Henry III — 1216–1272 — 57 years — died at age 65
Edward I — 1272–1307 — 35 years — died at age 68

1232 — end of Hubert de Burgh's justiciarship
1258–59 — Provisions of Oxford, Provisions of Westminster, Treaty of Paris
1264 — Mise of Amiens, Battle of Lewes, Simon de Montfort's Parliament
1265 — Battle of Evesham
1266 — Dictum of Kenilworth
1284 — Statute of Wales
1292 — Judgment for John Baliol, beginning of Scottish wars
1295 — "Model" Parliament 1297 — *Confirmatio cartarum*
1303 — Treaty of Paris with Philip the Fair

I. ROMAN-CANON LAW AND THE PROBLEM OF PROOF

I assume that you know something about the tangled historiography of Roman and canon law in England (frequently combined under the phrase *ius commune*). If you have no acquaintance with the topic, you can get a start with J. H. Baker, *An Introduction to English Legal History*, 5th ed. (2019), 33–5, 135–44 (https://oxford-universitypressscholarship-com.ezp-prod1.hul.harvard.edu/view/10.1093/oso/9780198812609.001.0001/oso-9780198812609). By far the best treatments of the story are R. H. Helmholz, T*he Ius Commune in England: Four Studies* (2001) and the same author's *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, Oxford History of the Laws of England, 1 (2004).

One way of approaching the complicated topic of the relationship between nascent legal system of England in the late 12th and early 13th centuries and Roman and canon law is to look at the question of proof. The bibliography given under Week 4 in the syllabus, all of which is online, shows that there is considerable controversy, particularly among Baldwin (online), Hyams (online), and Bartlett (online), about the decline of the ordeal. Perhaps the best way to get a handle on the topic, particularly since we have only an hour in which to do it, is by looking at a few selected primary sources.

1. *Glanvill* was written sometime between 1187 and 1189. What do we know about the spread of Roman and canon law in England before that time?
    a. Papal judges delegate in the time of Stephen and Matilda. The relationship of papal judges delegate to the Becket controversy
    b. *Ordines judiciarii*, "how-to-do-it" books on how to run a judicial proceeding; the Anglo-Norman school of canonists
    c. Decretal collections, many of the earliest of which are of English provenance
    d. Vacarius, a jurist trained in Bologna, was a member of the household of Theobald, archbishop Canterbury (d. 1161). V. taught Roman law, perhaps at Northampton. Fairly early in the 13th century, we have faculties of Roman and canon law at both Oxford and Cambridge.
2. How were the cases in Polstead Saga proven?
    a. Assize of novel disseisin and mort d'ancester
    b. Battle or grand assize
    c. Special juries as in the Burnham case.

3. Possible methods of proof:

   a. Ordeal

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

   c. Inquest

   d. Oath

   e. Witnesses

   All of these can be found in the Carolingian period, so it's not as if the folks in the early middle ages didn't know about them. There was, as has been argued, an 'ancient pattern of lawsuit': Claim, denial (or confession), judgment, proof. That should seem a bit odd, but the argument is that the key element of the judging was not who wins the case. That is going to be determined, as it were inscrutably by the method of proof chosen. In the Gregorian reform of the 11th century we see the revival of arguments that had been made earlier that certain forms of proof were inappropriate for churchmen: battle certainly, but also ordeal. The rediscovery of Roman law in the 12th century lent support to this argument, because ordeal and battle were not methods of proof used by the Romans, at least not in the Corpus Iuris Civilis.

4. England opted, by and large, though not exclusively, for inquest. Domesday book, the Pipe Roll of 31 Henry I, assize *utrum* (ultimately the petty assizes), the grand assize, the jury in writs of entry, the grand jury and ultimately the petty jury in criminal cases. Wager of law in certain personal actions. Battle in writs of right. Ordeal collapses at the beginning of the 13th century. The canon law opted for witnesses. Compurgation in minor criminal matters.

5. Assize of Clarendon, c. 1–2, 14 (1166) (Mats., p. IV–1, 3)

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

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

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

6. *Glanvill*, section 1.9 (Mats., p. IV–9 to IV–16)

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

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

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

8. Canon 18 of the Fourth Lateran Council (1215) (Norman P. Tanner, trans.)

18. [Clerics to dissociate from shedding-blood]
No cleric may decree or pronounce a sentence involving the shedding of blood, or carry out a punishment involving the same, or be present when such punishment is carried out. If anyone, however, under cover of this statute, dares to inflict injury on churches or ecclesiastical persons, let him be restrained by ecclesiastical censure. A cleric may not write or dictate letters which require punishments involving the shedding of blood, in the courts of princes this responsibility should be entrusted to laymen and not to clerics. Moreover no cleric may be put in command of mercenaries or crossbowmen or suchlike men of blood; nor may a subdeacon,

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

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

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

10. How do Baldwin, Hyams, and Bartlett differ on the question of the decline of the ordeal?

11. What do Donahue and Green contribute to the story of proof?

II. ROMAN LAW AND CANON LAW — THE COURTS OF THE CHURCH – SELECT CANTERBURY CASES

1. A.1 RICHARD DE MELKSHAM *c.* HENRY, SON OF HENRY DE WINCHESTER Diocese of Winchester 1198 X 1204 A CASE OF BASTARDY

H. by the grace of God archbishop of Canterbury, primate of all England, to (his) beloved sons the priors of Sherborne-next-Basingstoke and of Andover greeting and blessing: When a case of bastardy which was pending between (our) beloved sons Henry son of Henry of Winchester, on the one side, and Richard son of William de Melksham, on the other, was brought by appeal from the audience of the venerable father, the bishop of Winchester, to us, the parties having been constituted before us, it was proposed in law on behalf of Richard that Eva, the mother of the said H., his opponent, took the habit of religion at the abbey of Wilton and having been made a nun there made her profession before the same his adversary was conceived or born, whence he said that he is a bastard. The opposing party replied on the other hand that E., his mother, was at one time at the same abbey but never took the habit of religion or having been made a nun made there her profession, but taken from there was lawfully joined in marriage to H. his father. He constantly asserted that he was born after a lawful marriage had been contracted between them. And he added that they lived together as husband and wife the whole period of his father's life. Affirming that these things are notorious in those parts in which they lived together, he said that he had many witnesses to prove sufficiently what he had proposed. Issue having been joined in this manner, with the assent of the parties, we think fit that the witnesses which either party shall cause to be produced should be examined by you and before you. Wherefore we command, order and strictly enjoin that having called the parties together you admit (the witnesses) as often as shall be just and examine them sworn, carefully and faithfully, on all the annexed articles, having the Lord before your eyes. Having examined them, sign what the witnesses say faithfully with your seals and transmit it to us on the morrow of the purification of blessed Mary (2 Feb.), setting the same day for the parties by peremptory edict, on which (day) they should appear before us to receive what the reason of law might require. On the same day signify to us by your return letters how you have executed our mandate. Witnesses, moreover, named by either party, if they withdraw themselves

for favour, hate or fear, you may, having issued a warning, compel by ecclesiastical censure, if necessary, to testify to the truth. Farewell.

First production of Richard de Melksham against Henry, son of Henry of Winchester.

Simon Maron, sworn, said that in the time of King Stephen, Theobald, the priest, veiled Eva, mother of Henry, in the church of the Holy Cross, Salisbury, and he saw this. And afterwards the aforesaid Theobald led her to Bishop Jocelin at the church of Saint Mary, and Simon seeing this, Bishop Jocelin blessed her. And from there the same E. went to Wilton and stayed there for a year. But he does not know how she was taken from there.

Herdig, sworn, says that Eva received the veil from Theobald, the priest, in the church of the Holy Cross, Salisbury, and in the same church she was blessed by Jocelin the bishop. And he says that he was present. And after one day or two the convent of Wilton came and took the same E. to Wilton, and the same E. stayed at Wilton for a year and more. But he does not know when she was taken away from there.

2. A.3. MASTER MARTIN RECTOR OF BARKWAY c. PARISHIONERS OF NUTHAMPSTEAD Diocese of London c. 199l A Dispute concerning a chapel.

1. Depositions on behalf of the rector of Barkway: How many witnesses? Twelve.

2. Depositions on behalf of the parishioners of Nuthampstead: How many witnesses? Twelve.

3. A.8. STEPHEN DE BELL0 AND AGNES Diocese of Chichester c. 1200 An *inquisitio* concerning a marriage

The names of those sworn to inquire about the marriage between St. de Bello and Agnes his wife: Asch, the writer (*scriptor*); Stephen, himself swore, and his wife Agnes; John le Vanur; Robert, the son of Brithmer; Gilbert de Bosco; Thomas Rufus; Orgar, the cutler; Wibert le Wrench; Osmund; Ulviva; Ydonia; Isabel. All these say the same thing about the affinity, to wit, that Agnes, the wife of Stephen, was the wife of Elias, a cook, and Isabel, once the concubine of Stephen, was the daughter of Elias's mother's sister. The whole neighbourhood testifies to this, and it is well known to all.

Concerning the co-maternity, Agnes, wife of St., once the wife of Elias, the cook, said that Isabel at his asking took her son from the sacred font, and she took the gift which Isabel gave to his son at baptism as a godmother, and he always greeted her with a kiss as godmother.

John le Vanur, sworn, said that he took the son of Elias and Agnes from the sacred font, and in the same hour the aforesaid Isabel took him as the co-mother of Agnes.

Thomas Rufus, sworn, said the same in every respect as John, adding that he gave the boy his name.

Ulviva, a woman, sworn, said that she was present when John le Vanur and Thomas Rufus and the aforesaid Isabel and a certain other woman by the name of Arnilda, at the same time the said son of Agnes from the holy font, who had been baptized by a chaplain named Adam on the Sunday next after the feast of All Saints (1 Nov.).

Isabel said the same as Ulviva, except that she does not recall the day, adding that she gave four pence to the boy which she sent to Agnes, the mother of the boy.

4. **A.9.** RICHARD SUEL Diocese of Worcester c. 1200 A case of bastardy.

Witnesses of Richard Suel, accused of bastardy. First production of Richard Suel.

Oviet de Festa, sworn, said that he was present when Fulk betrothed Edith, the mother of Richard accused of bastardy, before Hugh le Poor and before his household, and afterwards he had her as his for a year and begot on her this Richard. A year later he was again present when matrimony was solemnly celebrated between them in the church of Romsley.

Asked by which priest, he said by William, now dead. Asked about the time and day, he said that it was between the feast of All Saints and the advent of the Lord, on a Saturday near the first hour. He said also that he carried the boy with his father and mother to the church

5. A.10. ALAN DE CARLTON *c.* W. WIDER Diocese of Lincoln (?) c. 1200 A case of violence to a clerk

Depositions on behalf of Alan de Carleton

[Endorsed] Attestations of Alan, the deacon, against W. Wider.

These are the witnesses for Alan de Car1ton:l Robert, a chaplain; Nicholas; William; Richard Blundus, Ralph; John; Richard; Robert, son of Hugh; Osbert Brunus; Hugh Faber.

Robert, a chaplain, sworn, said that he saw W. Wider throw Alan, the parson, to the ground in the cemetery on Monday after Pentecost after the celebration of mass, and he heard from many that the same W. struck Alan with his fist. Asked whether Robert, son of W., put his hand on Alan, he says that he did not see R. put his hand on Alan.

Nicholas, sworn, says that he saw A., the parson, lying on the ground but he does not know how he fell, nor did he see the aforesaid W. or Robert lay hand on the said Alan, but he heard from many that the aforesaid W. struck Alan.

William, sworn, says that he has heard from many that W. threw Alan to the ground and that he struck him. But he had heard nothing of Robert.

Richard Blund, sworn, says the same as William in every respect.

Ralph, sworn, says the same as Robert, the chaplain, in every respect.

John, sworn, says the same as Nicholas in every respect.

Robert, son of Hugh, sworn, says that he saw W. pull Alan by the cloak, but he did not see him strike the same A., but he heard it from others.

Osbert, sworn, says the same as Nicholas in every respect.

Hugh Faber, sworn, says the same as Robert the chaplain, in every respect.

III. EDWARD I AND PARLIAMENT

The question of the origins of Parliament was hotly controverted among historians of the last century. Baker's general account of law-making across English legal history (*Introduction*, 206–37, which you should read if the background is unfamiliar to you) bypasses it, though he does refer to the notion that parliament was a court. Since our focus is going to be on the statutes of Edward I, we should keep in mind that the parliaments of Edward I (of which there were some fifty over the course of a 35-year reign) spent far more time on cases than they did on statutes and that some of Edward's 'statutes' were not made in Parliament. If you have any more time for secondary reading, I would recommend an old but still valuable account by G. O. Sayles, *The King's Parliament of England* (1975): https://catalog.hathitrust.org/Search/Home?lookfor=1285732&type=oclc&urlappend=%3B.

1. The latter years of the reign of Henry III saw a major baronial revolt. For a brief period a baronial party led by Simon de Montfort effectively took over the government. Their program of reform was expressed in writing, the Provisions of Oxford of 1258 and the Provisions of Westminster of 1259. The former dealt with the structure of the king's government, the latter with the operations of the legal system. For a while Montfort was supported by the young Edward, the king's eldest son and the future Edward I, but Edward ultimately abandoned him, and Montfort was killed at the battle of Evesham in 1265.
2. Montfort held a couple of parliaments. Some have seen them as the origin of the institution that solidified in the time of Edward I. Others, Sayles among them, look to other origins. Be that as it may be, the idea of reform did not die with Montfort. Many of the Provisions of Westminster were incorporated in the Statute of Marlborough of 1267.
3. When Edward I became king in 1272, the idea of reform continued. In 1275, the statute of Westminster I made 51 specific reforms in the legal system, which along with those of Marlborough were to continue throughout the Middle Ages and beyond.
4. A request to do something about *maritagium* was in the petition of the barons prior to the Provisions of Oxford. Nothing was done about *maritagium* in either Marlborough or Westminster I, but it was the first chapter in Westminster II in 1285, another massive reform effort (50 chapters) that combined with Marlborough and Westminster was implemented in later centuries.
5. The result of these reform efforts was that the tenurial relationship became less important, but what was going to emerge in its place was by no means clear.

IV. THE STATUTES *DE DONIS* AND *QUIA EMPTORES*

The material that we are going to deal with about the land law is complicated. Law school courses in property sometimes give some hints of it. Baker's *Introduction*, 241–66, 279–300 (a couple of pages into the next chapter) is both short and quite clear. I strongly recommend that you read it before you try to figure out what the statute *De donis* (1285) and *Quia emptores* (1290) were all about.

1. Some 15th century definitions:

   fee simple, "to A and his heirs," the highest estate, freely alienable, not devisable, descendible generally

   fee tail, "to A and the heirs of his body", may descend only to A's issue, freely alienable but the alienee takes only what the alienor had, in effect, a life estate

   dower, life estate in the widow in 1/3 of all lands of which her husband was seized at any time during the marriage in fee simple or fee tail, which land the heir of the marriage, had there been any, could have inherited

   curtesy, life estate in the widower in all of the lands of which his wife was entitled to be seized during the marriage in fee simple or fee tail, which the heir of the marriage could have inherited, so long as a child is born to the marriage who cries to the four walls.

2. The operation of warranty
   a. Lord A seizes Tenant B of land and takes his homage. Then he seizes tenant C of the same land and takes his homage.

i. T.B. on the land T.C. brings a writ of right in Lord A's court. If A tries to put C on the land novel disseisin. If A defaults, tolt and pone, C vouches A.

ii. T.C. on the land T.B. brings writ right in Lord A's court. Same possible two results. This means that Lord A can't do right.

iii. Lord A dies, fitz A held to the same thing

iv. T.B. dies fitz B does the same with mort d'ancestor

b. Lord A seizes Tenant B of land and takes his homage. Lord A leaves the land to T.C. in his will.

i. If fitz A tries to put B off the land novel disseisin

ii. If C gets on, T.B. sues with difference, no warranty to C why? no homage

iii. If C not on, he has no place to go

Therefore no devisability is a consequence of warranty.

c. Tenant B seises subtenant C of the land and takes his homage. Lord A does not like Subtenant C.

i. If Subtenant C is on the land he is protected by novel disseisin; if he is not he is protected by writ of right (this time brought in B's court), and his heir by mort d'ancestor unless TB defaults in service

ii. If tenant B tries to substitute TC for himself, then Lord A still has discretion, hence almost all conveyances are by subinfeudation.

3. The Prittlewell case

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

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

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

35:H05—H. de P. essoins

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

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

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

4. Walter de Grancurt's case—no.46

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

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

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

d. What happened in this case? Walter tried to take the land back and is sued in something that looks like mort d'ancestor—the real issue is are Cecilia and Juliana entitled—possible that Walter thought the land limited to male heirs

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

6. What's left for the lord? Knights' fees commuted to money early—wardship, marriage, relief, escheat—let's go back to example (7)(c))

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

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

7. Now we're ready to look at the statutes (Mats §5B)

a. De Donis (Statute of Westminster II, 13 Edw. I, c. 1) –> formedon in the descender

First, concerning the frequent gifts of tenements upon condition, namely: when anyone gives his land to a man and his wife and to the heirs born of that man and that woman adding the express condition that if such man and woman die without heir born of that man and woman the land so given shall revert to the donor or his heir; and also in case where anyone gives a tenement in liberum maritagium, which gift has an inherent condition, although it may not be expressed in the charter of the [particular] gift, which is as follows, that if the man and woman die without heir born of themselves the tenement so given shall revert to the donor or his heir; and also in the case where anyone gives a tenement to [a donee] and to the heirs issuing from his body, it has seemed and still seems hard to the donors and to the heirs of donors that their will [as it is] expressed in their gift has not hitherto and still is not observed. For in all the aforesaid cases, after issue has been begotten and born of those to whom the tenements were so given conditionally, such feoffees have hitherto had the power of alienating the tenement so given disinheriting their issue of that tenement against the will of the donors, and the express form of the gift. And furthermore whereas upon failure of issue of such feoffees the tenement so given ought to revert to the donor or to his heir according to the form expressed in the charter of gift, [the donor or his heir] has hitherto been excluded from the reversion those tenements by the deed and feoffment of those to whom the tenements have been so given upon condition, notwithstanding that any issue [born of them] has died, which was clearly contrary to the form of the [donor's] gift. And therefore the lord king, considering that it is necessary and useful to supply a remedy in the aforesaid cases has laid down that the will of the donor, according to the form clearly expressed in the charter of gift, shall henceforth be observed;[1]

[1] Professor Plucknett believed that the statute was subject to a hasty amendment after these words. See below para. 9.

so that those to whom a tenement is so given upon condition shall not have power of alienating the tenement so given in such a way that it will not remain to the issue of those to whom it was so given after their death, or to the donor or to his heir if issue fails, whether because there was no issue at all or [because] there was issue but it failed by death without an the heir [of the body] of such issue. Nor from henceforth shall the second husband of such a woman have any [right] in a tenement so given upon condition after the death of his wife by the [curtesy] of England, nor shall the issue of the woman and her second husband [have any right of] hereditary succession. But immediately upon the death of the man and woman, to whom a tenement was so given, [the tenement] after their death [shall] either pass to their issue or shall revert to the donor or to his heir as is aforesaid. And because in a new case a new remedy must be supplied, the demandant shall have writ like this: "Command A. that he is justly, etc., to yield up to B such manor with the appurtenances which C. gave to such a man and such a woman and to the heirs issuing from that man and that woman; or which C. gave to such a man in liberum maritagium with such a woman, and which after the death of the aforesaid man and woman ought to descend to the aforesaid B., the son of the aforesaid man and woman, by the form of the aforesaid gift, as he says; or, which C. gave to [a donee] and to the heirs issuing from his body, and which after the death of that [donee] ought to descend to the aforesaid B., the son of that [donee] by the form [of the aforesaid gift]." The writ by which the donor may have his recovery upon failure of issue is in common enough use in the Chancery.

b. Quia Emptores (Statute of Westminster III, 18 Edw. I, c. 1) –> end of subinfeudation

Whereas the buyers of lands and tenements belonging to the fees of great men and other [lords] have in times past often entered [those] fees to the [lords'] prejudice, because tenants holding freely of such great men and other [lords] have sold their lands and tenements [to those buyers] to hold in fee [to the buyers] and their heirs of their feoffors and not of the chief lords of the fees, with the result that the same chief lords have often lost their escheats, marriages, and wardships of lands and tenements belonging to their fees; and this has seemed to the same great men and other lords [not only] very hard and burdensome [but also] in such a case to their manifest disinheritance: The lord king in his parliament at Westminster after Easter in the eighteenth year of his reign, namely, a fortnight after the feast of St John Baptist, at the instance of the great men of his realm,1 has granted, provided, and laid down that from henceforth it shall be lawful for any free man at his own pleasure to sell his lands or tenements, or [any] part of them; provided however that the feoffee shall hold those lands or tenements of the same chief lord and by the same services and customary dues as his feoffor previously held them. And if he sells to another any part of his same lands or tenements, the feoffee shall hold that [part] directly of the chief lord and shall immediately be burdened with such amount of service as belongs or ought to belong to the same lord for that part according to the amount of the land or tenement [that has been] sold; and so in this case that part of the service falls to the chief lord to be taken by the hand of the [feoffee], so that the feoffee ought to look and answer to the same chief lord for that part of the service owed as [is proportional] to the amount of the land or tenement sold. And be it known that through the aforesaid sales or purchases of lands or tenements or any part of them, those lands or tenements must in no way, in part or in whole, by any scheming or contriving, come into mortmain contrary to the form of the statute lately laid down on this matter. And be it known that this statute applies only to lands to be held in fee simple; and that it applies [only to sales to be made] in the future; and it is to take effect at the feast of St Andrew next coming.

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

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

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

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

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

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

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