

Vanderbilt Law Review En Banc

Volume 68
Issue 1 *En Banc* - 2015

Article 9

2024

The Tale of the Fee Tail in Downtown Abbey

J. B. Ruhl

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlreb>

Recommended Citation

Ruhl, J. B. (2024) "The Tale of the Fee Tail in Downtown Abbey," *Vanderbilt Law Review En Banc*: Vol. 68: Iss. 1, Article 9.

Available at: <https://scholarship.law.vanderbilt.edu/vlreb/vol68/iss1/9>

This Essay is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review En Banc by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

The Tale of the Fee Tail in *Downton Abbey*

*J.B. Ruhl**

I.	INTRODUCTION	131
II.	ORIGINS AND EVOLUTION OF THE FEE TAIL	133
III.	THE FEE TAIL IN <i>DOWNTON ABBEY</i>	137
IV.	THE FEE TAIL IN THE UNITED STATES	139
V.	REFLECTING ON THE FEE TAIL.....	141

I. INTRODUCTION

Poor Lady Mary Crawley, oldest daughter of Robert Crawley—the reigning Earl of Grantham, Lord of the manor at Downton Abbey, and overseer of the Crawley estate’s vast land holdings in Yorkshire, England.¹ Mary’s lot in life is to find a husband. But not just any husband. Preferably, he should be the presumptive heir to the estate her family now possesses, which in this story means she must wed a cousin. It was all arranged, but then the poor fellow went down with the Titanic. On learning of the loss of their extended family member, Mary and her family are devastated. They mourn not over Mary’s broken heart, however—she couldn’t care less about the guy. Rather, their concern is that once Earl Robert is dead and gone, they’ll all be living on the streets.

* David Daniels Allen Distinguished Chair in Law, Vanderbilt University Law School.

1. *Downton Abbey*: Seasons 1–5 (PBS television broadcast 2010–2015); see also *DOWNTON ABBEY*, available at <http://www.pbs.org/wgbh/masterpiece/downtonabbey/>, archived at <http://perma.cc/24XL-LFQZ> (last visited March 5, 2015 at 6:48PM); LIST OF *DOWNTON ABBEY* CHARACTERS, available at http://en.wikipedia.org/wiki/List_of_Downton_Abbey_characters, archived at <http://perma.cc/5VGS-D7P2> (last visited March 5, 2015 at 6:43PM); SCRIPT LINE: TRANSCRIBED FILM AND TV SCRIPTS, *DOWNTON ABBEY*, available at <http://scriptline.livejournal.com/55348.html>, archived at <http://perma.cc/Q99S-28FE> (last visited March 5, 2015 at 6:50PM). This Essay draws generally from the aforementioned websites for background on the *Downton Abbey* story. Spoiler alert: for those who have not watched *Downton Abbey*, what follows gives away much of the plot line, but none of the Countess Dowager’s brilliantly pithy lines.

So opens the hit television series, *Downton Abbey*. Set in England in the early 1900s, the show follows the lives of the aristocratic Crawley family and their relatives, friends, and servants. But *Downton Abbey* is not just an engaging, richly produced television series; it is also a history lesson near and dear to the hearts and minds of all first-year law students. For the plot twist that drives the first several seasons of the series involves a once well-known but now obscure interest in real property known as the “entail,” also referred to as the fee tail.

Under the fee tail arrangement at work in *Downton Abbey*, known as a fee tail *male*, possession of the property passes from the first grantee of the entailed estate, who (of course) is a male, to his lineal male heirs.² Because of rules of primogeniture prevailing at the time, the estate passed to the grantee’s oldest son. Then that male heir passes the estate on to his oldest son, who passes it to his oldest son, and so on. But what if the fifth lucky fellow in this chain has no sons? In that sad state of affairs, the estate will hunt around for another male heir in the lineage from the original grantee of the estate in fee tail male. If there are no such heirs, the estate reverts to the original grantor (or his assignees or heirs).³ Either way, the wife and daughters of the gentleman in this predicament are out of luck, which illustrates the point of the fee tail—to prevent the estate from leaking outside the family.⁴

This background about the fee tail male explains how *Downton Abbey* tees up its drama. Robert holds the Crowley estate in fee tail male. He has three daughters but no sons. Thus, it is the end of the line for that clan of Crawleys when Robert dies. When the show opens, the next male heir in line is Robert’s first cousin, James, and he or his son Patrick (or a male issue of Patrick) will take over the estate if one is alive at the time Robert dies. Conveniently, however, Robert and James saw to it that Mary and Patrick were to marry (they were second cousins, the children of first cousins, which is okay). One assumes Patrick would not give the boot to his in-laws, Mary’s mother and sisters. So, all was set—until James and Patrick sank into the chilly Atlantic waters with the Titanic.

Enter the distant male relative and new presumptive heir to the estate, Matthew Crawley. An unmarried, middle-class solicitor from Manchester, Matthew happens to be Robert’s third cousin once

2. See *infra* Part II.

3. JOSEPH BIANCALANA, THE FEE TAIL AND THE COMMON RECOVERY IN MEDIEVAL ENGLAND 84 (J. H. Baker ed., 2001).

4. But wait! Why doesn’t someone in that predicament just sell the estate and take the money to purchase another country manor not encumbered by the fee tail? See *infra* Part II.

removed,⁵ with nine “degrees of separation” between them.⁶ They likely never knew the other existed, much less ever met, but lawyers of the day kept track of such things. Thus arrives Matthew with his widowed mother to Downton Abbey. Being not the least bit aristocratic, however, Matthew initially is reluctant to embrace the idea that he will rule over this place. By the second and third seasons, his reluctance fades as his romance with Mary blossoms, more on this in Part III.

II. ORIGINS AND EVOLUTION OF THE FEE TAIL

The writers of *Downton Abbey* explain the concept of the fee tail just enough to captivate viewers with the Crawley’s drama, but they are careful not to bore. Indeed, most law students in the United States (and probably England too) learn no more about the fee tail than what one could glean from the series. This Part explains the origin and evolution of the fee tail, and how poor Mary ended up in the unenviable position of having to rescue her family by marrying her cousin.

The first episode of *Downton Abbey* opens in 1912 England. Robert’s great-great-grandfather took title to the estate in fee tail male, which, based on the number of generations we can estimate, occurred sometime in the early 1700s. However, the fee tail in its early forms dates at least as far back as the late 1100s—providing a rich history of similar property transfers leading up to the Crawleys’ predicament.

By far the most comprehensive treatment of that history is Joseph Biancalana’s *The Fee Tail and the Common Recovery in Medieval England 1176–1502*.⁷ Some brief details—just enough to get what’s going on in *Downton Abbey*—are illuminating.

It all started with *maritagium*, which was a grant of land made by a woman’s father or other relative upon her marriage.⁸ The grant was to the woman and her husband, but the land was inheritable only

5. This means Robert’s great-great-grandparents were Matthew’s great-great-great-grandparents.

6. The “degree of separation,” sometimes called a “degree of removal” or “degree of kinship” between a decedent and a living relative, is computed by summing the number of generational gaps (vertical jumps on a family tree) from the decedent to the nearest common ancestor (here, 5) and then downward to the relative (here, 4). See RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 2.4 (1999); cf. 46 AM. JUR. 2D *Judges* § 114 (applying the same formula to calculate degrees of consanguinity between a judge and a party).

7. BIANCALANA, *supra* note 3.

8. *Id.* at 7; see generally C.M.A. McCauliff, *The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations, and the Interests of Women*, 66 TUL. L. REV. 919 (1992).

by the woman's children with that man; if she had none, upon her death the land would revert to the grantor or his assigns or heirs. The social purpose was to provide inheritance to women in an era of male primogeniture, to help the new couple get a start, and to bond the two families.⁹ The key aspects it shared in common with fee tails, which came along later, were the exclusion of collateral heirs—that is, keeping the land away from, for example, the grantor's nephew or the daughter's brothers—and ensuring reversion to the grantor if the daughter had no children.¹⁰

Starting in about 1150, legal flux prompted shifts in the mechanics of *maritagium* and, among other things, grantors added words of limitation, such as “[O] to H and W *and the heirs issuing from the bodies of H and W.*”¹¹ These extra words were unnecessary under the traditional rules of *maritagium*, but when added to the grant they provided security, commanding lineal inheritance. A bit later in that century, conditional gifts of land unrelated to marriages emerged using a similar approach, such as “[O] to B *and the [male] heirs of his body*, but if B should die without [a male] heir of his body the land shall revert to [O].”¹² The magic “male heirs of his body” language acted in theory as a condition on the reversion to the grantor, but the real motive was to place restraints on the grantee.

One of the most important concerns to the landed class at this time—which one should recall is during the days of feudalism—was to keep land “in the family” and prevent division and dissolution of the estate. This meant excluding collateral heirs, such as the grantor's nephew or cousin.¹³ There was also a rule against being lord and heir at the same time.¹⁴ The conditional gift solved both problems by tracking the approach of *maritagium*. But these early versions of the fee tail did not look very far into the future, as the reversion clause was only triggered if the first grantee had no male *heir* of his body. It was unclear what should happen if the first grantee had a son, who had a son, who had no sons.¹⁵ What then?

By the early 1200s, drafters of these conditional gifts composed various wordings in an attempt to clarify that the estate would pass down the lineal line until failure of issue, and then revert to the

9. BIANCALANA, *supra* note 3, at 7.

10. *Id.*

11. *Id.* at 40–41 (emphasis added) (internal quotation marks omitted).

12. *Id.* at 6.

13. *Id.* at 7.

14. *Id.* at 14–15.

15. *Id.* at 17–18.

grantor or his heirs.¹⁶ Nevertheless, the prevailing rule of law and practice well into the 1200s was that the first grantee could alienate the land held in fee tail male as soon as he had a son.¹⁷ In other words, the early forms of fee tails were no more than distant cousins of the fee tail in play for the Crawleys of Downton Abbey.

To impose some sense of order to all the creative drafting and confused interpretations, in 1285 Parliament enacted the statute, *De Donis Conditionalibus*.¹⁸ The preamble to this statute on conditional gifts purported to summarize the state of the law at the time, and it endorsed the view that the fee tail, until that time, was alienable as just described above.¹⁹ The statute aimed to change that, but it was not entirely clear from the jumbled wording what the new rule was to be.²⁰ Over the next 150 years, however, the courts interpreted *De Donis* as supporting the “indefinite entail,” under which the entail imposed a restraint on alienation for every generation of the first grantee’s lineal heirs, forever, with reversion to the grantor upon complete failure of issue.²¹ As Biancalana states, by “the early 1420s it was clear that the restraint of alienation imposed by *De Donis* by tenants-in-tail continued until the donee’s issue became extinct.”²²

While this interpretation of *De Donis* may have favored the landed class at one time, it was repugnant to the rising commercial class, which saw land as more of a commodity.²³ Even the landed class eventually began to find the fee tail bothersome, as it made it difficult to convert wealth from land to more flexible cash.²⁴ Indeed, it is worth noting that during this period most land transactions were of unencumbered fee simple estates; the fee tail was a distinct minority, and the fee tail male was rare.²⁵ But given its association with the landed class, the amount of land tied up in fee tails was presumably

16. *See id.* at 20–39 (“[A]s early as the 1230s some grantors began to place restraints on alienations in their grants in fee tail. The restraint usually provided that the donee shall not alienate the land because if he dies without an heir . . . the land is to revert to the grantor.”).

17. *Id.* at 83–86.

18. *Id.* at 6 n.1 (citing *De Donis Conditionalibus*, 13 Edw. I, c. 1 (1285), *Statutes of the Realm*, I, 71–2).

19. *Id.* at 86–87.

20. *Id.* at 87–88.

21. *See id.* at 83–121 (“By about the third decade of the fifteenth century *De Donis* restrained alienation by the donee and by every generation of his issue. Whether or not there had been alienation in fact discontinuing an entail, the right to the entail lasted indefinitely[.]”).

22. *Id.* at 258.

23. *See* Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 261–62, 264 (1995) (during this period there were “two competing impulses: The need to maintain a market in land satisfactory to meet rising levels of demand, . . . and the desire of the gentry . . . to conserve their landholdings”).

24. *Id.*

25. BIANCALANA, *supra* note 3, at 160–76.

significant, so the *De Donis* had the effect of keeping substantial holdings off the market. Enter the lawyers, who developed a creative scheme for breaking the entail that eventually proved effective: the common recovery.²⁶

Even though the common recovery operated on solid underlying legal foundations, as discussed below, it was employed to perpetrate a sham. Biancalana describes the procedure as follows:

The procedure of a common recovery was fairly simple. Suppose A holds land in fee tail but wishes to grant the land to B and to bar the entail. A grants the land to B and then B brings an action for the land against A in the Court of Common Pleas. A denies B's right and vouches a warrantor who enters into the warranty and defends the action. The grantee-plaintiff, B, pleads against the warrantor, who denies B's right. Either the plaintiff or the warrantor then requests and receives a continuance. On the day appointed to resume the case, the warrantor absents himself. The court gives a default judgment for B against A and for A against the defaulting warrantor. The plaintiff, B, might or might not sue out a writ to execute the judgment.²⁷

To understand how this operated, one must know that the meaning of the phrase "vouches a warrantor" is akin to the meaning of the "voucher to warranty" provision in the Uniform Commercial Code.²⁸ In the common recovery scheme, the warrantor was purportedly dragged into court to attest that the title is entailed and to state that he would defend against the purchaser's claim.²⁹ The warrantor pledged to pay the seller land of at least equal value if the warrantor lost the claim. This warrantor arrangement took place legitimately in a variety of contexts. However, under the common recovery scheme, of course, the seller and warrantor did not actually mean for the warrantor to follow through on the pledge of lands and the warrantor intentionally missed the court date in the lawsuit with the purchaser.

While there is one example of this occurring prior to 1400, there is reason to believe the parties in that case were acting in good faith and simply missed the hearing, with the court showing little sympathy.³⁰ Possibly that result gave lawyers the idea to replicate the outcome through the sham common recovery scheme, such that "evidence about the earliest recoveries in the 1440s makes it almost certain that lawyers were manufacturing default judgments against warrantors."³¹ The courts seemed unconcerned because by the late

26. Exploring the development of the common recovery in its entirety is beyond the scope of this Essay. For an in-depth explanation, see *id.* at chs. 5–6.

27. *Id.* at 250.

28. U.C.C. § 2-607(5).

29. BIANCALANA, *supra* note 3, at 255–57; see also Reid, *supra* note 22, at 265 n.188 (detailing the operations of the "common recovery" device).

30. BIANCALANA, *supra* note 3, at 252, 254.

31. *Id.*

1400s, common recoveries were, well, common.³² Social norms were changing and evolving, and fee tails seemed to serve little purpose.

By the nineteenth century the fee tail was so disfavored by so many—including the aristocracy who by then saw the value in free alienation—that Parliament codified and simplified the disentailing process in the Fines and Recoveries Act of 1833.³³ This Act allowed the “actual tenant in tail” to alienate the estate in fee simple by executing a “disentailing assurance” deed.³⁴ Another blow came with the Law of Property Act of 1925, which abolished the fee tail as a legal estate, though allowing its creation in real and personal property as an equitable interest in trust.³⁵ These laws provide the final pieces of the puzzle for understanding the fee tail in *Downton Abbey*.

III. THE FEE TAIL IN *DOWNTON ABBEY*

Admirably, the writers of *Downton Abbey* captured the flavor of this history. As discussed above, when news of James’s and Patrick’s deaths arrives, the first episode reveals that Robert holds the estate in fee tail male, creating a serious problem for his wife and daughters. Through a conversation between Robert’s wife, Cora, and his mother, the Dowager Countess of Grantham Violet Crawley, viewers learn that there is a way to break the entail. Cora, an American, likely thinks this whole fee tail idea is preposterous. But she is even more enthusiastic to break it because for some unexplained reason she agreed, at the insistence of Robert’s father, to contractually bind her extensive personal wealth to the entailed estate. For the Countess the reason to break the entail is obvious—Downton Abbey is her life. From the way Cora and the Countess speak of the entail, however, one would think it is the 1450s and Robert would have to resort to sham.

32. *Id.* at 252–53.

33. Fines and Recoveries Act, 1833, 3 & 4 Will. 4, c. 74.

34. *Id.* Section 15 provided:

After the thirty-first day of December one thousand eight hundred and thirty-three every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King’s most excellent Majesty, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made.

Id.

35. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20.

In fact, it would have been easy for Robert, as actual tenant in tail, to disentail the estate (though not his title of Earl).³⁶

Robert is a noble Englishman, however, and refuses to break the entail. As he explains in a scene walking on Downton's grounds with Mary, his reasons reflect the nature and purpose of the entail in its glory days. As Robert sees it, he is merely a steward of the land responsible for its continued support not of just the Crawleys, but of all the servants, the tenants working the land, the people of the nearby town, and his successor. That is the order of things, and he is not about to upset it. Indeed, his description does capture the essence of the fee tail male, which can be thought of as a series of life estates passing from one oldest male son to the next, giving some sense of responsibility from one generation to the next. Hence, notwithstanding that the law allowed Robert to break the entail and social norms had long since shifted away from the values underlying the fee tail male, Robert intends to stand on principles of the aristocracy. *Downton Abbey* is, after all, a soap opera.

With the estate—at Robert's noble but irrational election—remaining under the cloud of the entail, one easily can see what's coming next when Matthew shows up: What will he and Mary make of each other? The relationship between the two cousins makes for a major plot line over the course of the first three seasons of the series. Robert decides it best to accept Matthew's status as presumptive heir and tries to integrate him into the management of the estate and its social order, which means Matthew and Mary see each other frequently. Despite this, they speak infrequently about their feelings and after going off to fight in World War I, Matthew becomes engaged to another woman, Lavinia Swire. Although Matthew is genuinely in love with Lavinia, she picks up on the unspoken chemistry between Matthew and Mary (seeing them steal a kiss was a hint). To cut to the chase, Lavinia conveniently dies of influenza. On her deathbed she forgives Matthew and thus opens the door to a relationship between Matthew and Mary. Although it takes them some time to sort through the turmoil, ultimately they wed in 1920 and, best of all, they have a son. By the end of the third season, therefore, Mary is exactly where she was headed when the series started—married to a male cousin,

36. The title of Earl would have been passed through entail and primogeniture. England, in the *Downton Abbey* era, used male primogeniture as the rule of succession. See Christine Alice Corcos, *From Agnatic Succession to Absolute Primogeniture: The Shift to Equal Rights of Succession to Thrones and Titles in the Modern European Constitutional Monarchy*, 2012 MICH. ST. L. REV. 1587, 1604 (2012) (noting that male primogeniture was the rule of succession in the United Kingdom, Denmark, and Norway until the fall of 2011).

the presumptive heir of the estate. It seems that Downton Abbey is saved.

After Matthew and Mary wed, Robert suffers financial loss from a failed investment in Canadian railroads. Matthew has inherited an equally large bundle of money from Lavinia's father, who obviously took a liking to Matthew during the engagement. Thus, Robert proposes that Matthew purchase a one-half interest in the Downton estate, thus rescuing Robert's finances and providing Matthew with a managerial role before the entail bestowed any such role upon him. The mechanism and consequences of this sale go ironically unexplained, given how impossible the idea of breaking the entail seemed to Robert in the first season. Robert and Matthew, as actual tenant in tail and the presumptive heir, respectively, were certainly in a position to end the entail together in harmony. One assumes Robert had a change of heart about disentailing the estate once it was clear that Downton and its fortune would remain with his family.

It is perhaps worth mentioning that immediately after Mary's son is born, Matthew crashes his car and dies. In the final plot twist to end the series' third season, Matthew had scratched out a will in the form of a witnessed letter leaving all his estate to Mary. This means when Matthew died, Mary became a half-owner of the estate with her father. Her son will take the other (presumably still entailed) half of the estate, and the title of Earl of Grantham, when Robert dies. Somehow all is back to normal at Downton Abbey.

IV. THE FEE TAIL IN THE UNITED STATES

Downton Abbey could not have been set in the United States because there would have been little consequence to Patrick drowning (or even a reason for Mary to marry him). The fee tail was on the chopping block in the States from the start. In 1776, the year of the Declaration of Independence, Virginia abolished the fee tail. Thomas Jefferson, who led the effort, later said that he ranked this legislation among his foremost achievements.³⁷ The language in the bill points out many weaknesses of the fee tail—most notably, it “sometimes does injury to the morals of youth by rendering them independent of, and disobedient to, their parents.”³⁸ In 1785, James Madison introduced a bill in the Assembly that extended the scope of the 1776 statute. The

37. John F. Hart, *"A Less Proportion of Idle Proprietors": Madison, Property Rights, and the Abolition of Fee Tail*, 58 WASH. & LEE L. REV. 167, 178 (2001).

38. Va. H.D., *Bill to Enable Tenants in Fee Tail to Convey Their Lands in Fee Simple*, (Va. 1776), available at FOUNDERS ONLINE, NAT'L ARCHIVES, <http://founders.archives.gov/documents/Jefferson/01-01-02-0224> (last updated Dec. 1, 2014).

bill perfected the conversion of all remaining tenancies in tail into fee simple and comprehensively extinguished all derivative rights of inheritance, reversion, and remainder back to that date.³⁹

Most of the states abolished the fee tail in the early nineteenth century. By 1824, New Hampshire was the only state that applied the fee tail as in England.⁴⁰ Four states—Vermont, Illinois, Indiana, and Louisiana—had “never known” the fee tail, twelve had abolished it or converted it by statute into a fee simple absolute, and six barred it by deed.⁴¹ Most states have used legislation to abolish the fee tail estate.⁴² Legislation generally abolished the fee tail estate and transformed it into a fee simple absolute or a life estate in the life tenant, followed by a future interest in fee simple absolute in the life tenant’s heirs.⁴³

Non-states also rejected the idea of the fee tail early on. The Mississippi Territory and the Missouri Territory abolished fee tails in 1812 and 1816, respectively.⁴⁴ In 1816, the Missouri Territory enacted a law declaring that the doctrine of entails “shall never be allowed, and in all cases where any real estate shall be entailed, the . . . right and interest . . . shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined . . .”⁴⁵ Today, the only remnant of the fee tail is the “tenancy in tail” in Delaware, Maine, Massachusetts, and Rhode Island.⁴⁶ The tenant in tail, however, may bar the entail and alienate a fee simple by deed.⁴⁷

39. *Id.*

40. Percy Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 179, 191–92 (1927) (citing DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES n.115 (1824)).

41. *Id.*

42. Thirty-seven states’ statutes are listed in RESTATEMENT (THIRD) PROP.: WILLS & OTHER DONATE TRANSFERS § 24.4 n.3 (2011).

43. *Id.*; see also 2-18 THOMPSON ON REAL PROPERTY, Third Thomas Edition § 18.04 (David A. Thomas ed.) (dividing states into four categories: those where an estate limitation formerly sufficient to create an estate in fee tail now creates either 1) fee tail absolute in first taker absolute, or subject to reverting back to grantor if first taker dies unsurvived by descendants; 2) confers a life estate on the first taker, fee simple absolute on heir of first taker; 3) estate in fee tail for the lifetime of the first taker, heir of first taker a fee simple absolute; 4) fee simple preserving limitations over the third parties as conditional limitations upon fee simple defeasible rather than contingent remainders after fee tails).

44. Hart, *supra* note 37, at 186.

45. *Id.* (citing Act of Jan. 19, 1816, ACTS PASSED BY THE GENERAL ASSEMBLY OF THE TERRITORY OF MISSOURI 32, 33 (St. Louis, Joseph Charless 1816)).

46. See THOMPSON, *supra* note 43.

47. See, e.g., DEL. CODE ANN. tit. 25, § 302 (2015); R.I. GEN. LAWS 34-4-15 (2013).

V. REFLECTING ON THE FEE TAIL

Besides serving as a plot twist for good period fiction⁴⁸ and as a juicy hypothetical harnessed by law professors teaching property, the fee tail has no relevance in modern England or the United States. However, it is worth at least some exploration for two important reasons. First, the history of the fee tail illustrates the significant impact lawyers, courts, and legislatures have had through time in shaping and transforming property rights. After all, the rise of the fee tail resulted from lawyers drafting creative conditional gifts; the fall of the fee tail resulted from lawyers conjuring up creative, albeit sham, legal claims. Courts and legislatures went along for the ride in both directions.

The second reason to keep the fee tail in modern legal education is to instill some sense of modesty in our conception of today's status quo. The fee tail of the 1400s seems both quaint and misguided to our eyes, but at the time it was a natural part of the enlightened social order. Likewise, by no means should we think of our current configuration of property law as the end of the co-evolution between law, technology, environment, and social norms. Forces of change are always at work putting pressure on accepted conventions. Sea-level rise, the Internet, water scarcity, environmental degradation, wealth disparities, and human migration could very well converge to push out today's seemingly stable set of property principles and usher in new regimes. In a few centuries, what we think of today as obviously appropriate ways of configuring property rights may seem to our descendants as nonsensical. Then they, like those behind *Downton Abbey*, will draw on our absurdity for good story lines and plot twists.

48. The fee tail also plays a prominent role in such great works as *Pride & Prejudice* by Jane Austen, *Middlemarch* by George Eliot, and *Brideshead Revisited* by Robert Louis Stevenson.

