concludes: "We cannot usefully characterize legal positivism in terms of the separability thesis" (p. 152). Let us begin by noting that Coleman errs in declaring that no one contests the particular claim which he has singled out as the positivist affirmation of the separability of law and morality. Michael Moore, Deryck Beyleveld, Roger Brownsword, Michael Detmold, and others have contested that claim during the past couple of decades. More important, Coleman's dismissal of the significance of the separability thesis is due entirely to his fixing upon the least controversial variant of that thesis to the exclusion of other variants. Especially during the past three or four decades, most of the interesting debates between legal positivists and their opponents have revolved around other renderings of that thesis, involving different senses or dimensions of morality. As Coleman himself later acknowledges (p. 193, n. 21), we shall find those debates largely unintelligible if we do not realise that they are centred on the separability of law and morality. When the positivist affirmation of that separability is grasped in its multi-faceted richness—rather than simply in its most pallid formulation—we can see that it indeed forms the heart of legal positivism. To slight that affirmation is to darken counsel by rendering opaque most of the disputes between legal positivists and their adversaries.

This review has had to skip over most of the details of Coleman's arguments and analyses. Suffice it here to say that those arguments and analyses offer ample food for thought on the part of anyone interested in legal philosophy. Coleman has enabled his readers to deepen their contemplation of the issues which he addresses.

MATTHEW H. KRAMER

The Fee Tail and the Common Recovery in Medieval England 1176–1502. By JOSEPH BIANCALANA. [Cambridge: Cambridge University Press. 20001. xix, 351, (Appendices) 88, (Bibliography) 14, and (Index) 45 pp. Hardback £70.00. ISBN 0–521–80646–1.]

ENTAILS were abolished in Scotland nearly a century ago, and recently English entails, at the bidding of the Law Commission, have come under the ban of the law. So it is perhaps timely to have a work which traces the origin and growth of this peculiar interest in freehold land, and its development into a perpetuitous interest until made destructible by way of common recoveries. This monograph takes the reader through the span of the later middle ages; it is effectively a study of the dynamics of land and family law during this period. As anyone who has striven to follow the effect of *De Donis* (1285) and the later complexities of the common recovery can appreciate, the subject-matter presents difficulties, and additionally there has been a dearth of knowledge as to the theory and practice of entailing land. The author has been conscious of this, for there are helpful summaries both forward and backward looking, much as occasional oasis relieves a trying territory. It is not without interest to note that this work started over ten years ago (at the instance of Professor Sam Thorne) as a study of the common recovery and then extended beyond into entails, as so could be read backward if following the author's own studies (almost as a series of essays), but it seems easier to begin at the beginning.

The first of the six chapters considers conditional fees before *De Donis* and the changes in the law and practice of *maritagium*. Since *mort d'ancestor* (1176) lords could no longer refuse admission to the heir of the tenant, and so grants developed restricting the line of qualified heirs and excluding collaterals. In this early period the author has been able to take advantage of the work of Milsom and Brand on early formedons. Perhaps his most significant observation is the different approach of the judges to succession to such qualified fees as contrasted with their treatment of alienations. Since Maitland's time it has been generally thought that a grant to a donee and the heirs of his body was regarded as enabling alienation when there was such an heir to inherit the fee. The author takes a different view, presented in much detail and (at pp. 31–32) he produces a case of 1281 where a reversioner claimed where the donee of entail had had two sons who predeceased her, and which he believes "did much to motivate the enactment of *De Donis* in 1285". Whether a single case in eyre could trigger such a sweeping response may be considered doubtful, unless the litigants were pre-eminent persons.

The second chapter moves on to *De Donis* and its aftermath, particularly the growth of the "perpetual" entail. The text of *De Donis* is subject to very close analysis; it is a text which is not a miracle of drafting, when one recalls the trouble that the ambiguous word "issue" has given rise to down the centuries in wills and conveyancing. The author then turns to a study of descender writs to trace the effect of the statutory restraint on alienation. "Legal historians", he says "who have speculated about the duration of entails have not looked at the plea rolls". Since the record gives writ and claim, and since the claimant had to claim as heir to the last ancestor dying seised, it is possible to see how many descents were relied on in such writs. This is an admirable account of the stages of growth in the enduring entail. The process involves adopting the hypothesis that Chancery controlled the reach of descender writs (in effect following Professor Robert Palmer on a kind of secondary legislation in Chancery). Four stages of extension are shown until in the first half of the fifteenth century the entail became inalienable; it is curious that the extensions seem to have occurred in the early years of new reigns 1310, 1330 and the 1420s. It is not easy to discern political motive, thought it may be recalled that Henry IV did ensure an entail of the crown by parliament, and this perhaps inspired early lancastrian chancellors. Perhaps it was a simpler notion that as generations passed, "the will of the donor" so cherished by *De Donis* needed extension.

Chapter three, "Living with Entails", is about how entails were employed and is mainly concerned with family settlements. *Maritagium*, so influential in the early development of entails, gave way to jointure settlements on marriage, and entails also have a role in intergenerational transfers. The frequency and use of entails is illustrated from some elaborate analysis of final concords from a sample of counties over 180 years. Chapter four examines how the doctrine of assets by descent and collateral warranties might be used to bar entails before the invention of common recovery. The latter device was an arrangement for the collateral descent of a warranty given by an alienating tenant in tail upon the heir who was consequently barred. Effective when it worked, it was nevertheless far from satisfactory as a sovereign remedy against perpetuity. To have the

warranty and the title descend collaterally was not always possible, and where possible, precarious.

The two closing chapters describe, first, the origin and development of the common recovery and second, the common recovery in operation. The common recovery was of course much more than a disentailing device; it is one of the central features in the history of conveyancing. The machinery, or how it worked, has never caused much difficulty provided that one is prepared to follow the formalities of a real action. The theory, or why it worked, has cause more headache. The headache has been usually brought on by indignation with the idea that satisfaction could be obtained from the vouchee, a penniless puppet. Less difficulty has been felt over the effect of collusive judgment in transferring title. The civilian analogue is *cessio in iure*, but this naturally was quite unknown to the inventors of the common recovery. The strength of this study is that the record evidence is related to the courtroom discussions and inns of court lectures. The record tells us what was done; the debates and discussions what the lawyers thought they were doing. "Sometimes it looks as if practice was ahead of theory. Other times it looks as if theory was ahead of practice" (pp. 261–262). A part of the difficulty mentioned above must be that the theory changed, as did the practice (though not synchronously). A writ of right led easily to a theory of preclusive effect of judgment, but after 1490 writs of entry were used instead. The change seems to have been associated with the rise of a theory of recompense, as is witnessed by Brudenell's Inner Temple lectures in 1491. The final stages in the mechanism were to introduce double or multiple vouchers, a voucher being needed because simple default or concession by the tenant had been ruled out by the legislation of 1285.

With regard to the operation of the common recovery the author extracted over a thousand recoveries between 1440 and 1502, and in 334 of these it has been possible to provide from extraneous sources some context and indication of the purpose of the transaction. They are fully set out as an appendix at pp. 352–439, where they are categorised as sales of land, transfers into mortmain, dispute settlements, and resettlements. Of these the greater part by far are the first and last categories, that is, a near equal division between land market transactions and family arrangements. The final pages examine the degree of social acceptance of the common recovery which is essentially about its use in disinheriting heirs of entail. The well-known discussion in *Doctor and Student* may be typical of general attitudes to disinheritance, "but abstract principles do not decide concrete cases" (p. 348). And by 1540 parliament was prepared to allow a final concord to bar the heir of entail. Nevertheless the social acceptance up to 1502 can only be gathered from the actual use of the common recovery. It seems likely that the common recovery was invented when it was because entails had developed into perpetuities. And though it is outside the scope of this book it is instructive to compare this solution to the problem of shackling land with "fettered inheritances" (to use Coke's phrase) for an indefinite future as contrasted with the solution found a couple of centuries later when executory interests and trusts had recreated perpetuities. Then it was thought that prevention was better than cure.

The whole study is founded on thorough research, and on an ability to handle some very technical doctrine. Indeed Professor Biancalana's mastery of the materials is such that his explanations or interpretations seem to follow almost as matters of necessity. Nevertheless, there may remain some

places where one might expect further debate. For example, what the yearbook lawyers said about the preamble to *De Donis* and the mischiefs aimed at is not consistent with the author's view of causes and events. But then in modern times one can see bench and bar from time to time inventing legal history "on the hoof" so to say; perhaps 700 years ago their predecessors were doing just that. Certainly any further work in this field will have to start from the information and interpretations of this magisterial monograph.

D.E.C. YALE

The Law of State Immunity. By HAZEL FOX QC. [Oxford: Oxford University Press. 2002. xxxii, 555, (Bibliography) 6, and (Index) 10 pp. Hardback £80.00. ISBN 0–19–829836–6.]

FIFTEEN years after the last substantial UK published work on State immunity, Lady Fox's treatise *The Law of State Immunity* constitutes a timely and much needed addition to the literature. Indeed, due in large part to the growing importance of human rights and peremptory norms, the law of State immunity and international law in general have evolved considerably since the monographs of Lewis (1984) and Schreuer (1988) were published. The last five years have been particularly eventful, with important pronouncements on immunity by the House of Lords in the *Pinochet* (1999/2000) and *Lampen-Woolfe* (2000) cases, by the European Court of Human Rights in *Al-Adsani* (2001) and by the International Court of Justice in the *Arrest Warrant* case (2002). With the rise of transnational human rights litigation in North America since the early 1980s and the possible adoption of the ILC *Draft Articles on Jurisdictional Immunities* in the near future, State immunity remains as one of the more controversial issues in contemporary international law. Clearly, this book is on time and on point.

State immunity is a doctrine of international law aimed at limiting the adjudicative and enforcement jurisdiction of municipal courts in proceedings involving foreign States or their representatives. While rooted in principles of international law, State immunity also brings into play highly technical questions of procedure at the municipal level, and this duality has been at the core of the problem of achieving a satisfactory synthesis. But there is a further duality: though State immunity is primarily a legal matter, it is at the same time notoriously infused with concerns of foreign relations and policy. As a result, the law of State immunity is complex and, as evidenced by recent international legal developments, still in a state of flux. Fortunately for readers (likely to be practitioners, scholars and students of international law), *The Law of State Immunity* is not only comprehensive and meticulously researched, but also very well written. For its thoroughness and lucidity, Hazel Fox's treatise is a considerable scholarly achievement. The author's expertise on the subject is manifest: she has published authoritative articles on State immunity over the last two decades and was involved in the Institut de droit international's resolutions on *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law* (adopted at the 2001 Vancouver session of the Insitut).