# I. THE CONSEQUENCES OF THE ASSIZES OF HENRY II

1. Some 15th century definitions:
   a. fee simple “to A and his heirs” the highest estate, freely alienable, not devisable, descendible generally
   b. fee tail “to A and the heirs of his body” it may descend only to A’s issue, freely alienable but the alienee takes subject to the interest in the heirs of A’s body
   c. dower is a life estate in the widow in 1/3 of all lands of which her husband was seised at any time during the marriage in fee simple or fee tail, which land the heir of the marriage, had there been any, could have inherited
   d. curtesy is a life estate in the widower in all of the lands of which his wife was entitled to be seised during the marriage in fee simple or fee tail, which the heir of the marriage could have inherited, so long as a child is born to the marriage who cries to the four walls.
2. The operation of warranty
   a. Lord A seises Tenant B of land and takes his homage. Then he seises tenant C of the same land and takes his homage.
      i. Tenant B on the land Tenant C brings a writ of right in Lord A’s court. If A tries to put C on the land novel disseisin. If A defaults, tolt and *pone*; C vouches A to warranty in the central royal courts.
      ii. Tenant C on the land Tenant B brings a writ of right in Lord A’s court. Same possible two results. This means that Lord A can’t do right.
      iii. Lord A dies, fitz A held to the same thing
      iv. Tenant B dies, fitz B does the same with mort d’ancestor

      Therefore, free alienability *inter vivos* is the consequence of warranty.
   b. Lord A leaves the land to Tenant B in his will
      i. If B gets on the land before fitz A, fitz A sues him in mort d’ancestor.
      ii. If fitz A gets on the land before B, B sues a writ of right in fitz A’s court, but with a difference: Fitz A has no obligation to honor B’s claim, because there’s no warranty to B. Why? No homage. You can’t do homage to a dead man, and fitz A is not bound to warrant his ancestor’s will.

      Therefore no devisability is a consequence of warranty.
   c. Tenant B seises Subtenant C of the land and takes his homage. Lord A does not like Subtenant C.
      i. If Subtenant C is on the land, he is protected by novel disseisin; if he is not, he is protected by writ of right (this time brought in B’s court), and his heir is protected by mort d’ancestor unless Tenant B defaults in service.
      ii. If Tenant B tries to substitute Subtenant C for himself, then Lord A still has discretion; hence almost all conveyances are by subinfeudation.
   d. Prittlewell case

28:M04—Hugh Butler mort d'ancestor vs. C. de P., she essoins

28. Michaelmas, 1204.Essoins probably for sickness in coming to court. "Essex.Cecilia de Polstead against Hugh Butler concerning a plea of the assize by Robert son of Martin.To the octave of St. Martin [17 November].He has sworn.And all the recognitors do not come.Therefore let them all be attached."PKJ 3 (SS 83, 1967) 178, no 1057.

29:M04—H. de P. essoins v. H. Butler in plea of homage

29. Michaelmas 1204.Essoins probably for sickness in coming to court. "Suffolk.Hugh de Polstead against Hugh Butler about a plea of homage by Simon de Polstead.To the octave of St. Martin [17 November].He has sworn."PKJ 3:177, no 1048.

30:M04—H.B. vs. C. de P. the assize comes, she vouches H. de P.

30. Michaelmas, 1204. "Essex.The assize comes to recognize if William Butler father of Hugh Butler was seised in his demesne as of fee of forty acres of land with appurtenances in Prittlewell [Essex] on the day on which he died and if he died, etc., which land Cecilia de Polstead holds, who comes and says that she claims nothing except her dower in that land, and she calls to warrant Hugh de Polstead her son.And let her have him on the octave of St. Hilary [20 January], and she prays aid of the court.The same day is given to the recognitors who were present and who essoined themselves and to Robert 'Pointell''."CRR 3:226.

35:P05—H. de P. essoins

35. Hilary, 1205.Essoins for sickness in coming to court."Suffolk.The bishop of Norwich claims his court about this.Hugh de Polstead against Robert de Coddenham about a plea of land by Samson son of Ralph.To the same term [Easter].The same Hugh whom Cecilia his mother calls to warrant against Hugh Tailor [*parmentarium*] about a plea of the assize by the same Samson."PJK 3:214, no 1416.

38:M05—H. de P. makes fine, ? same case

38. *Id*.Amercements by Geoffrey fitz Peter. "Hugh de Polstead renders account of a half a mark for the same [disseisin].In the treasury a pound.And he is quit."*Id*. 251.

Note: 35:H05—bp. of Norwich claims his court, Cecilia calls H. to warrant

Tentative conclusion: Cecilia de Polstead vouches Hugh Jr. to warranty because Hugh Sr. has given away her dower land to his butler.

e. Walter de Grancurt's case--no.46

46.Easter, 1206."Norfolk.The jury comes to recognize if Ascelina de Candos, mother of Avis, wife of Hugh de Polstead, was seised on the day on which she died of one carucate of land with its appurtenances in Burnham as of her maritagium which was given to her by William de Grancurt, father of the aforesaid Ascelina, and if Walter de Grancurt with force and arms intruded himself on that land while this Ascelina was in her sickness of which she died and though that intrusion remained on that land after the decease of this Ascelina.The jurors say that William de Grancurt gave the aforesaid land to Hugh de Candos in maritagium with the aforesaid Ascelina, and she held that land as her maritagium all her life; and while she lay in her infirmity of which she died, fifteen days before her death Walter came with a multitude of people and put himself on that land and thus he held it from then to now.It was considered that Hugh de Polstead and Avis his wife and William de Gimingham and Juliana his wife have

seisin of that land of which Avis and Juliana are the heirs of this Ascelina. And Walter is in mercy." Id. 102.

i. He gave the land to Hugh de Candos along with Ascelina; suppose Hugh had survived Ascelina; if W. took Hugh's homage case proceeds as above; if he did not, Hugh is still entitled by the curtesy of England.

ii. Now we'll see why he may not take Hugh's homage. Hugh de Candos and Ascelina die without heirs of their bodies--the land should revert to Wm. and his heirs, but if he's taken Hugh's homage what is to prevent Hugh's heir general from claiming warranty? -- thus the 3-generation maritagium – contract, *Glanvill* says, in the church courts

iii. Hugh and Ascelina convey to Sir Hugh Polstead and take his homage; then little Juliana tries to claim that she is H & A's heir; she's s.o.l. that's Bracton's rule –> formedon

iv. What happened here? Walter tries to take the land back and is sued in mort d'ancestor – the real issue is are Ceclia and Juliana entitled – possible that Walter thought the land limited to male heirs

f. Thus, the logic of warranty made for a system in which all free holdings were freely alienable but not devisable. The logic of warranty came to attach to the endowment at the church door leaving the heir compelled to warrant both his mother/stepmother and the gifts of his ancestor, and curtesy can be seen as the almost inevitable consequence of the fact that the lord normally took the homage of the husband of the heiress. Already by the beginning of Henry III's reign the lord's relation to the land has become considerably more tenuous than what it had been fifty years earlier.

3. What's left for the lord? Knights' fees commuted to money early – wardship, marriage, relief, escheat – let's go back to example (2)(c))

a. Tenant B has a younger brother Subtenant C whom he seises and takes his homage for a rose at midsummer; Tenant B than dies and his heir is a minor; Lord A gets a lot of roses at midsummer

b. Suppose Subtenant C dies and leaves a minor heir; he's in his grandfather's wardship and Lord A is s.o.l. –> Quia Emptores

4. Now we're ready to look at the statutes (*Mats.* pp. V-12 to V-13)

a. *De Donis* (1285) –> formedon in the descender

First, concerning the frequent gifts of tenements upon condition, namely: when anyone gives his land to a man and his wife and to the heirs born of that man and that woman adding the express condition that if such man and woman die without heir born of that man and woman the land so given shall revert to the donor or his heir; and also in case where anyone gives a tenement in *liberum maritagium,* which gift has an inherent condition, although it may not be expressed in the charter of the [particular] gift, which is as follows, that if the man and woman die without heir born of themselves the tenement so given shall revert to the donor or his heir; and also in the case where anyone gives a tenement to [a donee] and to the heirs issuing from his body, it has seemed and still seems hard to the donors and to the heirs of donors that their will [as it is] expressed in their gift has not hitherto and still is not observed. For in all the aforesaid cases, after issue has been begotten and born of those to whom the tenements were so given conditionally, such feoffees have hitherto had the power of alienating the tenement so given disinheriting their issue of that tenement against

the will of the donors, and the express form of the gift. And furthermore whereas upon failure of issue of such feoffees the tenement so given ought to revert to the donor or to his heir according to the form expressed in the charter of gift, [the donor or his heir] has hitherto been excluded from the reversion those tenements by the deed and feoffment of those to whom the tenements have been so given upon condition, notwithstanding that any issue [born of them] has died, which was clearly contrary to the form of the [donor's] gift.

And therefore the lord king, considering that it is necessary and useful to supply a remedy in the aforesaid cases has laid down that the will of the donor, according to the form clearly expressed in the charter of gift, shall henceforth be observed; [something may have happened to the drafting here] so that those to whom a tenement is so given upon condition shall not have power of alienating the tenement so given in such a way that it will not remain to the issue of those to whom it was so given after their death, or to the donor or to his heir if issue fails, whether because there was no issue at all or [because] there was issue but it failed by death without an the heir [of the body] of such issue. Nor from henceforth shall the second husband of such a woman have any [right] in a tenement so given upon condition after the death of his wife by the [curtesy] of England, nor shall the issue of the woman and her second husband [have any right of] hereditary succession. But immediately upon the death of the man and woman, to whom a tenement was so given, [the tenement] after their death [shall] either pass to their issue or shall revert to the donor or to his heir as is aforesaid.

And because in a new case a new remedy must be supplied, the demandant shall have writ like this: "Command A. that he is justly, etc., to yield up to B such manor with the appurtenances which C. gave to such a man and such a woman and to the heirs issuing from that man and that woman; *or* which C. gave to such a man in *liberum maritagium* with such a woman, and which after the death of the aforesaid man and woman ought to descend to the aforesaid B., the son of the aforesaid man and woman, by the form of the aforesaid gift, as he says; *or*, which C. gave to [a donee] and to the heirs issuing from his body, and which after the death of that [donee] ought to descend to the aforesaid B., the son of that [donee] by the form [of the aforesaid gift]."

The writ by which the donor may have his recovery upon failure of issue is in common enough use in the Chancery.

And be it known that this statute shall apply to the alienation of a tenement contrary to the form of [any such] gift to be made hereafter, and shall not extend to gifts previously made. And if a fine shall hereafter be levied concerning such a tenement, it shall be void by [the operation of] the law itself, and there shall be no need for the heirs or those to whom the reversion belongs, even though [at the time of the fine] they are of full age and within England and not in prison, to put in their claim.

b. *Quia Emptores* (1290) –> end of subinfeudation

Whereas the buyers of lands and tenements belonging to the fees of great men and other [lords] have in times past often entered [those] fees to the [lords'] prejudice, because tenants holding freely of such great men and other [lords] have sold their lands and tenements [to those buyers] to hold in fee [to the buyers] and their heirs of their feoffors and not of the chief lords of the fees, with the result that the same chief lords have often lost their escheats, marriages, and wardships of lands and tenements belonging to their fees; and this has seemed to the same great men and other lords [not only] very hard and burdensome [but also] in such a case to their manifest disinheritance:

The lord king in his parliament at Westminster after Easter in the eighteenth year of his reign, namely, a fortnight after the feast of St John Baptist, at the instance of the great men of his realm,[1] has granted, provided, and laid down that from henceforth it shall be lawful for any free man at his own pleasure to sell his lands or tenements, or [any] part of them; provided however that the feoffee shall hold those lands or tenements of the same chief lord and by the same services and customary dues as his feoffor previously held them. And if he sells to another any part of his same lands or tenements, the feoffee shall hold that [part] directly of the chief lord and shall immediately be burdened with such amount of service as belongs or ought

to belong to the same lord for that part according to the amount of the land or tenement [that has been] sold; and so in this case that part of the service falls to the chief lord to be taken by the hand of the [feoffee], so that the feoffee ought to look and answer to the same chief lord for that part of the service owed as [is proportional] to the amount of the land or tenement sold. And be it known that through the aforesaid sales or purchases of lands or tenements or any part of them, those lands or tenements must in no way, in part or in whole, by any scheming or contriving, come into mortmain contrary to the form of the statute lately laid down on this matter. And be it known that this statute applies only to lands to be held in fee simple; and that it applies [only to sales to be made] in the future; and it is to take effect at the feast of St Andrew next coming.

5. What we suggested gives us the answer to some very curious aspects of all of these:

   a. The fee simple is freely alienable and not devisable because of the logic of warranty. The development had already taken place around the beginning of the 13th century. The statute *Quia Emptores* simply put an end to a practice whereby lords were being deprived of the feudal incidents, the only thing about lordship that was worth much any more; it did so by abolishing subinfeudation. All conveyances of the fee must be by way of substitution. The lords gave up their now nominal right to object to new tenants.

   b. *De Donis* is the product of a much more complicated development, that begins with the gift in *maritagium*. Because no warranty is taken in such gifts, the law must develop rules shorn of the key element that it has used in other areas. First comes curtesy, what would have happened if the lord had taken his son-in-law's warranty. Then comes the curious rule that upon the birth of issue the couple have the right to alien the fee simple. This is reversed by the statute *De Donis* that says that if this happens the heirs of the body of the couple may bring a new form of action called formedon in the descender to get it back. The statute also confirms the practice of allowing actions of formedon in the reverter, for the father to get the land back if the issue die out, and formedon in the remainder, to allow the father's alienee to get the land back if the issue die out.

   c. Dower and curtesy are seen as rather old consequences of the logic of warranty, the first from the extension of warranty to benefit the dowager and the second the logical consequence of the fact the lord will normally take the homage of the husband for the wife's land.

6. There may not be time for this in class, but it's certainly worth thinking about:

   a. According to Plucknett (*Legislation*, pp. 131–5) the statute *De Donis* is perfectly clear up to 'henceforth observed'. At this point it descends into a total mess that seems to confine formedon in the descender to the first generation of issue in tail. It then proceeds to talk about 'such woman', though no woman has been previously mentioned. To Plucknett this suggested that the statute was amended to take out a phrase that dealt with women and to substitute a phrase that was intended, clumsily, to limit the tail to the first generation. Hengham who was the draftsman of the statute could not have been responsible for this, and Edward I and his council, concerned about dynasties (compare E's dealings with his own son-in-law), may have been. Be that as it may, Beresford's dictum 25 years later is amazing, but it does correspond to what we know about the 4-generation entail. According to Plucknett it is not until 1410 that we get a clear indication of the unbarrable entail. He does not add, though he might have, that by 1410 ways were being found that

were to culminate in the common recovery to bar entails by clever manipulation of warranties.

b. *Aumeye's Case* (1305), Y.B. 33–35 Edw. 1, p. 82: Hengham, CJ: "Do not gloss the statute, for we understand it better than you; we made it."

c. *Belyng v. Anon*. (1312), Y.B. 5 Edw. 2, SS vol. 31, p. 176 (C.P.), Baker and Milsom, *Sources*: pp. 52–3: "Bereford, CJ: He that made the statute meant the issue in tail to be within the statute as much as the feofees until the tail should [become fee simple] in the fourth degree. And it was only by his oversight that he did not bring the issue by express words in the statute. So we shall not abate this writ."

## II. THE PROBLEM OF PROOF

1. Let's try to list the methods of proof that have been used in the materials that we have examined so far:

   a. Ordeal

   b. Battle (might be thought of as a form of (a))

   c. Inquest

   d. Oath

   e. Witnesses

   All of these can be found in the Carolingian period, so it's not as if the folks in the early middle ages didn't know about them. Claim, denial (or confession) judgment proof. Effect of the Gregorian reform and the rediscovery of Roman law.

2. Assize of Clarendon, c. 1, 14 (Mats., p. IV–1, 3)

   1. In the first place the aforesaid King Henry, on the advice of all his barons, for the preservation of peace, and for the maintenance of justice, has decreed that inquiry shall be made throughout the several counties and throughout the several hundreds through twelve of the more lawful men of the hundred and through four of the more lawful men of each vill upon oath that they will speak the truth, whether there be in their hundred or vill any man accused or notoriously suspect of being a robber or murderer or thief, or any who is a receiver of robbers or murderers or thieves, since the lord king has been king. And let the justices inquire into this among themselves and the sheriffs among themselves.

   2. And let anyone, who shall be found, on the oath of the aforesaid, accused or notoriously suspect of having been a robber or murderer or thief, or a receiver of them, since the lord king has been king, be taken and put to the ordeal of water, and let him swear that he has not been a robber or murderer or thief, or receiver of them, since the lord king has been king, to the value of 5 shillings, so far as he knows.

   14. Moreover, the lord king wills that those who shall be tried by the law and absolved by the law, if they have been of ill repute and openly and disgracefully spoken of by the testimony of many and that of the lawful men, shall abjure the king's lands, so that within eight days they shall cross the sea, unless the wind detains them; and with the first wind they shall have afterwards they shall cross the sea, and they shall not return to England again except by the mercy of the lord king; and both now, and if they return, let them be outlawed; and on their return let them be seized as outlaws.

3. *Glanvill*, section 1.9 (Mats., p. IV–9)

   [9] If the tenant denies all the summonses, he shall swear twelve-handed in respect of each of them. If any one of the oath-helpers defaults on the appointed day, or if a lawful and unanswerable objection can be made to one of them on personal grounds, then the tenant loses his seisin at once on account of the default. If, however, the oath-helping is duly accomplished, then the tenant shall answer to the plea on that same day.

4. Polstead Saga, entry 33 (Mats., p. IV–35 to IV–36)

   33. [Michaelmas, 1204] "Robert de Coddenham [Suffolk] demands against Hugh de Polstead fourscore acres of land with appurtenances in Boxford [Suffolk] as his right and heredity of which Thomas his father was seised as of fee and right and in his demesne in the time of Henry the father of the king, etc., taking from it esplees to the value of half a mark, etc.; and this he offers to deraign by his free man named Ralph Picot who offers this, etc., as of his sight. And Hugh comes and defends his right and says that in the court of the abbot of St. Edmunds a duel was waged between them about the same land, and afterwards he essoined himself for sickness in coming to court and afterwards for bedsickness, and he lay in a county other than Suffolk. And since the same abbot did not have the power to have the view of him held by his knights, the same Robert obtained a writ of lord G. that he might be viewed by lawful men of the county of Surrey in which he lay and that they might give him a day at the first county of Suffolk. Hugh came to this county with his champion, and Robert essoined himself, and the four viewer knights of his sickness essoined themselves, and a day was given to them at the next county. And then Hugh came with his champion and Robert did not come or essoin himself, and by consideration of the court he withdrew without a day and about this he puts himself on the county of Suffolk. Robert, on the other hand, says that it is true that they were given a day at the first county and that he, Robert, essoined himself, and at the second county both of them appeared with their champions, and because the county did not have a record of the duel that had been waged, both of them were told to look after themselves as best they could, and thus they withdrew without a day. And he did not make any default, and on this he puts himself on the county. Afterwards Hugh said as he had previously said, that he appeared at the first county with his champion, and Robert essoined himself. And at the other county Robert made default because he did not come nor did his champion. And a day was given for a third county to hear their judgment, and then Robert came and his champion, and they were told to come to a forth county unarmed to hear their judgment. And then they came, and by consideration of the county Hugh withdrew without a day. On the other hand, Robert asked that it be allowed him that Hugh previously said that he withdrew at the second county without a day and afterwards he acknowledged that at the fourth county he withdrew without a day. A day was given to them in the octave of St. Hilary [21 January]." *Id*. 240.

5. Canon 18 of the Fourth Lateran Council (1215)

   18. [Clerics to dissociate from shedding-blood]
   No cleric may decree or pronounce a sentence involving the shedding of blood, or carry out a punishment involving the same, or be present when such punishment is carried out. If anyone, however, under cover of this statute, dares to inflict injury on churches or ecclesiastical persons, let him be restrained by ecclesiastical censure. A cleric may not write or dictate letters which require punishments involving the shedding of blood, in the courts of princes this responsibility should be entrusted to laymen and not to clerics. Moreover no cleric may be put

in command of mercenaries or crossbowmen or suchlike men of blood; nor may a subdeacon, deacon or priest practise the art of surgery, which involves cauterizing and making incisions; nor may anyone confer a rite of blessing or consecration on a purgation by ordeal of boiling or cold water or of the red-hot iron, saving nevertheless the previously promulgated prohibitions regarding single combats and duels.

6. Tancred of Bologna, *Ordo iudiciarius* 3.6 (a small piece of a long, but clear "how-to-do-it" book on how to run a proceeding in an ecclesiastical court; the work was written just before and just after 1215)

   We dealt above with the genus of proofs. Now let us look at them by species, and first, concerning witnesses, because living voice is stronger than dead. Nov.73.3. And since more cases are determined by witnesses than by the other proofs, and very frequently greater debate arises about the statements of witnesses than about the other proofs, let us therefore examine witnesses very fully, dividing the treatise on witnesses into many titles, on account of its prolixity. First, it is to be seen who can be witnesses and who not.