Part I

THE TRADITIONAL CLASSIFICATIONS OF ESTATES AND FUTURE INTERESTS

Chapter 1

THE FEUDAL BEGINNINGS

SECTION 1. INTRODUCTION

Property students in the United States are likely to have ambivalent feelings about the Battle of Hastings. As pure history, the story of the Norman Conquest of England is as colorful as the Bayeux Tapestry, bringing to mind knights in armor and kingly combat. But for the student of American property law, the pleasure of reading about Duke William's glorious expedition against King Harold is likely to be tinctured by the memory that it was this same William the Bastard who set in motion the forces that would make American property law the monstrously complex and mysterious body of law that it is.

The English law student may think more kindly of the Conqueror; for the enactment, in 1925, of wide-sweeping statutory reforms wiped away in England much of the ancient dogma that the American law student must still learn.[1] It is a strange twist of history that at almost the same time the 1925 reforms were becoming effective in England, the American Law Institute was embarking on its massive *Restatement of the Law of Property*, which would, when published in 1936, give new life to the old learning.[2] The blunt fact is that the English can celebrate their Hastings; we Americans must live with it.

We do not propose to present in this text even a concise history of English feudalism. "Concise" histories have a way of becom-

1. The vehicles of reform were the Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, and its two predecessor and six companion acts. See generally Cheshire's Modern Law of Real Property, E. H. Burn, ed., 8–9, 82–112 (12th ed. 1976) [hereinafter cited as Cheshire].

2. See Restatement, Property (1936, 1940, 1944) (5 vols.). For criticism of the Restatement, see Clark, Real Covenants and Other Interests Which "Run With Land" (2d ed. 1947); McDougal, Future Interests Restated: Tradition Versus Clarification and Reform, 55 Harv.L.Rev. 1077 (1942).

ing 700-page books.[3] Nor do we propose even to present the standard catalogue of labels that distinguish the various forms of feudal land-holding.[4] Our purpose is to present just enough of the feudal background to make intelligible to the law student some of the more important doctrines and concepts of our modern law of property. Many of those doctrines and concepts trace their beginnings to the institution of *tenure by knight service*. In this chapter we shall attempt to show how that most feudal of feudal institutions contributed to the development of three of our modern property notions: potentially infinite ownership through inheritability; free alienability; and independent ownership.

SECTION 2. FEUDAL LAND-HOLDING: TRANSFER BY INFEUDATION AND SUBINFEUDATION

It was one thing for William to win his crown, but it was something else again for him to hold it. Had it been a twentieth-century England he had conquered, his task would have been an easier one. He should not have found it difficult to establish adequate control over a country that had an established system of transportation and communication, a monetary system controlled through an existing central bank, a population largely dependent for its survival on the continuance of major industrial enterprise, an organized tax collection process, and a single defeated national military force. But the England of 1066 did not lend itself to such easy domination. Its political power was scattered among the great land owners with their private armies; its economy was tied directly to the produce of its soil; its royal treasure was, to use Plucknett's word, a "casual" one.[5] The challenge to William was to secure his throne by maintaining a military capability superior not only to that of the land owners but also to that of potential foreign invaders, and at the same time to gain political and economic control of the land.

The challenge was not a new one to William. During the 31 years of his dukeship of Normandy, he had faced similar challenges to his power and had met them successfully. But the conquest of England gave William an opportunity to impose royal

3. See, e.g., Plucknett, A Concise History of the Common Law (5th ed. 1956) [hereinafter cited as Plucknett], which is a mere 746 pages long. This is an exceedingly difficult book for the first-year student because it assumes conversancy with law and history.

4. Specifically, we will not examine the intricacies of the tenures of serjeanty (ceremonial services), frankalmoin (spiritual services), and copyhold (unfree tenure). Excellent discussions of these tenures appear in Simpson, An Introduction to the History of the Land Law 1–14 (1961) [hereinafter cited as Simpson] and in Holdsworth, An Historical Introduction to the Land Law 16–29, 39–48 (2d ed. 1935) [hereinafter cited as Holdsworth].

5. Plucknett, 11.

control on the land to an extent not possible on the Continent. Because the English land owners had forced him to fight for his crown, he was able to assert his absolute right to all the land of England as spoils of war. Much of this land he redistributed to the Norman barons who had supported the expedition against England. But it would not do, of course, simply to hand out the land as rewards for services rendered; for how could William be sure that among the recipients would not be men whose ambitions might later prove threatening? It made sense to keep some strings attached to the land.

One string, conceptual in nature but of enormous practical significance, was the retention in William of ultimate legal ownership of the land that he granted. The grantees were permitted to enjoy many of the benefits that we normally associate with full ownership today, but in many important respects they more resembled tenants than owners. As tenants holding *of the king*,[6] their chief obligation was to render loyal service to him, service that usually took the form of specific duties assigned at the time the land was granted. Failure to perform the required service, or any other act of disloyalty to the king, might result in the loss of the tenant's holdings.[7] So thorough was the process by which the land of England became subject to fixed obligations to the king—the process generally referred to today as the *infeudation* of England—that by the time of the famous Domesday survey,[8] a scant twenty years after Hastings, it was possible to assign to almost every rock and stone of English soil its precise duty to the Crown.[9]

6. This phrase is the traditional description that implies the tenurial or feudal relationship between the king and his vassal. Any land could be located in the feudal structure by similar language: "A holds of B, who holds of C, who holds of . . . who holds of the King." The last name in the series was always the king's.

7. Originally, the feudal relationship was a personal one. Fidelity and loyalty were its necessary attributes. "[T]his was felt to be a solemn and sacred bond. . . . The obligations of mutual aid and support which grew out of it may perhaps owe their sacred character to the fact that they were so absolutely necessary to the preservation of society." Plucknett, 507. Any great breach of the relationship would result in a forfeiture of the holding; such a breach was originally described by the word "felony." The term came, of course, to describe all heinous crimes. Cheshire, 20. In time, the refusal to perform services ceased to be a felony; but the Statute of Gloucester, 6 Edw. 1, c. 4 (1278), again gave the lord a right to claim a forfeiture. Plucknett, 31, 536. It was usually easier to seize some of the tenant's chattels to make him perform or pay up. This procedure was called "distraint of chattels." Painter, Studies in the History of the English Feudal Barony 106–09 (1943) [hereinafter cited as Painter].

8. This survey, recorded in Domesday Book (which is still extant), described every parcel of land in the domain "with a view to settling clearly the rights of the Crown and the taxable resources of the country." Plucknett, 12. Overseeing this great task took up the last two years of the reign of William the Conqueror. At his death in 1087 the feudal relationships were solidly, because indelibly, established.

9. It should be mentioned, though it would not serve our purpose to explore the

Although the services required of each tenant varied—some highly personal in nature, such as tending the king's bedchamber; others ecclesiastical in character, such as praying for the king's soul—the most important from a purely practical point of view was the obligation to provide a fixed number of knights annually for service in the king's host.[10] Historians speculate why William did not choose to establish a mercenary standing army rather than to rely on knights supplied by the barons.[11] It seems probable that the shortage of money in circulation played a role; but it is entirely possible that William and his barons merely followed the Norman fuedal traditions to which they had become accustomed on the Continent. Whatever the reason, there can be no doubt that the holding of land in knight service—that is, subject to the obligation to provide the agreed number of knights—was to become one of the most important elements in shaping the legal institutions of land-holding for centuries to come.

The basic idea of feudal land "ownership," then, was that it was *tenurial* in character—more a *holding* of land on good behavior than ownership as we think of it today. For the barons to be able to perform the services assigned to their land, it would obviously be necessary to put the land to productive use. The ultimate value of the land lay in the timber and agricultural produce it would yield. The problem for the barons was to translate this real value into the knight-value assigned to it by William. One method of securing the necessary number of knights was simply to invite the young men of knightly ambition to become part of the baronial household.[12] A baron could feed, clothe, and arm his knights out of the productive labors of the lowly villeins who tilled the soil in exchange for the privilege of continuing to occupy the land they had occupied before the Conquest. But a more common method of obtaining the annual quota of knights was to *subinfeudate* portions of the baronial lands to individual knights in exchange for their obligations to spend a fixed portion of time anually in the king's or baron's service. A knight who so received a portion of a baron's land would hold *of* his baron in much the same way as the baron held *of* the king.

matter in detail, that not all the land of England was redistributed to the Norman barons. Much of it was left in the hands of those who had held it before the Conquest and who had not opposed William's claim to the throne. But the legal theory that the king was ultimate owner of all the land applied equally to land left with its former owners. For such an owner to continue his control, he would have to redeem the land with a money payment and, of course, subject it to the same obligations of service that had been exacted from the Norman barons. See Cheshire, 13–14.

10. For the best description of the economics of knight service, see Painter.

11. See Painter, 20; Stenton, William the Conqueror 444–46 (1925).

12. See Painter, 20–21.

The transfer of land from baron to knight did not, of course, discharge obligations that had attached to it when first granted by William. Thus, if a baron, having transferred portions of his lands to individual knights, committed an act of disloyalty to the king—perhaps merely the refusal to perform the required services—the king would not be barred from taking back even the lands now held by the knights. In a practical as well as a legal sense, therefore, a knight who received his land from a baron by subinfeudation held both of his baron and of the king—*immediately* of the former and *mediately* of the latter. It is not possible to say how much bargaining went into the transactions between baron and knight; but it is reasonable to suspect that they were negotiated with care.[13]

To complicate matters a bit more, the subinfeudation process did not end with the knights. They would often grant portions of their holdings to still others, exacting from their transferees fixed obligations of service measured in terms of labor in the fields, of agricultural produce, or simply of money payments.[14] A transferee from a knight would receive his land subject to the risk that his chattels would be taken, and in some cases his land actually lost, if the knight or baron above him committed a serious enough breach of his feudal obligations.[15]

Although it grossly oversimplifies matters to do so, we can for our purposes imagine the structure of feudal land-holding as fundamentally pyramidal in shape. From the king at the apex, the pyramid is built downward: first with grants to the barons, then with grants from the barons to the knights, and lastly (though the process sometimes went much further) with grants from the knights to those who actually occupy and farm the land. In each instance of transfer, the transferor and transferee agree on a fixed service that remains with the land no matter how much further it is transferred. From the base of the pyramid, services flow upward, changing perhaps in kind and quantity from tier to

13. We do know that in many cases the number of knights yielded was greater (and in a few cases, smaller) than the number actually owed by individual barons to the king. See Painter, 24–27.

14. At first all "free" tenures that did not come within the categories of military, spiritual, or ceremonial tenures were grouped under the heading "socage" tenure. Socage tenure was free from many of the feudal burdens accompanying tenure by knight service. Gradually, socage tenure spread up the feudal ladder. Services were generally "commuted" to money payments. See Cheshire, 22–23. Almost all the other free tenures were transformed into socage tenure in 1660 by the Tenures Abolition Act, 12 Car. 2, c. 24. All tenure not previously converted into socage tenure was so converted in 1925 by the Law of Property Act, 15 & 16 Geo. 5, c. 20. Tenure between ordinary persons may still exist, but only if the relationship was created before 1290; most "tenure" now involves only a relationship between subject and Crown. See Cheshire, 84–88.

15. See note 7, supra.

tier, but ultimately arriving at the king in the form of fully-armed knights. Holding the structure together is the mortar of personal loyalty—loyalty downward in the form of assurances of military protection, and loyalty upward expressed in the ceremonial pledge of fealty given to each grantor by his grantee.[16]

SECTION 3. TECHNICAL TERMINOLOGY

To facilitate further discussion, we will now need to use the traditional terminology to describe the relations and positions of persons on the pyramid. In each instance of transfer, the grantor exacts obligations of service from his grantee. In a sense, then, the transferor can still be said to "own" the transferred land much the way a modern landlord "owns" the land that he has leased. Both have merely translated their possessory rights into service obligations. In the feudal system, this retained right to receive services (and other important benefits that we shall describe later) is called a *seignory*. Land held in the form of a seignory is described as held *in service*. Land held in possession is held *in demesne*. A tenant who holds a seignory is called a *tenant in service*, and a tenant who actually possesses the land is called a *tenant in demesne*. The king, of course, is *lord* of all the land. The barons, referred to as *tenants in chief* or *tenants in capite*, are *mesne lords* (middle lords) to the knights. The knights, in turn, are mesne lords to the tenants in demesne.

SECTION 4. RESTRICTIONS ON ALIENABILITY

As we have performed the architectural feat of building a pyramid from the apex down, we have assumed that each successive transferee was free to subinfeudate his lands. It is difficult to imagine a mesne lord's objecting to this sort of transfer. In the first place, subinfeudation would leave intact the services personally owed by each transferor. In the second place, it was subinfeudation that made performance of the services possible. But the lord might well object if his tenant wished to transfer by *substitution*—that is, by conveying his interest to a replacement and dropping off the pyramid entirely. Such a transfer, if freely permitted, might easily result in a baron's or knight's discovering that someone he did not know and could not trust—perhaps even his worst enemy—had become his immediate tenant. It would be reasonable to suppose, then, that substitution was barred unless the mesne lord permitted it.

But land law was no more governed by reason in the twelfth century than it is in the twentieth. The truth seems to be that the tenant could alienate his land either by subinfeudation or by

16. See Plucknett, 507.

substitution, and the lord was powerless to prevent the transfer unless it would seriously injure his own interests.[17] The question whether a transfer was sufficiently damaging to be forbidden was decided in the lord's court, where the tenant was entitled to a judgment of his peers.[18] In order to understand why the lords should have tolerated a rule so favorable to tenants, it is helpful to remember that every feudal landlord, with the sole exception of the king, was himself the tenant of someone higher on the feudal pyramid. And in some cases, at least, the lord was able to reap some benefit from the conveyance by extracting a fee from his tenant at the time the transfer was made.

SECTION 5. GROWTH OF THE CONCEPT OF INHERITABILITY; PRIMOGENITURE

Still to be answered is the question of how much of an interest each transferee by subinfeudation or substitution would receive. We must retreat to surmise for part of our answer. Today, when we think of someone's owning a parcel of land outright, we think of the ownership as implying the right of the owner's heirs to have the land if the owner has not transferred it during his life or by his will. So deeply imbedded in our law is the idea of inheritability of land that it is difficult to imagine that ownership could ever have meant anything else.

It seems quite clear that inheritability of land had been known in England before the Conquest.[19] But it is also clear that lands held in feudal knight service immediately after the Conquest were not freely inheritable. A transferee would receive from his transferor simply the right to enjoy the land for life. Upon the transferee's death (and sometimes upon the transferor's death as well), the transferee's ownership would wholly terminate, and the right of enjoyment would move back up the pyramid to the

17. The Great Charter of 1217 loosely defined the lord's right by providing that no man could transfer so much of his land that he could not perform the feudal services out of the remainder. That this provision was not of much practical help to lords who wished to prevent undesirable substitutions is evident from the statement of the thirteenth-century justice Bracton: "[A]lbeit the tenant has done homage, he may put a new tenant in his place, and the lord must accept him, will he, nill he." Bracton, f. 81, quoted in 1 Pollock & Maitland, The History of English Law 345 (1968) [hereinafter cited as Pollock & Maitland].

The extent of feudal restrictions on alienation has been a matter of controversy since the days of Coke and Blackstone. Although most historians now agree that the tenant could, at least by the end of the twelfth century, transfer by substitution without the lord's consent, several authors and casebook editors have taken the opposite view. See, e.g., Casner & Leach, Cases and Text on Property 233–34 (1969); Dukeminier & Krier, Property 357 (1981); Bergin & Haskell, Preface to Estates in Land and Future Interests 8 (1st ed. 1966).

18. 1 Pollock & Maitland 343.

19. See Plucknett, 524–25.

next tier of ownership. A mesne lord could, upon the death of his tenant, accept the tenant's heir as tenant; but he was not required to do so. When he did accept his deceased tenant's heir as tenant, it was typically because the heir had paid the mesne lord a substantial sum (known as a *relief*) for the re-grant of the tenancy.

Even in the retrospect of 900 years, it seems obvious that such a system could not long survive. Life was certainly a more precarious business in those days, and it is not difficult to understand why a proposed transferee, knowing that his death in battle would leave his family landless, might dare to request, or even to insist, that his transferor commit himself *at the time of transfer* to accept his heir as substitute for him in the tenancy upon his death. For a time this commitment extended no farther than the transferee's immediate *eldest surviving son*. A son would be able to perform the knight service. Moreover, if the land passed to only one son, rather than to all the surviving sons of the deceased tenant, the administration of the tenancy would be more efficient.

Although this preference for the single male heir would remain a fixture of English property law for centuries to come,[20] the lord's commitment to accept his tenant's heir in the tenancy soon came to include not only daughters of the tenant (who took as a group, and then only when there was no son to take) but also, when there were no *lineal* heirs to take, brothers and sisters of the deceased tenant and even more distant *collateral* relatives. Moreover, the commitment extended not only to the tenant's immediate heir but also to the potentially infinite succession of heirs that followed.

To express this full commitment to accept as substitutes in the tenancy this potentially infinite succession of both lineal and collateral heirs, with preference to eldest surviving sons in single file down the years, the transferor would simply add the words "*and his heirs*" to the words of grant at the time of transfer. Naturally, a transferor would not make such a commitment unless *his* transferor had earlier made it to him. Thus the custom of giving the commitment moved first from the king to the barons, then from the barons to the knights, and ultimately down through all the layers of the pyramid.[21]

20. Primogeniture was not abolished in England until the Administration of Estates Act, 1925, 15 & 16 Geo. 5, c. 23. See Cheshire, 868, 871.

It must be noted that just after the Norman invasion there seems to have been a period of uncertainty, during which the principle of primogeniture struggled with that of giving an equal share to each son. See Plucknett, 527–28.

21. See Plucknett, 523, 524.

We might note here, parenthetically, that the English preference for single-file male descent—that is, the system of descent known as *primogeniture*—was never cordially received in this country. Our statutes of descent and distribution uniformly provide for sons' and daughters' sharing the inheritance equally. Although this seems a fairer method than primogeniture, which was finally abolished in Britain with the 1925 reforms,[22] the descent of property to an ever-expanding group of heirs can seriously complicate the clearing of old titles.

SECTION 6. LAYERS OF POTENTIALLY INFINITE OWNERSHIP CLAIMS

What we see emerging, then, is a concept of potentially infinite land ownership or tenancy. As long as there is an heir to claim the inheritance, the tenancy will go on and on, subject only to the continued performance of the required services and the occasional payment of other feudal dues. These "other feudal dues" will have to occupy our attention shortly. They will include, not so surprisingly, the *relief*, which, by this time, is no longer a matter of bargain between lord and heir, but a fixed legal obligation. But let us look further at this notion of potentially infinite ownership. Let us assume that A, the king if you like, infeudates "B and his heirs." B then subinfeudates "C and his heirs." Who has what? A and B both have seignories. A's seignory is potentially infinite as a matter of royal right. B's seignory is also potentially infinite since A used the appropriate "and-his-heirs" formula. C's tenancy in demesne is potentially infinite in duration for the same reason B's seignory is.

We have three layers of ownership, all potentially infinite. What happens if C dies without any heirs surviving him? Since C held of B, C's right of possession would pass back to B. This passage of ownership back to the mesne lord upon the death of his immediate tenant without heirs was called *escheat*. To complicate our example very slightly, let us assume that by the time of C's death without heirs, B's eldest son had succeeded to his father's seignory. Did B's son get C's land by escheat? Certainly. By inheriting the seignory, B's son also inherited the right of escheat. Now let us alter the model more seriously. Instead of C's dying without heirs, let us assume that B dies without heirs. The question is, what happens to C? Since C held of B, and since it seems obvious that B could not have transferred to C more than B had, we are forced to the conclusion that B's death without heirs cut off C's ownership claim. *But that is not what happened!* C's interest was left undisturbed.

22. See note 20, supra.

Only B's seignory escheated to A![23] Thus, C would now hold of A, owing to A the same services that he had formerly owed to *B*. Although it is easy to imagine why the courts took this position (Who would pay for a potentially infinite interest in land if it might be cut short by the expiration of the *grantor's* line of heirs?), its consequences to the feudal system were immense. We shall see why in a few pages.

Summing up the two preceding paragraphs, the use of the "and-his-heirs" formula came automatically to imply lineal and collateral inheritability (in short, *general inheritability*) of the transferred interest—hence, potentially infinite duration. Whenever a potentially infinite interest, whether a seignory or a tenancy in demesne, expired by reason of the running out of the line of heirs, the interest would escheat to the lord of whom the interest had been immediately held. The escheat of seignories left interests below them undisturbed; but the rule that the grantee's interest could continue after the grantor's interest had expired applied only to situations where the grantor had had a potentially infinite interest to start with. Thus, if all the grantor had was a life-enjoyment interest (which would be the case if the "and-his-heirs" formula had not been used when he got his interest), he could *lawfully* transfer no interest that would outlast his own life.[24]

Let us pose, but leave temporarily unanswered, two questions about these potentially infinite interests. *Question one:* When the "and-his-heirs" formula was used, did that mean that the transferee's heirs actually got ownership rights *at the moment the transfer was effected?* We have already impliedly answered this question, but we will answer it more fully in the next chapter. *Question two:* When the owner of a potentially infinite interest transferred a clearly *finite* interest, such as a life-enjoyment interest, what did the transferor keep? We shall answer that question partly in the next chapter and partly in Chapter Three.

SECTION 7. TRANSFER BY FEOFFMENT WITH LIVERY OF SEISIN

To add to our vocabulary, we may now pause to wonder how transfer of these potentially infinite interests was accomplished. Without a modern system of land records, it would be desirable that the transfer be effected with sufficient ceremony not only

23. Plucknett, 539; 1 Pollock & Maitland, 330–31; Simpson, 50.

24. This is still the law today. Of course, one could *unlawfully* try to sell more than he had. This was called, in the case of one who possessed a life interest but tried to sell more, a "tortious feoffment"; it operated to create an interest in the innocent transferee that might legally outlast the lifetime of the tortious feoffor or transferor. See Simpson, 113. For the definitions of the terms "feoffor" and "feoffment," see Section 7, infra.

to mark itself indelibly in the memories of the participants, but also to give notice to interested persons such as the mesne lord above the transferor. The central idea was to make ritual *livery* (meaning "delivery," from the Old French *livrer*) of *seisin* (meaning, roughly, "possession," from the Old French *saisir* or *seisir*). The transferor and transferee would go to the land to be transferred, and the transferor would then hand to the transferee a lump of soil or a twig from a tree—all the while intoning the appropriate words of grant, together with the magical words "and his heirs" if the interest transferred was to be a potentially infinite one.

The entire ceremony of transfer was called *feoffment with livery of seisin*. To *enfeoff* someone was to transfer to him an interest in land called a *fief*—or, if you prefer, a *feoff*, *feod*, or *feud*. Our modern word *fee*, a direct lineal descendant of *fief*, implies the characteristic of potentially infinite duration when used to describe an interest in land today; but in the earliest part of the feudal period, a *fief* might have been as small as a life interest. We shall see later that feoffment was *not* used to transfer interests "smaller" than life interests—e.g., so-called *terms for years*—but for our purposes now we may simply note that transfers of interests for life or "larger" were accomplished by livery of seisin. Although the ceremony of livery of seisin was often noted in writing, the writings, or "charters," were not the operative elements of transfer; they were merely evidence of transfer.

To sum up, then, we have a land transfer system based on transfer of physical possession. Each *feoffee* (recipient of a fief), having received the seisin from his *feoffor*, would be said to be *seised*, or possessed of an interest in the land. The importance of possession, or *seisin*, in the feudal scheme of things will occupy our attention fully in pages to come. As we explore the concept of seisin more thoroughly, we will see that it means something more than physical occupancy of land; but it is too early in our discussion to attempt a refinement of its meaning now. Transfer by feoffment with livery of seisin will be the dominant method of transfer until 1536 and will continue to be used in England until 1845.[25]

SECTION 8. THE FEUDAL INCIDENTS

As we have seen, the ownership of a seignory carried with it benefits in addition to the right to receive the annual fixed ser-

25. The Real Property Act, 1845, 8 & 9 Vict., c. 106, did not really abolish livery of seisin; but it allowed free use of the deed as a granting device, which had the same effect. The Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, finally got around to abolishing the old feudal device. See Cheshire, 752–53.

vices. Two of these benefits, or *incidents*, as they were called, we have already mentioned: the right to receive a money payment, called a *relief*, when one's immediate tenant's heir succeeded to the tenancy, and the right to get one's immediate tenant's interest back by *escheat* when the tenancy became vacant for lack of heirs.[26] We shall now have to examine these, and two other feudal incidents, more carefully.

Let us stay, for a moment, with relief and escheat. What kind of economic benefits did these incidents bring to the mesne lord? Looking first at relief, we have seen that the amount payable by an heir to the mesne lord upon the heir's succeeding to his ancestor's interest was originally strictly a matter of bargain. If the tenancy was a profitable one—that is, one that generated more income than the amount of annual services owed—the mesne lord might demand and get a substantial sum as a relief. An heir probably computed the amount he would be willing to pay for a re-grant of the tenancy much the way an investor today might compute the value of a rental building—by *capitalizing* its profit yield.[27] Thus, the amount of the relief would move upward as the value of the land itself moved upward. Unfortunately for the mesne lords, this common-stock characteristic of reliefs did not continue after inheritability became a standard fixture of land ownership. The relief became, like the services, a fixed sum, sustained by custom and regulated by law.[28] It would remain a benefit to the mesne lord and a burden to the heir, but it would no longer accurately reflect the real value of the tenancy.

Escheat, on the other hand, would continue, at least where tenancies in demesne were involved, to reflect real value. When a tenant in demesne died without heirs, his mesne lord would get the land itself back. He could either keep it and enjoy its profits or transfer it again at a price reflecting its full value. Even escheat of seignories would, of course, produce profits in cases where the deceased mesne lord had been receiving more services than he owed to *his* mesne lord. Thus, if A had subinfeudated B and his heirs at an annual service of five knights,

26. This was technically called escheat *propter defectum sanguinis*, to distinguish it from the situation whereby the tenancy escheated because of felony, which was called escheat *propter delictum tenentis*. See Cheshire, 20, 28.

27. The "capitalized value" of an income-producing property or enterprise is the amount a reasonable investor, taking into account possible alternative uses of money, would pay for the right to the projected income.

28. Chapters 2 and 3 of Magna Carta fixed ceilings on relief payments made by the barons to the king. See Howard, Magna Carta: Text and Commentary 10 (1964). The idea that relief was a fixed payment probably worked its way down the feudal ladder as a matter of course. See Painter, 56–64, 146–47.

and B had transferred separate portions of his demesne by subinfeudation to C, D, and E and their respective heirs at an aggregate annual service of eight knights, the death of B without heirs would entitle A, by escheat, to B's seignories worth eight knights a year—netting A the tidy profit of three knights a year.[29]

Two other incidents with this common-stock characteristic must be mentioned. One was *wardship*, the right of the feudal lord to guardianship of a deceased tenant's infant heir until the heir reached his majority. In feudal days, guardianship was not the paternalistic trusteeship we associate with the word "guardian" today. It was money, pure and simple. By becoming guardian, the mesne lord become entitled to treat the heir's lands for all practical purposes as his own, enjoying fully their use and whatever profits they yielded. At the end of the period of wardship, no accounting was owed by the mesne lord. If the heir's lands were demesne lands, the profits enjoyed by the mesne lord might be very considerable. If, however, all the heir had was a seignory yielding modest annual services, the wardship might be of little or no benefit.

Another important tenurial incident was *marriage*, the right of the mesne lord to pick the marriage partner of a female heir (and sometimes a male heir as well) of his deceased tenant. Since becoming the husband of an heiress meant for all practical purposes becoming the owner of her lands,[30] a wealthy young suitor might be willing to pay the lord a substantial sum in order to be picked for the honor. Here, again, the amount paid would undoubtedly vary depending on the value of the inheritance, seignories probably yielding less than lands in demesne.

SECTION 9. PRE-1290 TECHNIQUES OF "TAX AVOIDANCE"

We have now set the scene for some fancy feudal skulduggery—or, if you prefer euphemism, tax avoidance. The year, let us say, is 1268. C is tenant in demesne, and his interest is a generally inheritable one—that is, one originally created by the "and-his-heirs" formula. The knight service that was fixed to C's land at the time his great-grandfather first got it probably originally represented a fair return to the grantor, but it no longer reflects the much-increased value of the land. Perhaps

29. See note 13, supra.

30. At common law, a husband was often entitled during the marriage to exclusive possession or to the entire rents and profits of all the inheritable estates of which his wife was seised. We will not attempt a lengthy treatment in this text of the niceties of the common-law claims of spouses to each other's lands. A brief discussion appears in Section 5 of Chapter Two, infra.

it has now become a relatively modest annual money payment.[31] The relief, too, has become fixed in amount, somewhat burdensome but not onerous. But the incidents of escheat, wardship and marriage still reflect real value. Surely it would be absurd for C to allow B, the mesne lord, to have the benefits of these incidents if there were any way of avoiding it. Let us try to devise some avoidance techniques.

To put our problem in a real environment, let us assume that C has reached an advanced age, and that he has one son, S, who is six years old. Wardship, therefore, is our most serious problem. We first note that the incident of wardship attaches *only upon inheritance*—the *automatic* passage of ownership from father to eldest surviving son. If there were any way we could get the tenancy to S other than by inheritance, our problem would be solved. The obvious solution is for C to leave the tenancy to S by will. In that way, S will get the tenancy not as an *heir* but as a "purchaser"—a term that is usually applied today only to one who "buys" something, but that meant in feudal law one who acquired ownership of a tenancy *other than by inheritance*.[32] Unfortunately for C and S, transfers of interests in *land* by will are not yet recognized by the law courts.[33] Well, then, why not have C transfer the tenancy to S right now—that is, by *inter vivos* transfer. That will certainly make S a purchaser; and even though S may later turn against C, that risk seems preferable to letting B have wardship. But here again we are blocked; for last year, 1267, a statute was passed that makes transfer to one's eldest son fraudulent.[34]

31. With the introduction of the crossbow and the shift in focus of English warmaking from the consolidation and coast-defending of the period 1066–1155 to the active continental campaigning of Henry II (1154–1189), Richard the Lionhearted (1189–1199), and John (1199–1216), the king became less interested in cumbersome knights who had to be transported across the channel and more interested in being able to pay mercenaries. Thus a money payment, called *scutage*, was substituted for the levy of all or a part of the knights to be supplied by a baron, at least as early as the time of Henry II, who levied five such scutages during the first eleven years of his reign. Painter, 34. After the scutage became a fixed and expectable tax, e.g., 20 shillings per fief, the number of knights each vassal was expected actually to produce became much smaller. Id. at 38–39; see generally id., 30–45.

32. The feudal definition of "purchaser" is given fresh currency by the Uniform Commercial Code's use of the term to apply to one who takes by "sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property." See U.C.C. § 1–201(32) and (33).

Laymen—and sometimes first-year law students taking exams—wrongly assume that one who receives real property by will is an heir. Technically, the word "heir" is reserved for one who receives real property by action of the laws of intestacy, which operate today only in the absence of a valid will.

We shall have a good deal more to say of the distinction between heirs and purchasers in later chapters.

33. They will not be recognized until the Statute of Wills, 32 Hen. 8, c. 1 (1540), except for some local customs.

34. The Statute of Marlborough, 52 Hen. 3, c. 6 (1267). See Plucknett, Legislation of Edward I, 79–80 (1949).

Those of you who have read ahead may be suggesting the "use" as a technique for avoiding wardship—that is, transferring the tenancy now to a trustee with instructions to transfer it to S on C's death. But we need not consider the use now, because we have an easier and safer way of handling our problem. C's tenancy is wealth—wealth in the *form* of land. Why not simply convert C's land wealth to another *form* of wealth, one to which wardship will not attach? Why not, in short, sell the tenancy to some third person—D, let us say—for *cash*? C will be able to hold the cash for as long as he likes and then transfer it to S without difficulty. When S gets the cash, he can, if he wants, buy a tenancy of his own.

Obviously, if D is going to pay a good price for the tenancy, he will insist that the transfer be to D *and his heirs*; but the question for us is whether C shall transfer the tenancy by *substitution* or by *subinfeudation*. Which kind of transfer will produce the larger cash yield? If we transfer by substitution, C will drop off the pyramid, and D will replace him. D will then owe to B the same services that C now owes to B. That will reduce the price D is willing to pay for the tenancy. On the other hand, if the transfer is made by subinfeudation and if C demands from D only a nominal annual service—say, a peppercorn a year—D will undoubtedly pay a higher price. The trouble with that, however, is that C (and later S), by reason of keeping a seignory, will have to go on paying B his regular services. Transfer by substitution or subinfeudation looks like six of one and half a dozen of the other.

But what about the incidents that will attach to *D*'s tenancy? If we transfer by *substitution*, D will be in the same sitution C is now in. That is, upon D's death, B will be entitled to the same incidents we are now seeking to avoid. Knowing that, D will take it into account in his bid. If, however, C *subinfeudates* D, the incidents that attach on D's death will run to C (or S) as D's mesne lord. Our choice, therefore, is clear. C subinfeudates to D and his heirs. C can, if he wishes, transfer to D a kind of tenancy to which the incidents will not attach[35]—thereby inducing D to pay a higher price—or C can accept a lower price and retain the right to the incidents as a kind of investment for the future. In either case, the economic benefit of the incidents will run to C (and S).

All right, C now transfers to D and his heirs by *subinfeudation*, exacting from D the service of one peppercorn per year. What happens to B's services and incidents? The services are unimpaired; C (and later S) must go on paying them as before.

35. Marriage and wardship attached only to tenure by knight service and to grand serjeanty, a tenure we have not discussed. Holdsworth, 31–32.

But the incidents to which B had been entitled have become worthless. When C dies, B will become entitled to wardship of S, but the "*lands*" of S that B had expected would yield high profits *have been converted into a seignory worth one peppercorn per year*. Voila! Wardship has, for all practical purposes, been avoided. And, obviously, the identical technique can be used to avoid marriage and escheat as well.[36]

SECTION 10. QUIA EMPTORES

We should note, in looking back on C's tax avoidance gymnastics, that to be successful he obviously had to transfer to D the fullest possible ownership interest—that is, an interest inheritable by lineal and collateral heirs. If C had kept anything more than a bare seignory—say, by transferring to D a life-enjoyment interest only—the price C got from D would hardly have been worth the effort. Moreover, if C had sold D only a life interest, the "seignory" (that is perhaps not the correct term) retained by C might be worth a good deal. Hence B would not be as seriously hurt. The reason that we make this point will become clear in a moment.

It is too late, of course, for B to do anything about C; but it is not too late for him to prevent this kind of thing from happening in the future. B and other B's (barons) like him will repair to the legislature to close this extraordinary loophole. In 1290 they will be crowned with success by the enactment of *Quia Emptores*.[37] How did *Quia Emptores* correct matters? Simply by forbidding further transfer *by subinfeudation* of *generally inheritable* interests. Henceforth, anyone who owns such an interest will, if he wishes to transfer the *whole* interest to someone else, have to do it by substitution. Bare seignories may no longer be retained.

We shall see in our next two chapters that, despite *Quia Emptores*, transferors will ultimately find ways of avoiding their taxes. One way will be the "use," which we have already mentioned. Another will be the transfer of interests that leave the transferor with just a hair's breadth *more* of ownership than a bare seignory. But for our purposes here, it will suffice to

36. The example we have been using in this section is taken from Plucknett, 538–39. However, he does not explain the benefit running to C and S in terms of the *incidents* D will owe. But incidents must have played an important part, or else C and S would have obtained no real benefit.

37. The statute *Quia Emptores* . . . , 18 Edw. 1, c. 1 (1290), was so named from its first two words, which mean "since purchasers." The reasons for enacting the statute are set out, with bluntness befitting its purpose, in the preamble, which states that the statute was made "at the prayer of the magnates." See Plucknett, 540–41.

observe not only that alienability of land has become free, but also that the feudal pyramid itself is now destined for collapse.

The reason for its collapse, which will not occur immediately but will take hundreds of years of slow erosion, should be obvious. Putting it in its simplest form, let us assume that a tenant in demesne dies without heirs and without having transferred his full ownership to someone else. What happens? The land escheats to the mesne lord. The mesne lord is, of course, prevented by *Quia Emptores* from subinfeudating it again. Thus the bottom tier of the pyramid is gone forever. Now the mesne lord dies without heirs and without transferring his interest. The land moves up another tier by escheat, and now two tiers are gone. Finally, assuming that these calamities continue, the land arrives back at the king.[38] Must he, too, transfer only by substitution? Not so strangely, *Quia Emptores* did not apply to the king.

SECTION 11. SUMMARY

We set forth in this chapter to explore how the institution of knight service contributed to the development of our modern notions of potentially infinite ownership of land, free alienability of land, and independent ownership. We should see now that the first two notions are intimately related to each other. Land may be owned potentially infinitely because it is *inheritable*; but even where an owner has no prospective heirs to take his tenancy he can, by *alienating it*, give the tenancy a brand new start in life. The death of the transferor without heirs will leave the transferee's potentially infinite interest undisturbed. In a sense, then, the first two notions also feed into the third. That is, the transferee's ownership is *durationally independent* of anyone else's. To be sure, he will still hold *of* someone (his transferor's mesne lord), and he will still have to pay the services his transferor had been paying. Moreover, his tenancy will be burdened by feudal incidents. But as long as he performs his duties, his interest will go on and on, passing to his heirs or his chosen transferee, as he wishes. The slow collapse of the feudal pyramid will ultimately free him from even the feudal duties. In 1660, what vestiges remain of tenure by knight service will be abolished by statute.[39] In 1925, most of the remaining forms of

38. Of course, the mesne lord might die without heirs first. His seignory would then escheat to the next higher overlord, carrying with it the tenant in demesne, who would merely have a new overlord. The death without heirs of any tenant (mesne or otherwise) after *Quia Emptores* meant the disappearance of that tier from the feudal pyramid.

39. Tenures Abolition Act, 1660, 12 Car. 2, c. 24 See note 14, supra.

tenure will be swept away in the great reforms.[40] But we have a long way to go yet to reach 1925.

To link what we have learned to modern American law, we have merely to say that the notions of potentially infinite ownership and free alienability of land were simply absorbed into our jurisprudence from the very beginning as part of the common law. They are now the *given* of our property law. Except in one or two states,[41] the idea of tenure—at least in its pure feudal form with full ownership in one person and a bare seignory in another—scarcely got a foothold. Either *Quia Emptores* was accepted as a common-law rule, or statutes were early passed barring transfer of full owernship by subinfeudation.[42] In this country, one who has full ownership of land is said to own it allodially—that is, free of feudal services and incidents. Of course, we do have our property taxes and our inheritance taxes. If we don't pay them, we can lose our land. Moreover, if an owner dies without heirs and without having disposed of his land by a valid will, his land escheats to the state—not, of course, by feudal escheat, but by statute. Is this what lawyers call a distinction without a difference?

40. See notes 1 & 14, supra. The Crown is still entitled to take as *bona vacantia* lands whose owners die without wills or heirs. See Cheshire, 28.

41. The royal charters of Pennsylvania, Maryland, and the Carolinas provided that in certain instances *Quia Emptores* would not be in force, thus allowing new subinfeudation and giving the existence of tenure some meaning. Today, only two states (Pennsylvania and South Carolina) hold that *Quia Emptores* is not in force. In these states, and in some others, land is still held by tenure; but only in these two does the distinction make any difference. See 1 American Law of Property § 1.41 (Casner ed. 1952) [hereinafter cited as American Law of Property].

42. See the state-by-state analysis in Gray, The Rule Against Perpetuities §§ 23–23.2 (4th ed. 1942) [hereinafter cited as The Rule Against Perpetuities].