

Women's Property Rights on the Eve of the Black Death: A Preliminary Investigation

Michael Phifer

Medieval English society, although decidedly patriarchal, established robust property rights for women that, despite being subordinate to those of men, provided a measure of economic certainty and a potential for independence that mitigated the authority of men. Women's property rights were both legally and socially strong from the beginning of the common law and became stronger still through the 1340s. The way in which the common law defined rights—dower and inheritance, for example—and how the courts interpreted and applied the common law rules constitute the legal strength. The social strength concerns the way in which society actually handled women's property rights in practice. The two need not have been congruous: English society might have provided general legal protection to women's property rights while simultaneously having resisted them at an individual level. Since about 1100, however, the predominant social interest had been to maintain the benefits of the control of land within the nuclear family.¹ That interest included provisions for some female members of the family. A widow, for example, was entitled to a portion of her deceased husband's lands in the form of dower. Although a surviving son certainly displaced any daughters as heir, a daughter, when no son survived to inherit, excluded a collateral male as heir. English society—both men and women—recognized the benefits of providing economic security for at least some female family members. The balance within the family between male authority and female security was characteristic of the first English legal system.² The development of the common law demonstrates concern for establishing the legal strength of women's property rights. Preliminary analysis of common law records from the second quarter of the fourteenth century indicates that women's property rights were also quite strong socially.

The social strength of women's property rights is more difficult to document than the legal strength, but preliminary analysis indicates that the social strength during the second quarter of the fourteenth century peaked along with the legal strength. Statistical analysis of the records of the court of common pleas provides the firmest foundation from which to evaluate the social strength because the records are both voluminous and national. The evidence here falls into two categories: litigation from the court of common pleas and final concords (feet of fines) maintained in the documents of the same court. Analysis of litigation in progress in common pleas during Trinity terms 1342 and 1347 indicates that about 70% of real actions involved women's property rights on at least one side of the dispute. Much of this involvement was certainly the result of the operation of law: rules of dower and inheritance, for example, generated property rights in the hands of women. A substantial portion of it, however, was clearly the result of voluntary grants to

¹ James C. Holt, "Feudal Society and the Family in Early Medieval England: IV. The Heiress and the Alien," *TRHS*, ser. 5, xxxv (1985), 1-28.

² Robert C. Palmer, "The First Legal System: 1176 to 1348," <http://aalt.law.uh.edu/Conceptualization/FirstLS.html>.

women. From the late thirteenth century an increasing number of grants were made to husbands and wives jointly. A survey of the feet of fines confirms the extent to which women benefited from decisions to include them in grants. Women appeared as either donors or donees in roughly 85% of land grants made in Bedfordshire, Gloucestershire, Hampshire, Leicestershire and Northamptonshire during the second quarter of the fourteenth century. Their appearance as donors in about half of all concords might have indicated that they were divesting rights. Their appearance as donees in about half of all concords, however, reveals that that they were simultaneously and voluntarily included in grants. Taken altogether the evidence indicates that women's property rights were strong indeed on the eve of the Black Death.

1. The Legal Strength of Women's Property Rights: A Summary Overview

The expansion of women's property rights throughout the thirteenth century both depended on and contributed to the development of robust legal protection. From the beginning of the thirteenth century the common law recognized and protected those rights.³ Although women accrued real property rights in the land, they controlled land far less frequently than did men and their rights were generally subordinate to men's. A husband, for example, controlled his wife's property rights during the marriage. His control, however, was limited to his lifetime. The common law institutionalized such limitation in part by requiring a wife's consent for the permanent alienation of her property. That requirement not only afforded her some financial security—as a widow she could recover land that her husband had alienated during the marriage without her consent—but also limited her husband's authority. That same requirement, however, complicated the permanent alienation of a wife's land and thereby reduced the liquidity of that land as an asset available to the family for full economic exploitation. Dower—the portion of her husband's land that fell to the widow when he died—was similarly well protected and generously defined by the beginning of the fourteenth century. The legal protection of these rights might conceivably have generated social resistance to the expansion of women's property rights: individuals might have found it preferable to limit women's rights and thereby increase the flexibility of men to acquire, use and dispose of land at will without these constraints. Evidence from the second quarter of the fourteenth century demonstrates that the reality was quite the reverse.

Dower

³ Property right here means a relationship between a person and a thing created and regulated by the state. For the development of property right, see Robert C. Palmer, "The Origins of Property in England," *Law and History Review* Vol. 3, No. 1 (Spring, 1985), especially at pages 4-8. Contrast this with S.F.C. Milsom's discussion of women's claims to land in a feudal context as the result of contractual obligations in S.F.C. Milsom, "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*, ed. Morris S. Arnold et al. (Chapel Hill: The University of North Carolina Press, 1981), 60-89. For the extent to which women's property rights had become the subject of litigation at common law, see Robert C. Palmer, "Women's Property Rights: The Action of Waste," <http://aalt.law.uh.edu/ELHOv/WomPropRts.html> and "Dower 2," <http://aalt.law.uh.edu/ELHOv/Dower2.html>.

Dower underwent the most significant change of all women's property rights between the early-thirteenth and mid-fourteenth century; during that time dower right expanded dramatically. Dower right guaranteed for the widow a portion of her deceased husband's heritable lands. At the beginning of the thirteenth century, the husband appears typically to have endowed his wife publicly at the church door when they married.⁴ The common law set the maximum endowment at a third part of his lands; he could endow her of less but not more.⁵ Whether to include future allocations was his decision. If he did nominate dower, she was entitled only to that. If he did not explicitly nominate either particular land or some portion of all of his lands, however, the common law deemed her to be endowed of a full third part of those lands of which he was heritably seised when they married.⁶ The 1217 issuance of Magna Carta expanded the default common law definition of dower to include future acquisitions, although the husband's nomination of dower still superseded default dower during the thirteenth century.⁷ The expansion by Magna Carta was inherently unclear, and the courts interpreted it broadly.⁸ Around 1250 the common law also broadened dower right by accepting as legitimate marriages created by an exchange of words of present consent rather than only those performed publicly under the auspices of the church.⁹ The thirteenth century trend was an unmistakable expansion of the legal strength of women's property rights.

At the fullest extent of its development, dower was generous indeed. Common law dower gave the widow a claim to a third part of any land of which her husband was seised at any time during the marriage such that her children by him could inherit. After 1307 the widow was entitled to forego her nominated dower in favor of her full common law dower.¹⁰ Simultaneously the process by which a widow could, if necessary, recover her dower through the king's courts had become increasingly advantageous to her. As a result of the increasing legal strength of dower right, therefore, the volume of dower litigation in the court of common pleas had actually begun

⁴ Ranulf de Glanville and G. D. G. Hall, *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, (Holmes Beach: W.W. Gaunt), 1983, 64-5.

⁵ *Ibid.*, 59. Glanvill's limitation applied only to military fees; widows of men who held by socage or Kentish *gavelkind* could receive a half part in dower, Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, Vol. 2, (Cambridge: Cambridge University Press, 1895), 418-22.

⁶ *Ibid.*

⁷ "Let a third part of all the land of her husband that was his during his lifetime be assigned to [the widow] for her dower, unless she was endowed of less at the door of the church." *Statutes of the Realm*, Vol. 1, (Burlington: TannerRitchie Publishing, 2007), 17.

⁸ For further background see Janet Loengard, "Rationabilis Dos: Magna Carta and the Widow's 'Fair Share' in the Earlier Thirteenth Century," in *Wife and Widow in Medieval England*, ed. Sue Sheridan Walker, (Ann Arbor, M.I.: The University of Michigan Press, 1993), 63.

⁹ Paul Brand, "'Deserving' and 'Undeserving' Wives: Earning and Forfeiting Dower in Medieval England," *The Journal of Legal History* Vol. 22, no.1 (April 2001), 8. The church had recognized the legitimacy of marriages created by an exchange of words of present consent in the mid-twelfth century. For a treatment of the development and complications that could arise because of reliance on verbal contracts, see Richard Helmholz, *Marriage Litigation in Medieval England*, (Cambridge: Cambridge University Press, 1974), 27-47.

¹⁰ Joseph Biancalana, "Widows at Common Law: The Development of Common Law Dower to 1307," (Paper presented at Harvard Law School, October 3, 1989), 87.

to decline: assuming that the marriage was valid and the husband had indeed been heritably seised during the marriage, resistance of the widow's claim had a relatively low chance of success.¹¹

Maritagium

Maritagium—the traditional gift of land from the bride's family to the newlywed couple—made the bride a more attractive prospect, helped the couple to establish an independent household and provided some security for the wife beyond what she might receive as dower from her husband. Such a grant looked particularly attractive to the bride's family when the husband's father still lived and the husband had not yet inherited his father's land, or when the husband was a younger son and thus unlikely to inherit. Because no homage was due from *liberum maritagium* until the fourth generation and it therefore carried no services, the land could potentially rejoin the bulk of the family inheritance if the wife died without issue.¹² It thus preserved for her family the possibility of recovery through at least the third generation. Such a provision, however, created some difficulty. In the early thirteenth century both the husband and wife enjoyed some right in the land for the duration of their lives, but descent thereafter depended on the form of the original grant.¹³ Some grants specified that only issue of the present marriage could inherit; others indicated that the land should descend simply to the issue of the wife. Grants of the latter form could therefore allow the woman's issue of a second marriage to inherit. In either case neither husband nor wife had a heritable interest in the land until after the birth of issue, a limitation that made the heritability and thus permanent alienation conditional on the birth of such issue.¹⁴ Failing issue the land reverted to the donor or his heirs as a result of the temporary suspension of homage. Grants in *maritagium* were therefore allocations of family wealth to establish collateral lines and not definitive alienations.

By the early fourteenth century, however, *maritagium* appears to have diminished in importance. Biancalana argues that by the end of the first quarter of the fourteenth century the typical marriage settlement involved monetary compensation from the bride's family and land settled jointly on husband and wife from the groom's family.¹⁵ Biancalana traces the addition of a joint tenancy to the marriage arrangement to the 1270s.¹⁶ Regardless of the strength of Biancalana's explanation for the change, his evidence does show *maritagium* to have been less common by the early fourteenth century than it had been previously. Developments in the late thirteenth century undoubtedly contributed to the decline of *maritagium*, although the importance

¹¹ Robert C. Palmer, "Dower," <http://aalt.law.uh.edu/ELHOv/Dower.html>.

¹² Glanvill, 93; Henry de Bracton, *Legibus et Consuetudines Angliae*, edited and translated by Sir Travers Twiss, (London: Longman & Co., 1878), Vol. 1., 169.

¹³ Pollock and Maitland, Vol. 2, 16-7.

¹⁴ *Ibid.*

¹⁵ Joseph Biancalana, *The Fee Tail and the Common Recovery in Medieval England, 1176-1502*, (Cambridge: Cambridge University Press, 2001), 142. He dates the emergence of the change to marriage portions in money to the 1230s, but the completion of the shift from dower *ex assensu patris* to joint tenancy to the "second decade or so of the fourteenth century."

¹⁶ *Ibid.*

of those developments for the social strength of women's property rights extended far beyond land that she brought into the marriage.

Joint Tenancies and Fees Tail

Joint tenancies became particularly attractive at the end of the thirteenth century and contributed to the growing legal and social strength of women's property rights. Statutory change facilitated the increase of feoffments settled jointly on the husband and wife and, perhaps, also on their child. Land settled on a husband and wife jointly, as with any joint tenants, belonged to both of them and passed entirely to the surviving spouse. *De donis conditionalibus*, enacted in 1285, seemed to settle lingering questions about the alienability of conditional grants,¹⁷ or fees tail as they came to be called. Many such grants were settled jointly on the husband and wife to provide financial security both for the wife beyond what she might receive as dower and for direct descendants of the marriage. They simultaneously increased the potential for a widow to remain independent. Prior to 1285 donees appear to have been able to alienate the fee after the birth of issue, the point at which the condition had been satisfied and the donees had a heritable interest in the land.¹⁸ That ability to alienate worked against the intention of the grant itself, which was, in part, to ensure that the land descended to issue born of a particular marriage. After 1285 those enfeoffed in fee tail had only a life interest in the land. Upon the birth of issue who could inherit, the fee was in the issue. If the donees alienated the land, their descendant could recover through a writ of formedon in the descender.¹⁹ The statute therefore provided some security to the donor and made such grants more attractive.

Quia emptores in 1290 similarly encouraged joint tenancies. By forcing substitution rather than subinfeudation, the statute sought to preserve the feudal incidents and the lord's ability to exact services.²⁰ Simultaneously, however, it undermined what authority the lord still had to approve a new tenant. By allowing tenants to alienate without the lord's explicit approval of the new tenant, the statute facilitated feoffments of a husband and wife jointly.

Reinterpretation of *De donis* in the early fourteenth century expanded protection for the grantee's heirs, whether male or female, whose interests were the true motivations for grants in fee tail. The wording of *De donis* had extended the ability to recover only to the child of the original grantee himself.²¹ After 1285, therefore, the second generation was protected, but not the third and subsequent. In 1312 Bereford CJCP extended the limitation on alienability until the fourth

¹⁷ Robert C. Palmer, "Contexts of Marriage in Medieval England: Evidence from the King's Court circa 1300," *Speculum*, Vol. 59, No. 1 (Jan., 1984), 57.

¹⁸ Pollock and Maitland, 17.

¹⁹ C.M.A. McCauliff, "The Medieval English Marriage Portion from Cases of Mort D'Ancestor and Formedon," 38 *Villanova Law Review*, 933 (1993), 984.

²⁰ "...[The Freeholders of such great men have sold their Lands and Tenements to be holden in Fee of their Feoffors, and not of the Chief Lord of the Fees, whereby the same Chief Lords have many times lost their Escheats, Marriages, and Wardships of Lands and Tenements belonging to their Fees; which thing seems very hard and extream unto those (Lords and other great men,) and moreover in this case manifest Disheritance...]"(sic), *Statutes of the Realm*, Vol. 1, 106.

²¹ John Baker, *An Introduction to English Legal History*, Third Edition, (London: Butterworths, 1990), 318.

generation. “[H]e that made (or wrote) the statute ('celuy qe fit lestatut') meant to bind the issue in fee tail as well as the feoffees until the tail had reached the fourth degree, and it was only through negligence that he omitted to insert express words in the statute to that effect.”²² The boldness of Bereford’s ruling is surprising, but the sentiment is perhaps not. Binding “the issue...until the fourth degree” yields a situation very much like *liberum maritagium*.²³ Bereford may have thought that, despite their very different origins, the two ought to operate similarly.²⁴ Regardless of the original intent of the drafters, Bereford’s interpretation held for a time.

By the mid-fourteenth century the fee tail had become a perpetuity. Bereford’s limitation focused on what he believed to be the proper effect of the statute, and that limitation aligned with the way in which the law had treated *liberum maritagium*. The wording of the statute itself, however, was unclear. Baker argues that the lack of any mention in the statute of the three-generation limitation on alienability, coupled with the rational argument that an heir could not inherit any estate other than what his ancestor held, pushed the courts to accept that the prohibition on complete alienation extended generation after generation without end.²⁵ Baker’s line of thought was an extension of Bereford’s understanding: the statute made no reference to the fourth degree so that, if “issue” was not limited to the child of the initial grantee, it was a restriction not limited through just the grandchildren. Milsom called the fee tail a “juridical monster.”²⁶ Blackstone noted that the fee tail “occasioned infinite difficulties and disputes,” among which he included interruption of leaseholds, the defrauding of creditors, deprivation of full value to purchasers and encouragement of treason.²⁷

²² *Belyng v. Anon.* Y.B. Pasch. 5 Edw. 2, fo. 31, pl. 2, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=3043>.

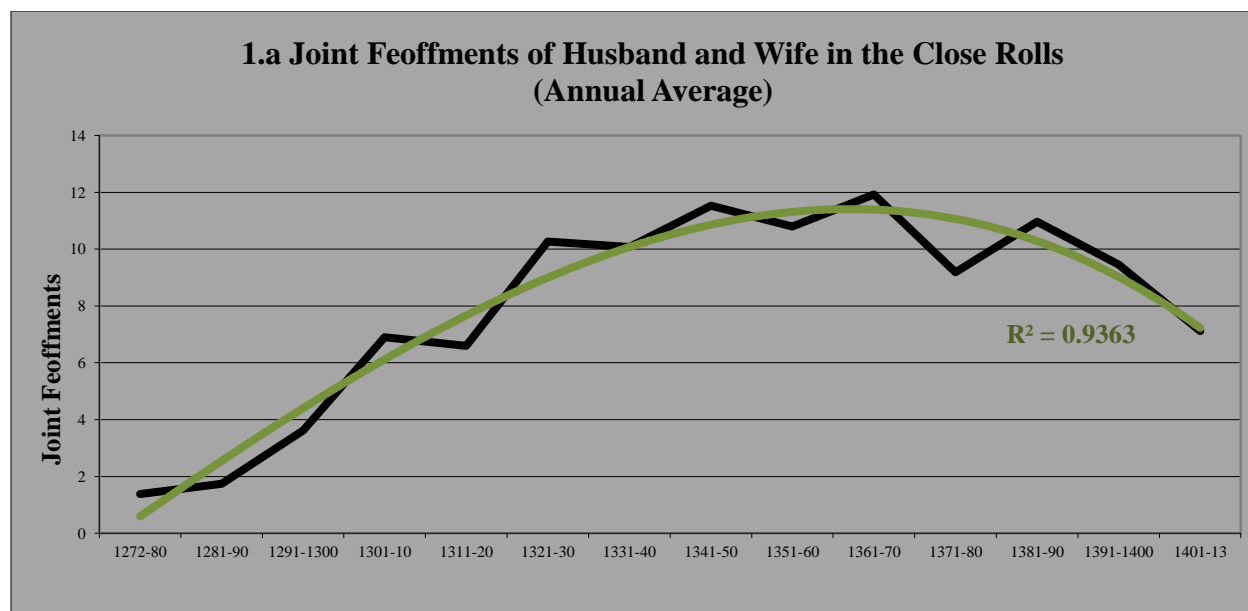
²³ See above at note 12.

²⁴ Neither the other framers of the statute nor his contemporary justices need necessarily have held the same view as Bereford.

²⁵ Baker, 319.

²⁶ Milsom, *Historical Foundations of the Common Law*, (Toronto: Butterworths, 1981), 177.

²⁷ William Blackstone, *Commentaries on the Laws of England*, Vol. 2 (Oxford: Clarendon Press, 1766), 116.



These statutory changes appear to have facilitated joint tenancies, although the impetus for the grants themselves came from individuals. Some of the interest was certainly a continuation of traditional marriage settlements. Marriage arrangements, however, must only have accounted for a portion of tenancies settled jointly on the husband and wife. Figure 1.a shows the annual average, in ten-year increments, of enrollments of joint feoffments of both the husband and wife, whether in fee simple or in fee tail, in the calendars of close rolls.²⁸ The chart shows two periods of growth: one in the 1280s and 1290s that likely corresponds to *De donis* and *Quia emptores* and another between 1311 and 1320 that follows Bereford's reinterpretation of *De donis*. Both Biancalana's survey of final concords and a survey of enrollments in the calendars of the close rolls show a general increase that began at the end of the thirteenth century and a trend toward relatively high levels of joint tenancies through the middle of the fourteenth century.²⁹

Some of these joint tenancies certainly were part of marriage settlements. Those that Biancalana identifies as most probably part of the arrangement, however, are outnumbered by other kinds of joint tenancies from his own evidence.³⁰ Many joint tenancies, moreover, were grants to the husband, wife and their son. Because the couple already had a living child, such grants might not have been marriage settlements, although they could have been methods to ensure that an illegitimate child born before the marriage could succeed to the land as the surviving joint tenant. Such circumstances must have arisen with some frequency. Increased flexibility to settle land jointly on husband, wife and child further ensured that members of the nuclear family, regardless of their legitimacy at common law, excluded more distant relations. Other grants, those made to the husband, wife and the husband's son, could have been settlements in advance of a

²⁸ The R^2 value represents correlation between the actual volume and the trend line, which shows the trend more clearly. An R^2 value of 1 would be a perfect match to the actual volume; a value above 0.7 indicates a strong correlation.

²⁹ Biancalana, *The Fee Tail and the Common Recovery in Medieval England, 1176-1502*, 192.

³⁰ *Ibid.*, 182. Biancalana here refers the reader to Table 3.7; the information that he references, however, is contained in Table 3.8.

second marriage, the son mentioned having been the child of a previous marriage. In the latter possibility, although the wife would have a life estate, her issue would only stand to inherit if her husband's son of his previous marriage predeceased her and then only if that the son died without heirs of his own.

The increase in joint tenancies, whether in fee simple or fee tail, had clear advantages for at least some wives. Dower provided the widow with a portion of her late husband's lands and had expanded throughout the thirteenth century to become quite generous. The simultaneous increase in dower litigation reflects both that generosity and the social strength of dower. Some women also brought land with them into the marriage. A consequential portion of women were heirs.³¹ Many more brought with them *maritagium*, which gave them at least a life interest in the land. The growth of joint tenancies suggests that an increasing portion of wives were jointly enfeoffed of lands settled on the couple in preparation for a marriage and perhaps of those purchased during the marriage. Rather than a third part of such acquisitions—the portion that would otherwise have come as dower—these lands remained fully in the wife's hands if her husband predeceased her.³² Joint tenancies were therefore likely responsible for at least a minor part of the decline in dower litigation during the first half of the fourteenth century, the remaining majority having been the result of the growing strength of dower right at common law.³³ Some portion of that decline probably also came from the increasing frequency of fees tail. A second wife could claim nothing in dower from a fee settled on her husband and his first wife and the heirs of their bodies, because no child of the second wife could inherit the fee tail given in such a manner.³⁴ The first wife, if she were widowed, of course stood to hold the land for the remainder of her life. In such circumstances the fee tail was beneficial to the first wife but detrimental to the second. That kind of arrangement, if part of a marriage settlement, could appear appropriate to both the husband and the bride's family. It also says more about the distribution of land among women than between women and men.

³¹ Payling estimates that 20% of inheritances passed to or through daughters during the first half of the fourteenth century. S. J. Payling, "The Economics of Marriage in Late Medieval England: the Marriage of Heiresses," *Economic History Review*, LVI, 3 (2001), 414.

³² The lands would of course fall under the control of a new husband if she remarried. The right to the land nevertheless remained with the woman. She certainly could have decided to alienate the land herself and settle instead for an annual payment.

³³ Palmer, "Dower," <http://aalt.law.uh.edu/ELHOv/Dower.html>.

³⁴ Some disagreement is apparent in the records, but the overall impression is that a second wife could not claim dower in lands that her children could never inherit based on the original grant. Sjt. Hampton, in a case in 1311 that turned on whether the grant had been made in fee tail or fee simple, argued that "some (Quidam) are of the opinion that where one gives a tenement to a husband and his wife and to the heirs of their bodies etc. (fee tail). That a second wife will have dower etc.," <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=2732>. In a similar case the following year, Bereford stated that "...the law does not provide (ne voet) that the second wife's issue can take the inheritance (heritage) in this case (circumstances) because it would be against the donor's intent (la volonte le donour)," <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=3007>. Bereford's view seems to have predominated thereafter. See, for further examples, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=3171>, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=4894>, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=7306> and <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=7368>.

By the beginning of the fourteenth century, the common law had created conditions in which women's property rights could flourish. Women's property rights were as secure at common law as men's. The general development of the law, moreover, redounded to the benefit of both men and women. Statutory changes in the thirteenth century had attempted to balance the competing interests of donors, donees and lords. Lords retained much of the value of the feudal incidents. The competition between donors and donees was more acute. Donors certainly sought to restrain alienation and thus to ensure that the benefits of the land remained within the confines of the original grant. Donees increasingly wanted more flexibility to alienate and therefore make the most economic use of the land. Berekford's interpretation of *De donis conditionalibus* navigated a middle course between those competing interests. Benefits to women came at the practical rather than doctrinal level. The evidence indicates that, in numerous individual circumstances, men chose freely to include women in grants, both fee simple and fee tail. Some of these were undoubtedly the work of a father attempting to ensure the financial stability of his daughter. Many others, however, were the product of a husband similarly providing for the financial stability of his wife in the event that he predeceased her.

2. The Social Strength of Women's Property Rights: Dower Litigation

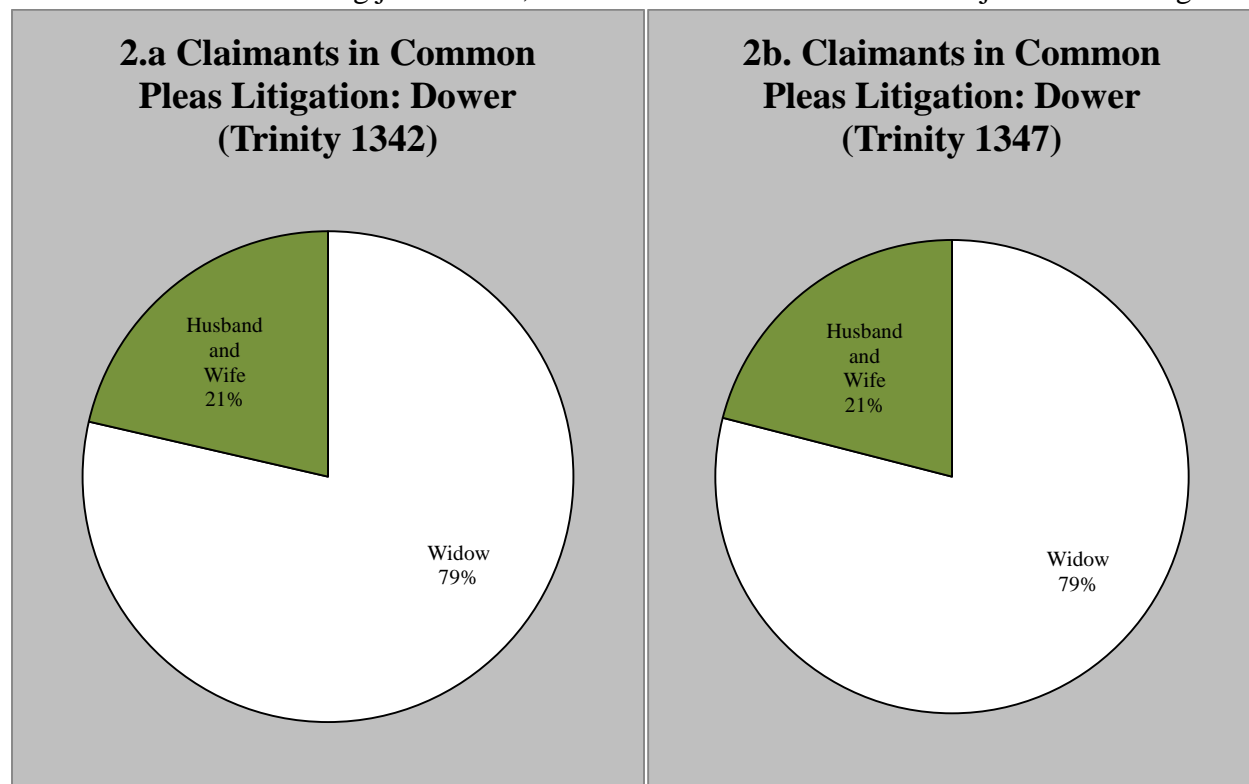
Despite the obviously legal nature of the evidence, dower litigation serves as a useful indicator of the social strength of dower right. Dower was a property right peculiar to women: a part of the husband's property diverted temporarily from the inheritance for the benefit of his widow. It became, by the fourteenth century, an exceptionally strong right both legally and socially. Dower was essentially an automatic right of the widow: if she had indeed been married and her husband had been seised heritably, she was entitled. From the beginning it was a major subject of real actions at common law.³⁵ It had the potential to touch the family of every freeholder and was thus a broad social interest. Dower certainly generated disputes, many of which undoubtedly created significant intra-familial tensions. Potential was high for conflict between widows and heirs. Those tensions, however, need not have been gendered: dower cases were not necessarily a sole widow against a male heir. The heir was likely a man but could as easily be one or more women, daughters of the decedent. The widow might well have remarried, in which case the claim came from a man and woman together. Although dower as a property right was gendered, the tensions it created were not.

As a result of the scope and strength of dower right, the volume of dower litigation had actually been declining during the first half of the fourteenth century. The potential for dower litigation was as high as it had ever been, but the strength of the widow's position discouraged real resistance. Much of the litigation was little more than an official procedure to bring all of the interested parties—widow, heir and purchasers—together so that they could reach an amicable settlement.³⁶ Measured by sheer volume dower litigation appears to have reached its zenith at the

³⁵ For a statistical overview of dower as a percentage of enrollments on the plea rolls of the court of common pleas see Palmer, "Dower 2," <http://aalt.law.uh.edu/ELHOv/Dower2.html>.

³⁶ Palmer, "Dower," <http://aalt.law.uh.edu/ELHOv/Dower.html>.

beginning of the fourteenth century: for about 25 years on either side of 1300, dower litigation hovered at more than 400 cases in progress per term.³⁷ Volume declined moderately thereafter. Data for 1342 suggests that the court of common pleas handled about 275 cases during Trinity term; 360 cases appeared in 1347.³⁸ The average volume per term for the second half of the fourteenth century, by contrast, was about 100 cases.³⁹ The decline during the first half of the century was therefore relatively minor but nonetheless perceptible. Much of that decline was the result of the increasing socio-legal strength of dower right, although some portion of it was probably also related to an increase in joint feoffments that, by directing all of the land to the widow as the sole surviving joint tenant, diminished the amount of land subject to dower right.



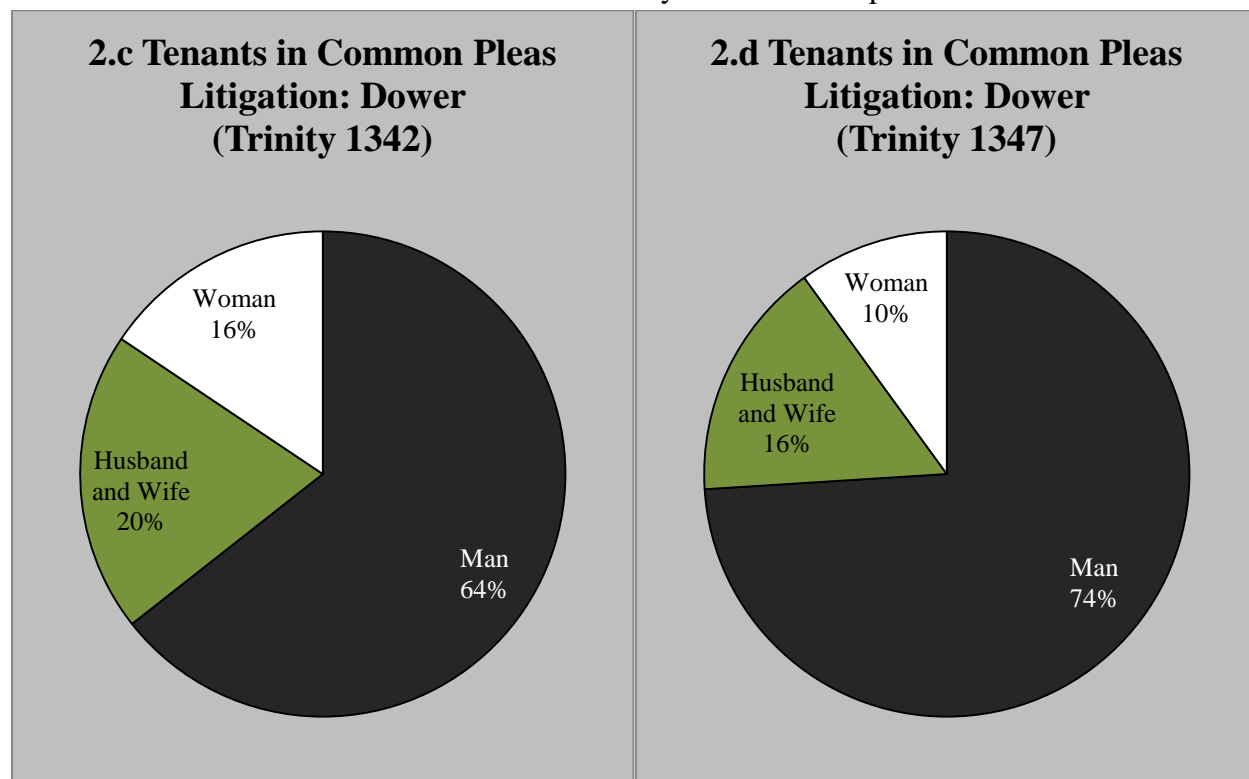
Men and women both had an interest in maintaining the strength of dower right. Dower was, by definition, a widow's right, but remarriage was not an obvious reason for the widow to lose her right at common law. Although litigation need not follow soon after the husband's death, most widows who were going to undertake action at common law probably did so with relative rapidity. A substantial portion of claimants therefore ought to have been single widows; a much smaller portion should have been remarried widows. The data for the 1340s confirm those presumptions with surprising consistency: 79% of claimants in both 1342 and 1347 were widows

³⁷ Ibid.

³⁸ Data for 1342 are incomplete. The estimate of 275 cases is rough and based on the volume of cases that appear on the fronts of the first 140 membranes in the roll.

³⁹ Michael Phifer, "Property, Power and Patriarchy: The Decline of Women's Property Right in England after the Black Death" (PhD diss., University of Houston, 2014), 167.

who appeared in court alone; a mere 21% of claimant widows in both terms had remarried before litigation began.⁴⁰ Securing dower right was, in many cases, a prerequisite to a subsequent marriage. Although the economic burden of dower fell disproportionately on men, both men and women had an economic interest in dower right. The overall interest, however, went beyond economic considerations. Had the interest been merely economic, men in general would have benefited from limitation of dower right. The expansion of the social strength of dower indicates a broad social desire to ensure the financial stability of widows despite the cost to men.



If women were not the sole beneficiaries of dower, neither were men the only targets. In 1342 women appeared as tenants, either alone or together with a husband, in 36% of the cases.⁴¹ The percentage was lower in 1347, but 26% of cases still involved a woman as tenant or co-tenant.⁴² In many of these cases the woman tenant was probably an heir, but in some portion of them the land was almost certainly held jointly by the husband and wife. Nothing in the standard format of the entries necessarily distinguishes land that was the wife's right but was defended by both the husband and wife from land that was the right of both. Neither the claimant nor the tenant side of the litigation display strictly gendered demographics: the benefits and burdens of dower cut across genders. The overall interest was in providing for the maintenance of women as widows.

Dower actions constituted a significant portion of litigation. Dower cases in Trinity term 1342 account for approximately 20% of all real property actions then in progress in the court of common pleas. That figure is relatively consistent with findings of roughly 24% in 1305 and 17%

⁴⁰ See figures 2.a and 2.b.

⁴¹ See figure 2.c.

⁴² See figure 2.d.

in 1347 that are generated by combining Palmer's data on both dower and all real actions as percentages of enrollments for those years.⁴³ As with all such litigation these figures undoubtedly fluctuated from term to term and year to year within a relatively stable range of perhaps 5%. As a category of real action, therefore, dower remained a broad social concern throughout the first half of the fourteenth century. Dower secured the financial stability of the widow but was simultaneously a source of wealth for a new husband. It was a temporary reduction of the inheritance and therefore the wealth of the heir, but the heir probably also appreciated dower. Even if, in his own particular circumstances, he found himself opposed to a widow claiming dower against him, he could also understand the general social benefit and the specific benefit to members of his own family, among whom were of course his mother and sisters.

3. The Social Strength of Women's Property Rights: General Land Litigation

By the mid-fourteenth century women's property rights, although certainly more limited than men's, were extensive. Enrollments of joint feoffments in the calendar of close rolls⁴⁴ understate the extent to which those rights had expanded, although they probably reflect the growth trend with relative accuracy. Such enrollments therefore provide only partial evidence for what must have been a much more voluminous expansion of women's property rights. Women gained rights in land in a variety of ways. Many, but not all, of these joint feoffments were undoubtedly the result of marriage settlements. Simultaneously daughters continued to inherit land in the absence of a son. Litigation in progress in the court of common pleas during Trinity term 1342 demonstrates the extent to which the incidence of women's property rights had increased.⁴⁵ Women, either sole or married, account for 36% of all claimants in real actions.⁴⁶ Simultaneously women appeared in 30% of real actions as tenants.⁴⁷ In total 61% of litigation involved women on at least one side of the dispute.⁴⁸ With the inclusion of dower litigation, a full 70% of real actions at common law in Trinity term 1342 included women.

⁴³ Palmer, <http://aalt.law.uh.edu/ELHOv/Dower2.html>; <http://aalt.law.uh.edu/ELHOv/Actions.html>.

⁴⁴ See figure 1.a.

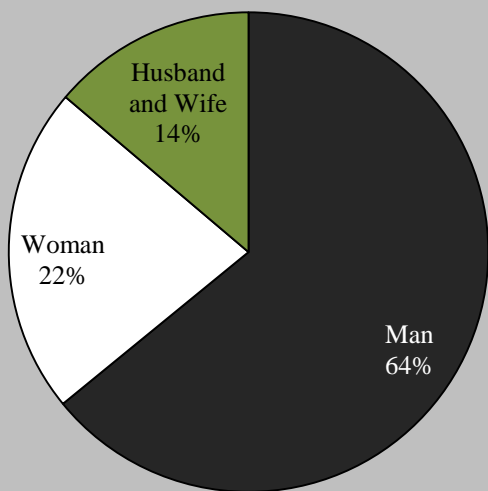
⁴⁵ Dower is excluded from other real actions here, as are arrangements for final concords. Evidence for Trinity term 1342 is based on analysis of only part of the roll. The analyzed portion, however, is representative of the full roll.

⁴⁶ See figure 3.a.

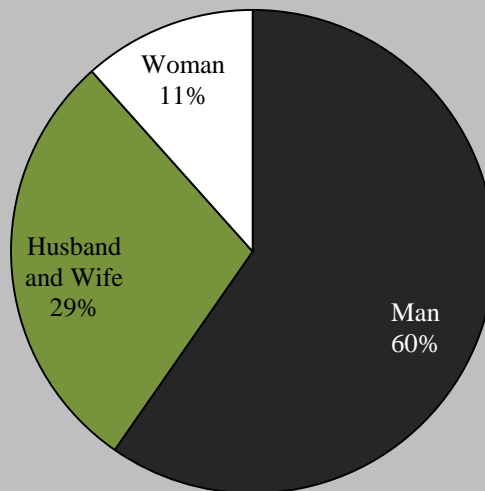
⁴⁷ See figure 3.b.

⁴⁸ See figure 3.c.

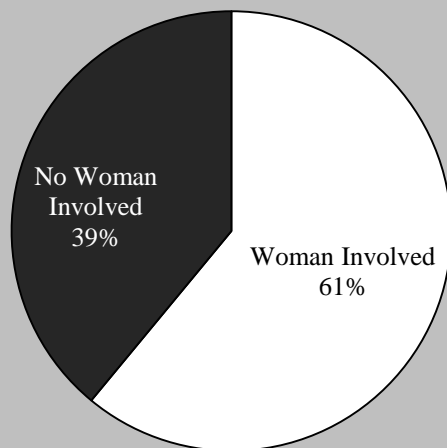
3.a Claimants in Common Pleas Litigation: Real Actions Excluding Dower (Trinity 1342)



3.b Tenants in Common Pleas Litigation: Real Actions Excluding Dower (Trinity 1342)



3.c Women's Involvement in Common Pleas Land Litigation Excluding Dower (Trinity 1342)



Society must therefore have recognized a clear benefit from women's property rights. Had it been otherwise two scenarios seem possible. Litigation might have been, as much as anything else, a means to recover land that had by misfortune become at least partially subject to the property rights of women. If a prominent motivation of litigation had indeed been to suppress women's property rights, women ought to appear with much greater frequency as tenants or co-tenants than as claimants, whether sole or together with a husband. If, alternatively, society had been generally successful in keeping out of the hands of women land that the common law might otherwise have directed to them against the prevailing social sentiment, women ought to have appeared with greater frequency as claimants than as tenants. Such a scenario would suggest that women struggled to achieve the benefit that the law at least nominally provided to them and therefore attempted to use the courts to overcome social resistance. Both scenarios seem to be improbable and neither appears to hold true: women were as likely to be claimants as tenants.

The data do, however, show a difference between married and unmarried women. A greater proportion of women were married when they appeared in court as tenants: women appeared alone as claimants in 22% of the cases but as tenants in only 11%.⁴⁹ Timing rather than prejudice probably explains much of this discrepancy. Some actions depended on the death of the husband. Dower obviously depended on a dead husband. A woman could also use a writ of *cui in vita* to recover land of hers that her husband had alienated during the marriage. The heir might have assumed control of land that he believed to be part of the inheritance but was, in fact, the right of the deceased tenant's wife. In some instances she might have waited to undertake action at common law and could certainly have remarried with relative rapidity.⁵⁰ In many cases, however, the widow probably acted quickly to claim all that was hers by right, either to ensure her financial independence or to make herself a more attractive prospect for remarriage. Her husband's death opened the way for her to press rights that he had managed during the marriage in a manner similar to that in which his death created an immediate dower claim, which may or may not have generated litigation. Action undertaken shortly after the death of the husband undoubtedly explains most of the higher frequency of sole women claimants.

Married women were probably also in a better position to reach amicable agreements outside of court, and single women may more frequently have accepted some arrangement other than actual control of the land. Some litigation was a preliminary stage in arriving at such an arrangement.⁵¹ Having begun litigation in common pleas, a single woman was in a much stronger position to bargain effectively. The tenant well recognized that, even if the woman's claim was weak, litigation could be extensive and expensive. If she had some reasonable claim—and she likely did if she undertook litigation in common pleas—the tenant's decision to reach some settlement with her that satisfied both parties might have been the safest option.

⁴⁹ See figures 3.b and 3.c.

⁵⁰ Rosenthal, for example, estimates that most aristocratic widows who remarried did so within about five years. Joel Rosenthal, *Patriarchy and Families of Privilege in Fifteenth Century England*, (Philadelphia: University of Pennsylvania Press, 1991), 195.

⁵¹ Palmer, "Dower," <http://aalt.law.uh.edu/ELHOv/Dower.html>.

The distribution of women's property rights nevertheless seems to remain relatively consistent. In dower litigation women appeared as tenants or co-tenants in roughly 30% of cases.⁵² In Trinity term 1342 they account for 36% of claimants or co-claimants and 30% of tenants or co-tenants in other real actions.⁵³ Certainly more was at work than dower: all of the land subject to dower right was never at once apportioned as such. At all times, however, a substantial portion of it must have been held in dower, whether by the widow solely or together with a new husband. Some land remained unencumbered by dower: land given in joint fee tail to a husband, wife and their issue would never be subject to the dower of a second wife.⁵⁴ Lands held by lease, for a term of years or for a term of life were similarly not subject to dower. Other land was held by the husband and wife jointly, and the wife stood to take the whole of that if she outlived her husband. If the gendered distribution of property rights in land that was the subject of litigation at common law is any representation of the broader social distribution of such rights, however, the consistency of women's appearance in such litigation suggests that they enjoyed property right in at least one-third of English land subject to the common law.

4. The Social Strength of Women's Property Rights: Feet of Fines

Final concords provide a broader sample than litigation to gauge the social strength of women's property rights. The final concord—a record of a land transaction begun by fictitious suit in the court of common pleas and written in triplicate on a membrane of parchment that was then divided such that each of the parties took a copy and the remaining portion, the foot of the fine, remained in the official record—was the only means by which to divest a married woman of her property right. Because of the constraints on her ability to act independently of her husband, special provision had to be made to enable her to act in accordance with her husband to alienate her land permanently. During the process of making a final concord between the parties, the justices examined the wife independently of her husband to ensure her willing participation in the transaction.⁵⁵ Without her active consent a widow could recover, with a writ of *cui in vita* after her husband's death, land of hers that he had alienated during the marriage. Final concords were essential for eliminating the otherwise potentially costly, residual right of a married woman. The donors might not have been especially interested in undertaking the inconvenient process, but the value of securing a clean transaction was certainly apparent to purchasers. The value of final concords, however, was not limited to the clear elimination of a married woman's rights: as a permanent record of the transfer that was maintained in the common law courts, final concords were evidence of right that could be proffered during litigation and therefore were well worth the price for discerning purchasers. Demographic analysis of the parties to final concords provides a baseline for the extent to which women's property rights flourished in the mid-fourteenth century.

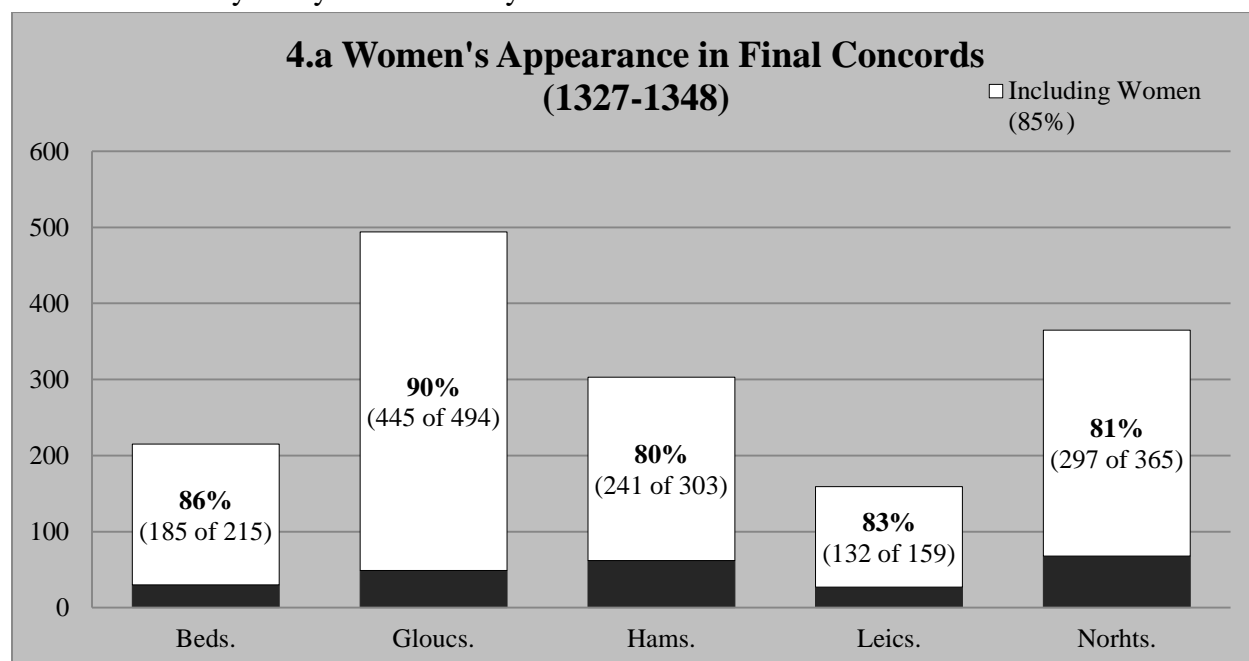
⁵² See figures 2.a and 2.d: 36% in Trinity term 1342 and 26% in Trinity term 1347.

⁵³ See figures 3.a and 3.b.

⁵⁴ See above at note 34.

⁵⁵ Pollock and Maitland, 98.

Because of the final concord's distinctive role as a means to alienate the property right of a married woman, women should have been party to final concords in significant numbers. Analysis of final concords for five counties—Bedfordshire, Gloucestershire, Hampshire, Leicestershire and Northamptonshire—for the first 22 years of Edward III's reign (1327-1348) confirms that supposition.⁵⁶ As a result of the wide variation in the raw numbers of final concords both among the counties and throughout the years under consideration, women's involvement is better reckoned by the percentage of concords to which they were a party rather than by the raw number of concords.⁵⁷ That involvement, moreover, is reflected by concords to which a woman was a party either by herself or together with her husband. Both sides of the transaction are of interest: the percentage of concords to which a woman was a party as either a donor or a donee. The concords, considered in total, suggest that women were donors in nearly half of all final concords recorded in the court of common pleas during roughly the second quarter of the fourteenth century. They were similarly donees in about half of all concords.



Those two sides, however, partially obscure the extent to which women's property rights permeated society. On average a woman appeared as a party, on one side or the other, in 85% of concords (1,300 of 1,536 total).⁵⁸ Gloucestershire showed not only the greatest number of concords but also the highest level of women's appearance as either donor or donee: fully 90% (445 of 494). Hampshire had the lowest rate of women's appearance, although the percentage remains robust at 80% (241 of 303). Regional consistency is questionable: the neighboring counties of Leicestershire and Northamptonshire, roughly similar in size, show similar levels of women's appearance—83%

⁵⁶ The concords were counted and analyzed by regnal year, but the figures display that information by calendar year so that the timing is easier to see. Regnal years for Edward III began on January 25. The difference between regnal and calendar years, therefore, is relatively minor.

⁵⁷ Raw numbers for concords are, however, provided in figures 4.h-r.

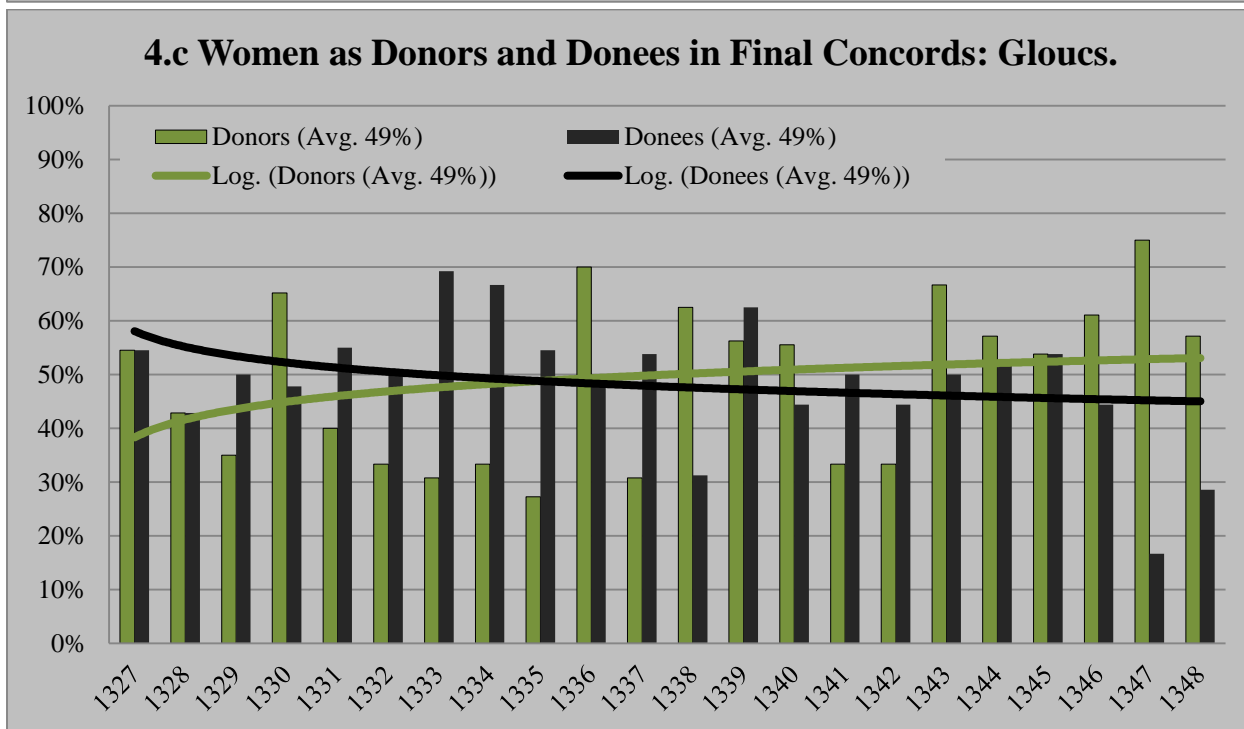
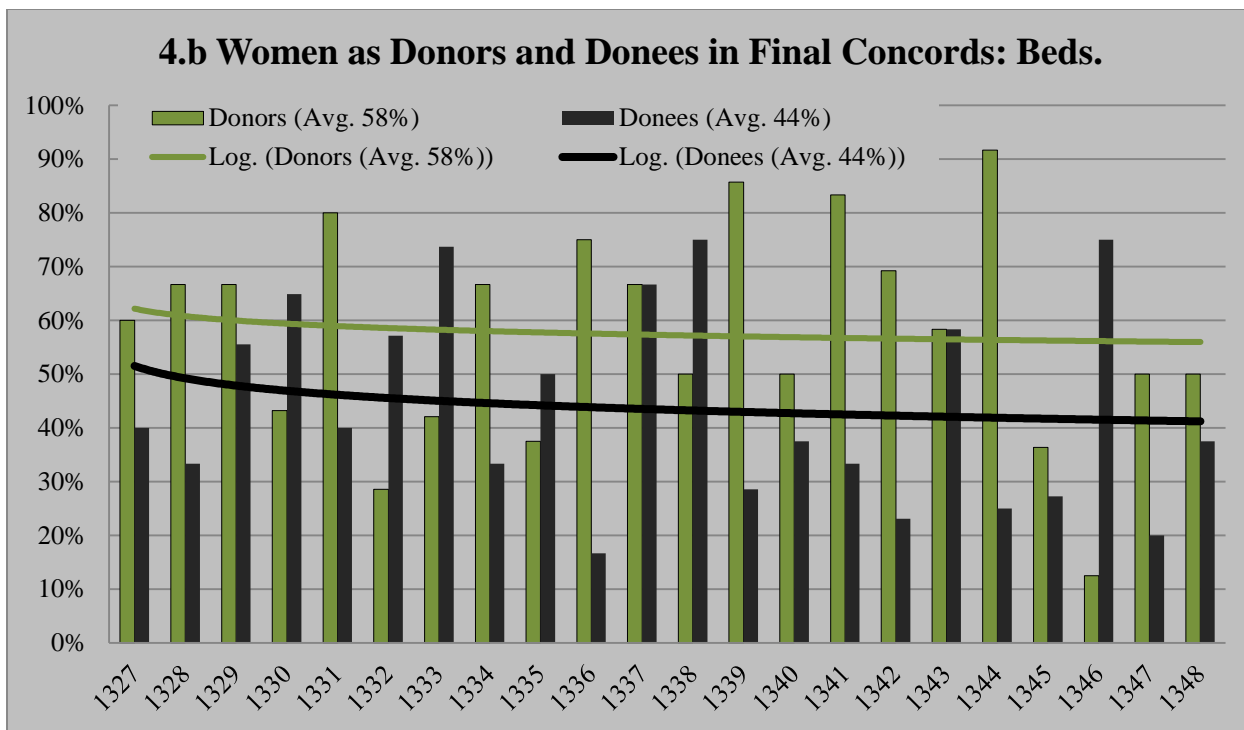
⁵⁸ See figure 4.a.

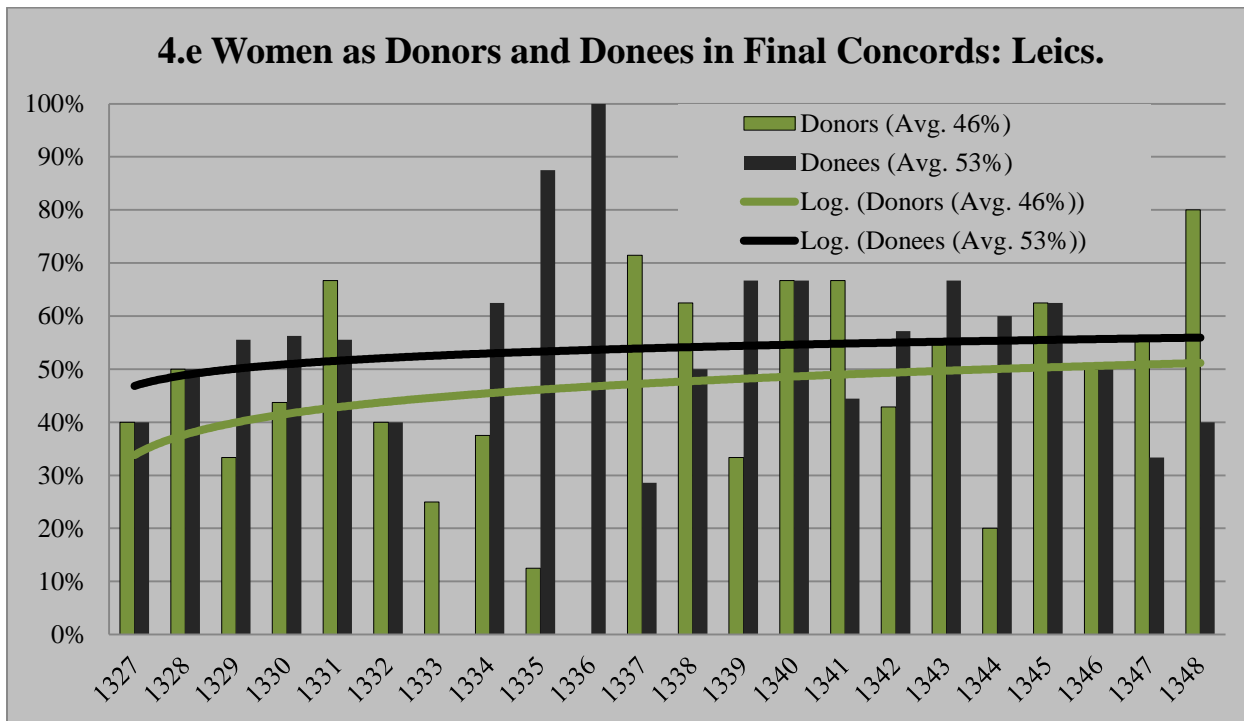
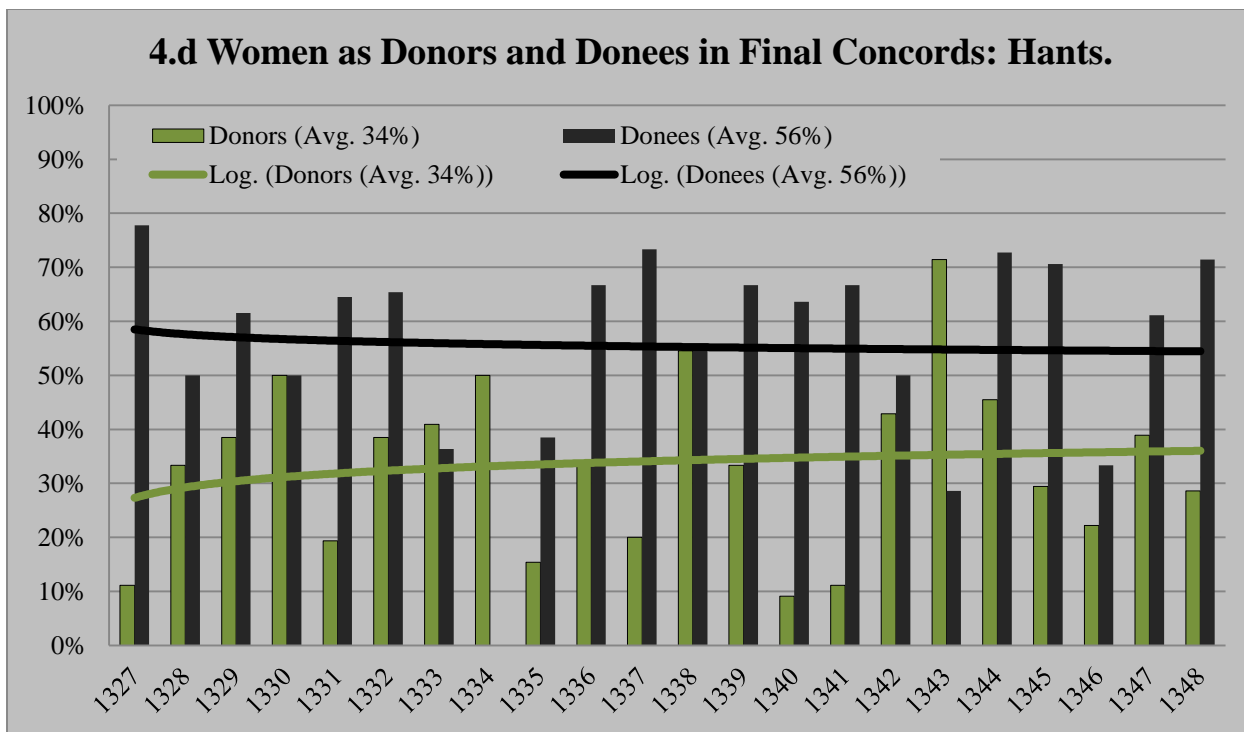
(132 of 159) and 81% (297 of 365) respectively—despite more than twice as many concords having been recorded for Northamptonshire. Bedfordshire had a considerable number of concords for its size, and women appeared in 86% (185 of 215) of those. For at least these five counties, therefore, women were party to 80-90% of final concords regardless of the size or location of the county. The vast majority of those women who appeared were wives rather than sole women. Sole women account for a mere 1-2% of donors; they constituted 1-5% of donees. The appearance of sole women mirrors the results for women overall, with the lowest percentage in Gloucestershire and the highest in Hampshire.⁵⁹

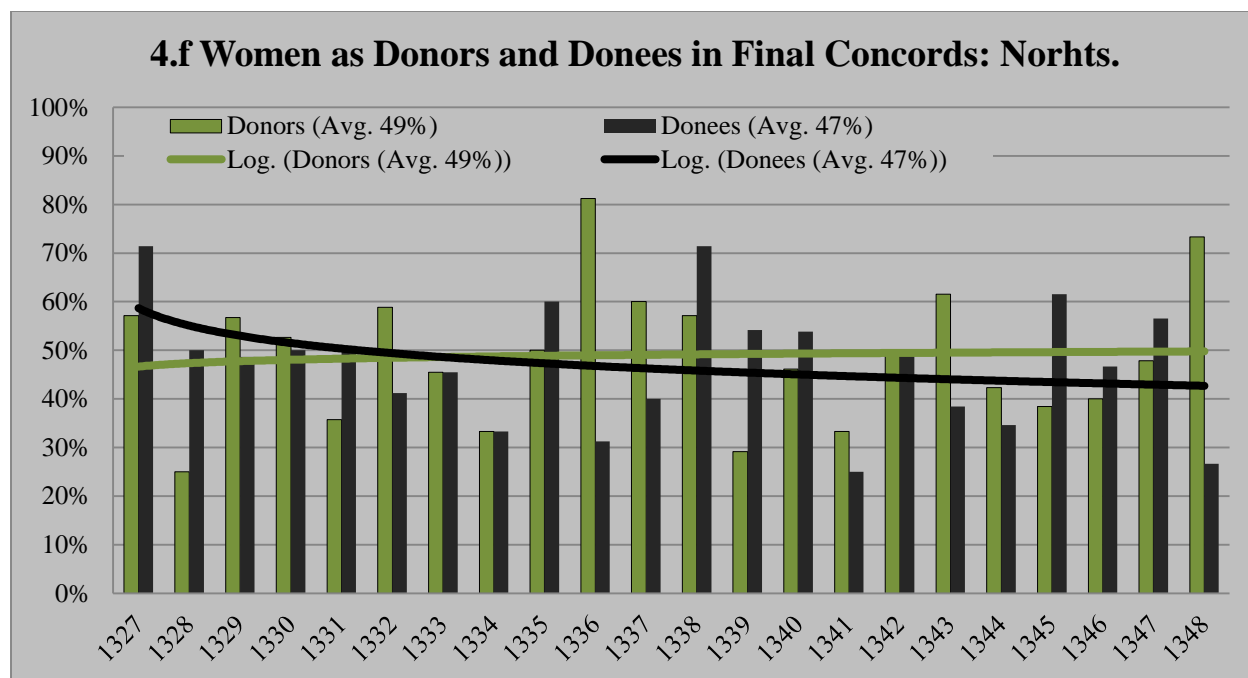
The consistency of women as donors and as donees is remarkable. Because the final concord was the only effective means to alienate the property rights of married women, their relatively high percentage among donors is entirely expected. If the situation had been such that society in general sought to eliminate women's property rights, especially those generated by inheritance, women would still have accounted for a relatively high percentage of donors. Conversely, however, they should then have accounted for a relatively low percentage of donees, such that the trend would show a transfer of land away from women—either sole or together with a husband—and to men alone. None of the counties show such a trend: on average women appeared as donees just about as often as they appeared as donors. Only Hampshire exhibits any significant imbalance between women as donors and as donees. There the trend is exactly the opposite of what could be expected if women's property rights were under any sort of attack: on average women account for 34% of donors but for 56% of donees.⁶⁰ In this county that, on the face of it, appeared to be the least favorable for women's property rights, those rights seem to have been becoming stronger and more frequent throughout the second quarter of the fourteenth century.

⁵⁹ See figures 4.h-q.

⁶⁰ See figure 4.d.







Women's property rights appear to have remained relatively stable. In all counties except Bedfordshire the percentage of women donors increased.⁶¹ Much of that increase, however, appears to have happened by the mid-1330s; the percentage remains fairly stable thereafter. The percentage of women donees decreased throughout the period in all counties except Leicestershire, and the majority of that decline also happened by the mid-1330s. Women were a greater percentage of donors in Bedfordshire between 1327 and 1348⁶² but simultaneously a greater percentage of donees in Hampshire and Leicestershire.⁶³ In Gloucestershire and Northamptonshire women accounted for a greater percentage of donees through the mid-1330s but a greater percentage of donors thereafter.⁶⁴ Fluctuations from year to year, however, far exceed the differences in the overall trends. The frequency with which women appeared as donors or donees in at least half of the concords for any given year suggests that the annual fluctuations conceal some of the strength of women's property rights. On average women appeared as donors in more than half of the annual concords in all but Hampshire, where their appearance was relatively low throughout the period and they only met or exceeded 50% in 4 of 22 years.⁶⁵ They appeared as donees in at least half of concords in all counties but Bedfordshire, where they reached 50% in 9 of 22 years.⁶⁶

⁶¹ See figures 4.b-e.

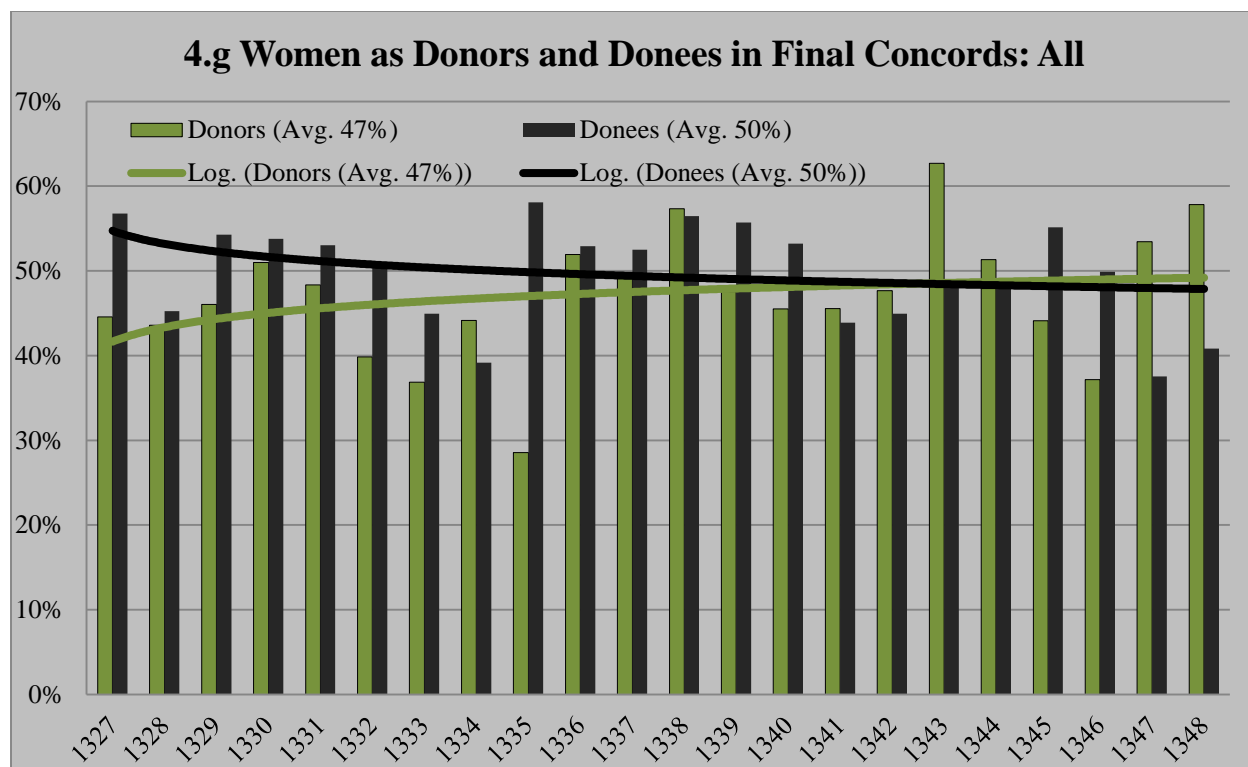
⁶² See figure 4.b.

⁶³ See figures 4.d and 4.e, respectively.

⁶⁴ See figures 4.c and 4.f, respectively.

⁶⁵ See figure 4.d.

⁶⁶ See figure 4.b.



To the extent that final concords can provide an indication of the frequency of women's property rights, those rights remained relatively stable throughout the second quarter of the fourteenth century. In all of the counties except Bedfordshire women appeared more often as donees than as donors through the mid-1330s at least. Taken altogether the final concords show a slight increase in the percentage of women donors and a slight decrease in the percentage of women donees.⁶⁷ This might suggest a diminution in the frequency with which women held jointly with men by the 1340s. That diminution, however, is probably illusory. The percentages do indeed decline. Simultaneously, however, the number of concords declines. Each individual concord therefore has a greater effect on the percentages. The fluctuation from year to year, moreover, is substantial at times. The inclusion or exclusion of data from one or two more years either at the beginning of the period or at the end might have a considerable effect on the trend line. Excluding 1327 and 1328,⁶⁸ the least productive years were in the 1330s for all counties: Bedfordshire 1337 (3 concords), Gloucestershire 1334 (3 concords), Hampshire 1334 (4 concords), Leicestershire 1339 (3 concords) and Northamptonshire 1337 (5 concords).⁶⁹ The relatively low percentage of

⁶⁷ See figure 4.g.

⁶⁸ For all five counties few concords appear for these two years. They are, however, followed by 3-5 years with unusually high numbers of concords. The pattern here may be the result of the beginning of the reign of Edward III in 1327: concords that might otherwise have occurred in 1327 and 1328 simply shifted into the subsequent years. Mike Davies and Jonathan Kissock have shown a similar, temporary decline in the number of concords from seven counties in 1307. Their data show the temporary decline seen here in 1327 and 1328 as having begun in 1326. The transition from Edward II to Edward III, therefore, may be only one factor in the low numbers in 1327 and 1328. Mike Davies and Jonathan Kissock, "The Feet of Fines, the Land Market and the English Agricultural Crisis of 1315 to 1322," *Journal of Historical Geography* 30 (2004): 220, 225.

⁶⁹ See figure 4.r.

women among donors in Hampshire—especially in 1327 when the divergence between women as donors and donees is tremendous—also skews the overall percentages. The percentage of women as donees, moreover, fails to account for women’s property rights generated by the normal operation of law. Some portion of the rights of female donors came from inheritance. Among donees, however, inheritance is not a factor: those numbers show only the results of voluntary grants that included women. The percentage of women as donees therefore underrepresents the extent of women’s property rights.

Overall, therefore, women seem to have been gaining property rights during the second quarter of the fourteenth century. That they appeared as parties to at least half of the final concords in any given year more often than not suggests that expanding women’s property rights was indeed a widespread social interest. Statistics for a greater number of counties and for a longer period of time will better demonstrate trends over time and geography. The main purpose here is to provide a statistical baseline for the strength of women’s property rights prior to the Black Death. Findings from the analysis of this set of final concords are congruent with and supportive of the results derived from the other data sets.

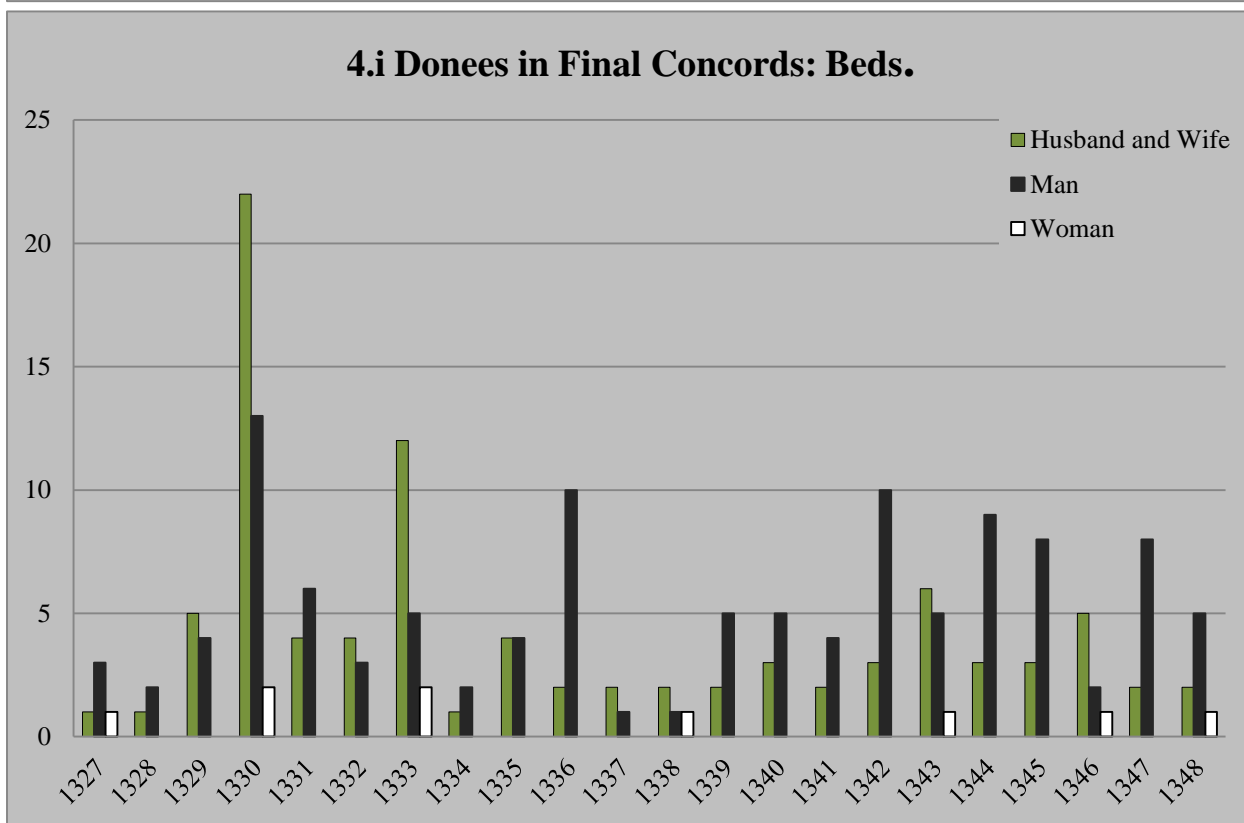
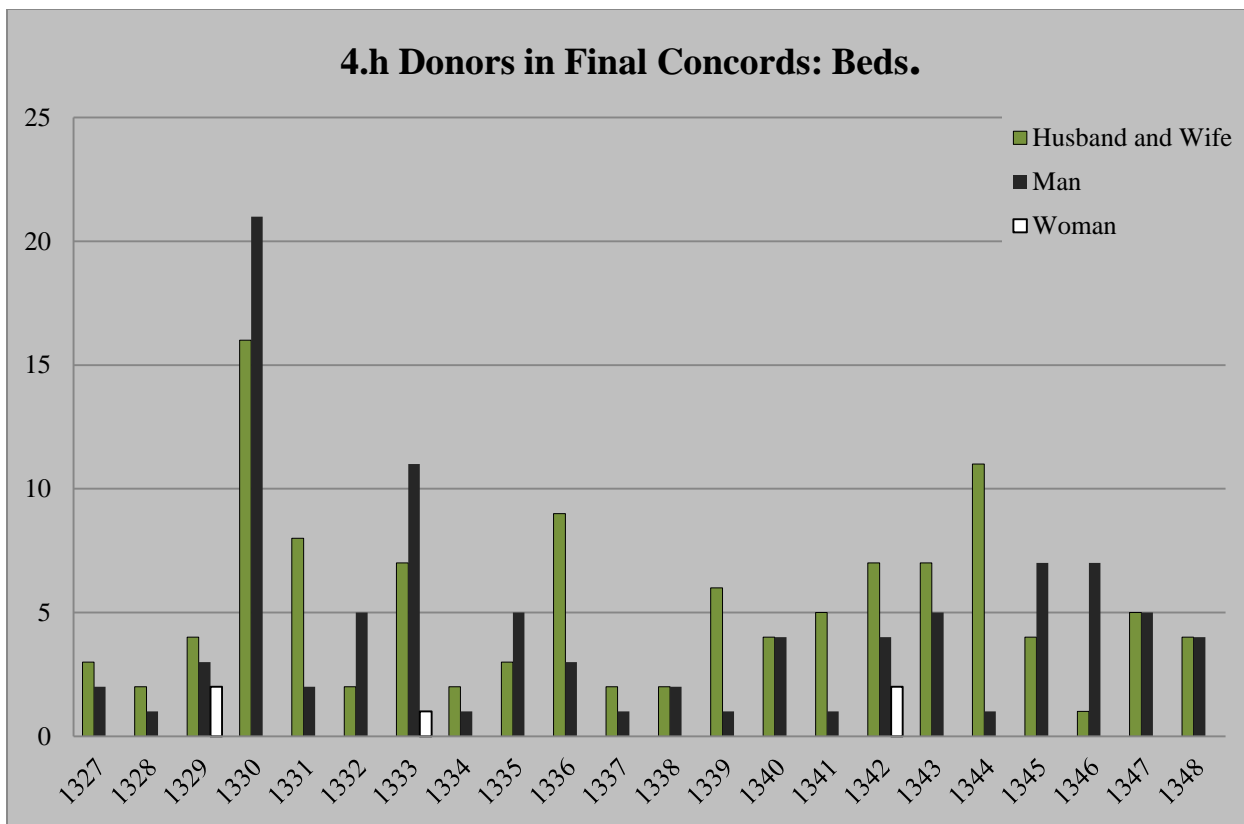
5. Conclusion

The social strength of women’s property rights peaked during the second quarter of the fourteenth century. The common law simultaneously provided relatively secure legal protection of women’s property rights, although they remained subordinate to men’s. The social strength—the extent to which society accepted and promoted women’s property rights—need not have been congruent with the legal strength. Preliminary analysis of women’s appearance as parties to litigation and as both donors and donees in final concords suggests that society broadly supported the expansion of women’s property rights.

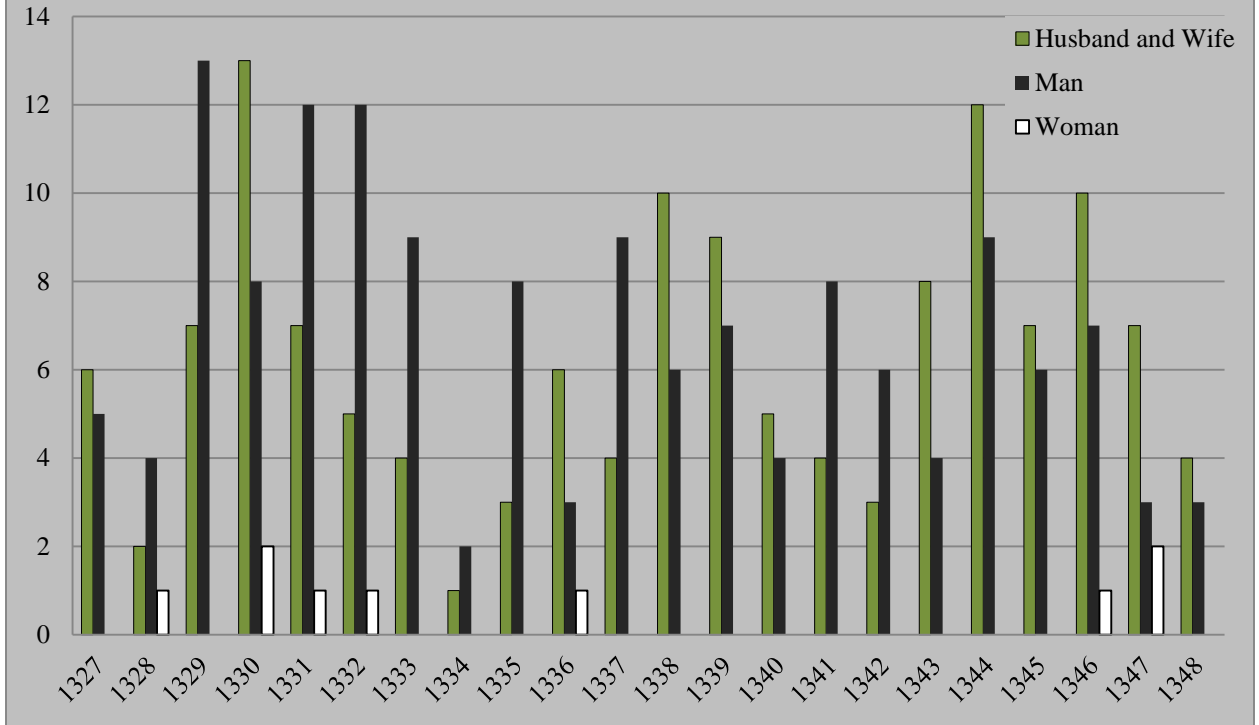
Analysis of litigation provides one measure by which to gauge the social strength of women’s property rights. Dower remained a broad social concern throughout the second quarter of the fourteenth century. It accounted for about one-fifth of real actions at common law. Despite being a gendered property right, dower did not necessarily generate gendered disputes. Men and women were involved on both sides of the litigation. Two-thirds of non-dower real actions involved women on at least one side of the litigation. Among all real actions women appeared as tenants or co-tenants in about one-third of cases. The consistency with which they appeared, moreover, suggests an absence of discrimination beyond the systematic subordination of female right to male right embodied in the rules of intestate succession. These cases were, in other words, neither attempts to circumvent or eliminate women’s property rights nor the result of women resisting organized deprivation of their property right by men. The data appear to show a relatively broad distribution of property rights among both men and women that, in the normal course of affairs, generated litigation.

Final concords confirm the social strength of women’s property rights in the second quarter of the fourteenth century. Women appeared as donors in about half of final concords recorded for

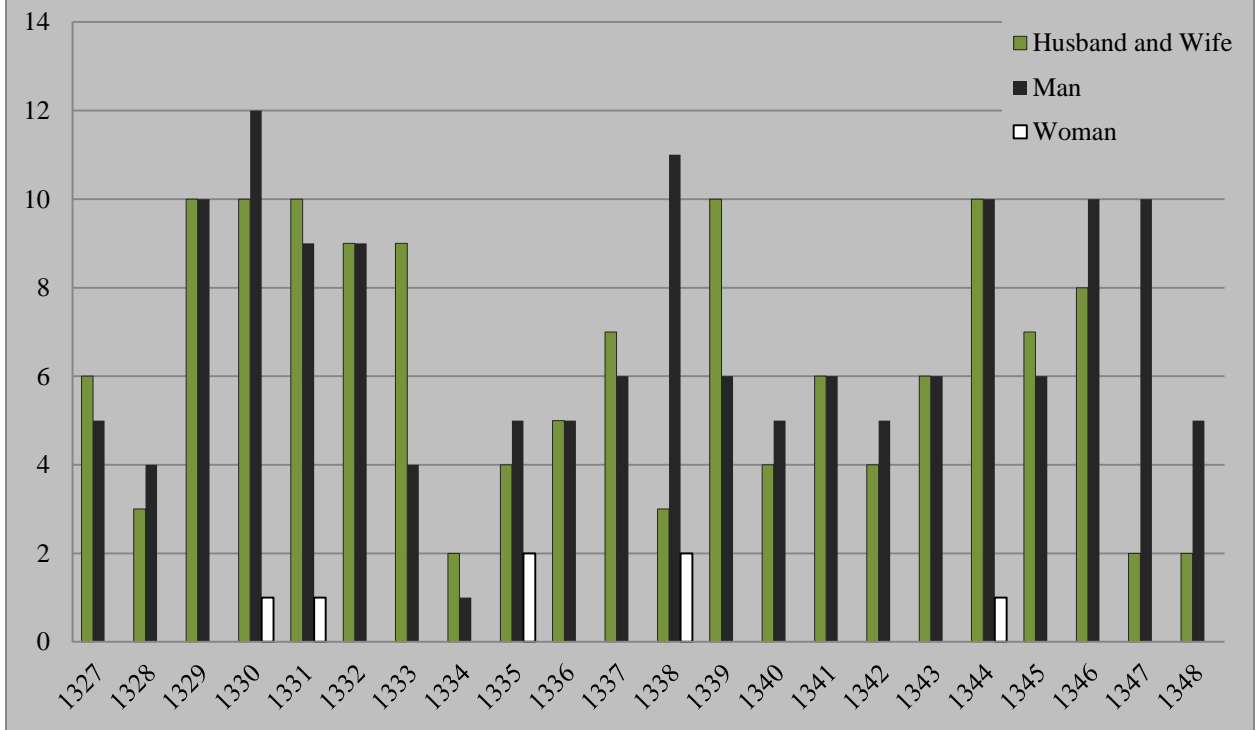
the five counties and similarly appeared as donees in about half. Women of course should have appeared as a relatively high percentage of donors. That they appeared as donees at a similar rate indicates that their participation was not simply a requirement generated by a widespread desire to eliminate women's property rights and thus further subordinate women to male domination. They clearly benefited not only from the allocation of property by default common law rules—dower and inheritance, for example—but also from voluntary grants, although almost always as married women. Women's appearance as donees accounts only for voluntary grants. Many women also inherited land, and although they would have been represented on the donor side of the concords, they would not have been represented as donees. What deficit the charts may show, therefore, is partially illusory. The combination of evidence from both litigation and the final concords reveal a widespread incidence of women's property rights on the eve of the Black Death.



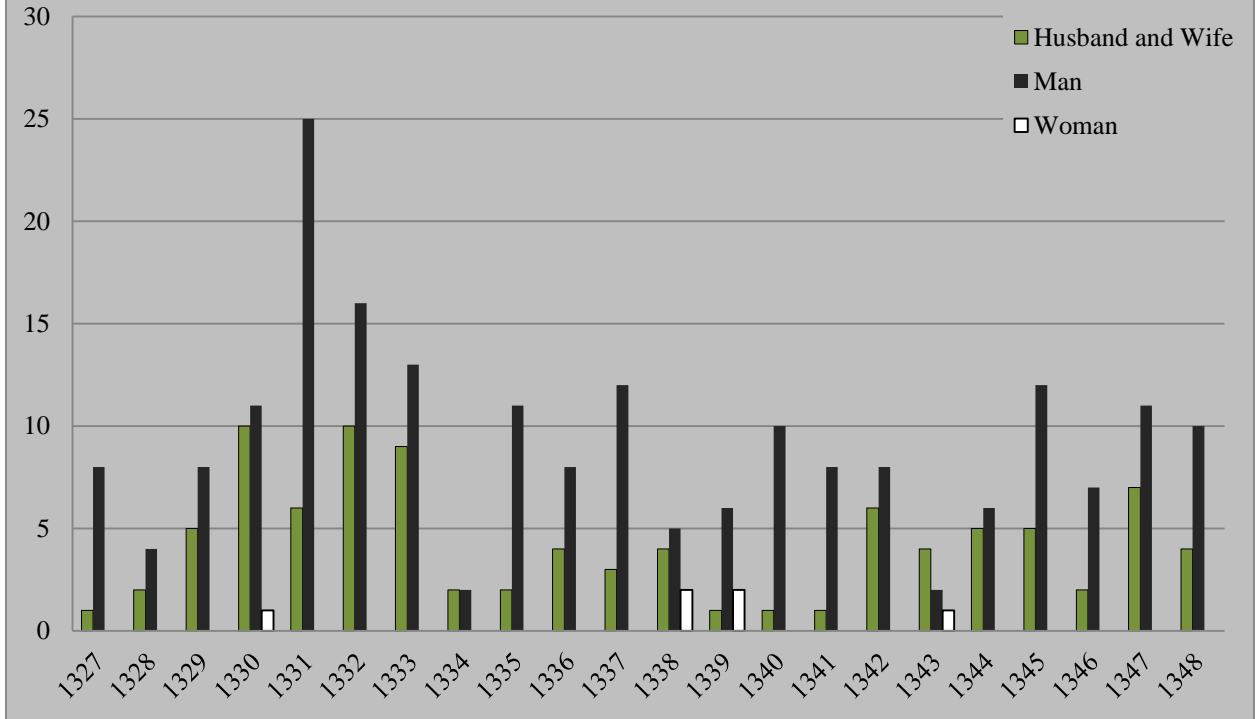
4.j Donors in Final Concords: Gloucs.



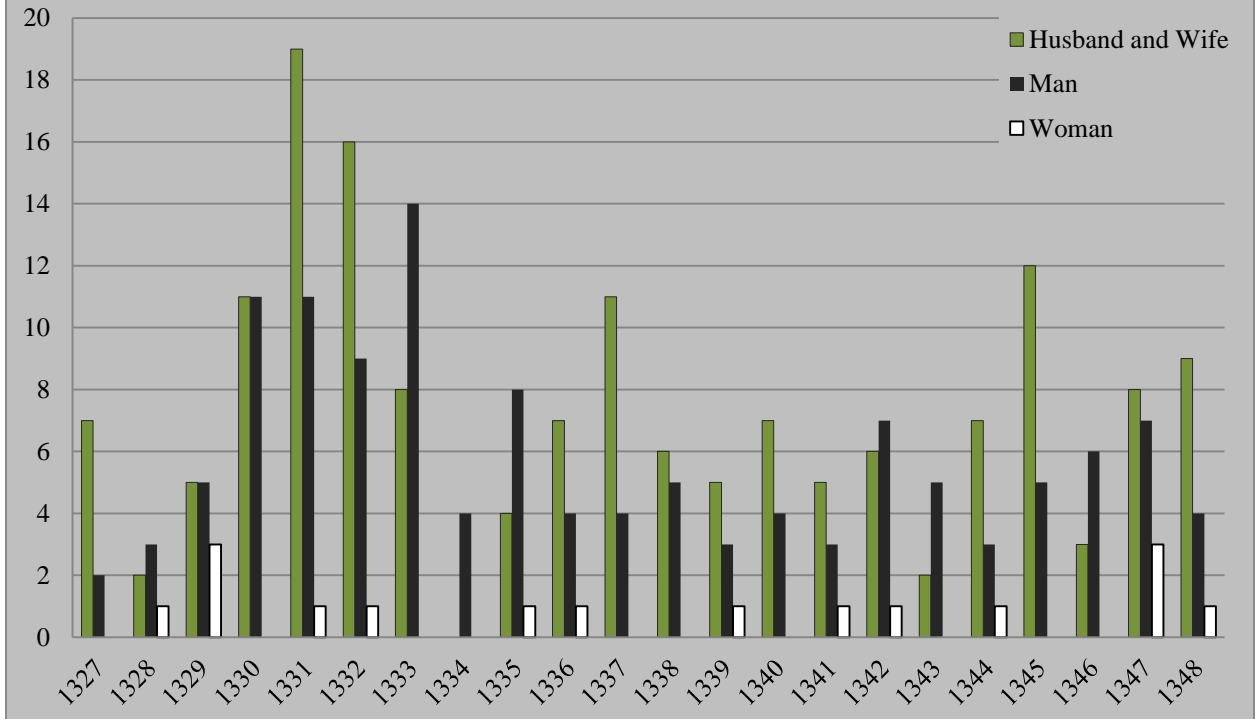
4.k Donees in Final Concords: Gloucs.



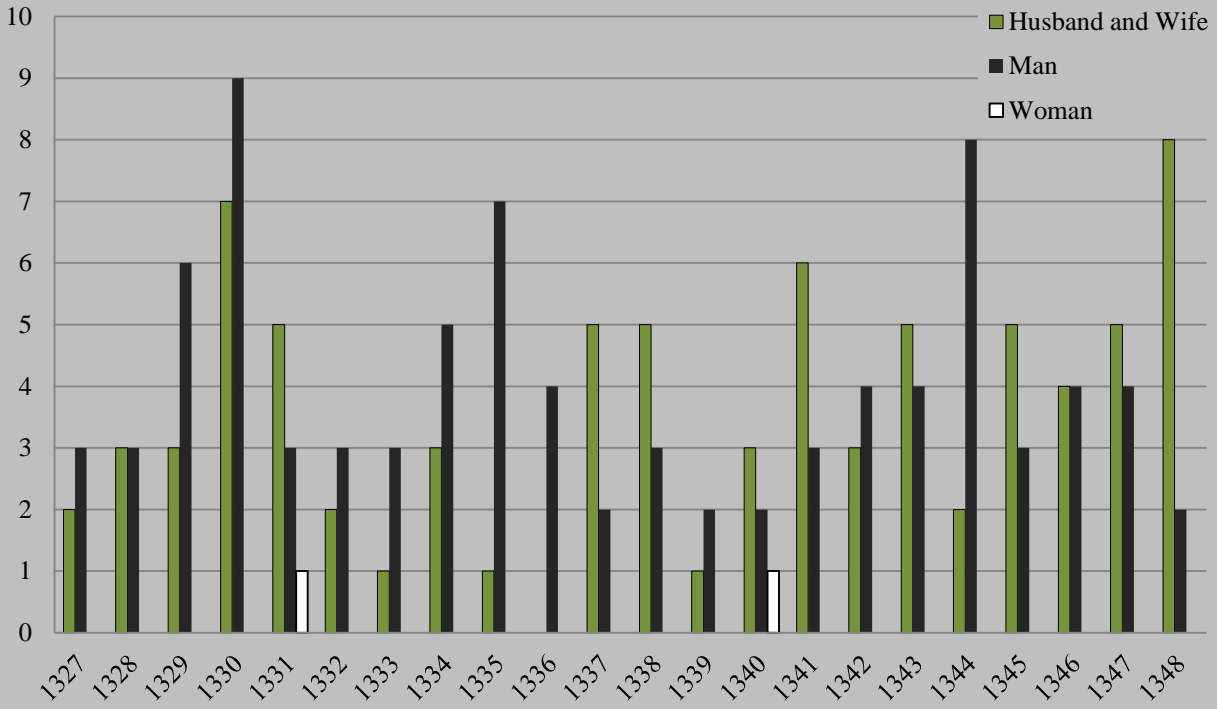
4.1 Donors in Final Concords: Hants.



4.m Donees in Final Concords: Hants.



4.n Donors in Final Concords: Leics.



4.o Donees in Final Concords: Leics.

