

LECTURE 53 Of Estates In Fee

The perusal of the former volumes of these Commentaries, has prepared the student to enter upon the doctrine of real estates, which is by far the most artificial and complex branch of our municipal law. We commenced with a general view of the international law of modern civilized nations, and endeavored to ascertain and assert those great elementary maxims of universal justice, and those broad principles of national policy and conventional regulation, which constitute the code of public law. The Government of the United States next engaged our attention, and we were led to examine and explain the nature and reason of its powers, as distributed in departments, and the constitutional limits of its sphere of action, as well as the restrictions imposed upon the original sovereignty of the several members of the Union. We then passed to the sources of the municipal law of the State governments, and treated of personal rights, and the domestic relations which are naturally the objects of our earliest sympathies, and most permanent attachments. Our studies were next directed to the laws of personal property, and of commercial contracts, which fill a wide space in all civil institutions; for they are of constant application in the extended intercourse and complicated business of mankind. In all the topics of discussion, we have been, and must continue to be, confined to an elementary view and sweeping outline of the subject; for the plan of these essays will not permit me to descend to that variety and minuteness of detail, which would be oppressive to the general reader, though very proper to guide the practical lawyer through the endless distinctions which accompany and qualify the general principles of law.

In treating of the doctrine of real estates, it will be most convenient, as well as most intelligible, to employ the established technical language to which we are accustomed, and which appertains to the science. Though the law in some of the United States discriminates between an estate in free and pure allodium, and an estate in fee simple absolute, these estates mean essentially the same thing; and the terms may be used indiscriminately, to describe the most ample and perfect interest which can be owned in land. The words *seizin* and *fee*, have always been so used in this state, whether the subject was lands granted before or since the revolution; though by the act of 1787, the former were declared to be held by the tenure of free and common socage, and the latter in free and pure allodium.¹ In Connecticut and Virginia, the terms *seizin* and *fee* are also applied to all estates of inheritance, though the lands in those states are declared to be allodial, and free from every vestige of feudal tenure.² The statute of New York, to which I have alluded, made an unnecessary distinction in legal phraseology as applied to estates; and the distinction lay dormant in the statute, and was, utterly lost and confounded in practice. The technical language of the common law was too deeply rooted in our usages and institutions, to be materially affected by legislative enactment's.

The New York revised statutes have now abolished the distinction, by declaring, that all lands within the state are allodial, and the entire and absolute property vested in the owners, according to the nature of their respective estates. All feudal tenures of every description, with their incidents, are abolished, subject nevertheless to the liability to escheat, and to any rents or services certain, which had been, or might be, created or reserved. And, to avoid the inconvenience and absurdity of attempting a change in the technical language of the law, it was further declared, that every estate of inheritance, notwithstanding the abolition of tenure, should continue to be termed a fee simple, or fee; and that every such estate, when not defeasible or conditional, should be termed a fee simple absolute, or an absolute fee.³ It was undoubtedly proper, that the tenure of lands in this state should be uniform, and that estates should not in one part of the country be of the denomination of socage

tenures, and in another part allodial; but it may be doubted, whether there was any wisdom or expediency in the original statute provision, declaring the lands in this state to be allodial, and abolishing the tenure of free and common socage, since nothing is gained in effect, and nothing is gained even in legal language, by the alteration. The people of the state, in their right of sovereignty, are still declared to possess the original and ultimate property in and to all lands; and the right of escheat, and the rents and services already in use, though incident to the tenure of free and common socage, are reserved⁴

A fee, in the sense now used in this country, is an estate of inheritance in law, belonging to the owner, and transmissible to his heirs.⁵ No estate is deemed a fee, unless it may continue forever. An estate, whose duration is circumscribed by the period of one or more lives in being, is merely a freehold, and not a fee. Though the limitation be to a man and his heirs during the life or widowhood of B., it is not an inheritance or fee, because the event must necessarily take place within the period of a life. It is merely a freehold, with a descendible or transmissible quality; and the heir takes the land as a descendible freehold.⁶

The most simple division of estates of inheritance is that mentioned by Sir William Blackstone,⁷ into inheritances absolute or fee simple, and inheritances limited; and these limited fees he subdivides into qualified and conditional fees. This was according to Lord Coke's division, and he deemed it to be the most genuine and apt division of a fee.⁸ Mr. Preston, in his *Treatise on Estates*,⁹ has, however, gone into more complex divisions, and he classes fees into fees simple, fees determinable, fees qualified, fees conditional, and fees tail. The subject is full of perplexity, under the distinctions which he has attempted to preserve between fees determinable and fees qualified; for he admits that every qualified fee is also a determinable fee. I shall, for the sake of brevity and perspicuity, follow the more comprehensive division of Lord Coke, and divide the subject into fees simple, fees qualified, fees conditional, and fees tail.

(1.) Fee simple is a pure inheritance, clear of any qualification or condition, and it gives a right of succession to all the heirs generally, under the restriction that they must be of the blood of the first purchaser, and of the blood of the person last seized.¹⁰ It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land. Every restraint upon alienation is inconsistent with the nature of a fee simple, and if a partial restraint be annexed to a fee, as a condition not to alien for a limited time, or not to a particular person, it ceases to be a fee simple, and becomes a fee subject to a condition.

The word heirs is, at common law, necessary to be used, if the estate is to be created by deed.¹¹ The limitation to the heirs must be made in direct terms, or by immediate reference, and no substituted words of perpetuity, except in special cases, will be allowed to supply their place, or make an estate of inheritance in feoffments and grants.¹²

The location of the word in any particular part of the grant is not essential; for a grant of a rent to A, and that he and his heirs should distrain for it, will pass a fee.¹³ The general rule is applicable to all conveyances governed by the rules of the common law; for though prior to the statute of uses, the fee, in the view of a Court of Chancery, passed by reason of the consideration, in a bargain and sale, or covenant to stand seized to uses, without any express limitation to the heirs; yet when uses were by statute transferred into possession, and became legal estates, they were subjected to the scrupulous and technical rules of the courts of law. The example at law was followed by the courts

of equity, and the same legal construction applied by them to a conveyance to uses.¹⁴ If a man purchases lands to himself for ever, or to him and his assigns for ever, he takes but an estate for life. Though the intent of the parties be ever so clearly expressed in the deed, a fee cannot pass without the word heirs.¹⁵ The rule was founded originally on principles of feudal policy, which no longer exist, and it has now become entirely technical. A feudal grant was *stricti juris*, made in consideration of the personal abilities of the feudatory, and his competency to render military service; and it was consequently confined to the life of the donee, unless there was an express provision that it should go to his heirs.¹⁶

But the rule has for a long time been controlled by a more liberal policy, and it is counteracted in practice by other rules, equally artificial in their nature, and technical in their application. It does not apply to conveyances by fine, when the fine is in the nature of an action, as the fine *sur conuzance de droit*, on account of the efficacy and solemnity of the conveyance, and because a prior feoffment in fee is implied.¹⁷ Nor does the rule apply to a common recovery, which is in legal contemplation a real action; for the recoverer takes a fee by fiction of law, according to the extent of his former estate, of which he is supposed to be disseized.¹⁸ It does not apply to a release by way of extinguishment, as of a common of pasture;¹⁹ nor to a partition between joint-tenants, coparceners, and tenants in common; nor to releases of right to land by way of discharge or passing the right, by one joint-tenant or coparcener to another. In taking a distinct interest in his separate part of the land, the release takes the like estate in quantity which he had before in common.²⁰ Grants to corporations aggregate pass the fee without the words heirs or successors, because in judgment of law a corporation never dies, and is immortal by means of perpetual succession.²¹ In wills a fee will also pass without the word heirs, if the intention to pass a fee can be clearly ascertained from the will, or a fee be necessary to sustain the charge or trust created by the will.²² It is likewise understood, that a court of equity will supply the omission of words of inheritance; and in contracts to convey, it will sustain the right of the party to call for a conveyance in fee, when it appears to have been the intention of the contract to convey a fee.²³

Thus stands the law of the land, without the aid of legislative provision. But in this country, the statute law has in several instances abolished the inflexible rule of the common law, which has long survived the reason of its introduction, and has rendered the insertion of the word heirs no longer necessary. In Virginia, Kentucky, Alabama, and New York,²⁴ the word heirs, or other words of inheritance, are no longer requisite, to create or convey an estate in fee; and every grant or devise of real estate made subsequent to the statute, passes all the interest of the grantor or testator, unless the intent to pass a less estate or interest appears in express terms or by necessary implication. The statute of New York also adds, for greater caution, a declaratory provision, that in the construction of every instrument creating or conveying any estate or interest in land, it shall be the duty of the courts to carry into effect the intention of the parties, so far as such intention can be collected from the whole instrument, and is consistent with the rules of law. Some of the other states, as New Jersey, North Carolina, and Tennessee, have confined the provision to wills, and left deeds to stand upon the settled rules and construction of the common law. They have declared by statute, that a devise of lands shall be construed to convey a fee simple, unless it appears, by express words or manifest intent, that a lesser estate was intended.²⁵

(2.) A qualified, base, or determinable fee, (for I shall use the words promiscuously,) is an interest which may continue for ever, but the estate is liable to be determined by some act or event, circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be

transitory or perishable, yet such estates are deemed fees, because it is said, they have a possibility of enduring forever. A limitation to a man and his heirs, so long as A. shall have heirs of his body; or to a man and his heirs, tenants of the manor of Dale; or till the marriage of B.; or so long as St. Paul's church shall stand, or a tree shall stand, are a few of the many instances given in the books in which the estate will descend to the heirs, but continue no longer than the period mentioned in the respective limitations, or when the qualification annexed to it is at an end.²⁶ If the event marked out as the boundary to the time of the continuance of the estate, becomes impossible, as by the death of B. before his marriage, the estate then ceases to be determinable, and changes into a simple and absolute fee; but until that time, the estate is in the grantee, subject only to a possibility of reverter in the grantor.

It is the uncertainty of the event, and the possibility that the fee may last for ever, that renders the estate a fee, and not merely a freehold. All fees liable to be defeated by an executory devise, are determinable fees, and continue descendible inheritances until they are discharged from the determinable quality annexed to them, either by the happening of the event, or by a release.²⁷ These qualified or determinable, fees are likewise termed base fees, because their duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the title. A tenant in tail may, by a bargain and sale, lease and release, or covenant to stand seized, create a base fee, which will not determine until the issue in tail enters.²⁸

If the owner of a determinable fee conveys in fee, the determinable quality of the estate follows the transfer; and this is founded upon the sound maxim of the common law, that *nemo potest plus juris in alium transferre quam ipse habet*. Within that rule, the proprietor of a qualified fee has the same rights and privileges over the estate as if he were a tenant in fee simple; all the estate is in the feoffee, notwithstanding the qualification, and no remainder can be limited over, nor any reversion expectant thereon, other than the possibility of a reverter when the estate determines or the qualification ceases.²⁹

3. A conditional fee is one which restrains the fee to some particular heirs exclusive of others, as to the heirs of a man's body, or to the heirs male of his body.³⁰ This was at the common law construed to be a fee simple on condition that the grantee had the heirs prescribed. If the grantee died without such issue, the lands reverted to the grantor. But if he had the specified issue, the condition was supposed to be performed, and the estate became absolute, so far as to enable the grantee to alien the land, and bar not only his own issue, but the possibility of a reverter. By having issue, the condition was performed for three purposes; to alien, to forfeit, and to charge. Even before issue had, the tenant of the fee simple conditional might by feoffment have bound the issue of his body. But there still existed the possibility of a reverter in the donor. After issue born, the tenant could also bar the donor and his heirs of that possibility of a reversion, but the course of descent was not altered by having issue.³¹ The common law provided the *formedon in reverter*, as; the remedial writ for the grantor and his heirs, after the determination of the gift of the conditional fee, by the failure of heirs.³²

Before the statute *de donis*, a fee on condition that the donee had issue of his body, was in fact a fee tail, and the limitation was not effaced by the birth of issue. If the donee died without having aliened in fee, and without leaving issue general or special, according to the extent of the gift, the land reverted again to the donor. But the tenant-, after the birth of issue, could and did alien in fee; and this alleged breach of the condition of the grant, was the occasion of the statute of Westminster 2d.

13 Edw. I. c. 1. commonly called the statute *de donis*, which recited the evasion of the condition of the gift by this subtle construction, and consequent alienation, going to defeat the intention of the donor. The statute accordingly, under that pretense, preserved the estate for the benefit of the issue of the grantee, and the reversion for the benefit of the donor and his heirs, by declaring that the will of the donor, according to the form of the deed manifestly expressed, should be observed, and that the grantee should have no power to alien the land. It deprived the owner of the feud of his ancient power of alienation, upon his having issue, or performing the condition, and the donor's possibility or right of reverter was turned into a reversion. The feud was to remain unto the issue according to the form of the gift, and if such issue failed, then the land was to revert to the grantor, or his heirs; and this is frequently considered to have been the origin of estates-tail, though the statute rather gave perpetuity, than originally created that ancient kind of feudal estate.³³

(4.) Of Fees tail. — The statute *de donis* took away the power of alienation on the birth of issue, and the courts of justice considered that the estate was divided into a parties lar estate in the donee, and a reversion in the donor. Where the donee had a fee simple before, he had by the statute only an estate tail; and where the donor had but a bare possibility before, he had, by construction of the statute, a reversion or fee simple expectant upon the estate tail. Under this division of the estate, the donee could not bar or charge his issue, nor, for default of issue, the donor or his heirs, and a perpetuity was created. The inconvenience of these fettered inheritances, is as strongly described, and the policy of them as plainly condemned, in the writings of Lord Bacon, and Lord Coke, as by subsequent authors,³⁴ and the true policy and rule of the common law is deemed to have been overthrown by the statute *de donis* establishing those perpetuities. Attempts were frequently made in Parliament to get rid of them, but the bills introduced for that purpose (and which Lord Coke says he had seen) were uniformly rejected by the feudal aristocracy, because estates tail were not liable to forfeiture for treason or felony, nor chargeable with the debts of the ancestor, nor bound by alienation. They were very conducive to the security and power of the great landed proprietors and their families, but very injurious to the industry and commerce of the nation.

It was not until *Taltarum's case*, 12 Edw. IV, that relief was obtained against this great national grievance, and it was given by a bold and unexampled stretch of the power of judicial legislation. The judges upon consultation resolved, that an estate tail might be cut off and barred by a common recovery, and that by reason of the intended recompense, the common recovery was not within the restraint of the statute *de donis*.³⁵ These recoveries were afterwards taken notice of, and indirectly sanctioned, by several acts of Parliament, and have ever since their application to estates tail, been held as one of the lawful and established assurances of the realm. They are now considered simply in the light of a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were a tenant in fee simple; and estates tail in England, for along time past, have been reduced to almost the same state, even before issue born, as conditional fees, were at common law, after the condition was performed by the birth of issue.

A common recovery removes all limitations upon an estate tail, and an absolute, unfettered, pure fee simple, passes as the legal effect and operation of a common recovery. It is the only mode of conveyance in England, by which a tenant in tail can effectually dock the entail. If he conveys by deed, he conveys only a base or voidable fee, and he will not exclude his heirs *per formam doni*. Even by fine he only bars his issue, and not subsequent remainders. He conveys only a base or qualified fee, though the remainder-man will be barred by limitation of time, as a stranger would upon a fine levied with proclamations. It is the common recovery only that passes an absolute title.³⁶

In *Mary Portington's case*³⁷ Lord Coke says, that the judgment in 12 Edw. I. was no new invention, but approved of by the resolutions of the sages of the law; who, “perceiving what contentions and mischiefs had crept in to thee disquiet of the law by these fettered inheritances, upon consideration of the act, and of the former exposition of it by the sages of the law, always after the said act, gave judgment that in the case of a common recovery, where there was a judgment against the tenant in tail, and another judgment against the vouchee to have in value, the estate should be barred.”

Estates tail were introduced into this country with the other parts of the English jurisprudence, and they subsisted in full force before our revolution, subject equally to the power of being barred by a fine or common recovery. But the doctrine of estates tail, and the complex and multifarious learning connected with it, have become quite, obsolete in most parts of the United States. In Virginia, estates tail were abolished as early as 1776, and in New York, as early as 1782, and all estates tail were turned into estates in fee simple absolute.³⁸ So, in North Carolina, Kentucky, Tennessee, Georgia, and Missouri, estates tail have been entirely abolished by being converted by statute into estates in fee simple.³⁹ In the states of Vermont, Indiana, Illinois, South Carolina, and Louisiana, they do not appear to be known to their laws, or ever to have existed; but in several of the other states, they are partially tolerated, and exist in a qualified degree.⁴⁰

Conditional fees at common law, as known and defined prior to the statute *de donis*, have generally partaken of the fate of estates in fee tail, and have not been revived in this country. Executory limitations under the restrictions requisite to prevent perpetuities, and estates in fee upon condition, other than those technical conditional fees of which we are speaking, are familiar to our American jurisprudence, as will be more fully shown in a subsequent lecture. In Connecticut, the doctrine of conditional fees, so far as they are a species of entails, restraining the descent to some particular heirs in exclusion of others, have never been recognized or adopted.⁴¹ These conditional fees are likewise understood to be abolished in Virginia, by a statute which took effect in 1787; and this I apprehend to be the better construction of the statute law of New York in respect to these common law entailments; for the owner can alienate or devise them as well as an absolute estate in fee.

By the act of 1787,⁴² every freeholder was authorized to give or sell at his pleasure any lands whereof he was seized in fee simple; and by the act of 1813,⁴³ every person having an estate of inheritance, was enabled to give or devise the same; and by the new revised statutes,⁴⁴ every person capable of holding lands, and seized of or entitled to any estate or interest therein, may alien the same. These qualified fees are estates of inheritance in fee simple, though not in fee simple absolute;⁴⁵ and they would seem to come within the letter and spirit of the statute provisions in New York. In South Carolina, fees conditional at common law exist, and fees tail proper have never existed. The first donee takes an estate for life, if he has no issue; but if he has issue, the condition of the grant is performed, and he can alien the land in fee simple.⁴⁶

The general policy of this country does not encourage restraints upon the power of alienation of land; and the New York Revised Statutes have considerably abridged the prevailing extent of executory limitations. The capacity of estates tail in admitting remainders over, and of limitations to that line of heirs which family interest or policy might dictate, renders them still beneficial in the settlement of English estates. But the tenant in tail can alien his lands by fine or recovery; and the estate tail can only be rendered inalienable during the settlement on the tenant for life, and the infancy of the remainder-man in tail.

Executory limitations went further, and allowed the party to introduce at his pleasure any number of lives, on which the contingency of the executory estate depended, provided they were lives in being at the creation of the estate; and to limit the remainder to them in succession, and for twenty-one years afterwards.⁴⁷ This was the rule settled by Lord Chancellor Nottingham, in the great case of the *Duke of Norfolk*;⁴⁸ and the decision in that case has been acquiesced in uniformly since that time, and every attempt to fetter estates by a more indefinite extent of limitation, or a more subtle aim at a perpetuity, has been defeated.⁴⁹ But the power of protracting the period of alienation has been restricted, in New York, to two successive estates for life, limited to the lives of two persons in being at the creation of the estate.⁵⁰

The English law of entail is so greatly mitigated, as to remove the most serious inconveniences that attend that species of estates; and it is the opinion of the most experienced English property lawyers, that the law of entail is a happy medium between the want of any power, and an unlimited power, over the estate. It accommodates itself admirably to the wants and convenience of the father who is tenant for life, and of the son who is tenant in tail, by the capacity which they have, by their joint act, of opening the entail, and resettling the estate from time to time, as family exigencies may require. The privileges of a tenant in tail are very extensive. He not only can alienate the fee, but he may commit any kind of waste at his pleasure.⁵¹

And yet, with a strange kind of inconsistency in the law, he is not, any more than a tenant for life, bound to discharge encumbrances on the estate. If, however, he does it, or pays the interest on them, he is presumed to do it in favor of the inheritance.⁵² He is not obliged even to keep down the interest on a mortgage, as a tenant for life is bound to do. If, however, he discharges the encumbrance or the interest, he is presumed to do it in favor of the inheritance; for he might acquire the absolute ownership by a recovery, and it belongs to his representatives to disprove the presumption.⁵³ On the other hand, the tenant cannot affect the issue in tail, or those in remainder or reversion, by his forfeitures or engagements. They are not subject to any of the debts or encumbrances created by the tenant in tail, unless he comes within the operation of the bankrupt law, or creates the mortgage by fine.⁵⁴

Entails, under certain modifications, have been retained in various parts of the United States, with increased power over the property, and greater facility of alienation. The desire to preserve and perpetuate family influence and property is very prevalent with mankind, and is deeply seated in the human affections.⁵⁵

This propensity is attended with many beneficial effects. But if the doctrine of entails be calculated to stimulate exertion and economy, by the hope of placing the fruits of talent and industry in the possession of a long line of lineal descendants, undisturbed by their folly or extravagance, they have a tendency, on the other hand, to destroy the excitement to action in the issue in tail, and to leave an accumulated mass of property in the hands of the idle and the vicious. Dr. Smith insisted, from actual observation, that entailments were unfavorable to agricultural improvement. The practice of perpetual entails is carried to a great extent in Scotland, and that eminent philosopher observed, half a century ago, that one third of the whole land of the country was loaded with the fetters of a strict entail; and it is understood that additions are every day making to the quantity of land in tail, and that they now extend over half the country.

Some of the most distinguished of the Scots statesmen and lawyers have united in condemning the

policy of perpetual entails, as removing a very powerful incentive to persevering industry and honest ambition. They are condemned as equally inexpedient and oppressive; and Mr. Bell sincerely hoped that some safe course might ere long be devised, for restraining the exorbitant effects of the entail law of Scotland, and for introducing some limitations consistent with the rules of justice and public policy.⁵⁶ Entailments are recommended in monarchical governments, as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions. Every family, stripped of artificial supports, is obliged, in this country, to repose upon the virtue of its descendants for the perpetuity of its fame.

The simplicity of the civil law is said by Mr. Gibbon, to have been a stranger to the long and intricate system of entails, and yet the Roman trust settlements, or *fidei commissa*, were analogous to estates tail. When an estate was left to an heir in trust to leave it at his death to his eldest son, and so on by way of substitution, the person substituted corresponded in a degree to the English issue in tail. One of the novels of Justinian⁵⁷ seems to have assumed that these entailed settlements could not be carried beyond the limit of four generations. This is the construction given to that law by some of the modern civilians,⁵⁸ though Domat admits that the novel is expressed in a dark ambiguous manner, and he intimates that it was introduced by Tribonian, from corrupt views. It is also termed by Mr. Gibbon,⁵⁹ a partial, perplexed, declamatory law, which, by an abuse of the novel, stretched the *fidei commissa* to the fourth degree. In France, entails were not permitted formerly to extend beyond the period of three lives; but in process of time, they gained ground, and trust settlements, says the ordinance of 1747, were extended not only to many persons successively, but to a long series of generations.

That new kind of succession or entailment was founded on private will, which had usurped the place of law, and established a new kind of jurisprudence. It led to numerous and subtle questions, which perplexed the tribunals, and the circulation of property was embarrassed. Chancellor D'Aguesseau prepared the ordinance of 1747, which was drawn with great wisdom, after consultation with the principal magistrates of the provincial parliaments and the superior councils of the realm, and receiving exact reports of the state of the local jurisprudence on the subject. It limited the entail to two degrees, counted per capita, between the maker of the entail and the heir; and therefore if the testator made A. his devisee for life, and after the death of A. to B., and after his death to C., and after his death to D., etc., and the estate should descend from A. to B., and from B. to C., he would hold it absolutely, and the remainder over to D. would be void.⁶⁰ But the Code Napoleon annihilated even the mitigated entailments allowed by the ordinance of 1747, and declared all substitutions or entails to be null and void, even in respect to the first donee.⁶¹

NOTES

1. See the Reports *passim*, and particularly 18 Johns. Rep. 74 and 20. id. 548, 553.
2. 6 Conn. Rep. 373. 386. 500. 4 Munf. 205. Notes to .2 Blacks. Com. 44, 47, 77, 104, by Dr. Tucker.
3. N.Y. Revised Statutes, vol. i. 718. sect. 3 and 4. — p. 722. sect. 2.
4. Ibid. p. 718. sect. 1. 3, 4. — Why should we assume the allodial theory, if we must preserve the language of the socage tenure? with the *mutato nomine*, it is still *de te fabula narratur*.

5. The word feudum imports not only *Beneficium*, but *Beneficium* and *haereditatem*. It is an inheritable estate. *Feudum idem est quod haereditas*. Litt. sec. 1. Wright on Tenures, 148.

6. 1 Co. 140. b. 10 Co. 98. b. Vaughan's Rep. 201. 2 Blacks. Com. 259. Preston on Estates, Vol. i. 480. According to Lord Ch. J. Vaughan, (though Sir William Blackstone and Mr. Preston do not follow his opinion,) the heir takes in the character and title of heir, and not of special occupant.

7. Com. Vol. ii. 104, 109.

8. Co. Litt. 1. b. - 10 Co. 97. b. 2 Inst. 333. The Judges, in Plowden, 241. b, 245. b, and Lord Ch. J. Lee, in *Martin v. Strachan*, 5 Term Rep. 107, *in notis*, are still more large in the division of inheritances at common law. They make but two kinds, fees simple absolute, and fees simple conditional or qualified.

9. Vol i. 419.

10. Litt. sect. 1. and 11. Co. Litt. 1. b. Fleta, lib. iii. c. 8. Plowd. 557. a. — But the above restriction has been essentially changed in this country, as we shall see hereafter, when we come to treat of the law of descent.

11. Lord Coke, in Co. Litt. 8. b. says, that a grant to a man and his heir in the singular number, conveys only an estate for life, because the heir is but one. This is a strange reason to be given, under a system of law which prefers males to females in the course of descent, and in which the right of primogeniture among the males is unrelentingly enforced. Mr. Hargrave, note 45. to Co. Litt. 8. b. questions the doctrine, and he says there are authorities to show that the word heir, in a deed as well as in a will, may be taken for *nomen collectivum*, and stand for heirs in general. The doctrine of Coke was very vigorously attacked by Lord Ch. J. Eyre, near a century ago, in *Dubber v. Trollope*, Amb. 453.; and Lord Coke himself showed, in Co. Litt. 22. a, that an estate tail, with the word heir in the singular number, was created and allowed in 39 Ass. pl. 20. Notwithstanding all this authority in opposition to the rule as stated by Lord Coke, and the unintelligible reason assigned for it, Mr. Preston states the rule as still the existing law. Treatise on Estates, vol. ii. P.8

12. Litt. sec. 1.

13. Lord Coke, in 3 Bulst. 128.

14. 1 Co. 87. b. 100. b. Gilbert on Uses and Trusts, by Sugden, 29. 143. *Tapner v. Merlot*, Willes' Rep. 177. *Van Horn v. Harrison*, 1 Dal. Rep. 137.

15. Holt, Ch. J., 6. Mod. Rep. 109.

16. 2 Blacks. Com 107, 108.

17. Co. Litt. 9. b. Preston on Estates, vol. ii. 51, 52.

18. Ibid. 2 Blacks. Com. 357.

19. Co. Litt. 280. a.

20. Co. Litt. 9. b. 273. b. Preston, *ub sup.* 5. 55-59.

21. Co. Litt. 9. b.

22. Ibid. *Holdfast v. Marten*, 1 Term Rep. 411. *Fletcher v. Smiton*, 2 ibid. 656. *Newkirk v. Newkirk*, 2 Caines' Rep. 345. Dane's Abr. vol. iv. ch. 128.

23. Comyn's Dig. tit. Chancery, 2. T. 1.

24. Statute of Virginia, December 13, 1792. Statute of Kentucky, December 19, 1796. New York Revised Statutes, vol. i. 748. sect. 1, 2. Griffith's Law Register.

25. Mr. Humphreys, in his Essay on Real Property, and Outlines of a Code, p. 235. 1st edit. has proposed the same reform, of rendering the word heirs no longer necessary in conveyances in fee; and the American lawyer cannot but be forcibly struck, on the perusal of that work, equally remarkable for profound knowledge and condensed thought, with the analogy between his proposed improvements and the actual condition of the jurisprudence of to country. But I think it very probable that the abolition of the rule requiring the word heirs, to pass a fee by deed, will engender litigation. There was none under the operation of the rule. The intention of the grantor was never defeated by the application of it. He always used it when he intended a fee. Technical and artificial rules of long standing and hoary with age, conduce exceedingly to certainty and

fixedness in the law, and are infinitely preferable on that account to rules subject to be bent every day by loose latitudinary reasoning. A lawyer always speaks with confidence on questions of right under a deed, and generally circumspectly as to questions of right under a will

26. Plowd. 557. a. 10 Co. 97. b. 11 Co. 49. a. 1 Ld. Raym. 326. Powell, J. in *Idle v. Cooke*. 2 Ld. Raym. 1148. 2 Black. Com. 109. Preston on Estates, vol. i. 431, 432, 433, 441-481, 483.

27. *Goodwright v. Searle*, 2 Wils. Rep. 29.

28. *Machell v. Clarke*, 2 Ld. Raym. 778. The apprentice of the Middle Temple, in the course of his learned and successful argument in Walsingham's case, (Plowden, 547. 557.) stated the distinction which has been followed by Mr. Preston, between a determinable and a base fee, and he gives the following obscure explanation of the latter "A. has a good and absolute estate in fee simple, and B. has another estate of fee in the same land, which shall descend from heir to heir, but which is base in respect of the fee of A., and not of absolute perpetuity, as the fee of A. is." He then gives the following example, by way of illustration: "If a man makes a gift in tail, and the donee be attainted of treason, the king shall have the land as long as there are any heirs of the body of the donee; and in that case, there are two flans, for the donor has his ancient fee simple, and the crown another fee in the same land, which is but a base fee, for it is younger in time than the fee of the donor, and if the heirs of the body of the donee fail, the fee is gone, whereas the fee of the donor never perishes; it is pure and perpetual, while the other is but base and transitory." Mr. Preston, in his Treatise on Estates, vol. i. 460, 468, defines a qualified fee to be an interest given to a man and to certain of his heirs only, as to a man and his heirs on the part of his father; but this is termed in Plowden, 241. b. a fee simple conditional.

29. 10 Co. 97. b. Preston on Estates, vol. i. 484. According to Lord Ch. J. Vaughan, the reverter in this case is a *quasi* reversion, and he did not see why a remainder might not be granted out of such a qualified fee. *Gardner v. Shelden*, Vaughan, 269. But the rule is probably otherwise, and on a fee simple conditional at common law, a remainder could not be created, for the fee was the whole estate. There was only a possibility, or right of reverter left in the donor, and that was not an actual estate; (Lee, Ch. J. in *Martin v. Strachan*, 5 Term Rep. 107. note;) and yet Mr. Preston (on Estates, vol. ii. 353.) concludes that limitations of remainders, after qualified or limited estates of remittance were in use at common law

30. Fleta, lib. 3. ch. 3. sect. 5. 2 Blacks. Com. 110.

31. Bracton, lib. 2. ch. 6. 17. b. Co. Litt. 19. on 2 Inst. 333.

32. F. N. B. 219.

33. Sir Martin Wright (Int. to Tenures, 189.) observes, that the *statute de donis*, did not create any new fee, *aut re aut nomine*. It only severed the limitation from the condition of the gift, according to the manifest intent of it, and restored the effect of the limitation to the issue, and the reversion, as the proper effect of the condition, to the donor. The fee simple conditional at common law, was declared, in the case of *Willion v. Berkley*, Plowd. 239, to be the same as the estate tail under the *statute de donis*.

34. Lord Bacon on the use of the law. Co. Litt. 19. b. 6 Co. 40.

35. Co. Litt. 19. b. *Mildmay's case*, 6 Co. 40. *Mary Portington's case*, 10 Co. 35.

36. *Martin v. Strachan*, 5 Term Rep. 107. note. This case was affirmed in the House of Lords, Willes's Rep. 444.

37. 10 Co. 3.

38. Act of Virginia, of 7th October, 1776. Laws of N.Y. sess. 6. ch. 2.-sess. 9. ch. 12. N.Y. Revised Statutes, vol. i. 722. sec. 3.

39. Act of North Carolina, 1784. Act of Kentucky, 1796. Griffith's Reg. under the appropriate heads, No. 8.

40. In New Hampshire, estates tail are said to be retained, but I should infer from statutes passed in 1789, 1791, and 1792, respecting conveyances by deed and by will, and the course of descents, that estates tail were essentially abolished. In Alabama and Mississippi, a man may convey or devise land to a succession of donees then living, and to the heirs of the remainder-man. In Connecticut, by statute, (Kirby's Rep. 118. 176, 177. Swift's Dig. vol. i. 79.) and in Ohio and Missouri, if an estate tail be created, the first donee takes a life estate, and a fee simple vests in the heirs, or person having the remainder after the life estate of the grantee. This is also the case in New Jersey, by the act of 1820, though difficulty has been suggested to exist if the grantee has no children, or their issue. (Griffith's Reg.) The tenant in tail in those states, is in reality but a tenant for life, without the power to do any act to defeat or encumber the estate in the hands of the heir or person in remainder. In Rhode Island, estates tail may be created by deed, but not by will, longer than to the children of the devisee, and they may

be barred by deed or will. Estates tail exist in Maine, Massachusetts, Delaware, and Pennsylvania, subject nevertheless to be barred by deed, and in two of these states by will, and they are chargeable with the debts of the tenant. (Dane's Abr. vol. iv. 621. *Lithgow v. Kavenagh*, 9Mass. Rep. 167. 170. 173. Statute of Mass. 1791. c. 60. Jackson on Real Actions, 299.) A fee simple passes on a judicial sale to satisfy a charge. This is so decided in one of those states, and the same consequence must follow in all of them when the land is chargeable with debt. (*Gause v. Wiley*, 4 Serg. & Rawle, 509.) In Maryland, estates tail general, created since the act of 1786, are now understood to be virtually abolished, since they descend, and can be conveyed, and are devisable, and chargeable with debts, in the same manner as estates in fee simple. It is equally understood that estates tail special, are not affected by the act of 1786, and therefore the decisions prior to *Newton v. Griffith*, (1 Harris & Gill, 111.) would seem to apply to that species of estates tail. Such estates may be barred by deed as well as by common recovery; and they are chargeable with debts by mortgage, and not otherwise; and they are not devisable; and if the tenant dies seized, they go to the issue, but not to collaterals. (Statutes of 1782 and 1799. 3 Harris & McHenry, 244. 1 Harris & Johns. 244, 465. 2 Ibid. 69, 281. 314. 3 Ibid. 302.)

41. Kirby's Rep. 118. 176. 3 Day, 339. Swift's Digest, vol. L 79.
42. Laws N.Y. sess. 10. ch. 36.
43. Laws N.Y. sess. 36. ch. 23.
44. N.Y. Revised Statutes, vol. i. 719. sec. 10.
45. Litt. sec. 13. Co. Litt. 19. a.
46. 2 Bay, 397. 1 McCord's Ch. Rep. 91. 2 ibid. 324. 326. 328.
47. In *Benjough v. Edridge*, 1 Simons, 173, 267, a limitation was made to depend on an absolute term of twenty-one years after twenty eight lives in being at the testator's death!
48. 3 Cases in Chancery, 1.
49. *Duke of Marlborough v. Earl Godolphin*, 1 Eden's Rep. 404. *Long v. Blackall*, 7 Term Rep. 100.
50. N.Y. Revised Statutes, vol. i. 723, 724. sec. 17. 19.
51. Moseley, 224. Cases temp. Talbot, 16.
52. *Amesbury v. Brown*, 1 Vesey, 447. *Earl of Buckinghamshire v. Hobart*, 3 Swanston, 186.
53. Lord Talbot, in *Chaplin v. Chaplin*, 2 P. Wms. 235. *Amesbury v. Brown*, 1 Vesey, 477. *Earl of Buckinghamshire v. Hobart*, 3 Swanston, 186.
54. *Jenkins v. Keymes*, 1 Lev. 237.
55. Ch. J. Crew, of the K. B., in the great case concerning the Earldom of Oxford, in which that house, under the name of De Vere, was traced up through a regular course of descent to the time of William the Conqueror, observed, that "there was no man that has any apprehension of gentry or nobleness, but his affection stands to the continuance of so noble a name and house, and would take hold of a twig or twine thread to uphold it." (Sir Wm. Jones' Rep. 101. 1 Charles I.) But the luster of families, and the entailments of property, are, like man himself, perishable and fleeting; and the Ch. Justice, in that very case, stays for a moment the course of his argument, and moralizes on such a theme with great energy and pathos. "There must be," he observes, "an end of names and dignities, and whatsoever is terrene. Where is Mowbray? Where is Mortimer? Nay, which is more and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality."
56. Smith's Wealth of Nations, vol. i. 383, 384. Edin. Review, vol. xl. 359. Miller's Inquiry into the Present State of the Civil Law of England, 407. Bell's Comm. on the Laws of Scotland, vol. i. 44.
57. Novel, 159. Ch. 2.
58. Browne's View of the Civil Law, vol. i. 189. Wood's Inst. of the Civil Law, 189. Domat's Civil Law, b. 5. tit. 3. Proeme. But Pothier, very loosely, and without any reference to authority, says, that the Roman law allowed entails to an indefinite extent. *Traité des Substitutions*, sec. 7. art. 4.
59. Hist. Vol. Viii. 80.
60. Pothier *Traité des Substitutions*, sec. 7. art. 4. Touillier, tom. 5. p. 27. 29. *Repertoire de jurisprudence*, tit. Substitution

fidei commissaire, sec. 9. art. 2.

61. Code Napoleon, art. 896. In monarchical governments, like those of France and England, which require the establishment and maintenance of hereditary orders in power and dignity, it may be very questionable whether the entire abolition of entails be wise or politic. As they are applied to family settlements, in England, and modified according to circumstances, they are found, according to a very able and experienced lawyer, Mr. Park, to be extremely convenient, and to operate by way of mutual check. Thus, if the father, being tenant for life, wishes to charge the estate beyond his own life, to meet the wants of the junior branches of the family, and provide for their education, and marriage, and settlement in life, and his eldest son, being the tenant in tail, stands in need, on arriving to majority, of some independent income, they can do nothing without mutual consent. It is, therefore, a matter of daily occurrence, in respect to estates among the principal families belonging to the landed aristocracy, to open the entail, and resettle it, by the joint act of the father and the son, to their mutual accommodation. New arrangements are repeated at intervals, as new exigencies arise, and all improvident charges and alienations are checked by these limitations of estates of inheritance, by way of particular estate in the father for life, with a vested remainder in the son in tail; for the father cannot charge beyond his life, nor the son convey the remainder during the father's life, without mutual consent. That consent is never obtained, but for useful or salutary family purposes; and by this contrivance estates are made to subserve such purposes, while their entirety is permanently preserved.