TO DATE, THIS IS PERHAPS THE MOST IMPORTANT LECTURE OF THE SEMESTER.

1. Please provide an Overview of the Topic.

Out of feudalism came the law of estates. As I mentioned on Tuesday, the word estate has several meanings. One references what a person owns when they die. Here when we speak of the law of estates, we are referring to the degree, nature, extent, and quality of interest in ownership that one has in land or other property or classifications of those interests.

The types or classifications of estates are broadly: freehold and leasehold. We have already leasehold estates, those involving present possessory interests for a term. Now we turn our attention to present possessory interest that are tied to life times, these are the fee simple, the fee tail, the life estate, as well as conditional or defeasible estates, the determinable and the subject to condition subsequent.

Three topics: fee simple absolute, inheritance, fee tail

2. Some introductory remarks.

1. Inter vivos transfer by grant- such as sale, a grantor uses granting language to pass title to the grantee. Here words really matter.
2. Grantor can grant no better title than that which they own.
3. Grantor must use the correct granting language in order to create the correct estate. Today, grant is usually in writing, a deed, signed by the grantor, pursuant to the Statute of Frauds (pp. 375, 472-474). Often, a grant is pursuant to a sale contract and is subject to consideration. Others might be pursuant to a gift, without consideration.
4. We discuss the grant by formula, such as “to A and his heirs”. And we use fictitious land, such as Greenacre, Whiteacre, Blackacre.
5. A life estate to A is ownership for A’s life.
6. A fee simple (absolute) may last forever (theoretically).
7. A fee simple (as well as other estates) may be absolute or conditional, subject to divesting (or losing).
8. Two sets of rules, common law (1600) and today.
9. Technical material, you either get it wrong or right, no in between
10. Must be able to go both ways, how to create and how to interpret what the language creates
11. Deals with quality of an estate, not the underlying value of the property, e.g. could have fee simple in a toxic waste dump
12. Chart or diagram the conveyance or inheritance.
3. Fee simple (absolute), the best of title, the closest to absolute ownership, largest estate in terms of duration, as it can last forever—how was it developed? What does it mean?

Overview—best of title, fee simple absolute, the entire bundle of rights, with the right to alienate (sell, gift, etc), to will, or pass on my inheritance. If you owe, you can disinherit either by will or by sale.

1. **Heritability**—originally, a fee owner owned a life interest subject to possible regrant by the lord with the payment of a relief; changed “to A and his heirs”—means that the grantee received fee simple, present possessory interest and the right to pass on to one’s heirs (elder son).

2. **Alienability**—originally, a fee simple owner could not sell to another or will to another; with Quia Emptores (1290) fee simple was freely transferable by its owner.

3. **Freehold**—the owner of the fee (simple) takes free of the lord’s control such that if A transfers to B and then A dies without heir, the property does not escheat to the lord (unless B dies without heir).

4. **Reification of abstractions**—process of separating the legal interest from the land itself; the legal interest operates as a thing: it can be transferred, will or passed by inheritance, can be mortgaged.

5. **Fee Simple in Land**, not personal property.

4. **How are fee simple (absolute) created?**

   1. Early common law, grantor to “A and his heirs” meant that when A died, his elder son (B) would take title, if A owned it by then. But that A’s son (B) would only have an expectation, not a real interest.

   2. B has no actual interest as the words “and his heirs” are words of limitation (creating a fee simple), whereas “to A” are words of purchase.

   3. “To A and his heirs” meant it was inheritable, otherwise “to A”, “to A, his successors and assigns forever” or “to A in fee simple” created a mere a life estate. (p. 183, fn 9)

   4. In a will, “and his heirs” was not needed to create a fee simple, any words indicating the testator intended to create a fee simple (such as “to A absolutely”) sufficed. (p.183, fn. 9)

   5. Today, by will, it is assumed that the testator intends to dispose of as large an estate as the grantor has.

   6. Today, in no state is it necessary to add “and his heirs” to create a fee simple: sufficient to grant “to A” as the law assumes transfer of all the grantor has unless stated otherwise. So today, a fee simple is created by “to A” or “to A and his heirs.” **But remember that the heirs have no real property (or other) interest.**

   7. Rationale for these rules of law: to create the strongest, most alienable, inheritable estate with limited restrictions promotes the maximum utility of land.
5. What are the answers to the problems, page 183?

6. What about inheritance of fee simple?

1. What is inheritance? What a “heir” gets if a fee simple owner dies still owning fee simple and not disinheriting an heir by will (or otherwise).
2. What is intestate? Dying without a will. If a will, the takers are called devisees or legatees (personal property, p. 184, fn. 10)
3. If one dies intestate, the land or real property descends to their heirs. Today, personal property is a part of the estate and descends to the same heir as the land.
4. Historically, real property descended to the eldest son under the doctrine of primogeniture.
5. Personal property (portion of the dead person’s estate) went to their next of kin.
6. Who are heirs? Those who actually survive the decedent, as provided by state statute of descent. You are not your parent’s heirs, but heirs apparent.
7. What position is a spouse in? At common law, not an heir, but provided for under dower or curtesy (pp. 335-6). Today, in all states the surviving spouse is designated as an intestate successor of some share in the decedent’s land; the size depends on who else survives.

7. What are the classes of heirs and their priority to take the estate?

1. Issue or descendants, children and grandchildren by representation if predeceased children, per stirpes (“by the stocks”), sharing equally today.
2. Until 1925, under primogeniture, the eldest son inherited the land. Only if no sons in the descendant line would daughters inherit.
3. Children born out of wedlock was filius nullius (child of no one) and did not inherit from either mother nor father at common law. (Adoption was unknown in England until 1926.)
4. Today, in the US, adopted children inherit from their adoptive parents and sometimes from their natural parents as well.
5. Ancestors- parents of the decedent, take if there are no heirs.
6. Collaterals- brothers, sisters, nephews, nieces, uncles, aunts, and cousins. If no spouse, issue, or parents, then to brothers and sisters (and their descendants by representation) take in all jurisdictions. Then if varies.
7. Escheat- if no blood heirs, land and personal property escheat to the state where the property is located.

8. Cannot by granting words seek to create estates, numerus clauses. (Remember, leasehold, tenancy for the life of the tenant or terminable at his will, p. 367, note 2).

9. What is a fee tail and how different from a fee simple?
Overview. Fees of various types are created by will, and so are a form of a gift. By comparison, in a sales transaction, one would seldom want to purchase, for full value, anything other than fee simple.

1. The problem with fee simple absolute is its greatest strength, its absolute alienability or transferability. This makes land a commodity, subject to transfer from family wealth and subject to creditors’ claims. We have the same problem today. Whatever family wealth exist today (in your family, for example), it can be lost through poor management, bad luck, liability (lawsuits), taxes, and creditors’ rights. There is a natural tension between present holders of wealth and their apparent heirs.

2. As a part of their estate planning, some of the wealthy English families desired to make their land inalienable, to assure that it passed on my inheritance, and to prevent forfeiture to the Crown. (See p. 178 on forfeiture.) So they wanted to make grants that would restrict the next and future generations from losing the land for any reason.

3. So they sought an estate where the current family head could not cut off the inheritance rights of the descendants.

4. Their attempt, “to A and the heirs of his body” failed for the early courts held that if and when A had issue (a child), A could transfer fee simple, thereby cutting off the inheritance rights of his issue. They found this construction to create a fee simple conditional, a fee simple conditional upon having issue. (Apparently still available in Iowa and South Carolina, p. 186, note 12)

5. In 1285, under political pressure, Parliament enacted the Statute de Donis Conditionalibus, which created the fee tail.

6. Fee tail is created “to A and the heirs of his body,” wherein the estate descends to A’s lineal descendants, generation after generation. (p.187, fn 14, could be fee tail male or fee tail female or fee tail special), and practicably giving the present holder a life estate interest only (the fee tail tenant in possession).

7. What happens to the estate when the blood line runs out? Every fee tail is followed by a future interest, either a reversion or a remainder. (p.187, but that will become more obvious later).

8. The fee tail led to lots of abuse, as Blackstone noted (p.187), including a means of avoiding forfeiture for disobedience to the crown. This made Kings of England concerned.

9. In 1472, in Taltarum’s Case, the court gave the fee tail tenant in possession a method to “bar the entail,” by bringing a collusive lawsuit known as a common recovery, the court would issue a decree awarding him a fee simple, cutting off all rights of his issue and extinguishing any reversion or remainder. (see p. 188, fn 15).

10. This action could be taken by the fee tail tenant or the king if the fee tail were forfeited for traitorous acts.

11. Eventually, the common recovery was abolished and one could imply bar the entail by having a fee tenant convey a fee simple by deed to another.
12. Another strategy that the dynastic landed gentry used to make land inalienable was to grant a life estate, followed by a future interest (a practice which eventually led to the Rule Against Perpetuities, p. 244).

13. In the early US, the fee tail and primogeniture were abolished. Today, the fee tail can only be created in Delaware, Maine, Mass., and Rhode Island, and can be terminated by the tenant in possession transferring fee simple to another. (But it cannot be terminated by will.) While not greatly significant in today’s practice, fee tail still shows up prominently on the Multistate Bar Exam. (And there are other legal devices seeking to accomplish similar results, see the trust. p. 239.)

14. Today, what effect is the language “to A and the heirs of his body, and if A dies without issue to my daughter B and her heirs”? One of three groups of statutory interpretations: Either it creates a fee simple in A or it creates a fee simple in A but if A dies without issue, then to B (in fee simple) or it creates a life estate in A, with a reminder in fee simple in A’s issue. (pp. 188-9).