tenure. The property of the soil remained in the lord from whom the grant was received. The king or lord had the *dominium rectum*, and the vassal or feudatory the *dominium utile*. Prior to the introduction of the feudal system, lands were allodial, and held in free and absolute ownership in like manner as personal property was held. Allodial land was not suddenly but very gradually supplanted by the law of tenures. They were never so entirely introduced as to abolish all vestiges of allodial estates. The precise time when benefices became hereditary is uncertain. They began to be hereditary in the age of Charlemagne, who facilitated the conversion of allodial into feudal estates. The perpetuity of fiefs was established earlier in France than in Germany ; but throughout the continent it appears they had become hereditary, and accompanied with the right of primogeniture and all the other incidents peculiar to feudal governments, long before the era of the Norman conquest.

England was distinguished above every part of Europe for the universal establishment of feudal tenures. There is no presumption or admission in the English law of allodial lands. They are all held by some feudal tenure. There were traces of feudal grants, and of the relation of lord and vassal in the time of the Anglo-Saxons, but the formal and regular establishment of feudal tenures in their genuine character, and with all their fruits and services, was in the reign of William the Conqueror. The tenures which were authoritatively established in England in the time of the Conqueror were principally of two kinds, according to the services annexed. They were either tenures by *knight service*, in which the services, though occasionally uncertain, were altogether of a military nature ; or tenures by *socage*, in which the services were defined and certain, and generally of a predial or pacific nature.

Most of the feudal incidents and consequences of socage tenure were expressly abolished in New York by the act of 1787 ; and they were wholly and entirely annihilated by the New York Revised Statutes. They were also abolished by statute in Connecticut in 1793 ; and they have never existed, or they have ceased to exist in all essential respects, in every other State. The only feudal fictions and services which can be presumed to exist in the United States, consist of the feudal principle, that the lands are held of some superior or lord, to whom the obligations of fealty, and to pay a determinate rent, are due. But this doctrine of feudal fealty has never been practically applied, or assumed to apply to any other superior than the chief lord of the fee, or, in other words, the people of the State, and then it resolved itself into the oath of allegiance which every citizen, on a proper occasion, may be required to take.

LECTURE LIV.

OF ESTATES IN FEE.

The perusal of the former volumes 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.

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 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.—2.

1. *Have not the words* seisin *and* fee *been always used in New York?*—2, 3.

They have, 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, but this was 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 is too deeply rooted in our usages and institutions, to be materially affected by legislative enactments.

In Connecticut and Virginia, the terms seisin 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. *What have the New York Revised Statutes declared on this subject?*—3.

That all lands within the State are allodial, and the entire and absolute property vested in the owners, according to 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 called 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. *What is the proper meaning of a "fee," as now used in this country?*—3, 4.

An estate of inheritance in law, belonging to the owner, and transmissible to his heirs. No estate is deemed a fee, unless it may continue for ever.

4. *What is an estate called, whose duration is circumscribed by one or more lives in being?*—4.

A freehold. 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.

5. *What is the most simple division of estates as laid down in the books?*—4.

That mentioned by Sir William Blackstone, 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.

6. *How has Mr. Preston, in his treatise on estates, divided fees?*—4.

Into fees simple, fees determinable, fees qualified, fees conditional, and fees tail.

7. *What is a fee simple at common law?*—5.

It 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. It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater interest in land.

8. *Is, or is not the word, heirs, at common law, necessary to be used, if the estate is to be created by deed?*—5, 6.

It is.

9. *If a man purchase lands to himself for ever, or to him and his assigns for ever, what will he take at common law?*—5, 6.

He takes but an estate for life ; though the intent of the parties be ever so clearly expressed in the deed, a fee can not pass without the word heirs. 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.

10. *Has not the rule for a long time been controlled by a more liberal policy?*—6.

It has, and it is counteracted in practice by other rules equally artificial in their nature, and technical in their application.

11. *Does it apply to conveyances by fine?*—6.

It does not, where the fine is in the nature of an action.

12. *Does the rule apply to a common recovery?*—7.

It does not.

13. *Does it apply to a release by way of extinguishment, as of a common of pasture?*—7.

It does not; 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.

14. *What does the releasee take, in taking a distinct interest in his separate part of the land?*—7.

He takes the like estate in quantity, which he had before in common.

15. *How do grants to corporations aggregate pass the fee?*—7.

Grants to corporations 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.

16. *Will a fee pass by will without the word heirs?*—7.

It will, 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. 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.

17. *But has not the statute law of some of the States abolished the inflexible rule of the common law?*—7, 8.

It has. In Virginia, Kentucky, Mississippi, Missouri, Alabama, New York, and doubtless, other States, 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 subsequently 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.

18. *What is a qualified, base, or determinable fee?*—9.

It 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 perishable or transitory, yet such estates are deemed fees, because, it is said, they have a possibility of enduring for ever. 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.

19. *What if the event, marked out as the boundary to the time of the continuance of the estate, becomes impossible?*—9.

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.

20. *What renders the estate a fee, and not merely a freehold?*—9.

The uncertainty of the event, and the possibility that the fee may last for ever.

21. *What are determinable fees, and how long do they continue descendible inheritances?*—9.

All fees liable to be defeated by an executory devise are determinable fees, and they continue descendible inheritances until they are discharged from the terminable quality annexed to them, either by the happening of the event, or by a release.

22. *What are these qualified and determinable fees termed?*—9.

They are likewise termed base fees, because their duration depends upon the occurrence of collateral circumstances, which qualify and debase the purity of the title.

23. *May a tenant in tail, 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?*—9.

Yes, he may.

24. *If the owner of a determinable fee conveys in fee, what follows the transfer, and on what is such a result founded?*—10.

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.*

25. *What rights and privileges over the estate has the proprietor of a qualified fee?*—10.

The same as if he were a tenant in fee simple, subject to that common law maxim.

26. *What is a conditional fee?*—11.

It 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.

27. *How was this fee construed at common law?*—11.

It was construed to be a fee simple, on condition that the grantee had the heirs prescribed.

28. *What if the grantee died without issue?*—11.

Then the lands reverted to the grantor.

29. *What if he had the specified issue?*—11.

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.

30. *Could the tenant of the fee simple conditional have, by feoffment, bound the issue of his body before issue had?*—11.

He could.

31. *After issue born, could the tenant bar the donor and his heirs of their possibility of a reversion?*—11.

Yes, but the course of descent was not altered thereby.

32. *How was it before the statute* de donis?—11.

Before the enactment of the statute so called, 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.

33. *What effect had the statute* de donis, *on the birth of issue, and how was it considered by the courts of justice?*—12.

It took away the power of alienation on the birth of issue, and the courts of justice considered that the estate was divided into a particular estate in the donee, and a reversion in the donor.

34. *When the donee had a fee simple before, what had he by the statute?*—12.

An estate tail.

35. *Under this division of the estate, could the donee bar or charge his issue?*—12.

He could not. But the tenant in tail was not chargeable with waste, and the widow had her dower and the husband his curtesy in the estate tail.

36. *Were estates tail liable to forfeiture, for treason or felony?*—13.

No. Nor were they chargeable with the debts of the ancestor, nor bound by alienation.

37. *To whom were they beneficial, and to whom injurious?*—13.

They were 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.

38. *When was relief first obtained against this great national grievance?*—13.

It was not until Taltarum's case, 12 Edward IV., that relief was obtained, and it was given by a bold and unexampled stretch of the power of judicial legislation.

39. *What, then, did the judges resolve upon?*—13.

Upon consultation they 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.*

40. *Were these recoveries afterward taken notice of?*—13.

They were, 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.

41. *How are they now considered?*—13.

They are now considered merely 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 a long 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.

42. *What does a common recovery remove?*—13, 14.

It 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.

43. *What does a tenant in tail bar by fine?*—14.

His issue only, and not subsequent remainders.

44. *What alone is it, that passes an absolute title?*—14.

The common recovery.

45. *Did not estates tail subsist in full force before our Revolution?*—14.

They did.

46. *Has not the doctrine of estates tail, and the complex and multifarious learning connected with it, become quite obsolete in most parts of the United States?*—14, 15.

Yes, it has. In Virginia, estates tail were abolished as early as 1776; in New Jersey, estates tail were not abolished till 1820; and in New York, as early as 1782, all estates tail were turned into estates in fee simple absolute. So, in North Carolina, Kentucky, Tennessee, Georgia, Missouri, and other States, estates tail have been abolished, by being converted by statute into estates in fee simple. In the States of 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.

47. *What of conditional fees at common law?*—16.

They have generally partaken of the fate of estates in fee tail, and have not been revived in this country.

48. *Does the general policy of this country encourage restraints upon the power of alienation of land?*—17.

No. It does not.

49. *Have the New York Revised Statutes enlarged or abridged the prevailing extent of executory limitations?*—17.

They have considerably abridged them.

50. *Have not entails, under certain modifications, been retained in various parts of the United States?*—19, 20.

They have, 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 affections.

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 in-

dustry in the possession of a long line of lineal descendants, undisturbed by their folly or extravagance, it has 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 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 Scotch statesmen and lawyers have united in condemning the policy of perpetual entails, as removing a very powerful incentive to persevering industry and honest ambition.

51. *What says Mr. Gibbon on the simplicity of the civil law?*—20.

It is said by him 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.

52. *How far were entails formerly permitted to extend in France?*—21, 22.

To the period of three lives only; 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 the 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. But the Code Napoleon annihilated 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.

LECTURE LV.

OF ESTATES FOR LIFE.

1. *What is an estate of freehold?*—23, 24.

An estate of freehold is a denomination which applies equally to an estate of inheritance and an estate for life. Sir William Blackstone confines the description of a freehold estate simply to the incident of livery of seisin, which applies to estates of inheritance and estates for life; and as those estates were the only ones which could not be conveyed at common law without the solemnity of livery of seisin, no other estates were properly freehold estates. Any estate of inheritance, or for life, in real property, whether it be a corporeal or an incorporeal hereditament, may justly be denominated a freehold.

2. *What, by the ancient law, did a freehold interest confer upon the owner?*—24.

A variety of valuable rights and privileges. He became a suitor of the courts, and a judge in the capacity of a juror; he was entitled to vote for members of Parliament, and to defend his title to the land; as owner of the immediate freehold, he was a necessary tenant to the *præcipe* in a real action, and he had a right to call in the aid of the reversioner or remainder-man,