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'And so, enquire the difference': Gender, land, and social change in twelfth and thirteenth century England, a study of maritagium and fee tail

Phillips, Ginger Jaye, M.A.

Rice University, 1992

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‘AND SO, ENQUIRE THE DIFFERENCE’:
GENDER, LAND, AND SOCIAL CHANGE
IN TWELFTH AND THIRTEENTH CENTURY ENGLAND,
A STUDY OF MARITAGIUM AND FEE TAIL

by

GINGER JAYE PHILLIPS

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IN PARTIAL FULFILLMENT OF THE
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APPROVED, THESIS COMMITTEE

[Signatures]

Professor K. F. Drew, Chair
Department of History

Harold Hyman, Professor
Department of History

Carol Quillen, Assistant Professor
Department of History

Houston, Texas
September, 1991
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GINGER JAYE PHILLIPS

1992
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ABSTRACT

Ginger Jaye Phillips

The maritagium and the gift in tail were conditional gifts by which land from the patrimony might be provided to daughters and younger sons while ensuring that when such cadet branches failed the land would return to the central inheritance. The coalescence of the common law around coherent principles and the legislation of Edward I on land conveyance resulted in the demise of the maritagium as a land conveyance form and its replacement by the gift in tail. Also, attitudes about the place of women in the family and marriage and the economic changes of the thirteenth century, which encouraged the development of a flexible strategy between demesne and rented lands created a land sales market, caused the practice of granting marriage portions in land to daughters to be replaced by monetary and chattel gifts, while no such change was made in the provision for younger sons.
A Note On Language

In this thesis ‘he’ and ‘his’ are used generically as pronouns referring to landholders, lords, tenants, demandants, and other figures, except where a woman is specified. The author of this thesis is aware that gender-neutral language is generally to be preferred in the interests of accuracy and good style; however, as one of the major points of this thesis is the exclusion of women from positions of power, especially public power, the generic masculine is being used to reinforce that point. The author realizes that not all participants in the courts or in the public arena of landholding were male. By the ideals of medieval England, however, they should have been. The anomaly that the female actor represents in the language of this thesis is only intended to reflect the anomaly that she represented in medieval England.
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Introduction

And note, that frank-marriage and fee-tail are not entirely of the same nature; and so, enquire the difference.¹

Why did the practice of granting maritagium and especially the practice of granting frankmarriage (liberum maritagium) die out in late thirteenth century England when the practice of granting gifts in tail did not? This thesis seeks to answer that question by examining the social, economic, and legal aspects of the problem as it existed in the twelfth and thirteenth centuries. In this introduction the sources will be discussed, and then a brief examination of the problem will be made.

The Year Books have been used as primary sources for case material. The Year Books are anonymous notebooks written by aspiring lawyers on case proceedings.² They have a distinct advantage for students of medieval English law over the official records because of their format. In a Year Book case, more information than the “count,” the formal recitations of charge and defense made by each party to a dispute, is available to the student of the law. Cases appear instead in the following format:

A woman brought her writ of Dower. The tenant: You were never joined to him in lawful matrimony. Passeley [for the demandant]: The reverse. Bereford [justice]: In what bishoprick [sic]? Passeley: In the bishoprick of Lincoln.

¹ Alfred J. Horwood, ed. Year Book 30 & 31 Edward I (London: 1863) 250. Note that in these Year Books the English translation of the cases appears on the even page while the Latin or Law French case notes appear on the odd page; hence, the even pages will be the reference source.

Bereford: She never came into England so you have lost all. 
Passeley: Not so; for at the suggestion of him who sues for the 
woman, they will have a writ to the bishop of the place where 
they say that the espousals were had, although it be out of the 
realm, and then he will send to the court in the same form: 
that is the law of England.³

This example shows the sort of legal wrestling evident in the Year Book 
cases. These cases demonstrate legal techniques and the fine points of the 
law in a fashion not evident from the Rolls, the official records of cases, in 
which only the “count” is generally recorded.

For contemporary twelfth and thirteenth century English legal 
theory, several different sources have been cited. The earliest well-known 
text was probably written between 1187 and 1189.⁴ Three justices have been 
suggested as candidates for the authorship of the text: Hubert Walter, 
Geoffrey Fitz Peter, and, the best known of the three, Ranulf Glanvill.⁵ 
Henri de Bracton’s On the Laws and Customs of England dates from the 
mid-thirteenth century. Its author was active in the royal courts; his 
earliest appointment that can easily be traced dates from 1239, when he was 
apparently already a senior clerk in the King’s Bench.⁶ Britton dates from 
the reign of Edward I.⁷ T. F. T. Plucknett has dated it at ca. 1290, and has 
offered the same date for another minor treatise entitled The Mirror of

⁴ G. D. G. Hall, ed., The Treatise on the Laws and Customs of the Realm of England, 
⁵ Glanvill xxxi-xxxi.  
Legal History (London: Hambledon, 1985) 75.  
Justices. All of these works purported to describe the state of the law in England. Although they were not entirely accurate, and cases available to the student of the law sometimes directly contradict the theories laid out by the authors of these treatises, they are important in describing the legal theory of the twelfth and thirteenth centuries.

From the sources of law in theory and practice one must now turn to the question at hand. Why did maritagium die out during the thirteenth century and why did gifts in tail survive? To understand the answers to this question one must first examine the nature of the two types of land conveyances.

The gift in tail or entail was a gift made to a person and the donee’s heirs of a prescribed class (generally heirs of the body) which would revert to the central inheritance if those heirs failed. This was originally designed to provide for younger sons, remitting the hardships of primogeniture, while preventing the hazards of partible inheritance and without permanently detaching the grant from the central inheritance. This custom had grown from the custom of granting maritagium and could be described equally well as a generalized case of it. Maritagium was a customary provision for daughters (who in general received nothing under the English inheritance custom of primogeniture if there was even one son) which was granted to the daughter and her husband upon marriage. The

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8 T. F. T. Plucknett, A Concise History of the Common Law, 5th ed., (Boston: Little, Brown, 1956) 265, 267. Plucknett believed that The Mirror of Justices did not circulate in the Middle Ages, and has described it as “the most fantastic work in our legal literature” (267).
land was intended to pass only to the heirs of the woman’s body with a reversion to the donor or his heirs if the heirs of the prescribed class (that is, the descendants of the daughter) failed. The gift in land was free (liberum) when services were not required. For neither free nor unfree maritagia was homage required to the donor or his heirs. This fact allowed the land to be reabsorbed; but without homage, only custom forced the heirs of the donors to maintain the gift. It had become the custom that the third heir of the donee would do homage to the donor or his heir, which provided for a reasonable number of heirs of the prescribed class, and allowed those heirs to gain the protection of homage to preclude revocation of the grant.

K. B. McFarlane has stated that the custom of granting frankmarriage had died out among the nobility by the end of the thirteenth century and had been replaced by marriage gifts of money. A lack of royal court records for frankmarriage cases would seem to at least partially bear him out; Robert Palmer has pointed out that records of disputes over such chattel and money settlements are not found in the royal court records, but rather in the records of the ecclesiastical courts. The abandonment of land gifts as marriage portions to daughters was not restricted to the upper class. Judith Bennett, in her work on the town of

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9 Custom was generally enough. However, some suits over maritagia have been recorded. S. F. C. Milsom, The Legal Framework of English Feudalism (Cambridge: Cambridge UP, 1976) 142-143.
Brigstock, has reported that marriage settlements (that is, settlements on a couple at their marriage) there were usually divided along gender lines, with men contributing land and women contributing chattels.\footnote{Judith M. Bennett, *Women in the Medieval English Countryside: Gender and Household in Brigstock Before the Plague* (Oxford: Oxford University Press, 1987) 98. Her evidence was based on manorial court records from the late thirteenth century and the first half of the fourteenth century.}

What, then, were the legal differences between the gift in maritagium and the gift in fee-tail which allowed the latter type of gift to survive and caused the former type of gift to dwindle out of use? And, equally importantly, what were the societal factors which supported gifts in fee-tail and extinguished gifts in maritagium?

The answers to the these questions can be organized around two central concepts: the organization and meaning of land and the organization and meaning of gender, especially under the law. These pivotal concepts are important to the organization of medieval society and thought on land distribution, and underlie many of the laws and regulations which seem impenetrable to the modern mind. These concepts will both be addressed in subsequent chapters.

Land is the basis of all wealth in an agricultural society; not only is it perceived as a source of production but, at least in early medieval England, as the sole form of capital. To understand the meaning of land to the medieval Englishman, several factors must be taken into account.
During the thirteenth century England underwent a serious social and economic upheaval which primarily affected the middle tiers of the feudal pyramid. A number of factors caused this upheaval, which seriously affected the composition and outlook of that group which might be called the gentry: those men who were clearly free, were often quite wealthy, and yet were not of the ranks of the peerage.

Prices were clearly rising in thirteenth century England, encouraging an increase in demesne production. The thirteenth century has been repeatedly described as an era of “high farming” in which substantial improvements in agricultural technology were attempted.\(^\text{14}\) Further, the period was one of steady inflation of prices.\(^\text{15}\) These facts further encouraged an increase in farming for the market rather than restricting the demesne to subsistence production.

Agricultural economics are tied to the general economy, and the value of land is also tied to the value of other social goods. That the English economy was growing in the thirteenth century was clear. England had excellent natural resources such as wool and the growth of trade in the High Middle Ages allowed the English to take advantage of the fortune nature had bestowed upon them. The country was sufficiently prosperous for the crown to take part foreign adventures between the late twelfth and


early fourteenth centuries, which repeatedly caused huge sums of money to be sent abroad.\textsuperscript{16}

The continued growth and strength of the English currency also played a part in the growth of the economy. The recoinages of 1247-1250 and of 1279-1281 can be used to estimate the amount of coin in the realm. Spufford has given an estimate of ca. 100 million pennies (£400,000) in circulation at the time of the first recoinage, and an estimate of 150 million pennies (£600,000 +) at the time of the second.\textsuperscript{17} While it is known that some of this coin went abroad in trade and to finance the crown’s foreign ventures, it also circulated in the country.

Population also affected the economy. Although estimates of English medieval population vary widely, there is agreement that the English population was rising until about the year 1300. J. C. Russell, the demographer of medieval England, has argued that the population of England reached a plateau after about 1300 and in 1348 was at about 3.7 million.\textsuperscript{18} M. M. Postan, who has posited a declining population even before the Black Death, has set the population figures for late thirteenth and early fourteenth century England as high as five to seven million people.\textsuperscript{19}

\textsuperscript{17} Spufford, \textit{Money and Its Use} 204.
During the thirteenth century landlords were able to take advantage of this rising population. They ceased the commutation of labor services begun during the twelfth century and in some area labor services were increased.²⁰ Real wages were also declining during the thirteenth century, allowing demesne producers to hire wage labor and increase their profit margins.²¹ Regardless of the numerical estimate of the population, the growth it experienced during the thirteenth century was a factor in the changing perception of land.

The clearing of land was related to the rising population. Postan’s theory of population decline was derived from the question of the quality of land cleared in the late thirteenth and early fourteenth century.²² There was continued expansion of settlements in most parts of England until the end of the thirteenth century, indicating a need for the expansion of land. This was true even though some of the land being brought under cultivation was definitely marginal land and ill-suited to agricultural production. There were some areas in which land fell out of cultivation due to agricultural, economic and political factors. However, the overall pattern (exclusive of some regional variations) indicates that there was still a need

²² He has argued repeatedly that the population decline, which he believed preceded the Black Death, was based upon a Malthusian crisis, because the “marginal” land being cleared in the early fourteenth century was insufficient to support continued population increase. See his “Note” on W. C. Robinson, “Money, Population, and Economic Change,” Economic History Review 2nd series 12 (1959).
to cultivate new land up to the turn of the fourteenth century. This in turn indicates a social pressure to cultivate new lands, partially from population pressure but certainly affected by other factors.

Also important to the understanding of land distribution practices is a thorough knowledge and appreciation of the land law. There were a number of important land laws passed during the reign of Edward I. Regulations dealing with land distribution and exchange included *De viris religiosis* (sometimes called the Statute of Mortmain) in 1279, *De donis conditionalibus* and the rest of the Second Statute of Westminster in 1285, and *Quia emptores* in 1290. These laws demonstrate that land distribution and exchange practices were undergoing important changes during the late thirteenth century. They are crucial to an understanding of the legal and social mores of the late thirteenth century, and as such are quoted in full in the appendices to this thesis. The modern student of law must not presume that these laws were made in a vacuum; as in modern times, laws were made because the existing laws and practices were inadequate in their handling of real problems.

*De viris religiosis* was the royal reply to baronial protests over the disadvantages of mortmain tenure, which had been heard as far back as the late twelfth century. Gifts in frankalmoign to the Church gained the donor no useful secular services, and more importantly, by passing the

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land into corporate possession, the donor's lord was denied the feudal incidents; as such, mortmain land was a serious economic disadvantage to the donor's lord.\textsuperscript{25}

\textit{De donis conditionalibus} was also a royal reply; this statute was made in response to a problem of land distribution. It dealt directly with the question of entails, which were often treated as having been converted to gifts in fee simple at the birth of the first heir. In 1258 there were complaints against the practice of childless widows, who had no heirs of their bodies, alienating such grants and leaving the reversioner without a recovery.\textsuperscript{26} \textit{De donis} was clearly intended to preserve such gifts along the lines that the donors had originally intended, although some commentators think that the statute was botched and never had the intended force.\textsuperscript{27}

\textit{Quia emptores} was also a crucial statute of the land laws. It ended subinfeudated grants in fee simple.\textsuperscript{28} Its language clearly dealt with buyers ('emptores') as well as with the feoffee ('feoffatus').\textsuperscript{29} It expressly

\textsuperscript{25} Milsom, \textit{Historical Foundation of the Common Law} 113. Frankalmoign tenure was land held by a religious corporation in exchange for the service of prayers. This type of tenure was also called "free alms."


\textsuperscript{27} Plucknett, \textit{Legislation of Edward I} 131-135. He stated that Ralph de Hengham, the writer of the statute, apparently intended to set the entail up in law as the traditional maritagem (inalienable until homage by the 3rd heir), but instead set up an effective estate for life with an unbarrable remainder in fee simple to the heir of the body of the donee. S. F. C. Milsom (\textit{Historical Foundations of the Common Law} 177) agreed that the lawyers interpreted the statute that way until Justice Bereford pointed out that it was not the intention of the law. Bereford's reinterpretation of the law ended up keeping the entail in force until all heirs of the prescribed class were deceased. Plucknett found the first certain statement of this principle in 1410 (\textit{Legislation of Edward I} 135).

\textsuperscript{28} Milsom, \textit{Historical Foundations of the Common Law} 114.

empowered tenants to alienate at their own free will by substitution, and thereby shows that land has become a thing owned rather than a thing earned by services. S. F. C. Milsom has pointed out that Quia emptores epitomized the changes that had taken place over more than a century in the methods of land distribution and exchange, and it that officially sanctioned the replacement of the vertical societal structures of mutual obligation by technical rules for property exchange.\footnote{Historical Foundations of the Common Law 115-116.}

The substantial amount of legal change regarding the exchange and distribution of land did not merely indicate the essential changes that the nature of land transactions underwent during this period. It also demonstrated a clear interest in the demarcation of the land rights of lord and tenant. The trend was clearly towards the tenant’s ability to alienate all lands freely. De donis and De viris are attempts to rescue some rights of the lords from the trend; Quia emptores is a final admission of the general principle, to which entails became a special exception. However, alienability also represented tenant control, or what the modern student of law would call ‘ownership.’ The determination of tenants to control their own land completely could also be read as another indication of land pressure.

Gender is also a crucial category of analysis for examining the differences between gifts in tail (maritagium or otherwise) to non-inheriting offspring. It is important to note that, as in many cultures, women were considered deficient in comparison to men in the medieval
world. The basis of the medieval ideology of female inferiority is too well-known to merit repetition. It is sufficient to say that such a belief permeated all levels of medieval society and had a strong basis in the ecclesiastical conception of women.\footnote{31}

The concept of coverture is based upon the idea of the inherent inadequacy of women as structured by medieval society and is crucial to questions concerning the meaning of gender, especially as gender relates to law. Coverture was the crux of legal inferiority for married women in medieval England (who were penalized far beyond the disabilities extending to their unmarried sisters on account of gender). The custom was that in marriage the two who had become one flesh became such in the eyes of the law. A married woman had no individual legal existence -- she could not separately own property or chattels, she could not conduct business (save that she was recognized under the law as a feme sole for that purpose\footnote{32}), and she could not oppose her husband's alienation of land which she had brought to the marriage (so long as he lived).

The ideology and practice of patrilineal descent, embodied by David Herlihy in the concept of the lineage, is also vital to the understanding of gender as it relates to land distribution. Herlihy describes the lineage as a unilinear filiation group conscious of descent from a specific common ancestor through a line of descendants of the same sex, with common


insignia and ties such as coats of arms, battle cries, and mythology. In England such descent was of course through the male line. S. F. C. Milsom has proposed that inheritance customs in the twelfth and early thirteenth centuries coalesced around a specific understanding of sex roles as they relate to land. In Milsom's formulation, men are possessors of land (as they are in Herlihy's lineage formulation) and women are its transmitters. Milsom has used this theory to explain both inheritance customs and the custom of curtesy.

Finally, there is the necessity of explaining the public function of land. Landholding was essentially a part of public life in medieval England. The requirements of the feudal system dictated that the act of holding land was a public rather than a private matter. The feudal structures of homage and services, including the court suit, made the public nature of seisin clear. All transfers of land had to be a matter of public record or else be legally invalid, which further emphasized the public nature of landholding. Female control of land implied an exercise of public power which was foreign to the English mentality. Thus, restrictions on female control of land, such as that made by coverture, were restrictions on the public actions and public power of women.

Such an understanding of the relationship between gender and land also clarifies some of the underlying principles of English land law. The common law concepts of *ius* (right) and *seisin* (use) closely paralleled Milsom’s formulation of gender division, in that *ius* provided no actual control over land (just as a woman under coverture could not control the disposition her land, which had passed to her husband). Right could be transmitted via females, but only the rare feme sole (generally a widow) had use of her own land.

When taken together, all of these factors, social, cultural, economic, and legal, provide a more complete picture than that given by an examination of any single one of them. The Englishman of the late thirteenth century was struggling to provide for his children. There was only a limited amount of land available to the family. If all the children were to remain on the family’s land they would have to accept a diminished standard of living. By custom, the holder’s land would go to one child (generally the eldest son), but provision had to be made for the future of the other children. Daughters were clearly marginal to the holder’s lineage; they passed into another lineage at marriage and the heirs of their bodies would be members of that family.\(^\text{36}\) Land provision for his daughters upon their marriage simply was too expensive to the family holding for the holder to afford. When coin was plentiful, as it was in the late thirteenth

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century, it made greater sense for an Englishman to give it, rather than scarce land, to his daughter upon the occasion of her marriage.\textsuperscript{37}

Thus it is apparent that the failure of the maritagium as a form of land transfer was dictated by social choices and underlying assumptions as well as economic conditions. The gift in tail to a younger son, which continued to provide land to members of the lineage after the donee's heirs had entered, had a vital role to play. Further, as a form of subinfeudation that remained possible after \textit{Quia Emptores}, the gift in tail expanded beyond its original role as a gift in the family. In a time of population and land pressure, the rational peasant made a decision to give the less valuable goods to the marginal members of his family -- the females. The maritagium had been a generous solution to the question of provision for daughters, and the failure of the arrangement was inevitable as soon as any of the favorable economic factors which allowed such generosity failed.

\textsuperscript{37} This was especially true when one considers that the coins in use during the late thirteenth and early fourteenth century were in general of low value (generally 1d or less), and that a father could thus calculate the exact scale of a money gift very easily compared to a gift of land. Further, money gifts could be given on a much smaller scale than land gifts by marginal holders. For the theory that the extensive use of coins penetrated to the rural areas as well as urban trade areas, see Spufford, \textit{Money and Its Use} 143 and 241-247.
Chapter One

Was There a Crisis of the Gentry in the Thirteenth Century? Economic and Tenural Evidence

D. A. Carpenter has asked whether there was a crisis of the knightly class in the thirteenth century, and has concluded on the basis of evidence from Oxfordshire that there was not.1 However, P. R. Coss has given evidence for the difficulties suffered by some landholders during the same period.2 Christopher Dyer has described the thirteenth century as a testing ground for the gentry; the less able fell out of that social stratum, whereas the fittest survived, or even flourished.3

What in fact happened during the thirteenth century was that a serious upheaval took place in the middle tiers of the feudal pyramid. Originally those tiers had been made up of knights, whose military service was rewarded by grants of land, which were to be farmed by villeins and free tenants whose services and dues would ensure that the knight was able to eat without having to farm his tenement himself. However, changes which had begun in the twelfth century were already eating away at the traditional feudal social structure, and by the end of the thirteenth century they had utterly destroyed it.

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It is clear that by the reign of Edward I knighthood was a title of honor rather than a description of military function, and that the composition of the feudal knighthood had changed. Knighthood was already beginning to lose its military connotations in the twelfth century; Henry II would not call the feudal levy of "agrarii militae" out for the Toulouse campaign of 1159.4 In the twelfth century a group of about 6500 knights could have been expected; by Edward's reign there were only about 1500 knights and another 1500 men with sufficient social and economic status to take on the title who had not done so.5 Edmund King has reported that in late thirteenth century England there was only one knight for every five knight's fees.6

The decrease in the number of knights was caused by an increase in the costs of knighthood.7 A result, there were numbers of small landholders who now fell outside of the feudal knighthood and were still distinctly not villeins, or even low-status free tenants; in fact, they were in some cases still manorial lords with villeins of their own.8 The slow disintegration of feudal bonds had emancipated these men from direct

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5 Edward Miller and John Hatcher, Medieval England: Rural Society and Economic Change (London: Longmans, 1978) 173. The estimate given apparently referred to property arrangements (knight's fees), which were expected to be sufficient to support the knights.
7 Carpenter, "Crisis of the Knightly Class," 739. Coss, following N. Denholm-Young, has suggested that the income required to maintain knighthood may have been as high as £100 p.a. by 1285 (Coss, "De Langley and of the Knightly Class," 190).
8 Coss, "De Langley and the Crisis of the Knightly Class," 189-190.
dependence on their feudal lords and allowed them to take governmental responsibility on the local and national level, rather than the military responsibility that had previously been the primary function of their estate. At the same time other land holding groups were emerging above the ranks of the peasantry, apart from the urban merchants whose interests lay in goods and not necessarily in land. These groups included lawyers, estate functionaries, and royal bureaucrats, all of whose vocations required increasing specialization and were becoming more regularly established during the thirteenth century. These professions might also provide a refuge for small landholders forced to sell out.

Any economic crisis suffered by the small landholders was not based in an instability of the English currency. Peter Spufford has stated that during the late thirteenth century currency was more plentiful in England than it was to be again for five hundred years. He has cited a number of facts which indicate the wealth in coin of the English during the thirteenth century. The weight of silver in circulation during the reign of Edward I was greater than the weight of silver in circulation during the reign of Elizabeth I. The amount of silver passing on the average through the

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12 Spufford, *Money and Its Use* 205. It should be remembered that there were no gold coins in circulation during this period in England. Spufford has argued that the English kings in general had a policy of preventing the use of gold as currency (*Money and Its Use* 277). He has pointed out that gold coins were a commodity rather than a medium of exchange in the thirteenth century; they were used for ceremonial purposes, such as
English mint each year in the late thirteenth century was not exceeded again until after the Napoleonic Wars. In the recoinage of 1247-50, when Henry III completely reissued the currency, Spufford has estimated there were about 100 million silver pennies in circulation in England. At the time of the recoinage of 1279-1281, Spufford has estimated that circulation was at about 150 million silver pennies.

The quality of English coinage had been established well before the thirteenth century. The silver used to make the coins was of excellent quality. A. E. Feavearyear has dated the setting of the sterling standard (.925 fineness) in English coinage at or before the Norman Conquest. This standard was retained throughout the medieval period. As a result, the English sterling was known throughout Europe as a standard of excellence. For example, in 1233 the goldsmiths of Venice pledged to work no silver of less fineness than the English penny sterling; and in 1288, when Genoa and Pisa made peace, the war indemnity the Pisans were to pay to Genoa was specified in sterling.

Further, the weight of the English penny remained stable throughout the thirteenth century. The pre-decimal pound, as a money of account, was

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royal almsgiving; and that almost all the gold coins in England during the thirteenth century were of foreign provenance, as the only gold coin issued by an English monarch in the thirteenth century, the gold penny issued in 1257, was a total failure as a circulating currency issue (Money and Its Use 183-185).

13 Spufford, Money and Its Use 205.
14 Money and Its Use 204. Recoinage was the medieval procedure by which coins were replaced. People had to take their old coins and bullion to the mint, where the coin and bullion were exchanged for new coin, with a surcharge for the king and the minters.
16 Spufford, Money and Its Use 141.
made up of 240 silver pennies, and it was specified that the number of pennies in a pound by account should equal the number by weight.\textsuperscript{17} The mint standard remained the same from the time of the Conquest until 1275, when a minor debasement for wear was made, so that a pound of silver was made into 243 pennies.\textsuperscript{18} The currency in circulation was actually less than the mint standard by weight because of coin clipping and simple wear on the coins.

The currency was valued by foreigners because of its strength. English coins were of fine quality and of large size. Foreign monarchs debased their currency, increasing the amount of base alloy in the metal and decreasing the size of the coins in order to attract more silver for exchange at the mint. Because the English monarchs avoided debasement for profit (having other ways to profit from recoinage\textsuperscript{19}), English coins were

\textsuperscript{17} The pound was standardized as 100 pence in the early 1970s. Previously it had been accounted as made up of 20 shillings, each containing 12 pence (generally written as £ s d).

\textsuperscript{18} Feavearyear, The Pound Sterling 9.

\textsuperscript{19} Pamela Nightingale has said that the English mints were, from the tenth century onward, characterized by tight royal control and exploitation or royal profit. Pamela Nightingale, “The King's Profit: Trends in English Mint and Monetary Policy in the Eleventh and Twelfth Centuries,” in N. J. Mayhew and Peter Spufford, eds., Later Medieval Mints: Organization, Administration, and Techniques (Oxford: BAR, 1988) 61. Nightingale attributes changes in minting policies in 1158 and 1180 to the centralization of the bureaucracy and the desire for closer royal control over the minting profits. Nightingale, “The King's Profit,” 65, 69. There was a charge of 16d in the pound for exchange of old coins for new in the recoinage of 1247 which paid not only for the workers who made the coins but also included a 6d charge for the exchange (seignorage): John Craig, The Mint: A History of the London Mint from A.D. 287 to 1948 (Cambridge: Cambridge UP, 1950) 34. Michael Prestwich has recounted that the profits from the mints in the first two years following the recoinage of 1279 was £35,788. Michael Prestwich, War, Politics and Finance Under Edward I (Totowa, NJ: Rowman and Littlefield, 1972) 200. Seignorage during this recoinage was at 14d or 14 1/2d in the pound. Craig, The Mint 38.
valued widely in Europe as a medium of exchange. Edward's enormous war expenditures in the period between 1294 and 1298 sent approximately £750,000 into Europe, where it circulated in and between other realms. The French coinage had been debased by Philip IV to pay for his wars with Edward, and the debasement resulted in a preference by the French for English coins as a circulating medium. By the end of Edward's reign there was about £50,000 in English money circulating in France. The largest English coin in circulation at that time was the groat, worth 4d. In order to account for so much money, between three and twelve million English coins had to be circulating in France. It was because of this sort of outflow that the export of silver coinage from England was forbidden in 1299 by the Statute of Stepney. However, the exodus of coin from England on such a large scale did not occur until almost the turn of the century, and was not a factor in the economy of the earlier part of Edward's reign.

However, though the English currency was in excellent shape relative to the other currencies of the period, the increasing number of coins available was bound to affect the economy. Peter Spufford has stated that a radical change in both urban and rural usage of coins took place between the late twelfth and the early fourteenth century. Edward Miller and John Hatcher have suggested that the inflow of bullion which

20 Spufford, Money and Its Use 289.
21 Spufford, Money and Its Use 162. Not all of this money was spent in direct war preparations; a good portion was spent in allowances (bribes) to his allies in the war.
24 Spufford, Money and Its Use 143.
accompanied the strong coinage in the thirteenth century may have been a factor in the increasing prices of that period, which has been described as one of steady, but not catastrophic, inflation.25

J. E. Thorold Rogers has examined the prices of several types of grains in his history of prices in England.26 During the period between 1259 and 1300, the average price of wheat was generally below 6s 6d per quarter, rising above it in six years, but only twice rising above 7s.27 Rogers' information for other agricultural products was often sketchy for the late thirteenth century, but did not indicate any consistent, dramatic inflation or severe depression of the prices for barley, drage, oats, beans, peas, vetches, rye, or malt before 1300.28 The overall trend apparent from Rogers' price lists was for slowly increasing wheat prices.

D. L. Farmer has pointed out some of the limitations of Rogers' work.29 In his own examination of grain prices in the late thirteenth century, he has pointed out that the prices of grains were closely tied together, and that the prices of all grains were dependent on the wheat

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25 Miller and Hatcher, Medieval England 65, 68. Also, Coss, "De Langley and of the Knightly Class," 190, after the work of P. D. A. Harvey.
26 J. E. T. Rogers, A History of Agriculture and Prices in England: From the Year After the Oxford Parliament (1259) to the Commencement of the Continental War (1793) Volume I: 1259-1400 (London: 1866). It is important to remember when examining grain prices that the English use of the word "corn" has traditionally differed from the American usage; the word has been used in English records to mean grain in general or wheat in particular.
27 Rogers, History of Agriculture and Prices 217-218.
28 Rogers, History of Agriculture and Prices 226-229. Vetch is a legume; drage, or dredge, was related to barley, and was often malted.
harvest.\textsuperscript{30} He has also indicated that the price for grains in general rose through the period.\textsuperscript{31} The long-term trend for the thirteenth and early fourteenth centuries showed a serious increase in grain prices, so that in 1330 they were four to five times what they had been in 1180. However, that increase included a severe inflationary period in the early part of the thirteenth century.\textsuperscript{32}

Grains were not the only products of agriculture in England. Peasants and lords alike also viewed livestock as important to their livelihood. Farmer has indicated that livestock prices were generally stable between about ca. 1210 and about ca. 1260. In this period the price increases in livestock and related products such as cheese varied from nothing to one case of an increase of 45%.\textsuperscript{33} However, in the last third of the century, livestock prices fluctuated under the influence of the recoinages.\textsuperscript{34} Farmer also has shown that Edward's recoinages actually acted to curb sharply-increasing livestock prices.\textsuperscript{35} Whether Edward and his officials intended to control prices or whether the restraint was merely a byproduct of the recoinages can only be a subject for speculation.

From information in the tables provided with Farmer's article, there were definite increases in livestock prices in the last thirty years of the thirteenth century. While increases in the prices of oxen, plough-horses,

\textsuperscript{30} Farmer, "Prices and Wages," 735-737.
\textsuperscript{31} Farmer, "Prices and Wages," 734-735.
\textsuperscript{32} Farmer, "Prices and Wages," 718.
\textsuperscript{34} Farmer "Some Livestock Price Movements," 16.
and cows remained low, there was a definite growth in the prices for sheep and cart-horses; however, sheep prices may have been affected by factors other than general inflation.\textsuperscript{36} Fortunately for the landowner and the tenant, the crucial beasts for agricultural production were oxen and in some areas plough-horses, whose prices remained more steady.

There were also non-agricultural economic indicators available during the late thirteenth century. D. A. Carpenter has indicated that the Oxfordshire gentry actually enjoyed a high standard of living during the thirteenth century. He has derived his evidence from increased expenditure on luxury items such as better housing.\textsuperscript{37} Edward Miller has suggested that opportunities for consumption increased during the thirteenth century.\textsuperscript{38} Christopher Dyer has reported expanded building and increased consumption of wine on the part of the gentry.\textsuperscript{39} J. D. Chambers has described the period as seeing a building boom.\textsuperscript{40} There were also developments in architectural style in the thirteenth century, indicating an increased concern over such matters. J. G. Hurst has noted that several new types of dwelling roofs were developed in the thirteenth and fourteenth centuries.\textsuperscript{41}

\textsuperscript{36} Farmer, “Some Livestock Price Movements,” 3. The price increase for sheep may have been related to difficulties with sheep disease in England in the last quarter of the thirteenth century (Rogers, History of Agriculture and Prices 460).
\textsuperscript{37} Carpenter, “Crisis of the Knightly Class,” 739 ff.
\textsuperscript{38} Miller, “England in the Twelfth and Thirteenth Centuries,” 11.
\textsuperscript{39} Dyer, Standards of Living 108.
\textsuperscript{41} J. G. Hurst, “Rural Building in England and Wales,” chapter nine in Hallam, Agrarian History 880.
These economic indicators demonstrate that, apart from the problems caused by wars and internal unrest, the English economy was healthy during the thirteenth century. However, the money economy was not the source of the troubles of the gentry. The root of the problem was that there was no longer enough land to go around for the gentry. This was due to several factors, the most important of which were population growth, the expansion of settlement to its limits, and an active market in land.

The farming out of manors to rent in return for rents was a traditional practice from a time when subsistence was an end in itself and unused resources were relatively abundant. During the thirteenth century this ceased to be the case. Thus landlords learned to adapt their policies to the rewards and costs of the market.\textsuperscript{42}

During the twelfth century, the contraction of the manorial demesne by leases to renters for fixed returns had been the general policy of landlords.\textsuperscript{43} But the increase in prices for agricultural products during the thirteenth century made it sensible for lords to increase their production from the demesne for the market.\textsuperscript{44} Inflation made it difficult for lords whose income was made up primarily of fixed rents and charges (as the income of many smaller landlords was) to continue to survive on their limited incomes.\textsuperscript{45} Demesne farming for profit was one clear solution

\textsuperscript{42} Miller, "England in the Twelfth and Thirteenth Centuries," 13.
\textsuperscript{43} Miller, "England in the Twelfth and Thirteenth Centuries," 4.
\textsuperscript{44} "Prices, then, influenced manorial policy, rather than the reverse." Farmer,"Prices and Wages," 731.
\textsuperscript{45} Coss, "De Langley and the Crisis of the Knightly Class," 190-191.
to this problem. Therefore both small and large landholders were increasing the size of their demesnes during the thirteenth century.\textsuperscript{46}

Further, evidence indicates that lay and ecclesiastical landlords were investing significantly in the expansion of output. They attempted to increase the efficiency of their farms by additional fertilization, by changing crop rotations to include legumes (increasing the nitrogen in the soil), and by improving seed stock and the breeding stock of the farm animals. Landlords also built new outbuildings and bought out common rights. They also hired skilled estate officials to further increase productivity. The thirteenth century has been described as an era of “high farming” because of such agricultural improvements.\textsuperscript{47}

In addition to the increase in prices, real wages for agricultural workers were stable or even declining (because of the increase in the population), making profit margins for demesne production even higher.\textsuperscript{48} Further, M. M. Postan has indicated that the commutation of labor services begun in the twelfth century ceased and even reversed in the thirteenth century.\textsuperscript{49} He has charted a distinct relationship between the size of the demesne holding and labor services required of villeins, indicating that lords were taking full advantage of villein labor where a large demesne

\textsuperscript{46} Carpenter, “Crisis of the Knightly Class,” 742; Miller and Hatcher, Medieval England 219; Farmer, “Prices and Wages,” 728.


\textsuperscript{48} Chambers, Population 24; Farmer, “Prices and Wages,” 719.

required a large labor force. However, the inflation worked to the disadvantage of small landholders with insufficient land resources to shift to demesne farming.

Conversely, rising rents and entry fines also made it profitable to shift land out of demesne and into rented tenements, especially in the latter part of the century, when prices were increasing more slowly than rents. Entry fines could increase dramatically in areas where land-hunger was extremely high.

New settlement patterns in England in the thirteenth and fourteenth centuries are important evidence of a crisis in land of the late thirteenth century which caused a sharp hunger for land among farmers. An important study of the agrarian history of medieval England from just before the Conquest to the Black Death has recently appeared, with an extensive treatment of land settlement in all parts of England and Wales between Domesday and the Black Death. Expansion of settlement stopped in the late thirteenth century in many parts of England, and had certainly ceased before the arrival of the Black Death in most parts of the country.

The reason for lack of new settlements in many places was the fact that the land being reclaimed was difficult to farm. This included the land

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50 Postan, "Chronology," 92-93.
51 Coss, "De Langley and the Crisis of the Knightly Class," 190-191.
53 Miller and Hatcher, Medieval England, 236; Hallam, Agrarian History 234, for this problem in the West Midlands.
54 Hallam, Agrarian History, chapter three, "New Settlement" (pp. 139-272). Various experts contributed sections on different regions in England for this chapter.
of the Weald, the great forest of Southeast England, which was partially heath and bog and had soil described as cold and "heavy to work."\footnote{Hallam, Agrarian History 174, 177.} Settlers were clearing increasing amounts of marginal land in Southeast England, where settlers moved on to exposed ridges with thinner, stonier soil, valley sides jutting with rocks, and wet, heavy ground. Cultivation of such marginal land was also taking place in the late thirteenth and early fourteenth centuries in the West Midlands and Southwest England.\footnote{Hallam, Agrarian History 231, 242.} There were also retreats in this period from areas previously settled, which are in some cases clearly related to the quality of the land. In the West Midlands, periods of retreat occurred in the 1270s and 1280s and after 1320.\footnote{Hallam, Agrarian History 233-234.} In Northern England, land was abandoned in the late thirteenth and early fourteenth centuries; there was apparently a cycle of claiming land, then abandoning it in favor of new assarts, which may have been related to soil quality.\footnote{Hallam, Agrarian History 257-258.} In addition to the development of new land settlements, land hunger was also reflected in the enclosure and development of "waste" or pasture areas by landlords.\footnote{Miller and Hatcher, Medieval England 39.}

Not all regions of England followed exactly the same pattern of land use and development. For instance, there was definitely continued settlement in Cornwall right up to the Black Death. This continued expansion was related to the Cornish tin-mining industry, which was undergoing significant growth through the period.\footnote{Hallam, Agrarian History 244-245.} However, as closely
as a single pattern of agricultural expansion can be discerned throughout England, the extension of land settlement in England seems to have been drawing to a close by about 1300, and one major reason was a lack of suitable land to develop.

Also important in any consideration of a shift from demesne farming to renting out was the change in the types of rent contracts at the end of the thirteenth century. New rent contracts at the end of the century were made for shorter terms than before, and these new, shorter leases have been described as “more precarious.” A forty-year term was considered too long by the end of the thirteenth century, as such a long lease might be considered a customary grant by later courts.61 Thus, through the century, an ability to adapt the estate to the needs of the moment was important to the maintenance of economic status for landholders.

In addition to the maintenance of flexibility in land, the gentry was also attempting to protect its tenurial rights; it attempted to keep control of tenants’ and grantees’ land use. Closer control of land rights protected both the lord’s financial rights and maintained the possibility for shifts between demesne and rented land when necessity struck. The tightening of the grip on land is evident in both baronial policies (especially during the reform and rebellion period of the 1250s and 1260s) and royal enactments.

One royal enactment which dealt with the question of alienability was De viris religiosis, sometimes called the Statute of Mortmain, made into

61 Miller and Hatcher, Medieval England 235-236. This contemporary comment indicates a shrewd awareness of the effects of common law on land tenure.
law in 1279.⁶² Mortmain land was land donated to the church in frankalmoign tenure.⁶³ The difficulty with such gifts, as the text of the statute makes clear, was not with the effect on the donor, but the effect on the donor's feudal lord, who was deprived of feudal incidents for the land.⁶⁴ The donor's lord was also deprived of services due from the land, which was a further economic hardship.⁶⁵

The barons and gentry clearly felt threatened by such deprivation. Baronial protests over the disherison caused by lands held in mortmain were heard as early as the end of the twelfth century.⁶⁶ The discontent of the barons did not diminish with the passing of time. It was one of the wrongs that the barons requested the king to remedy in the Petition of the Barons (1258).⁶⁷ Mortmain alienation without permission from the chief lord was actually banned by the rebel baronial government in chapter fourteen of the Provisions of Westminster (1259).⁶⁸ Despite baronial complaints, no royal action on the issue of mortmain alienation was taken for another twenty years. When the action was taken, it was decisively in favor of feudal control. The effect of this statute was immediately

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⁶² The text of this statute is quoted in full in Appendix I.
⁶³ Frankalmoign tenure was land held in free alms, that is, by an ecclesiastical corporation which provided only services in prayer to its grantor.
⁶⁴ The statute specifically mentioned the escheat, but wardships and marriages were of course also barred. The corporate nature of the Church as landholder prevented any advantage due to incapacity of the tenant from accruing to the lord.
⁶⁸ Treharne and Sanders, Documents of the Baronial Movement 145.
undermined, however, by royal grants of licenses for mortmain alienation. The first known license for mortmain alienation was granted in 1280.\textsuperscript{69}

**De donis conditionalibus**, the first chapter of the Second Statute of Westminster (1285), also dealt with the question of tenurial control.\textsuperscript{70} This clause dealt with "conditional gifts" -- gifts such as marriage portions to daughters (gifts in maritagium) and gifts in tail to younger sons which were intended to return to the principal inheritance if the heirs of the donee failed. The question of control of marriage portions was also on the minds of the reforming barons at mid-century; chapter twenty-seven of the Petition of the Barons (1258) requested that a legal remedy (i.e., writ) be made available for the problem.\textsuperscript{71} The goal of the landholders was to prevent women who had been given family land as marriage portions from alienating that land; if the women died childless (or even had no children from the marriage for which the portion was made), the land ought to revert to the chief inheritance on the deaths of the women. As with mortmain, royal response was slow; legislation on this matter waited over a quarter-century after the barons' complaint. Also as with mortmain, the response was decisively in favor of control, not alienability.

**De donis** is at best difficult to read, and it was only clarified by Justice Bereford a quarter century after it was written. T. F. T. Plucknett has argued that the author of the statute intended to make all marriage

\textsuperscript{69} Raban, *Mortmain Legislation* 1.
\textsuperscript{70} The text of this statute is quoted in full in Appendix II.
\textsuperscript{71} Treharne and Sanders, *Documents of the Baronial Movement* 89. The request was specifically concerned with childless widows who sold their marriage portions.
portions or gifts in tail inalienable until after the entry and homage of the third or fourth heir.\textsuperscript{72} S. F. C. Milsom has demonstrated that initially it was believed that the condition of the gift was fulfilled in the person of the first heir (the donee's offspring), and that person could thereafter alienate freely. However, Justice Bereford's understanding of the purpose of the statute was that the condition bound heirs beyond the first. Thus \textit{De donis}, in protecting the rights of donors, paved the way for the development of the classical entail of later centuries.\textsuperscript{73}

From these two pieces of legislation, it might seem that the Crown had an interest in curbing the trend towards free alienation of land. However, the landholders were doomed to lose on the issue of free alienation of land by tenants. Their loss was immortalized in the statute \textit{Quia emptores} (1290), which granted the right of alienation to all free tenants.\textsuperscript{74}

However, the interests of the lords were also protected by the statute, as it banned subinfeudation in favor of substitution.\textsuperscript{75} This ban, like the ban on mortmain alienation, protected the feudal incidents. For years, tenants who wished to sell their lands had been doing so by artificial

\textsuperscript{73} S. F. C. Milsom, \textit{Historical Foundations of the Common Law} 2nd edition (Toronto, Butterworth's, 1981) 176-177. As Milsom has pointed out, it is crucial to realize that the statutes were still considered amendments to the body of common law, rather than the stone-carved laws made by modern government. Bereford interpreted the statute in light of what he knew the draftsman (probably Hengham -- per Plucknett, \textit{Legislation of Edward I} 131) intended.
\textsuperscript{74} The text of this statute is quoted in full in Appendix III.
\textsuperscript{75} That is, tenants could no longer have tenants of their own; if they sold the land, the new tenant (buyer) would assume a relationship with the seller's lord that was exactly what the seller's relationship with the lord had been.
subinfeudation -- they were vendors, not feudal lords, to the new tenants, and collected a capital payment at the time of sale, but only nominal rents (such as the traditional rose at midsummer) thereafter. If the seller, the lord's grantee, died leaving an heir in wardship, then the lord would only collect that rose, and none of the income actually associated with the land. *Quia emptores* protected the lord's economic interests by dropping the old tenant out of the chain, and allowing the lord to collect the wardship of the person holding the land. Free alienation now did not threaten the lord's interest, as it had in an earlier period when the feudal relationship was real and meaningful. By the end of the thirteenth century the lord's interest in the tenant was financial, not personal. Thus control over which person was to be tenant was allowed to lapse.\(^{76}\)

Though the trend embodied by *Quia emptores* appears at first sight to be directly opposed to the concern for control of tenure expressed by *De viris religiosis* and *De donis conditionibus*, it is actually of a piece with them; it is a measure intended to protect the economic interests of the manorial landholders. Royal regulation of land transfers under these three laws was clearly made in response to the concerns of landholders who perceived that they were being deprived of financial gains from their lands.

Why had the concern for control over land and the financial rewards therefrom become so important in the thirteenth century? The answer is that there was an active market in land during the period which worked to

\(^{76}\) Milsom, *Historical Foundations* 113-115.
the benefit of great landholders (the magnates) and ecclesiastical bodies but also worked to the disadvantage of many smaller landholders.

Sandra Raban has stated that it was easier in the thirteenth century to marry into land, or be granted it by royal favor, than to gain it on the land market. 77 Baronial protests at mid-century indicate that some of the barons, knights, and gentry felt this was not true. P. R. Coss has cited clause 25 of the Petition of the Barons in support of the theory that the smaller landholders were undergoing a debt crisis, which was forcing them to sell their land to magnates and others. His interpretation is to be preferred to the traditional one, that the clause discussed underage heirs, on technical grounds. 78 A translation of this clause, as amended by Coss, follows:

Further, they seek a remedy in this, that Jews sometimes transfer their debts, and the lands pledged to them, to magnates and other persons powerful in the kingdom, who on this pretext enter the lands of lesser men, and although those who owe the debt are ready to pay it, with the interest, the magnates put off the matter, saying that without the Jew to whom the debt was owed they cannot do anything, and that they know nothing, and thus they continually put off the repayment of the borrowed money, so that, by the intervention of death or some other mischance, evident peril and manifest

78 Coss, “De Langley and the Crisis of the Knightly Class,” 192. The question revolved around the Latin phrase “terras minorum,” which was traditionally translated as “lands of minors” and was translated by Coss as “lands of lesser men.” The phrase generally used in the Latin to describe underage persons (minors) was “infra aetatem” (within age), which was so used elsewhere in the Petition (clause 2). Further, in the introduction to the petition, the phrase “maioribus et minoribus” (great and lesser) was used to describe the men presenting the petition. For these reasons it seems that the usual interpretation of “terras minorum” is unwarranted, and Coss’ translation is valid. See Treharne and Sanders, Documents of the Baronial Movement 76-79 and 86-87 for the original Latin and the traditional translation.
diatherion plainly threaten those to whom the holdings belonged.\textsuperscript{79}

This is a strong statement from the gentry (i.e. the "minores" or lesser men) on the threat they felt to themselves. Combined with the reformers' demands previously cited, it leaves the reader with an image of a group which saw itself as under siege.

The besiegers in this case came from a number of different groups. Royal servants, such as Geoffrey de Langley and Walter de Merton, and magnates such as the de Clares were buyers in these transactions.\textsuperscript{80} Coss, following H. G. Richardson, has also cited Jewish participation in the land market as transferers of debt, and attributes the ill-treatment they received during the rebellion and even their eventual expulsion to the effects of the resentment of the gentry.\textsuperscript{81} Edward Miller and John Hatcher have attributed part of the land hunger of the late thirteenth century to persons whom they describe as speculators, who paid some of the highest entry fines for land.\textsuperscript{82} Another important buyer of lands, and one whose pressure clearly caused landholders to feel threatened, was the Church and its monasteries, although their participation in the land market varied from house to house.\textsuperscript{83} One commentator has suggested that the reasoning

\textsuperscript{79} Treherne and Sanders, \textit{Documents of the Baronial Movement} 87.
\textsuperscript{80} Coss, "De Langley and the Crisis of the Knightly Class," especially 186-187.
\textsuperscript{81} Coss, "De Langley and the Crisis of the Knightly Class," 187, 194.
\textsuperscript{82} Miller and Hatcher, \textit{Medieval England} 48; Coss, "De Langley and the Crisis of the Knightly Class," 185-186.
behind De viris religiosis may have been to prevent the further expansion of monastic demesnes.\textsuperscript{84}

The Crown was also a part of the vise which squeezed Englishmen at the end of the thirteenth century. Eleanor of Provence, the wife of Henry III, was also involved in the land market and in the market for Jewish debt.\textsuperscript{85} Also, one authority on English government has said that during the latter part of the reign of Edward I, taxation of personal property was raised to a high estate.\textsuperscript{86} These types of royal activities, both personal and administrative, acted to increase the pressure on gentry families.

However, not all gentry families were doomed. Careful acquisition and management of lands clearly brought some men up in the world, just as other factors, such as small holdings and debts, brought other men down.\textsuperscript{87} Some families were successful at land acquisition and added to their demesne land with additional tenements bought from freeholders.\textsuperscript{88}

\textsuperscript{84} T. A. M. Bishop, "Monastic Demesnes and the Statute of Mortmain," \textit{English Historical Review} 44 (1934), 303-306.

\textsuperscript{85} Coss, "De Langley and the Crisis of the Knightly Class," 173-174.


\textsuperscript{87} The case of the baronial rebellion was a separator of more and less successful men. Coss has argued that the supporters of the barons may have been men in straitened financial circumstances ("De Langley and the Crisis of the Knightly Class," 192-195); Carpenter, holding to the opposite view, has stated that though the gentry were sympathetic to the baronial cause, they were unwilling to rebel and thereby endanger their prospects ("Crisis of the Knightly Class," 751-752). It likely that both are correct; the more desperate their financial circumstances (and hence the less they had to lose) the more likely they were to support the baronial side. Not all the baronial supporters dropped out of the ranks of the gentry; but significantly, Coss has reported that those who did were already indebted, and were additionally burdened by the payments required by the Dictum of Kenilworth ("De Langley and the Crisis of the Knightly Class," 195-196).

\textsuperscript{88} Carpenter, "Crisis of the Knightly Class," 742.
Geoffrey de Langley himself was the product of a knightly family.⁸⁹ Men such as de Langley show that, while the thirteenth century was a time of difficulties for the gentry, it was possible to overcome them.

The market in land and its participants, both winners and losers, clearly show the kinds of changes feudal society underwent in the thirteenth century. The middle tiers of the eleventh century, the Norman knights who had to be ready at a moment's notice to put down the rebellious Saxons, had lost their place in the social order. The new order, as it was developing during the thirteenth century, required a new middle group: civil servants, lawyers, judges, and others who held the title of knight (if they held it at all) as a social honor.

In addition to the societal changes, there was also a change in the nature of land. Land gained, in addition to its traditional significance as the source of and the primary form of wealth, a new character as a resource to be exploited -- and even a commodity to be bought and sold. With these changes came a commitment to extract the fullest value from land, whether by improvements in farming techniques or increasing rents and entry fines. There was also a commitment to closer legal control of the financial benefits for which land could be exploited.

Given these factors, it becomes less surprising that marriage portions consisting of land became uncommon and even died out completely. In the face of demonstrated instability of conditional grants at

⁸⁹ Coss, “De Langley and the Crisis of the Knightly Class,” 167.
mid-century, and the need for families to maintain control over the lands of the patrimony, the surprise is not that frankmarriage ceased to be a viable form of marriage gift. The surprise is that younger sons were still able to gain access to the valuable resources of the patrimony by means of the grant in tail.
Chapter Two

Tenurial Developments of the Long Thirteenth Century: From Tenure as One Part of a Reciprocal Relationship To Tenure as Ownership

It was observed in the previous chapter that land, the primary form of wealth, gained a new character in England during the thirteenth century; tenants and lords alike began to treat land as a commodity to be bought and sold and as an exploitable resource to be farmed for profit or to be leased out for high rents and entry fees as wages, prices, entry fees, rents, and other economic indicators dictated. In this chapter the legal aspects of that change in character will be examined, as a prelude to the discussion of the specifics of gifts in maritagium and gifts in tail. The link between the legal changes of the thirteenth century, especially the important legislation enacted by Edward I, and the economic and social changes of the thirteenth century will also be explored.

It has been argued by a number of experts on the common law that the original feudal fees granted after the Conquest were not inherited in the sense that modern persons would understand the term. Instead, they were heritable: that is, the old tenant's heir (whoever that might be) was regarded as having a claim to be put in as the new tenant by the lord of the fee upon the death of the old tenant. For anything to come of that claim, the lord would have to act on it, and if the lord chose not to put him into the fee, the heir had little recourse.¹

S. F. C. Milsom has noted the importance of the verb "to seise" and its implications for tenure. Originally the word was used as an active, transitive verb, implying not just factual possession of land but seigniorial acceptance. It was not that the tenant was seised, but that the lord seised the tenant. T. F. T. Plucknett has equated the term "seised" with the reality of holding a tenement "in quiet enjoyment," which implies that the tenant holding the fee was not challenged by anyone, including the lord of the fee.

The development of the verb "to seise" into the noun "seisin" has strong implications for the nature of the changes in tenure. Plucknett has noted that by the late thirteenth century, it was the sheriff who "put [someone] into seisin;" Plucknett's use of that particular phrase indicates the primacy of the noun rather than the verb in the mind of the legal thinker. Milsom has argued that royal interference in the matter of whom the lord would seise upon the death of a tenant was originally intended only to ensure that the claim of the heir was enforced; the king ordered the lord to do right by the heir -- to seise him. Milsom has also argued that the eventual almost total transfer of power from the lord's court to the royal


3 Plucknett, Concise History of the Common Law 358.
4 Plucknett, Concise History of the Common Law 389.
5 Milsom, Legal Framework 41. However, the heir's right may not have been enforced by Anglo-Norman courts for other reasons. Stephen D. White has suggested that the early courts may have taken facts into legal consideration which would have been ignored by later courts. White particularly mentions the right of a lord to choose who his tenant will be. Stephen D. White, "Succession to Fiefs in Medieval England," in T. H. Aston, ed., Landlords, Peasants, and Politics (Cambridge: Cambridge UP, 1987) 131.
court initiated by this simple level of interference in the lord's customs and choice of tenant was neither foreseen nor desired.\textsuperscript{6} Like much of the early English statute law, the enforcement of heritability was originally a change in procedure, not substance.\textsuperscript{7}

Robert Palmer has described the year 1153 as the crucial one for the beginning of the alteration of property rights and the development of an estate of ownership. It was in 1153 that the compromise which ended the anarchy was made and the claims of Stephen, who held the throne, and Matilda, who was the daughter of Henry I, were resolved. Stephen was to remain king, and Henry, the son of Matilda, later Henry II, was to succeed Stephen, to the exclusion of Stephen's other potential heirs. The compromise made by Henry and Stephen was, according to Palmer, intended to be a model for those disinheritied by the war. Palmer has argued that possessory and proprietary remedies grew from the enforcement of that type of agreement at all levels of society. Then, after 1176, the remedies were standardized and the bureaucratization of the court system began.\textsuperscript{8} Whether or not Palmer is correct in choosing the compromise that ended the anarchy as the starting point of the growth of the legal bureaucracy is debatable; however, the theoretical superstructure

\textsuperscript{6} Milson, \textit{Legal Framework} 36. However, T. F. T. Plucknett has pointed out that the assize of mort d'ancestor ignored the lord's court (since the lord was the defendant in the action). Plucknett, \textit{Concise History of the Common Law} 360.


of the law and the fundamental legal principles upon which it rested had already been described before the turn of the century.\textsuperscript{9}

It is apparent from the preceding statements and facts that the change from heritability to a right of inheritance was directly connected to the interference of the royal court in the matter of the lord’s legitimate choice of tenant, and that the series of developments was intertwined with the evolution of the tenancy in fee simple from life estate to ownership. The right of the heir to inherit his predecessor’s lands, whether the heir was an eldest son inheriting by primogeniture or was some other person inheriting the land through another inheritance custom, had clearly been established by the late twelfth century and was apparent in the writings of Glanvill.\textsuperscript{10}

The original tenurial contract, before the establishment of the right to inherit, had been much like a modern purchase; the lord, who had land -- capital wealth -- bought service from the grantee in return for a tenure.\textsuperscript{11} The duration of the contract did not extend past the death of the tenant. When the tenant died, by the logic of feudalism the lord ought freely to have been able to choose the new tenant, and ought not to have been forced to accept the heir of the deceased tenant, who might not be wanted by the lord for some reason.\textsuperscript{12} The activity of the king’s court, which forced the lord to

\textsuperscript{10} Glanvill 75.
\textsuperscript{11} Milsom, \textit{Legal Framework} 39.
\textsuperscript{12} Plucknett, \textit{Concise History of the Common Law} 508.
accept a particular new tenant, namely the heir of the deceased tenant, weakened the lord's rights and strengthened the rights of all tenants.\textsuperscript{13}

The early origins of the development of heritability and ownership from feudal tenures have been more than adequately discussed elsewhere and merit no more discussion in this chapter.\textsuperscript{14} However, the parts of the progression which concern ownership and which took place during the thirteenth century are more important, and shall be examined further. It is more important at this point to examine the characteristics of land transfers in the thirteenth century and the ways in which legal and social developments caused and were affected by these characteristics.

Three interrelated developments came to characterize land transfers in the thirteenth century. First, artificial methods of transferring land developed, with attendant difficulties for the legal system and for those who possessed land and wished to transfer it. Second, the real and reciprocal relationship between the lord and the tenant disintegrated completely. Third, the seigniorial court system had completely broken down and jurisdiction over free tenants passed almost completely into the royal court system. These three interrelated problems eventually led to the destruction of the original feudal system and its recasting into something new by the legislation of Edward I.

\textsuperscript{13} Milsom, \textit{Legal Framework} 121.
What exactly is meant by an artificial transfer of land? It is a gift or sale of land by which a change in the holding of a tenement was made that somehow circumvented the rules and regulations of the common law. In other words, one might manipulate the law in order to do something which was technically prohibited. Several examples of different types of artificial transfer can be examined from the legal records.

First, one might investigate the case of William de Whelton, who wished to transfer his manor of Whilton to his younger son Nicholas de Whelton in the early 1260s. This transfer has been described by Robert Palmer as "a bit of legal sleight of hand."\(^{15}\) William made the formal "livery of seisin," putting his son's hand on the door hasp of the manor house and giving him a branch of a cherry tree, signifying the fruits of the land, and then left for two weeks. Perhaps also at this time Roger, Nicholas' elder brother, quitclaimed the land to Nicholas.\(^{16}\) During the two weeks Nicholas used the land as his own by fishing, burning wood, and taking fealty from the tenants. Upon William's return to Whelton, Nicholas granted him a life tenure in the manor.

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\(^{15}\) Palmer, Whilton Dispute 31. The transfer between William and Nicholas was not intended to be real and lasting. Once Nicholas had the land, he granted it back to his father in a lease of life term. This enfeoffment and re-enfeoffment was a way in which William could grant lands to Nicholas during his lifetime without losing the revenue from the lands. William had to make the grant during his lifetime because the rules of inheritance (which were firmly established by the mid-thirteenth century, when the gift was made) dictated that the land would go to William's elder son Roger.

\(^{16}\) That is, he formally gave up his claim as Nicholas' elder brother and William's heir to the land before witnesses. This could be done verbally or by means of a written document.
This transfer has become known to modern scholars because it was unsuccessful. There was no charter recording the transfer, which was not strictly necessary, but would have helped to prove that the transfer had been made at a later date; also, Nicholas' use of the land was insufficient -- he never worked the land, he did not replace the bailiff, and he did not free any unfree tenants. Any of these actions would have shown that complete delivery of the land had been taken. Without them, a transfer of the manor was at best questionable. The questionable transfer of Whilton caused litigation which lasted well over a century.17

Another type of land transfer that could be characterized as artificial was the type of land transfer associated with marriage. Robert Palmer has discussed the fact that land transfers between marital partners and spouses-to-be had to be routed through outsiders.18 He has also argued that arrangements that appear to be matters of wedding etiquette were often

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17 Palmer, Whilton Dispute 31-32. Bracton made theoretical comments that clearly apply to the Whilton case:

If one (who) has both rights, property and possession grants both to another, attaching this modus to the gift, that after a time the possession revert to him to be held for life, he to have only the free tenement, the property remaining with the donee, let the donor not enter at once, on that same day or the next, no matter for what purpose, as for lodging there as a guest, or subsequently (that is, shortly thereafter) for that of using as before [the tenement], for by such action it is assumed that he never had the intention of withdrawing from possession...


Also the following:

Gifts are sometimes made in writings, though if there is no writing it is no less valid, provided it has other proofs...


actually dictated by legal necessities. An example of the kind of maneuvering gifts made between spouses or betrothed parties required to be legally effective can be seen in a case from the reign of Edward I. In this case, the wife's father had insisted that the prospective groom's transfer of lands to his daughter be carried out clearly and well before the marriage. Bracton indicated that gifts of land between those who were about to be married were invalid, and gives the following reason:

[I]t makes a difference whether it [the gift] is made because of affection and marriage to follow or not, for if a marriage was afterwards contracted between such persons [donor and donee] it appears that marital honor and affection already existed, the persons being taken into account and the union of their lives considered. ... Simple gifts are not to be made, either before espousals, before marriage, or during marriage ...  

The principle that the royal courts could invalidate improperly made gifts was clearly already established by Bracton's time. Bracton also mentioned in discussing the same question that gifts between spouses made artificially (that is, made by granting the land to a third party who would later grant it to the other spouse) should not be conceded any validity.

[S]uppose it is made indirectly, the husband giving (the land) to a stranger that he may give it to his wife, either at once or after the husband's death, or conversely, if it is the wife who wishes to make a gift to her husband. It ought not to be valid ... [I]t does not matter whether what is done is precisely (what is prohibited) or amounts to the same. (The contrary, however, was held, erroneously and by mistake of the court, and, so to speak, by counsel of the court (in the case) of Godfrey of Crowecrombe, who gave land to Robert of Mucegros so that

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after the death of Godfrey the same Robert might give it to Godfrey's wife.)

This passage, especially the recounting of the case of Godfrey of Crowecrombe, indicates that Bracton and other legal lights of his period were well aware of the problem of artificial transfers. They knew that a little legal sleight of hand sometimes allowed donors to get around the law. However, they had become bound up in the rules of law as much as everyone else, and sleight of hand might be able to accomplish a technically illegal gift.

Godfrey de Crowecombe's case leads the student of the law to yet another type of artificial land transfer: a subinfeudation where what was truly needed and wanted by all parties was a substitution. Godfrey probably granted the land to Robert for a nominal service, such as a rose at midsummer. When the grant back to Godfrey's widow was made (probably also for a nominal rent), the feudal chain had become the following: Godfrey's lord --> Godfrey (or his heir) <-- Robert --> Godfrey's wife. The question of from where the rents and services would come in this case was of clear interest to Godfrey's lord. The mischief to him of a rose rent grant made to Robert has already been discussed in the context of feudal incidents, but the original mischief clearly was much greater.

The tenant's holding of the land and the rents and dues from it were originally two sides of the same coin; only later did they become independent of each other and fixed by law. If Godfrey had subinfeudated

23 Milsom, Legal Framework 34-35.
his lands repeatedly for nominal rents, he would have insufficient lands
left to support the rents and the services he was required to render to his
lord. This is the problem to which Glanvill referred when he stated the
following principle:

[T]he general rule is that any person is allowed to give freely in
his lifetime a reasonable part of his land to whom he pleases.\textsuperscript{24}

The key word in Glanvill’s sentence is ‘reasonable.’ By it he meant that
enough land must be left to fulfil the obligations of the tenement. If enough
land were not left for the tenant to do so, his lord would suffer a loss of
income from both the rents and the services. Along these lines, Frederick
Pollock and F. W. Maitland have stated that inherited lands had to bear the
same burdens which they bore in the days of the current tenant’s
predecessor.\textsuperscript{25}

Samuel E. Thorne has pointed out the differences between the
theories of Glanvill and the theories of Bracton in their understanding of
alienability. Where Glanvill distinguished clearly between the patrimony
and individual acquisitions, and only allowed three types of alienation from
the patrimony to be made freely, as long as they were ‘reasonable,’ Bracton
made no distinction, and an individual could freely alienate, with the heir
getting only what his predecessor had deigned to leave him.\textsuperscript{26} The lord’s

\textsuperscript{24} Glanvill 70.
\textsuperscript{25} Frederick Pollock and F. W. Maitland, “Inheritance and Descent,” in Laurence
\textsuperscript{26} Thorne, “English Feudalism,” 27-28. The three types of legitimate alienation from the
patrimony recognized were to a daughter in frankmarriage, to retainers as a reward,
and to the church in free alms. All three of these awards would diminish the
patrimony; not only did they lessen the demesne available, but they were all types of
loss of seigniorial revenues from artificial subinfeudation, as well as the loss of control, must have been significant.

In a feudal system in which actions were dictated by the relationship between the lord and his tenant, Godfrey's lord would never have had to ask the kinds of questions described above about a land transfer by one of his tenants. The transfer of a tenement which owed rents and services to him would have been made with his knowledge and approval or not at all. If a grant of his land had been made against his will or without his knowledge, he would have been within his rights to discipline Godfrey. He would also have been within his rights to disseise Godfrey in the fullest sense of the word, that is, to withdraw his seigniorial approval, had Godfrey failed to fulfil his feudal obligations. However, the royal court had long since intruded on what had originally been the legitimate business of Godfrey's lord, and the result was S. F. C. Milsom's "long wrangle" of the thirteenth century in which the lords attempted to keep their right to prevent subinfeudation.27

What Godfrey of Crowecrombe was apparently trying to do was to give extra land to his wife, beyond the reasonable dower permitted by custom.28 What he might have been trying to do in another, similar, case was sell his land to Robert, and that case is in many ways analogous to the

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27 Milsom, Legal Framework 92.
28 Bracton stated that gifts between spouses are prohibited "for in that way a fraud is perpetrated against the constitution (of dower)." Bracton, On the Laws and Customs of England ii 98.
other case in which the alienation was only to be temporary. The main differences between a temporary transfer to Robert, in which Robert was expected to grant the land to Godfrey's widow, and a sale to Robert were that Robert would expect to enjoy the land permanently if it were sold to him and that he would have paid Godfrey in cash at the time of the gift -- or sale -- for the privilege.

The questions Godfrey's lord (who shall be called Richard in this hypothetical discussion of the matter) would be left to ask about Godfrey's grant to Robert were the same whether Godfrey sold it to him or merely granted him what amounted to a tenure for the term of Godfrey's life with a reversion to his widow. Further, while Richard might have sympathized with Godfrey's desire to ensure his wife had something beyond reasonable dower (especially if Godfrey's estate were small and she were not likely to remarry) and not have objected to an effectively temporary transfer to Robert to achieve that end, a permanent transfer to Robert would have been quite different. In the legal terminology, Robert was a stranger to Richard. When Godfrey granted the tenement to Robert without reference to Richard, Richard felt entitled to prosecute, claiming that Godfrey had made a wrongful alienation.29

The relationship between the theoretical Richard and Godfrey had clearly broken down from its feudal model of personal relations and reciprocal obligations. One of the reasons for this breakdown was that the feudal levy has long since gone by the wayside and the meaning of the types

29 Milsom, Legal Framework 92-93.
of feudal tenure had changed. Miller and Hatcher have cited a case from 1228 where a tenement was ruled to be a military holding because the charter of the grant stated the land owed foreign service and the tenant collected scutage from his peasants to pay rent.\footnote{30} This had clearly been a military holding at one time, but there is no indication that the current tenant had done or was even capable of doing military service.

Military tenure had become just a name; it described a type of tenure in which certain services were originally required, but all that was required by the early thirteenth century was a particular type of remuneration: scutage. The number of military tenures had dramatically proliferated because of new feoffments and because of the seigniorial practice of spreading the burden of scutage among tenants; if a tenant paid a single penny of scutage, the tenement was considered to be held by military tenure.\footnote{31} The result of this breakdown for Richard was that he could no longer throw the interloper (in his eyes) Robert out. If he did so, Robert would sue him for novel disseisin, and Richard would be amerced for an abuse of his seigniorial authority.\footnote{32} Richard no longer had that level of control over the land -- he was only seised of the services due from it.\footnote{33}

Subinfeudations may have been favored over substitutions by lords because of the problems of warranty. S. F. C. Milsom has suggested that in most cases it was to the disadvantage of the lord to agree to a substitution

\footnote{31} Pollock and Maitland, "Inheritance and Descent," 201-202.  
\footnote{32} Milsom, \textit{Legal Framework} 11.  
\footnote{33} Thorne, "English Feudalism," 28-29.
because the lord might still be liable to compensate the heirs of the grantor (to whom he had originally owed warranty) with an equally valuable tenement. One way in which a lord could prevent the problem of a warranty owed to the original tenant was to have that tenant take homage from the substitute. This barred a later claim by the grantor's heirs; but the cost to the lord was subinfeudation, with all the losses of rents, services, and incidents that subinfeudation implied. Further, subinfeudation introduced distance between the lord and the actual tenant, namely the person who lived on the land, worked it, or saw to the working of it; the lord and tenant were now separated by one or more links in the feudal chain which should clearly be described as artificial.

It has already been suggested that the outcome of certain royal legislative and judicial acts was neither foreseen nor desired. Why should the acts of the feudal lords have been any different? In staving off the evils of having to compensate the heirs of the grantor of a tenement, the lord of the tenement had, probably inadvertently, introduced another evil which his descendants had cause to lament. The feudal lord had lost a measure of control over his tenant.

An additional problem which was a result of the artificial subinfeudations discussed above was the failing jurisdiction of the baronial courts. It has been clearly indicated above that part of the problem was the encroachment of the royal courts on what had originally been the prerogatives of the lord's court. Some of this encroachment was deliberate;

34 Milsom, Legal Framework 111.
T. F. T. Plucknett has stated that the assize of novel disseisin was established in a manner calculated to make disseisin an offense of which only the royal court could take cognizance.35 However, a part of the difficulty in maintaining the jurisdiction of the seigniorial courts clearly stemmed from the increasing number of artificial links of the feudal chain.

S. F. C. Milsom has discussed this problem in relation to distraint and its change of jurisdiction from that of the seigniorial courts to that of the sheriff. He also discusses the writ of right patent which must be directed to the immediate lord, not the chief lord.36 How were complaints against or to an immediate lord to be handled when that lord had no court? How was a feudal lord without a court able to demand services or rents due? In a case of distraint under normal feudal circumstances (that is, in which the feudal lord had a court), the lord would distrain the tenant by taking certain chattels into custody when the tenant failed to perform services; the sheriff would only interfere when the tenant lodged an action of replevin, claiming that the lord had wrongly taken the chattels.37 If there were no court to take or hold the goods as a distraint, the lord would have to apply to the sheriff to do it for him; and Milsom has argued that this was a contributing factor in the removal of distraint to the duties of the sheriff.

The royal court was one to which any free subject of the king had resort. As artificial subinfeudation became more common, so must the use of the royal court to settle disputes which would have traditionally been

35 Plucknett, Concise History of the Common Law 359.
36 Milsom, Legal Framework 33-34.
37 Plucknett, Concise History of the Common Law 368.
settled in seigniorial courts. However, a second emphasis on the fact that royal jurisdiction was encroaching on what had traditionally been seigniorial prerogatives should be made. S. F. C. Milsom has characterized royal and seigniorial courts as parallel, even rival, courts operating alongside each other, in which the same decisions would be reached. While methods of proof might be slightly more sophisticated in the royal courts, the outcome of a case would be the same whether it were taken to the royal court or the seigniorial court. As far as a tenant was concerned, the real advantage to litigation in the royal court was political; the lord could not simply halt a case.\textsuperscript{38} It has already been pointed out that free subjects of the king had access to the royal courts. When it was to their advantage to take a case there, doubtless they would.

It is also clear from the evidence that the royal courts could and did override actions taken in a seigniorial court. For instance, one might examine the case of Countess Amice, who after the dissolution of her marriage to the earl of Clare removed a tenant just before the end of the twelfth century. She summoned him to answer in her court by what warrant he held of her, and upon his insufficient answer (he called the earl to warrant his tenancy), she and her court dispossessed him. He sued her by novel dispossessin in the year 1200 and won; he had been seised (in the active sense) by the earl. Amice was not bound to warrant him in the royal courts, as his entitlement came not from her, but her former husband, but she could not throw him out "iniuste et sine judicium," to use the words of

\textsuperscript{38} Milsom, \textit{Legal Framework} 36.
the writ of novel disseisin. However, she had not disseised the tenant without judgement; her court had adjudged his seisin to be insufficient. The problem was that Amice and her court could not legally summon him to answer by what warrant he held.\(^{39}\)

This case represents an infringement on the original seigniorial prerogative of choosing tenants, and an infringement that Amice clearly did not expect. She seems to have been under the impression that she had every right to ask him that question, and to refuse to accept the answer he gave. Her assumption would be natural in a world designed along truly feudal lines; she was not bound to accept the choices of her predecessor.\(^{40}\) However, by the year 1200 the royal court had already begun the establishment of the independent nature of seisin, which existed outside the lord's prerogative to seise; T. F. T. Plucknett has stated that the general jurisdiction of the royal courts over land, without reference to the feudal courts, was clearly conceived by the mid-thirteenth century.\(^{41}\) Notice also in this case that the royal court effectively reversed that action taken by Amice's court. Amice might later sue the tenant in the royal court and

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\(^{39}\) Milsom, *Legal Framework* 45-47. The writ in the royal courts that served her purpose was *cui ante divortium*, which parallels the wit *cui in vita* discussed in chapter four. This writ was still quite some time in the future when Amice and her husband parted.

\(^{40}\) Thorne, "English Feudalism," 28. Thorne discusses this matter in the light of heritability. Heritability has arrived when the contract between A and B has extended beyond their deaths and bound their descendants. The original contract between A and B had only been for so long as both of them lived, and the successor of either was not bound to renew it. The parallel between this case and the case of Amice is clear. As Milsom said of the tenant, "[his] ticket came from a former management" (*Legal Framework* 46).

\(^{41}\) Plucknett, *Concise History of the Common Law*, 361.
successfully get him out with a judgement from that court, but the authority of Amice's seigniorial court had been damaged.

The developments of the thirteenth century are clearly capped by the three enactments discussed in the previous chapter: *De viris religiosis* (1279), *De donis conditionalibus* (1285) and *Quia emptores*. The tenurial implications of these laws have already been discussed as they relate to the economic and social upheavals of the thirteenth century. However, they merit further discussion at this point in terms of their legal implications as regards the changes in land conveyance.

*De viris religiosis* created a ban on mortmain alienation without the lord's permission and as such was clearly a measure which increased seigniorial control. It has been suggested that the measure was intended as a check on monastic growth. Though it clearly favored seigniorial rights as a symbolic statement, the practical effect was reduced by the royal licenses that were granted as early as 1280 to allow mortmain alienation.

*De donis conditionalibus* also favored seigniorial rights in theory. The law was intended to force donees in tail or in maritagium to observe the originally intended disposition of the gifts in land. The exact details of what happened to it shall be discussed in detail in the next chapter; at this point

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42 The complete text of each is given in Appendix I, II, and III, respectively.
43 Mortmain alienation was alienation to a corporation, generally the church. The corporate nature of the donee meant that it never escheated, and was considered to be in a "dead hand."
it is sufficient to say that the statute was not at first interpreted by the law
courts as increasing the force of the donor's intentions.46

Last, and most crucial to this discussion, is Quia emptores. Quia
emptores represents the final failure of seigniorial control over tenants.
The lord no longer had any control over who was to be the tenant of a
specific fee. He had to make do with the admittedly substantial sop of the
rents, services, and incidents, but this was a mere crumb compared to the
original loaf that the lord had once had: a life's service for a life's tenure,
with a court to ensure that services due were done and the rents due were
paid. But the era of the real feudal relationship was long gone by 1290.
Land had already gained the character of a commodity, being bought and
sold. S. F. C. Milsom has characterized the effects of Quia emptores as
follows:

[T]his [alienability] is a property of the ‘fee simple’ and flows
from a rule of law and not the words of any grant. ... The fee
simple has become an estate, ‘and his heirs’ magic words to
create it ... A social structure depending upon obligations in
the vertical dimension between lord and tenant has been
flattened out into technical rules about property.47

Of course, as Milsom has recognized, the flattening of the vertical structure
of relationships based on obligations had already taken place, and Quia
emptores merely stands as a summation of the social and legal changes in
tenure which occurred during the thirteenth century.

47 S. F. C. Milsom, Historical Foundations of the Common Law, 2nd ed. (Toronto:
Butterworth's 1981) 116. On the original appearance of the magic words “and his
heirs,” J. C. Holt notes that they had become necessary to a heritable grant by the mid-
The flattening of the vertical society of feudalism had damaged the rights of every feudal lord, but it had granted some advantage to almost every lord as well, because every feudal lord except the king was someone's feudal tenant. As a logical consequence of this fact, it becomes clear that the same developments viewed as problems by men acting in their roles as landlords were regarded as freedoms and increasing property rights when the same men viewed them as tenants of the men who were of the next higher tier in the feudal hierarchy. Quia emptores must thus be viewed not only as a submission by lords of their property rights in exchange for firmer assurances regarding their rents and incidents, but as a victory for tenants seeking free alienability. The compromise of the statute lay in the fact that the lords and the tenants were in large measure the same group of people. Each link in the feudal chain had his rights in land he kept in demesne strengthened, and had his rights in land which he had subinfeudated weakened.\textsuperscript{48}

Quia emptores brings the discussion full circle, and at this point the links between the economic upheavals described in chapter one and the legal developments described in this chapter should be made clear. The changing economy of the thirteenth century brought about a change of attitude in the landlords of the time.\textsuperscript{49} On this subject, Edward Miller has made an interesting comment: “hereditary leases were virtually inevitably

\textsuperscript{48} Thorne, "English Feudalism," 20.
wasting assets.” Elsewhere, he has stated that the English baronial estates of the medieval period had been built haphazardly, by the distribution of land at the Conquest, successful politics, and skillful exploitation of the marriage market. Combine the two statements with the economic changes discussed in the previous chapter and the implication is clear: it was at least partially in their own interest for lords to support free alienation, not only for themselves but for their tenants.

To clarify that statement, one must ask, what did the thirteenth-century lord want from his estates? The answer to this question has already been discussed in the previous chapter: he wanted the maximum income that could possibly be extracted from his lands. That income could be provided either by profits from demesne production or by profits from increasing rents and entry fines; a lord was willing to exploit either source of income to its greatest extent.

First is the question of demesne production. The desire to invest in land in an entrepreneurial sense, which in part drove the land market during the thirteenth century, made alienability a desired trait in land: investors needed someone from whom they could buy. Lords wanted to consolidate those haphazardly-built estates and increase their demesne lands in order to increase production. As was made clear in the previous chapter, stable or decreasing wages and increasing prices made expanding demesne production a source of increasing profit to the lord.

However, the lord also wanted maximum profits from his rented lands. For some lords, especially at the end of the century, rent incomes were extremely important. For instance, in the accounting year 1296-1297, 67% of the revenue of the Earl of Cornwall came from rents, and only 10% from demesne profits.\textsuperscript{52} It is in this light that Miller's statement about hereditary leases must be examined. While rents were in general increasing, a hereditary lease was maintained at the rent for which it had originally been leased; thus it would be worth less to the lord than an equally valuable parcel of land more recently leased for a higher rent. The shorter rent contracts of the late thirteenth century have already been mentioned as one aspect of this phenomenon.\textsuperscript{53}

The other aspect is an effect of \textit{Quia emptores}. The monetary value of the artificial subinfeudations banned by that statute had never been in the rents; it had always been in the capital payment made to the vendor when the transfer of the land was made. \textit{Quia emptores} allowed the lord of the tenure to take a share of that money in the form of the entry fine. Thus, after the statute, an alienation was advantageous to the lord. The lord was making a new arrangement with a new man, and he could raise the rent if the traffic would bear it. Before the statute, no benefits had accrued to the lord upon an artificial subinfeudation, and it has already been shown that the effects of the subinfeudation could easily damage him. By supporting

\textsuperscript{52} Miller and Hatcher, \textit{Medieval England} 203. The remaining 23% of revenue came from other sources such as court revenues.

\textsuperscript{53} Miller and Hatcher, \textit{Medieval England} 235.
the legislative change, the lords regained lost incidents and gained increasing opportunities for rent hikes.

Thus free alienability was actually more profitable for lords by the end of the thirteenth century than a continuation of the old, artificial feudal tenures would have been. It benefited the lord by allowing further purchases and consolidation of demesne and by allowing him to gain further benefits from his rented land while protecting the incidents which might bring him a windfall in the future.

This chapter has briefly discussed the legal changes in the nature of landholding in thirteenth century England, and has connected them to the economic and social changes that occurred during the period. Although they are often divided in the study of the medieval period, the three fields are intertwined, and changes in one area had real and substantial effects in the other. Between the three areas, enough background has been established for a meaningful discussion of frankmarriage and fee-tail as legal and social constructs.
Chapter Three

Gifts in Maritagium and Fee-Tail:
The Social and Legal Implications of Conditional Gifts
And the Impact of Gender and Lineage

The social and economic situation surrounding the demise of the gift in maritagium, or marriage gift, has already been discussed. The remaining question has become: why did the gift in tail survive as a method of land transfer when the marriage gift did not? In order to answer this question, a number of ideas and concepts must be discussed.

First, there are the questions of heritability and primogeniture. These two concepts are closely related to each other and to questions of provision for younger children. Without heritability, the question of providing for excluded children fails to arise. Without customs of favoring one heir over all others, such as the custom of primogeniture, the question is also moot. The distribution of land among all heirs causes other types of inheritance problems. Primogeniture is also conceptually related to patrilineal descent customs which leave daughters and younger sons in the cold where inheritance is concerned.

The legal structures of the gift in maritagium and the gift in fee-tail are also important to this discussion. While the two structures are very similar, and in most respects parallel each other, there are distinct legal differences between the two. The differences revolve around the fact that gifts in tail were a later and more closely legally defined form of conditional gift than mere gifts in maritagium. A discussion of these differences is
helpful in understanding why fee-tail survived when gifts in maritagium did not.

Finally, two statutes of Edward I should be discussed in the context of their specific effects on marriage gifts and fee-tail. These statutes, De donis conditionalibus and Quia emptores, have already been discussed as economic and tenurial measures.\textsuperscript{1} However, both of them also had specific legal impacts on gifts in maritagium and fee-tail. De donis, of course, was specifically aimed at conditional gifts such as maritagium and fee-tail; as such it had a very great impact on that type of land transfer. Quia emptores was not directed at conditional land transfers, but at unconditional transfers, namely sales. Its effect on fee-tail was indirect but nonetheless significant.

Each of these concepts and developments is important to an understanding of why fee-tail succeeded and survived as a form of land conveyance while the gift in maritagium died out. The legal and social changes made in matters of inheritance and land transfer to non-inheriting children led to the creation and evolution of fee-tail and resulted in the demise of the gift in maritagium.

The first question which the scholar seeking to understand the demise of the marriage gift must understand is the question of heritability. Heritability and the corresponding development of primogeniture demonstrate the conflicting dynamics of the family as a group of

\textsuperscript{1} The text of De donis conditionalibus can be found in Appendix II; the text of Quia emptores can be found in Appendix III.
contemporaries rather than as part of a chain of ancestors and descendants. These developments also help the scholar to deduce the timing of the emergence of marriage gifts for daughters and the gift in tail for younger sons. Further, the development of primogeniture can be linked with the consciousness of a lineage and the development of an aristocratic ideology which pushed women out of the mainstream of their families.

J. C. Holt has argued that the claim of the heir on the lord and the father was already established in eleventh century Normandy, and that heritability accompanied the Normans into England with the Conquest. However, when he discusses heritability in Norman England, Holt was clearly not discussing the kind of inheritance system that characterized the thirteenth century. Rather, Holt envisioned the eleventh century English heir as having only the claim on the lord, whereas the Norman heir's rights were more concrete and could be bought off with cash. At a point in time when the claim of the heir was so tenuous, there is little question of mechanisms for insuring that other children would receive a fair share of the patrimony.

S. F. C. Milsom's formulation of the writ of mort d'ancestor has come from a period of about a century after Holt's arguments over Norman and early post-Conquest heritability. The king began to interfere in the lord's

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tenurial decisions by insisting that the old tenant's heir be put in as the new tenant. Glanvill quotes the writ of mort d'ancestor as follows:

The king to the sheriff, greeting. If G. son of O. gives you security for prosecuting his claim, then summon by good summoners twelve free and lawful men from the neighborhood of such-and-such a vill to be before me or my justices on a certain day, ready to declare on oath whether O. the father of the aforesaid G. was seised in his demesne as of fee of one virgate of land in that vill on the day he died, whether he died after my first coronation, and whether the said G. is his first heir. And meanwhile let them view the land; and you are to see that their names are endorsed on the writ. Witness, etc.

Not only does this writ indicate that by Glanvill's time the royal courts had begun to interfere in the lord's court; it also shows that a claim on the lord had been converted to a definite right, and that a system of preferring some heirs over others has arisen.

Clearly during the intervening century developments had taken place which ensured that fees were not only heritable by a single heir but were inherited with a clear preference of some types of heir over others. The original feudal tenurial arrangements which emphasized a lifetime's service bought by a life tenure of land have already been discussed in the previous chapter. The question, then, is how by the late twelfth century the

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5 G. must be O.'s first heir. See also Frederick Pollock and F. W. Maitland, "Inheritance and Descent," in Laurence Krader, *Anthropology and Early Law* (New York: Basic, 1966) 212-213, for the view that ultimogeniture was imposed in the interest of the lords on villein tenants.
arrangements came to be settled in favor of a sole heir who was the eldest son of the previous tenant.

This question is particularly meaningful when one takes into account that the custom of primogeniture, which was apparently established for military tenures, came to be the general inheritance custom of the realm of England, and that in the late twelfth century, even the military tenants who were subject to it apparently disliked it. When Glanvill wrote, primogeniture was not the rule for all tenements; he clearly stated that primogeniture was the custom for military tenures and that socage land was partible.7

Samuel E. Thorne has suggested that the development of primogeniture was linked with the development of a strong system of inheritance for military tenures. The eldest son of the deceased tenant was most likely to be both prepared to administer the fee and be acceptable to the men of the fief. Thus, granting the land to the eldest son was originally a rule of expediency which gradually during the eleventh and twelfth centuries took on the force of law.8 Thorne has also argued that the development of the rule of inheritance implied by the writ of mort

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6 Pollock and Maitland, "Inheritance by Descent," 206 and n33.
7 Glanvill, 75.
8 Samuel E. Thorne, "English Feudalism and Estates in Land," in S. E. Thorne, Essays in English Legal History (London: Hambledon, 1985) 17-18. T. F. T. Plucknett has connected the growth of alienability of fees with the rise of primogeniture. Once primogeniture had been established as the normal inheritance custom, the tenant could alienate more freely. Plucknett has related the distinction between acquired and inherited lands made by Glanvill to a desire to treat all sons equally. Plucknett has also stated that once that intention had clearly been set aside, fathers were free to make provisions for younger sons without consulting the heir. T. F. T. Plucknett, A Concise History of the Common Law 5th ed. (Boston: Little, Brown, 1956) 526-529.
d'ancestor quoted above was not certain until the third quarter of the twelfth century. Until that time, the regrant by the lord was required.9

S. F. C. Milsom has connected the development of warrants with the development of the right of inheritance. The promise to warrant is a promise that the contract being made and warranted will be renewed upon a change of the parties to the contract. Clearly this development implies that both parties expected their descendants to continue in their current holdings. The claim of the grantee is of course based on the warrant from the grantor; however, the grantor makes a similar assumption about his estate which is in no way ensured by the contract. An assumption of general heritability seems to underlie such contracts.10

From these statements the importance for legal and social arrangements of the development of inheritance from heritability can be seen. However, an important aspect of inheritance is the choice of heir. Both the Roman and the Germanic legal traditions had assumed that inheritances were partible.11 In Normandy parage, a system of partible

9 Thorne, "English Feudalism," 18-21. David Herlihy has attributed the trend towards primogeniture in England to royal desire to maintain services. He has noted that all English tenements owed service to the king. Medieval Households (Cambridge: Harvard UP, 1985) 95-96.
10 Milsom, Legal Framework 42. T. F. T. Plucknett has also connected the development of alienability with the development of warranty; the heirs of a man who warranted were bound to the warranty also, and thus could have no claim to the tenement which he was bound to warrant. Plucknett, Concise History of the Common Law 529.
11 David Herlihy, Medieval Households (Cambridge: Harvard UP, 1985) 93. J. C. Holt has characterized parage as a refinement of partition in which all younger sons were represented by the eldest and the relationship was extended for several generations. Holt, "Politics and Property" 106. This practice was similar to the English practice of dividing land among female heirs as partencers while maintaining service through the eldest daughter which was established in the early twelfth century, and elaborated by Glanvill. J. C. Holt, "Feudal Society and the Family in Early Medieval England:
inheritance, was the general rule of succession.¹² By contrast, primogeniture became the normal English inheritance system; exceptions to the rule were clearly identified as unusual and different customs.¹³

Frederick Pollock and F. W. Maitland have suggested that customs similar to parage may have existed in post-Conquest England for sons as well as co-heiress daughters; they have found evidence in Domesday for thegns who held in that fashion. They have suggested that, as in Normandy, the eldest was the senior and the seignior, and was responsible for service to the King. Pollock and Maitland also theorized that this arrangement may have been simplified by a powerful royal government, such as that enjoyed by the Anglo-Norman kings. The royal court may

¹² Holt, "Notions of Patrimony," 213. Inter vivos grants by the father were not allowed to stand in Normandy ("apres moi, le partage"). Emmanuel Le Roy Ladurie, "Family Structures and Inheritance Customs in Sixteenth Century France" in Jack Goody, Joan Thirk, and E. P. Thompson, eds. Family and Inheritance: Rural Society in Western Europe 1200-1800 (Cambridge: Cambridge UP, 1976) 52. Some parts of Normandy, such as Caux, actually practiced English-style primogeniture. Ladurie, "Family and Inheritance," 53.

¹³ Two examples of non-primogeniture inheritance customs in England were Kentish gavelkind, which was a parage system, and "borough English," which was a practice of ultimogeniture. Plucknett, Concise History of the Common Law 528 and 530. Frederick Pollock and F. W. Maitland have stated that "borough English" was not common before the early fourteenth century. Pollock and Maitland, "Inheritance and Descent," 211. Judith Bennett has reported an unusual inheritance custom on the manor of Brigstock in the thirteenth century, in which the eldest son inherited all the land that his father had purchased, and the youngest inherited his father's inheritance -- a modified ultimogeniture. Judith M. Bennett, Women in the Medieval English Countryside: Gender and Household in Brigstock Before the Plague (Oxford: Oxford UP, 1987) 14.
have held that the senior adequately represented the tenement, and allowed the legal claims of the younger sons to lapse.\textsuperscript{14}

The question of female inheritance never seems to have arisen in Norman England. S. F. C. Milsom has framed the question of inheritance by women as follows:

\textit{A lord would never have made his initial arrangement with a woman. Is he obliged to renew it with a woman?\textsuperscript{15}}

The assumption was that a woman would be incapable of performing the services associated with the tenement. Lords looked for males to perform the tenurial service. Thus it was sons who inherited, and daughters only came into an inheritance if there were no sons.

The development of primogeniture clearly was parallel in time to the development of inheritance from heritability; both occurred in the century or so following the Conquest. The types of questions asked about inheritance in Normandy and in England must have differed somewhat because the solutions chosen for general inheritance customs were very different, as has been mentioned previously. It is important to remember in this context that the Conquest represented a break with the past; all land was acquisition, which was important in light of some legal concepts which will be mentioned below.\textsuperscript{16} J. C. Holt has stated that even in the generation

\textsuperscript{14} Pollock and Maitland, "Inheritance and Descent," 197.
\textsuperscript{16} Holt, "Notions of Patrimony," 214. The question of whether the difference between acquired and inherited land developed before or because of the Conquest, which allowed the system of land grants to be overhauled, is irrelevant to this discussion. However, it
following the Conquest, the subdivision of an English barony among the sons of a deceased baron was unusual.\textsuperscript{17}

In the \textit{Leges Henrici Primi}, a compilation of questionable enforceability which has been definitely dated to the early twelfth century, a clear distinction was made between a man's acquisitions and the patrimony he had inherited from his ancestor.\textsuperscript{18} Glanvill similarly made such a distinction:

[A man] has only inherited land, or only acquired land, or both inherited and acquired land. If he has only inherited land, he can ... give a certain part of that inheritance to any stranger he chooses. However, if he has several legitimate sons, he can hardly give any part of the inheritance to a younger son without the heir's consent; for, if this were allowed, the disinheritance of elder sons would often occur... Can a man who has a son and heir give part of his inheritance to his bastard son? ... [H]e can do so.

If he has only acquired land, and wishes to give part of this land, then he can do so; but he cannot give all of his acquired land, because he must not disinherit his son. However, if he has not begotten an heir of his body, whether son or daughter, he can give to anyone he pleases part or all of his acquired land to hold heritably... In this way any person can give away all his acquired land in his lifetime, but he cannot make another his heir ... for only God, not man, can make an heir.

If he has both inherited and acquired land, then it is beyond question that he can give in perpetuity any part or all of his acquired land to whom he pleases; he can also,
notwithstanding this, give a reasonable part of his inherited land, as has been explained above.\textsuperscript{19}

The distinction between acquired and inherited land provided a foundation for provision for younger sons and for daughters, who might also be granted a marriage portion from the inherited lands. Primogeniture as inheritance system was clearly sensible for military tenures, as an eldest son was likely to be able to perform the services immediately after or even before his father’s death; however, primogeniture was a hardship on younger children, who were denied access to the family’s properties. When acquired land could be used to remit that hardship, the conflict between the family line represented by primogeniture and the heir and the contemporary family represented by the other children could be resolved easily.

Glanvill, of course, did not represent the final state of the law; the common law was constantly evolving. By the time of Bracton, two generations after Glanvill, there was no mention of acquisition in a discussion of alienability. Bracton wrote the following on gifts:

\begin{quote}
It is clear that all who are not prohibited by law or right may [give land]. One who has reached his majority and is of full age ... may make a gift of any tenement, provided he is of sound mind, in seisin, and has the administration of his own affairs...\textsuperscript{20}
\end{quote}

\textsuperscript{19} Glanvill 70-71.
The distinction between acquired and inherited property had been almost completely abandoned by the middle of the thirteenth century. This left younger children, especially younger sons, without any hope of gaining lands unless a special gift was made to them by their fathers.

The difficulties of transferring lands to younger sons in the mid-thirteenth century have been discussed already in the previous chapters. The transfer between William and Nicholas de Whelton is one example of a legal artifice used to exploit the loopholes of the system of inheritance under primogeniture. By means of an inter vivos grant, William was able to attempt to circumvent the rules of primogeniture and pass the chief manor of Whilton to his younger son, while planning to continue to hold the manor for the remainder of his life. This would have been a clear violation of the laws known by Glanvill; but had the legal forms been more closely followed, there is no doubt that such a transfer would have been allowed and would have stood up in court under the laws of 1264.

In both the twelfth and thirteenth centuries, daughters were in a substantially better position than younger sons as regards their ability to receive lands from the family. The form of customary gift allowed to be granted to daughters was the maritagium, or marriage gift. This gift was an institution found in England only after the Conquest.

\[21\] However, see Bennett, *Women in the Medieval English Countryside* 14, for an example of a custom which differentiated between acquired and inherited lands into the fourteenth century.


Senderowitz Loengard has suggested that the term "maritagium," which is used to describe such a grant, may be Norman in origin.\textsuperscript{24} Evidence also suggests that some of the less easily understood aspects of the maritagium may have developed from Norman practice.\textsuperscript{25}

Daughters were allowed to receive marriage portions in land from the patrimony as well as land from acquisitions (as long as the acquisition rules held). Glanvill stated the rule for the granting of a maritagium from the patrimony as follows:

Every free man who has land can give a certain part of his land with his daughter, or with any other woman, as a marriage-portion, whether he has an heir or not, and whether the heir if he has one is willing or not, and even if he is opposed to it and protests.\textsuperscript{26}

Frankmarriage was already known as a species of maritagium in Glanvill's time; the services due from land given in frankmarriage were not reserved to the chief lord of the fee until homage was done for the land, as they were in a normal marriage-portion.\textsuperscript{27}


\textsuperscript{25} Specifically, the custom that homage was done (effectively dividing the maritagium from the patrimony from which it had originally sprung) upon the entrance of the third heir parallels the Norman custom that an estate held under the custom of parage broke away from the patrimony, by means of homage, at the fourth degree. This statement was according to the Très Ancien Coutumier, which is dated at 1199. However, the Norman Summa de Legibus, dated at 1235, stated that homage was done in parage at the seventh degree. Holt, "Politics and Property," 106-107. While the parallel between the Norman custom of parage and the English maritagium is speculative, it is important to note, especially given Loengard's contention that the word "maritagium" may be of Norman origin.

\textsuperscript{26} Glanvill 69.

\textsuperscript{27} The difference between frankmarriage and a marriage gift burdened with services continued to be recognized through the thirteenth century. For instance:
maritagium, homage was not done to the donor or his heirs until the third heir of the donee had entered the tenement.  

Bracton also recognized the gift in maritagium and defines it as land given on account of marriage (propter nuptias). Just as in Glanvill’s time, homage was not done for a maritagium during Bracton’s time until the third heir entered. Bracton also acknowledged the difference between frankmarriage and marriage-portion which are burdened with service, and mentioned that some are partly free and partly burdened. Finally, Bracton made explicit the connection between homage, which destroyed the reversion, and the services due from the tenement. Although there had been some elaboration of the theoretical aspects of the maritagium between the time of Glanvill and the time of Bracton, the maritagium had clearly retained not only its basic character but also its legal structure as a type of gift over a period of two generations.

Marriage portions were a legal and societally sanctioned method by which daughters might share in the lands of the patrimony. However, the exclusion of younger sons from the family’s resources in land was contrary not only to the bonds of affection between family members but also to the

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There is a difference between a gift in marriage and a gift in frank-marriage; for a gift in marriage is where service is done, etc., and a gift in frank-marriage is quit, etc., of services, etc.


28 Glanvill 92. He explained on p. 93 that homage was not taken immediately because it destroyed the reversion. The reason that homage destroyed the reversion was that homage converted a conditional estate into a fee simple. After homage had been taken, the donor’s heirs had become the feudal lords of the donee’s heirs and the tenement only returned to the lords on escheat.

29 Bracton, On the Laws and Customs of England ii 76-78.
societal understanding of family. Primogeniture meant that the eldest son must be the heir, and that he had to maintain and increase the stature of the family. The younger sons, or cadets, were also a part of the lineage, even if they could not claim an equal share in the lands of the patrimony.

David Herlihy’s research on families in medieval Europe has led him to the concept of the lineage as an explanation for certain social developments. He has dated its appearance at the end of the tenth century, and characterizes it as a unilinear filiation group with a consciousness of descent from a specific ancestor through a line of same-sex descendants. In addition, the members of the lineage shared insignia, such as names, heraldic devices, battle cries, and a common mythology. Herlihy has also linked it with inheritance strategies practiced by European nobles.30 It seems intuitively obvious that the English case follows this pattern. Certainly some aspects of lineage consciousness had penetrated through all levels of English society; Judith Bennett has reported that on the manor of Brigstock family names were given to the sons by the late thirteenth and early fourteenth centuries.31

Georges Duby has dated the emergence of the consciousness of lineage among French princes and territorial rulers at the mid-tenth century, and states that it had penetrated to the level of the ordinary knights.

31 Bennett, Women in the Medieval English Countryside 69. Interestingly and unsurprisingly, only sons were given family (first) names; daughters were given names which Bennett describes as “fanciful,” and carrying no familial importance.
by ca. 1050. Thus a French concept of lineage was clearly in place before the Conquest and was able to be imported into England. J. C. Holt has associated the use of toponyms, patronyms, and other surnames with lineage consciousness in England and Normandy in the tenth and eleventh centuries. David Herlihy has connected the rise of the dynastic lineage with the rise of the feudal principalities and the creation of feudal institutions, such as fiefs and offices. Clearly there was room for an ambitious man to rise and carve out a hereditary dynasty in the England of the Conquest; in William's England, the elimination of potentially disloyal Anglo-Saxon lords left substantial room for a growing Norman aristocracy and its feudal ambitions.

The question is not when did the concept of lineage arrive, because the evidence indicates strongly that it arrived with the conquering Normans. Frederick Pollock and F. W. Maitland have cited evidence that under the Anglo-Saxon laws of Alfred's day, a married woman maintained relations with her kin, and that a man or woman's maternal kin was counted among the persons having the right to receive the person's wergild and the responsibility of the blood feud if the person were injured or killed. Combined with the information provided by Georges Duby about

33 Holt, "Politics and Property," 69-70. A toponym is a name based on the family's chief seat. Examples of toponyms include Montfort and Warenne (whose chief seats were in Normandy) and Salisbury and Gloucester (English seats).
34 Herlihy, Medieval Households 92.
35 Pollock and Maitland, "Inheritance and Descent," 174. Pollock and Maitland stated that the maternal kin received one third of the wergild if a person was slain. They also stated that if a woman committed homicide vengeance was not to be taken on her husband's family.
the growth of lineage consciousness in France during the tenth and eleventh centuries, this knowledge allows the date of the change to be fixed at the Conquest.

The question is not what effect lineage consciousness might have had on the growth of primogeniture. That question is speculative in nature and difficult to resolve, although David Herlihy has suggested that the growth of primogeniture as an inheritance custom on the Continent was connected to the inheritance and land maintenance strategies of lineages.36

Instead, the question for England is how lineages would provide for younger sons. Younger sons were necessary to lineages as insurance against the disastrous death of the eldest son in any generation; if such an event occurred a second son would maintain the family name and the family line.37 However, younger sons also partook of the qualities of the lineage: they shared the ancestry, the name, the coat of arms, the battle-cry, and the motto.

The Victorian solution to the problem of younger sons was to foist them off on the military services, to the colonies, and to the Church. Only the latter solution was widely available as a means to maintain status in the thirteenth century, though some younger sons were able to find

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36 Herlihy, Medieval Households 93. He has stated that fiefs were generally partible until 1300, but at about that time noble families abandoned the partible inheritance strategy in favor of the entailed (in the sense of restricted inheritance) estate inherited by primogeniture. The resulting in-generational tensions were managed by granting non-entailed properties or movables to younger offspring.

37 Jack Goody, “Strategies of Heirship,” Comparative Studies in Society and History 15 (1973), 7. It has been said in the press of the current Princess of Wales that she has done her duty to the crown, having provided “a heir and a spare.”
employment as mercenary knights or soldiers. Parage, which might have provided for younger children, had been abandoned in favor of primogeniture. The father could make an *inter vivos* grant to the younger sons, but if homage were taken it would bar the reversion, and if homage were not taken the heir was not obliged to warrant the gift. As the grant of the manor of Whilton showed, methods of bringing about a transfer by artifice were often unpredictable. The logical solution finally accepted for ensuring the prosperity of younger sons was a gift analogous to the marriage-portion provided to daughters: a conditional gift which would revert to the chief inheritance if direct lineal heirs failed.

This gift was the gift in tail, also called the fee-tail or entail. Bracton described the limitations put upon it as follows in his discussion of conditional gifts:

> Just as the class 'heirs' may be enlarged, as was said above, so it may be restricted by the *modus* of the gift, so that all heirs generally are not called to the succession ... as where it is said, 'I give to such a one so much land with the appurtenances in such a vill to have and to hold to him and his heirs born of his body and that of his wedded wife' or 'I give to such a one and to

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38 Jack Goody has listed four basic solutions to the problem of the drain that extra offspring (those other than the heir) might make on the family's resources. First, the family could maintain only unmarried children other than the heir (which caused them to hunt for heirs to marry or kept them in service to the family); second, it could put surplus children out to service; third, it could force them to emigrate (to towns, or by joining the army); and fourth, it could induce them to join the Church (which resulted not only in maintenance for the child but by its rules of celibacy prevented that child from having children who might make a claim on the family estate). Goody, *Strategies of Heirship,* 13-14. Clearly these strategies were employed in medieval England; however, they could not be used by all families in all circumstances.

39 S. F. C. Milsom, *Historical Foundations of the Common Law,* 2nd ed. (Toronto: Butterworth's, 1981) 172. The effect of homage within the family, which Milsom has described as "capricious" is explained on pp. 171-172 in respect of the maritagium. It can be summed up neatly in the common law maxim "homage destroys the reversion."

such a one his wife (or ‘(to such a one) with such a one, my daughter) to have and to hold to him and his heirs of the body of such wife (or ‘(and the heirs ) issuing from (or ‘born and to be born to’) such daughter’). Then, since only certain heirs are specified in the gift, it is evident that the descent is only to them, [and] their common heirs ... because that was the donor’s intention.41

A gift such as this was clearly limited to the descendants of the donee. It is also important to note that by Bracton’s time gifts in tail to a daughter and her husband were already sufficiently well known for Bracton to include them in his work.42 Glanvill discussed only the maritagium as a land conveyance from the patrimony to daughters, and no form of conveyance from the patrimony to sons at all (gifts to younger sons were forbidden without the consent of the heir on the grounds that a father might favor his younger sons over his eldest43); gifts in tail were a later development.

If the maritagium already existed as a form of land gift to daughters, why would fathers prefer to give them land by means of a gift in tail? The answer to this question is complex and relies upon close knowledge of some of the legal structures which governed the gift in tail and the maritagium. However, as a general answer, for which evidence will be brought forth below, one would say that the maritagium as a form of gift became less secure because it was an inexplicit form of gift and relied upon only the common law to support the form of the gift.44 By contrast, the gift in tail

41 Bracton, On the Laws and Customs of England ii 68.
42 The distinction between the two does not seem to have been clear by the late thirteenth century. “A fee tail may be instanced by a gift in frank-marriage.” Year Book 21 & 22 Edward I 364-366.
43 Glanvill 70.
44 T. F. T. Plucknett has said that while a charter might accompany a maritagium, the terms became well enough established that the use of the term “maritagium” sufficed to
was more secure because, being legally a less explicit type of gift than the maritagium, and thus requiring a closer attention to the specifics upon the making of the gift, it relied less upon the common law and more upon the specifics of a gift made in that form. In other words, the individual gift in tail, being more specific than the individual gift in maritagium, was more secure.

The general nature of the maritagium as a type of gift is clear from the legal records. Bracton has described the gift in maritagium as follows:

A maritagium sometimes reverts to the donor by tacit condition or express ... It is clear that land sometimes is given before espousals and because of marriage, by the father or other relative of the woman to the husband with such woman, or which has the same effect, to them both together, that is to such a man and his wife with their heirs, or to a woman to facilitate her marriage ... If marriage is mentioned the land so given may be called a maritagium. A gift of this kind is made before the marriage, sometimes at the marriage, sometimes after the marriage ... It is land given propter nuptias that is called a maritagium.

Bracton’s statement makes the inexplicit nature of a gift in maritagium clear; it was an umbrella term which covered a multitude of arrangements for transferring land on the occasion of a marriage. A comparison of his

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45 Plucknett, Legislation of Edward I 127-128.
47 However, T. F. T. Plucknett has said that “the terms and incidents of the maritagium were perfectly well known.” Plucknett, Concise History of the Common Law 546. Bracton may have been stretching the commonly accepted definition of the term in his definition, or his statement may reflect confusion among legal specialists as to exactly what constituted the maritagium. Certainly Bracton was able to define the maritagium in a similar form to the institution that Glanvill had known in a statement previously cited.
description of the gift in maritagium with his description of the gift in tail clearly shows that each gift in tail was meant to be specific.

Bracton was already aware of some of the difficulties caused by the inexplicit nature of gifts in maritagium. For instance, he asked the following question:

What if, when a gift in free marriage is first made, no charter containing an express warranty is drawn, neither homage nor service is done, and the donee or his heirs are impleaded? If they vouch the donor of the maritagium, their feoffor, to warranty, is he bound to answer in the absence of a charter and homage? In truth he is so bound, for a woman so married by the donee, or, if she dies, her children and heirs, will take the place of a charter and suffice for one.48

This statement reflected uneasiness with a gift whose form relied on common knowledge in an age where charters and other written confirmations and records of gifts were becoming more and more necessary to establish their legality and to maintain their force under the law.

Another difficulty with the maritagium was that it passed out of the control of the family. The difficulties under the law that married women faced in controlling their lands are discussed fully in a subsequent chapter. However, it is sufficient to say at this point that the family or the woman might have difficulty recovering such lands from a wrongful alienation by her husband. J. P. Cooper has theorized that the origins of the entail are connected with a change in the conception of the maritagium, which began

48 Bracton, *On the Laws and Customs of England* ii 78. See also the discussion of the Whilton case in the previous chapter for the importance of written evidence in proving an enfeoffment under the law.
to allow the donee to alienate the land after issue was born of the marriage for which the gift had been made.\textsuperscript{49} This was a clear violation of the intention of the donor, who made a gift of land so that the new family would have the land to support itself.

Clearly the gift in marriage was a gift on account of the woman. Ralph de Hengham, a famous jurist of the Edwardian period, said as much in a case towards the end of the reign of Edward I:

\begin{quote}
[T]he woman is always the cause of the gift in frankmarriage, whereby the estate of the wife is larger than the estate of the husband...\textsuperscript{50}
\end{quote}

However, a gift of land to a woman also conflicted with the prevailing ideology of land and family in England in the twelfth and thirteenth centuries. There are two major aspects to the conflict: the underlying ideal that land should not pass to a woman because of the exercise of public power involved in landholding, and the intention that land should remain within the lineage.

S. F. C. Milsom has discussed the prevailing ideology of land as it related to women in a discussion of female inheritance. He has quoted from a contemporary text the following statement on the preference for male heirs:

\begin{quote}
Quia ... ipse est de masculo, consideratum est quod ... majus jus habeat in terra illa.\textsuperscript{51}
\end{quote}

\textsuperscript{49} J. P. Cooper, “Patterns of Inheritance and Settlement by Great Landowners from the Fifteenth to the Eighteenth Centuries,” in Goody et al., \textit{Family and Inheritance} 199.

\textsuperscript{50} \textit{Year Book} 30 & 31 Edward I 388.

\textsuperscript{51} Milsom, “Inheritance by Women,” 240. It reads “Since he is male, it is adjudged that he ought to have a greater right in that land.”
Milsom has theorized that the role of a woman in medieval English land law was not to hold property herself but to transmit it to other men by marriage and by maternity.\textsuperscript{52} J. C. Holt has also formulated the question of female inheritance as one of transmission, although he sees not only the right to the land but also the blood of the lineage being transferred.\textsuperscript{53} Eileen Spring has described the history of English real property law as barring the heiress in favor of male heirs.\textsuperscript{54} While that statement is somewhat excessive, it is clearly true that a pattern of favoring male heirs over females can be discerned throughout English inheritance customs.

This interpretation of the role of women in relation to land makes some sense of certain difficult points of English land law. For instance, it assists in clarifying the difference between right and seisin in the common law, which is different from the distinction between ownership and possession made in the Roman Law.\textsuperscript{55} What was right? Right could be

\begin{itemize}
\item \textsuperscript{52} Milsom, "Inheritance by Women," 260. He has also theorized that the special nature of curtesy, the custom whereby a husband who had fathered a child which had survived birth on the woman was entitled to keep all of her lands as a life estate after her death, may have arisen from this ideology. If the woman could only transmit the land, it was her husband who was the lord's man. In this light the estate of curtesy seems reasonable and its differences from the more limited life estate of dower seem logical. See Milsom "Inheritance by Women," 254-259.
\item \textsuperscript{53} Holt, "The Heiress and the Alien," 3.
\item \textsuperscript{54} Eileen Spring, "The Heiress-at-Law: English Real Property from a New Point of View," Law and History Review, vol. 8 #2 (Fall 1990) 292.
\item \textsuperscript{55} Plucknett, \textit{Concise History of the Common Law}, 357-358. Plucknett has said of seisin:
[It] was a conception peculiar to the middle ages; it is an enjoyment of property based on title, and is not essentially distinguishable from right ...

\textit{Concise History of the Common Law 358}

However, saying that there is no distinction between right and seisin seems ingenuous, as the medieval English jurist clearly did distinguish between them. S. F. C. Milsom has said that right and seisin increasingly conformed to the Roman concepts of ownership and possession from the thirteenth century (\textit{Historical}}
described as the sort of interest in land that any woman can have. Only a
feme sole could have seisin, but any woman could have right. This
understanding of right and seisin is simplistic and does not embrace all of
the complexity of the two concepts; in fact, it is a circular definition. The
formulation of that statement by a medieval jurist would be rather that a
woman could always have right, but only a feme sole could have seisin.

If the woman's right in land was primarily transmissive, then the
land she and her husband received as a gift in maritagium was in a legal
sense necessarily a gift to him, the fact that she was the cause of the gift
notwithstanding. At this point the concept of the lineage reappears so
that its effect on gifts of land to females can be examined. David Herlihy
has summed up the effect of the lineage ideology on females in the lineage
succinctly:

Daughters were pushed to the margins of the agnate lineage,
and their children passed entirely out of the generatio of their
maternal ancestors.

Upon marriage, women passed out of their paternal lineage and into the
lineage of their husbands. An example of a change in lineage is provided
by the fact that by the late thirteenth century the women of Brigstock were
taking the surnames of their husbands upon marriage. Further, a woman

\footnotesize

\textbf{Foundations of the Common Law} 119). See also the explanation of the verb 'to seise' in
the previous chapter.

\textsuperscript{56} Note that a woman could claim 'right' to her dower in the heir's court. The right in this
case would not be what a modern scholar would describe as ownership, since dower was

\textsuperscript{57} T. F. T. Plucknett has cited cases which indicate that the earliest form of the
maritagium was given to the husband and not to the couple jointly. Plucknett, \textit{Concise
History of the Common Law} 546.

\textsuperscript{58} Herlihy, \textit{Medieval Households} 87-88.
in Brigstock abandoned public and formal association with her father's relations in favor of the kin and associates of her husband after marriage.59 At the time of marriage, land given to daughters passed out of the family with them, and passed into the hands of their husbands' families. The children of the daughters were members of their father's lineage, not their mothers.60 The inheritance of the land by those children marked its definite exit from their mother's lineage.

Thus the policy of keeping land within the lineage and the legal uncertainties of the gift in maritagium were the major social and legal factors in its demise. Fathers did not cease to be concerned for their daughters; nor did they wish to exclude them from any advantage that might accrue to them from the family's wealth. Rather, they chose to make marriage gifts to their daughters in money, or by the more secure form of a gift in tail, as Bracton implied.61

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59 Bennett, Women in the Medieval English Countryside 133-136. The husband of a woman might deal with her kin, but the woman herself generally relied upon her husband's associations for public (court) business, such as pledging. Also, by the year 1200 some English women were already known by occupational surnames or by the surnames of their husbands, neither of which might have any relation to their own activities. Christine Fell, Cecily Clark, and Elizabeth Williams, Women in Anglo-Saxon England and the Impact of 1066 (Bloomington: Indiana UP, 1984) 158.

60 In some cases this was not true. For instance, in 1383, Sir William Fraunk provided that if his son died without issue, his eldest daughter should be married to a gentleman who would take her father's arms and would receive his lands. This was a case in which the lineage was deliberately introducing an outside male and adopting him to continue itself after the failure of other heirs. Doris Mary Stenton, The English Woman in History (London: Allen & Unwin, 1957) 42-43.

At this point one must turn back to the gift in tail. Its superiority over the inexplicit maritagium has been made clear, and the reasoning for its development as a method for granting land to younger sons, who might otherwise have been excluded from the patrimony, are also obvious. However, neither the maritagium nor the gift in tail was as securely inalienable by the donee as the donor might have wished. Thus came about the famous enactment *De donis conditionalibus*, the first chapter of the Second Statute of Westminster.

T. F. T. Plucknett has asserted that both the gift in tail and the maritagium were being treated as if they were conditional gifts made under the Roman law. By the interpretation favored in the courts before *De donis*, the condition of the gift was considered to be accomplished in the first heir. At the time of the birth of that heir, the interest which the donee had in the land was considered to be changed from a conditional fee to a fee simple. Plucknett has cited a passage in the *Digest* in which this theory can be found.\(^{62}\)

This interpretation of the meaning of conditional gifts was clearly contrary to the intention of the donors, who gave land in maritagium and in tail in order to support family members and their descendants. When the fee was considered simple, and thus alienable, after the birth of issue to the donee in tail or maritagium, the wishes of the donor were set aside. The active land market of the thirteenth century and the use of land as a

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commodity have already been mentioned; the land belonging to a family was treated as a salable asset. It had come about that land given by conditional methods would only return to the patrimony from which it had issued if the donees died without even begetting an heir; even if the heir were to die before its parents (the original donees), the land might have already been sold on the open market. Further, even if the donee's heir were to die before its parents and they had not alienated the land, there was no guarantee that the gift would return to the patrimony. Once the fee had been converted to a fee simple, all classes of the donee's heirs would have access to the fee upon the death of the current fee-holders.

A reform was clearly needed to correct this situation. T. F. T. Plucknett has said that Edward's policy in reforming the land laws was to protect the reversioner at all costs.\(^63\) Certainly that was the intended effect of *De donis*; the following quote from the heart of the statute should make the intended effect extremely clear.

[The lord king, perceiving that it is necessary and useful to provide a remedy in the aforesaid cases, has enacted that the wish of the donor, according to the form manifestly expressed in the deed of gift, is henceforth to be observed, in such wise that those to whom the tenement was thus given upon condition shall not have the power of alienating the tenement so given and thereby prevent it from remaining after their death to their issue, or to the donor and his heirs if issue fail either because their was no issue at all or because if there was issue it has failed by death, the heir of such issue failing.\(^64\)

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\(^{63}\) Plucknett, *Legislation of Edward I* 129. Edward's policy also included dealing with the reversion in curtesy and in dower.

This statement clearly indicates that the alienability of the maritagium and
the gift in tail was to be limited, and the reversion to the donor and his heirs
was to be preserved. However, the statute only mentions the donee and the
heir of the donee, which was to provide a further difficulty to those seeking
to protect the reversionary interest.

The next step in protecting the reversionary interest of the donor and
his heirs was taken in 1312 by Chief Justice Bereford. Bereford was ruling
on a case to which the grandson of the donee was party, and who was
claiming the statute applied to his case. It was objected that, as the
grandson of the donee, the man was outside the limits that the statute had
drawn, and that the condition of the gift had been fulfilled in the heir of the
donor. However, Bereford ruled that the grandson was within the help of
the statute, as the statute had intended to protect the reversion until the
fourth degree -- that is until the third heir of the donee entered. The
grandson of the donee was still a degree within the intended limits of the
statute, and Bereford abided by those intended limits rather than the
written limits given in the statute. Bereford's ruling clearly showed that
statutes were seen as amendments to the common law and as such were
treated more flexibly than modern statute law.\textsuperscript{65} It also recognized that the
roots of the gift in tail were to be found in the maritagium, and hence

\textsuperscript{65} Milsom, \textit{Historical Foundations of the Common Law} 177. The evolutionary nature of
statutory remedies will be further discussed in the next chapter, when the practice of
receipt is explained.
attempted to conform the rules that had been developed to manage the
former gift with the customary rules for the latter.\footnote{66}

Although Bereford’s ruling is at the later limits of this investigation,
and certainly after the time at which maritagium had fallen out of use, it
remains important. However, it apparently did not seem to bar the
development of the classical entail, which was to remain an important part
of the land law for many centuries. Bereford’s ruling was not very well
known at the time; it was recorded in the Year Books but was not found in
the abridgements.\footnote{67} However, S. F. C. Milsom has described it as a
“decisive step,” although he has also stated that the degrees were
mentioned with increasing confusion into the fifteenth century without ever
limiting the duration of the entail.\footnote{68} T. F. T. Plucknett has dated the first
certain statement of the perpetually enduring entail at 1410, and has stated
that it was created by the courts in spite of \textit{De donis}.\footnote{69} Whether or not
Bereford’s statement about the degrees had any effect on the future
development of the entail, he was apparently the first person to state that
the entail was inalienable after the first heir. It was he who committed the
courts to a view that the public shared and understood, unlike the legal
principle that had been in effect before \textit{De donis}.\footnote{70}

It has already been stated in the preceding chapters that economic
and legal changes in the thirteenth century made it desirable for families to

\footnotesize\footnotetext{66}{Plucknett, \textit{Legislation of Edward I} 133.}
\footnotesize\footnotetext{67}{Plucknett, \textit{Legislation of Edward I} 134.}
\footnotesize\footnotetext{68}{Milsom, \textit{Historical Foundations of the Common Law} 177.}
\footnotesize\footnotetext{69}{Plucknett, \textit{Legislation of Edward I} 135.}
\footnotesize\footnotetext{70}{Plucknett, \textit{Legislation of Edward I} 131.}
keep a closer hold on the patrimony, both the parts held in demesne and the parts rented out. Any gift made by the family would diminish those valuable resources. Even after De donis the reversion of the conditional gift to the patrimony was uncertain. Why, then, did the gift in tail survive?

Part of the answer to this question may be sought in the statute Quia emptores. The purpose of this statute was to prevent artificial subinfeudations (that is, subinfeudations that were effectively substitutions), which damaged the economic rights of lords. This aim was achieved by banning subinfeudation by purchase and replacing it with substitution. However, several loopholes remained in the ban on subinfeudation. One of these was the gift in tail.⁷¹

Just as artificial subinfeudations had been practiced before this statute, artificial tails were made after it. The English understood the workings of their complex legal system well enough to attempt to circumvent it. The fee tail was necessarily a loophole in the ban on subinfeudation, as it was illegal to enfeoff someone in fee tail and have that person hold of the chief lord.⁷² One example of an attempt to exploit the legal loopholes left by Quia emptores is the grant and regrant of the manor

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⁷¹ T. F. T. Plucknett has pointed out that a subinfeudated grant of a life tenure could also be made. He lumps life tenure and the fee-tail together as “lesser estates.” Plucknett, Concise History of the Common Law 543.

⁷² See Marton v. Prior of Gisburn, found in F. W. Maitland, ed. Year Book 2 & 3 Edward II (London: Quaritch, 1904) 21-30, in which case Bereford described the attempt to make the feoffee in tail hold of the chief lord as a “sin.” He also said the following:

> [F]or it is not natural that the tenant for life or in tail or in frankmarriage should hold of the chief lord; naturally he should hold of the donor.

Year Book 2 & 3 Edward II 27.
of Whilton between Philip and Felicia de Montgomery and Robert Burnel in 1290.73

Felicia was the daughter of Nicholas de Whelton, whose interest in Whilton has already been discussed. Burnel was the Bishop of Bath and Wells, and the Chancellor of England. Philip and Felicia granted (sold) the land to Burnel, who granted it back to them in fee tail for the service of a single chaplet of roses. The services which had previously been due to the Stutevilles, the chief lords of Whilton, remained due to them, bypassing Burnel. The sale of Whilton to Burnel, doubtless at a nominal price, gave him a continuing interest in the land and gave the Montgomeries a powerful ally in the familial disputes over Whilton. The fee tail limited the class of heirs and kept the Montgomeries from selling Whilton, but a sale was unlikely after Felicia had spent a quarter-century wrangling over the estate, and Felicia was well within her childbearing years. Further, the fee tail was specifically set up to protect both Philip and Felicia in the event of the untimely death of either.74

Philip and Felicia de Montgomery were clearly using the gift of the reversionary interest in Whilton as a bribe to gain Robert Burnel's interest

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73 The text of the final concord can be found in Palmer, Whilton Dispute 142-143.
74 Palmer, Whilton Dispute 137-142. The grant was made to Philip and Felicia in fee tail to the heirs of her body (including any from subsequent marriages) with a remainder in fee tail to Philip and the heirs of his body (by any subsequent marriages), with the reversion being to Burnel. That is, Whilton would be inherited by any children of Philip and Felicia. If Philip were to die before Felicia, having fathered no children on her, Whilton would be inherited by any surviving child of hers. However, if Felicia were to die first, leaving no children, Whilton would be inherited by a child of Philip's. Only if Philip and Felicia were both to die without any children would Burnel's reversionary interest come to fruition.
in their family dispute over the manor of Whilton. Burnel and the Montgomerys had business dealings, but they were not kin, and the use of the fee tail in this situation shows that the use of the gift in tail had expanded far beyond its originally intended use as a counterpart to maritagium. This was apparently because each gift made in fee-tail was specific and therefore easy to maintain legally.

The gift in tail thus had uscs beyond the gift to a younger son that had originally been contemplated by those who had established it. It survived through the difficult period between De donis and Bereford’s lengthening of the duration of the entail at least partially because of gifts such as this; gifts which treated the law as “a mass of technicalities which might be ingeniously combined to serve [one’s] ends.”\textsuperscript{75} However, the fact remains that while daughters were receiving their marriage portions in money by the end of the thirteenth century, sons were receiving land until the sixteenth and seventeenth centuries.\textsuperscript{76}

The answer to the question of why this occurred must be sought in the concept of the lineage. It has already been emphasized that the ideology of the lineage worked to cut off female members of the family from access to the land resources of the patrimony. The fact that sons, who remained within the lineage after their marriage, had access to land long after the access of daughters had ceased is no accident. However, there were legal and social factors beyond the lineage which helped to bar women from

\textsuperscript{75} Plucknett, \textit{Legislation of Edward I} 1.
\textsuperscript{76} Cooper, “Patterns of Inheritance and Settlement,” 212.
access to family land -- which in fact worked to bar them from access to
landholding at all. These factors will be explored in the next chapter.
Chapter Four

Why Women in Medieval England Were Not Given Land

In the preceding chapter the concept of the lineage and its effect on women in their quest to gain a share of the familial lands was discussed. The daughters in a family were at the edges of the family lineage and were excluded from the paternal family upon marriage. For this reason, they were eventually excluded from familial disposition of lands except in cases when they were sole inheritors. When there was a son and heir by whom the lineage could be continued, daughters were given marriage portions in money or goods rather than in land.

However, even apart from the question of the lineage and the societal comprehension of land and gender which underlay it, there were legal reasons why disposition of land to daughters was undesirable. Daughters who were married were under the yoke of coverture; daughters whose husbands had died were independent widows, outside the control of any family. These were both undesirable states for women who might alienate or be forced to alienate family lands.

It is important to understand why both states were undesirable for women who held family land, and the underlying social and legal tensions which made them so. In this chapter these questions will be examined and answered and then discussed in the light of the information about social, legal, and tenurial developments of the twelfth and thirteenth centuries that have already been mentioned.
A. The Question of Coverture: Does Marriage Make Them Truly As One?

In medieval England, marriage was the expected disposition of most women. An indication that women valued marriage so strongly is provided in the rule that a gift made to a man by a woman on account of an impending marriage between them was considered invalid under the common law, just as a gift made by a man of unsound mind or an underaged boy was not legally binding.¹

For heiresses of the landholding class, marriage was a necessity, dictated by the needs of the land; Eileen Power has said that in some ways an heiress was as much tied to the soil as the manorial villein.² M. R. Kittel has stated that families in the thirteenth century arranged marriages for a wide variety of reasons, such as assuring peace, cementing family alliances, and securing financial gain.³ The desire of medieval Englishwomen for marriage is evidenced by the fact that some women brought lawsuits against the men who had promised to arrange marriages for them (often at a high cost to the women) and then failed to do so.⁴ Rural women were forced into marriage by a lack of options: they were too poor to

⁴ Kittel, Married Women 30.
become nuns and the only wage-earning position generally open to women, that of domestic servant, was generally restricted to adolescents.\(^5\)

Yet marriage had clear disadvantages for a woman, for by it she lost any legal independence she might have had or hoped for. If the woman had been ruled by a heavy-handed father or brother or had been in ward to a demanding lord before her marriage, she was now about to enter into a condition which would be at least as diminishing in the legal sense: coverture.\(^6\)

Coverture was the principle by which a man and a woman joined in marriage became one person in the eyes of the law. The oneness was not absolute, however, since a married man was always in theory able to act for his wife; she in theory could never act alone. A number of statements from legal sources clearly illustrate the principle. A married woman could not sue without her husband, as illustrated in one case where a tenant (defendant) argued that the demandant (plaintiff) had married between the time she had bought the writ and the time the case came to trial, and the case was decided on that point.\(^7\) In another legal record, the county of Cornwall was fined £80 for erroneous legal practices including allowing a married woman to prosecute a case without naming her husband.\(^8\)

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\(^6\) The author of The Mirror of Justices wrote that married women were in ward. William Joseph Whittaker, ed., The Mirror of Justices (London: 1894) 119.


\(^8\) Year Book 30 & 31 Edward I 240. There was also a record in the same volume where the Justices amerced the entire county -- though a sum is not given -- for allowing a married woman to appeal alone against her rapist (see pp. 506-508). Also see Alfred J.
married woman could not wage law (she could not have compurgators make oath for her). 9 She could own no chattels; those which were hers before the marriage became the property of her husband. 10 She was forced to submit to all of his actions that did not offend God. 11

Bracton discussed the inequality of the husband and the wife in property dealings in the following passage from On the Laws and Customs of England:

If the wife makes a gift of her husband's property without his assent, restitution lies for the husband by the assize of novel disseisin or by writ of entry, just as it does for any other person, that is, 'that she alienated without his consent.' But, conversely, if the husband makes a gift of his wife's property it will never be revoked during the life of the husband, since a wife may not dispute her husband's acts. If the husband gives a thing given them both, the wife may not recall her husband's gift during his lifetime, but if she makes a gift [of such property], the husband may revoke it [at once]. 12

This was a clear statement of the disadvantage which accrued to wives compared to the advantages which accrued to their husbands on marriage in the matter of joint or separate property.

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9 Year Book 20 & 21 Edward I 98. However, see the case of Eleanor de Chastel, who waged her law along with her husband in a case where she and her husband were impleaded for a debt she supposedly contracted while single. The Year Book writer comments on this case “mirum tamen” (however, this is a wonder). This case appeared in Year Book 32 & 33 Edward I 14 & 15.


The principle of coverture, however, actually had some advantages for the married woman. Although she was unable to act for herself or prevent her husband from acting, the woman under coverture was not legally responsible for her deeds. A number of illustrations of this principle can also be drawn from legal texts. For example:

Note that, if a woman make a quitclaim while covert and quitclaim her dower for the whole of her life, it is worth nothing. Otherwise, if she be single.\textsuperscript{13}

Note that, if a man deny his own deed and it be found to be his deed, he shall go to prison: but not so, if he deny his father’s deed. In like manner it will be in the case of a woman who has a husband.\textsuperscript{14}

Note that, if a man and his wife implead a person for a debt of twenty marks [£13 6s 8d], and the defendant say that the woman did, while she was single, release and quitclaim that debt in consideration of ten marks [£6 13s 4d], and he put forward her deed, and she deny her deed, and it be found that it is her deed, she shall go to prison if she be not under coverture.\textsuperscript{15}

In one case, Justice Bereford asked:

Had she a husband when the alienation was made? for if the alienation was made while she was covert, it was the deed of her husband.\textsuperscript{16}

\textsuperscript{13} *Year Book 20 & 21 Edward I* 20.

\textsuperscript{14} *Year Book 20 & 21 Edward I* 40. This statement is not clear, but presumambly it meant that the woman would not go to jail for denying a deed made while she was married, on the principle that she could make no contract while married and should not be penalized for her husband’s actions. In 33 Edward I a married woman was imprisoned for denying a debt that she made while single, which would seem to bar the conclusion that a married woman could not be jailed for acts committed while single (*Year Book 32 & 33 Edward I* 478).

\textsuperscript{15} *Year Book 20 & 21 Edward I* 110. “If she be not under coverture” presumably referred to the time when she made the deed quitclaiming the debt.

\textsuperscript{16} *Year Book 32 & 33 Edward I* 278.
Whether or not a woman could gain the benefits of acting under coverture could depend on public perception as well as her marital status. In one ruling, the Justices indicated that if a woman claimed that a deed was made while she was under coverture, it was a sufficient counter to claim that no one knew she was married.\textsuperscript{17} Also, a woman under coverture could not make a default.\textsuperscript{18}

The fact that the husband and wife were legally one flesh was also a liability to the husband upon occasion. In a case in 31 Edward I, a defendant who prayed aid of his wife lost his case because he was unable to produce her in court on demand.\textsuperscript{19} In a similar case in 32 Edward I, the Year Book writer gave as a reason for a decision in favor of the plaintiff:

\textit{... because B. [the defendant] prayed aid of his wife, and she is and ought to be at his will wherever he pleases, and he assigns no reason why he does not now produce her here ...}\textsuperscript{20}

\textsuperscript{17} Alfred J. Horwood ed., \textit{Year Book 21 & 22 Edward I} (London: 1874), 426-428. The Justices allowed the case to go to judgement on the question of whether or not the woman was known to be married.

\textsuperscript{18} \textit{Year Book 20 & 21 Edward I} 306. That is, she could not be held legally responsible for the fact that she did not appear in court (for which she could be amerced, i.e. fined).

\textsuperscript{19} \textit{Year Book 30 & 31 Edward I} 386. Aid-prayer was a legal procedure by which a defendant prayed (i.e. requested) aid of someone who also had a legal interest in the tenement. An important difference between aid-prayer and voucher to warranty was that someone summoned by aid-prayer was not required to compensate the tenant if the case were decided for the demandant, as someone called to vouch to warranty would be. Thus, it was an ideal method of summoning one's spouse. See T. F. T. Plucknett, \textit{A Concise History of the Common Law}, 5th ed. (Boston: Little, Brown, 1956), 411-412, and \textit{Year Book 21 & 22 Edward I} 468.

\textsuperscript{20} \textit{Year Book 31 & 32 Edward I} 122. The essoin was the medieval version of the modern continuance. Essoins were allowed for a number of reasons, such as crusading, being in the King's service, and various types of illness. See Whittaker, \textit{the Mirror of Justice} 82-87, and Bracton, \textit{On the Laws and Customs of England} iv 68-147, for contemporary accounts of the types and uses of essoins. The wife in the case above had attempted to essoin herself, and the essoin was quashed. The other legal principle in operation in cases of this kind was that the wife had not actually been summoned (and thus could not request an essoin). See also in the same volume pp. 92-94 and 182.
In another case, in a writ of covenant the demandant claimed that his feoffor's wife had come to eject him from the manor he had leased, and that the feoffor had thus broken the covenant. The feoffor protested that he had no knowledge of his wife's action, nor had he ordered or approved it. The Justices' comment on the judgement was as follows:

Inasmuch as the act of the wife was the act of the husband, the Court adjudges that Sir Henry [the plaintiff] do recover his damages of a hundred marks [£66 13s 4d].

The assumption in this case was not that the deed of the wife had bound the husband, but that she had not acted independently of him; despite the husband's protests, the Justices assumed he was behind the attempt to drive out the tenant. The husband in this case paid a stiff penalty for being unable to live up to the ideal of "one flesh."

Married women were at severe disadvantages in legal dealings. However, the Justices and the Crown were often sympathetic to problems of married women in court. Although a married woman was not supposed to act in court without her husband, the rules were in fact flexible. Practical exceptions had to be made to coverture; for instance, absent husbands sometimes appointed their wives as attorneys, and married women were sometimes allowed to act as if single (as femmes soles) for purposes of

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21 Year Book 32 & 33 Edward I 474. However, separation of husband and wife was already an established principle in some criminal cases. Bracton wrote that a wife was not in all circumstances held liable for her husband's theft. Similarly, Bracton separated the wife from the husband if she had committed theft without his knowledge or consent. Bracton, On the Laws and Customs of England ii 428.
trade. The following instance of an exception to coverture comes from the Year Books:

Note that, if a man and his wife be joint-feoffees of a tenement, neither shall lose by the default of the other: but the one who is present in Court shall answer in respect of his or her right.

That the actions of the husband might be unfair to his wife was a recognized fact. Glanvill clearly recognized this and was troubled by it; however, the following comment made by him on the subject of the husband's alienation of land against the wife's will clearly shows that the inviolability of royal actions was more important to him than an injustice done to wives:

When a husband put in place of his wife [as an attorney] in a plea concerning the wife's marriage-portion or dower loses or releases any of the wife's right, whether by judgement or by concord, may the woman reopen the plea [after his death, when she is no longer under coverture to him], or is she wholly bound by the act of her husband after his death? It does not seem that the woman ought in such a case to lose any right by her husband's act, for while she was in the power of her husband she could not contradict him in any matter nor act against his will, and thus could not, if her husband were unwilling, take care for her own right. Yet, on the other hand,

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22 Margaret Wade Labarge, *A Small Sound of the Trumpet: Women in Medieval Life* (Boston: Beacon, 1986), 35. It is difficult to discern women acting in court in the Year Books, as many of the cases were actually handled by lawyers. In some cases, the arguments are put into the mouths of the plaintiff and the defendant for part of the transcript, and in the mouths of the lawyers for the remainder. However, it is important to note that by the reign of Edward I the professionalization of the law was already underway. J. W. Hill has reported a case in which a lawyer was sued for malpractice (indicating a standard for legal practice was already established) in 38 Henry III. J. W. Hill, "The Rise of the English Legal Profession," *Transactions of the Royal Historical Society* new series 3 (1874), 134. Glanvill mentioned only the possibility of the husband acting as an attorney for his wife, and not the possibility of the wife acting as attorney for her husband. *Glanvill* 134-135.

23 *Year Book 20 & 21 Edward I* 96-98.
it is proper that things done in the court of the lord king should be settled and inviolable.\textsuperscript{24}

The law provided a remedy for a widow whose husband had alienated (sold) her land during their marriage: a writ called the \textit{cui in vita}.\textsuperscript{25} It introduced an important division between husband and wife. By means of it, the royal court recognized the unfairness of forcing a woman to endure an alienation of her land by her husband, and gave her means to correct that alienation.\textsuperscript{26} However, this writ benefitted only widows, not married women.

Chapter three of Second Westminster allowed another mitigation of the unfairness of coverture.

[T]his being observed that if a husband absent himself and refuse to defend his wife's right or wish to surrender it against his wife's will, if the wife come before judgement ready to answer the demandant and to defend her right, she is to be received.\textsuperscript{27}

This was a crucial point of separation between husband and wife; the practice was a wedge driven into the one flesh of the married couple,

\textsuperscript{24} Glanvill 134-135.
\textsuperscript{26} As to why anyone might want to buy such land if legal remedies existed: the tenant who bought land which belonged to the seller's wife was taking a chance: if the wife predeceased the husband, the grant might well stand. However, if the husband died first, the wife could recover by this writ. There was also a writ \textit{sur cui in vita} by which the heirs of the wife might reclaim the land, so even in the former case the tenant might not get away scot-free. And in any case, if the husband or the husband's heirs (who might not be the wife's heirs, as remarriage was not uncommon) could be forced to warrant the grant, the tenant would at least recover lands equal in value from the warrantor.
separating them into man and woman again.\textsuperscript{28} The idea that a wife's interests might not be the same as her husband's had permeated into the minds of the lawmakers and brought them to allow a legal separation of husband and wife in some cases in the interest of protecting the interests of the wife. However, the interest of the wife could not be protected if the husband were in court; if he were not absent, she was forced to rely on his good will in defending her property.\textsuperscript{29}

Another protection established for married women was the development during the thirteenth century of the practice of separate examination of the wife before the registration of a chirograph concerning land in which the wife had an interest. A chirograph was a written record of a transaction, often a fine (final concord) in the royal court, which had legal advantages for the recipient of the land conveyed by it: there was a permanent record in the hands of the court and actions accrued to the recipient of the land if the fine were violated.

Originally such fines could be made without the assent of the wife when her property was involved, but she was not bound to confirm the grant as a widow.\textsuperscript{30} It became the custom, and was well established by the end of the century, that in transactions concerning the land of the wife or joint land, the wife should be examined separately and in person (not by attorney) by the Justices. The husband was open to a legal action of deceit by his wife if he brought another woman to impersonate her, attempting to...

\textsuperscript{28} Kittel, \textit{Married Women} 116.
\textsuperscript{29} Alfred J. Horwood, ed., \textit{Year Book 33-35 Edward I} (London: 1879) 164.
have the chirograph made against her will or without her knowledge. If the wife did not assent to the alienation when examined separately, the chirograph would not be made; if her consent were given, she could never after sue for the land -- she was barred by the fine. The Justices were aware that opposition to the husband's alienation could put the wife at risk, and in one case where the wife refused to assent to the alienation forbade the husband on penalty of forfeiture of goods and land to harm his wife on account of her refusal.  

The separation of husband and wife in the matter of the making of chirographs was another mitigation of the inequities of coverture. The fact that it seems to have been prompted as much by the need for the chirograph to be a permanent settlement as by the unfairness done to the wife when her husband granted her lands away does not negate the advance and the protection that it represented for married women and their interests in land. Nor does it negate the fact that in this case, as in others, it was necessary to treat the husband and wife as separate individuals in order to have justice done to all parties.  

There is substantial evidence that women regularly took advantage of devices for protection from the inequities of coverture. Some of these cases and the legal principles which underlay them are quoted below. For

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31 Kittel, Married Women 130-133. The Justices were concerned both with the rights of the woman and with the necessity for the permanent alienation to remain unchallenged after the death of the husband.

32 The permanence of the alienation was also of importance to the purchaser, who wanted to ensure that title to the purchased land was unencumbered by the possibility of a widow reasserting her rights after the death of her husband. It was thus also in the purchaser's best interests to ensure that the alienation was made with the wife's consent.
example, the intention of the following ruling was clearly to prevent the
demandant’s collusive recovery of the tenements in question.\textsuperscript{33}

Note that (in the opinion of some) a woman who is a joint-
feoffee with her husband shall, after husband has made
default, be received to defend her right, and to abate the writ,
because she was not joined in the writ.\textsuperscript{34}

But, to the contrary, on the very same type of case:

Item, where a writ was brought against the husband alone,
who made default, his wife came into court and said that she
was joint-feoffee, and showed the charter, etc., and prayed to be
received, etc., and she was; and [she] prayed judgement of the
writ because she was not named. Hengham [justice]: Because
you are not party to the writ, etc. And she was not received to
abate the writ, etc.: and he [sic] vouched to warranty.\textsuperscript{35}

The question in these examples revolves around the fact that, in order for a
writ to be upheld in court, it had to follow exactly certain legal formulae.
When a tenement was held jointly, both of the feoffees of the tenement had
to be named as tenants in the writ. If both of the tenants were not named,
the tenant who was named could have the case dismissed. However, the
party who was not named was often considered a stranger to the writ and

\textsuperscript{33} Collusive recoveries were a legal fiction often practiced in the common law courts. For
instance, a man A wished to buy land from a man B, but the right of the land was vested
in C, B’s wife. Therefore, A sued out a writ against B (not B and C); B defaulted (did not
show up in court), and the land was awarded to A on B’s default. However, if C were
received to defend her right, and the right was good, A’s suit would fail.

\textsuperscript{34} Year Book 20 & 21 Edward I 252.

\textsuperscript{35} Year Book 30 & 31 Edward I 2. The ‘etc.’ seen in various places in the text refers to legal
formulae which were familiar to the writer of the Year Book. Such abbreviations
allowed the writer to keep up with the no doubt hurried pace of the court. Note that
Horwood read the subject of the last clause of this case as “he.” This reading is clearly
an error. From the context, the defendant, who was in this case the woman, whom the
court had already received to defend her right, and who was the one who would need to
vouch, was obviously the subject of both clauses. Further, the French text of the last
clause has no written subject, making the subject the same as that of the first clause --
the woman.
thus had fewer legal options in his or her defense of the tenement. Whether or not a woman acting to preserve her right in her land, for which her husband alone was impleaded, was a stranger to the writ was apparently a subject for legal debate. In the first example, the woman was allowed to plead an exception to the writ as if she were a party to the writ; in the second, she was treated as a stranger to the writ, and forced to make her defense along other lines, by calling her feoffor to support her claim to the land.

It is clear from the two citations made in the preceding paragraph that there was no agreement as to exactly what the law was on some points, and that in fact the details of the law, whether the common law or the statute law, were variable between justices -- especially in the matter of praying to be received, where a broadening of what was allowed by the law occurred over time.\(^\text{36}\) Thus the treatment that a married woman received in court might differ depending on who was on the bench.

However, it should be clear from all of the above citations that, although the common law severely restricted the rights of a married woman, statute law and the courts had found ways to aid her. However, such aid was clearly granted at the expense of the principle that the woman

\(^{36}\) Kittel, *Married Women* 116-121. Also on the expansion of the meaning of statutes, see *Year Book 32 & 33 Edward I* 290, where Justice Bereford, ruling on a situation analogous to one described in Westminster II, stated "We do not find that in this case you are within the Statute; but there was certainly just as much need for the Statute mentioning your case as the other case." Bereford ruled against the young man, but clearly felt sympathy for his case. Note that even in the thirteenth century there were "loose constructionists" and "strict constructionists." That Bereford was a strict constructionist in this case is particularly fascinating in the light of his construction of *De donis*, which was discussed in chapter three.
and her husband were as one. For instance, the following case shows not only the independence of the married woman in court, but her responsibility for action in respect of her own land:

Note that, if a man and his wife be impleaded in respect of the wife's heritage, and the wife appear, and the husband make default, the wife shall not lose her right by the reason of the default of her husband; but she shall answer at once and defend her right, inasmuch as she is in Court: and if she do not, then the demandant shall pray judgment of her as undefended, inasmuch as she is in court and will not answer.37

The married couple could use both the principle of coverture and the principle of the independence of marital partners to their benefit, as in the following case:

Note that where a writ of debt was brought against a man and his wife, on the first day the husband essoined himself, and the wife made default; in consequence of which an attachment was sued out against her, etc.; on the second day the wife essoined herself, and the husband appeared in court, etc.; on the third day the wife appeared and the husband essoined himself; and this essoin was not allowed, because he had appeared in court after he had been essoined: wherefore for the delay, etc. (for if this essoin had been allowed, etc., they would never come into court [together], because the husband would again appear, etc., and the wife would essoin herself; and so one ad infinitum) by the great distress sued out against the husband.38

Although the Justices clearly saw through their scheme, this couple was able to use the necessity of both of their presences in court and their ability

37 Year Book 20 & 21 Edward I 102. The point to this ruling was that the woman could act as if sole when defending land in which she had right.
38 Year Book 30 & 31 Edward I 50.
to essoin independently to avoid the action (perhaps hoping to pressure the plaintiff into settling for less, or in hopes that he might die).\textsuperscript{39}

The possibilities for legal separation between husband and wife in the common law courts were clearly growing in the late thirteenth century. The procedure of “praying to be received,” or “receipt,” was introduced as part of a major overhaul of the court system and, as with other reforms introduced in the same law, undoubtedly represented an inequity seen in the laws by either the Justices or the barons. In order to remedy that inequity, the procedure of allowing the woman to defend her right separately was introduced.

However, the courts clearly preferred to see husband and wife treated as a legal unity, and separated them only when doing so seemed essential in the interests of justice.\textsuperscript{40} The expansion of the principle of praying to be received suggests that such separation may have become more necessary -- or at least more apparently necessary -- as the thirteenth century drew to a close.

One instance of the expansion of the principle behind the procedure of receipt occurred when Justice Hengham allowed a woman to be received by attorney after her husband's default, even though she would normally

\textsuperscript{39} The technique of delaying the progress of a suit by alternating essoins was known as fourching. Married partners were forbidden to fourch after both had appeared in court by the Statute of Gloucester (1278). Kittel, \textit{Married Women} 105, 107. Although the Statute of Gloucester’s prohibition technically did not apply to this case, the analogy is clear, and it was well within the discretion of the Justices to quash the essoin.

\textsuperscript{40} Kittel, \textit{Married Women} 125, 126. See also Bracton, \textit{On the Laws and Customs of England} ii 428 for an example of separation of a married couple in a criminal case.
only be received in person. The attorney had been appointed when writ was first presented and had been present throughout the case. Hengham clearly saw that the default was made in collusion, and that the wife intended to prevent a collusive loss of the land. Thus, he allowed the attorney to defend the land for the wife.\footnote{Year Book 32 & 33 Edward I 448-450. Also note the following statement on the necessity of a woman under coverture appearing in court personally:

[T]hat disclaimer was made by attorney, which can never oust a feme covert from her estate, for she must be in Court in her proper person and be examined by the Court.

Year Book 33-35 Edward I 4.

In that case the woman was allowed to sue despite a disclaimer she had made by attorney in a previous case. The assumption seems to have been that the disclaimer was not hers since she had not been in court when it was made. Note this case in comparison to the requirement that a wife be in court to make a chirograph as previously mentioned.}

The ultimate legal division between husband and wife was when they faced one another in a lawsuit. M. R. Kittel, in her doctoral dissertation, found evidence of a very few cases from thirteenth and early fourteenth centuries where husband and wife faced each other in court.\footnote{Kittel, Married Women 124-126. In the one case which Kittel quoted, the wife was listed among the defendants as if she were sole ("Joan the daughter of Lawrence of Bluntesdon") as well as with the plaintiff ("Richard of Manton and Joan his wife").}

The following example case is from the Year Book of 32 Edward I:

Sir Philip de Kyne brought a Writ of Waste against Joan who was the wife of John de la Hay in respect of tenements which she held for a term of her life of the aforesaid Philip. Passelegh (for Joan): We tell you that Philip is our husband; judgment if he can employ such a writ against us. Toudeby (for Philip): We have counted against you as a feme sole and you as a feme sole have denied the damages; therefore you ought not to get to that exception. Passelegh: The denial of the damage only makes the party answerable; now, if your person be answerable, that is to your advantage. But our exception is to the action, to which exception you answer not; judgement. Toudeby: Where was she married, and in what bishoprick
[sic], and in what church? **Passelegh**: In the diocese of Canterbury, in such a church. **Toudeby**: Not married, ready etc. -- And the other side said to the contrary.\(^{43}\)

The essentials of this case are as follows: the plaintiff was attempting to sue the defendant for damages. but the defendant claimed that the plaintiff is her husband (in which case, since they were legally one person, he had no right to sue her). The plaintiff claimed that since, in the preliminary ritual stage of the suit known as the count, the defendant had defended herself as an unmarried woman, she was liable for the rest of the suit. In fact, if she had been at court and not responded to the count made against her, the plaintiff would have immediately demanded judgement of her as undefended. The defendant claimed that all her answer did was to make her legally liable if she was found to have committed the waste, but that she had made a claim which would invalidate the entire suit, and that he had failed to answer the claim. Therefore, she asked the Justices to rule whether or not the suit was valid.

The plaintiff, tacitly conceding her point on the lack of validity of the writ between married persons, asked her to prove that the marriage had in fact taken place (by providing a location). When she produced the requested information, the plaintiff was willing to go to judgment on whether or not a valid marriage between the plaintiff and the defendant had taken place. Presumably the Justices sent to the ecclesiastical court or to the Archbishop of Canterbury (in whose diocese the marriage was purported to have taken place) to determine whether or not a valid marriage had taken place. If the

\(^{43}\) *Year Book 32 & 33 Edward I* 194.
Church said they were unmarried, the suit would proceed, but if they were married, the suit would be thrown out.

The fact that a case such as this occurred indicates that the artificialities of coverture and attempts to remedy its inequities had begun to disrupt strongly the legal principle of one flesh. The practice of separate examination of the wife before a chirograph concerning her land could be made and the practice of praying to be received are clear cases of an understanding to which the law-makers and law-users were coming about the necessity of separation of marital partners in the interest of justice. The common law was not initially adapted in either ideology or methodology to handle issues of separation between husbands and wives, and though it could be amended by statute, the law's evolution took time.\footnote{As is commonly known to scholars of English law and the history of English women, the married Englishwoman had no general legal right to separate property until the late nineteenth century.} The thirteenth century was an age of transition for the common law, and the many changes made during that period required time to mesh into the framework of the law as it already existed.

Thus, the married woman's experience of law varied from year to year and court to court, as the assimilation of her rights, benefits, and limits under the law occurred. However, despite changes in her rights and her growing ability to separate herself from her husband when the interests of justice required such a separation, the ideology of coverture was never challenged by the courts or by the statute law.
The paradigm of coverture combined with the concept of the lineage, in which females were already pushed to the margins, to exclude daughters from family resources in land. Daughters passed into another family; their inheriting children were members of another lineage; and crucially, their control of lands during their husbands' lifetimes was limited by the understanding of marriage held by society and the courts. Though these daughters had the right to protect their lands -- lands acquired from the patrimony of the birth family -- the limits which coverture placed on their rights made gifts of land to daughters who were marrying out of the family risky. The risks of losing land that the family took in granting it to daughters as marriage portions became too great to bear in the thirteenth century.

B. The Status of Widowhood: The Risk of an Independent Woman

After the death of her husband, a widow in thirteenth century England had three choices as to her lifestyle. She might become a nun, or, after a suitable mourning period, she might remarry, taking with her to her new husband her property, including the dower lands left to her by her previous husband, or she might remain a widow. As an independent widow, she was an anomaly in the society of the thirteenth century, and perhaps even a threat to the social and economic order which underlay the higher tiers of English society.
Carol Karlsen has discussed the economic problems caused by independent widows in seventeenth century New England. Of these widows, she said:

This type of woman [the widow] could hold and dispose of property as independently as the males in her family. She occupied a relatively autonomous position in the structure of society. Indeed, despite assumptions that widows remarried quickly in the early and mid-seventeenth century, some of the widows who benefitted from inheritances in early Salem remained widows despite opportunities to remarry. Such woman strained the delicate balance of beliefs at the core of Puritan attitudes toward women.45

Despite the fact that Karlsen’s discussion is of another time and another place, the attitudes toward the widow held by Puritan New Englanders were clearly related to the attitudes of the thirteenth century English. For who were the Puritans but Englishmen of a harsher religious stripe, and what law did they follow in their new land but the common law which they brought with them from the old country?

A widow might live for many years after her husband’s death. Judith Bennett has reported that widows on the manor of Brigstock survived their husbands by several years, and in one case a widow was known to have survived thirty-seven years after her husband’s death.46 William de Whelton’s widow Felicia survived him by almost thirty years.47

The long survival of these women without their husbands meant that some provision had to be made for their support.

Jack Goody has said that under a lineage system, the separate property of each partner in a marriage returns to the original kin of each partner when one of the spouses died, whereas under a jointure system the widow controls at least part of the property.\(^\text{48}\) By Goody’s standards, England operated under a mixed system. Separate property was inherited by heirs from the marriage, and if no such heirs had survived it was returned to the surviving kin of the spouses. Additionally the spouses could own joint property, which remained with the widow at her husband’s death. The maritagium was so treated, and until the reforms embodied in De donis conditionalibus, any widow whose children had died during her lifetime might freely alienate the maritagium.\(^\text{49}\)

However, the primary economic support for English widows was expected to be the dower. There were several different kinds of dower that might be arranged for a widow, but the one which eventually became customary was the reasonable dower, which consisted of one third of the properties held by the deceased husband at the time of the marriage, and

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\(^{49}\) See Appendix III.
later came to include all lands acquired during the marriage.\textsuperscript{50} S. F. C. Milsom has described dower as a special entity, and states that it is as much a form of tenure as an estate.\textsuperscript{51} M. R. Kittel has indicated that during the thirteenth century the estate of dower came to be set and arose more by the operation of the law than by a specific endowment by the woman’s husband.\textsuperscript{52}

Widows could also recover lands that were their own by right but had been alienated by their husbands during the marriage. This was accomplished by the writ \textit{cui in vita}, mentioned above. This writ was clearly an important legal safeguard for women who held any land in their own right, as it speeded the process by which widows whose husbands had alienated their land could recover it. As part of the reforms made in the Second Statute of Westminster it was extended so that widows could use it to regain land collusively alienated by their husbands by means of default.\textsuperscript{53}

Clearly, a widow was far better off legally than she had been before her husband’s death. She would have property from her husband -- her dower -- by which she might be supported, and further, she would have an opportunity to recover any lands which her husband had alienated during his lifetime. She was independent and under the legal control of no man.

\textsuperscript{50} Glanvill 58-60, 68 (dower with the consent of the father); Bracton, \textit{On the Laws and Customs of England} ii, 265-275; Kittel, \textit{Married Women} 84-87.
\textsuperscript{52} Kittel, \textit{Married Women} 88.
\textsuperscript{53} English Historical Documents III 430-431. The key Latin phrase should be translated “during whose lifetime she could not gainsay.” A writ of entry was based on the principle that the tenant had come into the property in a legally invalid manner.
Why, then, was she an unsuitable beneficiary of a gift in land? Several reasons lie behind the reluctance to allow even widowed women a share in the patrimony.

One clear problem which lay in granting land to a widowed daughter was that she might choose to remarry. Although the widowed state clearly had its attractions, it has already been pointed out that the English woman of the thirteenth century found marriage a desirable state, and that society expected women to be married. Certainly the religious life was an alternative to marriage (and one that might seem especially attractive to older widows), but a widow who went into the cloisters was "dead to the world" and could not have any claim on the patrimony.54 Thus a widow who became a nun fell outside of the consideration of the family attempting to preserve the patrimony and support its members.

If the widow did not join the church (and the majority did not), she might either remain single or choose to remarry. If she remarried, the widow again fell under the strictures of coverture and its attendant legal disadvantages. Any land she might acquire from the patrimony would again fall under the sway of her husband. Thus a widow who remarried was, in the eyes of the distributors of the patrimony, no better than her married sisters.

However, English society of the thirteenth century was clearly uncomfortable with the idea of a woman of independent means. Kathleen

54 See Year Book 20 & 21 Edward I 20, for a case in which a nun figured.
Casey has commented that study of women in urban occupations, who were of necessity at least partially financially independent, reveals an antagonism between the economic potential of women and the legal structure of the Anglo-Norman bureaucracy. It has already been demonstrated that the legal system of the twelfth and thirteenth century acted on the assumption of the subjection of women to men. The antagonism discovered by Casey can then be seen as an institutionalized lack of acceptance for women who were not so subjected.

Independent women in medieval English society clearly lacked cultural affirmation and value. As in many societies, there was an opposition between the public orientation expected of men and the domestic orientation expected of women. For instance, chroniclers writing after the Norman Conquest were surprised at women who played active roles in government and war, which represented a clear change in attitude from the Anglo-Saxon period and emphasized the shrinking opportunities for public life available to women after the Conquest. Also, there were

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56 Frederick Pollock and F. W. Maitland have stated that “it is rare ... to find that any large mass of land long remains in the hands of a feme sole.” Frederick Pollock and F. W. Maitland, “Inheritance and Descent,” in Laurence Krader, Anthropology and Early Law (New York: Basic, 1966) 227.


religious justifications for the inferiority of women and the exclusion of women from public life.\textsuperscript{59}

The difference in expected orientation is also clearly visible in the legal activities of men and women. Despite the fact that widows had the same legal property rights that men had, they lacked access to the informal types of influence and authority which were also important in lawsuits.\textsuperscript{60} They also lacked the types of networks of assistance in legal dealings available to men; women in Brigstock had substantially smaller networks than their brothers or husbands. Married women in Brigstock relied upon their husband's associations, whereas the few unmarried women relied on their natal kin.\textsuperscript{61} These smaller networks, which directly limited the influence available to women, indicate that widows were less likely to be able to maintain their land in an era of legal struggle. They also reflect the discomfort of the medieval English with women in public life. It has already been noted that seizin of land could be defined as a male prerogative. The exclusion of women from the seizin of land in most circumstances can be seen as an important facet of their general exclusion from power in public life.

In this situation grants of land from the patrimony to independent widows can clearly be seen as socially unacceptable as well as legally unwise. In addition to the fact that an independent widow controlled her

\textsuperscript{60} Palmer, \textit{Wilton Dispute} 147.
\textsuperscript{61} Bennett, \textit{Women in the Medieval English Countryside} 133-138.
own land and was not under the dominion of a male from the lineage, the
act of granting her land thrust her forth into public life, a sphere where she
did not truly belong and was less likely to be able to retain her land than a
man would be. Widows were thus no better as beneficiaries of land than
their married sisters.

C. Conclusion: The Fundamental Incompatibility Between the Role of a
Woman and the Role of a Landholder

The preceding material has indicated and explained that women,
whether married or widowed, were poorly situated to want to preserve or be
able to preserve parts of the patrimony which might have been distributed to
them. It has been explained already that women were at the limits of the
lineage which traced its descent through the male line. Women were thus
doubly unlikely to receive parts of the patrimony.

However, the underlying conception of women and their proper role,
which limited a woman's ability to participate effectively in public
functions, such as landholding and court suits, also hampered her ability
to gain access to the patrimony. It affected her both as a wife, who was
under coverture to her husband, and as a widow, whose independence
contradicted the assumption that women's role was in the private sphere.

The late twelfth and thirteenth centuries were a time of social and
legal change, in which it became economically and socially prudent to
restrict the distribution of the patrimony. The lands of the family had to be
preserved for the heir. In a climate which stressed preservation of the
lands belonging to the lineage, it was particularly unwise to grant familial
lands away to women. Both as wives and widows, daughters who were granted a share in the family lands were likely to take them beyond the control of the family and eventually out of the lineage.
Conclusion

In the preceding chapters the reasons why the maritagium died out and the gift in tail survived during and after the thirteenth century have been examined. The social and economic changes of the thirteenth century have been discussed, and these have been linked with both the developments in the legal system and with the specific changes made in the legal structures of the gift in tail and the maritagium. In this conclusion, an overview of these points will be made.

In the first chapter the social and economic crisis of the thirteenth century was discussed. The “minores,” who might also be described as gentry, were attempting to maintain or even improve their position in a time of social and economic change. While there were no drastic discontinuities in the thirteenth century such as the civil war between Stephen and Matilda had been in the twelfth, there were a number of factors which combined to put the position of men who stood in the middle and lower tiers of the feudal hierarchy at risk. The primary economic factor was the steady inflation rate which dramatically increased prices during the thirteenth century. Even though moments of peak inflation were often abated by recoinage, the overall rise of prices is clear from records cited in chapter one.

During the thirteenth century there was also a sharp hunger for land which caused new settlement in all areas of England. This was reflected in an active land market in which all social and economic groups
participated.\textsuperscript{1} Gentry who were unable to adopt strategies of balancing their demesne production and rent incomes were forced to sell out, providing increased land and hence flexibility for the survivors. The land market was not necessarily a desperate resort for all Englishmen; Edward Miller has theorized that the economic changes of the thirteenth century were based in the increasing confidence of landlords rather than their desperation.\textsuperscript{2} However, the land market created a view of land as a commodity to be bought and sold rather than the source of capital and the motivating force behind personal relationships.

The land market also had effects in both the social and legal realms. Socially, it broke the personal bonds between lord and tenant by introducing artificial links into the feudal chain. This breakdown occurred in a time when custom was being made into abstract, objective law and removed from the realm of the seigniorial authority to that of the royal authority. The process of removing suits from the seigniorial court into the royal court had begun during the twelfth century, but there can be no doubt that land sales, by increasing the number of lords who had no courts, assisted the process.

The royal court, unlike the seigniorial court, in which the participants were united by common bonds and oaths, and often by common knowledge as well, had to enforce standards of objective proof. Although

\textsuperscript{1} Even villeins were able to become involved in the land market. See M. M. Postan, "The Charters of the Villeins," in M. M. Postan, \textit{Essays on Medieval Agriculture and General Problems of Medieval Society} (Cambridge: Cambridge UP, 1973) 107-149.

contradictory rulings, such as those cited in chapter four, clearly show that discretion was involved in the judicial proceedings at the royal level, they show that the discretion used was in enforcing and interpreting a set of abstract standards. It was not intention, but action, that was important in the realm of the royal courts. The repeatedly cited case of the transfer of Whilton manor is a clear demonstration of the need for objective proof.

The new tendency towards abstraction is also apparent in the compilations of laws and customs that began to appear during the late twelfth century. These compilations are an attempt to codify custom and to make it into a single cohesive body of law. This tendency is especially apparent in Britton, the late thirteenth century compilation, which purported to be a royal enactment.3 The royal legislation of the thirteenth century, especially that of Edward I, also acted to make the law into an abstract body, with objective rules, rather than a flexible body of custom maintained by memory and changing with circumstance.

Thus the thirteenth century could be described as a time of abstraction. Land became an abstract commodity; law became an abstract body of rules; personal feudal relations were replaced by a contractual relationship between a vendor and a buyer. From this abstracted world one must turn to the more intimate world of the family, to examine the role of younger children and the question of gender.

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The concept of the lineage, which has already been described in chapter three, was clearly part of the aristocratic ideology of England. Primogeniture, the chief inheritance custom of England, which was the sole inheritance custom for knight's fees, clearly supported the dynastic view of the family suggested by lineage ideology. David Herlihy has reported that primogeniture became common on the Continent at the beginning of the fourteenth century, replacing partible inheritance with a strategy of entail and granting younger members of the family moveables.\textsuperscript{4} It does not seem coincidental that this change of strategy was occurring at the same time that the English gentry was limiting the gifts of land given to daughters and phasing out the customary form of marriage-portion in land. While the exact causes for the change in family strategy on the Continent are not within the scope of this thesis, the lineage ideology that drove the changes was clearly found both in England and on the Continent.\textsuperscript{5}

Lineage ideology emphasized the role of males and de-emphasized the role of females in family strategy. Daughters were still important in forging links with other dynasties, but their children were considered to be members of another lineage, and all heirs who could trace descent through

\textsuperscript{5} Developments on the Continent often closely parallel English developments during the Middle Ages; so long as the English king ruled large portions of France, they were closely tied to France. One instance of this parallel development is the limitation on mortmain alienation. The English ban on such alienation was made in 1279; a French law called the \textit{Constitutio ecclesiarchum utilitati} definitively banned mortmain gifts in 1275. Sandra Raban, \textit{Mortmain Legislation and the English Church 1279-1500} (Cambridge: Cambridge UP, 1982) 21.
the male line, even through younger sons, were to be preferred over them. Because of this, distribution of lands to daughters was a family strategy which ceased to make sense; it was a means of detaching land from the patrimony and granting it to another lineage, from which it was unlikely to return.

The specific form of the maritagium has been shown in chapter three to be unsuitable as a form of land conveyance in an era of increasing legal abstraction. In the late twelfth century, Glanvill was able to provide the legal historian with a clear definition of maritagium and how it was to be administered; by the time that Bracton wrote, the consensus on what a maritagium was had already begun to erode. Although he was still able to give a description that matched Glanvill's in most particulars, Bracton was clearly confused about what might be called a maritagium. By his time, two generations after Glanvill, the inexplicit maritagium was already in the process of being replaced by the gift in tail: an abstract form of gift which was governed by general rules under which specific types of gift might be made. The origins of the gift in tail lay in the maritagium, as both medieval and modern legal scholars have recognized. It might be characterized as the thirteenth century improvement upon the customary gift of the preceding centuries.

The private, familial marginality of women -- the fact that they were the heirs of last resort -- was matched by their public submission to male

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authority and their lack of public power. Coverture was the public symbol of female subjection; a woman passed from the potestas of her father to the potestas of her husband. She could gainsay neither of them. The widow, who was rewarded for outliving her husband by the legal ability to exercise power over land that normally was restricted to males, was an anomaly.

Control over land was a public function in England. The feudal relationship was originally envisaged as a relationship between man and man. A woman could not personally perform military services, and thus her role as a landholder was necessarily limited. But in the increasingly abstract world of the thirteenth century the feudal relationship had fallen by the wayside. Seigniorial control over land was a thing of the past. The logic which had barred female participation in the public exercise of landholding was an ancient reminiscence that had no more relation of the reality of the late thirteenth century than the feudal levy which the king could call to his service. In the interest of justice women had to be allowed increasing amounts of power over land. This led to a number of developments, of which the most important was the increase in the rights of wives and widows who wanted to protect their lands from the depredations of husbands whose interests did not always coincide with that of their wives.

Although the abstractions of the legal system allowed wives and widows increasing freedom, that freedom remained fundamentally at odds with the public understanding of women. Robert Palmer has said, "medieval England did not have even a lurking suspicion that women as
persons might be equal to men," and he was right.\textsuperscript{7} The tensions between the freedoms that a legal system may grant to women and their actual ability to exercise those freedoms are still evident today. They were also evident in medieval England. The court and the king's law might protect a woman from the inequities of coverture; no one ever said that coverture, which kept women in a secondary status, implying that they required men to mediate between themselves and the law, was the problem in and of itself.

The private nature of female children and their marginality in their families combined to make them the least likely to gain access to the valuable land resources of the patrimony. Originally younger sons had less access to land than daughters; while Glanvill clearly sanctioned marriage portions for daughters, he made no provisions for the support of younger sons from the patrimony.\textsuperscript{8} T. F. T. Plucknett has stated that the change between Glanvill's view and the view held later by Bracton -- that all land was alienable -- was caused by the imposition of primogeniture as an inheritance custom on lands which had previously been partibly inherited. Plucknett has dated this change at about 1200, but was unsure of the reasons behind the change, or even whether there was a deliberate policy of favoring primogeniture; he theorized that a few decisions by the king's court might have tipped the balance in favor of one of two competing


inheritance customs. Frederick Pollock and F. W. Maitland have also noted a change in inheritance customs, although they place it slightly earlier. They state that the judiciary of Henry II adjudged that testamentary alienation of land was prejudicial to the heir and that the same judges or their immediate successors decided that the consent of the heir would no longer be necessary for an inter vivos gift. The link between the change discussed by Pollock and Maitland and the change discussed by Plucknett is clear: they are another pair of rungs on the ladder leading from both feudalism and pre-feudal estates in land towards that estate which the modern person would describe as individual ownership of land.

If the statements of Plucknett and Pollock and Maitland are correct, then during the thirteenth century English developments roughly paralleled the developments Herlihy has set forth for the Continent. There was a change in the strategies used to maintain the lineage. In England, however, younger sons were not yet to be completely excluded from the land resources of the patrimony. The legal devices to grant land to younger sons, the inter vivos gift and later the gift in tail, came into being in the early thirteenth century. The exclusion of younger sons would not occur until the sixteenth century in England. However, times were tight in the

thirteenth century. In order to maintain the family, sacrifices had to be made. One of those sacrifices was the gift in land made to a daughter on her marriage; land was a valuable commodity, and daughters were the least important of the offspring. It was while these social and economic developments were occurring that an attempt to set up the customs of England into an abstract and coherent legal system was being made. The standards of this increasingly codified and objective legal system made the maritagium, the traditional marriage-portion, obsolete; it was replaced by the gift in tail, which was more versatile. In the final analysis these were the reasons why it survived and the maritagium faded away.
Appendix I

'De Viris Religiosis,' 1279
(also known as the Statute of Mortmain)

The king to his justices of the bench, greeting. As it was once provided that men of religion should not enter anyone’s fees without the licence and will of the chief lords from whom those fees are immediately held, and men of religion have, notwithstanding, from then until now entered both their own fees and those of others, appropriating them to themselves, buying them, sometimes receiving them from others as a gift, whereby the services which are due from such fees and which were provided from the beginning for the defence of the realm are unjustifiably withdrawn and chief lords in respect of them lose their escheats, We wishing for the benefit of the realm a suitable remedy to be provided for this have, on the advice of the prelates, earls and others faithful subjects of our realm who are of our council, provided, established, and ordained that no religious or any other person whatever shall presume on pain of forfeiting them to buy, sell, [or] receive from anyone under colour of gift or term of years or any other title whatsoever, or by any other means, art, or artifice appropriate to himself lands or tenements, whereby such lands and tenements come in any way into mortmain. We have provided also that if any religious or any other presumes by any means, art, or artifice to contravene the present statute it shall be lawful for us and the other immediate chief lords of the fees so alienated to enter it within a year from the time of such alienation and hold it in fee and heritably. And if the immediate chief lord is negligent and does not wish to enter such fee within
the year, then it shall be lawful for the lord immediately above to enter the fee within the following half year and hold it as aforesaid; and so each mediate lord shall do if the nearer lord is negligent in entering such fee as is aforesaid. And if all such chief lords of such a fee who are of full age and within the four seas of England and not in prison are negligent or remiss in this regard for the space of one year, we immediately the year from the time when such purchases, gifts, or acquisitions in other ways happen to be made is over shall take possession of such lands and tenements and enfeoff others with them for certain services to be rendered to us for them for the defence of our realm, saving to the chief lords of those fees the wards, escheats and other things pertaining to them and the due and accustomed services therefrom. And therefore we command you to have the aforesaid statute read before you and henceforth firmly kept and observed. Witness the king at Westminster, 14 November.

Appendix II

‘De Donis Conditionalibus,’ 1285

First, concerning tenements which are often given upon condition, that is, when someone gives his land to some man and his wife and the heirs begotten of the same man and woman with the added condition expressed that, if the man and woman should die without heir begotten of them, the land so given should revert to the donor and his heir; also in the case when someone gives a tenement in frankmarriage, which gift has a condition attached, though it is not expressed in the deed of gift, which is, that if the man and woman should die without heir begotten of them, the tenement so given should revert to the donor or his heirs; also in the case when someone gives a tenement to somebody and the heirs issuing of his body: it seemed, and still seems, hard to such donors and heirs of donors that their wish expressed in their gifts has not heretofore been observed and still is not observed. For in all these cases, after offspring begotten and issuing from those to whom the tenement was thus conditionally given, these feoffees have hitherto had the power to alienate the tenement so given and to disinherit their own issue contrary to the wish of the donors and the form expressed in the gift. And further, when on the failure of the issue of such feoffees the tenement so given ought to have reverted to the donor or his heirs by the form expressed in the deed of such a gift, notwithstanding the issue, if any there were, had died, they (the donors) have heretofore been barred of the reversion of the tenements by the deed and feoffment of those to whom the tenements were this given upon condition, which was manifestly against the form of their gift. Wherefore the lord king,
perceiving that it is necessary and useful to provide a remedy in the aforesaid cases, has enacted that the wish of the donor, according to the form manifestly expressed in the deed of gift, is henceforth to be observed, in such wise that those to whom the tenement was thus given upon condition shall not have the power of alienating the tenement so given and thereby prevent it from remaining after their death to their issue, or to the donor and his heirs if issue fail either because their was no issue at all or because if there was issue it has failed by death, the heir of such issue failing. Neither shall, henceforth, the second husband of such woman have anything by the curtesy after the death of his wife in a tenement so given upon condition, or the issue of such woman and second husband have hereditary succession, but instead immediately after the death of the man and woman to whom the tenement was so given, it shall revert after their death either to their issue or to the donor or his heir as is aforesaid. And because in a new case a new remedy must be provided the following writ is to be made as required: Command A. to render to B. justly etc. such and such a manor with appurtenances which C. gave to such and such a man and such and such a woman and the heirs of the body of that man and woman

OR which C. gave to such and such a man in frank marriage with such and such a woman and which after the death of the aforesaid man and woman ought, by the for of the aforesaid gift, to descend to the aforesaid B., the son of the aforesaid man and woman
OR which C. gave to so and so and the heirs of his body and which after the death of the same so and so ought by the form etc. to descend to the aforesaid B., the son of the aforesaid so and so.

The writ whereby the donor has his recovery when issue fails is in common use in the chancery. And it is to be understood that this statute applies to the alienation of a tenement contrary to the form of a gift made after the statute, and does not extend to gifts made before it. And if a fine is levied hereafter of such a tenement, it is not to be legally binding, and the heirs or they to whom the reversion belongs will not be bound to lay their claim even if they are of full age, within England, and not in prison.

Appendix III

‘Quia Emptores,’ 1290

Quia emptores terrarum et tenementorum de feodis magnatum et aliorum in praebijicium eorum et temporibus retroactis multoties in feodis suis sunt ingressi, quibus libere tenentes eorum et magnatum et aliorum terras et tenementa sui vendiderunt, tenenda in feodo sibi et haereditibus suis de feoffatoribus suis et non de capitalibus dominis feodorum, per quod iidem capitales domini eschaetas, maritagia, et custodies terrarum et tenementorum de feodis suis existentuim saepius amiserunt; quod quidem eisdem magnatibus et aliis dominis quam plurimum durum et difficile videbatur et similiter in hoc casu exhaereditio manifesta; dominus rex in parlamento suo apud Westmonasterium post Pascha anno regni sui XVIII° videlicet in quindena Sancti Johannis Baptistae, ad instantium magnatum regni sui, concessit, prvidit et statuit, quod de cetero liceat unicuique libero homini terram suam seu tenementum sive partem inde pro voluntate sua vendere; ita tamen quod feoffatus teneat terram illam seu tenementum de eodem capitali domino et per eadem servitia et consuetdines per quae feoffator suus illa prius tenuit. Et si partem alium earundem terrarum seu tenementorum suorum alicui vendiderit, feoffatus illam teneat immediate de capitali domino, et oneretur statim de servitio quantum pertinet sive pertinere debet eodem domino per particula illa, secundem quantitatem terrae seu tenementi venditi; et sic in hoc casu decidat capitali domino ipsa pars servitii capienda per manum feoffatoris, ex quo feoffatus debet eodem capitali domino, juxta quantitatem terrae seu tenementi venditi, de particula illa
servitii sic debiti esse intendens et respondens. Et sciendum quod per preadictas venditiones sive emptiones terrarum et tenementorum, seu partis alicujus eorumdem, nullo modo possunt terrae seu tenementa illa in parte vel in toto, ad manum mortuam devinire, arte vel ingenio contra formam statuti super hoc dudum editi, etc. Et sciendum quod istud statutum locum tenet de terris venditis tenendis in feodo simpliciter tentum, etc. et quod se extendit ad tempus futurum; et incipiet locum tenere at festum Sancti Andreae proximo futurum, etc.


Because purchasers of lands and tenements belonging to the fees of magnates and others have often in past times entered into their fees to the prejudice of those magnates and others, in that their free tenants have sold their lands and tenements to the purchasers to be held in fee by them and their heirs of their feoffors and not of the chief lords of the fees, whereby the same chief lords have very often lost escheats, marriages, and wardships of lands and tenements belonging to their fees, a thing which seemed to those magnates and other lords exceedingly hard and hard to bear and tantamount in this case to manifest disinheritance, the Lord King in his Parliament at Westminster after Easter in the eighteenth year of his reign, namely on the quindene of St. John the Baptist, at the instance of the magnates of his kingdom, granted, provided, and enacted that henceforth it is to be lawful for each free man to sell at will his land or tenement or part thereof, so, however, that the feoffee shall hold that land or tenement of the same chief lord and by the same services and customs his feoffor previously
held them by. And if he sells some part of those lands or tenements of his to anyone, the feoffee shall hold it immediately of the chief lord and be charged at once with as much service for that portion as pertains or ought to pertain to the same lord in accordance with the amount of land or tenement sold; and so in this case, that part of the service which is exactable by the feoffor shall fall to the chief lord, since the feoffee ought to be intendant and answerable to the same chief lord, according to the amount of land or tenement sold, for that portion of the service so due. And it is to be understood that by the aforesaid sales or purchases of lands or tenements, or any part of them, those lands and tenements can in no way, in part or wholly, come into mortmain, by art or by artifice, contrary to the form of the statute ordained on this some time ago etc. And it is to be understood that the present statute is applicable only to lands to be held in fee simply, and that it applies to the future; and it will begin to take effect at the feast of St. Andrew etc.

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