

## *Tenures and Estates,*

*From Jeremy Sheff, “Estates and Future Interests” in Stephen Clowney, James Grimmelmann, Michael Grynberg, Jeremy Sheff, and Rebecca Tushnet, eds., Open Source Property: A Free Casebook (2015).*

[According to common law doctrine of tenures] all land under the dominion of the English crown is held “mediately or immediately, of the king”—that is, the crown has “radical title” to all land under its political dominion. William the Conqueror declared that all land in England was literally the king’s property; everyone else had to settle for the privilege of holding it for him—the privilege of *tenure* (from the Norman French word “tenir”—to hold). Tenurial rights were intensely personal in early feudal society: the right to hold land was a privilege granted by the crown in exchange for an oath of allegiance and a promise of military service by the tenant—the oath of homage. The word homage derives from the French word *homme*—literally “man”—precisely because the ceremony surrounding the oath created not only the right of tenure, but a political and military relationship between “lord and man.” In exchange for the tenant’s loyal support, or *fealty*, the lord warranted the tenant’s right to hold a plot of land, called a *fief*, or *fee*.

Acceptance of this form of military tenure obligated the tenant to provide a certain number of knights when called on by the king, and the land held by the tenant was supposed to provide sufficient material support to enable him to meet this military obligation. Sometimes, by the process of *subinfeudation*, the King’s direct tenants (or “tenants-in-chief”) could spread this burden around by in turn accepting homage from other, lesser nobles and freemen, each of whom would be responsible to the tenant-in-chief for a portion of the tenant-in-chief’s obligation to provide knight-service. The tenants-in-chief thereby became “mesne lords” in their own right (“mesne” being Norman French for “middle” or “intermediate”). There could be several layers of mesne lords (i.e., “land lords”) in the feudal hierarchy, at the bottom of which were “tenants in demesne” (“demesne” being Norman French for “domain” or “dominion”)—who actually held the land rather than subinfeudating it further. Of course, holding land did not mean one actually worked it; a tenant in demesne often left the cultivation and productive use of land to those of lower social status. These could be “villeins”—serfs legally bound to the land by birth—or “leasehold” tenants—a leasehold being a right to hold land for a term of years in exchange for payment of rent in cash or (more often) kind, and of lesser status than the “freehold” estate held by feudal tenants tracing their rights up the feudal pyramid to the crown.

Because a feudal tenant’s land rights were intimately connected to this web of personal, political, and military relationships, there was no logical reason why the tenant ought to be free to transfer those rights to anyone else—and good reason for the lords to resist such alienation of the fee by their tenants. Indeed, fees could be forfeited to the lord for the tenant’s breach of the homage relationship or commission of some other “felony,” and on the tenant’s death it

was not clear that his family members had the right to inherit the fee. The king was assumed to have the right to retake the fee and re-grant it to a preferable new tenant upon his displeasure with or the death of the old tenant (it was his land, after all). Within a century, however, the dynastic ambitions of the baronage compelled King Henry I to concede (in his Coronation Charter of 1100) that a recently deceased baron's heir could redeem his fee upon payment of "a just and lawful relief"—i.e., a payment of money to the crown, as a kind of inheritance tax. Under the principle of primogeniture that took hold in England around this time, the lord's heir was his eldest son; landowners were not free to choose who would take over their tenancy after their death. Thus, subject to the payment of a relief, the fee became *descendible*—capable of being inherited from one generation to the next—and the grant of a descendible tenancy by the crown was now made not "to Lord Hobnob," but "to Lord Hobnob and his heirs." To this day, the latter phrase remains the classic common-law formula for creating the broadest interest in land that the law will recognize: the *fee simple absolute*.

Descendibility of the fee simple having been settled early in the history of English land law, the broader question of full alienability took several more centuries to work out. The history of medieval English land law is a history of tenants trying to secure their families' wealth and power by expanding alienability and evading tenurial obligations to their lords and the crown, while the crown and higher nobility tried to adapt the law to preserve their status and prevent such evasions. There is a dialectical quality to this history. For example: for complicated reasons subinfeudation quickly came to present a greater threat to the economic interests of the higher ranks of the feudal hierarchy than simple substitution of one tenant for another. Thus, in 1290 the Statute of Quia Emptores banned subinfeudation. But in doing so it validated substitution, and with it the practice of selling an entire fee in exchange for money during the life of the tenant. Similarly, in 1536, at the insistence of King Henry VIII, the Statute of Uses abolished many clever schemes adopted by tenants to use intermediaries to direct the disposition of real property interests after death and to put those interests outside the reach of the law courts (and of the crown's feudal authority). But in doing so, the statute validated one type of flexible property arrangement we have come to know as a *trust*. Moreover, the removal of the primary mechanism lawyers had developed to meet tenants' demand for intergenerational planning was sufficiently unpopular that Henry felt compelled to consent to the enactment of the Statute of Wills in 1540—finally permitting tenants to pass their legal estates in land by will rather than being at the whim of the rule of primogeniture. Finally, since the 16th century, primogeniture has given way to a more complex system of default inheritance rights for various relatives of the deceased who leaves no will; these rights are designed to try to approximate what legislatures think the *decedent* would have wanted, not necessarily what is best for the government. This set of default rights comprises the law of *intestate succession* [...]

Various other statutes and common-law developments over the centuries culminated in the system of possessory estates and future interests that were imported into the North American English colonies, and thus into the independent Ameri-

can states (excluding Louisiana). Underlying them all is a fundamental distinction that traces back to the “radical title” asserted by William the Conqueror in 1066: there is a conceptual difference between the ownership of land and the ownership of a legal interest in that land [...]

### Basic Estates and Future Interests

We will begin by examining two possessory estates—the **fee simple absolute** and the **life estate**—and two future interests (one of which you have already encountered)—the **reversion** and the **remainder**.

**The Fee Simple Absolute** The fee simple absolute is the most complete interest in land that the law will recognize. When we say that “O owns Blackacre” without any further qualification, what we actually mean is that O owns a presently possessory fee simple absolute in Blackacre. The key distinguishing characteristic of the fee simple absolute is that it has no inherent end—it is an estate of indefinite duration. It is descendible, devisable, and alienable inter vivos; so it can be transferred to a new owner, but it cannot be destroyed. At most, it can be carved up into lesser estates and interests for a while, and we will spend most of the rest of this chapter understanding how that happens.

At common law, as previously noted, the fee simple absolute was created by the formula: “to A and his heirs.” That formula still works, but in modern usage it is sufficient to simply say “to A,” and the use of such language in a conveyance from the owner of a fee simple absolute will be presumed to create a fee simple absolute in A.

**The Life Estate** The life estate is just what it sounds like: an estate that confers a right to possession for the life of its owner. The owner of a life estate is referred to as a life tenant. The life estate terminates by operation of law upon the owner’s death (i.e., it ceases to exist). It is created by the formula: “to A for life.” Because it must by definition end—we all have to die sometime—any land held by a life tenant must also be subject to a future interest in some other person. We’ll explore what those future interests might be shortly.

[...]

**The Reversion** [...] Consider what happens when A, owning a life estate in Blackacre, dies. A’s life estate terminates by operation of law; it simply ceases to exist and disappears. Who “owns” Blackacre now? It seems obvious that somebody must have a right to possession of the land, but it seems equally obvious that whoever that somebody is, they had no right to possession before A died. Whoever they are, during the term of A’s life estate they must have held an interest that would entitle them to take possession at some point in the future (that is, a future interest).

There are two candidates for such an interest. We will begin with the most basic: the reversion. Suppose that O, owning a fee simple absolute in Blackacre, conveys Blackacre “to A for life,” and says nothing more? What is the legal effect of this grant?

Based on the formula we just learned, it should be clear that A receives a life estate in Blackacre. But what other effects does the grant have on the legal rights of the parties? Think about the interest O held prior to the conveyance: the fee simple absolute. Remember that a fee simple absolute is an interest of infinite duration—it never ends. So when O starts with a possessory interest of infinite duration, and then gives away a life estate—whose duration is limited by a human lifespan—to A, something was left over. Specifically, O never gave away the right to possession of Blackacre from the day of A’s death to the end of time. Whether meaning to or not, O gave away less of an interest in Blackacre than what he owned, meaning he still holds some interest. We call this type of interest—the residual interest left over when a grantor gives away less than they have—a retained interest.

This retained interest can’t entitle O to possession during A’s life—A has the exclusive right to possession as the life tenant. So O’s interest must be a future interest during the term of A’s life estate: an interest that will entitle O to possession after the natural termination of the life estate. As we discussed in the example of the lease, we call this kind of future interest a reversion. It is a retained interest in the grantor—created when a grantor conveys less than his entire interest—that will become possessory by operation of law upon the natural termination of the preceding estate. Colloquially, we say that Blackacre “reverts” to O. In some opinions, you will see the holder of a reversion referred to as a “reversioner.”

A reversion can of course also be created explicitly, for example, if O conveys Blackacre “to A for life, then to O.” In this case, O has explicitly created a life estate in A followed by a reversion in O.

**The Remainder** A remainder is a type of future interest created in someone other than the grantor. The distinguishing characteristic of the remainder is that—like a reversion—it cannot cut short or divest any possessory estate. (We will later encounter other future interests that can.) A remainder simply “remains,” sitting around and waiting for the natural termination of the preceding possessory estate (be it a life estate or a lease), at which point the remainder will become possessory by operation of law. Suppose that O, owning a fee simple absolute in Blackacre, conveys Blackacre “to A for life, and then to B.” Again, A would have a life estate, but now O has also affirmatively created a future interest in B. Because the future interest is created in someone other than the grantor, it isn’t a reversion. And because it cannot cut short A’s life estate (note the “and then” language), it must therefore be a remainder. Due to the persistence of dated gendered terms in legal discourse, you will often see the holder of a remainder referred to as a “remainderman,” even today, regardless of

that person's gender.

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