1993

The Medieval English Marriage Portion from Cases of Mort D'Ancestor and Formedon

C.M.A. McCauliff

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Property Law and Real Estate Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol38/iss4/2

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
THE MEDIEVAL ENGLISH MARRIAGE PORTION FROM CASES OF MORT D'ANCESTOR AND FORMEDON

C.M.A. McCauliff*

I. THE MARRIAGE PORTION AND THE WRIT OF MORT D'ANCESTOR ................................................. 935
   A. Definition of the Phrase “seised as of fee” .............. 936
   B. On Whose Seisin Should the Demandant Claim? .......... 941
   C. Problems Arising From Subsequent Alienation .......... 947
   D. Pleading in a Case of Mort d'Ancestor ................. 951
   E. Choice of Mort d'Ancestor or Formedon ............... 956
   F. Reversions after a Marriage Portion ..................... 962

II. THE MARRIAGE PORTION AND THE WRITS OF FORMEDON 968
   A. History of the Wrists of Formedon ....................... 969
   B. Counts for the Wrists of Formedon ..................... 981
   C. The Conditional Fee and Wrists of Formedon: Choice of Wrists Revisited ..................................... 990

III. CONCLUSION .............................................. 1000

In medieval real property law, the English marriage portion played a central role in the development of the doctrine of estates in land. At the outset of a marriage, the father of the bride made a gift to contribute to the economic support of his daughter and any children she might have, and he provided for the reversion of the land to him and his heirs if his daughter had no child.1 The writ of mort d'ancestor2 provided an early vehicle in the legal system for the child, after the mother’s death, to obtain what his (or, if there were no male heir, her) grandfather intended his grandchild to receive. Later on, writs of formedon,3 literally tailored to the form of the gift the bride’s father had given, came to

* Professor of Law, Seton Hall University School of Law; A.B. Bryn Mawr College; M.A., Ph.D. University of Toronto; J.D. University of Chicago. The author wishes to thank her research assistant, Helen M. Schinagl of the Class of 1994, for her help, excellent judgment and unfailing sense of humor.

1. For a discussion of the process involved in giving a marriage portion, see C.M.A. McCauliff, The Medieval Origin of the Doctrine in Land: Substantive Property Law, Family Considerations, and the Interests of Women, 66 Tul. L. Rev. 919, 923-29 (1992). A Fellowship from the American Bar Foundation facilitated the research for both this and the Tulane article.

2. For a discussion of the origin of the writ of mort d’ancestor, see infra notes 33-36 and accompanying text.

3. For a discussion of the origin of the writs of formedon, see infra notes 120-61, and accompanying text.
supplant the writ of mort d'ancestor. This Article will examine several thirteenth- and early fourteenth-century cases based on writs of mort d'ancestor and formedon to show the development of the doctrine of estates in land through the gradual emergence of substantive doctrines which ultimately provided explicit recognition of, and protection to, the rights of those holding marriage portions.4

There is a close connection between certain points in the remedies provided by the writs of mort d'ancestor and formedon in the descender, despite the fact that the writs of formedon did not originate from the writ of mort d'ancestor. Through the writ of mort d'ancestor Henry II gave protection to the tenant, in particular, from the rights exercised by the landlord and upheld in his court. The writs of formedon also responded to the litigants' need to describe their situations. More precisely, these writs described the circumstances under which marriage portions and what we call entailed estates were given and held. Perhaps the writs of mort d'ancestor and formedon in the descender looked all too similar, since many demandants, probably with the advice of their counsel, sued a writ of mort d'ancestor out of chancery when they would have been better served by a writ of formedon in the descender.

The development of the doctrine of estates required a redefinition of the use to which the writ of mort d'ancestor could be put.5 In fact, the uses to which the writ of mort d'ancestor was put were continually changing since its first purpose was described in the Assize of Northampton in 1176.6 The stricture that the tenant in tail could not use the writ of mort d'ancestor was certainly not known to the thirteenth century but resulted from the application of the doctrine of estates to the articles of the assize,7 especially to the article: was the ancestor seised in

---

4. Most of the cases which form the basis for this study are unprinted. They may be read at the Public Record Office in London. Translations of the quoted portions from these cases have been provided by the author, and the original text is quoted in parentheses after the translation. The translations of other sources are those of the editor or translator of the cited source.

5. Earlier on, the use of mort d'ancestor contributed its share to the development of the doctrine of estates in land.


8. For a discussion of the use of the assize of mort d'ancestor, see J.H.
demesne as of fee?  
Finally, it is important to emphasize that the unprinted cases which provide the basis for this study use technical terminology but not the same technical terminology that later writers of textbooks used to describe the theory of estates in land. While we might keep the eventual result and its terminology in mind, it is important to allow the process and the concepts in the early case law to be shown clearly. Imposing later terminology on early cases brings a false clarity that does not reflect the real story of these cases, the effort to grapple with the facts and to provide a meaningful solution to conflicts as they arose. The cases are short and do not exhibit the reflections of judicial opinions; nevertheless, it is only from these details that a picture of what it meant to be a litigant or a lawyer during the thirteenth century can emerge. In the early days, the writs, that is procedure, and the law of estates, that is substantive law, were so intertwined so as to be virtually indistinguishable; procedure was important in making the substantive law itself. Therefore, we can expect to find pleading giving rise to the issues in the case and in some sense shaping the substance of the law. The organization of the cases in this Article is designed to highlight the living process which makes the law.

I. The Marriage Portion and the Writ of Mort D’Ancestor

The early use of the word fee is extremely important to the later development of remedies for the marriage portion. Technically, the "fee" in England came to mean landed property held in return for service, and the earliest use of this definition occurred in a charter made at the end of the ninth century in Languedoc. 9 Bloch defined the fee as "basically an economic concept." 11 Professor Ganshof sketched the history of the way in which the word

Baker, An Introduction to English Legal History 257 (3d ed. 1990) (explaining assize as judicial procedure by which heir could recover seisin).
11. Id. The Germanic word for “fee,” in modern German Vieh, was related to the Latin pecus and meant either movable property in general or cattle. Id. In Gaul, the word lost its original meaning and context and came to mean remuneration. Id. at 166. Fee was a word popular in vernacular speech and was Latinized to feodum, and then came to replace beneficium, the Latin word for the vassal’s tenement. Id. at 167.
“fee” was used in England: “In England the word *feudum*, which was employed in its technical sense on the morrow of the Con-
quest, was extended very early to cover any form of free heritable
tenement . . . .” 12 Perhaps the most significant characteristic of
the fee at this early time was that it was given by a lord to his
tenant; as a result, the tenant usually had to answer for his tene-
ment in the court of his lord.

A. Definition of the Phrase “seised as of fee”

Ambiguity in the word *fee* is apparent in many cases from the
early thirteenth century. This ambiguity is to be expected since
the heritability which the word “fee” implied was as yet unquantifi-
ed. One result of this ambiguity, Bracton allowed, was that the
tenant had exceptions to the articles of the assize based on the
fact that the tenement demanded was a marriage portion. 13 But
there were many difficulties involved in deciding who was seised
in demesne as of fee. Bracton listed numerous exceptions which
the tenant could make to the articles of the assize based on each
word in the assize: seised, demesne and fee. 14 Additionally,
Bracton said that *ut de feodo* may mean either “as fee” or “as of
fee.” 15 Bracton’s observation may indicate a reservation shared
by other lawyers regarding the literal meaning of the word *fee*.
The marriage portion contributed to the need and pressure for a
clearer legal definition of “fee.”

Professor Thorne proposed one definition of the word *fee* as
it was used in the late twelfth century: “Fee” came to mean a
tenement held heritably. 16 The tenant who held as of fee could

12. F.L. Ganshof, Feudalism 111 (Philip Grierson trans., 1961). Further,
Ganshof noted:
In England, the heritability of fee was far from being generally estab-
lished in the period immediately following the Norman Conquest. The
two earliest charters of enfeoffment which we possess, dating from
1066/87 and 1085, seem to have contemplated nothing more than
grants for life, though it is worth noting that in both cases, fees did in
fact become hereditary. In the twelfth century, however, heritability
must be regarded as a characteristic feature of the English fee.

*Id.* at 135.

13. 3 Bracton on the Laws and Customs of England 285-86 (George E.
Woodbine ed. & Samuel E. Thorne trans., 1977) [hereinafter 3 Bracton On
Laws]. “[H]e [the tenant] may say by way of exception that nothing could
descend to the demandant by assise from a tenement . . . where it was given
in maritagium to such a one.” *Id.* at 286.

14. *Id.* at 269-75.

15. *Id.* at 274-75.

16. Samuel E. Thorne, English Feudalism and Estates in Land, 17 Cam-
bridge L.J. 193, 203 (1959). Thorne explained:
In the assise of mort d’ancestor the question put to the recognitor was
expect to have his “heir” inherit unless he alienated the tenement. The regulation of the amount of heritability and alienability any tenant had and the relationship between heritability and alienability were eventually clarified by the doctrine of estates in a series of ascending rights. The tenant for life could not expect his heir to inherit and could legitimately alienate only for term of his own life. A tenant in tail could only expect the heirs of his body to inherit and could alienate, at least for his own lifetime, with the possibility that after he died his heir would put forward a claim to hold that tenement. The tenant in fee simple, if he did not alienate, expected that his heir would inherit. The writ of mort d’ancestor played a part in providing a remedy for heirs of tenants who held in fee. This writ also later came to be used in claiming tenements once given in marriage.

Often times the exceptions brought concerning tenements held as marriage portions failed to relate to the fact that the tenement might not descend as an ordinary fee; rather, it was alleged that the ancestor did not die seised. That objection is somewhat strange since the assize of novel disseisin made it clear that the tenant of a freehold (or liberum tenementum) has seisin. In 1281, for example, the tenant in an action initiated by a writ of cosinage made the defense that the ancestor did not die seised and that the tenements were the right and marriage portion of his wife. The jury said that the ancestor did not die seised. Perhaps the record implied that “as of fee” was to be understood.

simply whether the ancestor had been seised in his demesne and “as of his fee.” Had he, in other words, held it as one normally held a fief, or had he held it as a pledge, or as a loan, or in some other way that made it evident that the land was another’s? If he had held it “as of his fee” his heir was to have seisin. But to hold land “as of one’s fee” in the late twelfth century meant to hold an estate for one’s life which one’s heirs would succeed by force of the original gift.

Id.

17. Id.


19. Writs of cosinage and ael are treated with writs of mort d’ancestor for the purposes of this Article. These writs became available in 1237. S.F.C. Milson, Inheritance by Women in the Twelfth and Early Thirteenth Centuries, in On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne 76 & n.79 (Morris S. Arnold et al. eds., 1981) [hereinafter Milson, Inheritance]. In the twelfth century, a writ of mort d’ancestor could only be used by children, siblings, and nephews or nieces of the deceased. The writ of mort d’ancestor, however, was supplemented in the early thirteenth century by writs available to grandsons (writ of ael), to great-grandsons (writ of besael), and to other blood relations (writ of cosinage). Baker, supra note 8, at 268 n.43.

20. JUST 1/151 m. 8; see also JUST 1/117A m. 3d (providing another exam-
But more likely it was too difficult to say, as Bracton suggested, that the ancestor died seised as of fee but that the fee in question had a special, limited descent. Later, even when the definition of fee had become clearer and fee not only signified heritability in general, but was also modified to show how much heritability was meant in a particular case, the concept of "fee" as heritability was still not free from difficulties.

The difficulty with tenurial arrangements that most bothered thirteenth-century lawyers was precisely the location of rights. In whose person did the fee lie? The doctrine of tenure by itself tended to obscure any precise definition of particular rights because no one actually "owned" the land; one tenant held of another, who was his lord, who in turn held of his lord.21 Every tenant had some right in such a case, but the exact definition of these rights was only explained in the later doctrine of estates. Once this doctrine developed fully, the rights of the tenant in demesne amounted to an "estate," which the tenant owned.

To be seised in demesne as of fee meant to have some rights of heritability and alienability, but these rights were still undefined at the beginning of the thirteenth century. The definition of heritability did not arise as a question for dispute in 1100 when the Coronation Charter of Henry I provided that a son could "rely" his father's tenements, and consequently, there was no difficulty in alienating tenements as gifts in marriage.22 But the practice of relieving the tenements of one's ancestor and then of alienating them provided the law with the experience of many problems as to what the rules of inheritance should be.

During much of the twelfth century, no precise legal concept of heritability existed. Nevertheless, some distinction between being seised as of fee, marriage portion, and inheritance was already being made when the century opened. In 1200, the phrase, "seised as of marriage portion" occurred: non fuit in seisina . . . set ipsi ut de maritagio.23 Three years later, in an assize of mort

---

21. This practice was later called subinfeudation. Baker, supra note 8, at 257.

22. For the text of the charter, see Select Charters, supra note 6, at 116.

d'ancestor, issue was joined on whether the ancestor died seised as of his inheritance or as of the marriage portion of his wife.24 The tenant admitted that the complainant's ancestor was seised: "he says that it is true that Stephen died seised of the tenement but as of the marriage portion of Gundreda des Musters, his wife."25 That is, the tenant argued that the complainant's ancestor died seised only of his wife's marriage portion. The parties put themselves on a jury to find whether the ancestor died seised as of right and inheritance or as of his wife's marriage portion, "whether she was seised on the day on which she died as of dower or as of fee and right because the land was given in marriage."26

In another assize of mort d'ancestor brought in 1203, issue was joined on whether the ancestor held as of fee or as of the marriage portion of his wife: "It is adjudged that the assise proceed in this form, namely whether Roger held that land as a fee or as a marriage portion by Wilbruga, whom he married."27 In a case in 1207, the issue was whether the ancestor died seised as of fee or as of the marriage portion of his wife. "It is adjudged that the jury be made on whether Roger, father of the aforesaid Roger, died seised of the aforesaid half knight's fee as of the gift of Radulfus Filliol or as of the marriage portion of Benceline his wife."28 Again, in 1207, issue was joined on whether the female ancestor died seised as of her dower29 or as of fee and right because the tenement was given to her in marriage.30

From these early examples it would seem that to die seised as of fee meant to have the right of heritability attaching to the tenement. The dower held by a widow was not her fee; similarly the marriage portion held by a widower was not his fee. The apparent contradiction arising from the two examples of 1207 is re-

24. 3 Curia Regis Rolls of the Reign of John 66 (1926).
25. Id. (dicit quod versum est quod Stephanus inde obiit saisitus, set sicut de maritagio Gundrede des Musters uxoris sue saisitus obiit).
26. Id. (utrum obiit saisitus sicut de hereditate sua et jure an sicut de maritagio Gundrede uxoris sue).
27. Id. at 325-26. (Consideratum est quod assisa procedat in hac forma, scilicet utrum Rogerus tenuit terram illam sicut feodum an sicut maritagium per Wiburgam, quam ductix in uxorem.).
28. 5 id. at 105. (Consideratum est quod jurata fiat, utrum scilicet Rogerus pater predicti Rogeri obiit saisitus de predicto feodo dimidii militis ut de feodo ex done Radulfi Filliol' an ut de maritagio Benceline uxoris sue).  
29. Dower was a life estate given to the widow from her husband's land. Baker, supra note 8, at 308.
30. 5 Curia Regis Rolls of the Reign of John, supra note 24, at 105 (utrum ipsa Asicia (sic) fuit saisita de predicta terra die qua obiit sicut de dote sua an fuit saisita die qua obiit ut de feudo et jure quia ei data fuit).
solved when the marriage portion is called a fee only as far as the heir of the body of the woman holding in marriage is concerned. The marriage portion was the woman’s “fee” in the sense that her heir, if the heir were her child, could inherit the marriage portion. The woman’s child, even if she had only a daughter, was the “next heir” to her marriage portion.

By the end of the twelfth century, the meaning of heritability came to be an important issue, very much complicated by the donation of marriage portions and similar gifts; by this time the assize of mort d’ancestor was already being used to recover marriage portions.\(^{31}\) Heritability was affirmed in practice, but lawyers had to find a good, working legal definition of heritability operable in judicial cases arising from different circumstances. The marriage portion fitted into the loose definition of heritability but only well enough to indicate that a more precise definition was needed.

Although he noticed that a tenant in the twelfth century may have held the same tenements that his father held before him, Professor Thorne took exception to the prevailing view that heritability was characteristic of twelfth-century English land law.\(^{32}\) Thorne is really suggesting that historians have assumed estates were always heritable, but he argued that this only developed during the course of the twelfth century. Thorne examined heritability before the Assize of Northampton (1176), when he tried to get at the difficulties involved in the concept of “ownership,” a topic

---

31. Plucknett commented that the writ of mort d’ancestor set the seal of authority on the idea of heritability. Theodore F.T. Plucknett, A Concise History of the Common Law 360 (5th ed. 1956) [hereinafter Plucknett, Concise History]. “The assize of mort d’ancestor seems to have been definitely directed against the lords, for the defendant was frequently a feudal lord who refused to admit the heir of his deceased tenant to succeed him, and the assize therefore played a large part in the final establishment of the hereditary principle.” As Professor Thorne pointed out, Plucknett considered that the hereditary principle was admitted by the king and his tenants in chief. Thorne, supra note 16, at 196.

which in feudal land law has relevance beyond the study of jurisprudence.

B. On Whose Seisin Should the Demandant Claim?

Originally, the writ of mort d'ancestor was designed to aid the heir in obtaining seisin of his father's tenements when his father's lord intervened before the heir could enter. The Assize of Northampton set out the terms for the early use of the assize of mort d'ancestor; the heir of a tenant was to have the same seisin as his father had. If the lord prevented the heir from having seisin of his father's tenements, the king's justices were to have a recognition made.

By the time of Glanvill's treatise, written during the 1180s, perhaps a decade after the Assize of Northampton, the assize of mort d'ancestor was available against anyone interfering with the rights of the heir. Bolland's description of the writ of mort d'ancestor as it appeared in the Book of Assizes (1344) is an accurate description of the later action: If a tenant died seised of a tenement which "he was not holding as a mere life tenant, his heir was entitled to obtain possession of it as against every other person."

One of the most frequent difficulties the demandant faced in bringing a writ of mort d'ancestor to claim tenements once given in marriage was the question, on whose seisin should he rely? The articles of the assize required that the demandant claim on the seisin of the person last seised. This difficulty, however, was faced by all who felt that they were prevented by a third party from taking seisin of tenements once held by an ancestor, whether or not the tenements had once been given in marriage.

33. PLUCKNETT, Concise History, supra note 31, at 360.
34. Id. For a recent treatment of the writ of mort d'ancestor, see Joseph Biancalana, For Want of Justice: Legal Reforms of Henry II, 88 COLUM. L. REV. 433, 484-514 (1988). Biancalana stressed the importance of Thorne's work on the writ of mort d'ancestor. Id. at 488-89.
36. W.C. Bolland, The Book of Assizes, 2 CAMBRIDGE L.J. 192, 193 (1924). Bolland also explains the history and types of assizes. Id.
37. See 3 BRACTON On Laws, supra note 13, at 269. Once the demandant has put forward his intention:

he must support and prove, by the assise in the manner of an assise, all the clauses of the writ, that is, that such a one, the ancestor whose seisin he claims, was seised, and in his demesne as of fee, and on the day he died, and that he died after the term, since this assise like the others is limited to a certain term. And if he fails as to one of these clauses the assise will fall as though he had failed in all.

Id.
and whether or not the demandant chose a writ of mort d'ancestor. A marriage portion was usually given to a husband with his wife on the occasion of their marriage, to hold to them and the heirs of their bodies. When the heir put forward his claim to hold such a tenement and used the writ of mort d'ancestor, was he to claim on the seisin of his mother or his father? Was the heir's claim to be based on his father's seisin or would the claim vary according to whether his mother or his father was the more recently seised?

The demandant using mort d'ancestor to claim a tenement once given in marriage might have made any one of several mistakes in his choice of an ancestor who was last seised as of fee. For example, if the demandant claimed on the seisin of his male ancestor, the tenant might have denied that the ancestor was seised as of fee because his ancestor's wife outlived his ancestor. This difficulty presented itself both before the writ of formedon in the descender was commonly known and after the statute De Domis\(^38\) had publicized the writ as the following cases demonstrate.

Initially, a demandant seeking to inherit his ancestor's marriage portion had to argue that the marriage portion was a cognizable, inheritable interest in land. The tenants in an assize of mort d'ancestor of 1293 joined issue on whether the ancestor died seised as of fee simple.\(^39\) We may imagine that at some point before the suit a donor gave land in marriage with a female relative, perhaps a daughter. The ancestor in this case of mort d'ancestor was apparently the donee. The ancestor, Richard, held the tenements in demesne only for himself and a certain Isabella his first wife and for the heirs of their bodies issuing and thus did not die seised as of fee simple.\(^40\) We may imagine the claimant was not the issue of Richard and Isabella but of Richard

\(^38\) For the text of De Domis, see 1 The Statutes of the Realm 71-72 (London, Record Commission, 1810). For a discussion of De Domis, see McCulloff, supra note 1, at 979-1006 (1992) (discussing statutory interpretation).

\(^39\) JUST 1/625 m. 27. The tenant joined issue on whether the ancestor was seised of fee simple and denied it. (William did not issue from Isabella.)

\(^40\) The decision stated:

And because it is proved by this assize that the aforesaid Richard (on whose death etc.) purchased the said tenements to him and the aforesaid Isabelle and the heirs of their bodies issuing, and that the aforesaid William did not issue from the aforesaid Isabelle, it is adjudged that the aforesaid Robert and Beatrice go from here without a day (and are acquitted).

(\textit{Et quia convictum est per assidam istam quod predictus Ricardus de cujus morte & c. perquisivit predicta tenementa sibi et predicte Isabelle et hereditibus de corporibus suis exentibus et quod idem Willemus de predicta Isabella non exivit. Consideratum est quod predictus Robertus et Beatricia inde sine die.)
and presumably a second wife, and the decision followed the procedure expected when such an exception was found to be true: "[I]t is adjudged that the aforesaid Robert and Beatrice go from here without a day (and are acquitted)." Thus the marriage portion is recognized as heritable if there is an heir to fit the terms in the grant of the marriage portion. According to one view, that heir is a child born to the woman whose marriage portion the land is, but not a child born to the husband and a second wife because the second wife was usually not related to the donor and, therefore, not a person whose children the donor intended to provide for.

Another demandant in 1292 successfully used a writ of mort d'ancestor to claim tenements which he said were his mother's marriage portion.\textsuperscript{41} The tenant said that the ancestor had purchased to him and his heirs (that is in fee simple and therefore freely alienable), but the demandant pleaded that the tenements were his mother's marriage portion, and that, although his father outlived her, he had no fee simple to alienate. "So that the aforesaid Johanna died seised of the tenements as of fee, whence the demandant says that the aforesaid John (the father) then did not have a fee simple in the tenement, unless as it was said above."\textsuperscript{42} Legally speaking, the widower held his late wife's marriage portion by the "curtesy of England," in our terms a life estate. The jury found that the demandant's mother died seised as of fee according to the form of the gift: "The aforesaid Johanna died seised of the tenements as of fee, according to the form of the aforesaid gift, and that the aforesaid Nicholas is the next heir of the aforesaid Johanna by the aforesaid form of the gift."\textsuperscript{43} The demandant Nicholas recovered seisin.\textsuperscript{44} Again, in a writ of ael in 1302, the demandants counted and Serjeant Toutheby for the tenants said, "Sir, they say Thomas died seised in demesne as of fee. We say he had nothing unless jointly with Avice in frank marriage. Ready & c."\textsuperscript{45} Issue was joined on whether Thomas was

\textsuperscript{41} JUST 1/303 m. 14d. In 1292, and, indeed for many years earlier, he might have used the writ of formaceden in the descender.

\textsuperscript{42} (Ita quod predicta Johanna obiit inde seistita ut de feodo unde dicit quod predictus Johannes tunc non habuit in predictis tenementis feodum simpliciter nisi sicut predictum est.).

\textsuperscript{43} (predicta Johanna obiit inde seistita ut de feodo secundum formam predicte donacionis et quod predictus Nicholas est propinquior heres predicte Johanne per predictam formam donacionis).

\textsuperscript{44} The court, in upholding the demandant's choice of writ, would have disagreed with Chief Justice Bereford that the proper remedy was a writ of formaceden in the descender. For a discussion of Bereford's arguments, see infra note 215 and accompanying text.

\textsuperscript{45} Y.B. 30 & 31 Edw. I (1302), reprinted in 31 Rolls Series 368 (Alfred J.
seised as of fee.

In 1249, Richard Gare brought his writ of mort d'ancestor on the death of his father. The tenant called his warrantor who gave no reason why the assize should not have been taken. The jury found that William, Richard's father, was not seised as of fee on the day he died because the land was the marriage portion of Matilda, William's wife. If Richard were also Matilda's son (and not a second wife's child), he might have succeeded by claiming on his mother's seisin of her marriage portion. Some years later, in 1276, the tenants raised the ancestor's lack of seisin when Margery, daughter of William de Halstede, brought a writ of mort d'ancestor on the death of her father. The recognitors made default and no decision was recorded for this case.

In 1279, Nicholas de Belegreave brought a writ of mort d'ancestor on the death of his father to claim lands which included the common purchase of his parents, the inheritance of his mother and the marriage portion of his mother. For the common purchase, the tenants said that the land was the joint purchase of the ancestor and his wife who outlived him; for the inheritance and marriage portion, the tenants said that the tenements belonged in whole or in part to the wife of the ancestor on whose death the demandant brought his suit. They added that if this explanation proved insufficient, they would plead the general issue. The ancestor on whose seisin Nicholas claimed therefore did not die seised as of fee. The jury found that the aforesaid Henry was not seised of the said tenement as of fee.

Four years before De Donis in 1281, Isabella, daughter of Adam Blundy of Chesterfield, brought her writ of mort d'ancestor on the death of her father. The jury found that Adam did not die seised because those tenements "were given to the same


46. JUST 1/176 m. 7d.

47. CP 40/13 m. 2d. "Richard and Johanna come and say that the aforesaid William, on whose death [the writ was brought], did not die seised; neither had William any fee in it nor any thing else unless in the name of a certain Johanna, his wife, whose marriage portion the aforesaid land was." (Ricardus et Johanna veniunt et dicunt quod predictus Willelmus de cuius morte & c. non obit inde seisinus nec aliquid feudum inde habuit nec aliquid aliud, nisi nomine cuissdam Johanne uxoris sue cuiss mortis predicta terra fuit.).

48. CP 40/28 m. 13.

49. For a discussion of medieval pleading, see Baker, supra note 8, at 90-94 (explaining that pleading general issue "put in question the truth of every material allegaton in the count").

50. JUST 1/148 m. 2d.
Adam in free marriage with a certain Matilda, mother of the aforesaid Isabelle.51 In the same year Margery de Hergo brought her writ of cosinage against Amicia, widow of Henry de Caluore, on the death of Henry. Amicia said that Henry did not die seised: the tenements "were the right and marriage portion of a certain Amica, wife of the same Henry."52 Issue was joined on whether the tenements were the right and purchase of Henry or the marriage portion of his wife. The jury found the latter to be true and that Henry, therefore, did not die seised.

In 1293, eight years after De Donis publicized the writs of formedon among lawyers, Robert de Faredon brought his writ of mort d'ancestor on the death of his father, Peter.53 Apparently the tenant was the uncle of the demandant; he was married to a sister of the demandant's mother. The jury found that the father of the bride gave a marriage portion, that the demandant was their child, but that his mother outlived his father so that nothing of the fee could remain to his father.54 Robert was advised that he might purchase another writ, if he thought he might be successful. Presumably, Robert might have been successful if he had then purchased a writ of mort d'ancestor, claiming that his mother died seised as of fee. There was no complication added to the problem of who was last seised since Robert's mother did not alienate. Robert lost on a technicality—that his father could only be seised for the term of his life and not as of fee of his wife's

51. (data fuerunt eidem Ade in liberum maritagium cum quadam Matilda matre predicte Isabelle).
52. JUST 1/148 m. 8. (fuerunt jus et maritagium cujusdam Amicie uxor Matris ejusdem Henrici). For another assize of mort d'ancestor involving a marriage portion, see Robert C. Palmer, Contexts of Marriage in Medieval England: Evidence from the King's Court Circa 1300, 59 Speculum 42, 49-50 (1984) (citing JUST 1/763 m. 24 (1280)).
53. JUST 1/652 m. 30d.
54. The jury stated:
John de Plesset gave [a certain tenement] to the said Peter (on whose death etc.) with a certain Idonea, his daughter, in marriage, and to the heirs of the same Peter and Idonea issuing. Robert is the son and heir of the said Peter and Idonea; Peter died seised and after his death, the said Idonea remained in the said tenements by the curtesy of England and died seised. It is adjudged that the tenements were given in free marriage with the said Idonea; Idonea survived her husband so that nothing of a fee could remain to the same Peter by this free marriage. (Johannes de Plesset dedit predicte Petro de cujus morte &c. cum quadam Idonea filia sua in maritagium et hereditibus de corporibus ipsorum Petri et Idonee exunitibus et Robertus est filius et heres predictorum Petri et Idonee et Petrus obit seisinus et post cujus mortem predicta Idonea remansit in predicta per legem Anglie et obit seisa constat empti est Quando data fuit in liberum maritagium predicte Petro cum predicta Idonea quae quidem Idonea supervivit virum suum Hae quod nichil seodi per istum liberum maritagium eidem Petro remanere potuit.).
marriage portion—even though it was clear that he should have been the next tenant. The choice of ancestor, whether it was made simply by Robert or with legal advice, was very ill-informed.

The problem of whether to base a claim to tenements once given in marriage on the seizin of the last tenant, the husband or the wife, was solved by the writ of formedon in the descender. The count of this writ did not rely simply on the seizin of either husband or wife, but set out the form of the gift and put forward the demandant’s claim as heir to the donees of the gift.55 But demandants continued to use writs of mort d’ancestor; they encountered fuller arguments, both before and after the statute, than the allegation that the tenement demanded was the marriage portion of the ancestor’s wife and that the ancestor therefore did not die seised as of fee.

Perhaps a case of 1269 came nearest to the original use for which the writ of mort d’ancestor was designed: to aid the heir in obtaining seizin of his father’s tenements when his father’s lord intervened before the heir could enter.56 Richard de Ba, the demandant, brought his assize of mort d’ancestor against the tenant, his lord, who claimed that Richard was in his wardship and should not have seizin until he was of full age.57 Richard said that an ancestor of the tenant gave the land in free marriage to his ancestor and that he ought to hold quit of services and exactions of the chief lord of the fee. In this case Richard was clearly relying on the seizin of his father to put his claim against his lord. The descent of the marriage portion to Richard’s father as tenant in tail was not traced. Since the tenant in this case was the lord from whom the demandant’s father had held for service, he could not question the seizin of Richard’s father as tenant in fee. The tenant recognized Richard’s right to hold quit of service. The seizin of the ancestor as tenant in fee (ut de feodo) was not always so easily recognizable in other cases.

C. Problems Arising from Subsequent Alienation

One of the most frequent objections to the claim of the demandant in a writ of mort d’ancestor was that the ancestor’s wife continued in seizin of the marriage portion after the death of the

55. For a discussion of the use of the writ of formedon in the descender see infra, notes 184-94 and accompanying text.
56. Plucknett, Concise History, supra note 31, at 360.
57. Just 1/643 m. 7d. For an explanation of the legal consequences of wardship, see Baker, supra note 8, at 275-76.
ancestor and then alienated either to the tenant or to the tenant's father, so that the last person seised in demesne as of fee was in fact the tenant. The tenant in a case of 1250 put forward such an argument.58 Parceners59 brought a writ of cosinage on the death of their grandfather, and the tenant objected that the ancestor did not die seised as of fee since the tenement was the marriage portion of the ancestor's wife who alienated in fee after her husband's death. The tenant said that the father of the parceners confirmed the gift by his charter. The jury's findings agreed with the tenant's argument.60 This case was unusual in so far as grandchildren of the original donees of a marriage portion did not often attempt to recover the marriage portion once it was alienated.

In the parceners' case, Roger, (the child of the donee in tail and father of the parceners) only confirmed a previous alienation; he did not himself alienate, and thus he might have used the writ of mort d'ancestor himself to recover the marriage portion, if he did not agree that the tenement should have been alienated. The record does not give the immediate circumstances under which the parceners brought their writ, whether it might have been soon

58. JUST 1/530 m. 30.
59. Parceners are joint heirs. BLACK'S LAW DICTIONARY, supra note 9, at 1112.
60. The jury's findings provided:
The jury say that the aforesaid Hugh did not die seised of the said land because the said land was the right and marriage portion of Margery, formerly the wife of the same Hugh, and that the same Margery, after the death of the same Hugh, in her widowhood, gave the aforesaid land to the said Radulfus, father of the said Henry, by her charter. And they say that the aforesaid Roger, father of the same Avelina and the other [parceners], afterwards confirmed the same gift to the same Radulfus and made the said charter to him.
(furata dicunt quod predictus Hugo non obiit seisitus de predicta terra quia predicta terra fuit jus et maritagium Margeriei quondam uxoris ipsius Hugonis et quod eadem Margeriei post mortem ipsius Hugonis in viduitate sua dedit predictam terram predicto Radulfo patri predicti Henrici per cartam suam. Et dicunt quod predictus Rogerus pater ipsorum Avelinae et aliarum postea eundem donum ipsi Radulfo confirmavit et predictam cartam ei fecit.).
The ancestor was called consanguineus of the demandants but father of Roger, who was the father of the parceners. For a discussion of parceners and the law of inheritance, see BAKER, supra note 8, at 303-07 (explaining rules of inheritance). See also Eileen Spring, The Heiress-at-Law, English Real Property Law From a New Point of View, 8 LAW & HIST. REV. 273 (1990) (describing common-law rules of inheritance and comparing actual inheritance by women in thirteenth and eighteenth centuries); S.F.C. Milsom, Inheritance, supra note 19, at 60 (reviewing inheritance and family provisions in twelfth and early thirteenth centuries); David Postles, Gifts in Frankalmoign, Warranty of Land, and Feudal Society, 50 CAMBRIDGE L.J. 330 (1991) (discussing relationships between gifts in marriage, heritability of land in lay tenures, and development of warranty clause in charters).
after the death of Margery (the ancestor’s wife), Radulfus (the father of the tenant), or perhaps even Roger (the father of the pareners). The demandants might have made a better case by claiming through a writ of right, but even after the statute, the child of the donees in tail could alienate despite the form of the gift. Roger’s confirmation was sufficient affirmation of the alienation, and the claim based on the seisin of the demandant’s grandfather was weak in 1250. It is difficult to see how else the parencers might have claimed on the seisin of their ancestor.

In 1284, Sibilla, daughter of John of Kenilworth, found that she had no action on the death of her father. The tenant objected that the assize of mort d’ancestor ought not to be made, because the tenement was given to Sibilla’s father in free marriage with the grantor’s daughter (Wymarca) who not only outlived Sibilla’s father but later enfeoffed the tenant. In effect, the tenant said Sibilla had no action based on her father’s seisin. Sibilla replied with what became the standard count of a demandant who claimed by a writ of formedon in the descender, setting out the terms of the gift, the donees of the gift and the descent of the gift to the demandant as issue of the donee and heir according to the form of the gift. The decision was made that “no action lies for the aforesaid Sibilla concerning the death of the aforesaid John,” because the tenement was a marriage portion and Sibilla recognized “that the same Wymarca outlived the aforesaid John by which virtue of the marriage portion the whole fee and de-

61. The writ of right is the oldest form of writ which initiates litigation in the court of the mesne lord. Simpson, supra note 7, at 25. For a more detailed discussion of the writ, see Van Caenegem, supra note 18, at 206-34.

62. JUST 1/460 m. 14d.

63. She said:
that the aforesaid Eda gave said tenement to the aforesaid John in free marriage with the aforesaid Wymarca and to the heirs of their bodies issuing, and she says that the same Sibyl was born to the same John and the same Wymarca and offers a certain charter under the name of the said Eda, which witnesses the same Eda gave etc. the aforesaid tenement to the said John in free marriage with the aforesaid Wymarca and to the heirs of the bodies of the same John and Wymarca issuing . . . [and that] Syyl issued of the same John and Wymarca.

(quipredicadEdadeditpredicatumtenementumpredictoJohanniinliberum
maritagiumcumpredictaWymarcaethereditusdecorporibus eiusexunitibuset
dicitquoidemJohanneprocereavitipsamSibillumdepredicataWymarcaetprofert .
quandamcartamsubnomineprediceteEdaquestestaturquodeademEdadedit &
c.predicatoJohanni predicatum tenementum in liberum maritagium cum predicta
Wymarcaethereditusdecorporibus Ipsorum Johannis et Wymarce exunitibus . . .
ipsaSibyllaeexitdepredictisJohanneetWymarca.)

64. (nulla actio competit predicte Sibille de morte predicti Johannis).
mesne remain to the aforesaid Wymarca."\(^{65}\) Despite the form of
the gift, Wymarca apparently had a fee she could alienate. Sibilla
could not have brought an assize of mort d'ancestor on the death
of her father since her father did not die seised. The writ which
would have best fitted the circumstances of her case was
formedon in the descender.

In 1284, when the writ of formedon in the descender was
available, Richard, son of Thomas Obyl, brought his writ of mort
d'ancestor on the death of his father.\(^{66}\) It is doubtful that the
existence of the writ of formedon in the descender and Richard's
choice of the assize, rather than the newer remedy, had any real
effect on the decision taken on the arguments and the facts.
Clearly the demandant had no intention of claiming by the form
of the gift, for he had the opportunity to bring up the form of the
gift at one point in the case. The demandant chose not only to
ignore the form but also to deny it. Indeed, the propriety of the
demandant's chosen remedy was not in question.

The tenant raised the question of whether the demandant
had any right at all. The tenant pointed out that one Gilbert gave
the tenements demanded in frank marriage to the ancestor with
his wife, to have and to hold to the husband, his wife and their
heirs issuing. He further said that the ancestor died with his wife
still living and that she alienated to the tenant, to have and to
hold to him and his heirs with a warranty and that the demandant
was the heir of the woman and her warrantor. The tenant asked
whether the demandant, therefore, had any remedy against the
deed of his mother. Then, a very ingenious and unusual, if inef-
flectual, point was made for the demandant, that no one is pre-
vented from having his day in court by the deed of another
party.\(^{67}\) But the demandant might have carried his point further
by claiming that although his mother was seised as of fee, she
was not seised (as of fee simple) so that she could alienate. Richard,

\(^{65}\) (quod eadem Wymarca supervixit predictum Johannis per quod totum per virtutem
maritagi foedum et dominicum remanitit predicte Wymarce).

\(^{66}\) JUST 1/502 A m. 5.

\(^{67}\) The demandant argued:
And Richard, son of Thomas, says he ought not to be stopped from
acting by the deed of the same Amice, and he seeks this land of the
seisin of his aforesaid father. And says that since the statute of the lord
king does not provide that anyone ought to be rejected by the deed of
another from an action other than himself on whose seisin, etc.
(Et Ricardus filius Thome dicit quod per factum ipsius Amice ab agendo non debet
repelli petit istam terram de seïsina predicti patris sui Et dicit quod desicat in stat-
tutis domini Regis non continentur quod nullus per alterius factum repelli debet ab
actione quam ipse de cujus seïsina.).
the demandant, claimed by inheritance according to the form of the gift. By such an argument the demandant may have influenced the decision in his favor, but in 1284 the point was still unsettled. The demandant may have seen that his claim to inherit, based on the seisin of his father, would have been weakened by that argument, since his father held in the same way as his mother held.

The demandant chose to ignore the marriage portion and the form of the gift in favor of emphasizing his father’s seisin of the tenements. It was a tactical error for the demandant to have ignored, and implicitly to have denied, the gift in marriage, for the tenant showed his charter and issue was joined on whether the demandant’s ancestor died seised as of fee or whether the demandant’s mother held as of her marriage portion. The jury found in favor of the tenant. In the end, however, the choice of arguments may have made little difference. Richard, son of Thomas, pleading against such a determined tenant, may in any case have had little chance since the court often did not accept the view of the law which was put forward the next year in the statute *De Donis Conditionalibus*.

Two demandants had more success than Richard, son of Thomas, in claiming marriage portions by writs of mort d’ancestor in 1285 because the demandants’ mothers had not alienated their respective marriage portions. In the first case, the ancestor was the mother of the demandant.68 The ancestor held in marriage, outlived her husband and died seised as of fee. The jury found the demandant’s facts correct. This case was easier to decide, since the ancestor had not alienated and the court did not have to go against any alienation made by the ancestor.

The demandant in another case also had more success than Richard, son of Thomas, in recovering his mother’s marriage portion, which his father had alienated.69 The demandant brought his writ of mort d’ancestor on the death of his mother and had little difficulty in proving that his father was not a tenant in fee but only a tenant for life by the curtesy. The tenant of the case said that he held only for life of the inheritance of a child under age, from whose father he had received a charter. The demandant, Robert, put his claim very clearly:

And Robert says that a certain Roger de Bosco, whose

68. *JUST* 1/11 m. 7d.
69. *JUST* 1/12 m. 13.
right the aforesaid tenements were, gave the same tenements to a certain Robert, father of the same Robert son of Robert, in free marriage with the aforesaid Matilda (on whose death etc.) And he says that after the death of the aforesaid Matilda, the aforesaid Robert, husband of the same Matilda, held the aforesaid tenements by the law of England; Robert demised (conveyed) the same tenements to the aforesaid Henry, whence he says that whatever charter the same Henry shows under the name of the aforesaid Almaricus, the same Almaricus was never seised of the same tenements so that he could demise them to anyone.  

It was easier for this demandant to put his case clearly than it was for Richard, son of Thomas, for the court probably favored the position that “the fee and demesne” of a marriage portion remained to the woman whose marriage portion the tenement was. If she outlived her husband, but did not alienate, her heir would have a good chance of recovering the tenement. If the woman herself alienated, the court would be more reluctant to go against the wishes of the woman, especially in an assize of mort d’ancestor based on the seisin of her husband, whom she outlived.

D. Pleading in a Case of Mort d’Ancestor

The conduct of the pleading and the facts of the case were both important to the choice of a writ. Once the litigant had chosen a writ of mort d’ancestor, he was not home free. The conduct of the pleading was still fraught with difficulty for the litigants. The decisions made in cases based on writs of mort d’ancestor often owed less to the court’s knowledge of the existence of other and perhaps more appropriate writs than to the skill and determination with which each party prosecuted his or her case. On the one hand, a good case might be lost by clumsy pleading. On the other hand, clever pleading on behalf of a demandant who had brought the wrong writ might very well have brought a successful end to the case for the demandant. Furthermore, a weak plea for

---

70. (Et Robertus dicit quod quidam Rogerus de Bosco cuius ius predicta tenementa fuerunt dedit eadem tenentia cuidam Roberto patri ipsius Roberti filii Roberti in liberum maritagium cum predicta Matildide cujus morte & c. Et dicit quod post mortem predicte Matildide tenuit predictus Robertus vir ipsius Matildidis predicta tenentia per legem Anglie qui eadem tenentia dimisit predicto Henrico unde dicit quod quaecumque cartam idem Henricus profert sub nomine predicti Almarici Idem Alaricus nunquam seistus fuit de eisdem tenementis ita quod illa alicui dimittere potuit.).
the demandant, with a poor argument or an easily spotted error, might have gone unnoticed by a dull counsel for the tenant. Such a tenant, who may have had no more right than the demandant, lost the case by unskillful pleading. The complicated pleading tended to obscure the issue of which party had the greater right to inherit the land.

In a simple, clear case pleading did not have to become so complicated. For example, in 1228, William, son of William, brought his writ of mort d'ancestor on the death of his mother.\footnote{JUST 1/801 m. 8.} Some of the circumstances in the case might have been emphasized so that William could have brought a writ of entry,\footnote{The writ of entry is similar to the writ of right, but the writ of entry also specified a “flaw in the means by which the defendant had ‘entered’ the land.” BAKER, supra note 8, at 268. The writ was brought to recover possession of land wrongfully withheld from the demandant, such as where a tenant was admitted for a certain term and the term had expired. \textit{Id.} at 268-69.} since the demandant claimed that his grandfather gave the tenement in question to his father with his mother in free marriage and that the tenant had entry through a tenant who only had wardship. The jury found the demandant’s recital of the facts accurate. It would be difficult to pretend that this case was anything other than straightforward and clear. The demandant was entitled to hold his mother’s marriage portion, and the tenant by guardianship was not seised as of fee. This demandant did not need the writ of formedon in the descender to make the circumstances of his case clearer.

Sibilla of Kenilworth,\footnote{For a discussion of Sibilla’s case, see supra, notes 62-65 and accompanying text.} in an assize of mort d’ancestor brought in 1284, set forth the form of the gift and lost the case because she admitted in her pleading that the gift was made according to the form which she described. The court in Sibilla’s case held that alienations of marriage portions were not only legal but that the descendant of donees in marriage could not reverse the decision of the ancestor to sell, at least not by a writ of mort d’ancestor. By recognizing the form of the gift, which the court upheld, she ruined her chances of success. Although the theory put forward in the statute gained currency in the courts,\footnote{See McCauliff, supra note 1, at 990 & n.190 (discussing JUST 1/1002 m. 26 in which demandants put forth theory of conditional gift).} the position of the court as a whole was too unsettled to predict the decision to be given in any particular case. Litigants and their counsel may have avoided taking a position on the marriage por-

\footnotesize

\begin{itemize}
  \item \texttt{[Vol. 38: p. 933]}
\end{itemize}
tion not so much because they could not determine what the opinion of the court might be but because they shared the uncertainty of the court.

The statute *De Donis* made it illegal for the children of a second marriage to inherit their mother's marriage portion. If there were no child from the first marriage, the tenement was to revert to the donor or his heir rather than descend to the child of the mother's second marriage. A child of the husband's second marriage was of course not related to the woman for whose children the donor wished to provide. While a rule excluding children of second marriages might prevent confusion by leaving no room for doubt, or for the child of the second marriage to allege that there was no issue from the first marriage so that he himself might inherit, the rule was a deviation from the probable purpose of the early marriage portion to provide for the support of the woman and her children. Demandants putting false claims to obtain seisin of a marriage portion contributed to this rule, but the rule apparently existed in customary form long before the statute, as the cases quoted above show. Donees alienated tenements once they had heirs. The justification was that the tenements were given to the donees and the heirs of their bodies. Once they had heirs of their bodies, they felt they fulfilled the conditions on which the grant was made.

In 1285, the year of the statute, Juliana le Kyng brought her writ of cosinage against Robert Grampe.75 The ancestor, Henry Sparwe, died without heirs of his body, and the fee reverted to his grandmother's brother and then descended to Juliana, according to her claim. Robert, the tenant, denied her right. The tenant said instead that one John fitz Walter gave the tenement to Henry in free marriage with a certain Margery, relative of the donor to have and to hold to him and the heirs of Henry and Margery issuing. Henry died while Margery was still living, and Juliana did not issue from Henry and Margery, "whence the tenant seeks judgement, if the fee of the aforesaid tenements may be the donors' and in a restricted form to the heirs issuing of the same Henry and Margery in a mode to be able to descend to this Julianna, who now sues, etc."76 The tenant argued the "mode" of the gift restricted inheritance to the class of heirs descending from the couple and not from the woman and a later husband. Juliana,

75. JUST 1/956 m. 10.
76. (unde petit judicium si feodum tenementorum predictorum sit donatorum et in forma restricta hereditibus exuinitibus de ipsis Henrico et Margeria modo descendere possit isti Juliane que nunc petit &c.).
who did not descend from Margery, claimed as the relative of the donor. In Juliana's and similar cases, a tenement given according to a limited form of inheritance was demanded by someone who was a stranger to the form.\textsuperscript{77}

These same arguments can be seen clearly in a straight forward case from 1293.\textsuperscript{78} The demandant, not really entitled by the form of the gift, claimed an entailed estate by the writ of mort d'ancestor. William, son of Richard de Stok, brought his writ on the death of his father against Robert le Carpenter and his wife Beatrice. The tenants said that the demandant's father purchased the land only for himself, his first wife Isabella and "to the heirs of their bodies issuing."\textsuperscript{79} The jury did not know whether any child of Richard and Isabella survived, but William was the son of Richard's second marriage.

The tenants of the case were not in fact the heirs of the original donor, one Emma de Markum, but had purchased the service of the tenement, thereby becoming reversioners. Emma's son sold to the brother of Beatrice, who in turn sold the service to the tenants Robert and Beatrice. The alienation of a reversion was to cause some trouble later when lawyers were trying to decide what a reversion was. They were not yet entirely sure that it was an estate, a bundle of rights, owned as any other estate was owned, but with the possibility that the tenement might never actually revert to the reversioner. Here the sale of the reversion is stated quite simply as a sale of the service of the land:

Robert de Carpenter and Beatrice afterwards purchased the service of the aforesaid tenement from a certain Robert, brother of the same Beatrice; indeed Robert bought that tenement from a certain Robert son of the aforesaid Emma, by reason of which purchase the aforesaid Robert de Carpenter and Beatrice were in seisin of the aforesaid

\textsuperscript{77} This was the classical theory of conditional gifts, similar to, but less extensively developed than in the case of Hotoff v. Chartres, JUST 1/620 m. 5. For a discussion of Hotoff v. Chartres, see McCauliff, supra note 1, at 976-77 & nn.158-61 (explaining facts of case).

\textsuperscript{78} JUST 1/625 m. 27. For more information on this case, see supra note 39 and accompanying text.

\textsuperscript{79} "Richard (concerning whose death) bought the aforesaid messuage for himself and a certain Isabella, his first wife, and only the heirs of their bodies issuing whence they say that the same Richard did not die seised as of fee simple as the aforesaid William by his writ alleges." (Ricardus de cyjus morte perquisivit predictum mesuagium sibi et cuidam Isabelle prime wori sue et hereditibus de corporibus executibus tantum unde dicunt quod idem Ricardus non obiit seisset ut de feodo simplici sicut predictus Willelmus per breve suum supponit.).
tenement after the death of the aforesaid Richard, as that which, as claimed, ought to revert as to the heir of the aforesaid Emma by the form of the gift, which the aforesaid Emma made to the aforesaid Richard. 80

The jury found that since William was not descended from Isabella, he was not to take by the assize. The demandant without a just claim to hold a marriage portion had his best chances for success when the tenant pleaded the general issue, pleaded badly, or simply said nothing which would have held back the assize. If the jury then did not fully investigate the way in which the ancestor was seised, the demandant would have a good chance to take seisin by judgment after the assize was made.

Demandants trying to obtain tenements once given in marriage frequently did not succeed when they were not entitled by the form of the gift. For example, two demandants brought their writ of mort d'ancestor on the death of their aunt. 81 The tenant called a warrantor who said that his father gave the tenement to the tenant in marriage with his niece, with a remainder for life to her husband (the tenant) and a reversion to the donor and his heirs. The warrantor then showed the charter and further said that the tenement ought to revert to him as the heir of the donor on the death of the tenant since the ancestor died without heirs of her body. 82 The demandants claimed that their grandfather, John de Hopeton, died seised as of fee and that the land in question

80. (Robertus le Carpenter et Beatrice postea perquisuerunt servicium predicti tenementi de quodam Roberto fratre ipsius Beatrice qui quidem Robertus illud perquisivit de quodam Roberto filio predictae Emme racione cujusdam perquisitus Roberti le Carpenter et Beatrice post mortem predicti Ricardi in seisina predicti tenementi ut en quae asserit herede predictae Emme revertere debet per formam donationis quam predicta Emme inde fecti predicto Ricardo.)

81. JUST 1/1042 m. 8.

82. The warrantor argued:

John, his father, gave the aforesaid land to the aforesaid Walter in marriage with the aforesaid Matilda, his niece, to hold to the same Walter and Matilda and the heirs of the same Matilda, and that after the death of the same Matilda, the two bovates of land would remain to the same Walter all his life. So that after the death of the same Walter and Matilda, the land ought to revert to the said John and his heir, and he offers the charter of the said John, which witnesses this. Thus he says that the land ought to revert to himself because the said Matilda died without heir of herself, and it ought not to descend to the aforesaid Walter and Richard.

(Johannes pater suus dedit predictam terram predicto Wallero in maritagium cum predicta Matillide nepote sua tenendam eisdem Waltero et Matillide et hereditibus ipsius Matillidis et quod post decessum Matillidis remanerent iis bovates terre eisdem Wallero tota vita sua. Ita quod post decessum ipsorum Walleri et Matillide debet terra illa reverti ad predictum Johanni et heredes suos et profert cartam predicti Johannis que hoc testatur. unde dicit quod terra illa debet revertere ad ipsum quia
descended to three sisters as parcers, the ancestor and the mothers of the demandants, by hereditary right. The jury found that John de Hopeton gave the land in marriage with his daughter. The demandant took nothing. While it was often best to plead the general issue in a writ of mort d'ancestor, in this case the tenant's warrantor set forth a valid exception, later listed by Bracton in his discussion of the writ of mort d'ancestor.83

E. Choice of Mort d'Ancestor or Formedon

In this subsection, for the purposes of substantive doctrinal law which concerns the legal historian, we must look at the circumstances that dictated the demandant's choice of a writ. This is the best way to determine what the status of the law was. The writs of formedon were set forth in the statute De Donis Conditionalibus in 1285, codifying and changing chancery practice dating from the 1260s.84 To our contemporaries schooled in categories of black letter law, the choice of mort d'ancestor or formedon might appear cut and dried, but during the thirteenth century when litigants were asking chancery to sue out a proper writ to fit the circumstances of their problems, it was not at all clear which writ was appropriate, as the following cases show.

During the thirteenth and fourteenth centuries, demandants were searching for the proper writ through which they could make their claims to land once given as a marriage portion. Analytically, today, we would separate claims for descent of a marriage portion and claims for a reversion after a marriage portion. Then, litigants had not yet legally separated the claims into reversion and descent. The writ of mort d'ancestor was used to put forward many different claims concerning tenements given in marriage. While it is interesting to speculate why this writ in particular was used for so many different purposes, the following observations are offered only as suggestions. Claims that had very little indeed to do with inheritance were sometimes made through a writ of mort d'ancestor.85 Perhaps the most plausible suggestion for the frequent use of the writ of mort d'ancestor is that the

83. 3 Bracton On Laws, supra note 13, at 286.
85. The writ of novel disseisin was on occasion as useful. See Van Caenegem, supra note 18, at 261-71. In bringing a writ of novel disseisin, the demandant alleged a recent dispossession by the person then seised of the land. Simpson, supra note 7, at 28-29.
claimant using the writ was not claiming on his own seisin. However, claimants might very well have chosen writs of entry *sur cui in vita*\(^8\) when widowers alienated their wives’ marriage portions to the disinheri
tance of the heirs. However, writs of entry *sur cui in vita* were not often used to claim marriage portions.

During the second half of the thirteenth century, writs of formedon in the descender could also be brought to claim land once given as a marriage portion. The writ of formedon in the descender was apparently, from the statute’s attempt to publicize it, not very well known to the public by 1285. Writs of mort d’ancestor were frequently used even though writs of formedon in the descender would have better served the claimant’s case. Of course, chancery sued out whatever writ the purchaser wished at the peril of the purchaser’s success in court. But litigants demanding tenements once given in marriage often did not seem to have had good legal advice to guide their choice of a writ.

In addition to the use of the writ of mort d’ancestor in place of formedon in the descender, demandants sometimes used the writ of mort d’ancestor in place of a writ of formedon in the reverter. Demandants used the assize for this purpose far less frequently than they used it in place of formedon in the descender. Two factors accounted for the smaller number of cases in which the demandant claimed a reversion by a writ of mort d’ancestor. First, the concept of reversion was very much akin to the provision for a customary escheat of a tenement to the lord for lack of heirs. Writs of entry and escheat were available for those cases in which the lord could not exercise his right of reversion without hindrance. Second, the problem of seisin, if difficult for the demandant claiming to inherit a marriage portion from his mother or his father, was far more difficult for the demandant claiming a reversion because he was not the heir of the ancestor on whose seisin he was claiming. Moreover, litigants, or their counsel, who used the writ of mort d’ancestor to claim the reversion of a marriage portion showed that they did not really understand the articles of the assize. The demandant was not supposed merely to be an heir, but the heir of the ancestor on whose seisin he was claiming.

In a case of 1219, the demandant was really claiming to be the heir of his grandfather.\(^8\)\(^7\) He brought a writ of mort d’ances-

---

\(^8\) Baker, *supra* note 8, at 269. The tenant had no entry except through (per) the widower to whom (cui) his father in law had granted the tenement. *Id.*

\(^8\) 8 *Curia Regis Rolls of the Reign of Henry III* 20 (1938).
tor on the death of his aunt who held a marriage portion of the
demandant's grandfather. But the question was not only next
heir to whom but also next heir to what? The demandant, Robert
de Baddel, was in fact his grandfather's heir to a right of reversion
on the marriage portion given with the demandant's aunt Matilda.
During the course of the argument, the demandant admitted that
his grandfather, Robert Baddel, gave the land in free marriage.
The demandant claimed that the donee of the marriage portion
died without heirs, and that the land ought to revert to the
demandant. The decision was very clear. Robert, the demandant,
used the wrong writ, and he lost on points of the assize because
he was not the next heir of his aunt. He might very well have
been the next heir of his aunt had she held for homage and ser-
vice rather than in marriage.

Admittedly, the distinction between being the heir of his aunt
and the heir of his grandfather was subtle, for it was only on the
death of his aunt that Robert could enter the tenement. But on
whose seisin was he claiming, on his aunt's seisin or his grandfa-
ther's? Robert was entitled to enter on the death of his aunt but
only because his grandfather gave the grant with a reversion to
himself and his heirs. Robert was entitled to the reversion of his
aunt's marriage portion, but he might not have been her heir gen-
eral.\textsuperscript{88} Reversion and escheat were no doubt common occur-
dences, and the concept of reversion was familiar to the
landholder in the middle ages; however, the reversion was not
fully understood. The court did not advise Robert what writ he
might have used to better advantage, but the writ of right, escheat
or entry would have served. The next term, Robert was busily
claiming another tenement by a different writ.

Similarly in 1232, Nicholas, son of Gilbert, brought a writ of
mort d'ancestor on the death of his sister.\textsuperscript{89} The tenant in his
defense explained that the tenement was given to William with
Alditha, the ancestor, in marriage by Gilbert, father of Alditha
and Nicholas, and that Alditha died seised as of her marriage por-
tion. But after the death of Gilbert, Nicholas quitclaimed to Wil-
liam, Alditha and to Gilbert, son of Alditha. Perhaps the tenant
purchased from Gilbert, son of Alditha. Nicholas recognized the
charter but said that it was made while he was under age. The
judgment was then given.\textsuperscript{90} How the tenement was transferred

\textsuperscript{88} An heir general is the ordinary heir by blood. BLACK'S LAW DICTION-
ARY, supra note 9, at 723.
\textsuperscript{89} JUST 1/951 A m. 14.
\textsuperscript{90} "And because Nicholas is not the heir of the same Alditha, his sister to
from Gilbert, son of Alditha, to the tenant was not disclosed, nor was there mention of whether Gilbert or any child of his was still living. Nicholas was really the heir of the donor rather than the heir of his older sister so that the writ of mort d'ancestor was not appropriate in his case. He would have done better to bring a writ of entry or a writ of right.

Thus it is abundantly clear that for the demandant with a legitimate claim to a marriage portion it was difficult to decide which writ to bring and how to put his claim. The choice of the writ was so important that the wrong selection could result in a nonsuit. Indeed, it was sometimes easier for a demandant who either knowingly or unknowingly brought a false claim.

In 1205, Hugh of Okeover was suing Walter de Montgomery by a writ of right for lands given in marriage with Walter's sister to Hugh's father, Ralph, but the case was adjourned without a day because Walter was abroad in the service of the king. Hugh then brought a writ of mort d'ancestor against Walter's tenants claiming that his brother Richard was last seised in demesne as fee and that he was Richard's heir. Hugh was in fact the half brother of Richard, the son of Walter's sister; Hugh himself was the child of Ralph's second wife. The jury for the assize found that Richard died seised. Hugh was to have his seisin. There was no doubt that Richard was last seised and Hugh had no trouble in deciding on whose seisin to base his claim. Richard died without heirs. Hugh effectively succeeded in depriving Walter de Montgomery of his reversion to the marriage portion.

The claim of the half-blood, such as Hugh of Okeover, to hold a tenement once given in marriage was often put forward in a writ of mort d'ancestor. But it frequently happened that the half-blood claiming the marriage portion was the issue of the second marriage of the woman whose marriage portion the disputed tenement was. In 1228, a son brought his writ of mort d'ancestor on the death of his mother. The tenant said that the land was

whom the land was given in marriage, but the heir of the aforesaid Gilbert, the first donor, it is adjudged that he take nothing by the assize.” (Et quia Nicholas non est heres ipsius Aldithe sororis sue cui terra data fuit in maritagium sed heres predicti Gilberti donatoris primi. Consideratum est quod nichil capiat per assisam.).

91. For an account of claims of the Okeovers, see McCauliff, supra note 1, at 933-34 & n.47 (detailing dispute over marriage portion between son of second marriage and lord).

92. For the case based on a writ of right, see 3 Pleas Before the King or His Justices (1198-1212), reprinted in 83 SELDEN SOC'Y 164-65 (Doris M. Stenton ed., 1967). The assize of mort d'ancestor is to be found in 5 CURIA REGIS ROLLS OF THE REIGN OF JOHN, supra note 24, at 41.

93. JUST' 1/819 m. 31d.
given to her father in marriage with her mother, the ancestor. The warrantor of the marriage portion agreed that the gift was made to Robert and Philippa and their heirs issuing, but the demandant insisted that the marriage portion was granted to Philippa and her heirs and not to the heirs of the marriage specifically. The jury found that the marriage portion was given to Phillipa and the heirs issuing of the marriage and that Alice, the tenant, was the heir. The tenant was therefore quit.

The decision in a similar case of 1245 was made very explicitly. Henry de Swalewe brought his writ of mort d'ancestor on the death of his mother. The next heir to the marriage portion was the tenant, the child of the woman's first marriage, and not the demandant, her son from her second marriage. It was often easier for the son of the woman's second marriage than for the child of the first marriage to claim as a demandant because, in the case of the offspring of the second marriage, there was no difficulty in deciding on whose seisin to base the claim. The demandant born of a woman's second marriage claimed his mother's marriage portion, for the most part, based on her seisin, and if the jury did not examine the case carefully, it might seem that the son was his mother's next heir.

Again, in 1247, a demandant claimed the reversion of a marriage portion by a writ of mort d'ancestor. Thomas, son of Richard, brought his writ on the death of his sister. The tenant was his brother-in-law who held by the curtesy. The tenant objected that the assize ought not to be made, because the tenement was the marriage portion of the ancestor, Agnes. Thomas disputed

94. JUST 1/428 m. 9d. The jury gave the following findings: The aforesaid Helena, mother of the aforesaid Henry, died seised of the aforesaid toft with appurtenances as of land which was given to her in marriage with Robert Blauncheard, her husband, to have and to hold to the same Robert and the heirs of the same Robert and Helena issuing; the same Helena had by the aforesaid Robert a certain Agnes, her daughter, who is still alive. And after the death of the same Robert, the same Helena later took another husband, and the aforesaid Henry was born to them. And because the said toft was so given under the condition aforesaid, they say that the aforesaid Henry is not the next heir of the said Helena, rather the said Agnes (is).

95. JUST 1/56 m. 8d. "The assize ought not to be made on this because he
the tenant’s claim to hold by the curtesy, saying that the cry, which would prove that the child was born alive, was not heard.\textsuperscript{96} The answer Walter gave to Thomas’ objection was sufficient to make it clear that whatever claim Walter may have had, Thomas had no claim since Thomas’ mother, who gave Agnes the gift, was still alive.

And Walter says that a certain Eva, mother of the aforesaid Agnes and Thomas, gave Thomas the aforesaid land in marriage with the aforesaid Agnes and that the aforesaid Eva still lives; so he says that if the aforesaid land ought to revert to anyone after the death of the same Agnes for default of heirs, it ought to revert to the said Eva rather than to the aforesaid Thomas.\textsuperscript{97}

The demandant could not deny Walter’s argument, and Walter was quit. It is hard to imagine why Thomas put forward his claim when there were two more immediate claims, the tenant’s for the term of his life and the donor’s for the reversion. Nevertheless, the demandant may have had some chance of success if the tenant had put up a different argument.

A demandant might nonetheless recover a reversion through the writ of mort d’ancestor if the tenant relied on the wrong defense. In 1278, Nicholas, son of Thomas of Hynton, was successful when he put a similar claim to that of Thomas, son of Richard, by a writ of mort d’ancestor.\textsuperscript{98} Nicholas brought his writ on the death of his aunt, Geva, whose marriage portion the tenement was. The tenant used a different argument from that of Walter, whose former wife was the ancestor in the case discussed above. The tenant said that Geva died and her husband had been the purchaser.

\textsuperscript{96} “And Thomas says that no cry was ever heard from any child which the same Walter had of the same Agnes, so that he could not hold the aforesaid by the curtesy of England.” (\textit{Et Thomas dicit quod nullus clamor unquam fuit auditus ab aliquo puero quem idem Walterus de predicta Agneta suscitavit : ita quod terram predictampossit tenere per legem Anglie & c.).

\textsuperscript{97} (\textit{Et Walterus dicit quod quadem Eva mater predictorum Agnetis et Thomae dedit et predictam terram in maritlagium cum predicta Agnete et quod predicta Eva ad-huc utivm unde dicit quod si predicta terra ad alijum reverti debet post mortem ipsius Agnetis pro defectu heredis potius deberet reveri ad predictam Euan quam ad predictum Thomam.).

\textsuperscript{98} JUST 1/133 m. 1.
[T]hat it was the purchase of a certain Radulfus, husband of the said Geva (on whose death, etc.) Radulfus purchased the said tenements to him and his heirs separately from the inheritance of the same Geva. And he says that the aforesaid Geva died with the said Radulfus still living, whence he says that the aforesaid Geva did not die seised of the tenements in demesne as of fee.  

The tenant chose to dispose of Geva's rights in the land by fixing the heritable right in her husband. The tenant might have argued that the tenement was the marriage portion of the ancestor and that the demandant could not inherit his aunt's marriage portion. The demandant's task was made easier once he answered the tenant's objection and claimed that the tenement was the ancestor's rather than her husband's. His argument in support of his claim was complete. The jury found that the ancestor died seised and that the demandant was the ancestor's next heir. Nicholas had his seisin, even though he was probably claiming the reversion on the marriage portion. He was not in fact the heir of his aunt as far as her marriage portion was concerned.

F. Reversions after a Marriage Portion

The reversion of a marriage portion to the heir of the donor sometimes occasioned yet another use of the writ of mort d'ancestor. Once a reversioner successfully recovered tenements which had been given in marriage, the heir general of the last tenant in marriage sometimes brought either a writ of mort d'ancestor or, less frequently, a writ of novel disseisin against the reversioner. This was a more reasonable use of the writ of mort d'ancestor, for the claim of a reversion was not directly based on the seisin of the ancestor, whereas the claim to inherit from the ancestor, when the ancestor had no heir of his body, may have

99. (Quod fuit perquisitum cujusdam Radulphi viri predicta Geue de cujus morte & e. qui eadem tenementa perquisivit sibi et hereditibus suis separatim de hereditate ipsius Geue. Et dicit quod predicta Geue obit vivente predicto Radulfo unde dicit quod predicta Geue non obit inde seisita in dominico ut de feodo.)

The demandant further stated:
And Nicholas says that a certain Michael, father of the aforesaid Geva, gave the aforesaid land to the same Radulfus in free marriage with the same Geva, whence he says that it was the free marriage of Geva and not the purchase of Radulfus. And he says that she died seised in her demesne etc. and he puts himself on the assise.

(Et Nicholas dicit quod guidem Michael pater predicte Geue dedit predictam terram eadem Radulfo in liberum matrimonium cum ipsa Geue unde dicit quod fuit liberum matrimonium predicta Geue et non perquisitum predicti Radulphi. Et dicit quod obit inde seisita in dominico suo &c. Et ponit se super assisam.).
been valid if the ancestor's tenement were not held by a special form. The demandant claiming against a reversioner may have thought, or may in certain circumstances have been able to convince the jury to think, that 1) the ancestor held in fee; and 2) the demandant was the next heir of the ancestor.

However limited a tenant's interest in a tenement, his relatives and descendants took advantage of the possession to keep the tenement as long as possible. In 1269, Adam de Puttel brought his writ of mort d'ancestor on the death of his uncle. The warrantor for the tenant said that the assize ought not to be made because a certain Reginald de Henton gave the tenements to the ancestor in marriage with a certain Johanna. The case for the warrantor and his tenant was put very convincingly, and the jury, which found for the tenant, repeated the warrantor's argument. The tenant Johanna was being harassed by the relative of the ancestor who did not die seised in demesne as of fee. The reversioner had successfully recovered the tenement given in marriage, had been in seisin and had enfeoffed another tenant, but the demandant nevertheless felt that he still had a claim.

Similarly, in 1285, the demandant claimed on the death of his

100. KB 26/190 m. 6.
101. The jury's report was as follows:

The jurors say on their oath that the aforesaid Reginald gave the aforesaid land in marriage to the said Hugh de Puttel with the aforesaid Johanna, and to his heirs of their bodies legitimately born. So that the said Hugh had by Johanna a certain child who cruelly died before the aforesaid Johanna, and afterwards, the said Johanna died with the said Hugh still living, by which the same Hugh held the aforesaid messuage and land by the curtesy of England and according to the form of the aforesaid gift. And (they say) that the aforesaid Hugh did not die seised in his demesne as of fee. And that after the death of the same Hugh, the said Reginald seised the aforesaid messuage and land into his hand as he well could according to the form of his gift aforesaid. After his seisin and long use of the tenement, he enfeoffed the said Johanna, the wife of the aforesaid Richard de Puttel, and placed her in seisin thereof by his charter.

(Juratores dicunt super sacramentum suum quod predictus Reginaldus dedit predictam terram in maritagiun predicti Hugoni de Pyttel cum predicta Johanna et hereditibus suis de corporibus eorumdem procreatis legitime. Et qua predictus Hugo suscitavit quendam prolem de predicta Johanna qui inhumaniter descessit ante predictam Johannam et postea obiit predicta Johanna vivente predicto Hugoni per quod idem Hugo tenuit predicta messuagium et terram per legem Anglie et secundum formam donationis predicte. Et quod predictus Hugo non obit inde seismus in dominico suo ut de fode. Et quod post mortem ipsius Hugonis predictus Reginaldus seeyavit predicta messuagium et terram in manum suam sicut ei bene licuit secundum formam donationis suae predicte. et post seismam suam inde diu usitatae feodavit inde predictam Johannah uxorem predicti Ricardi de Pyttel et ipsam inde per cartam suam in seismam posuit.)
father whose son he was by a second marriage.\textsuperscript{102} The ancestor’s children by his first wife died, but he continued to hold his first wife’s marriage portion by the curtesy. The tenant said that after the ancestor died without heirs of his first wife, he entered into the tenements as the next heir of Richard, son of Stephen, who gave the tenements in free marriage with his sister Basilia. He further stated that the ancestor whose death was the subject of the litigation died seised as he said and not otherwise. The jury found the tenant’s story to be correct. These cases show that once a tenant acquired a certain interest in a tenement, even though it was a limited interest, his relatives and descendants attempted to acquire that tenement. This is, of course, the reason that so many heirs by the form of the gift were prevented from obtaining seisin, although alienation in some instances occurred.

In 1295, the tenant in a similar case argued against the demandant by denying that the ancestor died seised as of fee simple.\textsuperscript{103} Peter de Boland, the tenant, said that his grandfather had given the tenements to the ancestor in free marriage with Amice who died without heirs of the bodies of the ancestor and Amice and “after whose death the aforesaid tenements ought to revert to the same Peter as heir of the aforesaid Peter, his grandfather, whence he says that the aforesaid Henry did not die seised of the tenement in his demesne as of fee simple.”\textsuperscript{104} Presumably the tenant would have been successful with this plea if indeed the tenements had not been given in fee simple. The judgment was not recorded. The demandants in these and similar cases either thought the tenements were given in fee simple, or perhaps, in some instances, just may have thought they could convince the jury of their claim.

Instead of resorting to writs of mort d’ancestor, several demandants toward the end of Edward I’s reign brought writs of novel disseisin in similar circumstances, when they were claiming to hold lands once given in marriage against the reversioner. In 1303, Gerard de Camville brought his writ of novel disseisin against Radulfus de Schyrleye, who said that his grandfather gave the tenement to the couple and the heirs of their two bodies.\textsuperscript{105} The tenant said that immediately after the death of the wife, who

\textsuperscript{102} JUST 1/706 m. 4.
\textsuperscript{103} CP 40/110 m. 118d.
\textsuperscript{104} (post quarum mortem predicta tenentia revertabantur eidem Petro tanquam heredi predicti Petris avi &c. unde dicit quod predictus Henricus non obiit inde seisitus in dominico suo ut de feodo simplici &c.).
\textsuperscript{105} JUST 1/156 m. 17.
outlived her husband, he entered as the reversioner. The demandant, however, said that long before Elizabeth died he himself was enfeoffed to hold in fee. The jury did not know whether the couple had been enfeoffed to hold in fee or in tail, but the jury said that each by virtue of the gift had a free tenement and that later the wife enfeoffed the demandant who was in seisin for six years before the tenant disseised him. A day was given for judgment.

The above situation is somewhat different from that of the demandant claiming by mort d'ancestor since the demandant was not the relative of the tenant in tail but purchased from her. The jury specifically mentioned that the demandant was seised six years, until the death of the tenant in tail without heirs of her body. This means that more than ten years after the statute De Donis a tenant in tail alienated when she had no heir of her body.

Again in 1303, a demandant used the writ of novel disseisin to claim as the heir of the tenant in free marriage who died without heirs of her body. The tenant denied the disseisin saying that he was the reversioner. Nicholas, the demandant, insisted that William le Yung "died seised of it in demesne as of fee and after whose death the aforesaid Nicholas entered as son and next

106. "The same Radulfus, immediately after the death of the aforesaid Elizabeth, who outlived the aforesaid John, entered into the aforesaid manor as that he was expecting, to whom the right and reversion of the same tenement [should come] without injury or disseisin . . . ." (Idem Radulfus statim post mortem predictae Elisabethe quae superius dixit predictum Johannis intravit manerium predictum ut ille cui jus et reversio eiusdem tenementum expectabat absque iniuria seu disseisina . . . ). Palmer, supra note 52, at 46-47 & n.14, found an assize of novel disseisin in 1271, in which a divorcee claimed that the whole tenement ought to remain (remanere debeb) to her because it was her liberum maritagium. The justices found that her husband unjustly disseised her.

107. JUST 1/1325 A m. 5.

108. The tenant argued:

For he says that the aforesaid tenements were, at another time, in the seisin of a certain Andrew Wylekin, who gave the same in free marriage to a certain William le Yung with a certain Matilda, his daughter; he further says that said William and Matilda held those tenements sought against him. And because the aforesaid William and Matilda died without heir of their bodies issuing, the same William entered into the aforesaid tenements as into his reversion as relative and next heir of the same Andrew, and they continued their seisin of it without any injury.

(Id) hic enim quod tenementa predicta fuerunt aliquo tempore in seisina cujusdam Andree Wylekin qui eadem dedit in liberum maritagium suum Willelmo le Yung cum quadam Matildida filia sua quipsum Willelmus et Matildis tenuerunt tenementa illa versus eum petita. Et quia predicti Willelmus et Matildis obierunt sine herede de corporibus suis exsunt idem Willelmo intravit in tenementis predictis tanguam in reversione suo ut consangueineus et heres propinquior ipsius Andree et seisinam suam inde hucusque continuavertunt absque alia iniuria.)
The jury found for the tenant, and the decision was put in the terms of the assize. “Nicholas never was in seisin as of his free tenement . . .”

In 1306, under circumstances similar to those William le Yung faced, the jury found for the demandant. A tenant in tail demised for a term of years, and the tenant of the case disseised the alienee to claim the reversion of a gift made in tail. The tenant denied the accusation of disseisin. The demandant, however, told a more complete story, and the court found that his version of the facts was correct.

And the aforesaid Richard de Brickesburn says that the aforesaid Roger and Alice, his wife, were enfeoffed of said messuage simply and not by the entailed form. The same Roger and Alice enfeoffed a certain Thomas Pychard of the aforesaid messuage to himself and his heirs, and the same Richard afterwards reenfeoffed the aforesaid Roger and Alice of the same messuage to hold for the term of life of the other. And the aforesaid Alice, who survived the aforesaid Roger demised to the aforesaid Richard for the term of the life of the other (Roger).

Because the court believed the demandant’s allegations, the deci-

110. (Nicholas nunquam fuit in seisina ut de libero tenemento suo).
111. JUST 1/712 m. 1.
112. She said that her father:
Enfeoffed a certain Roger le Serviant and Alice, his wife, of the aforesaid messuage with appurtenances to hold to them and the heirs of their bodies issuing under this condition — that if they died without an heir etc., the aforesaid messuage would revert to the heirs of the aforesaid Richard. And she says that because the aforesaid Roger and Alice died without heir of themselves etc. after their deaths, her father entered into the aforesaid messuage as into the inheritance of the same Isabella, as he was well permitted to do.

113. (Et predictus Ricardus de Brickesburn dicit quod predicti Rogerus et Aliciauxor eius fuerunt feoffati de predicto messuage simpliciter ei non per formam talliatam qui quidem Rogerus et Alicia feoffaverunt quendam Thomam Pychard de predicto messuagio sibi et heredibus suis quod predicta Ricardus postea refeoffavit predictos Rogerum et Aliciam de predicto messuagio tenendo ad terminium vitam ulterior. Et predicta Alicia supervisit predictum Rogerum ad terminium vitam ulterior dimissi predicto Ricardo.)
tion was made in favor of the demandant who was to recover seisin.\textsuperscript{114}

To sum up, the most important use of the writ of mort d'ancestor in connection with the marriage portion was to claim to inherit a marriage portion held by the demandant's mother and father. But the claim could be made only on the seisin of one parent. The writ of mort d'ancestor was the proper writ for the heir to a marriage portion before the statute, \textit{De Donis}, if only because no other writ was well enough known. The demandant bringing the writ to claim tenements once given in marriage often found it difficult to make his case strong enough for the courts to give judgment in his favor. The problem was that the ancestor was not seised as of fee to the same degree as the tenant in fee simple and this was often complicated by an alienation on the part of the ancestor so that the demandant often found it impossible to prove his case satisfactorily.

In Bracton's time, it was accepted that the heir to a marriage portion could claim by a writ of mort d'ancestor.\textsuperscript{115} Professor Milsom pointed out that Britton and Fleta also prescribed the writ of mort d'ancestor for the heir to an entail when the donee had not alienated.\textsuperscript{116} Bereford,\textsuperscript{117} in another version of the case with which this Article closes,\textsuperscript{118} held that Chief Justice Hengham took the view that the writ of mort d'ancestor was never open to the heir in tail. Furthermore, Justice Inge offered that even before the statute \textit{De Donis} the writ of formedon in the descender was the

\begin{itemize}
  \item \textsuperscript{114} In two cases of novel disseisin from the first year of the reign of Edward II, the tenants were reversioners who took back marriage portions after the donees had died without heirs of their bodies. The first case (\textit{JUST 1/ 1342 m. 7}) was somewhat unusual in that the demandant was the husband of the woman with whom the marriage portion was given. The wife died and the husband enfeoffed their son and conceded to him whatever he had in the tenement in perpetuity. The son then died without heir of his body and the tenant of the case took the marriage portion back as that which ought to revert to him by the form of the gift. The husband wished to hold for term of life, but he was not in seisin so that he could be disseised. In the second case (\textit{JUST 1/ 1343 m. 19}) the tenant was the original donor of the marriage portion.
  \item \textsuperscript{115} See 3 \textsc{Bracton on Laws}, \textit{supra} note 13, at 268 (discussing assise of mort d'ancestor to recover land given as gift).
  \item \textsuperscript{116} S.F.C. Milsom, \textit{Formedon Before De Donis}, 72 \textsc{Law Q. Rev.} 391, 392 (1956). Britton and Fleta's treatises were written circa 1290. Baker, \textit{supra} note 8, at 202 [hereinafter Milsom, \textit{De Donis}].
  \item \textsuperscript{117} William Bereford was a Serjeant at law and a Justice of the Common Pleas from 1294 to 1309, was Chief Justice from 1309 until his death in 1326. John Sainty, \textsc{The Judges of England} 1272-90 (1993).
  \item \textsuperscript{118} For a discussion of this case, see infra note 213 and accompanying text.
\end{itemize}
proper remedy for the heir in tail.\textsuperscript{119}

The writ of mort d'ancestor did not provide a good, workable remedy for the heir to a gift given in tail. While the ancestor may have been seised as of fee (which was all that the assize required), the growing recognition of the distinction between the fee tail and the fee simple made it more difficult for the heir to use mort d'ancestor for an entail. After the publicity given by the statute \textit{De Domis} to the writ of formedon in the descender, which also acknowledged that the ancestor died seised as of fee, the writ of mort d'ancestor gradually fell into disuse for the purpose of recovering marriage portions and other gifts in tail. The disfavor in which the courts held claims to marriage portions initiated by writs of mort d'ancestor must eventually have prompted many lawyers to advise their clients against the use of the assize. The writs of formedon, which superseded the writ of mort d'ancestor, will be examined in the next section.

II. THE MARRIAGE PORTION AND THE WRITS OF FORMEDON

The three writs of formedon were designed to protect estate owners who had rights arising from the form of conditional gifts. The earliest of these writs was formedon in the reverer, which appears on the curia regis rolls as early as the reign of John.\textsuperscript{120} It was used to claim reversion when the donee in tail or of a marriage portion left no heirs of his body. The second writ of formedon, in the descender, cannot be said to have been an effective remedy in the courts before 1285. It was meant to be used when the heir to the marriage portion was not the heir general.\textsuperscript{121}

The third writ of formedon, in the remainder, gave a remedy to the donee who was to have entry before the reversioner and after the life tenancy (or tenancies) or gifts in tail became extinct. It was not mentioned in \textit{De Domis} and never attained the popularity of the other writs during the reign of Edward I. Before 1285,

\textsuperscript{119} Y.B. Michaelmas 6 Edw. II (1312-13), \textit{reprinted in} \textit{34 Selden Soc'y} 44 (Sir Paul Vinogradoff and Ludwig Ehrlich eds., 1917).

\textsuperscript{120} See Milsom, \textit{De Domis}, \textit{supra} note 116, at 393-97 (noting that while formedon in descender was pleaded as early as 1275, no remedy existed if tenant in tail had issue and alienated).

\textsuperscript{121} The statute provided only that the donee(s) in tail could not alienate, so that it was possible to argue, as Herle did in 1312: Mort d'ancestor was to be used by the grandchild of the donees since by statute the child of the donees could alienate. See \textit{infra} note 213 and accompanying text. The writ of mort d'ancestor was properly substituted for formedon in the descender, until \textit{De Domis}, and continued to be used even after the statute but in more limited circumstances.
there is very little indication on the plea rolls of what the remainderman, as he eventually came to be called, did to recover his rights.122

The provision and use of effective remedies, in particular the development of the use of writs of formedon, enabled donors to continue giving gifts with a special form and later, during the fourteenth century, to expand the arrangements they had made up to the enactment of De Donis. However, serious problems presented by these writs, which the courts often considered to lie only for wrongs committed after 1285, had to be settled before the effectiveness of the writs of formedon was assured. From the solution to these problems emerged a developed doctrine of estates.

A. History of the Writs of Formedon

The history of the writs of formedon before De Donis, especially formedon in the descender and formedon in the remainder, is very much of an outline only. The writ of formedon in the reverter was no doubt the oldest of the writs of formedon, and the other writs may have been based on this first writ. The precedents in Novae Narrationes for formedon in the remainder are based on the action in the descender. A note after the count for an action claiming the right to the reversion linked the actions in the descender and in the remainder.123 However, by the time of the note in Novae Narrationes about procedure in the three writs, probably at the end of the reign of Edward I, the writ of formedon in the reverter had moved further away from the other writs.

122. Charters provide many examples of remainders in the thirteenth century; remainders were provided on perhaps about half the gifts in tail. Reversions were reserved on all marriage portions, explicitly in the deeds or implicitly by the form of the gift. Actions brought for reversions during the reign of Edward I were far more frequent. The estate of the remainderman took effect only on the extinction of the estates of the donee in tail. To quote Professor Plucknett:

on the fundamental question of the nature of remainders, it is apparent that the courts of Edward II had not yet settled their first principles ... it seems clear that the balance of opinion was to regard the remainder as a purely executory interest which could be described as 'nothing,' 'mere words,' or 'wind' until it fell into possession ... It was slowly supplanted by a different view which regarded the remainder as a present right, although its enjoyment in possession was postponed.

T.F.T. Plucknett, Introduction to 13 Y.B. 12 Edw. II (1318) in 65 Selden Soc'y Lxxiii (John P. Collas & Theodore F.T. Plucknett, eds., 1950). Brand, supra note 84, at 321, suggests that the earliest case on a proper writ of formedon in the remainder was in 1279.

The reverter had to be fitted into feudal social terminology. Baker discussed the feudal terminology used in the writ of formedon in the reverter, applying the "feudal" concept of escheat, in which the grantor expected to get the tenement back if the donor(s) died without heirs of the class prescribed in the grant.\footnote{Baker, supra note 8, at 313.} The need for the language of escheat in the writ of formedon in the reverter declined after military service was organized outside the structure of land tenure.\footnote{Frank M. Stenton, The First Century of English Feudalism 1066-1166, at 135 (2d ed. 1961) stated that as early as the reign of King John (1199-1216), professional mercenaries were being used extensively. For later developments, see Maurice Powicke, The Thirteenth Century 1216-1307, at 540-59 (2d ed. 1962) (recounting use of mercenaries in war during years 1265-68).} Professor Milsom pointed out that Fleta dealt with the actions in the reverter and in the descender under the heading De Ingressu.\footnote{S.F.C. Milsom, Introduction to Novae Narrationes, supra note 123, at cxxii n.8.} This is a reference to the origins of the writ of formedon in the reverter in the writ of entry. The wording of the writ setting forth the demandant's claim to a reversion could easily have been, at least in part, a model for the other writs of formedon. As Palmer emphasized, the conditional gift before De Donis depended precisely on the fulfillment of the condition to trigger heritability and alienability.\footnote{Palmer, supra note 52, at 57. For more details about the situation before De Donis, see supra note 74 and accompanying text.} After the enactment of the statute De Donis, the entail was a fee which continued to limit heritability to the children of the couple (or individual) specified and alienability to the term of the life of the alienating party.

The history of formedon in the reverter before De Donis is comparatively easy to trace. The earliest writs of formedon in the reverter were a special writ of entry; there may have been some cases based on this writ almost as early as the writs of entry themselves, which date from the late twelfth century. But the earliest example of the writ of formedon in the reverter found on the curia regis rolls dates from the fifteenth year of John's reign, 1213.\footnote{Curia Regis Rolls of the Reigns of Richard I and John, supra note 24, at 36.} In this case, the seisin of the donor Autropus (the demandant himself) was mentioned and esplees were laid in him, but no form of the gift to the donee was set out.\footnote{Id.} The demandant's claim to a reversion could easily have been, at least in part, a model for the other writs of formedon. As Palmer emphasized, the conditional gift before De Donis depended precisely on the fulfillment of the condition to trigger heritability and alienability.\footnote{Palmer, supra note 52, at 57. For more details about the situation before De Donis, see supra note 74 and accompanying text.} After the enactment of the statute De Donis, the entail was a fee which continued to limit heritability to the children of the couple (or individual) specified and alienability to the term of the life of the alienating party.

124. Baker, supra note 8, at 313.
125. Frank M. Stenton, The First Century of English Feudalism 1066-1166, at 135 (2d ed. 1961) stated that as early as the reign of King John (1199-1216), professional mercenaries were being used extensively. For later developments, see Maurice Powicke, The Thirteenth Century 1216-1307, at 540-59 (2d ed. 1962) (recounting use of mercenaries in war during years 1265-68).
126. S.F.C. Milsom, Introduction to Novae Narrationes, supra note 123, at cxxii n.8.
127. Palmer, supra note 52, at 57. For more details about the situation before De Donis, see supra note 74 and accompanying text.
129. Id. Esplees are simply the products of the earth, such as crops, but may also include ground rents and services. Black's Law Dictionary, supra note 9, at 546.
dant went immediately at that point into his claim about the tenant’s entry into the land, which did not give him good title.\footnote{130} The demandant Autropus said he gave the land as a marriage portion to his daughter who died without an heir de se. The outcome of the action was not recorded, but the demandant was probably not successful, judgment probably being given to the tenant by the curtesy.\footnote{131}

Let us now examine the next case involving Autropus’ gift. In 1221, William de Braham’s second wife sought recovery of land Autropus had given as a marriage portion by impleading Autropus’ son, also named William, for tenements in Freston.\footnote{132} Agnes, the demandant, brought a writ of trespass after an alleged disseisin of tenements which she held in guardianship with her son Philip, from the gift of Earl Roger. William, son of Autropus, gave a full history of what became of the tenements from the time his father was seised until his own attempt to recover the tenements once given in marriage to Agnes. William’s father, Autropus, gave his daughter Agnes a marriage portion, and when she died without heirs, William said he placed himself on that land because the land reverted to him. William, son of Autropus, lost this action. Maitland commented on the writ of trespass and its “thoroughly possessory nature,” apparently attributing the decision to the nature of the writ, “for on the defendants’ pleading Alice (recte Agnes) has no title.”\footnote{133} William, son of Autropus, however, remained unsatisfied with this decision and brought a writ of entry against the Braham family, this time against Philip, son of William and Agnes, in 1223.\footnote{134}

One further material fact was added in this action, and it no doubt accounts for much of the difficulty which Autropus and his son faced in recovering the tenements given in marriage. Autropus may have alienated his reversion to Earl Roger. Issue was joined on whether the earl actually was in seisin after Autropus made a charter to him. William, son of Autropus, put his case very persuasively. William claimed the reversion for lack of heirs

\footnote{130} 7 Curia Regis Rolls of the Reigns of Richard I and John, supra note 128, at 36.
\footnote{131} Before the land reverted to the donor, the widower, who was entitled to hold his wife’s land for his lifetime, had to die. This was the origin of the statement that the law of England was very courteous to husbands.
\footnote{133} Id. at 427 n.1.
\footnote{134} 11 Curia Regis Rolls of the Reign of Henry III, supra note 87, at 83.
on tenements given in marriage and said that the earl never had seisin so that he could not give or warrant those tenements. The difficulties William, son of Autropus, faced in recovering the tenements as his reversion had nothing to do with the writ of entry by which he claimed. Had it been certain that the earl was never in seisin or that Autropus never had any intention of alienating, William would have had no trouble recovering the tenements. The roll on which the judgment would have appeared, according to the date given at the end of the pleadings discussed, is not extant, but the judgment was probably finally satisfactory to both parties since the case did not arise again.

Bracton included in his Note Book an unusual case pleaded in 1225, based on a writ of entry and ostensibly claiming a reversion after a marriage portion.135 Maitland noted that Fitz-Herbert catalogued this case under dower and gave a gloss on the facts of the case: “Seemingly Isabella Beauchamp having by a former marriage a son, William, has married Nicholas Kenet and died without having issue by him. Nicholas claims curtesy.”136 Maitland then gave a reference to Bracton’s treatise for a note by “the annotator” at the end of the case which was as follows: Nota quod terra data in maritagium reuertitur ad uerum dominum donatorem quia nullum fuerit simul.137

The case did not seem out of the ordinary to the thirteenth century narrator nor to Maitland. But if Nicholas were Isabella Beauchamp’s second husband, her son, William, was really claim-

135. 3 Bracton’s Note Book, supra note 132, at 96.
136. Id. at 96 n.3.
137. Id. at 97. The case reads as follows:
William de Bello Campo (Beauchamp) seeks against Nicholas de Kenet the manor of Sheldelegha with appurtenances as his right, in which the same Nicholas has no entry unless through Isabella de Beauchamp, his wife and mother of the aforesaid William whose heir he is. As the same William says, Nicholas held the aforesaid manor in marriage, and then the same William says that Isabella died without heir of her body by which the land ought to revert to him as son and heir. Whence he complains that after the death of the same Isabella, Nicholas took 10 markes of his money, and he produced suit on this matter.

(Willelmus de Bello Campo petit versus Nicolaum de Kenet manerium de Sheldelegpha cum pertinentiis ut ius suum in quod idem Nicolaus non habet ingressum nisi per Ysobellam de Bello Campo uxorem suam matrem predicti Willelmis cuissus heres ipsi est que predictum manerium tenuit in maritagium ut dicit, et unde idem Willelmus dicit quod Isobella obit sine herede de se per quod terra debut reuerti ad eum ut ad filium et heredem suum, et unde queritur quod post mortem ipsius Ysobelle cepit idem Nicolaus de moninibus suis x. marcas et inde producti sectam.)

Id. Maitland’s reference is to Bracton f.438 which can be found in 4 Bracton On Laws, supra note 13, at 360.
ing to inherit his mother's marriage portion. The claim is put in the terms of the early writ of formedon in the reverter when the writ was still a writ of entry. The marriage portion may have been given separately with Isabella on the occasion of her second marriage; it is called her inheritance later in the plea, but the tenement may also have been Isabella's marriage portion when she married her first husband. The source of the gift was disputed, but apparently the point was not considered material to the decision.\(^{138}\) The tenant claimed that the king had given the manor to him in marriage with Isabella; the demandant claimed that the tenant held of Ralph de Tony.\(^{139}\) The decision was based on whether the tenant had issue of his wife. Since the tenant did not, the demandant, Isabella's son, recovered seisin from his stepfather. The demandant did not state that Ralph de Tony was a relative of Isabella or that he gave the manor in marriage. The demandant was not claiming to be the heir of the donor from whom the right of reversion descended. He in fact claimed as the son and heir of his mother: *terra debuit reverteri ad eum ut ad filium et heredem suum.*

The facts of the case, which would have been stated if a fully developed writ of formedon in the descender had been available, cannot be ascertained with certainty. But it would seem as though in claiming to inherit his mother's marriage portion, which his step-father had been holding by the curtesy without children by his wife, William was putting his claim in the form of a reversion rather than a descent. But despite the annotator's note, William was not the ordinary donor and *verus dominus:* he was the heir by the form of the gift. The court did not, or could not, notice the form of the writ since the tenant himself offered no objection to it, but instead thought his safest protection was to claim to hold the marriage portion in chief. The writ of formedon in the reverter may have provided a surer model for the writ of formedon in the descender at a more opportune time, when the phrase *debut reverteri* was changed to *debut descendere.*

In 1219, Richard le Harre and his wife Antigonia recited their count giving full details as to why a tenement once given in marriage should revert to them.\(^{140}\) The gift had been made by an-

---

138. *3 B racont' s Note Book,* *supra* note 132, at 97.


140. *2 B racont' s Note Book,* *supra* note 132, at 54.
other Richard, Antigonia's father. They claimed the tenement as the right of Antigonia whose father was seised in demesne as of fee in the time of King John when he gave Antigonia’s aunt the land in maritagium. They had a son who died without heir of his body. The case turns not on whether the marriage portion ought to revert but on whether it ought to revert to Antigonia, since Antigonia had a brother now dead.\footnote{141}

These early cases stated that if the woman, whose marriage portion the tenement was, died without heirs of her body, eo quod \textit{X. obiit sine herede de se}, the tenement was to revert, \textit{reverti debuit}. In two early instances, the tenement was said to revert for default of heirs, \textit{reverti debuit pro defectu heredis}. William, son of Autropus, stated the case in these terms in answer to Agnes’s writ of trespass, in 1221.\footnote{142} In another case, from 1232, the warrantor for the tenant admitted that the tenements were his wife’s marriage portion and ought to revert to the demandant for lack of heirs, \textit{ad ipsum Robertum pro defectu heredis}.\footnote{143} In 1241, William de Appeldurle brought his writ of entry against his former son-in-law with an opening in the same form as cases from the 1220s:

William de Appeldurle seeks against William de Oxecroft 8 acres with appurtenances in Leddred as his right. And which the same William gave Isabella one-time wife of the same William in free marriage. And which, after the death of the aforesaid Isabella, ought to revert to the aforesaid William because the aforesaid Isabella died without heir of himself.\footnote{144}

\footnote{141} The existence of the deceased brother creates an issue as to whether his heirs may claim. For other early cases in print in which the demandant claimed a reversion on a marriage portion by a writ of entry, see 2 \textit{Bracton's Note Book}, supra note 132, at 982-83. The “annotator” also appended two hypothetical writs to the end of a case of 1231. The first writ was for the heir of a donor, the second for the chief lord. When the chief lord brought the writ, he claimed the tenement as his right and escheat. The tenement was to revert as his escheat for lack of heirs. The writs were about mid-thirteenth century. For another printed case, see 11 \textit{Curia Regis Rolls of the Reign of Henry III}, supra note 134, at 532.

\footnote{142} 3 \textit{Bracton's Note Book}, supra note 132, at 426-27. For a discussion of William’s claims, see notes 132-37 and accompanying text.

\footnote{143} \textit{JUST} 1/62 m. 16. On the same roll, \textit{JUST} 1/62 m. 24d., Simon Druvel brought a writ of entry, but did not mention that the tenement was a marriage portion which ought to revert to him until the tenant brought it up and claimed it because he was heir of his aunt to whom the marriage portion had been given. Simon said that “William Druwell, his father, gave that land in marriage to the same Sybil and because that land ought to revert to the same William as to an heir of himself.” (\textit{Willelmus Druwell pater suus terram illam dedit in maritigum eidem Sibille et quia terra illa reverti debet ad ipsum tanquam ad herede de se}.)

\footnote{144} \textit{JUST} 1/868 m. 11.
It does not mention the default of heirs.

Four years later, the language of escheat was adopted in a case of 1245. The phrase 'ought to revert for lack of heirs' was not used, but the tenement was said to revert as an escheat (tanquam eschaeta) because the tenant died without heirs of himself.145 The language of escheat was then used until almost the end of the reign of Henry III. The writ of escheat itself had developed from a writ of entry.146 There was little distinction at this time between a reversion according to the form of the gift and an escheat for lack of heirs after a gift given to a man and his heirs.

Several cases during the late 1240s were based on a writ of entry which used the language of escheat. In 1246, Simon, son and heir of Simon de Rupe, brought his writ of entry for lands his father, also Simon de Rupe, gave his daughter 'Katherine and the heirs who issue from her and which ought to revert to him.'147 Several more cases from the 1240s phrase the demandant's claim for a reversion on a marriage portion in terms of an escheat to the demandant.148

---

145. JUST 1/482 m. 36d. William de Arcey of Flykeburg seeks against Roger de Oskeby two 1/2 bovates of land with appurtenances . . . which Walter Bek held and which ought to have reverted to the same William as his escheat because the aforesaid Walter died without heir, etc. And then he says that a certain Johanna, sister of the same William was given that land in marriage.


147. JUST 1/1045 m. 48d. (tanquam eschaeta sua eo quod predicta Katherina obit sine herede de se).

148. See, e.g., JUST 1/699 m. 16d; JUST 1/561 m. 26d m. 9; JUST 1/560 m. 5; JUST 1/234 m. 31d; JUST 1/567 m. 26d. The cases on Rolls 560 and 561 were heard at Norwich before Henry of Bath; Preston was the judge for the cases heard on Roll 234 (at Colchester) and Roll 567 (at Norwich).

Two more examples will be sufficient to illustrate the pattern of the claim. One Radulfus pleaded his case in 1248, claiming a reversion as his escheat, but the jury found that the grandfather of Radulfus did not give the land in marriage with Margery. JUST 1/231 m. 30d.

Radulfus de Hay seeks against . . . Thomas, son of Albreda, one acre of
During the next decade, the wording of the writ was in transition. One demandant would claim the reversion on a marriage portion as his escheat; another might claim it as that which ought to revert to him by the form of the gift. It is difficult to offer any reasons why the writ of formedon in the reverter adopted the language of the writ of escheat after it had already been used as simply a writ of entry because the writ for the reversion on a marriage portion in the simple form of a writ of entry was successful. Possibly the writ for a reversion used the same wording as the writ of escheat because the distinction between reversion and escheat was not yet very great.

Language for the reversion developed straightforwardly. In 1268, John de Skipwith brought a writ of formedon for a claim based on a reversion in order to make a concord.\(^{149}\) He did not

land with appurtenances in Little Shoberry as his right, and which ought to revert to the same Richard as his escheat because Margery de Shoberry to whom William de Hay, grandfather of the aforesaid Radulfus (whose heir he is), gave that land in marriage and died without an heir of her body. And whence the aforesaid Radulfus says that the aforesaid William de la Hay gave the aforesaid land to a certain William de Shobyr in marriage with Margery, his daughter, who afterwards died without an heir of herself; whence he says that the aforesaid land ought to revert to the same Radulfus as heir of the aforesaid William de Hay.

(\textit{Radulfus de Haya petit versus \ldots Thomam filium Albrede unam acram terre cum pertinentiis in parva Shobyr ut jus suum}. \textit{Et que ad ipsum Ricardum reverti debet tanquam escaeta sua eo quod Margeria de Shobyr cui Willelmus de Haya auus predicti Radulfi cujus heres ipse est terram illam dedit in maritagium obiit sine herede de se Et unde predictus Radulfus dicit quod predictus Willelmus de Haya dedit predictam terram cuidam Willelmo de Shobyr in maritagium cum Margeria filia sua que postea obiit sine herede de se . unde dicit quod predicta terra reverti debet ad ipsum Radulfum tanquam heredem predicti Willelmi de Haya.}).

The tenant was quit. In the following year, Nigel fitz Lambert brought his writ of entry to obtain as an escheat the reversion of a gift given in marriage. \textsc{Just. 1} 561 m. 67d.

Nigel, son of Lambert de Weston, seeks against Lambert, son of Alditha, 8 acres of land with appurtenances in Weston, \ldots as his right, etc. And which Aylric de Weston, relative of the aforesaid Nigel whose heir he is, gave in marriage to Orewanna de Weston and the heirs who would issue of her and which ought to revert to the same Nigel as his escheat because the aforesaid Orewenna died without an heir of herself.

(\textit{Nigellus filius Lamberti de Weston petit versus Lambertum filium Aldithe octo acras terre cum pertinentiis in Weston \ldots ut jus suum etc}. \textit{Et quas Aylric de Weston consanguineus predicti Nigellus cujus heres dedit in maritagium Orewanne de Weston et hereditibus qui de ea exirent et que ad ipsum Nigellum reverti debent tanquam escetae sua eo quod predicta Orewenna obiit sine herede de se.}).

No decision was recorded in this case. The form of the demandant’s opening count remained the same through the 1250s.

\(^{149}\) \textsc{Just} 1/1050 m. 50d. He maintained:

John de Skipwith seeks against Robert de Thorpe and Cecilia, his wife, 5 acres of meadow in Cotingham, which William de Skipwith father of

https://digitalcommons.law.villanova.edu/vlr/vol38/iss4/2
use the language of escheat, nor did he invoke the form of the gift by name. Similarly, in 1272, William, son of Adam of Lincoln, brought his writ for the reversion after a gift given to a husband, his wife, and the heirs of the body of the wife. William mentioned neither escheat nor the form of the gift. The writ was like the simple writ of entry used for early claims to a reversion at the end of John’s reign and the beginning of his son’s reign. By the end of the reign of Henry III, the writ of formedon in the reverter was reaching its developed form, which bypassed the claim that the marriage portion or gift in tail was an escheat and emphasized that the marriage portion reverted to the donor according to the form of the gift.

In 1272, William le Chanu brought his writ of formedon in the reverter against Baldwyn de Aker. The clerk recorded some of the pleading but broke off before issue was joined.

William le Chanu seeks against Baldwin de Aker 20 acres with appurtenances in Wottlesforde, which John le Chanu, father of the aforesaid William, whose heir he is, gave William de Burg with Beatrice, sister of the same John and the heirs coming forth from her. And which, after the death of the same Beatrice, ought to revert to the same William by the form of the gift aforesaid because the aforesaid Beatrice died without heir of the aforesaid John whose heir he is gave to Richard de Thorp and the heirs of his body issuing and which after the death of the same Richard ought to revert to the same John because the aforesaid Richard died without heir of himself etc.

(Willelmus filius Ade de Linc’ petit versus Simonem de Banewell unum mesuagium ij tofa lej lacras terre et unam acram prati unum molendinum cum pertinentiis in Torkesey que Adam de Linc’ pater predicti Willelmi cujus heres ipsa est dedit Rogerio le Tailor et Hawisa woxi eius et hereditibus suis qui de predicta Hawisa exerent et que post mortem ipsorum Rogeri et Hawiso ad prefatum Willelmum reverti debent eo quod predicta Hawisa obiit sine herede de se &c.).

150. The preliminaries before the concord was made must have been brief.

151. JUST 1/483 m. 66d. The writ stated: William, son of Adam de Lincoln, seeks against Simon de Banewell one messuage, two tofts and 51 acres of land, one acre of meadow, and one mill with appurtenances in Torkesey, which Adam de Lincoln, father of the aforesaid William whose heir he is, gave Roger le Tailor and Hawisa his wife and their heirs who would issue of the aforesaid Hawisa and which after the death of the same Roger and Hawisa ought to revert to the aforesaid William because Hawisa died without an heir of herself.

(Willelmus filius Ade de Linc’ petit versus Simonem de Banewell unum mesuagium ij tofa lej lacras terre et unam acram prati unum molendinum cum pertinentiis in Torkesey que Adam de Linc’ pater predicti Willelmi cujus heres ipsa est dedit Rogerio le Tailor et Hawisa woxi eius et hereditibus suis qui de predicta Hawisa exerent et que post mortem ipsorum Rogeri et Hawiso ad prefatum Willelmum reverti debent eo quod predicta Hawisa obiit sine herede de se &c.).

152. JUST 1/84 m. 13d.
herself.\textsuperscript{153}

The alienability of the marriage portion by the widow was assumed in this case by Baldwin the tenant, who purchased the marriage portion from Beatrice as part of an exchange of lands.

So that the same Beatrice afterwards, during her long widowhood, sold the aforesaid land to the same Baldwin to hold to himself in fee for certain other land which the same Baldwin gave to the same Beatrice for the term of her life, whence he seeks judgement because the aforesaid Beatrice (whose marriage portion the aforesaid land was) sold and after the aforesaid death of the aforesaid William, her husband, if the aforesaid William le Chanu can claim anything of right in the aforesaid land.\textsuperscript{154}

Contesting the terms which the tenant used, the demandant said that the tenant did not prove that the husband William de Burgo had any child by his wife. The demandant accepted that a marriage portion was alienable once issue was had. This was the classical conditional gift. Its alienation in many instances may have provided the demandant with the equivalent income in rent or services from another tenement purchased with the proceeds. The other points the demandant put forth against the tenant who purchased a marriage portion which should have reverted were that 1) the tenant recognized that the tenement was a marriage portion and 2) Beatrice had nothing in the land unless a term for her life, presumably because she had no heir of her body. The record breaks off with the demandant asking if he should be excluded from having his plea heard.

In 1279, Isabella de Fortibus\textsuperscript{155} brought a writ of formedon

\begin{flushleft}
\textsuperscript{153} (Willelmu le Chanu petit versus Baldwynum de Aker xx acras cum pertinentiis in Wottlesforde quas Johannes le Chanu pater predicti Willelmi cujus heres ipsa est dedit Willelmo de Burgo cum Beatrica sorore eiusdem Johannis et heredibus de ea provenientibus Et que post mortem ipsius Beatrice ad ipsum Willelum reverti debent per formam donationis predictae eo quod predicta Beatrica obiit sine herede de se.).

\textsuperscript{154} (Ila quod ipsa Beatrica postea in longa viduitate sua vendidit predictam terram idem Baldewino tenendam sibi in feudo pro quadam aliqua terra quam idem Baldewinus concessit idem Beatrice ad terminum vitae unde petit judicium desicat predicta Beatrica cujus maritagium predicta terra fuit vendidit et predictam post mortem predicti Willelmi martii si si predictus Willelma le Chenu aliquid juris clamare potest in predicta terra.).

\textsuperscript{155} From her many pleas, Isabella de Fortibus must have been as informed about the law as many lawyers. She demanded high standards when lands to which she had a claim were involved. The most interesting case involving Isabella and a marriage portion is discussed in McCauliff, \textit{supra} note 1, at 968-70. For additional information about Isabella, see F. M.Powicke, 2 \textit{King

https://digitalcommons.law.villanova.edu/vlr/vol38/iss4/2
1993] Medieval English Marriage 979

in the reverter which is relevant not only because the writ is in its final form but also because the jury made an interesting statement about the marriage portion.

Isabella de Fortibus, Countess of Albemarle, seeks against John, son of William de Insula, one messuage and three carucates of land with appurtenances except 6 1/2 acres of land in Cruk, which William de Vernon, great grandfather of the aforesaid Isabella, whose heir she is, gave to William de Brewer and Johanna, his wife, and to their heirs who would be born to the same William and Johanna, and which ought to revert to the aforesaid Isabella because the aforesaid William and Johanna died without heirs of their bodies issuing.156

In all probability, no explicit evidence of a reversion to the heir of the donor was presented. If the jury did not see the charter by which William Vernon may have confirmed his gift in marriage, they made up for the lack of a charter by giving a statement about the marriage portion worthy of Bracton’s treatise.157 According


156. CP 40/9 m. 45. (Isabella de fortibus Comitissa Albemarle petit versus Johannem filium Willelmi de insula unum messuagium et tres carucatas terre cum pertinentiis exceptis va virgatis terre et dimidius in Cruk que Willelms de Vernon groavus predicte Isabelle cujus heres ipsa est dedit Willelmo de Breure et Johanne uxori eius et heredibus suis qui de eisdem Willelmo et Johanne exeunt et que post mortem ipsorum Willelmi et Johanne ad prefatam Isellam reverti debent eo quod predictus Willelms et Johanna obierunt sine herede de corporebus suis execente.)

There are some pleas based on a gift made by a grandfather and some pleas in which the descent of the demandant is traced from the great grandfather, but cases in which the demandant claimed a reversion of a marriage portion given by the demandant’s grandfather are rarely found on thirteenth-century plea rolls.

157. The record states:

The jurors say that the aforesaid William de Vernon gave the aforesaid tenements with appurtenances to the aforesaid William de Brewer in free marriage with the aforesaid Johanna, his daughter, and that the aforesaid William de Brewer and Johanna died without an heir issuing from their bodies.

And because donation of land or tenement simply made to any man in free marriage with any woman, as the jurors say, of its very nature according to the law and custom of the realm implicitly contains in itself the aforesaid form of the gift contained in the writ, even though it is not expressed, viz., that the aforesaid husband and wife may have and hold the aforesaid land or tenements to them and their heirs born of their bodies. And if they die without an heir born of their bodies, the aforesaid land reverts to the donor or his heirs. And the aforesaid William de Brewer and Johanna, to whom the aforesaid tenements were given in free marriage, died without heir of themselves. It is adjudged that
to the law and custom of the realm, a gift in free marriage implicitly contained the form of the gift set forth in the writ of formedon in the reverter. The jurors made a statement about the form of the gift of marriage portions in general; they then related the statement to the donees of the marriage portion in this case.

Finally in 1281, John le Blund brought his writ of formedon in the reverter against Radulfus Paynel. The writ was in its final form, as the report of the count shows. In addition, the demandant referred to a writ brought in 1255 as "a certain writ by the aforesaid form of the gift." The record of that case was reproduced on this roll, when the tenant asked the demandant to show what he had of the form. The demandant stated that his father gave the tenements in question to a couple and the heirs of their bodies issuing, and that after their deaths, the tenements ought to revert to the demandant by the form of the gift because they died without heirs of their bodies. In 1281, it was still legal tradition that the writ of formedon in the reverter had ex-

the aforesaid Isabella recover her seisin against him and let John be in mercy.

(Juratores dicit quod predictus Willelmus de Vernon dedit predicta tenementa cum pertinentiis predicto Willelmo de la Briuere in liberum maritagium cum predicta Johanna filia sua. Et quod predicti Willelmus de la Breure et Johanna obierunt sine herede de corporibus suis exeunte Et quia donacio terre vel tenementi simpliciter facta aliqui viro in liberum maritagium cum aliqua muliere sicut juratores dicit de sui natura secundum legem et consuetudinem regni implicite continet in se predictam formam donacionis in brevi contentam. licet non exprimatur videlicet quod predicti vir et mulier habeant et teneant predictam terram vel tenementa sibi et hereditibus suis de corporibus suis procreatis. et si obierent sine herede de corporibus suis procreato predicta terrae revertatur ad donatorem vel heredes suas. Et predicti Willelmi de Briuere et Johanna quibus predicta tenementa data fuerunt in liberum maritagium obierunt sine herede de se consideratum est quod predicta Isabella recuperet seisinam suam versus eum et Johannes in misericordia).

Bracton made the following similar statement:

If they have no such heirs the land will revert to the donor by tacit condition, as where that it revert is not expressed in the gift, or by express condition, where the gift so provides, and so if heirs once came into being and fail.

2 Bracton On Laws, supra note 13, at 68 (f.18); see McCauliff, supra note 1, at 947-48 (discussing Bracton's explanation of two exceptions to operation of form of gift).

158. JUST 1/485 m. 48d.
159. (quoddam breve per formam donationis predicte).
160. The roll on which this case was originally recorded has not survived.
161. The record states:

And which, after the death of the same Reginald and Alice, ought to revert to the same John by the form of the gift because Reginald and Alice died without heir of their bodies, etc. John le Blund seeks against Adam Paynel 1/2 a carucate of land with appurtenances in Berghton as his right and into which Adam has no entry unless by Roger de Jarpenvill to whom the aforesaid John demised that land in free marriage with Alice his daughter and the heirs who would issue of the same
isted for a long time. The writ which the demandant's father brought for the reversion of a marriage portion in 1255 was recognized as a writ of formedon in the reverter in 1281, a quarter of a century later. Soon after the statute, legal tradition became confused as to whether the writs of formedon, and in particular the writ of formedon in the descender, existed (or more practically, were used) before De Donis.

B. Counts for the Writs of Formedon

We may now turn to a consideration of the writs of formedon in greater detail. Counts based on the writs of formedon were included in Novae Narrationes. The writ of formedon in the reverter was based on the seisin of the donor. The demandant described the seisin of the donor fully with references to the reign in which the donor was seised and to the profits he took from the tenement. Then the demandant stated that the donee died seised in demesne as of fee and right according to the form of the gift. If the donee had a child, the demandant traced the descent of the gift in fee tail to the child and, if any, to his child. The demandant then said that the tail ended: the tenant in tail last seised died without heir of his body, and therefore, the right in the tenements reverted to the donor. If the demandant were not the donor, but was the heir of the donor, he traced the descent of the right of reversion to himself.

In the precedents for formedon in the descender, the seisin of the donor was not quite so important as it was in those for formedon in the reverter, no doubt because the demandant was not claiming principally on the seisin of the donor. Nevertheless, the count began with a reference to the seisin of the donor. The terms of the donor's gift were then set out. The central part of

Alice, and which ought to revert as his escheat because the aforesaid Alice died without heir of herself, etc.

(ET que post mortem ipsorum Reginaldi et Alicie ad ipsum Johanne reverti debent per formam donationis predicte eo quod Reginaldus et Alicid obierunt sine herede de corporibus suis &c. Johannes le Blund petit versus Adam Paynel dimidiam carucatam terre cum pertinentiis in Berghlon ut jus suum et in quam Adam non habet ingressum nisi per Rogerum le J arpennvill cui predictus Johannes illum dimisit in liberum manifugium cum Alicid filia sua et heredibus qui de predicta Alicid exirent, et que ad ipsum reverti debet tanquam eschaeta sua eo quod predicta Alicid obierit sine herede de se &c.)

162. See Novae Narrationes, supra note 123, at 164, 236-377 (listing sample counts which include three examples of gifts in frank marriage for form of gift with reversion to donor's heir); see also Baker, supra note 8, at 203 (describing Novae Narrationes as providing wide selection of counts and defenses).

the claim then followed: The seizin of the donee in demesne of fee and right according to the form of the gift. Then the descent was traced to the demandant who claimed that he was the heir of the donees (or the last tenants in tail) and that the tenement ought to descend to him.

The statute *De Donis* could be interpreted so that the heir of the first donee claimed by purchase with his parents. Even so, in one of the counts for formedon in the descender, the demandant clearly claimed by hereditary right and not by purchase with the donees. The doctrine of estates was strengthened by the results following from such a claim. The count thereby enabled each heir to claim by hereditary right beyond the provisions for a conditional fee to the donee and his first heir made in the statute.

While the contradiction between a claim by purchase and a claim by hereditary right might be apparent to the modern historian, it was not so clear to the litigant claiming soon after *De Donis*. Even the fact that the heir by the form of the gift had claimed by the assize before the statute seems to have had little effect on the claim by purchase in the years immediately after the statute. This is admirably illustrated by the litigation in which Richard Daniel, an infant only one year below age, was involved in 1292. On the record, his case appears as an action of mort d'ancestor brought on the death of his mother against his step-father, Richard de Bere.\(^\text{164}\) The tenant, Richard de Bere, recognized that the ancestor, Cecilia, was seised in demesne as of fee on the day she died, and that Richard Daniel was her next heir. He added, however, that Cecilia was his wife by whom he had a son and that he therefore held by the curtesy.\(^\text{165}\) Issue was joined on whether the child was born alive and heard to cry. After the jury reported its findings, the demandant was not present and was amerced (fined), but excused from payment because he was under age.\(^\text{166}\)

All of the pleading in the report concerned the nature of the

\(^{164}\) JUST 1/303 m. 6. Trinity, 20 Edw. I, before Berewyk, J. at Hereford.

\(^{165}\) However, according to *De Donis*, the second husband of a woman who was given a conditional gift was not to hold by the curtesy, nor were their issue to inherit. The *Statutes of the Realm*, supra note 40, at 72.

\(^{166}\) A case in which Richard Daniel claimed land from Richard de Bere was recorded in the Year Book for 20 Edward I as an action based on a writ of formedon in the descender. Y.B. 20 & 21 Edw. 1 (1292), *reprinted in 31 Rolls Series* 58, 59 (Alfred J. Horwood trans. & ed., 1863). Whether the case was the same or whether Richard Daniel brought a different writ on the failure of the assize is difficult to determine, but it would seem likely that the action based on the form of the gift was a second and separate action.

It is possible that the reporter took notes on this case, which did not appear on the official record; it is also possible that this case was overlooked but did
demandant's claim and the nature of the writ the demandant used. Serjeant Spigornel, for the tenant, opened with a request for a judgment on the writ, for he said it was a writ of right and the demandant was below age. Serjeant Louther, for the demandant, countered that the demand arose from the form of the gift and that Richard was a purchaser of the gift. He elaborated further that birth of issue transforms a freehold so that the issue becomes a "purchaser" holding the fee and right "drawn out" of the donor. In fact, Richard Daniel's claim would not have been denied whether it was made by purchase or by inheritance, since he was issue of the first tenants in tail and would under either theory have been entitled to hold. Nevertheless, Spigornel did not neglect the opportunity to call the demandant's claim into question. Spigornel said that Richard Daniel ought not to be answered, "because in his count he says his ancestors were seised of fee and right and then descended through them to him as son and heir; and here he demands an estate by descent rather than purchase." Louther then tried to have it both ways, arguing that in the count he claimed by the form of the gift, but toward the end claimed by purchase. Spigornel insisted on his point and Justice Berewike solved the problem in terms of Spigornel's initial objection, which was not at all a definitive statement of policy. The judge decided that, since Spigornel first took exception to the writ on the grounds of the nonage of the demandant, Richard Daniel was to be answered for he was nearly of age and the writ was somewhat of a possessory writ. It was also offered that if the demandant had been ten or twelve instead of twenty he would probably not have been answered. Nevertheless, it is clear that important issues were at stake in the proper count and claim to be based on a writ of formedon in the descender.

Before the statute, the writ of formedon in the descender

appear on the record, or that the case was in fact an assize only, but this is not likely in view of Spigornel's opening argument:

Richard Daniel, an infant under age, brought his writ of formedon against Richard de Bere &c. by reason that one John le Seculer gave so much land & c. to John Daniel his father and Alice Daniel his mother and the heirs of their two bodies begotten; and said that John Daniel his father and Alice his mother were seised in their demesne as of fee and of right, and which land &c. ought to descend to him as son and heir of their bodies begotten, by virtue of the form &c.

Id. The Year Books, unlike the court records, were geared to the interests of the legal profession in seeing the possible arguments the pleaders (Serjeants such as Louther and Spigornel) could use in order to reach an issue which would go to the jury for resolution.

could be used by an heir whose ancestor did not alienate, but after De Donis, lawyers often emphasized that the writ was to recover alienated marriage portions and tenements given in tail. Another case from 1298, initiated by a writ of formedon in the descender, illustrates the gravity of the problem which the tenant in tail faced in choosing a remedy, even after the statute. In fact, the statute added problems of its own. Roger de Verdun, the tenant in the case, objected to the writ chosen by the demandant and stated that the writ, which he said was provided by the last statute of Westminster, referred only to alienations made after the date of the statute. The demandant, Henry de Waleton, admitted the tenant's explanation of how the writ came to be, but said that his parents never alienated the land and that the writ therefore applied to his case. Judgment was given in favor of Roger on the grounds that the writ was framed to provide a remedy for alienated lands, and that the donees of the gift in marriage did not hold after the statute.

And because that writ was provided concerning the tenements given by the same writ and afterwards for recovering tenements alienated afterwards, and [since] the aforesaid Henry well knew that the aforesaid Galfridus and Petronilla never were in seisin of the aforesaid tenement after the making of the aforesaid statute, and that the same Galfridus and Petronilla never alienated those tenements, it is adjudged that the aforesaid Roger go without a day.

168. JUST 1/805 m. 32d.
169. The Second Statute of Westminster was enacted in 1285. PLUCKNETT, CONCISE HISTORY, supra note 31, at 28. De Donis is the first chapter of this statute. Id.
170. Roger's objection stated: that this writ was provided in the last statute passed at Westminster and extended only to alienations made after that statute. He further says that the aforesaid Galfridus and Petronilla, (on whose seisin etc.) died a long time before the same statute was made and the writs provided therein.

(quod breve istud provisum in ultimo statuto facto apud Westmonasterium et se extendit ad alienationes factas post statutum illud tantum. Et dicit quod predicti Galfridus et Petronilla de cuyus seisina &c. obierunt per longum tempus ante confectionem eisdem statui et predicti brevis inde provisi.)

The themes of this case were thorny issues for a generation. See infra notes 213-14 and accompanying text for their eventual resolution. The arguments of Serjeants Herle and Scrope put forth in that case show that they would have agreed with the decision given in this case.

171. (Et quia breve istud provisatum fuit de tenementis datis per formam in brevi usto contentam et postea alienatis recuperandis. Et predictus Henricus bene cognovit quod predicti Galfridus et Petronilla nunquam fuerunt in seisina de predictis
It would seem as though there was much difficulty in understanding the relationship between the writs of mort d’ancestor and formedon in the descender and the proper uses of each, both before and after the second statute of Westminster.

The writ of formedon in the remainder posed perhaps the most difficult problems of the three writs which protected estates of less than fee simple. The central question was, on whose seisin could the remainderman base his claim? This was a very vexing problem since the remainderman was not the heir of the donor, as was the reversioner, nor was he the heir of the tenant in tail, as was the demandant who claimed by formedon in the descender. He could not claim on his own seisin, precisely because he was not yet in seisin. “It will be noted that the difficulty here being faced is nothing specially to do with conditional fees; it is essentially the difficulty of the purchaser who has never been seised.”

Nevertheless, the remainderman was not yet fitted into the doctrine of estates in such a way that his estate had an independent place regardless of what became of the conditional fee. The remainderman’s estate was based on chance and had only a small probability of taking effect since birth of issue fulfilled the condition and donees or their issue often alienated. Several forms are included in Novae Narrationes but none is definitive. The remainderman was the quasi-heir of both the donor and the donee, although he could not have seisin of the tenement unless the donee died without heir of his body. The remainder had to be fitted into feudal social terminolgy. Descent, which had worked its way into feudal military tenures, was the only available concept for Bracton to use, and the remainderman therefore traced his claim to seisin from the grantor and the first grantee to himself.

Litigants using the writ of formedon in the remainder wa-
vered between modeling this writ on that of formedon in the reverter or formedon in the descender. In 1262, a demandant was, it would seem from the facts available, claiming a remainder on a gift made by the demandant's father to the demandant's daughter for her life and with a remainder to the demandant. Other litigants who claimed by descent nevertheless adopted the language of reversion. Ulianus, son of Benedict, the demandant in

175. JUST 1/322 m. 9d. It is worth quoting the entire entry since the case dates from 1262, well preceeding the statute De Donis.

Ulianus, son of Benedict, seeks against John Launceleue, one virgate with appurtenances except three acres-and-a-half in Aldebury, which Johanna, daughter of Ulianus, held of Benedict de Audebury for the life of the same Johanna. And which, after the death of the same, ought to descend to the aforesaid Ulianus by the form of the gift, which the aforesaid Benedict made to the same Johanna and Ulianus etc. And whence he says that because the aforesaid Johanna died seised of the aforesaid land without heir born of her body, the aforesaid land ought to descend to him by the form of the gift of the aforesaid Benedict. And he makes profert of the charter of the same Benedict, which witnesses that the same Benedict gave and conceded to the aforesaid Johanna the aforesaid land with appurtenances to have and to hold of the same Benedict and his heirs all her life and, after the death of the same Johanna, the aforesaid land would remain with appurtenances to the same Ulianus and his heirs.

And John comes and vouches William son of Benedict le Clerk to warrant. Let him have him in the octave of Hilary at Canterbury.

The same Ulianus seeks against Adam Stannard three and a half acres with appurtenances in the same village, which the aforesaid Johanna held of the aforesaid Benedict for the term of the life of the same Johanna, and which ought to revert to the same Ulianus by the form of the gift aforesaid by the same writ etc.

Adam comes and vouches to warrant the aforesaid Willaim, son of Benedict. Let him have him at Canterbury.

(Ulianus filius Benedicti petit versus Johannem Launceleue unam virgatam terre cum pertinentiis exceptis vij acris terre et dimidium in Aldebury Quam Johanna filia Uliani tenuit de Benedicto de Audebury ad vitam ipsius Joanne Et que post mortem eiusdem ad prefatum Ulianum descendere debuit per formam donationis quam predictus Benedictus eisdem Johanne et Uliano inde fecit etc. Et unde dicit quod quia predicta Johanna obit seysta de predicta terra sine herede de corpore suo procreato debet predicta terra ad ipsum descendere per formam donationis predicti Benedicti. Et profert cartam eiusdem Benedicti que testatur quod idem Benedictus dedit et concessit predicte Johanne predictam terram cum pertinentiis habendam et tenendam de ipso Benedicto et hereditibus tota vita sua et post mortem ipsius Johanne remaneat predicta terra cum pertinentiis ipsi Uliano et hereditibus suis.

Et Johannes venit et vocat inde ad warrantum Willelum filium Benedicti le Clerk habeat eum in octabis sancti Hilari apud Canceuriarum

Idem Ulianus petit versus Adam Stannard tres acris terre et dimidium cum pertinentiis in eadem villa Quas predicta Johanna tenuit de predicto Benedicto ad terminum vitae ipsius Johanne et que ad ipsum Ulianum reverti debent per eandem formam predicte donationis per idem breve etc. Adam venit et vocat inde ad warrantum predictum Willelum filium Benedicti. Habeat eum apud Cantuariam.)

The same judge, Nicholas de Turri, was at Canterbury, 46-47 Henry III, JUST I/363, but Ulianus and William apparently were not.
this case, claimed a remainder but also adopted the language of reversion for his claim. The demandant, Ulianus, could hardly be blamed under these circumstances for trying to have it both ways in 1262. It is possible that the donor, Benedict, wished to give his granddaughter some lands and leave a remainder to his son, probably a younger son. The demandant did not seem to be able to make up his mind about which word—revert, descend or remain—he wished to use, and in the end, he used all three. Ulianus brought two separate actions on the same form of the gift. Unfortunately, the case did not proceed further, and there was no discussion of the writ or of Ulianus’ claim.

The count for the action of formedon in the remainder was perhaps the most involved and difficult count of all actions in medieval England, because the lawyers could not decide on whose seizin the demandant’s claim should be based. In 1263, Alice, daughter of John de Bradebrig, brought her writ for the reversion for a tenement given in frank marriage.176 Alice had given the gift in free marriage with Edeline to Roger as a gift for the lives of the donees only. In this way, Alice did not have to prove that the donees, who might have inherited the tenements, died without heirs of their bodies. She did not claim the tenement as her escheat. Instead, Alice relied on the form of the gift; her case emphasized that the tenement ought to revert according to the form of the gift which the donor made to the couple.177 Alice also brought the charter which showed the form of the gift so that it is possible the donor made the gift in frank marriage for the term of the life of the donees only. The tenant did not challenge anything Alice said.

It would seem as though Alice was claiming a remainder in tail after a marriage portion. The form of the gift made by her father left remainders to Alice and her brother Nicholas. Perhaps the tenant was the reversioner and heir of the donor. He came into court, and the parties immediately made a final concord recognizing Alice’s right to the tenement.

Donors providing for remainders and reversions made little distinction between the two interests when setting up their grants, but remainders were much harder to effectuate in practice. Alice’s extraordinary count clearly showed her claim that she was

176. JUST 1/912 A m. 6.
177. This entry on the roll is printed in Brand, supra note 84, at 320-21. He noted that the chancery allowed demandants to use writs of formedon in the reverter to claim remainders.
the next person entitled to hold by the form of the gift. The remainderman had to go to very great lengths to explain how the tenement was to come to him after all other previous tenants entitled to hold had held. It is also noteworthy that Alice was willing to go through the ordeal of getting such a difficult count correct for two acres. The claim of the remainderman was very weak and needed all the help which such an involved count could provide. It may at least have confounded the opposition when the remainderman got through it correctly!

In 1276, Isabella, widow of Richard le Venur, claimed a tenement after the donees held for a term of life.\textsuperscript{178} She claimed that the tenement ought to descend to her, but apparently she meant remain to her after a life tenure. The case was lost because the tenants objected that they held separately. The demandant insisted that the tenants held in common on 4 August 4 Edward I, the day on which she brought her writ. The demandant brought her case again later that term with the same writ except that she impleaded each tenant separately.\textsuperscript{179} The second tenant then called the first tenant to warrant. This step was not so useless as it might at first appear, since the parties made a final concord in favor of the demandant. The tenant said that the gift was not made for the term of life to the donees but to them and the heirs of their bodies; the tenant was the heir of the body of Geoffrey. Issue was joined on whether the gift had been made for term of life only or to the donees and the heirs of their bodies.

In 1279, however, John, son of Richard Wyke, claimed that a tenement should remain to him by the form of the gift and did not say that the tenement should descend to him.\textsuperscript{180} The case

\textsuperscript{178}. JUST 1/8 m. 4. The record states:

Isabella, who was the wife of Richard Le Venur, seeks against Warin, son of Gilbert le Keu and Matilda, who was the wife of Gilbert le Keu, one messuage with appurtenances in Hogoton-next-to Bereford, which Walter the Clerk gave to Rose de Memeste, Clemencia, Galfridus, Gabriel and William, his son, for the life of the same Galfridus and the others [and which] ought to descend to the aforesaid Isabella by the form of the gift.

(\textit{Isabella que fuit uxor Richardi le Venur petit versus Warinum filius Gilberti le Keu et Matildem que fuit uxor Gilbert le keu unum mesuagium cum pertinentiis in Hogoton vixta Bereford quod Wallerus le Clerk dedit Rosee de Memeste Clemencie Galfrido Gabrieli et Willemo filio ei ad vitam ipsorum Galfridi et aliorum ad predictam Isabelle descendere debet per formam donationis & c.}).

As BAKER stated, supra note 8, at 312-14, the chancery allowed demandants to claim remainders using the word “descend” because at the time it was very difficult to deal with the notion of a remainder: feudal concepts had integrated only inheritance into its conceptual framework.

\textsuperscript{179}. JUST 1/10 m. 16.

\textsuperscript{180}. JUST 1/914 m. 6d. The record states:
unfortunately proceeded no further than the tenant’s voucher of warranty. The parties were given another day.\textsuperscript{181} The opening statement of the record was the same as later counts recorded on the plea rolls and itinerant justice rolls around the year 1290 and indeed immediately after the statute, although the statute did not mention formedon in the remainder.

In 1284, the demandant brought his writ of formedon to claim a remainder after the deaths of two alleged life tenants.\textsuperscript{182} Again, he said that the tenements ought to descend to him.\textsuperscript{183} The most interesting part of the case is the initial claim put forth as the count, because in the subsequent pleading the demandant was asked to show proof of the form, and he showed an ordinary charter which left no remainder to him. The tenant easily obtained judgment. In most of these cases, it is likely that the demandant’s counsel had difficulty in deciding how the demandant was to claim, whether he was “heir” to the donor or “heir” to the donee. It is significant that except for the second claim of Ulianus all of these claims to remainders seem to have been based on the count for a formedon in the descender.

John, son of Richard de Wyke, seeks against Robert Cormongere one messuage and one virgate of land with appurtenances in Pageham as his right, which William de Heywode gave Master Reginald le Keu and Matilda, his wife and the heirs of the bodies of the same Reginald and Matilda issuing. And which, after the death of the same Reginald and Matilda, ought to remain by the form of the gift aforesaid because the aforesaid Reginald and Matilda died without heir of the bodies of the same Reginald and Matilda issuing, etc.

(Johannes filius Ricardi de Wyke petit versus Robertum Cormongere unum mesuagium et unam virgatum terre cum pertinentiis in Pageham ut ius suum. Que Willelmu de Heywode dedit Magistro Reginaldo le Keu et Matilde uxori eius et heredibus de corporibus ipsorum Reginaldi et Matildis executibus Et que post mortem ipsorum Reginald Matildis prefato Johanni remanere debent per formam donationis predicte eo quod predicti Reginaldus et Matildis obierunt sine herede de corpore ipsorum Reginaldi et Matildis exeunte &c.).

181. If the parties came on the day appointed, the plea might have been recorded on one of the following rolls: JUST 1/876-879.

182. JUST 1/114 m. 3.

183. John, son of William Terelony, seeks against Stephen, son of Jordan de Hakconn, one messuage and one acre of land with appurtenances in Holewode, which Roger Penytrinyt gave Hughelina and Philip, his son, for the life of the same Hughelina and Philip, [and which] ought to descend to the aforesaid John by the form of the gift, which the aforesaid Roger gave to the aforesaid Hughelina and Philip etc.

(Johannes filius Willelmi de Terelony petit versus Stephanum filius Jordani de Hakconn unum mesuagium et unam acram terre cum pertinentiis in Holewode que Rogerus Penytrinyt dedit Hughelina et Philipo filio eius ad vitam ipsorum Hughelina et Philippo et quod post mortem ipsorum Hughelina et Philippi ad prefatum Johannem descendere debuit per formam donationis quam predictus Rogerus prefatis Hughelina et Philippo inde fecit &c.).
C. The Conditional Fee and Writs of Formedon: Choice of Writs Revisited

The medieval lawyer's concern with the whereabouts of the fee and the definition of the fee engendered confusions about the writs of formedon. In addition, the confusion about the use of writs of formedon before the statute arose from the practice of applying the statute and the remedies mentioned there only to post-statutory gifts.

Confusion about the applicability of the statute is the easier problem to describe. Tenants immediately before the enactment of De Donis sometimes had a better chance to recover alienated marriage portions than they did for some years after the statute. Lawyers came to assume that if alienations of marriage portions were permitted before the statute, then there must have been no writ of formedon by which a demandant entitled by the form of the gift could recover. The demandant brought his writ of formedon, and the tenant objected to the writ because the alienation to the tenant occurred before the statute provided the demandant with a remedy; the alienation, the tenant claimed, was therefore no wrong to the demandant as far as the tenant was concerned.

For example, in 1290, Simon, son of Henry de Raghton, brought his writ of formedon in the descender against William de la Ferette. William pointed out that Simon's mother brought a similar writ against the tenant and recovered, but that after the recovery, she was willing to take one acre and 3s. rent for the two bovates she recovered, in exchange with William's warrantor, after the death of her husband. Simon's mother "well held tenaciously before the last statute of Westminster." William therefore questioned whether Simon had any claim once his mother alienated prior to the statute "and s[ought] judgement if the aforesaid Simon can have any claim in the aforesaid tenements against the deed of his mother who survived etc." 186

Other tenants in a plea based on a writ of formedon in the descender specifically mentioned that the writ was provided by the statute. In 1293, Richard de Hogton, tenant in such a case, conceded that the gift was given in marriage, and that the husband remained in the tenement after the death of his wife and

184. JUST 1/134 m. 22.
185. (se bene tenuit contentam ante ultimum statutum Westmonasterii).
186. (et petit judicium si predictus Simon aliquid clamium posse in predictis tenementis contra factum matris sue que supervixit &c.).
then gave the tenement to his brother. The tenant had entry through the brother-in-law of the woman whose marriage portion the tenement was, “before the statute of the lord king [was] provided concerning the writs on this matter.” In the same year Roger de Verdun, tenant in a similar case, said “that this writ was provided in the last statute made at Westminster and extends only to alienations made after the statute.”

In 1294, Stephen de Caverham, the tenant in a case initiated by a writ of formedon in the descender, successfully got the demandant to admit that he had no real remedy since the tenant purchased before the statute. The tenant invoked the former law in his argument, saying that the donee of the marriage portion was allowed to alienate. He therefore sought judgment whether the son could implead him, contravening the deed made by his father before the statute: “And seeks judgment if the same John could have an action to seek the abovesaid tenements against the deed of the aforesaid Radulfus, his father (whose heir etc.) in a time before the statute.” John, the demandant, could not deny the validity of the tenant’s argument.

Hugo de Haghe brought a writ of formedon in the descender against Roger Pyz in 1294 for a marriage portion given to his parents. He said that the tenement “was given to the aforesaid William, his father, in free marriage with Matilda wife of the same William after the statute of the lord king against which certain statute the same William alienated that messuage.” The tenant, however, insisted that the demandant’s father alienated before the statute and that he could legally do this. The refer-

187. JUST 1/408 m. 48.
188. (antequam statutum domini Regis de huiusmodi brevibus provisum).
189. JUST 1/805 m. 32d. (quod breve istud provisum in ultimo statuto facto apud Westmonasterium et se extendit ad alienationes factas post statutum illud tantum). For additional discussion of this case, see supra notes 168-69 and accompanying text.
190. JUST 1/1102 m. 24d.
191. (Et petit judicium si idem Johannes actionem habere possit ad predicta tenementa petenda contra factum predicti Radulfii patris sui cujus heres &c de tempore ante statutum.).
192. JUST 1/1102 m. 29.
193. (datum fuit predicto Willelmo patri suo in liberum maritagium cum Matilde uxore eiusdem Willelmi post statutum domini Regis contra quod quidem statutum idem Willelmus alienavit messuagium illum).
194. “And Roger . . . says that although the aforesaid messuage was given in free marriage, the aforesaid William nevertheless was well able to alienate that tenement before the statute etc. And [Roger] says that the aforesaid charter was made a long time before the statute.” (Et Rogerus . . . dicit quod licet predictum messuagium datum fuit in liberum maritagium predictus tamen Willelmus illud bene alienare potuit ante Statutum &c. Et dicit quod predicta carta facta fuit per longum tempus ante statutum.).
ence in the statute to the writ of formedon in the descender as a "new" remedy, combined with the theory of conditional gifts accepted generally in the courts, made it easy for tenants to assume that the title to the marriage portion they purchased was safe as long as the tenants had purchased before 1285. Lawyers eventually forgot that the writ of formedon in the descender had been available and simply used 1285 as a convenient cut-off point to decide whether a marriage portion was alienable.

In addition to these difficulties relating to the application of the statute, prospective claimants by the writs of formedon also had to face more fundamental uncertainties about the form and nature of these writs, in turn caused by the continued doubt about the nature of the gift which was given to the donee of a marriage portion, or other gift of limited inheritance. *De Donis* was concerned with conditional gifts and did not mention the word "fee." The avowed purpose of the statute was to regulate conditional gifts and give some support to the form of the gift which was being ignored. The form of the gift was given some recognition in actions of formedon before the statute, if only to be ignored subsequently.

When Adam de la Rivere brought his writ of formedon in the reverter in 1281, the tenants, Edmund de Spygurnel and his wife Claricia, recognized that the gift had been made to the donees in the form which the demandant alleged, but they said that the condition was fulfilled and that the reversion was therefore canceled.195

And Edmund and Claricia come and defend their right when and well know that the aforesaid Reginald, uncle *etc.*, gave the aforesaid John and Maselota, and the heirs of the bodies of the same [John and Maselota] issuing, the aforesaid tenements with appurtenances; and similarly, if the same John and Maselota died without heir of the body of the same Maselota issuing, that the aforesaid tenements ought to revert to the aforesaid Reginald and his heirs by the form of his gift, but they say that from the aforesaid John and Maselota issued a certain John and William, by which the aforesaid condition was fulfilled, and is, and the reversion of the tenements is there-

195. JUST 1/1005 m. 13. (This number is used for two rolls designated Part I and Part II instead of the usual A, B &c. This case is to be found in Part I; it is also recorded on JUST 1/1000 m. 12d.).
fore totally cancelled.\textsuperscript{196}

Unfortunately, Adam made default and lost the case without the need for a judgment, so that the court's opinion was not recorded.

In a similar case, in 1290, the demandant also made default, but not before he argued that a condition is always annexed to a marriage portion.\textsuperscript{197} Roger Sweyn brought his writ of formedon in the reverter, and the tenant showed a charter made to the donees of the gift. The gift was made in free marriage to the donee and to his heirs or assigns, so that the tenant asked whether the demandant had any action in the face of his ancestor's deed. Roger then made his statement that unless the donees fulfilled the condition, the reversion took effect.\textsuperscript{198}

In 1298, the tenant in a case of formedon in the reverter gave the theory of the conditional gift and the annihilation of the condition, but in terms of fees instead of gifts.\textsuperscript{199} The tenant argued that

The aforesaid Radulfus, the father, \textit{etc.} and had a certain wife, Matilda by name, who conjointly held the fee and right in the aforesaid tenements. And so, the same Matilda, as well as Radulfus her husband, \textit{etc.} conjointly gave of their seisin to the aforesaid Alan and Heloise, the donees in the aforesaid form [of the gift] . . . . The tenant said that the aforesaid Matilda survived the aforesaid

\textsuperscript{196} (\textit{Et Edmundus et Claricia veniunt et defendunt jus suum quando et bene cognoscent quod predictis Reginaldus avunculus &c dedit predictis Johanni et Maselote et hereditibus de corporibus ipsius Maselote exeuntibus predicta tenenta cum pertinentiis et similiter quod si idem Johannes et Maselota decessissent sine herede de corpore ipsius Maselote exeunte quod predicta tenenta reverti deberent ad predictum Reginaldum et heredos suos per formam donationis eiusdem set dicunt quod de predictis Johanni et Maselote exerunt quidam Johannes et Willelmus per quod condicio predicta plena fuit et est et reversio eorumdem tenementorum totaliter in frimitata.).

\textsuperscript{197} CP 40/86 m. 52d.

\textsuperscript{198} Roger says that the aforesaid charter ought not to be obeyed since by that charter it is clear that the aforesaid Henry gave the aforesaid tenement to the aforesaid Nicholas in free marriage with the aforesaid Agnes, which has a condition annexed to it, and so, by virtue of the marriage portion, the reversion of the same tenements pertains to the same because the aforesaid Nicholas and Agnes died without heir of their bodies issuing.

(\textit{Rogerus dicit quod predicta carta non debet ei obesse cum per illam compertum sit quod predictus Henricus dedit predicta tenenta predicto Nicholo in librum maritaggem cum predicta Agneta quod habet conditionem annexam in se et sic virtute maritaggii reversio eorumdem tenementorum ad ipsum pertinet eo quod predictus Nicholus et Agnes obierunt sine herede de corporibus suis exeuntibus.).

\textsuperscript{199} CP 40/123 m. 74d.
Radulfus (her husband), after whose death the same Matilda in her own power as a widow remised and quit-claimed for herself and her heirs to the aforesaid Alan and Heloise (the donees) and their heirs all rights which she had in the aforesaid tenements, so that by that quit-claim of the same Matilda, a fee simple accrued to the aforesaid Alan and Heloise in the same tenements.\textsuperscript{200}

Issue was joined on whether the deed which the tenant proffered was in fact the deed of the demandant’s father. The jury found that it was, and the tenant was quit. This last case was somewhat different from the others in that it was not the fulfillment of the condition by the donees in tail which gave them a fee simple but an additional donation by the donor. In effect, the reversion was joined to the tail to make up a fee simple. It then did not matter whether the tenants fulfilled the condition because they were free to alienate.

The as yet unsettled ideas about the conditional fee and the way in which the estate owner, entitled by the form of the gift, obtained seisin of his tenement were at times reflected in discussions and claims about the nature of the writs of formedon and the count in an action based on the form of the gift. In 1290, John Le Marescal and John de Kyrstrue brought their writ of formedon in the descender against William de Mulcastre, who said that one of the demandants, John de Kyrstrue, was under age, that the writ was a writ of right and that the case ought to be postponed until John came of age.\textsuperscript{201} The court apparently agreed because John was to await his age.

Some eighteen years later, Bereford disagreed, at least about the writ of formedon in the reverter. A demandant who brought his writ for a reversion counted on the seisin of his ancestor in the time of King Richard.\textsuperscript{202} Willoughby, for the tenant, objected

\textsuperscript{200} \textit{([P]predictus Radulfus pater \\&c habuit quandam uxorem Matillidem nomine que conjunctim cum ipso Radulfo viro suo habuit feodum et jus in predicta tenementa Et tam eadem Matillis quam predictus Radulfus vir \\&c conjunctim de seisin suam dederunt predicta tenementia predictis Alano et Helwoys in forma predicta. Et dicit quod predicta Matillis supervixit predictum Radulfi vitam suum post cujus mortem eadem Matillis in ligia vivitute sua remisit et quietam clamavit de se et heredibus sus predictis Alano et Helewysse et heredibus sus totum jus quod habuit in tenementis predictis Ita quod per illam quietam clamationem ipsius Matilli in accret predictis Alano et Hauise feodum simplex in eisdem tenementis.).}

\textsuperscript{201} \textit{JUST 1/136 m. 28. (Willelmus dicit quod breve istud est breve de recto et quod predictus Johannes de Kyrstrue particeps \\&c est infra etatem.).}

\textsuperscript{202} \textit{Y.B. 1 & 2 Edw. II (1307-1309), reprinted in 17 SELDEN SOC’Y 159 (F.W. Maitland ed., 1903).}
that the demandant was using the limitation allowed in a writ of right. Passeley, for the demandant, insisted that there was no limit for the writ in the reverter. The point was settled when Beresford intervened. "This is a possessor writ, and it cannot have a longer time than has a writ of ael or of mort d'ancestor. Wherefore the [other party] will be well advised in not answering to a count which goes back so long a time. . . . And at this point they demurred in judgement."

The demandant who brought a writ of formedon in the descender in 1299 discussed the relation of the writ of formedon in the descender to the writ of mort d'ancestor. The tenants were under age and claimed that they did not have to answer until they came of age.

Because he says that the aforesaid Henry, father of the same Stephen and Matilda (whose heirs the same are) died seised of the aforesaid messuage in his demesne as of fee, after whose death the same Stephen and Matilda, as next heirs of the same according to the Southern custom, entered into the same tenement as their right and inheritance.

For the demandant, it was argued that the case ought not to be held back because of their minority. An answer was already being given to the demandant by the tenants' claim that the donee in tail died seised as of fee simple and not "as of fee tail by the form of the gift whose contrary the same Johanna is prepared to verify; and this writ is competent to the demandant in this case in place of the assay of mort d'ancestor and this action is possessor."
The pleading of the counsel for the demandant is particularly distinguished. In cases involving marriage portions counsel were seldom so bold and usually did not answer effectively the tenants' proposals for a delay or the tenants' objections to the demandants' writs. For the demandant in this case, a distinction was

203. CP 40/130 m. 154.

204. (Quia dicit quod predictus Henricus (the donee in tail) pater ipsorum Stephanus et Matildis cuius heredes ipsi sunt obit seu situs de predicto mesuagio in dominico suo ut de feodo post cujus mortem idem Stephanus et Matillis ut propinquiores ipsius heredes secundum consuetudinem Suth intraverunt in eodem tenemento ut jus et hereditas sua.)

205. (ut de feodo talliato per formam donationis cuius contrarium eadem Johanna parata est verificare ac huiusmodi breve ei competit in hoc casu loco assise mortis antecessoris (et hoc actio possessoria est)).

206. For example, Matilda de Kneton found unreasonable an objection to the writ of formedon in the reverter which she had brought in 1298. CP 40/125 m. 244. She alleged that a gift was given in tail to a man and to the legitimate
made between being seised as of fee simple and as of fee tail. Further an objection was made to the tenant's answer, which used the terms of the assize of mort d'ancestor rather than the form of the gift. If the tenants wished to make such a point they should have answered and denied the form of the gift. Finally, the writ brought by the demandant was justified as against the alternative, the assize, and the nature of the writ as a possessory writ, rather than one in the right, was used as a reason why the case should not be postponed for the non-age of the tenants. The tenants then repeated their position, claiming that their father died seised as of fee and that the parole should demur for their non-age. The request for a demurrer then went to the jury, presumably, and no decision was later recorded at the end of the entry.

It was very important for the demandant to get his count right because, if the tenant could raise an objection to some point in the count or variation in the writ, the writ might abate. In a case of 1290, John St. John, tenant in a plea based on a writ of right, said that he did not have to answer the demandant because he, John, (the tenant of this case) sought the same tenements from John de Mandeville, the ancestor of the demandant, in the curia regis in the second year of King Edward's reign on the quindene of Easter by a writ of formedon in the reverter. John St. John then went on to give the answer made by John de Mandeville the heirs of his body. The tenant objected to the use of the word legitimate. He said that he did not have to answer

[b]ecause that writ is conceived against the common form used in chancery, he says therefore that when the aforesaid Matilda, by her writ, seeks the aforesaid tenements against him by asserting, in the same writ, that the aforesaid Alan gave those tenements to the aforesaid Henry and the heirs of his body legitimately procreated, etc., the writ by the form of the gift in this case according to the chancery course is competent to him under this form, namely that Alan de Kneton, father, especially since this word "legitimately" is not in these writs of this kind usually used in chancery.

((eo) quod breve istud conceptum est contra communem formam usitatum in cancellaria Dicit enim quod cum predicta Matilis per breve suum petat predicta tenenta versus eum asserendo in eodem brevi quod predictus Alanus dedit tenentia illa predicto Henrico et hereditibus de corpore suo legitime procreatis & c. breve per formam donationis in huiusmodi casu secundum cursam cancellarie [sic] ei competeter sub hac forma videlicet que Alanus de Kneton pater maxime cum hoc verbum legitime non sit in huiusmodi brevibus usuale in cancellaria &c.)

A day was given, and, at that time, Matilda sought a license to revoke her writ. 207. CP 40/83 m. 48d. The writ was said to be as follows: Order John de Manndevile that etc. he return the aforesaid tenements with appurtenances to John St. John which tenements William de St. John, grandfather of the same John de St. John, whose heir he is, gave to William de Heyneford and Matilda, his wife, and their heirs born of their bodies, and which, after the death of the same William and Matilda, ought to revert to him by the aforesaid form of the gift because
elder. From the surviving cases, starting with the reign of John, it is possible to trace the history of the action and the various forms the claim took before the statute of 1285.

In 1292, the demandant using the writ of formedon in the reverter faced objections to the form of the writ itself. The tenant objected on a very small point: where the writ says "gave John and Cecilia and the heirs of their bodies issuing," it ought to have said "to John and Cecilia and the heirs of the bodies of the same John and Cecilia issuing." The demandant answered that the form which he gave was a perfectly good form and that he ought not to change the form. The demandant's answer was as follows:

And Richard says that the aforesaid tenements were given to the aforesaid John and Cecilia contained in the form of the writ by which form it was competent to him to seek an action for the aforesaid tenements which form ought not to be changed as it seems to him, whence he seeks judgment if he ought not to respond to this writ.

The case was then to go to judgment.

The demandant by a writ of formedon in the remainder in the same William of Heyneford and Matilda died without heir born of their bodies.

(Precipe Johanni de Manndevile quod & c. reddat Johanni de Johanne predicta tenenta cum pertinentiis que Willelmu de Sancto Johanne auus ipsius Johannis de Sancto Johanne cypus here ipse est. dedit Willelmo de Heyneford et Matillidis uxori eius et heredibus suis de corporibus suis proceatis et que post mortem ipsorum Willelmi et Matillidis ad ipsum reverti debent per formam donationis predicte eo quod idem Willelmu de Heyneford et Matillis obierunt sine herede de corporibus suis procreato et dicit . . . ).

There is no surviving roll for Easter 2 Edward I, so that the original entry cannot be checked, but this copy is probably accurate.

208. CP 40/97 m. 26. The record states:

And Adam . . . says that he does not have to respond to him here on this writ because he says that this writ is not conceived in competent form because he says that where it says gave "to John and Cecilia and the heirs of their bodies issuing," it ought to have said "to John and Cecilia and the heirs of the bodies of the same John and Cecilia issuing," whence he seeks judgment.

(Et Adam . . . dicit quod non debet ei inde ad hoc breve respondere quia dicit quod breve istud non est conceptum in forma competenti. quia dicit quod ubi dicit. dedit Johanni et Cecilie et heredibus suis de corporibus suis executibus dixisse debuit Johanni et Cecilie et heredibus de corporibus ipsorum Johannis et Cecilie executibus unde petit judicium.)

In 1291, a case was recorded with a very long recitation of the count for a formedon in the reverter, in which the demandant traced his descent from the donor of the marriage portion. CP 40/89 m. 7.

209. (Et Ricardus dicit quod predicta tenementa data fuerunt predictis Johanni et Cecilie in forma contenta in brevi per quam formam competit et accio petendi predicta tenementa quam formam mutare non debit sibi videtur unde petit judicium si ad breve non debat ei respondere.).
1296 went through a long and complicated count only to find that the tenant objected that he did not have to answer the writ or the count, because the demandant claimed 60 acres of land in the writ and 80 acres in his count.\footnote{210} Judgment was demanded on the variation, which the demandant could not deny; so he took nothing.\footnote{211} The demandant, in his count, described the seisin of the donor in the reign of Henry III, mentioned that he then gave the gift according to the form previously described, and then described the seisin of the donee as fee tail. He claimed the remainder on the death of the donee in tail.

The intricacies of pleading and the pitfalls which might ensnare the demandant claiming by a writ of formedon in the remainder are admirably illustrated in the following case. In 1308, Serjeants Passeley and Herle argued over whether all persons

\footnote{210. CP 40/115 m. 123d.}

\footnote{211. The proceedings to that point are quoted as an illustration of the difficult count which it was the task of the demandant by a writ of formedon in the remainder to recite.}

William de Craye, by his attorney, seeks against Roger de Rysshelepe junior one messuage and 60 acres of land with appurtenances in Pareley, which Simon de Craye gave to John de Creye and the heirs of his body issuing, and which, after the death of the same John, ought to remain to William by the form of the gift which the aforesaid Simon made to the aforesaid John, because the same John died without heir of his body etc. And whence he says that the aforesaid Roger unjustly deforced him of 80 acres of land with appurtenances in the aforesaid village. And therefore unjustly, because he says that the aforesaid Simon was seised of the aforesaid tenements in his demesne as of fee in the time of the peace of the lord King Henry, father of our present king, who gave those tenements to the aforesaid John in the aforesaid form who (John) was seised by that gift of the aforesaid tenements in his demesne as of fee tail etc. And which, after the death of the aforesaid John, ought to remain to the aforesaid William by the form of the gift aforesaid, because the aforesaid died without heir of his body. And thereof he produces suit etc.

(Willelmus de Craye per attornatum suum petit versus Rogerum de Rysshelepe juniorum unum messuagium et lx acras terre cum pertinentiis in Pareley nesquaye que Simon de Craye dedit Johanni de Creye et hereditibus de corpore suo exequitiis et que post mortem ipsius Johannis prefdato Willelmo remanere debent per formam donationis quam predictus Simon inde fecit prefdato Johanni eo quod idem Johannes obit sine herede de corpore suo exeunti &c Et unde dicit quod predictus Rogerus injuste deforciat ei quattuorvingi et lx acras terre cum pertinentiis in predicta villa. Et ideo injuste quia dicit quod predictus Simonus fuit seystius de predictis tenementis in dominico suo ut de feodo tempore pacts tempore domini Henrici Regis patris Regis nunc qui tenemtia illa dedit predicto Johanni in forma predicta qui per donum illud fuit seystius de predictis tenementis in dominico suo ut de feodo talliatu &c Et que post mortem predicti Johannis predicto Willelmo remanere debent per formam donationis predictae eo quod predictus obit sine herede de corpore suo exeunte. Et inde predictum sectam &c.).

It is unusual to have such a complete record of the proceedings as the clerk here provided.
"who are party and are in front of him (the demandant) in the 'tail' are dead" ought to be named in all cases in a writ of formedon. Herle, for the demandant, objected that in the case when an ancestor died before he had the chance to acquire an estate it was not right to state his death in the writ. He then covered himself by saying that the writ in the case supposed the death of the ancestor who did not take seisin of the estate. Frisk-keney objected that there was a variation between the writ and a deed which Herle showed. "Sir, this is a writ in the remainder which ought to accord with the 'tail'. But the specialty speaks of a reversion and the writ says nothing about it. Judgment on this variance." Herle, after Toudeby's lengthy description of a hypothetical case resembling the present case, answered that reversion and remainder "cannot stand together in one writ, for one can find no such writ in Chancery ... if we were ousted from this writ, we should be barred for ever which would be a hardship, since no other writ can we find." Herle was referring to the fact that the remainderman could not then bring a writ of right since, in a writ of right, he would have to rely on hereditary right and the seisin of his ancestor.

The case went to judgment on the issue of whether, after the reservation of a reversion, any further limitation could give rise to a demand. "Bereford said in private that little accrued to Maud the wife of Simon by means of this return (or 'reversion')" because then the tenements were Simon's. The serjeants were really arguing over the imprecise choice of words by the donor in his deed, giving the tenements in tail, with a "reversion" to a couple for the term of their two lives, with a remainder finally to the demandant in fee. The donor would have saved all the confusion had he made his charter with a remainder for life, and then a remainder in perpetuity.

Finally, a Year Book discussion from 1312 epitomizes all the problems involved in choosing a writ to prosecute a claim to inherit an entailed estate. The demandant brought a writ of formedon in the descender but did not trace his descent because the son of the donees was seised. Scrope argued for the tenant that formedon was only statutory, and since the son of the donees was seised the case fell outside the scope of the statute. Herle, also arguing for the tenant, elaborated as follows:

212. Y.B. 1 & 2 Edw. II, supra note 202, at 166.
If you want to maintain your writ you must maintain it either by the common law or by statute . . . for the statute provideth no remedy except in the case of alienation by those to whom the gift was made. If, therefore, the child of these alienate, or die seised, and you have admitted that he was seised, the claimant’s recovery must be by the common law. Again, by the common law, the issue in the first degree would have the mortd’ancestor [sic]. Therefore since the case doth not come within the statute, the claimant is left to his recovery under the common law before the statute.214

Scrope and Herle argued that the writ of mort d’ancestor was the proper writ for the demandant who wished to claim a tenement alienated by the child of a donee in tail. Chief Justice Bereford stated that in a case involving a marriage portion, an assize of mort d’ancestor brought before the statute was abated by judgment. He treated all of these cases alike. “I take the law to be the same in both cases, for in both cases the tail continueth until after the fourth degree; and you are to know that we will not abate the writ in these circumstances and therefore answer, if you want to do so.”215 Bereford, by not abating the writ of formedon in the descender, contributed to the growth of the doctrine of estates.

III. CONCLUSION

To recapture the problems medieval English lawyers and clients could so easily articulate but which now lay buried in the plea rolls, we must conclude, as we began, with the cases. Detailed research done by so many since Maitland slowly yields patterns from which the reasons for the dilemmas, as well as their ultimate solutions, eventually emerge. As we look back at the work of the serjeants and judges, our sense of mystery gives way to appreciation of their craftsmanship, and, indeed, of their humanity, so very like our own, in turning statutes to different meanings thereby giving rise to unexpected problems, just as we do today. We recognize that their problems were different but their ration-

214. Id. Herle’s argument was anticipated shortly before, Y.B. 1 & 2 Edw. II, supra note 202, at 170. Maitland’s summary of the case reads as follows: “A writ of formedon in the descender may like a writ of mort d’ancestor be abated by a plea of last seizin.” Id. Herle hoped to show that, since the statute only prevented alienation by the child of the donees of an entail, the grandchild could not claim if his father and mother had not alienated. For an earlier case on the same theme, see supra notes 190-91 and accompanying text.

ality and their skill in solving them were not less than ours, as we listen once again to Serjeants Pasceley, Scrope and Herle and Chief Justice Bereford, who years before had a hand in drafting De Donis, and did not wish to see his work undone.

In summary, the writ of mort d'ancestor was used before and after the statute De Donis in place of the writs of formedon and most frequently in place of formedon in the descender. However, the writ of mort d'ancestor occasioned difficulties in deciding on whose seisin to base one's claim. It might be expected that demandants would wish to avail themselves of the writs of formedon, particularly after the statute provided new publicity and authority for the writs of formedon. The writ of formedon in the descender avoided the problem of claiming a marriage portion on the seisin of only the husband or the wife, but the arguments of Herle and Scrope as late as 1312 in favor of using the writ of mort d'ancestor must be taken into account. Lawyers from the reign of Henry II to the end of the reign of Edward I may have presided over the birth and youth of the common law, but they had the conservative habit of middle age. Formedon in the descender was advertised in the statute as a "new" remedy, but "new" must not be taken literally. Rather it meant "novel" as in novel disseisin: the recent past.

The writs of formedon were designed to protect the person entitled to hold tenements by the form of the gift. As has been shown above, demandants claiming by these writs faced many difficulties, due to the nature of the claim, which was often difficult to express concisely and convincingly, partly from the uncertainties in the nature of the estate, which the writs were to protect, and the highly technical nature of the pleading. Tenants took refuge in such objections as those given above and in objections that the demandant did not lay esplees in the tenant in tail last seised, and other similar objections. The statute De Donis could not by itself give solutions to the problems of conditional gifts, marriage portions and entails. Neither could the statute provide easily usable remedies for the recovery of interests of different degrees in such conditional gifts.

It was only through the accumulated effect of many cases brought to the courts based on writs of formedon—cases involv-

---

216. Before De Donis, the writ of formedon in the descender was only available when the tenant in tail had not alienated. "Nobody had any remedy before 1285 if the tenant in tail had issue and, being under no incapacity, conveyed the land away." Milsom, De Donis, supra note 116, at 393.

217. Palmer, supra note 52, at 49.
ing both important and insignificant points of law—that the serje-
ants and judges were able to build up a body of case law and work out clearer definitions of the nature of the fee which the deman-
dant was claiming. Through this process, lawyers fashioned the doctrine of estates and explored its implications in the courts. The writs of formedon raised important issues for the develop-
ment of the doctrine of estates in land because they provided the most effective means through which the problems inherent in conditional gifts were repeatedly brought to the attention of the judges. In effect, the concept of conditional gifts was the only device open to early medieval lawyers dealing with tenure, the singular doctrine of land law. The twin societal needs for herita-
bility and alienability of tenements required lawyers to recast their formulations, refining descent and escheat again and again until tenure was overtaken by the doctrine of estates in land which, at least for a time, better accomodated the sometimes con-
flicting desires of alienation and inheritance.