THE FEE TAIL AND THE COMMON RECOVERY IN MEDIEVAL ENGLAND

1176–1502

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INTRODUCTION

This book began as a study of the common recovery, a feigned action in the Court of Common Pleas. A holder of land in fee tail could transfer land free of the entail by means of a common recovery. The aim of the study was threefold: to discover when lawyers invented the device, to trace subsequent refinements and elaborations, which made the device at once more powerful and more efficient, and to determine the kinds of transactions in which landholders used the device in its first decades of existence. Research on that initial project revealed that lawyers invented the device in the 1440s and that by 1502 they had developed the common recovery into pretty much its final form. By 1502 common recoveries were used in over 200 transactions annually. By reconstructing the contexts of the recoveries gleaned from the plea rolls between 1440 and 1502 one could determine the kinds of transactions in which landholders used the common recovery.

That initial study grew backwards into the present book. Because the common recovery was a device for barring fee tails, I became curious about other methods lawyers had developed for conveying land free of entails. But then it seemed inadequate to speak of various devices for the barring of entails without speaking of fee tails themselves. Where did they come from? When and how did grants in fee tail come to be perpetual? And under what circumstances and for what purposes did landholders put their land in fee tail? For the origins of entails one had to go back to 1176, when the royal officials of Henry II invented the assize of mort d'ancestor, a rapid action that enforced royal, common law rules of inheritance. Fee tails were invented as a means of avoiding the doctrines that enabled royal government to enforce common law rules of inheritance. As much as I would have liked to summarize existing accounts of the origin, development, and use

of fee tails in a chapter introductory to a study focused on the common recovery, that strategy was not available. There was no adequate account of the origin, development, and use of fee tails. Thus I found myself working on a project which could fairly bear the title "The Fee Tail and the Common Recovery in Medieval England."

The long period covered by the book has required a severe selection of topics. Although the personal and social circumstances of the use of fee tails and common recoveries are important to understanding the practical import of the relevant legal rules and doctrines, the focus has been more on the legal than on the social history of fee tails and the common recovery. I have selected topics in the legal history of fee tails and the common recovery with a view to filling the gaps left by earlier legal historians and to placing their work in the larger picture permitted by new research. The result has been the form of connected essays. The reader might be assisted by having a general view or plan of the book in advance.

Chapter 1 traces the history of fee tails from about 1176 to the statute *De Donis Conditionalibus* in 1285. In this period there are three main subjects: the origin of fee tails and the law governing succession to and alienation of lands held in fee tail, the complicated relation between fee tails and *maritagium*; and the development of writs to secure the different interests – reversion, remainder, and the fee tail itself – created by a grant in fee tail. In this period, and indeed for most of the period covered by the book, the courts treated succession to land held in fee tail differently from alienations of land held in fee tail. The courts would not upset a grant made by a grantor who had received land in fee tail if the grantor had had a child who survived him. In 1281, however, the court changed its view: it would upset a grant if the grantor had a child, whether or not the child survived the grantor. This new position provoked the statute *De Donis*. The relation of fee tails to *maritagium* was complicated because it was reciprocal. Certain features of *maritagium* – the exclusion of collateral heirs and the retention of a reversion – served as models for grants in fee tail. But the law governing fee tails when applied to *maritagium* transformed customary understandings of *maritagium* until by 1285 *maritagium* came to be understood as merely a type of fee tail. Tracing the development of the formedon writs,

which secured the interests created by a grant in fee tail, is a matter of filling a few gaps left by Milsom and Brand.

Chapter 2, covering the period from the enactment of *De Donis* in 1285 to the third decade of the fifteenth century, traces the development of the indefinitely enduring fee tail. Lawyers first read *De Donis* as barring alienations by the grantee of land in fee tail whether or not he had a child and whether or not the child survived him. The primary focus of Chapter 2 is on the extension of this statutory restraint on alienation to every generation of the first grantee's lineal heirs. The Council and Chancery took discrete decisions to extend the statutory restraint on alienations and, what is not the same thing, the reach of the formedon in the descender writ. Not until the third decade of the fifteenth century was the statutory restraint on alienation perpetual. In the absence of an alienation, fee tails became perpetual probably as early as the third decade of the fourteenth century. This meant that, in the absence of an alienation, reversions or remainders limited after a fee tail would not be destroyed by the mere passage of time.

Chapter 3 turns to the use of fee tails and some of the consequences of holding land in fee tail. The chapter begins with the transformation of marriage settlements from grants of land in *maritagium* by the bride's father to his payment of a money marriage portion in exchange for the groom's or his father's grant of land to the groom and bride in joint fee tail. This transformation in marriage settlements took place during the period from almost 1220 to 1350. The increasing indebtedness of gentry, knights, and nobles drove the change from *maritagium* in land to marriage portion in money in exchange for jointure. The importance of jointures to the history of fee tails is confirmed in the next part of the chapter. The ways in which landholders used fee tails is explored by a study of final concords from seven counties from 1300 to 1480. The vast majority of fee tails were created in one of three situations: as jointure upon marriage, later in life when a landholder wished to give his wife jointure and plan the devolution of his property, and, after the invention of uses, by last will. Understanding the use of fee tails is helped by distinguishing between planning and litigation. The extension of fee tails traced in Chapter 2 did not affect planning. It prolonged the life of claims for litigation. Estate planners used fee tails, not with the hope of creating dynasties, but with the more realistic aim of

directing the devolution of their property to their widows and to the next generation.

Chapter 4 studies the ways in which a tenant-in-tail might grant land free of the entail before the common recovery. Two doctrines of warranty limited the statutory restraint on alienation derived from *De Donis*. By about a decade after *De Donis*, lawyers began to say that the statutory restraint against alienation did not apply if the claimant had assets by descent from the tenant-in-tail who had alienated the land. The more complicated doctrine was the strange doctrine of collateral warranty. The full range of collateral warranties only became conceivable in the tenurial world created by the statute *Quia Emptores*, for in this world warranty became separated from lordship and from grants of land. The mere release with warranty of a collateral ancestor could bar one's claim. Chapter 4 traces the development of collateral warranty and of the various types of collateral warranties. It also addresses the practical question of how useful they were as a method of barring entails. Apart from manipulating doctrines of warranty, a tenant-in-tail might try to bar his entail by manufacturing a feigned judgment against his title in fee tail. The rules limiting the preclusive effect of many types of judgment made this method of barring entails rather cumbersome.

Chapter 5 takes up the origin and development of the common recovery. After an experiment in 1436, the first recovery appears on the plea rolls of the Court of Common Pleas in 1440. By 1502, there were 240 recoveries used in 216 transactions. In the first seventy years or so of recoveries the writ and pleadings used in a recovery changed from writs of right to writs of entry. This change in form reflected a change in theory as to why a recovery was effective to bar an entail. The basic procedure was fairly simple. The grantee of land brought an action for the land in the Court of Common Pleas against the grantor. The grantor vouched a warrantor, who entered into the litigation against the grantee. The grantee-plaintiff or the warrantor received a continuance. The warrantor defaulted upon the resumption of the case. The Court gave judgment that the grantee recover the land from his grantor and the grantor recover over lands of equal value – known as recompense – from his warrantor. The hallmark of recoveries was the defaulting warrantor. At first, recoveries were thought to be effective because of the writ used and the fact that the

warrantor, not the defendant tenant-in-tail, had defaulted. Later, recoveries were thought to be effective because the warrantor owed the defendant recompense for the lands lost. This change in theory supported the change from writ of right to writ of entry. The chapter ends by exploring the use of recoveries with more than one voucher to warranty.

Chapter 6 explores the uses of recoveries, the types of transaction in which the parties used a recovery, and social attitudes to the barring of entails. The study of the types of transactions in which the parties used a recovery is based on an examination of 334 transactions from 1440 to 1502. For these transactions it was possible to discover the transactional context of the recoveries found on the plea rolls of Common Pleas. About 90 percent of these transactions were divided roughly equally between sales of land and resettlements. The remaining transactions were either transfers into mortmain or the settlement of disputes. Social attitudes to the barring of entails depended upon the reason why a tenant-in-tail barred the entail. There was, of course, a norm in favor of maintaining entails, especially when doing so secured male inheritance. But there were also competing norms. Every recovery disinherited someone. The questions were who was disinherited, in favor of whom, why, and under what circumstances. The interplay of competing norms was so complicated and so context sensitive that no systematic ordering of norms was possible. For that reason, neither Chancery nor parliament could formulate rules to control or to limit the use of common recoveries. Chapter 6 tries to give the reader a sense of the various competing norms and the complexity of their interaction.