, and £20 rent in Leskerdburgh, Leskerd St. Mary, Last, Wythiell, Tyrton, Great Hender, Little Hender, Gell, King's Wood, Tavena, Bradok, Godowe, Tregisteynton, Rawton, Cutbaryn, Trethorp, Brendowne, Halgrar, Badowdowne, Kemesland, Firdland, Glene, Oldway, Kylmenaum, Bodery, Wynkesdon, Pendriff, Fente-mavern, and Trevorhill, Cornwall.

(c) CP40/863, m.312d (Trin. 1477). P: Thomas Martin and John Saunders. D: Edward Courtenay and Elizabeth his wife and Halnoth Mauleverer and Jane his wife. Land: Manor of Beworthy, Devon.

Thomas Carminow had two daughters, Margaret who married Hugh Courtenay and Jane who married Halnoth Mauleverer. Edward Courtenay was the son of Hugh and Margaret. The recoveries appear

to have settled a Chancery dispute over the division of the Carminow property. C1/51/121, 2, 3, 4; C1/66/19, 20.

6. (a) CP40/942, m.343d (Mich. 1497). P: Humphrey Conyngesby serjeant at law, John Yaxley, serjeant at law, and Robert Constable, serjeant at law. D: William Stavely and Alice his wife, Joan Nevill, widow, Thomas Sapcote and Joan his wife. Land: Manor of Swaledale and 3,000 a. land, 3,000 a. meadow, 3,000 a. moor, 3,000 a. heath, and £16 rent in Healaugh, Reeth, Grinton, Fremington in Swaledale, Yorkshire.

(b) CP40/942, m.345 (Mich. 1497). P: Conyngesby, Yaxlee, and Constable. D: William and Alice, Joan, and Thomas and Joan. Land: Manor of Toynton and advowson of Low Toynton and 16 messuages, 14 tofts, 1,115 a. land, 655 a. meadow, 300 a. pasture, 600 a. marsh and rent of £6, 7s. 8d. and  $4\frac{1}{2}$  quarters of salt in High Toynton, Low Toynton, Helton, Friskne, Ashby, Irby, Braytoft, Hundleby, Great Fleet, Tetford, Worlaby, and Esterkete, Lincolnshire.

(c) CP40/942, m.345d (Mich. 1497). P: Conyngesby, Yaxlee, and Constable. D: John Sapcote, Guy Wolston, William Field, and Richard Sapcote, jnr. First vouchee: Joan Nevill, widow, William Stavely and Alice his wife, and Thomas Sapcote and Joan his wife. Land: Manor of Burley and 1,000 a. land, 300 a. meadow, 300 a. pasture, 300 a. woods and 2s. rent in Burley, Rutland.

All three recoveries were on writs of entry alleging defendant's entry after a disseisin by John Fraunceys, who with his wife Isabel (who had right) had three daughters Joan, Alice, and Joan. Joan the elder married William Nevill; Alice married as her second husband William Stavely; the younger Joan married Thomas Sapcote. Isabel died in 1492. The recovery appears to have effected a division among Isabel's three daughters. See 2 *V.C.H.*, *Rutland*, 115; 1 *V.C.H. Yorkshire, North Riding*, 241.

#### IV. RESETTLEMENTS AND USES

##### *A. Unidentified resettlements*

1. CP40/771, m.613 (Mich. 1453). P: John Trevilian, Roger Stakeley, and Thomas Gardiner. D: Thomas Blount and Walter Blount. Land: Manor of Fauld, Staffordshire.

The manor remained in the Blount family. S. Shaw, *History and Antiquities of Staffordshire*, 2 vols. (London: J. Nichols, 1798 and 1801), I, 80–1. In 1472, Walter Blount, Lord Mountjoy, and his wife Ann, duchess of Buckingham, conveyed the manor to feoffees. *Staffordshire Fines*, 250.

2. CP40/786, m.238 (Trin. 1457). P: Robert Ambrose. D: Edward Bothe by Robert Bothe his custodian. Land: Manor of Sundridge, Kent.

Because one Ralph Bothe died in 1485 seised of the manor, the

recovery appears to have effected a resettlement rather than a transfer out of the family. 1 *IPM, Henry VII*, No. 65.

3. CP40/791, m.441d (Mich. 1458). P: Thomas Malory and John Asplan. D: John Stukeley. Land: Manors of Nokes and Prestley, Huntingdonshire.

Stukeley's inquisition *post mortem* of 1488 reports that he had enfeoffed his son Gerard and Isabel his wife and the heirs of Gerard with the manors of Nokes and Prestley. 1 *IPM, Henry VII*, No. 412. Whether his conveyance to feoffees in 1484 was this settlement on Gerard and Isabel is not clear. *Huntingdon Fines*, 113, No. 2. The recovery of 1458 appears to have effected a resettlement of some sort. See 2 *V.C.H., Huntingdonshire*, 231-2.

4. (a) CP40/805, m.110 (Trin. 1462). P: James Boneython and Walter Buttokesfyde. D: Henry Bodrugan. Lands: Manors of Bodrugan, Trevarrick, Tucayse, Thretheake, Newlyn, Trellowith, Trevella, Trethem, Markwill, Penryn, Penstadowe, and Trethram, and 100 messuages, 40 tofts, 12 mills, 6 dovecotes, 100 gardens, 60 a. land, 80 a. meadow, 1,000 a. pasture, 60 a. woods, 1,000 a. heath and £10 rent on the abovementioned places, Cornwall.

(b) CP40/805, m.110d (Trin. 1462). P: Boneython and Buttokesfyde. D: Bodrugan. Land: Manors of Rostranyet, Cassows, Tremodrett, and Tregallan, Cornwall.

The manors in the two recoveries appeared in Bodrugan's inquisition *post mortem*. 3 *IPM, Henry VII*, No. 861.

5. (a) CP40/805, m.129 (Trin. 1462). P: John Stodely. D: Henry Husee. Land: 500 a. land, 12 a. meadow, 1,000 a. pasture, 200 a. wood, 66s. 8d. rent in Standen, Berkshire.

(b) CP40/805, m.129d (Trin. 1462). P: Stodely. D: Husee. Land: Manor of Standen except 500 a. land, 12 a. meadow, 1,000 a. pasture, 200 a. wood, 66s. 8d. rent, Berkshire.

Henry Husee died without children. The manor came to his brother Nicholas whose daughters held the manor jointly in 1478. 4 *V.C.H., Berkshire*, 195-6. The recovery appears to have effected a resettlement.

6. CP40/812, m.255 (Pas. 1464). P: John Gruely and John Goring. D: Robert Lee and Joan his wife. Land: Manor of Lee, Sussex.

A Richard Lee, probably a descendant of the defendant Robert Lee, died seised of the manor in Edward VI's reign. *Sussex Inquisitions*, No. 642.

7. CP40/842, m.320 (Pas. 1472). P: Edward Goldburgh. D: Thomas Hoo and Alice his wife and Roger Copley and Anne his wife. Land: Manors of Warnham and Roffey and 8 messuages, 800 a. land, 200 a. meadow, 300 a. pasture, 500 a. woods, 300 a. heath, and £14 rent in Warnham, Roffey, Horsham, Rusper, and Heckingfield, Sussex.

Roger Copley's wife, Anne, was Thomas Hoo's cousin and on Thomas' death in 1486 the manors went to Anne. 6(2) *V.C.H., Sussex*, 159-60, 210. The recovery might have effected the settlement on Anne.

8. CP40/843, m.125d (Trin. 1472). P: Thomas Gurney. D: Thomas Ruffard. Land: Manor of Fitz Hugh's and 100 a. land, 20 a. meadow, 20 a. pasture, and rent of 47s. and 1 cock and 1 hen in Edlesborough, Northall, and Dagnall, Buckinghamshire.

One-half of the manor descended to Katherine, daughter of William Bullock. She brought her share to her marriage to Thomas Ruffard. That portion of the manor remained in the Ruffard family until 1611. 3 *V.C.H.*, *Buckinghamshire*, 352.

9. (a) CP40/843, m.160d (Trin. 1472). P: Thomas Berowe. D: William Broke and Anne his wife. Land: Manors of Hundridge and Rowsham, Buckinghamshire.

(b) CP40/843, m.341d (Trin. 1472). P: Berowe. D: William and Anne. Land: 200 a. land, 60 a. meadow, 100 a. pasture, 100 a. woods, and £10 rent in Chesham, Buckinghamshire.

(c) CP40/843, m.401 (Trin. 1472). P: Berowe. D: William and Anne. Land: 1 messuage, 100 a. land, 10 a. meadow, 60 a. pasture, and 20 a. woods in [roll damaged], Hampshire.

(d) CP40/843, m.405 (Trin. 1472). P: Berowe. D: William and Anne. Land: Manor of Greenford, Middlesex.

William Broke died in 1476 seized of Rowsham jointly with his wife Anne by feoffment from Thomas Bergh or Berowe. 3 *V.C.H.*, *Buckinghamshire*, 462. Broke also died seized of Hundridge and was succeeded by his son, Leonard. *Ibid.*, 212. The manor of Greenford was in the Broke family from 1390 to 1531. 3 *V.C.H.*, *Middlesex*, 210.

10. (a) CP40/843, m.369 (Trin. 1472). P: Simon Burton, Oliver Sutton, William Brisco, and John Clerk. D: William Mulsho, Richard Burton and Alice his wife, Thomas Louth and Anne his wife, and Thomas Beauftiz and Elizabeth his wife. Land: Manors of Great Newton and Little Newton, Northamptonshire.

(b) CP40/843, m.369d (Trin. 1472). P: Burton, Sutton, Brisco, and Clerk. D: Mulsho, Richard and Alice, Thomas and Anne, and Thomas and Elizabeth. Land: 1 messuage, 2,300 a. land, 100 a. meadow, 200 a. pasture, 100 a. woods, and £10 rent in Kettleburgh, Framlingham, Brampton, Cretingham, Thorp, Salington, Charsfield, Kingshall, and Wingfield, Suffolk.

(c) CP40/843, m.407 (Trin. 1472). P: Burton, Sutton, Brisco, and Clerk. D: Mulsho, Richard and Alice, Thomas and Anne, and Thomas and Elizabeth. Land: 40 messuages, 400 a. land, 200 a. meadow, 600 a. pasture, 100 a. woods, 100 a. marsh, and 100s. rent in Northampton, Abington, Stanion, Great Newton, and Gedington, Northamptonshire.

(d) CP40/843, m.407 (Trin. 1472). P: Burton, Sutton, Brisco, and Clerk. D: Mulsho, Richard and Alice, Thomas and Anne, and Thomas and Elizabeth. Land: Manors of Pilton and Stoke and 60 messuages, 1,000 a. land, 200 a. meadow, 300 a. pasture, 100 a. woods, 100 a. marsh and £20 rent in Pilton and Stoke, Northamptonshire.

The manors of Pilton and Stoke remained in the Mulsho family from 1428 until Alice, daughter and one co-heir of Thomas Mulsho

brought it to her marriage with Henry Tresham. Alice's grandson died seised in 1533. 3 *V.C.H.*, *Northamptonshire*, 130, 134. It appears that the recoveries effected some sort of resettlement rather than a conveyance out of the Mulsho family.

11. (a) CP40/844, m.582 (Mich. 1472). P: Thomas Chaundler, John Baker, William Bocher, Robert Baynard, James Viell, and Richard Kingsmill. D: Alice Langford, Edward Dingley and Senchia his wife, Clara Langford, and Anne Langford by Edward Langford their guardian. (Edward Langford remitted his court for the recovery.) Land: Manor of Englefield, Berkshire.

(b) CP40/844, m.582d (Mich. 1472). P: Chaundler, Baker, Bocher, Baynard, Viell, and Kingsmill. D: Alice, Edward and Sanchia, Clara, and Anne. Land: Manors of Roshale and Slepe, Shropshire.

(c) CP40/844, m.590 (Mich. 1472). P: Chaundler, Baker, Bocher, Baynard, Viell, and Kingsmill. D: Alice, Edward and Sanchia, Clara, and Anne. Land: Manor of Athecote, Buckinghamshire.

The manor of Englefield remained in the Langford family into the sixteenth century. 3 *V.C.H.*, *Berkshire*, 396, 405; 4 *V.C.H.*, *Berkshire*, 5. The other recoveries probably also effected resettlements, perhaps transfers to uses.

12. (a) CP40/861, m.353 (Hil. 1477). P: Richard, duke of Gloucester, William Hastings, John Morton, John Donne, and William Lanington. D: Morgan Kidwelly and his wife Alice. Land: Manors of Langton Long Blandford, Littleton, Haydon, Crockern Stoke, Sherborne, and Handley and 40 messuages, 20 tofts, 1,000 a. land, 1,000 a. meadow, 300 a. pasture, 40 a. woods, and £40 rent in Sherborne, Langton Long Blandford, Littleton, Haydon, Chipping Blandford, Blandford St. Mary, Crockern Stoke, Handley, Holwell, Dorchester, East Lulworth, Canford, Yetminster, Trill, Caundle Purse, Caundle Marsh, Perihull, Butterwick, and the advowsons of the church and the chantry of Langton, Dorset.

(b) CP40/861, m.358 (Hil. 1477). P: Richard, Hastings, Morton, Donne, and Lanington. D: Morgan and Alice. Land: Manors of Buckshaw and Guldenswick and 15 messuages, 8 tofts, 800 a. land, 40 a. meadow, 50 a. pasture, 20 a. woods, and £12 rent in Kingston, Horethorne, Milborne Port, Turngate, Horsington, Elston, Henbridge, Charlton Camville, Hinton St. George, Merriot, and Buckshaw and common pasture for 6 cows and 200 sheep in Charlton Camville and for 200 sheep in Charlton Camville, Guldenswick, Kingston, and Horethorne, Somerset.

When Alice, the widow of Morgan Kidwelly, died in 1496 she was said to hold no lands in Dorset or Somerset. 1 *IPM*, *Henry VII*, Nos. 1225, 1226. But when her son and heir, William Cowdry, died two years later he was holding the Dorset manor of Long Blandford and Crockern Stoke and the Somerset manors of Buckshaw and Guldenswick. 3 *IPM*, *Henry VII*, Nos. 1101, 1102. The recoveries thus seem to have effected some sort of resettlement.

13. CP40/864, m.445 (Mich. 1477). P: Thomas Bolshale and John Smith.

D: William Harewell and Agnes his wife. Land: Manor of Shottery, Warwickshire.

From at least 1402 to 1746, Shottery was in the Harewell family. 3 *V.C.H., Warwickshire*, 260.

14. (a) CP40/865, m.338 (Hil. 1478). P: Christopher Coke and Reginald Bray. D: John Hody. Land: Manor of Pilsdon, Dorset.

(b) CP40/865, m.348 (Hil. 1478). P: William Huddesfield. D: Hody. Land: Manor of Beerhall, Devon.

(c) CP40/865, m.349 (Hil. 1478). P: Huddesfield. D: Hody. Land: Manors of East Whitefield and West Whitefield, Somerset.

The Devon and Dorset manors were held by John Hody, father of the John Hody of the recoveries. The elder Hody married Elizabeth Jerne, whose father had purchased Beerhall, Devon. Their eldest son was John, the defendant to the recoveries, and their next son was William. Upon the death of the elder John Hody, his wife married Robert Coppes. She resettled Pilsdon on Robert and herself for their lives, remainder in tail to William Hody. She resettled the Somerset manors on Robert and herself for their lives, remainder in tail to James Coppes, her son by Robert, remainder in tail to William. John Hody, the eldest son, had released his right to her in 1468. Elizabeth died in 1473. The manors of the recovery remained in the William Hody line. Although the exact resettlement is not known, the recoveries extinguished John Hody's claim to the manors. Hutchins, *History of Dorset*, II, 232.

15. CP40/865, m.425 (Hil. 1478). P: Thomas Billyng, chief justice of King's Bench, and Richard Tunstall. D: William Sayer and Margaret his wife, William Catesby, jnr., Thomas Merton, and John Chancy. Aid prayer: John Zouche demised to defendants for the life of Margaret, remainder to John Tresham, son of Thomas Tresham, and his heirs; defendants pray aid of John Tresham. Lands: Manors of Liveden, Bulls Liveden, Churchfield, and Church Brompton, and 100 messuages, 2,000 a. land, 100 a. field, 2,000 a. pasture, 400 a. woods, and £10 rent in Liveden, Bulls Liveden, Churchfield, Church Brompton, Oundell, Alderwench, Stanweg, and Kingstede, Northamptonshire.

Thomas Tresham was attainted for treason in 1472, but in 1458-9 by deed he had settled the manor of Liveden on feoffees, including Thomas Merton, a defendant to the recovery, for the life of his wife Margaret. Thomas Tresham was dead by 1474 and his son, John Tresham, succeeded him. Bridges, *History of Northamptonshire*, II, 373; *Close Rolls, 1468-1476*, No. 1329.

16. CP40/881, m.406 (Trin. 1482). P: John Catesby, justice of Common Pleas, Thomas Tremayle, serjeant at law, William Auddelfield, king's attorney, and Richard Joy. D: William Langhorn. Land: Manor of South Stoneham, Hampshire.

The manor remained in the Langhorn family until 1533. 3 *V.C.H., Hampshire*, 483.

17. CP40/882, m.560d (Mich. 1482). P: Roger Appulton and John

Nethersole. D: Edward Aylemere and Joan his wife. First vouchee: Thomas Curson. Land: Manor of Ingaldesthorpe, Norfolk.

Thomas Curson died seised of the manor in 1511. Blomefield, *History of Norfolk*, X, 336. His father, John, had died in 1471. Joan might be his widow. See *ibid.* At any rate, the recovery appears to have effected some sort of resettlement.

18. CP40/887, m.201 (Hil. 1484). P: Thomas Thwaytes, John Vavasour, serjeant at law, William Langton, clerk, and Thomas Deakney, cousin and heir of Baldwin Deakney. D: Robert Tilney. Land: Manor of Whittlesford, Cambridgeshire.

In 1451, Thomas, Lord Scales, entailed the manor on Robert Tilney who held it until his death in 1500. His son and heir Robert succeeded him and died seised in 1542. 6 *V.C.H.*, *Cambridgeshire* 266; 2 *IPM*, *Henry VII*, No. 450.

19. CP40/887, m.270 (Hil. 1484). P: Richard Filburn and John Green. D: Thomas [Rotherham], bishop of York, John Catesby, justice of Common Pleas, Thomas Tremayle, serjeant at law, John Vavasour, serjeant at law, Thomas Rugby, Henry Ashbourne, Thomas Bubbshide, Thomas Egleston and Agnes his wife. First vouchee: Richard Burdett and Joyce his wife. Land: Manor of Belne, Worcestershire.

In 1493, Richard Burdett died seised of Belne. 1 *IPM*, *Henry VII*, No. 802; 3 *V.C.H.*, *Worcestershire*, 46, 355.

20. CP40/902, m.448 (Mich. 1487). P: Robert Busse. D: John Paston. Land: Manor of Kirkehall, Norfolk.

Margaret, daughter and heir of Walter Mauteby, brought the manor to her marriage with John Paston. See Gairdner, *The Paston Letters*, III, 476. The manor remained in the Paston family for many years. Blomefield, *History of Norfolk*, VIII, 273.

21. CP40/903, m.158 (Hil. 1488). P: John Forster, Richard Churchyard, and John Shelley. D: Robert Knolles. Land: Manor of North Mimms, Hertfordshire.

Robert Knolles gave or left one – half of the manor to each of his two daughters. 2 *V.C.H.*, *Hertfordshire*, 253. In 1489, his daughter Elizabeth, wife of William Bustard, granted her half to John Fortescue, who died in 1501 seised of one-half of the manor. *Close Rolls, 1485–1500*, No. 460; 2 *IPM*, *Henry VII*, No. 392. It is not clear whether recovery put the manor into uses for Robert to devise to his daughters or whether the recovery effected a resettlement on his daughters during his life.

22. CP40/905, m.129 (Trin. 1488). P: Thomas Croxton. D: William Tendring. Land: Manor and advowson of Holbrook, Suffolk.

Tendring died seised of the manor in 1498. 2 *IPM*, *Henry VII*, No. 250.

23. (a) CP40/905, m.329 (Trin. 1488). P: John Ward, citizen and alderman of London. D: Philippa Ros, widow. Land: Rent of £13, 6s. 8d. in Colingham, Yorkshire.

(b) CP40/905, m.329d (Trin. 1488). P: Ward. D: Ros. Land: One-third of the manor of Wolley, Huntingdonshire.

(c) CP40/905, m.330 (Trin. 1488). P: Ward. D: Ros. Land: Manors of Over Wallop Buckland, Nether Wallop Buckland, and Broughton, Hampshire.

(d) CP40/905, m.330d (Trin. 1488). P: Ward. D: Ros. Land: Manor of Enfield, Middlesex.

(e) CP40/905, m.342 (Trin. 1488). P: Ward. D: Ros. Land: Rent of £13, 11s. 11d. and 1 quarter-penny in Basingstoke and Audener, Hampshire.

(f) CP40/905, m.348d (Trin. 1488). P: Ward. D: Ros. Land: Rent of £31, 2s. 7d. and 1 quarter-penny in Chichester, Sussex.

Philippa Ros was one of three co-heirs of Edward, Lord Tiptoft. Her inheritance of Wolley, Huntingdonshire, passed to her son Edmund, Lord Ros. 2 *V.C.H.*, *Huntingdonshire*, 231. Her inheritance of Enfield, Middlesex, likewise passed to her son Edmund. 5 *V.C.H.*, *Middlesex*, 226. The recoveries therefore appear to have effected some sort of resettlement.

24. CP40/905, m.424d (Trin. 1488). P: John Stile and Thomas Morein. D: Elizabeth Bromshott, widow. Land: Manors of Wode and Northale and one-half of the manor of Pagham and 30 messuages, 30 gardens, 230 a. land, 28 a. meadow, 120 a. pasture, and 40 a. wood in Brading, Arreton, and Newport, Hampshire.

Elizabeth Bromshott was the daughter and heir of William Urry. She married George Bromshott and brought him at least Wode, Northale, and one-half of Pagham. She must have married a Howles for she is said to have settled one-half of Pagham on her son Richard Howles in 1481. A John Howles sold Northale in 1548. See 5 *V.C.H.*, *Hampshire*, 142, 146, 147, 162. The recovery probably effected some sort of resettlement, perhaps a settlement on her son Richard Howles.

25. CP40/906, m.119d (Mich. 1488). P: Thomas Leek and Roger Johnson. D: Henry Grey of Codnor and Katherine his wife. Land: Manor of Evington, Leicestershire.

Grey was holding the manor in 1491. Nichols, *History of Leicestershire*, II, 557.

26. CP40/906, m.144d (Mich. 1488). P: John Trembrace, parson of St. Michael's of Penknell, and William Meryfeld, vicar of Bodwin. D: John Trenowyth. Land: Manor of Fenting Allan, the advowson of Penkevil and 8 messuages, 3 mills, 3,000 a. land, 10 a. meadow, 100 a. pasture, 100 a. woods, 60 a. heath, 20 a. alders, and 100s. rent in Tregonan, Tresawson, Tresowen, Worth, Penkevil, Tresulgan, Carathyn, Dynas, Tregelos, Tregartnon, Tregenhorne, Tremeer, Trewaras, Tregarthen, Treassowe, Nansprethek, Godryn Boswor, Bosneyek, Stymwoythegan, Reys, Treneck, Treveynon, Troon and Trevorder, Cornwall.

The manor of Fenting Allan was in the Trenowyth family until 1497 when it descended to John Trenowyth's daughter, Philippa, who brought it to her marriage with John Carminow. S. Drew, *History of Cornwall*, 2 vols. (Helston: W. Penaluna, 1824), II, 482.

27. CP40/906, m.401 (Mich. 1488). P: Thomas Jenney. D: John Blyaunt and Walter Blyaunt. Land: Manor of Ringshall, Suffolk.

The manor passed to John Blyaunt's son and heir. Copinger, *The Manors of Suffolk*, II, 342.

28. CP40/910, m.130d (Mich. 1489). P: John Lacy and Thomas Hall. D: William Birmingham. Land: Manor of Hoggeston, Buckinghamshire.

Birmingham held the manor until his death in 1490, when it descended to his grandson, William. 3 *V.C.H.*, *Buckinghamshire*, 370.

29. CP40/910, m.135d (Mich. 1489). P: John Chapman and William Clarenons. D: John Ward, citizen and alderman of London. First vouchee: Richard Waferer. Land: Manors of Cantlowbury, Wattonbury, and Stanes and 1 messuage, 400 a. land, 60 a. meadow, 40 a. pasture, 10 a. woods, and £10 rent in Hentworth and Ashwell, Hertfordshire.

Waferer released and quitclaimed the land to plaintiffs on 12 November 1489. *Close Rolls, 1485-1500*, No. 477. He had leased the manor of Wattonbury to Ward in 1471-2. 3 *V.C.H.*, *Hertfordshire*, 235. Wattonbury descended to Thomas Waferer who, in the sixteenth century, also held Cantlowbury. *Ibid.*, 235, 236. The recovery extinguished Ward's leasehold interest, but it is not clear whether the return of the leasehold was contemporaneous with or earlier than the recovery.

30. CP40/910, m.353 (Mich. 1489). P: John Bishop and Edward Down. D: Richard Fitz Lewis. Land: Manors of Cranham, Goshems, East Tilbury, West Tilbury, Chadwell, Little Thurrok, Amess, Field Ho, and Ingrave and 1 messuage, 1 garden, 406 a. land, 72 a. meadow, 260 a. pasture, 94 a. woods, £7, 5s. 3d. rent in Bishop's Wokinden (i.e. Cranham), East Tilbury, West Tilbury, Chadwell, Little Turrok, Dunton, Brentwood, Weald, Shenfield, Aveley, and West Horndon, Essex.

Fitz Lewis' father, Lewis, was killed at Barnet and posthumously attainted. Richard recovered Cranham and his father's other estate in Essex by 1487. He was survived by his fourth wife, Jane, to whom Cranham was granted for her life. 7 *V.C.H.*, *Essex*, 104. The recovery probably effected some sort of resettlement.

31. CP40/911, m.336d (Hil. 1490). P: John Paston. D: Richard Southwell, Andrew Jenney, John Jenney son of William Jenney, and Thomas Banyard. First vouchee: Edmund Jenney and Katherine his wife. Land: Manor of Holm Hale and 60 a. land, 5 a. meadow, 10 a. pasture, 2 a. woods, and 10s. rent in Filby, Maltby, and Burgh St. Margaret, Norfolk.

Katherine brought the manor to her marriage with Edmund Jenney; they were succeeded by William, Edmund's eldest son. Blomefield, *History of Norfolk*, VI, 9.

32. CP40/911, m.344d (Hil. 1490). P: John Apsle and Edward Bartelot. D: Thomas Combe and Margaret his wife, widow of John Elrington, and Godard Oxenbridge and Elizabeth his wife, widow of Roger Fenys. Land: Manor of Udamore, Sussex.

Margaret, daughter and co-heir of Thomas Etchingham, brought the manor to her second husband, John Elrington; their son succeeded to the manor. 9 *V.C.H.*, *Sussex*, 172-3.

33. CP40/912, m.335d (Pas. 1490). P: John Harpur, Richard Congreve, Thomas Shellesbury, John Underhill, Robert Butler, Thomas Gifford, William Aune, and Alexander Aune. D: William Harpur. First vouchee: William Frebody, son of William Frebody. Land: Manor of Thorp Mandevill and 1 messuage, 8 a. land in Thorp Mandevill, Northamptonshire.

William Frebody was succeeded by his son, Hugh, who died without issue in 1531. Bridges, *History of Northamptonshire*, I, 207.

34. CP40/912, m.364d (Pas. 1490). P: John Brown, Roger Appulton, Henry Harmon, and Thomas Salle. D: John Gerveys. Land: Manor of Willinghale Rokely (also known as Willinghale Doe), Essex.

Gerveys died seised of the manor in 1500. 3 *IPM*, *Henry VII*, No. 930.

35. CP40/915, m.312d (Hil. 1491). P: Thomas Cheyney, Henry Heydon, William Findern, Philip Calthorp, Thomas Cotton, William Gurney, Robert Drury, William Cheyney, Robert Paris, and Francis Calthorp. D: John Hasyldon. Land: Manor of Lyndon, Rutland.

Hasyldon's son, Francis, succeeded in 1509. *Patent Rolls*, 1494-1509, 596; 2 *V.C.H.*, *Rutland*, 74.

36. CP40/918, m.448d (Mich. 1491). P: Robert Drury and John Yaxley. D: James Hobart and Margaret his wife. Land: Manor of Rushes and Jennies and 1 messuage, 200 a. land, 12 a. meadow, 40 a. pasture, 16 a. woods, and 30s. rent in Gislingham, Barton, Finningham, Wetherden, Cotton, and Newton, Suffolk.

Hobart died seised of Jennies in 1516 and a Hobart was seised of Rushes in Henry VIII's reign. Copinger, *The Manors of Suffolk*, III, 271, 272.

37. CP40/920, m.120d (Pas. 1492). P: Henry Colet, William Knyvet, Robert Brudenell, John Colet, clerk, and John Colet, citizen and mercer of London. D: John Bouchier of Berners. Land: Manor of Barnesbury, Middlesex.

In the final concord accompanying the recovery, CP25(1)152/100/32, John Bouchier and Katherine his wife acknowledged the right of John Colet, clerk, and quitclaimed with warranty from themselves and the heirs of Katherine. The final concord was probably an attempt to set up a collateral warranty. In as much as John Bouchier sold the manor to Reginald Bray in 1502, the recovery effected some sort of resettlement. 8 *V.C.H.*, *Middlesex*, 53.

38. (a) CP40/920, m.284 (Pas. 1492). P: Henry Heydon, William Boleyn, John Paston, Thomas Tremayle, Thomas Wode, John Fyneux, Robert Rede, Thomas Kebell, Philip Calthorp, William Gurney, Humphrey Conyngesby, Thomas Frowyk, William Yelverton, William Calthorp, Robert Brudenell, and Richard Barton. D: William Tindale. Land: Manor of Haslingfield and 4 messuages, 100

a. land, 10 a. meadow, 100 a. pasture, and 10 a. wood in Haslingfield, Cambridgeshire.

(b) CP40/920, m.284d (Pas. 1492). P: As in (a). D: Tindale. Land: Manor of Illington and 10 messuages, 300 a. land, 200 a. pasture, 40 a. meadow, 10 a. woods in Illington, Clenchwarton, Tene, and Wigenhale, Norfolk.

When Tindale died in 1498, the manors passed to his son. 5 *V.C.H., Cambridge* 230. 2 *IPM, Henry VII*, 17–18.

39. (a) CP40/920, m.330d (Pas. 1492). P: Richard Knightly, Thomas Andrew, William Fleishewaye, and William Rolston. D: Robert Throckmorton and John Turpin. First vouchee: Thomas Green. Land: Manor of Laughton and 7 messuages, 200 a. land, 20 a. meadow, and 10 a. pasture in Laughton, Leicestershire.

(b) CP40/920, m.338 (Pas. 1492). P: Knightly, Andrew, Fleishewaye, and Rolston. D: Throckmorton and Turpin. First vouchee: Green. Land: Manor of Mears Ashby and 40 messuages, 50 a. land, 20 a. meadow, 20 a. pasture, 30 a. woods, and 8s. rent in Mears Ashby, Isham, Pytchley, Scaldwell, Hardwick Chapell, and Harrowden, Northamptonshire.

On 7 November 1505, Thomas Green was reported to be seised of Mears Ashby. 3 *IPM, Henry VII*, No. 1004. In 1496, Green's widow held land in Laughton. 5 *V.C.H., Leicestershire*, 215.

40. CP40/921, m.146 (Trin. 1492). P: William Body and John Copland. D: Charles Rypon and Elizabeth his wife. First vouchee: John Long. Land: Manor of Foxley and 1 messuage, 200 a. land, 100 a. meadow, 50 a. pasture, 40 a. wood, and £4 rent in Bray, Cokeham, White Waltham, and Benfield, Berkshire.

Elizabeth was the heir of John Foxley who held in the fourteenth century. She, her husband Charles, and her son by an earlier marriage, John Rekys, sold the manor in 1498. 3 *V.C.H., Berkshire* 102; *Close Rolls, 1485–1500*, No. 1094. The recovery therefore appears to have effected a resettlement of some sort. The identity and interest of John Long is not known.

41. CP40/922, m.130d (Mich. 1492). P: Laurence Milforth, Thomas Milforth, Milicent Milforth, and Agnes Milforth. D: William Husey, Robert Markham, John Markham, and William Porter. Land: One-thousandth of the Manor of Sedgebrook, Lincolnshire.

In 1498 John Markham sold Sedgebrook to Reginald Bray. *Close Rolls, 1485–1500*, No. 1101. See I, C, 3, above.

42. (a) CP40/922, m.398 (Mich. 1492). P: Richard Brugge, Thomas Cotes, Robert Serjeant, and Alan Carre. D: Richard Beauchamp, Lord Beauchamp. Land: Manor of Brousehille, Hertfordshire.

(b) CP40/922, m.398 (Mich. 1492). P: Brugge, Cotes, Serjeant, and Carre. D: Beauchamp. Land: Manor of Kemerton, Gloucestershire.

(c) CP40/922, m.441 (Mich. 1492). P: Brugge, Cotes, Serjeant, and Carre. D: Beauchamp. Land: Manor of Beckingham, Lincolnshire.

(d) CP40/922, m.441d (Mich. 1492). P: Brugge, Cotes, Serjeant,

and Carre. D: Beauchamp. Land: Manors of Longford and Down Hatherley, Gloucester.

(e) CP40/922, m.443 (Mich. 1492). P: Brugge, Cotes, Serjeant, and Carre. D: Beauchamp. Land: Manors of Milton and Kensham, Worcester.

At Richard's death in 1503 the Gloucestershire manor of Kemerton passed to his daughters Elizabeth and Margaret. 8 *V.C.H.*, *Gloucestershire*, 212. Longford passed to his daughter Anne, wife of Richard Lygon. 4 *V.C.H.*, *Gloucestershire*, 396–7. Milton and Kensham, by resettlement in 1495, passed to his daughter Elizabeth, wife of Robert Willoughby, Lord Brooke. 3 *V.C.H.*, *Worcestershire*, 81, 287–8. One infers that the Lincolnshire and Hertfordshire manors were treated similarly. It is not clear whether the plaintiffs held to Richard's use or made an immediate resettlement.

43. CP40/923, m.108 (Hil. 1493). P: Richard Querington and Henry Stile. D: John Norbury and Richard Say, serjeant at law. First vouchee: Elizabeth Bromshott. Land: Manor of Budbridge and 5½ messuages, 168 a. land, 30 a. pasture, and 10 a. woods in Gatcombe, Baylokbysee, Fairlee, and Godeton in the parish of Chale, Isle of Wight, Hampshire.

In 1510 George Bromshott, descendant of Elizabeth, sold the manor to Thomas Cooke, whose wife was granddaughter of Elizabeth. 5 *V.C.H.*, *Hampshire*, 142.

44. CP40/923, m.226d (Hil. 1493). P: Humphrey Conyngesby, serjeant at law, and Martin Ferris. D: Robert Shorediche and Margaret his wife. Land: Manor of Ickenham, Middlesex.

The manor descended in the Shorediche family from the fourteenth to the nineteenth centuries. 4 *V.C.H.*, *Middlesex*, 102.

45. CP40/924, m.148 (Pas. 1493). P: Henry Colet, Robert Brudenell, Thomas Wyndowet, Thomas Bradbury, and Nicholas Alwyn. D: Richard Pale and Ralph Asheton. Land: Manor of Ellesborough and 800 a. land, 100 a. pasture, 50 a. meadow, 200 a. woods, and 42s. rent in Ellesborough, Kimble, Hampden, and Stowe, Buckinghamshire.

Richard Pale had inherited the manor from his father in 1479 and died seised of the manor in 1504. 2 *V.C.H.*, *Buckinghamshire*, 332; 3 *IPM*, *Henry VII*, No. 876.

46. (a) CP40/926, m.134 (Mich. 1493). P: Richard Berkeley, Richard Milton, John Joce, and Simon Harington. D: William Astley and Joyce his wife. Land: Manors of Shepey [Magna], Shenton, Nailston, and Stretton and 1 messuage, 100 a. land, 100 a. meadow, 40 a. pasture, and rent of 40s. and 2 lb. pepper in Shepey, Shenton, Nailston, and Stretton, Leicestershire.

(b) CP40/926, m.134d (Mich. 1493). P: Berkeley, Milton, Joce, and Harington. D: William and Joyce. Land: Manor of Patshull and 100 a. land, 20 a. meadow, 100 a. pasture, 100 a. woods, 1 pond, and 5 marks rent in Patshull, Burnhill [Green], Staington, Millhouse, Madeley, Coven, and Nore [Hill], Staffordshire.

(c) CP40/926, m.322 (Mich. 1493). P: Berkeley, Milton, Joce, and

Harington. D: William and Joyce. Land: Manor of Boningale and 20 a. land, 10 a. meadow, 12 a. pasture, 200 a. woods, and 5 marks rent in Boningale, Shropshire.

The manor of Patshull remained in the Astley family until the eighteenth century. William's brother Richard succeeded him in 1497. 20 *V.C.H.*, *Staffordshire*, 164. This Richard was probably the Richard Astley who held Stretton in the early sixteenth century. 5 *V.C.H.*, *Leicestershire*, 262. See Nichols, *History of Leicestershire*, IV, 808 (Nailston), 924 (Shepey Magna).

47. CP40/926, m.336d (Mich. 1493). P: Richard Emson and John Young. D: Thomas Gower and Margaret his wife. Land: One-half of the Manor of Newbold Comyn and 1 mill, 60 a. meadow, 800 a. pasture, 50 a. woods, and a fishery in the waters of the Leam in Newbold Comyn, Warwickshire.

A Thomas Gower, the defendant's father, acquired half of the manor in 1421 and Gowers were in possession in 1574. 6 *V.C.H.*, *Warwickshire*, 158; *Warwickshire Fines*, III, No. 2519.

48. CP40/926, m.408d (Mich. 1493). P: John Brown and Richard Collop. D: Thomas West. Land: Manor of Greyes and 2 messuages, 8 tofts, 300 a. land, 30 a. meadow, 300 a. pasture, 30 a. woods, 10 a. marsh, and £5 rent in Great Cornard, Little Cornard, Sudbury, Chilton and Assington, Suffolk.

Thomas West died in 1509 seised of Greyes. 3 *IPM*, *Henry VII*, No. 558.

49. (a) CP40/940, m.160d (Pas. 1497). P: Humphrey Conyngesby and Thomas Frowyk, serjeants at law. D: John Verney and Margaret his wife. First vouchee: James Boughey. Second vouchee: Thomas Billington. Land: 1 messuage, 7 virgates land, 70 a. meadow, and 20s. rent in Helsthorpe, Swanbourne, Cheddington, Ivinghoe, and Pitstone, Buckinghamshire.

(b) CP40 940, m.239 (Pas. 1497). P: Conyngesby and Frowyk. D: John and Margaret. First vouchee: Boughey. Second vouchee: Billington. Land: Manors of Pendley and Launcelenes and 6 messuages, 4 virgates land, 8 a. meadow, 3 a. pasture, and 26s. rent in Tring and Medburn, Hertfordshire.

John died seised of Pendley in right of his wife, Margaret, daughter and heir of Robert Whittington, in 1505. 3 *IPM*, *Henry VII*, No. 44. See also 2 *V.C.H.*, *Hertfordshire*, 145, 284.

50. CP40/940, m.312d (Pas. 1497). P: William [Smith], bishop of Lincoln, Reginald Bray, John Mordaunt serjeant at law, Humphrey Conyngesby, serjeant at law, Hugh Oldom, Richard Emson, and Gregory Skipwith. D: William Parker and Alice his wife. Land: Manors of Mateshale and North Tudenham, Norfolk.

Alice, sister and heir of Henry Lovell, Lord Morley, brought the two manors to her marriage with William Parker. Their son, Henry Parker, succeeded them, and his son Edward sold the manors in Elizabeth's reign. Blomefield, *History of Norfolk*, X, 233, 263.

51. CP40/942, m.108 (Mich. 1497). P: Thomas Knabill and Peter Ro-

binson. D: William Tocketts and Margaret his wife. Land: One-quarter of the manor of Southbourn and the manor of Cliffe except 4 marks rent out of the manor of Cliffe, Yorkshire.

Margaret was a daughter and co-heiress of John Walton. She brought her share of Cliffe to her marriage with William Tocketts and to her later marriage with George Witham, whose children by Margaret later inherited the manor. 1 *V.C.H., Yorkshire, North Riding* 188.

52. (a) CP40/942, m.346 (Mich. 1497). P: John Pygot and John Hancock. D: John Longvyle. Land: One-half of the manor of Kingston Bagpuize, Berkshire.

(b) CP40/942, m.351 (Mich. 1497). P: Pygot and Hancock. D: Longvyle. Land: Manors of Rocke and Howton, Herefordshire, and one-half of the manors of Langam Dale, Monk Laughak and one-half of the advowson of Langam in Wales.

(c) CP40/942, m.351 (Mich. 1497). P: Pygot and Hancock. D: Longvyle. Land: Manor of Wootton and one-half of the advowsons of Stoke Bruerne and Alderton and 51 messuages, 36 a. meadow and £6 rent in Northampton, Northamptonshire.

(d) CP40/942, m.352 (Mich. 1497). P: Pygot and Hancock. D: Longvyle. Land: Manor of Walton, one-half of the manor of Dinton, one-third of the manor of Woughton [on-the-Green] and one-half of the advowsons of Walton and Woughton [on-the-Green], Buckinghamshire.

(e) CP40/942, m.352d (Mich. 1497). P: Pygot and Hancock. D: Longvyle. Land: Manor of Creighton and 6 messuages, 10 a. meadow, and 300 a. pasture in Stonysh and Pixton, Staffordshire.

(f) CP40/942, m.352d (Mich. 1497). P: Pygot and Hancock. D: Longvyle. Land: One-half of the manors of Burre and Whitacre [Nether Whitacre], one-half of the advowson of Alrythe, and 1 messuage, 60 a. land, 6 a. meadow, 100 a. pasture, £5 6s. 8d. in Tamworth, Glascote, and Castle Bromwich, Warwickshire.

Longvyles held Whitacre [Nether Whitacre] in the sixteenth century. 4 *V.C.H., Warwickshire*, 254.

53. CP40/942, m.406d (Mich. 1497). P: John Fyneux, William Warham, Robert Rede, Humphrey Segewick, John Cornwallis, and Gregory Adgore. D: Thomas Bassingbourn. Land: Manor of Manuden and 80 a. land, 20 a. meadow, 20 a. pasture, 20 a. woods, and £10 rent in Manuden, Stanstead, Farnham, and Ugley, Essex.

In 1493, William Say, brother of Katherine, Thomas Bassingbourn's wife, agreed to redeem the manor of Manuden, which Bassingbourn had mortgaged to one Robert Hawkins, a London merchant. In exchange, Bassingbourn was to make estate to Thomas Howard, earl of Surrey, John Lord Berneys, Thomas Lord Dacre, Henry Wentworth, William Say, Thomas Cheyney and six other persons of Manuden and other manors in Essex to the use of Katherine his wife for a yearly rent of £10, remainder to Thomas and his right heirs. *Close Rolls, 1485-1500*, No. 742. The plaintiffs might

be the six other persons to whom Bassingbourn was to make an estate of Manuden.

54. CP40/946, m.358d (Mich. 1498). P: John Caryll and Clement Clerk. D: Henry Roos and Maud his wife. Land: Manor of Applesham and advowsons of Combes and Simperham and 1 messuage, 1 mill, 2 dovecotes, 500 a. land, 16 a. meadow, 100 a. woods in Combes, Lancing, and West Grinsted, Sussex.

In 1502, Henry and Maud settled the manor of Applesham and the advowson of Combes on themselves for life, remainder to Hugh Denys and his wife, Mary, and the heirs of their bodies, remainder to the right heirs of Henry. *Sussex Fines*, III, No. 3361.

55. (a) CP40/946, m.441 (Mich. 1498). P: Thomas Frowyk, serjeant at law, Thomas Lucas, and William Huntly. D: John St. John, Walter Vaughn, William Grevill, Roger Bodenham, and John Richards. First vouchee: John Grey of Wilton. Lands: Manors of Snoreham, South Ho, and Sayers and 3 messuages, 200 a. land, 200 a. pasture, 500 a. marsh in Maldon, Purleigh, Latchingdon, and Canewdon, Essex.

(b) CP40/946, m.456 (Mich. 1498). P: Frowyk, Lucas, and Huntly. D: St. John, Vaughn, Grevill, Bodenham, Richards, and Thomas Green. First vouchee: John Grey of Wilton. Land: Manors of Tose-land and Yelling, Huntingdonshire.

In 1507, Edmund Grey, Lord Wilton, conveyed the lands in the Essex recovery to feoffees. *Essex Fines*, IV, 113, No. 206. Edmund sold the Huntingdon lands to Robert Throckmorton in 1507. *Huntingdon Fines*, 117; 2 *V.C.H.*, *Huntingdonshire*, 375. See also *ibid.*, 380.

56. CP40/947, m.130 (Hil. 1499). P: William Warham, Peter Edgecombe, Robert Constable serjeant at law, Richard Hampden, Henry Mackney, John Danvers, jnr., Thomas Ramsey, and John Bustard. D: William Hampden and Etheldreda his wife. Land: Manor of Hanslope called Stokes Manor and 3 messuages, 600 a. land, 120 a. meadow, 230 a. pasture, 60 a. woods, and 48s. rent in Hanslope and Stoke Hammond, Buckinghamshire.

The manor appears to have remained in the Hampden family until the seventeenth century. 4 *V.C.H.*, *Buckinghamshire* 354.

57. (a) CP40/948, m.126 (Pas. 1499). P: Thomas Tyrell, Robert Peyton, Robert Clere, Robert Constable, serjeant at law, Ralph Chamberlain, John Marney, Humphrey Tyrell, and William Eyre. D: Richard Badley. First vouchee: Edward Knyvet. Land: Manor of Costelins in Great and Little Waldingfield and the manor of Costelins in Groton, Suffolk.

(b) CP40/948, m.126d (Pas. 1499). P: Tyrell, Peyton, Clere, Constable, Chamberlain, Marney, Tyrell, and Eyre. D: Badley. First vouchee: Knyvet. Land: Manor of Stanway, Essex.

Knyvet died in 1501 seised of the manors in the two recoveries. 2 *IPM*, *Henry VII*, Nos. 418, 427. See also *ibid.*, No. 417 and Copinger, *The Manors of Suffolk*, I, 114; Morant, *History of Essex*, II, 191.

58. (a) CP40/949, m.355 (Trin. 1499). Richard [Fox], bishop of Durham, George [Grey], earl of Kent, Reginald Bray, John Arundel, Robert Painter, Thomas Cornwall, Thomas Kebell, serjeant at law, John Mordaunt, serjeant at law, Thomas Greynfield, John Walshe, Edmund Belknap, Robert Throckmorton, William Ashby, William Hertwell, William Grevill, Everard Fielding, Edward Stoning, and Robert Brudenell. D: John Devereux de Ferrers of Chartley. Land: Manors of Colishithe, Newbold Verdon, and Braunston and 100 messuages, 300 a. land, 100 a. meadow, and £14 rent in Coleshithe, Newbold Verdon, and Braunston, Leicestershire.

(b) CP40/949, m.356 (Trin. 1499). P: As in (a). D: John Devereux de Ferrers of Chartley. Land: Manor of Keyston and 40 messuages, 200 a. land, 100 a. meadow, and 40 s. wood in Keyston, Huntingdonshire.

(c) CP40/949, m.357 (Trin. 1499). P: As in (a). D: John Devereux de Ferrers of Chartley. Land: Manor of Bugbrook, and 40 messuages, 80 a. land, 60 a. meadow, and £5 rent in Bugbrook, Northamptonshire.

(d) CP40/949, m.358 (Trin. 1499). P: As in (a). D: John Devereux de Ferrers of Chartley. Land: Manors of Norton Ferrers, Charlton-Musgrove, and Garspur and 40 messuages, 200 a. land, 100 a. meadow, 40 a. wood, and 40s. rent in Norton Ferrers, Charlton-Musgrove and Garspur, Somerset.

Anne, daughter and heir of William de Ferrers of Chartley, had brought the manor of Keyston to her marriage with Walter Devereux and the manor descended in the Devereux family until 1589. 3 *V.C.H.*, *Huntingdonshire*, 70.

59. (a) CP40/960, m.142d (Pas. 1502). P: John Ernley and William Skardevyle. D: William Mompesson. Land: Manor of Newton Tony and 13 messuages, 7 tofts, 300 a. land, 40 a. meadow, 100 a. pasture, and 10s. rent in Newton Tony, Wiltshire.

(b) CP40/960, m.148d (Pas. 1502). P: Ernley and Skardevyle. D: Mompesson. Land: Manor of Leckswith and 12 messuages, 200 a. land, 40 a. meadow, 100 a. pasture, 40 a. woods, and 6s. rent in Leckswith, Wales.

Mompesson had inherited the manor in 1500 from his father John and on William's death the manor descended to John's grandson, John. 15 *V.C.H.*, *Wiltshire*, 148.

60. CP40/960, m.249d (Pas. 1502). P: Robert Shirborn, John Wayte, and Francis Dyneley. D: Eleanor Courte. First vouchee: John Wayte of Tychefeld. Land: Manors of Sutton and Medsted in Bishop's Sutton and Medsted and 20 messuages, 300 a. land, 200 a. pasture, 100 a. wood and £11, 13s. 4d. rent in Sutton, Medstead, New Alford, Tadley, and Quidhampton, Hampshire.

John Wayte of Tychefield, the first vouchee, conveyed Medstead in 1530 to one Richard Lyster. 3 *V.C.H.*, *Hampshire*, 43, 328. The recovery therefore effected a resettlement. The relation of John Wayte, the plaintiff, to John Wayte, the first vouchee, is not known.

61. CP40/960, m.256 (Pas. 1502). P: Thomas Appulton and John Hutton. D: John Crane. Land: Manor of Butlers next Sudbury, Suffolk.

John Crane died in 1504 seised of the manor. 2 *IPM, Henry VII*, No. 889.

62. CP40/960, m.315 (Pas. 1502). P: Christopher Urswick, John Fitzherbert, and Robert Fabian. D: Margaret Scot, widow. First vouchee: John Scot. Land: Manor and advowson of Stapleford Tawney and 500 a. land, 20 a. meadow, 200 a. pasture, 20 a. moor, 10 a. marsh, 100 a. woods, and 5 marks rent in Stapleford Tawney, Essex.

William and Margaret Scot had held the manor and advowson for their lives, remainder to their eldest John Scot in tail male, with successive remainders to John's younger brothers. When Margaret died in 1505, John Scot succeeded her. Morant, *History of Essex*, I, 179.

63. (a) CP40/961, m.143d (Trin. 1502). P: Humphrey Conyngesby, serjeant at law, Thomas Frowyk, serjeant at law, Thomas Marowe, Henry Frowyk, James Walsingham, John Green, Robert Astby, and Richard Redmeyn. D: Thomas Green. Land: Manor of Bonhunt and 1 messuage, 40 a. land, 10 a. meadow, 40 a. pasture, and 10 a. woods in Bonhunt, Wiken Bonhunt, Newport Pond, and Finchingfield, Essex.

(b) CP40/961, m.354 (Trin. 1502). P: As in (a). D: Thomas Green. Land: 2 messuages, 1 garden, 100 a. land, 10 a. meadow, 40 a. pasture, 20 a. woods in Hadley, Enfield, East Barnet, and Up Holborn, Middlesex.

In 1527 a Thomas Green and his wife Joan conveyed Bonhunt to another group of feoffees. *Essex Fines*, IV, 165, No. 366.

64. CP40/961, m.153d (Trin. 1502). P: Reginald Bray, Hugh Oldom, Humphrey Conyngesby, serjeant at law, and Thomas Frowyk serjeant at law. D: Margaret, countess of Richmond. First vouchee: Edward [Stafford], duke of Buckingham. Land: Manor of Stratton Audley and 500 a. land, 40 a. meadow, 100 a. pasture, 100 a. woods, and £3 rent in Stratton Audley, Oxfordshire.

The manor descended to Edward, duke of Buckingham's son Henry, Lord Stafford. 6 *V.C.H., Oxfordshire*, 326.

65. CP40/961, m.348 (Trin. 1502). P: Robert Southwell and William Jenny. D: William Knyvet. Land: Castle and manor of Bokenham and manors of Old Bokenham, New Bokenham, Tibenham, Lathes and two-thirds of the manors of Gryshagh [Grishaw] and Wymondham [Windham], Norfolk.

The lands in the recovery apparently remarried in the Knyvet family in the sixteenth century. Blomefield, *History of Norfolk*, I, 378–9; *ibid.*, II, 501.

66. (a) CP40/961, m.421 (T. 1502). P: Richard Guldeford, Edward Dudley, Thomas Isley, Richard Saunder, John Asshehurst, Henry Saunder, John Fenner, and John Jordan. D: John Gage. Land: Manor of Aston Clinton, Buckinghamshire.

(b) CP40/961, m.422 (T. 1502). P: As in (a). D: Gage. Land: Manor of Heighton, Sussex.

The Sussex manor remained in the Gage family. P. Horsfield, *History, Antiquities, and Topography of the County of Sussex*, 2 vols. (London: Nichols & Sons, 1835), I, 274. Presumably so did Aston Clinton.

67. CP40/961, m.429 (Trin. 1502). P: Robert Rede, justice of King's Bench, Thomas Fenys, Thomas Frowyk, serjeant at law, John Botiller, serjeant at law, Edward Ferrers, Thomas Marowe, John Kirton, and John Roles. D: George Nevill de Bergavenny. Land: Manor of Nutbourne and 2 messuages, 200 a. land, 40 a. meadow, 100 a. pasture, 40 a. wood, and 40s. rent in Nutbourne, Sussex.

The manor remained in the Nevill family. Horsfield, *History of Sussex*, II, 163.

68. CP40/961, m.430d (Trin. 1502). P: John Bygod, John Hastings, Ralph Gure, Thomas Strangeways, Edward Salven, and Richard Eryngton. D: Ralph Salven. Land: Manors of Etton, Lockington, Neswick, Sutton, Reighton, Brough, and Nafferton and 100 messuages, 4,000 a. land, 200 a. meadows, 1,000 a. pasture, 300 a. wood, 1,000 a. moor, and £10 rent in Etton, Lockington, Neswick, Sutton, Reighton, Brough, Nafferton, Auburn, Kilham, Gransmore, and Lowthorp, Yorkshire.

At least the manor of Nafferton remained in the Salven family. 2 *V.C.H.*, *Yorkshire, East Riding*, 286.

69. CP40/961, m.502 (Trin. 1502). P: Thomas Frowyk, serjeant at law, Humphrey Conyngesby, serjeant at law, Thomas Marowe, and Thomas Knighton. D: Thomas Bawde. Land: Manor and advowson of Corringham and 500 a. land, 200 a. pasture, 200 a. wood, and 300 a. marsh in Corringham, Essex.

Although Bawde was forced to sell many of his Essex manors in order to pay debts, he seems to have retained Corringham. See 8 *V.C.H.*, *Essex*, 83.

70. CP40/961, m.505 (Trin. 1502). P: Edward Taylor, Robert Okhorn, and Richard Dodde. D: James Viell and Joan his wife. Land: Manors of Howe, Hartridge, Titcomb, and Haslewick and 200 a. land, 20 a. meadow, 200 a. pasture, 300 a. wood, and 100s. rent in Howe, Hartridge, Titcomb, and Haslewick, Berkshire.

Vuell's son sold the manor of Titcomb in 1516. 4 *V.C.H.*, *Berkshire*, 209–10. The recovery effected some sort of resettlement.

71. CP40/962, m.132 (Mich. 1502). P: Maurice Berkeley, kn. D: Robert Brudenell and William Bolt. First vouchee: Edward [Stafford], duke of Buckingham. Land: Manor of Oakham, Rutland.

Edward retained the manor until his attainder in 1521. 2 *V.C.H.*, *Rutland* 12; J. Wright, *The History and Antiquities of the County of Rutland* (London: Bennet Griffin, 1684), 96–7.

72. CP40/962, m.337d (Mich. 1502). P: Mathew Brown, John Lygh, John Ernley, John Dantre, Thomas Stydolfte, and John Creghyston. D: Anne Merston, widow. Land: Manor of Horton, Suffolk.

Anne's husband, William Merston, had died in 1495; their son William succeeded Anne upon her death. 3 *V.C.H.*, *Sussex* 274.

73. CP40/962, m.351d (Mich. 1502). P: Nicholas Barnard, John Croker, Richard Goer, Roger Bainbridge, John Bainbridge, and Walter Westcomb. D: George Bainbridge. Land: Manor of Lockerly Butlers and 20 messuages, 300 a. pasture, 200 a. woods, and £10 rent in Lockerly Butlers, Titherly, Broughton, Holbury and Oakley, Hampshire.

George died seised in 1512 and was succeeded by his son and heir, Roger. 4 *V.C.H.*, *Hampshire*, 501, 516.

74. CP40/962, m.365d (Mich. 1502). P: George Langton, Richard Palmer, William Ashby, Thomas Lacy, George Ashby, Thomas Caton, Thomas Caton his son, John Lacy, snr., George Villers, son of Richard Villers, Thomas Armstrong, William Smith, William Stafferton, and John Palmer. D: Richard Langton. Land: Manor of West Langton and 8 messuages, 800 a. land, 200 a. meadow, 200 a. pasture, 40 a. woods, and rent of 34s. 8d., 1 capon, 1 lb. pepper, 1 pair of spurs in West Langton, East Langton, Kirkington, Thorp Langton, Haverbough, Gamonly, Foxton, and Kilby, Leicestershire.

The Langtons continued to hold West Langton through the sixteenth century. See 5 *V.C.H.*, *Leicestershire* 197.

75. CP40/962, m.408 (Mich. 1502). P: Richard Floore, John Palmer, and Thomas Palmer. D: John Colly and Isabel his wife. Land: Manor and advowson of Glooston and 1 messuage, 112 a. land, 50 a. meadow, 310 a. pasture, and 100 a. wood in Glooston, Leicestershire.

Colly acquired the manor in 1480 and his descendants held until 1632. 5 *V.C.H.*, *Leicestershire*, 113.

76. CP40/962, m.418d (Mich. 1502). P: John Page and John Courtop. D: Edmund Page. Land: Manors of Filston, Mattingham, St. Dennis and 2 messuages, 460 a. land, 50 a. meadow, 160 a. pasture, 330 a. woods, and 20s. rent in Shoreham, Farningham, Green Street, Stone, Darenth, St. Margarets, and Southfleet, Kent.

Two years after this recovery Edmund Page suffered another recovery of Filston to Richard Wood, John Tate, Henry Kebell, Oliver Wood, and Thomas Tate. *Close Rolls, 1500-1509*, No. 324.

77. (a) CP40/962, m.504 (Mich. 1502). P: Thomas Frowyk, serjeant at law, Robert Drewery, Anthony Fettiplace, and Lewis Pollard. D: Adrian Fortescue and Anne his wife. Land: Manor of Walnestune, Cornwall.

(b) CP40/962, m.505 (Mich. 1502). P: Frowyk, Drewery, Fettiplace, and Pollard. D: Adrian and Anne. Land: Manor of Meldreth, Cambridgeshire.

(c) CP40/962, m.505 (Mich. 1502). P: Frowyk, Drewery, Fettiplace, and Pollard. D: Adrian and Anne. Land: Manor of Wonford Hill and Clystbornvill and 65 messuages, 3 mills, 3,140 a. land, 50 a. meadow, 1,100 a. pasture, 25 a. woods, 70 a. heath and rent of £7 and 3 pairs of spurs in Wonford Hill, Marley Ho, Cholwell, South Wimysell, Bradclif, Cowick Barton, Cowick Street, Boldiche,

Woodley, Asherdevill, Buckton, Manston, Sidbury, Kingswear, Hatlegh, Pinn, Otterton, Dawlish, Kenton, and Exeter, Devon.

Anne succeeded her brother John Stonor in 1498 and brought the Cambridge manor to her marriage with Adrian Fortescue, who sold the manor in 1513. 8 *V.C.H.*, *Cambridgeshire*, 85.

*B. Transfers to feoffees to uses*

1. CP40/804, m.323 (Pas. 1462). P: Thomas Walter. D: Thomas Scot and Edith his wife. Land: Manors of Bradenham and Dorney and 4 messuages, 12 tofts, 4 gardens, 378 a. land, 19 a. meadow, 22 a. wood, 21s. and 1 quarter-penny rent in Perine, Wycombe, Burnham, Dorney, Boveney, Hitcham, and Cippenham, Buckinghamshire.

Thomas Scot acquired Dorney in 1430 and left it to his wife, Edith. 3 *V.C.H.*, *Buckinghamshire*, 221. The recovery probably facilitated the transfer to feoffees for his last will.

2. CP40/811, m.187 (Hil. 1464). P: Thomas Newburgh, snr., Thomas Husee, John Cranborn, canon of Salisbury Cathedral, Michael Kymes, John Neuton, William Kymes, John Sparwill, and John Lovell, chaplain. D: Margaret, widow of Robert Hungerford and daughter and heir of William Botreaux. Land: Manor of Maiden Winterborne [Winterbourne Stoke], Wiltshire.

Margaret's husband, Robert, forfeited his estates in 1461 and died in 1464. Her husband and his father had given the manor together with other manors to feoffees who were to establish a chantry in Salisbury Cathedral and an almshouse. Margaret claimed the manor as dower, but the recovery probably extinguished her claim, at least in part, to those who were probably her husband's feoffees. 78 *Historical Manuscripts Commission*, part 1, 290. See also 15 *V.C.H.*, *Wiltshire*, 278.

3. (a) CP40/824, m.305 (Trin. 1467). P: James Strangeways, John Conyers, Thomas Wytham, Thomas Colt, and Robert Ingleton. D: George Nevill and Henry Nevill. Land: Manors of North Pickenham, South Pickenham, Houghton, and Wigenhale, Norfolk.

(b) CP40/824, 308d (Trin. 1467). P: Strangeways, Conyers, Wytham, Colt, and Ingleton. D: George and Henry Nevill. Land: Manors of Helpringham and Scrokington, Lincoln.

George Nevill, who died in 1469, was in his earlier days described as an idiot whose lands were put into custody. George died with the Norfolk manors held for him. They descended to his grandson Richard through his son, Henry. See Blomefield, *History of Norfolk*, VI, 129–30. The recovery probably effected the putting of George's lands into custody.

4. CP40/835, m.356 (Pas. 1470). P: Robert Martin and John Northwode. D: John Bam and Elizabeth his wife. Land: Manor of Charles in Dartford, Kent.

The inquisition *post mortem* of Edward Bam, John's son, reports that one John Clerk was seised by feoffment of John Northwode, John Bam's feoffee, to the use of John and his heirs, and that the use descended to Edward. 2 *IPM*, *Henry VII*, No. 824.

5. (a) CP40/839, m.93d (Trin. 1471). P: John Fogg, William Hampton, Ralph Verney, Richard Fowler, Alfred Cornburgh. D: John Arundel and Katherine his wife. Land: Manors of St. Columb Major, Lanherne, Carnemough, Lanhadron, Coverton, Kennall, Condurrow, and Gerrans, Cornwall.

(b) CP40/839, m.94 (Trin. 1471). P: As in (a). D: John and Katherine. Land: Manor of Chideock and one-half of the manors of Horton and Up Cerne, Dorset.

(c) CP40/839, m.94d (Trin. 1471). P: As in (a). D: John and Katherine. Land: Manors of Illbear, Pitney, Werre, and Alnesey, Somerset.

(d) CP40/839, m.95 (Trin. 1471). P: As in (a). D: John and Katherine. Land: Manors of Treleigh, Trembleath, Winfenton, Tregenstok, Tremenelek, Bodwen, and Trurnvyan, Cornwall.

(e) CP40/839, m.95d (Trin. 1471). P: As in (a). D: John and Katherine. Land: Manors of Uton, Rudge, Spreacombe, and Braunton and one-half of the manor of Lady Well, Devon.

(f) CP40/839, m.96d (Trin. 1471). P: Alfred Cornburgh. D: John and Katherine. Land: Manor of Ravisbury, Surrey.

Plaintiffs to recoveries (a) and (d) turned the Cornish manors over to Richard Harecourt and Edward Gunstone, who, after John's death, conveyed them to Katherine for her life with reversion to John's right heirs. *Close Rolls, 1468–1476*, No. 1384.

Plaintiffs to (b) and (c) turned the Dorset and Somerset manors over to Richard Harecourt and Edward Gunstone, who, after John's death, conveyed them to Giles Daubeney, Robert Coppes, William Huddesfield, John Byconell, William Hody, and Richard Tomyowe and their heirs and assigns, for purposes unknown. *Close Rolls, 1468–1476*, No. 1385.

Plaintiffs to recovery (e) turned the Devonshire manors over to William Menwynnek, Thomas Tregarthen the elder, Thomas Lymby, Richard Reynolds, Richard Tomyowe, Thomas Killigrew the elder, and Laurence Goldsmith to hold the use of John's last will, which he declared on 10 November 1472. *Close Rolls, 1468–1476*, No. 1009.

Plaintiff to recovery (f) turned the Surrey manor over to Thomas Tregarthen, William Menwynnek, and Richard Reynolds, presumably to execute part of John's estate plan. *Close Rolls, 1468–1476*, No. 797.

6. CP40/844, m.418d (Mich. 1472). P: Robert Plomer and Roger Fraunceys. D: John Godstone. Land: Manor of South Hall, Essex.

Godstone's inquisition *post mortem* said that he was "a fool and a raging lunatic" and that Robert Plomer was seised of South Hall. 3 *IPM, Henry VII*, No. 921. In 1484, the manor was used in a marriage contract between John's son and heir apparent William, and Anne, sister of Thomas Ewlowe. Plomer and others became seised of South Hall to the use of John and heirs of his body, remainder to his issue William and the heirs of his body, with further remainders over. 2 *IPM, Henry VII*, No. 115.

7. CP40/887, m.204d (Hil. 1484). P: Guy Fairfax, John Bulman, Robert Sharp, and William Bulman. D: John Wilkinson and Joan his wife. Land: Manors of Thwing and Octon, Yorkshire.

The plaintiffs of the recovery apparently held to the use of the defendants. 2 *V.C.H., Yorkshire, East Riding*, 326.

8. CP40/902, m.454 (Mich. 1487). P: John Verney, William Danvers, serjeant at law, and Thomas Gale. D: Giles Wilsborn and Anne his wife. Land: Manors of Wyddial and Reed, Hertfordshire.

Giles and Anne suffered the recovery to the use of themselves and the heirs of Anne, who had inherited the manors from her father, John Scales. 1 *IPM, Henry VII*, No. 995; 3 *V.C.H., Hertfordshire*, 249; 4 *V.C.H., Hertfordshire*, 115.

9. CP40/904, m.151d (Pas. 1488). P: Thomas Brugge, Giles Brugge, John Moton, John Harwell, Roger Harwell, Richard Moton, John Harwell de Whitley, and John Butler. D: Robert Basset. Land: Manor of Upton Cheyney, Gloucestershire.

According to an inquisition of 1508, Basset died in 1489 seised of the manor; but an earlier inquisition did not report that he had so died. 3 *IPM, Henry VII*, No. 515; 1 *IPM, Henry VII*, No. 436. Given the proximity of the recovery to Basset's death and the result of the first inquisition, it is reasonable to conclude that the recovery conveyed the manor to feoffees to Basset's use.

10. CP40/910, m.334 (Mich. 1489). P: John Lacy and Thomas Hall. D: William Birmingham. Land: Manor of Shutford, Oxfordshire.

Birmingham, who suffered recurrent attacks of insanity and was incapable of managing his estates, suffered the recovery to the use of his wife Margaret for her life, remainder to her heirs. 2 *IPM, Henry VII*, No. 284; 10 *V.C.H., Oxfordshire*, 334.

11. (a) CP40/910, 422 (Mich. 1489). P: John [Morton], archbishop of Canterbury, John Vavasour, John Fyneux, William Sutton, Richard Sutton, John Downes, and John Nethersole. D: Joan Ingoldesthorp. Land: Manors of Wickham and Brewers, London.

(b) CP40/910, m.615 (Mich. 1489). P: As in (a). D: Ingoldesthorp. Land: Manors of Wickham and Brewers, Kent.

Fyneux was to hold the manor to the use of an indenture between himself and Ingoldesthorp, according to which he was to pay £50 yearly, £16, 13s. 4d. to Elizabeth, wife of William Stanley as her dower and the balance to Ingoldesthorp for her life, then hold to the use of her last will. 1 *IPM, Henry VII*, No. 1090.

12. (a) CP40/920, m.308 (Pas. 1492). P: John [Morton], archbishop of Canterbury, Thomas [Rotherham], archbishop of York, John [Alcock], bishop of Ely, Richard [Fox], bishop of Bath and Wells, John [de Vere], earl of Oxford, Thomas [Fitz Alan] Earl Aundel, George [Talbot], earl of Shrewsbury, Thomas [Stanley], earl of Derby, William Courtenay, Reginald Bray, Thomas Lovell, and Thomas Graynfeld. D: Thomas [Grey], marquis of Dorset and Cecilia his wife. Land: Manors of Brington, Crick, Wilby, Wetley, Lilbourne, and Claycoton and 30 messuages, 500 a. land, 60 a.

meadow, 20 a. woods and £4 rent in Brington, Crick, Wilby, Wetley, Lilbourne, and Claycoton, Northamptonshire.

(b) CP40/920, 310 (Mich. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manors of Northcote, Ilfracombe, Coldridge, Woodbury, Lymphstone, Clyst, Chambercombe, Church-Stanton, Kentisbeare, Charleton, Combestone, Compyne, Downfravyle, Axminster, Ottery St. Mary, Toryridge, Head Barton, Pale, Barnstaple, Hoxse, West Ashford, Knowstone le Kouple, Bealple Bourne, Brendon, and South Hall and 200 messuages, 3,000 a. land, 300 a. meadow, 200 a. woods, and £16 rent in the above places and in Tiverton, Honington, Sparkby, Sidford, Palmers, Tigley, and Lim, Devon.

(c) CP40/920, m.310 (Pas. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manors of Porlock, Pixton, Puckington, Yard, Huntspill-de-la-Hay, Torel's, Sock Dennis, Lymington, Archstoke, Innerney, Saysbovill, Stapleton, Littleton and 200 messuages, 3,000 a. land, 400 a. meadow, 120 a. woods and £8 rent in the above places, Somerset.

(d) CP40/920, m.310d (Pas. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manor of Anstwick and 30 messuages, 1,000 a. land, 500 a. meadow, 100 a. woods, and 10 marks rent in Anstwick, Yorkshire.

(e) CP40/920, m.332 (Pas. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manors of Egremont, Harrington, Everdale, Bolton [Hall], Drigg, Carleton, Gapford, and Wood Acre, Cumberland.

(f) CP40/920, m.332d (Pas. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manors of Trenywell, Trewellanne, Trewordreth, Woodford and 100 messuages, 2,000 a. land, 100 a. meadow, 100 a. woods, and £7 rent in the above places and Portloe, Nodden, Colquite, and Penare, Cornwall.

(g) CP40/920, m.333d (Pas. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manor of Groby and 30 messuages, 3,000 a. land, 100 a. meadow, 1,000 a. woods and £20 rent in Groby, Leicestershire.

(h) CP40/920, m.335 (Pas. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manor of Stoke-Upon-Terne and 20 messuages, 400 a. land, 40 a. meadow, 200 a. woods, and 20s. rent in Stoke-Upon-Terne, Shropshire.

(i) CP40/920, m.335d (Pas. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manor of Astley and 30 messuages, 1,000 a. land, 200 a. meadow, 200 a. woods, and £10 rent in Astley, Warwickshire.

(j) CP40/920, m.336 (Pas. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manor of Mayne, Allington, Moreton, Mapperton, Sturminster Marshall and 40 messuages, 600 a. land, 60 a. meadow, 16 a. woods and 20s. rent in the above places, Dorset.

(k) CP40/920, m.336d (Pas. 1492). P: As in (a). D: Thomas and Cecilia. Land: Manor of West Kington and 12 messuages, 300 a. land, 30 a. meadow, 20 a. woods, 20s. rent in West Kington, Wiltshire.

(l) CP40/920, m.337 (Pas. 1492). P: As in (a). D: Thomas and

Cecilia. Land: Manor of Merston and 20 messuages, 300 a. land, 160 a. meadow, 300 a. woods, and 40s. rent in Merston, Sussex.

13. CP40/923, m.229 (Hil. 1493). P: Robert Oliver, William Menwennek, and John Michell. D: William Willoughby. First vouchee: Robert Willoughby Lord Broke, kn. Land: Manor and advowson of Totell Gayton and 20 messuages, 200 a. land, 100 a. meadow, and 200 a. pasture in Ryston, Carlton, and Theddlethorp, Lincolnshire.

The plaintiffs held to the use of Willoughby and his heirs male. 2 *IPM, Henry VII*, No. 710.

14. CP40/926, m.269 (Mich. 1493). P: Alexander Beynam, Christopher Beynam, Thomas Ferrers, William Grevill, William Beynam, and Roger Porter. D: Richard Ferrers. Land: Manor of Great Taynton and 30 messuages, 60 a. land, 16 a. meadow, 40 a. woods, and £8 rent in Great Taynton, Gloucestershire.

The plaintiffs held to the use of Ferrers and his wife and the heirs male of Ferrers' body. 1 *IPM, Henry VII*, No. 1212.

15. (a) CP40/940, m.232 (Pas. 1497). P: Hugh Oldom and Edmund Threle. D: William Gorge and Nicholas Adam citizen and goldsmith of London. First vouchee: William Radmyld. Land: Manors of Broadwater and Lancing and 40 messuages, 3,000 a. land, 100 a. meadow, 1,000 a. pasture, 6 a. woods, and £10 rent in Broadwater, Lancing, Durrington, Worthing, and Laybrook, Kent, formerly Sussex.

(b) CP40/940, m.232d (Pas. 1497). P: Oldom and Threle. D: Gorge and Adam. First vouchee: Radmyld. Land: Manors of Great Milton and Little Milton and 30 messuages, 500 a. land, 20 a. meadow, 200 a. pasture, 60s. rent in Great Milton and Little Milton, Oxfordshire.

(c) CP40/940, m.234d (Pas. 1497). P: Oldom and Threle. D: Gorge and Adam. First vouchee: Radmyld. Land: Manor of Beverington and 6 messuages, 300 a. land, 60 a. meadow, 200 a. pasture, 40s. rent in Beverington and Bourne, Sussex.

(d) CP40/940, m.311 (Pas. 1497). P: Oldom and Threle. D: Gorge and Adam. First vouchee: Radmyld. Land: Advowsons of Broadwater, Albourne, East Easewrithe and of the Chantry at Broadwater, Sussex.

(e) CP40/940, m.312 (Pas. 1497). P: Oldom and Threle. D: Gorge and Adam. First vouchee: Radmyld. Land: Manor of Albourne, Sussex.

By final concord Radmyld granted the land of the five recoveries to Oldom and Threle and the heirs of Threle. *Sussex Fines*, III, No. 3319. Oldom and Threle then regranted the manors, but not explicitly the advowsons, to Radmyld for a term of ninety-nine years or until his death, remainder to William [Smith], bishop of Lincoln, Reginald Bray, John Shaa, Humphrey Conyngesby, Richard Emson, Bartholomew Rede, Thomas Riche, and Ralph Latham to the use of John Shaa. *Close Rolls, 1485–1500*, No. 994. On 20 July 1503, these feoffees were granted a pardon for having acquired the lands of the recoveries. *Patent Rolls, 1494–1509*, 304. On the same day, they

received license to grant Broadwater to the abbot and prior of St. Peter's, Westminster. *Ibid.* On 2 March 1504, they received license to grant Beverington and Lancing to St. Peter's, Westminster. *Ibid.*, 351.

16. (a) CP40/940, m.315 (Pas. 1497). P: Thomas Kebell, serjeant at law, John Mordaunt, serjeant at law, Thomas Frowyk serjeant at law, and Robert Turbervyle. D: William Danvers, Thomas Danvers, John Danvers, John Warde, citizen and alderman of London, Edmund Jenney, and William Gresholme. First vouchee: William Say. Land: Manor of Hooks and Pinnacles and 200 a. land, 100 a. pasture, 100 a. woods in Holyfield and Waltham Abbey, Essex.

(b) CP40/940, m.315d (Pas. 1497). P: Kebell, Mordaunt, Frowyk, and Turbervyle. D: William Say. Land: Manor and advowson of Market Overton and 200 a. land, 40 a. meadow, 100 a. pasture, and 40s. rent in Market Overton, Rutland.

There seems to be a mistake on the plea rolls in that the lands of recoveries (a) and (b) should be reversed. William Say had inherited the manors of Hooks and Pinnacles, which had been acquired by his father, John Say, in 1453 (*Essex Fines*, IV, 48, No. 324), but acquired Market Overton in 1486 in a transaction in which William Danvers and John Danvers were his co-feeoffees (*Close Rolls, 1485-1500*, No. 85). As for Hooks and Pinnacles, in 1515 Turbervyle at the request of Say conveyed the manor to Thomas Howard, duke of Norfolk. 5 *V.C.H.*, *Essex*, 160. And as for Market Overton, Say made a settlement of the manor in 1506. 2 *V.C.H.*, *Rutland*, 142. This evidence suggests that plaintiffs held for William Say's use rather than for a near-term resettlement. In the recoveries below, the possibility of a near-term resettlement cannot be excluded.

(c) CP40/940, m.317 (Pas. 1497). P: Kebell, Mordaunt, Frowyk, and Turbervyle. D: William Say. Land: Manors of Little Munden, Wickham Hall, and Sayesbury [Sawbridgeworth] and 100 a. land, 20 a. meadow, 40 a. pasture, 20 a. woods, and 30s. rent in Little Munden, Hertfordshire.

William Say acquired Little Munden in 1486 (*Close Rolls, 1485-1500*, No. 186), and apparently inherited Wickham Hall and Sayesbury or Sawbridgeworth (3 *V.C.H.*, *Hertfordshire*, 302, 305). All three manors were in Say's estate when he died in 1529. *Ibid.*, 130, 302, 305.

(d) CP40/940, m.317d (Pas. 1497). P: Kebell, Mordaunt, Frowyk, and Turbervyle. D: William Say, John Clopton, James Hobart, Edmund Jenney, and Thomas Frankyshe. Land: Manor and advowson of Great Munden and the advowson of the free chantry or priory of Rowley, and 2 messuages, 300 a. land, 100 a. pasture, 100 a. woods, and £24 rent in Great Munden, Little Munden, Hertfordshire.

Although it is unclear whether Say came by Great Munden by purchase or by the failure of his mother's heirs, the manor was in his estate at his death. 3 *V.C.H.*, *Hertfordshire*, 126.

(e) CP40/940, m.318 (Pas. 1497). P: Kebell, Mordaunt, Frowyk, and Turbervyle. D: Thomas Cheyney, John Butler, jnr., and Thomas Frankysshe. First vouchee: William Say. Land: Manors of Bedwell and Little Berkhamstead and 500 a. land, 40 a. meadow, 500 a. pasture, 500 a. woods, and 100s. rent in Essenden, Bishop's Hatfield, Bayford, North Mimms, Northaw, and Cheshunt, Hertfordshire.

Say inherited the manors of Bedwell and Little Berkhamstead from his father and they were in William's estate at his death. 3 *V.C.H.*, *Hertfordshire*, 429, 460.

(f) CP40/940, m.319 (Pas. 1497). P: Kebell, Frowyk, and Turbervyle. D: John [de Vere], earl of Oxford, Robert Rede, Henry Heydon, Richard Lewis, John Mordaunt, serjeant at law, William Waldgrove, James Hobart, and Henry Chauncy. First vouchee: William Say. Land: Manor of Bennington and 600 a. land, 40 a. meadow, 500 a. pasture, 300 a. woods, and £20 rent in Bennington, Hertfordshire.

William Say with the defendants to his recovery as his co-feoffees acquired Bennington in 1486. *Close Rolls, 1485-1500*, Nos. 186, 229, 348. In 1506, Say settled the manor on William Blount, Lord Mounjoy, husband of his daughter, Elizabeth. Say outlived the couple, and on his death the manor passed to his second daughter, Mary. 3 *V.C.H.*, *Hertfordshire*, 75.

(g) CP40/940, m.319d (Pas. 1497). P: Kebell, Mordaunt, Frowyk, and Turbervyle. D: As in (a). First vouchee: William Say. Land: Manors of The Baas, Periers, Geddings, Langtons, Marden Hill, Hailey, and Boxes and 1,000 a. land, 600 a. pasture, 200 a. wood, and £20 rent in Broxbourne, Cheshunt, Hoddesdon, Wormley, Amwell, and Thele [Stanstead St. Margarets], Hertfordshire.

Say inherited these manors from his father and they were in William's estate at his death. 3 *V.C.H.*, *Hertfordshire*, 436, 437, 451-2. The interest of the defendants is hard to explain.

(h) CP40/940, m.320 (Pas. 1497). P: Kebell, Mordaunt, Frowyk, and Turbervyle. D: William Say, Thomas Puryant, John Green, John Chauncy, Henry Chauncy, and John Feld. Land: Manor of Hoddesdon Bury and 4 messuages, 6 tofts, 8 gardens, 300 a. land, 60 a. meadow, 200 a. pasture, 300 a. woods, and £7, 6s. in Hoddesdon, Great Broxbourne, Little Broxbourne, Brickendon, Wormley, and Amwell, Hertfordshire.

Say, with the defendants to the recovery as his co-feoffees, purchased the manor from his sister's husband in 1494. *Close Rolls, 1485-1500*, Nos. 710, 742. The manor was in Say's estate at his death. 3 *V.C.H.*, *Hertfordshire*, 435.

(i) CP40/940, m.320d (Pas. 1497). P: Kebell, Mordaunt, Frowyk, and Turbervyle. D: William Say. Land: Manor and advowson of Lallford and 2 messuages, 100 a. land, 20 a. meadow, 40 a. pasture, and 60 a. marsh in Lallford and Farnham, Essex.

Many of the lands in the recoveries and the recoveries themselves were subjects of a suit in Chancery by Henry Bouchier, earl of Essex against William Say. The earl claimed that according to a marriage

agreement between himself and William Say, Say was to have the plaintiffs to the recoveries settle lands on himself and his wife Mary, daughter of William Say. C1/281/74–80.

17. (a) CP40/947, m.349 (Hil. 1499). P: William Houghton, Ralph Shirley, Thomas Kebell, serjeant at law, John Withington, Thomas Marowe, Richard Littleton, Robert Bryknell and John Hethe. D: William Littleton. Land: Manor of Cowsden, Worcestershire.

(b) CP40/947, m.349 (Hil. 1499). P: As in (a). D: Littleton. Land: Manor of Arley, Staffordshire (now Worcestershire).

Littleton's father, Thomas, died seised in 1481; after William's death the lands in the recovery passed to his son John in 1507. 3 *V.C.H. Worcestershire* 6; 4 *V.C.H., Worcestershire*, 210.

18. CP40/959, m.127d (Hil. 1502). P: Reginald Bray, John Shaa, Thomas Frowyk, and Thomas Jakes. D: Edward Hastings of Hastings. Land: Manors of Formandy and East Halgarth and 26 messuages, 2 tofts, 2 mills, 2 dovecotes, 20 gardens, 200 a. land, 60 a. meadow, 80 a. pasture, 100 a. wood, 400 a. heath, and 16s. rent in Formandy, Thornton, Ellesbourne, Pickering, East Halgarth, and Thurkilby, Yorkshire.

Two years after the recovery an inquisition *ad quod damnum* was held preparatory to Hastings' grant of the manors and lands to the dean and chapter of St. George's Chapel, Windsor. C142/18/17. The plaintiffs to the recovery were evidently either feoffees for Hastings or for the dean and chapter.

19. CP40/960, m.153 (Pas. 1502). P: James Russell and Thomas Moleyns. D: William Peverel and Joan his wife. Land: Manors of Bradford Peverell and Muckleford and 20 messuages, 1,000 a. land, 100 a. meadow, 1,000 a. pasture, 1,000 a. heath in Bradford Peverell, Muckleford, Cosins, and Hayes, Dorset.

The plaintiffs conveyed to Thomas Trenchard, Thomas Middleton, Henry Russell, John Stratton, and Edmund Roberds to hold the manors to the use of William for his life, taking 5 marks out of the revenues for Thomas Peverel, his son, and Margery his wife, remainder to Joan for her life, remainder to Thomas and the heirs of his body, remainder to the right heirs of William. 2 *IPM, Henry VII*, No. 964.

20. CP40/960, m.278 (Pas. 1502). P: John Devenish, Richard Carew, Thomas Fenys, Thomas Laurence, and Richard Copley. D: Thomas West, Lord de la Ware. Land: Manor of Swineshead, Lincolnshire.

West devised the manor by his will of 20 November 1504. *Close Rolls, 1500–1509*, No. 524.

21. CP40/961, m.148 (Trin. 1502). P: John Gilbert, Roger Holand, John Cruys, and John Kayleway. D: Edmund Devyok. Land: Manors of Cadecaheare and Melbury, advowson of Monk Okehampton, and 45 messuages, 12 gardens, 1,000 a. land, 120 a. meadow, 200 a. pasture, 20 a. woods, 200 a. moor, 1,000 a. heath, and rent of £10, 8s. 10d. 1 half-penny, 1 hawk, and 2 roses in Monk Okehampton, Nethercote, Southcote, Plympton, Madford, Blagdon, Croft, Greenslade,

Grudgeworthy, Nether Melbury, Wigden, Moor, Over Melbury, Brookescombe, Coxwell, Northcombe, Jaggeford, Germansweek, Teigncombe, Lenne, Okehampton, Newton, Busshell, North Stanton, Loworthy, Westworth Moor, Chichemore, Pyre, and in the parish of St. Leonard outside the southern part of Exeter in Tottisden, Twinyeo, and Marsh, Devon.

A week before his death in 1504 Devyok gave the manors to Henry Trecarell, Michael Kelly, and John Antony, perhaps his executors, for the performance of his last will. 3 *IPM, Henry VII*, No. 54.

22. (a) CP40/961, m.351d (Trin. 1502). P: Giles Daubeney, John Bouchier, Hugh Lutterell, Edmund Carew, William Saintmaure, and Nicholas Wadham. D: George Nevill of Bergavenny. Land: Manors of Chitelhampton and Langtree and 24 messuages, 12 tofts, 600 a. land, 100 a. meadow, 500 a. pasture, 1,000 a. wood, 400 a. heath, and £4 rent in Holt, Chitelhampton, Chitelhamholt, Proudeshury, Stowe, and Langtree, Devon.

(b) CP40/961, m.352 (Trin. 1502). P: Daubeney, Bouchier, Lutterell, Carew, Saintmaure, and Wadham. D: Nevill. Land: Manors of Winterslowe and 16 messuages, 12 tofts, 500 a. land, 100 a. meadow, 300 a. pasture, 500 a. wood and 60s. rent in Winterslowe, Wiltshire.

In the following year Nevill exchanged the manors and lands with Reginald Bray. *Close Rolls, 1500–1509*, No. 201. The plaintiffs to the recovery therefore appear to have been Nevill's feoffees.

### C. *Transfers out of uses*

1. CP40/961, m.123d (Trin. 1502). P: William Uvedale. D: John Norbury. Land: Manor of Pittleworth and the office of the East Bailiwick in the Forest of Buckholt, Hampshire.

Elizabeth Uvedale had given the manor and office to John Norbury and others, who were dead by 8 April 1501, to her use for life, remainder to the use of Robert Uvedale in tail male, remainder to the use of the right heirs of Thomas Uvedale, Elizabeth's late husband. On Robert Uvedale's death on 8 April 1501, William Uvedale was his son and heir. 2 *IPM, Henry VII*, No. 499. It appears that Norbury, the sole surviving feoffee, is conveying the manor and office to the *cestuy que use*.

2. CP40/961, m.410 (Trin. 1502). P: Robert Cornwallis, William Broun, citizen and alderman of London, Thomas Lightfoot, Richard Bedyel, Humphrey Tyrell, John Berdefeld, Thomas Berdefeld, John Lightfoot, and Roger Lightfoot. D: Robert Parker. Land: Manor of Newland Hall and 160 a. land, 20 a. meadow, 40 a. pasture, 20 a. woods, and 20s. rent in Roxwell and Writtle, Essex.

When John Berdefeld died on 16 February 1497, Henry Harling and Robert Parker were seised of the manor to the use of John, his heirs, and his last will. His heir was John Berdefeld, two years old, son of Thomas Berdefeld. Parker was transferring the manor out of John's use, but whether to the *cestuy que use* and co-feoffees or to new feoffees is not clear. 2 *IPM, Henry VII*, No. 1; 3 *IPM, Henry VII*, No. 936.

*D. Marriage and spousal settlements*

1. CP40/764, m.332d (Mich. 1452). P: Thomas Throgmorton and John Brokesby. D: Richard Hotoft and Joan his wife and John Hugford and Margaret his wife. Land: Manors of Wolston and Marston and 1 messuage,  $\frac{1}{2}$  virgate land, 6 a. meadow, and 10 a. woods in Bretford, Brandon, and Stretton on Dunsmore, Warwickshire.  
 Nicholas Metley, a lawyer, died seised in 1437 and had left the lands to his wife Joan for her life, remainder to his daughter Margaret. Joan married Richard Hotoft and Margaret married John Hugford. Hugford survived Margaret and died in 1485 holding the two manors by the curtesy of England. 1 *IPM*, *Henry VII*, No. 136. 6 *V.C.H.*, *Warwickshire*, 275, 276. The recovery probably effected a spousal resettlement on John and Margaret.
2. (a) CP40/803, m.244 (Hil. 1462). P: John Smith, Thomas Palmer, Thomas Wade, and John Southwick. D: Alice widow of William Lovell. Land: Manors of Shabbington, East Sleydon, and Wooburn, Buckinghamshire.  
 (b) CP40/803, m.244d (Hil. 1462). P: Smith, Palmer, Wade, and Southwick. D: Alice. Land: Manors of Hardwick, Cogges, Somerton, and Fringford, Oxfordshire.  
 Alice was the surviving sister and heir of William Deyncourt. As Baroness Deyncourt she brought the manors to her marriage with William Lovell who died in 1455. In 1462 she married Ralph Boteler of Sudeley. She died in 1474, succeeded by her grandson Francis, 9th Lord Lovell. 3 *V.C.H. Buckinghamshire*, 108; 4 *V.C.H. Buckinghamshire*, 102; 13 *V.C.H., Oxfordshire*, 122. The recoveries were probably part of a resettlement on her marriage to Boteler.
3. (a) CP40/813, m.323 (Mich. 1464). P: John Leynham, Richard Danvers, and William Danvers. D: Thomas Kene, William Hayton, Robert Corbet and Elizabeth his wife, and Robert Corbet. Land: Manor of Tubney and 4 messuages, 40 a. land, 20 a. meadow, 20 a. pasture, 20 a. wood, and 20s. rent in Tubney, Denchworth, Frilford, Abingdon, and Marcham, Berkshire.  
 (b) CP40/813, m.323d (Mich. 1464). P: Leynham, Danvers, and Danvers. D: Kene, Hayton, Robert and Elizabeth, and Robert. Land: One-quarter of the manor of Standlake, the advowson of Standlake, and 40 a. land, 6 a. meadow, 6 a. pasture, 200 a. woods in Standlake, Brighthampton, and Brize Norton, Oxfordshire.  
 Earlier in 1464, Robert Corbert, Elizabeth his wife, and Robert had conveyed by final concord Tubney to Richard Quartermain and Richard Fowler. CP25(1)13/87/2. Fowler, a nephew of Corbet, had married Joan, daughter of Quartermain's niece and heiress, another Joan, by her husband John Danvers. 4 *V.C.H., Berkshire*, 380. The recovery probably effected a resettlement on Richard and Joan, daughter of John and Joan Danvers. *Ibid.*
4. CP40/839, m.92 (Trin. 1471). P: Richard Danvers, Alfred Cornburgh, Nicholas Stathum, and William Calowe. D: Richard Cham-

berlain. Land: Manor of Stanbridge and Tilsworth and 20 messuages, 200 a. land, 40 a. meadow, 100 a. pasture, 40 a. woods, and £10 rent in Stanbridge and Tilsworth, Bedfordshire.

(b) CP40/839, m.96 (Trin. 1471). P: Danvers, Cornburgh, Stathum, and Calowe. D: Chamberlain. Land: Manors of Petsoe and Ekeney and 6 messuages, 200 a. land, 20 a. meadow, 200 a. pasture, and 100s. rent in Petsoe, Ekeney, and Emberton, Buckinghamshire.

Richard Chamberlain's father died shortly before 1471, when his trustee rendered the manors in the recoveries to Richard and his wife Sybil. *Close Rolls, 1468-1476*, No. 770. The plaintiffs of the recovery regranted to Richard and Sybil and the heirs male of Richard's body, remainder after the death of Sybil, to Richard and the heirs of his body, with remainders over. 1 *IPM, Henry VII*, No. 1237, 1238.

5. CP40/840, m.124d (Mich. 1471). P: Thomas Windsor and Thomas Waldylf. D: Edmund Rede and Katherine his wife. Land: Manor of Hampton Poyle, Oxfordshire.

In 1447 John Gaynesford had granted the manor to his son John and his wife Katherine in tail. Katherine later married Edmund Rede. In 1471, Edmund and Katherine settled the reversion of the manor on George Gaynesford, Katherine's son, and his wife Isabel Croxford. 6 *V.C.H., Oxfordshire*, 161. See I, A, 84.

6. CP40/845, m.333 (Hil. 1473). P: William Huddesfield and John Byconnell. D: William Say and Genevieve his wife, cousin and heir of Cecily Keriell. Land: Manors and advowsons of Wheathill, East Lydford, Farringdon, Radstock, and Raddington and 6 messuages, 1 toft, 587 a. land, 48 a. meadow, 1,000 a. pasture, 24 a. woods, 3 a. heath and rent of 4d. 1 half-penny, 1 lb. cumin, and 1 rose in Middle Leigh, Wells, Blakesy, East Lydford, and Long Sutton, Somerset.

Cecily Keriell died in 1472 leaving her granddaughter Genevieve as her heir. Although Genevieve died in 1480, William Say continued to hold until 1529. 5 *V.C.H., Somerset* 138. The recovery probably resettled the manors on Genevieve and William.

7. (a) CP40/886, m.64 (Mich. 1483). P: Thomas Eglove and Richard Moton. D: Humphrey Starkey, Robert Draper, citizen and alderman of London, William Herriot, citizen and alderman of London, Peter Pekham, John Broun, Thomas Champeneys, Thomas Sherwood, and Thomas Forster, citizen and mercer of London. First vouchee: Walter Devereux. Land: Manors of Webbley, Bodenham, Lionshall, and Morecote and 500 a. land, 60 a. meadow, 300 a. pasture, 100 a. woods in Webbley, Bodenham, Lionshall, Morecote, Kingspewn, and Dilwyn, Herefordshire.

(b) CP40/886, m.66 (Mich. 1483). P: Eglove and Morton. D: As in (a). First vouchee: Walter Devereux. Land: [Roll damaged].

Plaintiffs of the recovery conveyed to feoffees for the life of Joan, wife of Walter Devereux, to her use for her life, remainder as to Webbley to the heirs of the body of John Crophull and Margery his wife, deceased, remainder to the right heirs of Margery; as to

Bodenham, to the heirs of the bodies of Walter Devereux, Walter's father, and Elizabeth his wife, remainder to the right heirs of Walter, Walter's father; and as to the remaining manors, to Walter Devereux the son and his heirs. 3 *IPM, Henry VII*, No. 945; 2 *IPM, Henry VII*, No. 549.

8. (a) CP40/902, m.390 (Mich. 1487). P: Guy Fairfax and John Sulyard. D: William Hussey, Thomas Bryan, William Hody, Thomas Sapcote, and John Crevequer. First vouchee: John Audley. Land: Manor of Great Aston [Chetwynd Aston] and one-half of the manor of Fader-sham and 10 messuages, 300 a. land, 60 a. meadow, 200 a. pasture, 40 a. woods, and 100s. rent in Benthall, Cheswardyn, Sascott, Cruckton, Moyle, Arscott, Plealey, Pontesford, Sibberscot, Lea, Newnham, and Polmere, Shropshire.

(b) CP40/902, m.449 (Mich. 1487). P: Fairfax and Sulyard. D: Hussee, Bryan, Hody, Sapcote, and Crevequer. First vouchee: Audley. Land: One-half of the manor of Begworth and 2 messuages, 100 a. land, 10 a. meadow, and 100 a. pasture in Great Shernton, Little Shernton, Denton, and Little Widcombe, Gloucestershire.

(c) CP40/902, m.449d (Mich. 1487). P: Fairfax and Sulyard. D: Hussee, Bryan, Hody, Sapcote, and Crevequer. First vouchee: Audley. Land: Manor of Maningham super Wyham and two-thirds of the manor of Great Dilwyn and 4 messuages, 300 a. land, 40 a. meadow, 200 a. pasture, 200 a. wood, and 200s. rent in Seeters, Dilwyn, Little Dilwyn, Nenton, Hurst, Heynen, Henwood, and Yarsop, Herefordshire.

(d) CP40/902, m.451 (Mich. 1487). P: Fairfax and Sulyard. D: Hussee, Bryan, Hody, and Richard Bright. First vouchee: Audley. Land: Manors of Broughton Gifford and Ashton Gifford and 4 messuages, 100 a. land, 20 a. meadow, 60 a. pasture, 30 a. moor, 30 a. heath, and 30 a. woods in Broughton Gifford and Ashton Gifford, Wiltshire.

(e) CP40/902, m.451d (Mich. 1487). P: Fairfax and Sulyard. D: Hussee, Bryan, Hody, Sapcote, and Crevequer. First vouchee: Audley. Land: Manor of West Rodden and 2 messuages, 100 a. land, 10 a. meadow, and 40 a. pasture in West Rodden and Kilmersdon, Somerset.

Audley had enfeoffed defendants to the first recovery of the Shropshire lands to the use of his will. They suffered the recovery to Fairfax and Sulyard to the use of James Audley, John's son and heir, Joan his wife, and the heirs of their bodies, remainder to John's right heirs. 1 *IPM, Henry VII*, No. 604.

9. (a) CP40/903, m.341d (Hil. 1488). P: John Mortimer and Thomas Blount. D: John Croft and Joan his wife. Land: One-half of the manors of Weston, Ardley and Wigginton, Oxfordshire.

(b) CP40/903, m.342 (Hil. 1488). P: Mortimer and Blount. D: John and Joan. Land: One-third of the manors of Bubbenhall in Barnacle and Shotteswell, Warwickshire.

(c) CP40/903, m.344 (Hil. 1488). P: Mortimer and Blount. D: John

and Joan. Land: One-third of the manors of Holt, Shelsley Beauchamp, Churchill, Woodmanton, and Hanley Child, Worcestershire.

Joan was one of the daughters of Margaret, daughter of John, son of Joan Beauchamp. Margaret's lands were divided between the three daughters. The recoveries effected a resettlement of Joan's lands on herself and her husband. See 6 *V.C.H.*, *Oxfordshire*, 9; 5 *V.C.H.*, *Warwickshire*, 148; 6 *V.C.H.*, *Warwickshire* 47.

10. (a) CP40/905, m.141 (Trin. 1488). P: Richard Sutton and John Newport. D: John Philpot. Land: 2 messuages, 100 a. land, 30 a. meadow, 80 a. pasture, and 36s. 8 d. rent in Stepney, Hackney, and Stratford, Middlesex.

(b) CP40/905, m.145 (Trin. 1488). P: Sutton and Newport. D: Richard Hayward, Nicholas Lyster, Thomas Wells, snr., and Roger Philpot. First vouchee: John Philpot. Land: Manor of West Twyford and 20 a. land, 10 a. meadow, 12 a. pasture, and 4 a. woods in Harrow, Yeading, Hanwell, and Greenford, Middlesex.

(c) CP40/905, m.153 (Trin. 1488). P: Sutton and Newport. D: As in (b). First vouchee: John Philpot. Land: Manor of Hoxton, Middlesex.

The recoveries effected a marriage agreement between Oliver King and John Philpot by which John married Oliver's niece, Elizabeth Cosyn. Pursuant to the agreement Sutton and Newport conveyed the lands of the recoveries to King and co-feoffees to the use of John and Elizabeth in tail, except that the manors were to be held for their lives then divided between Philpot's sisters, Juliana and Margery, with the survivor to have fee tail, and for failure of issue remainder to the right heirs of Philpot. *Close Rolls, 1485-1500*, No. 302. As for West Twyford, Philpot was succeeded by his son Peter. 7 *V.C.H.*, *Middlesex*, 174.

11. (a) CP40/910, m.319d (Mich. 1489). P: Thomas Leek and Roger Johnson. D: Henry Grey of Codnor and Katherine his wife. Land: Manor of Grays Thurrock and 6 messuages, 200 a. land, 40 a. meadow, 100 a. pasture, 40 a. woods, and £40 rent in Grays Thurrock, Essex.

(b) CP40/910, m.320d (Mich. 1489). P: Leek and Johnson. D: Henry and Katherine. Land: Manor of Stoney Stanton and 10 messuages, 300 a. land, 100 a. meadow, 100 a. pasture, 20 a. woods, and £8 rent in Stoney Stanton, Leicestershire.

(c) CP40/910, m.402 (Mich. 1489). P: Leek and Johnson. D: Henry and Katherine. Land: Castle and manor of Codnor, manors of Loscoe, Langley, and Longwith Basset, and 100 messuages, 3,000 a. land, 500 a. meadow, 300 a. pasture, 100 a. woods, and £40 rent in Codnor, Loscoe, Langley, and Longwith Basset, Derbyshire.

(d) CP40/910, m.402 (Mich. 1489). P: Leek and Johnson. D: Henry and Katherine. Land: Castle and manor of Bytham, manors of Careby, Willingham, South Witham, Swayfield, and Saxby and 1,000 a. land, 500 a. meadow, 300 a. pasture, 100 a. woods, and £40 rent in the above places, Lincoln.

(e) CP40/910, m.405 (Mich. 1489). P: Leek and Johnson. D: Henry and Katherine. Land: Manor of Sapcote and 10 messuages, 200 a. land, 100 a. meadow, 100 a. pasture, 20 a. woods, and £20 rent in Sapcote, Leicestershire.

(f) CP40/910, m.410 (Mich. 1489). P: Leek and Johnson. D: Henry and Katherine. Land: Manors of East Wayte, Towton, Burton, Radcliff, and Dunham and 40 messuages, 1,000 a. land, 300 a. field, 1,000 a. pasture, 100 a. wood, and £20 rent in the above places, Nottinghamshire.

The manor of Greys Thurrock was settled in Katherine. 8 *V.C.H., Essex*, 40. The remainder of the recoveries probably also effected a spousal resettlement.

12. CP40/911, m.107 (Hil. 1490). P: William Cutlerd and John Hyn-desson. D: Richard Isham and Robert Yarum. First vouchee: Thomas Lovet. Land: Manor of Astwell and 22 messuages, 22 tofts, 2,000 a. land, 120 a. meadow, 500 a. pasture, 220 a. woods, and 40s. rent in Astwell, Falcutt, and Wappenham, Northamptonshire.

The plaintiffs demised the manor and lands to feoffees to hold to the use of Joan Lovet, Thomas' wife, for her life, remainder to Thomas in tail male, with further remainders over 1 *IPM, Henry VII*, No. 753.

13. (a) CP40/912, m.345d (Pas. 1490). P: John Walshe. D: Richard Forster. Land: Manor and advowson of Little Sodbury and 600 a. land, 100 a. meadow, 500 a. pasture, 200 a. woods in Little Sodbury, Old Sodbury, Chipping Sodbury, Shirigge, Homefield, and Dursley, Gloucestershire.

(b) CP40/912, m.356 (Pas. 1490). P: Walshe. D: Forster. Land: 50 messuages, 380 a. land, 60 a. meadow, 200 a. pasture, and 80 a. woods in Buttescombe, Porteshed, Capenor, Compton, Millon, Elynedon, Littleton, Bedminster, and Bishop's Stoke, Somerset.

John Walshe married Richard Forster's daughter and heir, Elizabeth. S. Rudder, *A New History of Gloucestershire* (Cirencester: S. Rudder, 1779), 677. The transfer was probably a marriage settlement, although there were other dealings between Forster and Walshe, for which see *Close Rolls, 1485-1500*, No. 1069.

14. CP40/922, m.341d (Mich. 1492). P: John Shurwood, John Marys, and John Calnecombe. D: Thomas Bury and Anne his wife. Land: Manor of Berrynarbor and 24 messuages, 700 a. land, 100 a. meadow, 200 a. pasture, and 100 a. heath in Berrynarbor, Devon.

The plaintiffs regranted to Thomas and Anne for their lives, remainder to the heirs of their bodies, remainder to Ralph Bury in tail, remainder to the right heirs of Thomas. 3 *IPM, Henry*, No. 576.

15. CP40/939, m.109d (Hil. 1497). P: Robert Constable, serjeant at law, William Grevill, Robert Brudenell, Roger Fitz, and Walter Rawedon. D: John Skidmore and Anne his wife. First vouchee: William Skidmore and Alice his wife. Land: One-half of the manors of Hosdens Farm, Dynes Hall, and Caxton and one-half of 500 a. land, 80 a. meadow, 70 a. woods, and 60s. rent in Hosdens Farm, Caxton,

Dynes, Maplestead, Great Maplestead, Sible Hedingham, Gosfield, Stanstead Hall, and Castle Hedingham, Essex.

Philip Skidmore or Scudamore died in 1488 holding the lands of the recoveries entailed to himself and his wife Wenllyan, remainder to his right heirs. His daughter, Anne, by his wife Wenllyan succeeded and married one John Skidmore. 1 *IPM, Henry VII*, Nos. 452, 453; Morant, *History of Essex*, II, 277-8; 3 *V.C.H., Buckinghamshire* 171. William Skidmore was Philip's heir general. 1 *IPM, Henry VII*, No. 454. By means of the recovery, Anne settled the lands on herself and her husband and the heirs of their bodies. 3 *V.C.H., Buckinghamshire* 171.

16. CP40/939, m.111 (Hil. 1497). P: Edward Dudley and Richard Capcote. D: John Skidmore and Anne his wife. D: William Skidmore and Alice his wife. Land: Manor of Burnham and advowson of Bekenfield, Buckinghamshire.

The properties were Anne Skidmore's, heir to George Skidmore, and the recovery effected a settlement on Anne and her husband John. 3 *V.C.H., Buckinghamshire*, 171; Lipscomb, *History of Buckinghamshire*, III, 204. See the preceding entry.

17. CP40/939, m.263 (Hil. 1497). P: Andrew Windsor, William Burgoyne, George Puttynham, William Fritton, Guy Palmes, John Fitzjames, jnr., John Marshall, John Parlman, Constantine Rowe. D: Robert Bowering and Alice his wife. First vouchee: William Juyn. Land: Manor of Ashton [Theynes] and 20 messuages, 60 a. land, 100 a. meadow, 40 a. pasture, 60 a. wood, 50 a. heath, 50 a. moor, and rent of 40d., 1 case, and 1 lb. pepper in Long Ashton, Somerset.

By their charter dated 8 May 1497, Windsor, Burgoyne, Puttynham, Palmes, Fitzjames, Marshall, and Rowe regranted the manor to Robert and Alice in tail, remainder to Juyn. Alice was Juyn's daughter. 3 *IPM, Henry VII*, No. 258. See IV, F, 6.

18. CP40/942, m.357d (Mich. 1497). P: Edward Belknap, John Smith, Robert Cotes, and Robert Brome. D: Henry Ferrers. Land: Manor of Hambleton, Rutland.

The recovery secured jointure for Constance, daughter of Nicholas Brome; Constance married Edward, son of Henry Ferrers. 2 *IPM, Henry VII*, No. 681. Edward succeeded his father to the manor. 2 *V.C.H., Rutland*, 69.

19. CP40/962, m.356d (Mich. 1502). P: Richard [Fox], bishop of Winchester, Roger Labourn, Thomas Hagarston, Thomas Swinbourne, Geoffrey Proctour, and Edward Crofton. D: John Lilbourne and Agnes his wife. Land: 20 messuages, 460 a. land, 100 a. meadow, 600 a. pasture, 40 a. woods, and 6d. rent in Belford and Yesington, Northumberland.

The recovery was suffered in the occasion of the marriage between Lilbourne's daughter and one co-heiress, Isabel, to William Proctour. The plaintiffs were to stand seised to Lilbourne's use for his life, remainder to Isabel and William in tail. 3 *IPM, Henry VII*, No. 304.

20. CP40/962, m.416d (Mich. 1502). P: Thomas Frowyk, chief justice of

Common Pleas, Humphrey Conyngesby, serjeant at law, John Yaxley, serjeant at law, Robert Brudenell, Edward Dudley, and Thomas Marowe. D: Edmund Grey of Wilton. Land: Manor of Wilton, Herefordshire.

In Michaelmas Term 1502, the feoffees of Grey's father, John Grey, demised the manor to Edward Stanley and Elizabeth his wife, John Grey's widow, for life. *Complete Peerage*, VI, 182, n. (a). The recovery seems to extinguish Edmund's claim in favor of his father's feoffees for the spousal settlement.

21. CP40/962, m.483d (Mich. 1502). P: Edmund Bussy and Richard Gaunt. D: Nicholas Byron and Joan his wife. Land: Manor and advowson of Over Colwick and 4 messuages, 100 a. land, 300 a. meadow, 300 a. pasture, 60 a. wood, and fishery in the waters of the Trent in Over Colwick, Nether Colwick, and Adbolton, Nottinghamshire.

The plaintiffs regranted the manor to Nicholas and Joan in fee tail. 2 *IPM*, *Henry VII*, No. 155.

#### E. *Intra-family sales and transfers*

1. (a) CP40/772, m.449 (Hil. 1454). P: Thomas Grey, Lord Richmond. D: William Grey, son of Richard Grey, late Lord Wilton. Land: Manor of Austen Grey, Wiltshire.

(b) CP40/773, m.110 (Pas. 1454). P: Thomas Grey. D: William Grey. Land: Manors of Purleigh, Gibcrack, Sayers, South Ho, Latchingdon, and Hyde Park, Essex.

(c) CP40/774, m.353 (Pas. 1454). P: Thomas Grey. D: William Grey. Land: Manor of Stretton, Derbyshire.

The final concord accompanying these recoveries is at *Essex Fines*, IV, 48.

2. CP40/804, m.316 (Pas. 1462). P: Philip Beaumont. D: Thomas Beaumont. Land: Manors of Shirwell, Youlston, Stoke Rivers, Courteshwell, Marsh, and the hundred of Shirwell, Devon.

Despite the recovery, a Thomas Beaumont died seised of the hundred and manors, except Courteshwell. 1 *IPM*, *Henry VII*, No. 379.

3. CP40/805, m.304d (Trin. 1462). P: John Stanford, jnr., D: William Stanford. Land: 4 messuages, 160 a. land, 16 a. meadow, 4 a. pasture, 10 a. wood in Clifton and Meppershall, Bedfordshire.

In 1466, John Stanford conveyed the lands in the recovery to John Stanford, citizen and mercer of London, and his co-feoffees. *Close Rolls, 1461-1468*, 381.

4. CP40/811, m.227 (Hil. 1464). P: John Smith and William Colyn. D: Elizabeth Wakehurst. Land: Manors of Dixter and Gatecourt and 1 messuage, 40 a. land, 40 a. pasture, and 20 a. wood in Northiam, Brede, Burwash, and Etchingham, Sussex.

The plaintiffs were agents for Thomas Etchingham, to whom Elizabeth Wakehurst, née Etchingham, sold the manors. Elizabeth's father, Robert Etchingham, had given the manors to Robert Wake-

hurst and Elizabeth upon their marriage. C1/31/281, 2, 3, 4; 9 *V.C.H., Sussex*, 273, 274.

5. CP40/836, m.237 (Trin. 1470). P: Thomas Lightfoot. D: John Lightfoot, also called John Fuller and Agnes his wife. Land: 1 messuage, 90 a. land, 3 a. meadow, 4 a. woods, and 3s. 11d. rent in Dunmow, Essex.  
The plaintiff was the son of the defendants. He conveyed over on 14 July 1470 to John Porter, citizen and fishmonger of London and Katherine his wife, Roger Gerveys, William Curteys, and John Freke. *Close Rolls, 1468–1476*, No. 478.
6. CP40/842, m.127d (Pas. 1472). P: Thomas Carbegh. D: Richard Carbegh. Land: 12 messuages, 8 tofts, 1 dovecote, 12 gardens, 8 a. land, 40 a. meadow, 40 a. wood, 200 a. heath, 20 a. moor, and 10s. rent in Carbegh, Treury, Trurnburg, Trurumarche, Truruvyan, Gavelglaston, Gavelpoltask, Gavelewynan, Garvadres Street, Nenham, and Chydanymergh, Cornwall.
7. CP40/842, m.211d (Pas. 1472). P: William Counter. D: John Counter. Land: Manor of Langherst and 800 a. land and 8 a. wood in Pagham, Sussex.
8. CP40/846, m.350 (Pas. 1473). P: William Speke, son of John Speke. D: John Speke. Land: Manor of Tangle, Hampshire.
9. CP40/879, m.351 (Hil. 1482). P: Thomas Howe. D: Anne Howe. Land: 20 a. pasture and 10 a. wood in Solihull, Warwickshire.
10. CP40/879, m.345d (Hil. 1482). P: William Test. D: Laurence Test and Joan his wife. Land: Manor of Daneway, Ferris [Court], and Catswood and 15 messuages, 6 tofts, 300 a. land, 26 a. meadow, 40 a. pasture, 60 a. woods, and 3s. 11d. rent in Frampton on Severn, Bisley, Tunley, Sapperton, Ebworth Ho, Cowley, Fretherne, Saul, and Eastington, Gloucestershire.
11. CP40/881, m.144d (Trin. 1482). P: John Aune. D: William Aune and Anne his wife. Land: 2½ messuages, 168 a. land, and 12 a. meadow in Balscot, Wroxton, and Alerington, Oxfordshire.
12. CP40/909, m.159 (Trin. 1489). P: John Lee. D: Marianne Lee. Land: 1 messuage, 2 tofts, 80 a. land, and 12 a. meadow in Moreton, Buckinghamshire.
13. CP40/910, m.514 (Mich. 1489). P: Henry Dilrok and Elizabeth his wife, widow of John Flemming. D: Roger Thorp and Constantia his wife, daughter and heir of Thomas Flemming. Land: One-third of the manor of Flemming and one-third of 5 messuages, 200 a. land, 260 a. fields, 312 a. pasture, 120 a. woods, and 54s. rent in Ravenwell, South Haningfield, Redington, Wickford, Dounham, Ranreth, and Stanbridge, and one-third of the advowson of Ranewell, Essex.

The recovery was accompanied by a final concord. *Essex Fines*, IV, 90, No. 3. Thomas Flemming had died in 1464. His son John died without issue, leaving three sisters as co-heirs – Constantia, Blanche, and Anne. Morant, *History of Essex*, II, 42. The recovery very much looks like a concession of dower to John Flemming's widow.

14. (a) CP40/915, m.312 (Hil. 1491). P: Roger Jukersell. D: John Jukersell. Land: 1 messuage and 11 a. and 1 rod land in Rotheram, Oxfordshire.

(b) CP40/915, m.374 (Hil. 1491). P: Roger. D: John. Land: 1 messuage and 1 a. and 1 rod land in Rotheram, Oxfordshire.

The two recoveries might be two attempts at the same transaction in that the parties used similar writs of entry *post disseisin* in both recoveries.

15. CP40/924, m.152d (Pas. 1493). P: William Laurens. D: Richard Laurens. Land: 1 messuage, 100 a. land, 8 a. meadow, and 8 a. wood in Hardwick, Devon.
16. CP40/941, m.44 (Trin. 1497). P: John More, sn. D: John More, jnr. Land: Manors of Staverton and Birdlip and 10 messuages, 10 tofts, 240 a. land, 30 a. meadow, 170 a. pasture, 8 a. woods, and 4s. 2d. rent in Staverton, Evington, Uckington, Hardwicke, Bodington, Haydon, Bentham, Cowley, Elkstone, Bumfield, Coldwell [Bottom], and Pitchcombe, Gloucestershire.

The plaintiff was the defendant's father, and the defendant had inherited the manor from his uncle John Dean. 8 *V.C.H.*, *Gloucestershire*, 91.

17. CP40/960, m.150d (Pas. 1502). P: Richard Francis. D: Robert Francis. Land: 5 marks rent issuing from 6 messuages, 10 virgates land, 40 a. meadow, 40 a. pasture, 100 a. woods, and 5s. rent in Stoney Stanton and Calke, Derbyshire.

On 26 April 1502 Robert released and quitclaimed with warranty to Richard. *Close Rolls, 1500–1509*, No. 155.

18. CP40/960, m.243 (Pas. 1502). P: Isabel Manningham, widow, John Shaa, Edmund Cokayn, Thomas Marowe, John Light, and John Esyngold. D: Robert Mitchell, Thomas Burgoyne, and Robert Cuthbert. Land: Manor of Little Paxton and 100 a. land, 6 a. meadow, 100 a. pasture, 4 a. woods, 23s. rent, and a separate fishery in the waters of St. Neots in Little Paxton, Huntingdonshire.

The grantee was Isabel Manningham and the grantor was William Manningham, who with his wife Alice, Joan Manningham, Eleanor Manningham, and the defendants to the recovery by final concord granted the land of the recovery to the plaintiffs in 1502. *Huntingdon Fines*, 116, No. 9. See 3 *V.C.H.*, *Huntingdon*, 334.

19. (a) CP40/961, m.141 (Trin. 1502). P: Robert Sheffield, Robert Lytton, John Kingsmill, serjeant at law, and John Scott. D: Henry Stafford, Margaret, countess of Wiltshire, John Viscount Lisle, Thomas Grey, Humphrey Conyngesby, serjeant at law, Thomas Frowyk, serjeant at law, John Gardiner, Thomas Byall, and Thomas Heywood. First vouchee: Edward [Stafford], duke of Buckingham. Land: Manors of Stanford Rivers, Traceys, and Suttons and 500 a. land. 40 a. meadow, 200 a. pasture, 200 a. woods, and £4, 6s. 8d. rent in those places, Essex.

(b) CP40/961, m.149 (Trin. 1502). P: As in (a). D: Edward, duke of Buckingham. Land: Manor of Newton Blossomville and 200 a. land,

20 a. meadow, 200 a. pasture, 200 a. woods, and 40s. rent in Newton Blossomville and Clipton, Buckinghamshire.

(c) CP40/961, m.153 (Trin. 1502). P: As in (a). D: Edward, duke of Buckingham. Land: Manor of Pyggesland and 100 a. land, 10 a. meadow, 40 a. pasture, 20 a. woods, and 10s. rent in Pyggesland, Essex.

(d) CP40/961, m.155 (Trin. 1502). P: As in (a). D: Edward, duke of Buckingham. Land: Manors of Brayfield and Waterhall and 200 a. land, 40 a. meadow, 100 a. pasture, 100 a. woods, and 20s. rent in Brayfield and Waterhall, Buckinghamshire.

For the final concord accompanying these recoveries see *Essex Fines*, IV, 107, No. 112. In the final concord, Edward, duke of Buckingham and his wife Eleanor quitclaimed with warranty to Sheffield, Lytton, Kingsmill, and Scott and the heirs of Scott. Humphrey Stafford 1st duke of Buckingham's third son was John Stafford. Upon John's marriage in about 1458, Humphrey settled the manor of Newton Blossomville on himself for life, remainder to John and his wife Constance. *Complete Peerage*, VI, 736, n.(d). John Stafford was created, earl of Wiltshire in 1470. *Ibid.*, 735. His son Edward married Margaret, daughter of Edward Grey, Viscount Lisle. Edward died without issue in 1498-9. At the time of his death he was seised of Newton Blossomville. By his will he left the manor to Edward, duke of Buckingham. The Henry Stafford of the recovery was the second son of Henry Stafford, grandson to Humphrey Stafford, 1st duke of Buckingham. In 1510, he was created, earl of Wiltshire. The recoveries apparently transferred manors from Edward, duke of Buckingham, to his brother Henry Stafford. For the manors of Newton Blossomville, Brayfield, and Waterhall were later held by Henry Stafford, earl of Wiltshire. 3 *V.C.H.*, *Buckinghamshire*, 325; 4 *V.C.H.*, *Buckinghamshire*, 423; 4 *V.C.H.*, *Essex*, 211.

#### F. *Regrants*

1. (a) CP40/813, m.138 (Mich. 1464). P: John Peres, John Mompesson, and John Mervin. D: Margaret Hungerford, widow of Robert Hungerford. Land: Manors of Aller and North Cadbury and 6 carucates land, 150 a. meadow, 300 a. pasture, 600 a. woods, 2,000 a. marsh, and £60 rent in Aller, North Cadbury, South Petherton, Barrington, Chilton, Stratton, and Southearp, Somerset.

(b) CP40/813, m.138d (Mich. 1464). P: Peres, Mompesson, and Mervin. D: Margaret Hungerford. Land: Manors of Publow, Wulwade, Pensford, and Newton St. Lo and 6 carucates, 150 a. meadow, 300 a. pasture, 400 a. woods, and £20 rent in those places, Somerset.

On 2 November 1464, the plaintiffs to the recovery and Margaret Hungerford, Thomas Hungerford and Anne his wife and Thomas Burgh and Margaret his wife entered into a final concord, whereby Mervin granted to Thomas Burgh and Margaret his wife for their

lives, remainder to Roger Tocotes, John Cheyney, John Sydenham, John Newburgh, Gregory Westley, and the heirs of Westley. *Somerset Fines*, IV, 126, No. 6.

2. (a) CP40/903, m.341d (Hil. 1488). P: John Fisher, serjeant at law, Edward Willoughby, Robert Logge. D: Thomas [Rotherham], archbishop of York, John [de Vere], earl of Oxford, William [Berkeley], earl Marshall and Nottingham, and Anne his wife, George Fitzhugh, deacon of Lincoln, and Thomas Fenys. Land: Manors of Alkington and Cam, Gloucestershire.

(b) CP40/903, m.354 (Hil. 1488). P: Willoughby and Logge. D: William, earl Marshall and Nottingham. Land: Manor of Cowley, Gloucestershire.

(c) CP40/903, m.354d (Hil. 1488). P: Fisher and Logge. D: William, earl Marshall and Nottingham, James [Goldwell], bishop of Norwich, Christopher Willoughby, Robert Willoughby, James Strangeways, and Edward Jenney. Land: Manors of Slimbridge and Hurst, Gloucestershire.

(d) CP40/902, m.357d (Hil. 1488). P: Fisher, Willoughby, and Logge. D: William, earl Marshall and Nottingham. Land: The castle and manor of Berkeley and the manors of Ham, Appleridge, and Hinton, Gloucestershire.

(e) CP40/903, m.359 (Hil. 1488). P: Fisher, Willoughby and Logge. D: As in (a). Land: Manor of Portbury, Somerset.

These recoveries effected resettlements on William, earl Marshall and Nottingham in tail, remainder to the king in tail male, remainder to the right heirs of William. Recovery (b): CP25(1)79/96/4; recovery (c): CP25(1)79/96/5; recovery (d): CP25(1)75/96/3. For recoveries (a) and (e) see *Close Rolls, 1485–1500*, No. 293.

3. CP40/903, m.417 (Hil. 1488). P: Edward Willoughby and Robert Logge. D: Humphrey Conyngesby and Isabel his wife. Land: Manor of Piddle also called North Piddle, Worcestershire.

Willoughby and Logge granted the manor to Humphrey and Isabel and the heirs male of Humphrey's body, remainder to William, Marquis Berkeley. 1 *IPM, Henry VII*, No. 826.

4. CP40/905, m.343d (Trin. 1488). P: Edward Willoughby and Robert Logge. D: William [Berkeley], earl Marshall and Nottingham. Land: Manors of Wotton Under Edge, Symond's Hall, Erlingham, the advowson of Wotton Under Edge and of the chantries of St. John of Worlele and St. Giles of Hildersley and 20 messuages, 240 a. land, 86 a. meadow, 412 a. pasture, and £12, 2s. 4d. rent in Slimbridge, Kingscote, Harwood [Gate Farm], Horton, Nibley, Sharncliffe, Erlingham, Iron Acton, and Acton, Gloucestershire.

By final concord Willoughby and Logge regranted to William for life, remainder to his wife Anne for her life, remainder to the heirs of William's body, remainder to the king in tail male, remainder to the right heirs of William, except that the manor of Erlingham and 1 messuage, 2 a. land, and £6, 6s. 8d rent in Erlingham were granted to William for one month, remainder to John Beauchamp and Anne

his wife, sister of Edward for their lives, remainder to the heirs of William's body, remainder to the king in male tail, remainder to the right heirs of William. CP25(1)79/96/6; 1 *IPM, Henry VII*, No. 778.

5. (a) CP40/910, m.543d (Mich. 1489). P: Edward Willoughby and John Skill. D: William Marquis Berkeley. Land: One-quarter of the manors of Brighthelmston, Clayton, Middleton, Meching, Seaford, and Allington, one-quarter of one-half of the manors of Cuckfield, Houndean [Bottom] and Keymer, one-quarter of one-half of the borough of Lewes and the barony of Lewes and the Chase of Clerys and of the Forest of Worth, one-quarter of the profits of No Man's Land, and 36s. 2d. rent in Iford, Sussex.

(b) CP40/910, m.545d (Mich. 1489). P: Willoughby and Skill. D: William, Marquis Berkeley. Land: One-quarter of the manors of Reigate and Dorking, Surrey.

(c) CP40/910, m.549 (Mich. 1489). P: Reginald Bray, William Smith, Richard Emson, and William Coope. D: William, Marquis Berkeley, earl Marshall and Nottingham. Land: Manor of Mawneys and 1 messuage, 300 a. land, 40 a. meadow, 200 a. pasture, and 20 a. woods in Romford, Essex.

(d) CP40/910, m.549d (Mich. 1489). P: Willoughby and Skill. D: William, Marquis Berkeley. Land: One-quarter of one-half of the manor of Marylebone, Middlesex.

(e) CP40/911, 380d (Hil. 1490). P: Willoughby and Skill. D: William, Marquis Berkeley. Land: Manor of Kington, Warwickshire.

Plaintiffs of recoveries (a), (b), and (d), by final concord resettled the respective lands on William in tail, remainder to the king in male tail, remainder to the right heirs of William. Recovery (a): CP25(1)241/95/7; recovery (b): CP25(1)232/77/15; recovery (d): CP25(1)152/100/21; recovery (e): *Warwickshire Fines*, 203, No. 2732. The point was to prevent William's brother, Maurice, from inheriting. 3 *V.C.H., Surrey*, 145, 235.

In Hilary Term 1489, Edward Willoughby and Robert Logge had settled the manor of Mawney on William in fee tail, remainder to Reginald Bray in fee simple. *Essex Fines*, IV, 90, No. 37. The manor was in William's estate at his death. 1 *IPM, Henry VII*, No. 832.

6. CP40/939, m.265 (Hil. 1497). P: Andrew Windsor, William Burgoyne, George Puttynham, William Fritton, Guy Palmes, John Fitzjames, jnr., John Marshall, John Parlman, and Constantine Rowe. D: Bartholomew Wesby and John Pride. First vouchee: William Juyn. Land: Manor of Battleborough, one-half of the manor of Bath Easton, and 50 messuages, 1 toft, 70 a. land, 140 a. meadow, 200 a. pasture, 100 a. woods, 30 a. heath, 30 a. moor, and 100s. rent in Pensford, Belialton, Bishopworth, Bedminster, Felton, Knolle by Bristol, Bath Easton, Naglesby, Warthyston, Battleborough, and Edingworth, Somerset.

By charter dated 8 February 1500 Windsor, Burgoyne, Puttynham, Palmes, Fitzjames, Marshall, and Rowe granted the manors to John

Bonaventure for life with successive remainders to William Juyn for life, Richard Juyn his son for life, Joan Juyn, William's wife, for life, Robert Bowering and Alice his wife, daughter of William Juyn, in tail, William Juyn and his heirs. 3 *IPM*, *Henry VII*, No. 258. See IV, D, 17, above.

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