THE LAW OF PROPERTY

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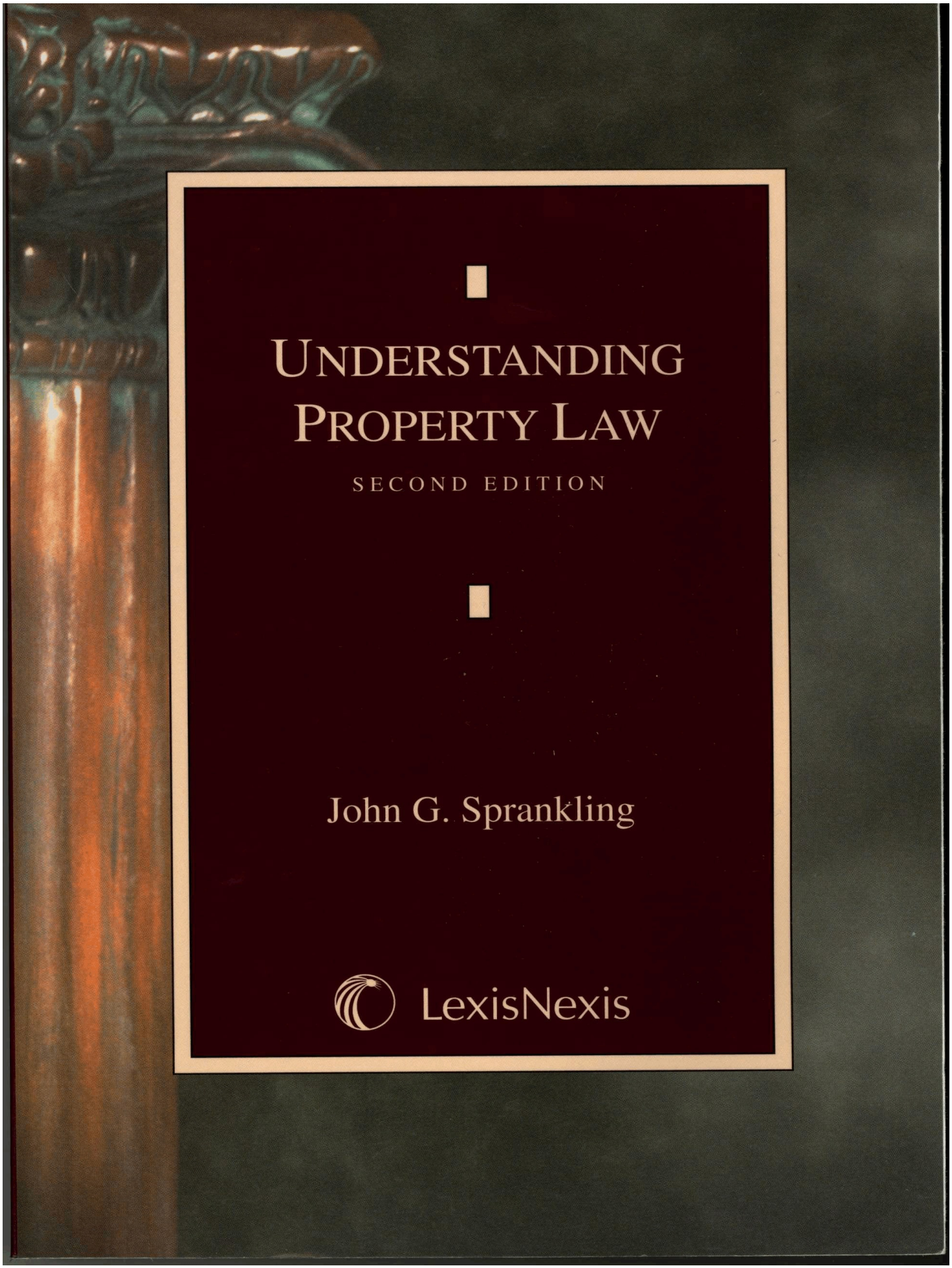
Class 11

Professor Robert T. Farley, JD/LLM



UNDERSTANDING PROPERTY LAW

SECOND EDITION

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LexisNexis

Chapter 8

HISTORY OF THE ESTATES IN LAND SYSTEM

SYNOPSIS

§ 8.01 The Estates System

What does it mean to "own" property? O, a layman, might believe that he "owns" his home. But technically O owns only an "estate" in the home,

probably fee simple absolute. O's estate consists of a cluster of legally-enforceable rights concerning the home.

Estates and *future interests* are the traditional building blocks of property law. The United States largely inherited the system of estates and future interests that evolved in England. Understanding the historical context in which this system arose—the focus of this chapter—is crucial to understanding modern property law. The current law governing estates is discussed in detail in Chapters 9–11, while future interests are covered in Chapters 12–14.

§ 8.02 Defining "Estate" and "Future Interest"

A *present estate* (sometimes called a *possessory estate* or just abbreviated as *estate*) is a legal interest that entitles its owner to the immediate possession of real or personal property. For example, if A owns a present estate in the farm known as Greenacre, he may now reside on Greenacre, cultivate its fields, harvest its crops, exclude other persons, and otherwise use the land. A does not "own" the land that comprises Greenacre. Rather, A owns an estate "in" Greenacre. The cluster of legal rights that constitute A's estate is seen as conceptually different from the land.

What if B now has a legal right to take possession of Greenacre in the future (e.g., "five years from now" or "upon A's death")? B does not hold a present estate because he is not entitled to immediate possession. Instead, his right is classified as a *future interest.* A future interest is a non-possessory interest that will or may become a present estate in the future.

The universe of estates and future interests concerns only the basic rights and duties of an owner in relationship to other private persons. It does not address the separate subject of land use regulation: the rights and duties between an owner and the state in relation to land (*see* Chapters 36–40).

§ 8.03 Property Law in Feudal England

[A] The Feudal Foundation

The English property law system may be traced backward in time to a single defining event: the Norman Conquest of 1066.[1] William the Conqueror became the King of England after leading his invading Norman army to victory over the ruling Saxons at the Battle of Hastings. However, as one historian observed, "[f]or nearly twenty years after the Battle of Hastings, the chances were against survival of the Anglo-Norman monarchy."[2] William's reign was threatened by continued domestic rebellion and

[1] For detailed discussion of the development of the feudal property system in England, see generally Cornelius J. Moynihan & Sheldon F. Kurtz, Introduction to the Law of Real Property 1–23 (4th ed. 2005); Theodore F.T. Plucknett, A Concise History of the Common Law 507–45 (5th ed. 1956); Powell on Real Property §§ 3.01-3.17 (Michael Allan Wolf ed., Matthew Bender).

[2] Frank M. Stenton, The First Century of English Feudalism, 1066–1166 148 (1932).

by the risk of foreign invasion. How could a small group of Normans occupy and defend the whole of England? William met this challenge by creating a complex military and governmental organization resting on principles of feudal *tenure* borrowed from Europe.

The heart of the new feudal system was a huge redistribution of land under terms imposed by the crown. William, as king, was quickly deemed to "own" all land in England. The Saxon nobles who had opposed William forfeited their lands to him; and other landowners—more or less voluntarily—ceded ownership to William in a process known as commendation. Over time, William transferred control over large tracts of land to approximately 1,500 supporters known as *tenants in chief*, in return for military service and other carefully-defined duties that were seen as a burden on the land itself. The results of this land redistribution were chronicled in the Domesday Book of 1086, which catalogued the landholdings of each tenant in chief.

The relationship between William and his tenants in chief was not a commercial, arms-length one, as is found in a modern sale of land. Rather, the feudal relationship between a lord and his vassal was intensely personal. In an elaborate ceremony known as *homage*, the vassal knelt and swore personal allegiance to the lord, creating mutual obligations of loyalty and support. Thus, when William, as lord, granted land to his tenants in chief, as vassals, they were considered to "hold" the land "of" the king. The tenants in chief did not "own" land in the modern sense. Rather, they essentially had the right to use, possess, and enjoy the land, but on the king's behalf. Initially, William granted land only for the lifetime of the tenant in chief. When the holder died, William might regrant the land to the holder's eldest son as a favor, but had no obligation to do so. In a sense, the tenant in chief was more akin to a well-trusted provincial governor than to a contemporary landowner.

The relationship between William and his tenants in chief became the basic model for landholding arrangements throughout feudal England. Through a process called *subinfeudation*, the tenants in chief created similar arrangements with their own vassals, who in turn created similar relationships with others, and so forth.

[B] Feudal Tenures

[1] Free Tenure and Unfree Tenure

Over time, feudal England recognized two categories of landholdings: *free tenures* and *unfree tenures*. The free tenures could be held only by the upper classes, essentially nobles and gentry, whose dignity and social position were incompatible with physical labor. The unfree tenures were held by the peasants or *villeins* who actually worked on the land. The king's courts protected only the rights of tenants holding free tenures, and thus set the stage for the later development of the common law of property.

The free tenures—based on the relationship between William and his tenants in chief—were by far the most important category. All of these

tenures shared a common core: each tenant owed the lord both *service* and *incidents*. And the obligation to provide service and incidents was considered to be attached to the land, thereby binding the tenant's successors in perpetuity.

[2] Services

Four free tenures were recognized in feudal England, each characterized by the type of service the tenant owed to the lord. The Normans had four basic needs: "safety, subsistence, salvation, and splendor."[3] Each need was met by a different type of tenure.

Knight service was the most honorable (and initially the most important) form of tenure. Most of the tenants in chief held their lands in knight service, which required them to provide a specified number of fully equipped knights to the king for 40 days of military service each year.

Socage tenure addressed the subsistence element. It required the tenant to periodically furnish to his lord a specified money payment (e.g., 20 pence), a fixed quantity of a particular agricultural product (e.g., 20 hens), or a defined labor (e.g., plowing a field two days each week).

Frankalmoign tenure involved a grant of land to a priest, church, or other religious body, accompanied by the service of praying for the grantor's salvation. Almost half of England was once held in frankalmoign tenure.

Finally, *serjeanty tenure* usually required the tenant to perform ceremonial or personal services to the king.

[3] Incidents

[a] Incidents During the Tenant's Lifetime

In addition to service, each free tenant owed the lord various other obligations, together called the *incidents* of tenure. Like service, the incidents were considered to burden the land. Four incidents existed during the tenant's lifetime:

(1) *homage* (the ceremony by which the tenant became a vassal);

(2) *fealty* (the oath by which the tenant promised to be loyal to the lord);

(3) *aids* (the tenant's duty to provide financial support to the lord on specified occasions, e.g., ransoming the lord from imprisonment); and

(4) *forfeiture* (the return of the land to the lord if the tenant was disloyal or failed to perform the required service).

[b] Incidents at Tenant's Death

At the tenant's death, four other incidents might arise: escheat, relief, wardship, and marriage. Over time, these incidents became far more

[3] Powell on Real Property § 3.05 (Michael Allan Wolf ed., Matthew Bender).

valuable than the tenurial service or the lifetime incidents, and this development in turn influenced the law's evolution.

Suppose tenant in chief A held land of the king in knight service. If A died without heirs, the land would return or *escheat* to the king, who could then grant it anew to another noble. Modern law recognizes the same basic concept; if a person dies intestate without heirs today, his or her property escheats to the state.[4]

Alternatively, suppose that A was survived by two grown sons, B and C. Although initially the king could regrant the land to whoever he pleased in this situation, over time the custom arose—later converted into an obligation—that the land would pass to the tenant's eldest son.[5] However, the heir was required to pay the king a fixed sum, called a *relief*, to obtain the land. The modern counterpart to the relief is the inheritance tax.

Wardship and marriage, the two remaining incidents, applied only to knight service and serjeanty tenure. Suppose A died leaving D, a five-year-old boy, as his only heir. The incident of *wardship* allowed the king, as overlord, to have possession of A's lands until D reached the age of 21; during this period, the king was entitled to the rents and profits from the land. The incident of *marriage* allowed the lord to sell the right to marry the heir. D, the minor heir, could refuse the marriage, but was then required to pay the lord a substantial fine.

[C] Subinfeudation and the Feudal Pyramid

Each tenant holding "of" a lord could create subtenures through a process called *subinfeudation*. Over time, this produced a complex pyramid of landholding arrangements that evolved into the Anglo-American system of estates in land.

Suppose again that tenant in chief A holds of the king in knight service the modern equivalent of 50,000 acres of land; A is required to provide five equipped knights for the king. A might grant the use of 5,000 acres to K, one of his knights, in knight service; K would be required to provide one knight to A, and would also owe to A the feudal incidents. K, in turn, might subinfeudate 1,000 acres to F in socage tenure, receiving in return the fixed sum of 1,000 pence per year and feudal incidents. The result is a chain of feudal relationships among the king, A (tenant in chief), K (called a *mesne lord*), and F (called a *tenant in demesne*). Each occupies a particular niche or *status* in the feudal pyramid. K, for example, owes service and incidents to A, but receives them from F.

As a result of subinfeudation, one parcel of land could simultaneously be the subject of many different tenures. F's 1,000-acre parcel, for example, is burdened by two tenures in knight service and one socage tenure. Thus, in effect, multiple persons could "own" property rights in the same land at

[4] *See, e.g., In re* O'Connor's Estate, 252 N.W. 826 (Neb. 1934).

[5] The principle that the eldest son inherits, called *primogeniture*, dominated English law until its abolition in 1925.

the same time. Under this example, F holds the right to present possession of the 1,000-acre tract. Yet K, A, and the king all hold rights in the same tract that may give them possession in the future. For instance, if F dies without heirs, the land will escheat to K.

[D] Evolution of the Estates in Land System

[1] Problems Produced by Subinfeudation

Over time, the feudal tenures withered away under the pressure of social and economic changes, to be replaced by the modern estates in land. The transformation was initially sparked by a decline in the value of the feudal services. As changes in the technology of warfare rendered knights obsolete, knight service became irrelevant. Further, as inflation eroded the purchasing power of money, the socage tenures which required fixed monetary payments lost most of their value. However, because the value of land rose with the prevailing inflation, the feudal incidents that were tied to the possession of land—escheat, marriage, and wardship—retained their value.

As incidents became far more valuable than services, subinfeudation increasingly undercut the rights of the lords. Suppose that F is about to die without heirs, and realizes that his land will then escheat to his lord, K. Due to inflation, the fixed rent of 1,000 pence has minimal value; assume that the reasonable rental value of the land is 10,000 pence annually. F might altruistically subinfeudate to B, a worthy but poor young farmer, in socage tenure for 10 pence per year. When F dies, the land does not escheat to K. Rather, K is entitled to the service due from F (1,000 pence per year) and succeeds to F's rights against B (10 pence per year). But the worth of this service to K is comparatively small. K loses the opportunity to receive the current rental value, 10,000 pence, because F has circumvented the incident of escheat. In this manner, tenants like F used subinfeudation to avoid the valuable incidents of escheat, marriage, and wardship.

[2] Statute Quia Emptores

The lords responded in 1290 with the enactment of the Statute Quia Emptores,[6] which abolished subinfeudation, and thus, in the short run, shored up the feudal system. Yet in the long run Quia Emptores ensured the disintegration of the system for two reasons. First, Quia Emptores greatly simplified landholding arrangements. No new tenures could be created and the existing tenures slowly disappeared with escheat or forfeiture. Over time, the middle layers of the feudal pyramid vanished, until most tenants in possession of land held directly of the king. Second, in exchange for banning subinfeudation, the lords allowed each free tenant to substitute another tenant in his stead without securing the lord's approval. In effect, a tenant could freely alienate his interest in land. No longer would each tenant and lord be bound together in the personal

[6] 18 Edw. I, ch.1 (1290).

obligations of loyalty and support that characterized the early feudal system. Instead, the relationship between tenant and lord was increasingly viewed in economic terms.

[3] From Tenures to Estates

With the principle of free alienation firmly established by Quia Emptores, it became possible to transfer—and thus create—different forms of land ownership known as estates. Each free person occupied a niche or *status* in the feudal pyramid; as feudalism waned, the related term *estate* was used to describe these new forms of landholdings. The estate system was built on the basic feudal contours. Multiple persons could hold interests in the same land at the same time. One person could hold the right to immediate possession of land, while others could hold a right to acquire possession in the future.

Over time, the king's courts recognized and protected three basic *freehold* estates—the life estate, the fee tail, and the fee simple (*see* § 9.05). In a sense, each estate was an echo of the feudal past. The life estate endured for the life of a specific person or persons, like the original grants of William the Conqueror. The fee tail endured from generation to generation as long as the bloodline of the original holder continued; like William's later grants, it expired if a holder died without closely-related heirs. Finally, as the logical consequence of Quia Emptores, the fee simple was freely transferable and endured literally forever; it escheated to the king only if the holder died without any heirs.

Even as these new estates developed, an intricate network of future interests arose (*see* § 12.04). By definition, if an owner holding fee simple transferred a lesser estate, such as the life estate or the fee tail, one or more future interests were created.

§ 8.04 Property Law in Post-Feudal England

[A] New Economic and Social Conditions

Between 1500 and 1700, evolving economic and social conditions opened a new chapter in the development of English property law. Agriculture shifted from subsistence crops to farming for national and foreign markets, as innovative techniques enhanced production and transportation facilities improved. With increased demand for manufactured woolen goods, sheep-raising efforts expanded. In turn, as ownership of land became more profitable, new tensions arose that shaped the law's future evolution.

Two themes dominated the era. One was the demise of feudalism. Over the kings' stubborn objections, the remaining feudal remnants were slowly swept away by a rising tide of private property law centered on estates in land. The other, somewhat overlapping theme, was an epic battle to determine the future course of the new estates in land system. Would it tilt toward protecting the autonomy of existing landowners to transfer their

lands on whatever terms they chose? Or would it tilt toward restricting such rights in order to ensure that land was freely alienable, as the newly-wealthy commercial interests desired?

[B] The Demise of Feudalism

Feudalism was an anachronism in England long before 1500. In particular, landowners resented the burdensome feudal incidents—which were by now usually owed directly to the king—just as modern landowners dislike taxation. Beginning in the 1300s, landowners sought to avoid the incidents through a creative technique known as the *use*. O, an owner, could convey his land to T, a trusted person, for the use or benefit of B, a relative or friend of O. This arrangement deprived the lord of the incidents that would otherwise arise on O's death; and B could enforce T's obligation in chancery court. In 1535, King Henry VIII was able to protect his revenues by abolishing the use through the famous Statute of Uses,[7] a temporary reprieve for the feudal system.

Yet almost immediately, the collapse of feudalism continued. An initial step was the enactment of the Statute of Wills[8] in 1540. Under prior law, an estate in land could not be devised; if a tenant died without an heir, it escheated to the lord. The Statute of Wills permitted the tenant to devise his rights, thus narrowing the incident of escheat.

In 1660, the Statute of Tenures[9] effectively ended feudalism. It abolished the feudal incidents of aids, homage, marriage, relief, and wardship, and converted all lingering knight service tenures into socage tenures. After 1660, if O, an English landowner, held fee simple, he could be said to hold the modern equivalent of full ownership. Certainly, the concept of tenure remained in theory; O was still deemed to "hold" "of" someone else, not to "own" land directly. But with the demise of the feudal incidents, tenure had no practical significance other than the residual incident of escheat if O *both* died without heirs *and* failed to devise his estate.

[C] The Battle Between Autonomy and Free Alienation

[1] The Basic Tension

As feudalism waned, a second epic struggle developed: would the emerging property law system favor owner autonomy or free alienation? The basic battle lines were drawn between large landowners, on the one hand, and newly-wealthy trading and commercial interests, on the other.

Large landowners sought unfettered autonomy to transfer their rights on whatever terms they deemed appropriate, regardless of the impact on society in general. In an era when land was the principal form of wealth, these owners wished to control the disposition of their property long after

[7] 27 Hen. VIII, ch. 10 (1536).

[8] 32 Hen. VIII, ch. 1 (1540).

[9] 12 Car. II, ch. 24 (1660).

their deaths in order to protect the economic, political, and social power of successive family generations. For example, suppose O devises Redacre, a large farm, "to my elder son G and his heirs, on condition that Redacre is always used for growing turnips, and if not so used, then to my younger son H and his heirs." G holds a special form of fee simple called fee simple subject to an executory limitation, while H owns a future interest called an executory interest; if G or any of G's successors ceases using Redacre for growing turnips, then H or his successor acquires fee simple absolute in Redacre. From O's perspective, the restriction makes sense; it encourages G and his successors to continue the currently desirable use of growing turnips on Redacre, which will provide income for their support without risking the family wealth in speculative ventures.

The trading and commercial forces, on the other hand, tended to view land as an economic investment. They argued that land should be freely transferable or *alienable* (like iron, fish, timber, and other commodities) to maximize its profitability. Accordingly, this group opposed future interests that tended to restrict the free transfer of rights in land. Consider again the farming restriction that O imposed on Redacre in the hypothetical above. Suppose that 100 years after O's death, raising turnips on Redacre no longer makes economic sense; the land is more valuable for other uses (e.g., as a factory site). Yet G's successor M is effectively locked into the low-value use of turnip farming. M cannot sell the land to an investor seeking a factory site; nor can M mortgage it in order to develop a factory on the land. Why? Because any buyer or lender would lose all rights once the turnip growing use terminated. If all English land could be burdened with similar restrictions, national economic development would be impaired.

[2] A Swinging Pendulum

The evolution of English property law between 1500 and 1700 can be broadly described as a pendulum swinging first toward owner autonomy and then back toward free alienability.

The period began with an explosion in future interests. In 1472, the decision in *Taltarum's Case*[10] ended the practical effectiveness of the fee tail by allowing a collusive lawsuit to end the entail. As a result, the landed gentry increasingly turned to various types of future interests—particularly contingent remainders held by transferees—to control future inheritances. During the early 1500s, courts expanded the types of remainders that could be created in real property.

This trend accelerated with the enactment of the Statute of Uses[11] in 1535, which similarly enlarged the categories of permissible interests in land. It permitted the creation of a second major type of contingent future interest that could be held by transferees: the executory interest. It also allowed the creation of trusts, and thus authorized a new layer of future

[10] Y.B. 12 Edw. IV, fol. 19, pl. 25 (1472).

[11] 27 Hen. VIII, ch. 10 (1536).

interests in equity. Finally, the Statute of Wills[12] in 1540 allowed owners to transfer rights in property by devise. This provided an efficient vehicle for creating the broad range of future interests that was now authorized.

The swing of the pendulum back toward free alienability is symbolized by a series of common law restrictions that progressively curtailed future interests, such as the Rule in Shelley's Case[13] (1581) (*see* § 14.13) and the Rule Against Perpetuities (*see* §§ 14.10, 14.11), which effectively began with the *Duke of Norfolk's Case*[14] (1681).

[D] The New Estates in Land System

By 1700, the English common law of property was relatively settled. Almost all of this body of law dealt with estates in land and their accompanying future interests. Little or no attention was devoted to areas that today form major components of modern property law, such as sales, financing, and public land use restrictions. Rather, the common law was primarily concerned with classifying different estates and interests held by private owners and describing the legal effects that flowed from these classifications.

As the product of over 600 years of legal evolution since the Norman Conquest, the estates in land system was extraordinarily complex. A few of its components were meaningless relics of feudalism. Others were products of the struggle against feudalism. Still other aspects were compromises forged in the tug of war between supporters of owner autonomy and advocates of free alienabilility.

§ 8.05 Estates in Land in the Early United States

[A] The "Reception" of English Property Law

Independence confronted our new nation with a dilemma: should we follow traditional English property law or create a uniquely American property law system? In the short run, necessity compelled the states to continue the use of relatively familiar English common law, which had been employed during the colonial era, despite the prevailing revolutionary antipathy toward the crown. This process is called the *reception* of English common law.

Thus, the states largely adopted the English principles governing estates in land and future interests. The feudal relic of tenure, however, was rejected. The Revolution was seen as severing all ties between American landowners and the king, including the traditional (although already irrelevant) notion of tenure. Although some states viewed themselves as

[12] 32 Hen. VIII, ch. 1 (1540).

[13] 1 Co. Rep. 93b, 76 Eng. Rep. 206 (K.B. 1581).

[14] 22 Eng. Rep. 931 (1681).

successors to the crown, most states abolished tenure. In addition, other factors narrowed the influence of the English system.[15]

[B] Simplification Due to Lack of Legal Resources

As a practical matter, the states were able to implement only a simplified version of English property law due to a lack of legal resources. English-trained lawyers were quite rare; most American lawyers and judges had learned the law through a combination of self-education and apprenticeship. Also, English law books were relatively scarce in America. Blackstone's eminently readable—but oversimplified—*Commentaries on the Laws of England* became the standard legal treatise, perhaps even more popular in the United States than in England. Accordingly, much of the complexity and nuance that characterized the English system was lost in the transplantation process.

[C] Express Exception for Local American Conditions

In embracing the common law, each state added a major exception: English principles would apply only to the extent consistent with local American conditions. In terms of property law, one fundamental difference between England and the new United States was geography. Most of the English land surface was devoted to agricultural use, and its property law system was accordingly attuned to a mature agrarian economy. Applying English rules to the vast, unowned wilderness of the United States often made little sense. For example, in England the holder of a mere life estate had only a limited right to cut timber due to the shortage of remaining forest. This rule was unnecessary (and indeed, counterproductive) in the United States, where the vast forests were considered the equivalent of weeds—obstacles to agricultural development.

[D] Little Demand for English Complexities

The surplus of "unowned" American land meant that much of the English system was irrelevant. The key feature of the system was that multiple persons could own simultaneous interests in the same property. There was little demand for this multilayered structure in the United States, where fee simple absolute land was abundant but labor was scarce. Why should citizen C hold land as a mere life tenant or tenant for years when fee simple land was freely available in the West?

[E] Democratic Concerns

Finally, certain feudal aspects of English property law were rejected outright as inconsistent with the goals of American democracy. For example, the states rejected the English rule of *primogeniture*, which restricted

[15] *See* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. Chi. L. Rev. 519, 521–56 (1996) (discussing the early development of American property law).

inheritance to the eldest son, as inconsistent with social equality. States similarly abolished the estate in fee tail—which allowed an owner to transmit property through generations of descendants without any sale to third parties—due to the fear of creating a landed aristocracy that would dominate American political life.

§ 8.06 Trends in Modern Law Governing Estates in Land

[A] The Victory of Fee Simple Absolute

The modern law governing estates in land is a jigsaw puzzle consisting of both new and archaic pieces. Developments in the United States have eroded away much of the elaborate English system in favor of fee simple absolute, the most basic estate. Because of changing cultural attitudes, freehold estates other than fee simple absolute are rarely created today. Moreover, contemporary legislatures and courts are typically hostile toward such other estates for two reasons. First, the future interests that accompany other estates tend to limit the free alienation of property, anathema in a society that increasingly views land as a commodity. Second, there is a clear movement toward disregarding "dead hand" control of land, in favor of protecting the good faith expectations of living property owners.

Today, virtually all land in the United States is held in fee simple absolute, unencumbered by any future interests. The law governing the fee simple absolute is relatively straightforward. Accordingly, the importance of estates in land as a discrete area of property law is slowly declining. Many of the traditional freehold estates in land—and the intricate future interests that accompanied them—are now increasingly obsolete (*see* Chapter 9). Yet remnants of the common law complexity linger, causing confusion to judges, attorneys, and law students alike.

[B] Developments in Communal Ownership

Communal ownership was a central feature of English property law. Multiple persons could share a concurrent estate in land, each having an equal right to possession and enjoyment of the entire parcel. American states largely adopted the English system of concurrent estates. Two of these estates—the tenancy in common and the joint tenancy—remain in widespread use today with only minor modifications from their common law ancestors, particularly as vehicles for owning family property (*see* Chapter 10). Beginning in the 1960s, the rise of condominium development produced an explosion in the use of concurrent estates among non-family members, which continues today.

[C] Toward Gender Equality in Marital Property Ownership

The modern law governing marital property largely ignores the traditional English common law approach (*see* Chapter 11). Driven by feudal

principles, the English system was premised on gender inequality; it vested virtually total control over family property in the husband. Modern American law has steadily moved toward gender equality.