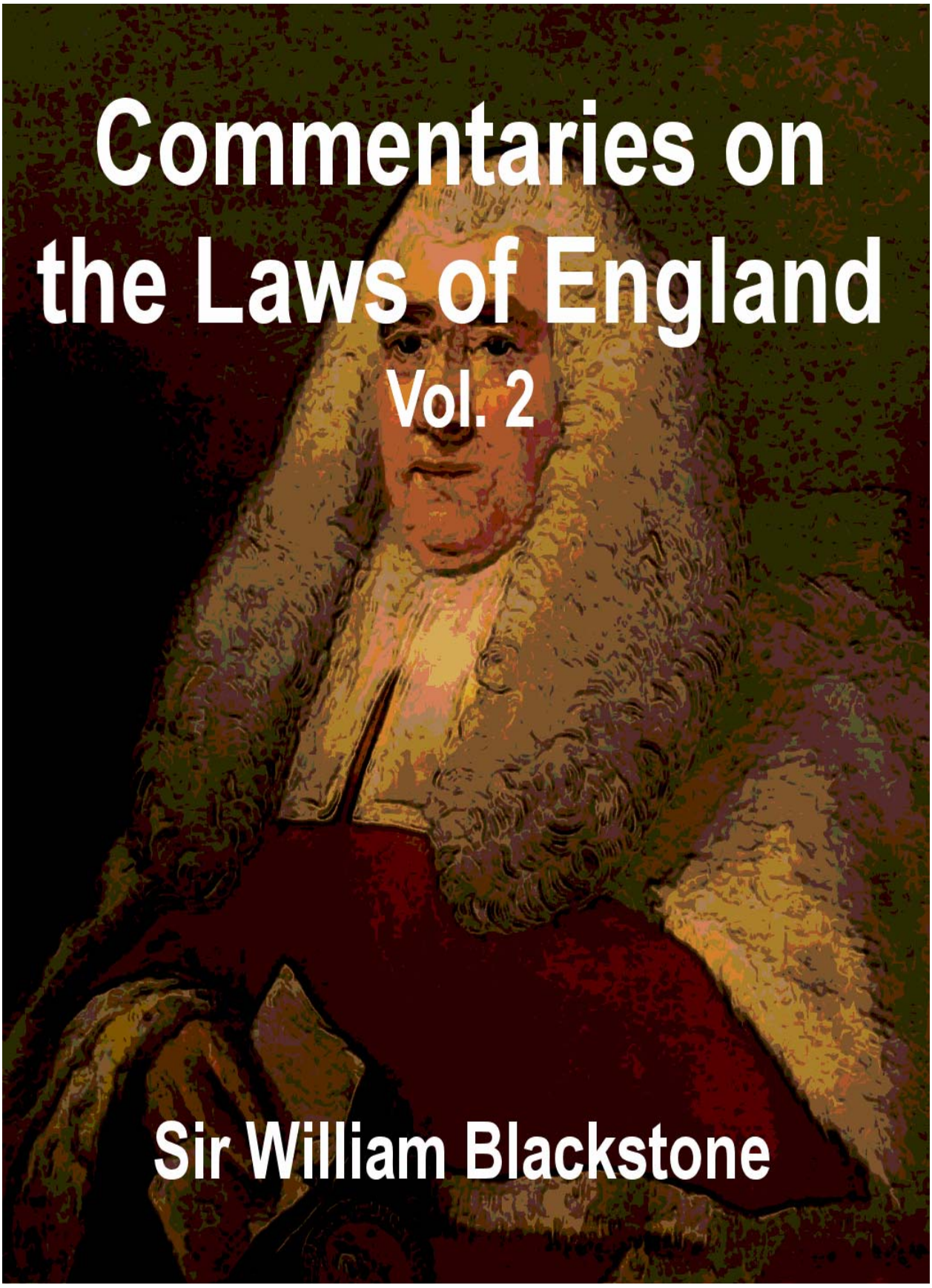
Commentaries on the Laws of England

Vol. 2



Sir William Blackstone

COMMENTARIES ON THE LAWS OF ENGLAND

BOOK THE SECOND (1766)

WILLIAM BLACKSTONE, Esq.

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BOOK 2:
Rights Of Things

CHAPTER 1

Of Property, in General

The former book of these commentaries having treated at large of the *jura personarum* [rights of persons], or such rights and duties as are annexed to the persons of men, the objects of our inquiry in this second book will be the *jura rerum* [rights of things], or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favor, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so, before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moves upon the earth."[1] This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans

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themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset*."[2] ["All things were common and undivided, as if there were but one estate for all."] Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to ought but the substance of the thing; nor could be extended to the use of it. For, by the law of nature and reason, he who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer:[3] or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular: yet whoever was in the occupation of any determinate spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theater, which is common to the public, and yet the place which any man has taken is for the time his own.[4]

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession;) if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural of observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall; which seem to have been originally mere temporary huts or moveable cabins, suited to the design of providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labor of the occupant; which bodily, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

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The article of food was a more immediate call, and therefore a more early consideration. Such, as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of water also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had dug that well."[5] And Isaac, about ninety years afterwards, reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace.[6]

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighborhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which Tacitus informs us continued among the Germans till the decline of the Roman empire.[7] We have also a striking example of the same kind in the history of Abraham and his nephew Lot.[8] When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavored to compose: "let there be no strife, I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered every where, even as the garden of the Lord. Then Lot chose him all the plain of Jordan, and journeyed east; and Abraham dwelt in the land of Canaan."

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practiced as well by the Phoenicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenseless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in color; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by

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those, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now (so graciously has providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its rational faculties, as well as of exerting its natural. Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labor, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, how this property became actually vested; of what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to every body, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the substance of the earth itself; which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Pufendorf insisting, that this right of occupancy is founded upon a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labor, is from a principle of nature justice, without any consent or compact, sufficient of itself to gain a title. A dispute that favors too much of nice and scholastic refinement! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it: for then it becomes, naturally speaking, *publici juris* [public right] once more, and is

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liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth, or other secret place, and it is discovered, the finder acquires no property therein; for the owner has not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure trove.[9]

But this method, of one man's abandoning his property, and another's seizing the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. This mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property, and Titius being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent, expressed by the conveyance, gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

The most universal and effectual way, of abandoning property, is by the death of the occupant; when, both the actual possession and intention of keeping possession ceasing, the property, which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion, which its becoming again common would occasion.[10] And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified

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as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances, to which no other title can be formed.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil, right. It is true, that the transmission of one's possession to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined; and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore also in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring, that “since God had given him no seed, his steward Eliezer, one born in his house, was his heir.”[11]

While property continued only for life, testaments were useless and unknown; and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing one's property, or a part of it, by testament; that is, by written or oral instructions properly witnessed and authenticated, according to the pleasure of the deceased; which we therefore emphatically style his will. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one third of his moveables from his wife and children: and, in general, no will was permitted of lands till the reign of Henry the eighth; and then only of a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present.

Wills therefore and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does any thing vary more that the right of inheritance under different national establishments. In England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he never can be their immediate heir, by any the remotest possibility:

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in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice: while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only two witnesses instead of three, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles: as if, on the one hand, the son had by nature a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person, who, from the result of certain local constitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed, and, where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

But, after all, there are some few things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such also are the generality of those animals which are said to be *ferae naturae* [wild nature], or of a wild and untamable disposition; which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again; there are other things, in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands: such also are wrecks, estrays, and that species of wild animals, which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things

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themselves in the sovereign of the state; or else in his representatives, appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

NOTES

1. Gen. 1:28.

2. Justin. L. 43. c. 1.

3. Barbeyr, Puf. 1. 4. c. 4.

4. *Quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occuparit.* [The world is a great theater, common to the public, yet the place which any man has taken is for the time his own.] Ce Fin. L. 3. c. 20.

5. Gen. 21:30.

6. Gen. 26:15, 18 etc.

7. *Colunt discreti et diversi; ut fons, ut campus, ut nemus placuit*. [They dwelt separately, in different parts, as a fountain, plain, or grove pleased them.] De mor. Germ. 16

8. Gen. c. 13.

9. See Book I. pag. 285.

10. It is principally to prevent any vacancy of possession, that the civil law considers father and son as one person; so that upon the death of either the inheritance does not so properly descend, as continue in the hands of the survivor. Ff, 28. 2. 11.

11. Gen. 15:3.

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CHAPTER 2

Of Real Property; and, First, of Corporeal Hereditaments

The objects of dominion or property are things, as contradistinguished from persons: and things are by the law of England distributed into two kinds; things real, and things personal.{Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go.

In treating of things real, let us consider, first, their several sorts or kinds; secondly, the tenures by which they may be held; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. Land comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. Tenement is a word of still greater extent; and though in its vulgar acceptation it is only applied to houses and other buildings, yet in its original, proper, and legal sense it signifies every thing that may be held, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum*, franktenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like:[1] and as lands and houses are tenements, so is an advowson a tenement; and a franchise, and office a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements.[2] But an hereditament, says Sir Edward Coke,[3] is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal, or implement of furniture which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere moveable; yet, being inheritable, is comprised under the general word, hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.[4]

Hereditaments then, to use the largest expression, are of two kinds, corporeal, and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For land, says Sir Edward Coke,[5] comprehends in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includes also all castles, houses, and other buildings: for they consist, says he, of two things; land, which is the foundation; and structure thereupon: so that, if I convey the land or ground, the structure of building passes therewith. It is observable that water is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and I cannot bring an action to recover possession of a pool or other piece of water, by the name of water only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general

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description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water.[6] For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain, substantial property, of which the law will take notice, and not of the other.

Land has also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum* [whoever has the land possesses all the space upwards indefinitely], is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word “land” includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which, nothing but a right of fishing:[7] but the capital distinction is this; that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum* [the most general name], every thing terrestrial will pass.[8]

NOTES

1. Co. Litt. 6.
2. Co. Litt. 19, 20.
3. 1. Inst. 6.
4. 3 Rep. 2.
5. 1 Inst. 4.
6. Brownl. 142.
7. Co. Litt. 4.
8. Ibid. 4, 5. 6.

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CHAPTER 3
Of Incorporeal Hereditaments

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same.[1] It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed in corporeal hereditaments: for they, being merely a contingent right, collateral to or issuing out of lands, can never be the object of sense: they are neither capable of being shown to the eye, nor of being delivered into bodily possession.

Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

1. Advowson is the right of presentation to a church, or ecclesiastical benefice. Advowson, *advocatio*, signifies *in clientelam recipere*, the taking into protection; and therefore is synonymous with patronage, *patronatus*: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common (from whence, as was formerly mentioned,[2] arose the division of parishes) the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed o nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church of which he was the founder, endower, maintainer, or, in one word, the patron.[3]

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages; but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight, nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporal possession be had of it. If the patron takes corporal possession of the church, the churchyard, the glebe or the like, he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by verbal grant, either oral or written, which is a kind of invisible, mental transfer: and being so vested, it lies dormant and unnoticed, till occasion calls it forth; when it produces a visible, corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter and receive bodily possession of the lands and tenements of the

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church.

Advowsons are either advowsons appendant, or advowsons in gross. Lords of manors being originally the only founders, and of course the only patrons, of churches,[4] the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson appendant:[5] and it will pass, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words.[6] But where the property of the advowson has been once separated from the property of the manor, by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor of lands.[7]

Advowsons are also either presentative, collative, or donative.[8] An advowson presentative is where the patron has a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he find him canonically qualified: and this is the most usual advowson. An advowson collative is where the bishop and patron are one and the same person: in which case the bishop cannot present to himself; but he does, by the one act of collation, or conferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson donative is when the king, or any subject by his license, does found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction.[9] This is said to have been anciently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of arch-bishop Becket in the reign of Henry II.[10] And therefore though pope Alexander III,[11] in a letter to Becket, severely inveighs against the *prava consuetudo* [erroneous practice], as he calls it, of investiture conferred by the patron only, this however shows what was then the common usage. Others contend, that the claim of the bishops to institution is as old as the first planting of Christianity in this island; and in proof of it they allege a letter from the English nobility, to the pope in the reign of Henry the third, recorded by Matthew Paris,[12] which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavored to introduce a kind of feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

However this may be, if, as the law now stands, the true patron once waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advowson is now become for ever presentative, and shall never be donative any more. For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavorable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will thereupon reduce it to the standard of other ecclesiastical livings.

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II. A second species of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called predial, as of corn, grass, hops, and wood;[13] the second mixed, as of wool, milk, pigs, etc,[14] consisting of natural products, but nurtured and preserved in part in gross: the third personal, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due.[15]

It is not be expected from the nature of these general commentaries, that I should particularly specify, what things are tithable, and what not, the time when, or the manner and proportion in which, tithes are usually due. For this I must refer to such authors as have treated the matter in detail: and shall only observe, that, in general, tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or *ferae naturae* [a wild nature], as deer, hawks, etc, whose increase, so as to profit the owner, is not annual, but casual.[16] It will rather be our business to consider, 1. The original of the right of tithes. 2. In whom that right at present subsists. 3. Who may be discharged, either totally or in part, from paying them.

1. As to their original. I will not put the title of the clergy to tithes upon any divine right; though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honorable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino* [by divine law]; whatever the particular mode of that maintenance may be. For, besides the positive precepts of the new testament, natural reason will tell us, that an order of men, who are separated form the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniences, and moderate enjoyments of life, at their expense, for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions.

We cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons, by augustin the monk, about the end of the sixth century. But the first mention of them, which I have met with in any written English law, is in a constitutional decree, made in a synod held A. D. 786,[17] wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators, and people. Which was a few years later than the time that Charlemagne established the payment of them in France,[18] and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy.[19]

The next authentic mention of them is in the *foedus Edwardi et Guthruni*; or the laws agreed upon

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between king Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws;[20] wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion; and, accordingly, we find[21] the payment of tithes not only enjoined, but a penalty added upon non-observance: which law is seconded by those of Athelstan,[22] about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

We are next to consider the persons to whom they are due. And upon their first introduction (as has formerly been observed [23]) though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased;[24] which were called arbitrary consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common.[25] But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first by common consent, or the appointments of lords of manors, and afterwards by the written law of the land.[26]

However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of king John.[27] Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under arch-bishop Dunstan and his successors; who endeavored to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves) and were then in hopes to have drawn, by sanctimonious pretenses to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected; since for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by pope Innocent the third[28] about the year 1200 in a decretal epistle, sent to the arch-bishop of Canterbury, and dated from the palace of Lateran: which has occasioned Sir Henry Hobart and others to mistake it for a decree of the council of Lateran held A. D. 1179, which only prohibited what was called the infeudation of tithes, or their being granted to mere laymen;[29] whereas this letter of pope Innocent to the arch-bishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries.[30] This epistle, says Sir Edward Coke,[31] bound not the lay subjects of this realm; but, being reasonable and just (and, he might have added, being correspondent to the ancient law) it was allowed of, and so became *lex terrae* [law of the land]. This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps which still continue in those portions of tithes, which the parson of one parish has, though rarely, a right to claim in another: for it is now universally held,[32] that tithes are due, of common right, to the parson of the parish, unless there be a special exemption. This parson of the parish, we have formerly seen,[33] may be either the actual incumbent, or else the appropriator of the benefice: appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy, by way of substitution to arbitrary consecrations of tithes.[34]

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3. We observed that tithes are due to the parson of common right, unless by special exemption: let us therefore see, thirdly, who may be exempted from the payment of tithes, and how. Lands, and their occupiers, may be exempted or discharged from the payment of tithes, either in part or totally, first, by a real composition; or, secondly, by custom or prescription.

First, a real composition is when an agreement is made between the owner of the lands, and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompense given to the parson, in lieu and satisfaction thereof.[35] This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general, and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist at this day by force of the common law. But, experience showing that even this caution was ineffectual, and the possessions of the church being, by this and other means, every day diminished, the disabling statue 13 Eliz. c. 10. was made; which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives or twenty one years. So that now, by virtue of this statute, no real composition made since the 13 Eliz. is good for any longer term than three lives or twenty one years, though made by consent of the patron and ordinary: which has indeed effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of parliament.

Secondly, a discharge by custom or prescription, is where time out of mind such persons or such lands have been, either partially or totally, discharged from the payment of tithes. And this immemorial usage is binding upon all parties, as it is in its nature an evidence of universal consent and acquiescence; and with reason supposes a real composition to have been formerly made. This custom or prescription is either *de modo decimandi* [a manner of tithing], or *de non-decimando* [an exemption from tithes].

A *modus decimandi* [manner of tithing], commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the accrual tenth part of the annual increase. This is sometimes a pecuniary compensation, as twopence an acre for the tithe of land: sometimes it is a compensation in work and labor, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him: sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

To make a good and sufficient modus, the following rules must be observed. 1. It must be certain and invariable,[36] for payment of different sums will prove it to be no modus, that is, no original real composition; because that must have been one and the same, from its first original to the present time. 2. The thing given, in lieu of tithes, must be beneficial to the parson, and not for the emolument of third persons only:[37] thus a modus, to repair the church in lieu of tithes, is not good, because that

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is an advantage to the parish only; but to repair the chancel is a good modus, for that is an advantage to the parson. 3. It must be something different from the thing compounded for:[38] one load of hay, in lieu of all tithe hay, is no good modus: for no parson would, *bona fide* [in good faith], make a composition to receive less than his due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a modus for another.[39] Thus a modus of 1 d. for every *milch* [milk] cow will discharge the tithe of *milch* kine, but not of barren cattle: for tithe is, of common right, due for both; and therefore a modus for one shall never be a discharge for the other. 5. The recompense must be in its nature as durable as the tithes discharged by it; that is, an inheritance certain:[40] and therefore a modus that every inhabitant of a house shall pay 4d. a year, in lieu of the owner's tithes, is no good modus; for possibly the house may not be inhabited, and then the recompense will be lost. 6. The modus must not be too large, which in law is called 2 rank modus: as if the real value of the tithes be 60£ per annum, and a modus in suggested of 40£ this modus will not be good; though on of 40s. might have been valid.[41] For, in these cases of prescriptive or customary modus's, the law supposes an original real composition to have been regularly made; which being lost by length of time, the immemorial usage is admitted as evidence to show that it once did exist, and that from thence such usage was derived. Now time of memory has been long ago ascertained by the law to commence from the reign of Richard the first;[42] and any custom may be destroyed by evidence of its non-existence in any part of the long period from his days to the present: wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the modus set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the first, this modus is *felo de se* [self-destructive] and destroys itself. For, as it would be destroyed by any direct evidence to prove its non-existence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later original.

A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his prerogative is discharged from all tithes.[43] So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiae* [the church does not tithe to the church].[44] But these privileges are personal to both the king and the clergy; for their tenant or lessee shall pay tithes of the same land, though in their own occupation it is not tithable. And, generally speaking, it is an established rule, that in lay hands, *modus de non decimando non valet* [an exemption from tithing is of no force].[45] but spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes, by variously ways:[46] as, 1. By real composition: 2. By the pope's bull of exemption: 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession: 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights templars, cistercians [certain monks], and others, whose lands were privileged by the pope with a discharge of tithes.[47] Though, upon the dissolution of abbeys by Henry VIII, most of these exemptions from tithes would have fallen with them, and the lands become tithable again; had they not been supported and upheld by the statute 31 Hen. VIII. c. 13. which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them. And from this original have sprung all the lands, which,

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being in lay hands, do at present claim to be tithe-free: for, if a man can show his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means before-mentioned, this is now a good prescription *de non decimando*. But he must show both these requisites: for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands.

III. Common, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man has in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like.[48] And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

1. Common of pasture is a right of feeding one's beasts on another's land; for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.[49]

Common appendant is a right, belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the land of other persons within the same manor. Commonable beasts are either beasts of the plow, or such as manure the ground. This is a matter of most universal right; and it was originally permitted,[50] not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plow or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the unenclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident, to the grant of the lands; and this was the original of common appendant: which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England.[51] Common appurtenant is where the owner of land has a right to put in other beasts, besides such as are generally commonable; as hogs, goats, and the like, which neither plow nor manure the ground. This, not arising from the necessity of the thing, like common appendant, is therefore not of common right; but can only be claimed by immemorial usage and prescription,[52] which the law esteems sufficient proof of a special grant or agreement for this purpose. Common because of vicinage, or neighborhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may enclose and bar out the other, though they have intercommoned time out of mind. Neither has any person of one town a right to put his beasts originally into the other's common; but if they escape, an stray thither of themselves, the law winds at the trespass.[53] Common in gross, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed: or it may be claimed by prescriptive right, as by parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

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All these species, of pasturable common, may be and usually are limited as to number and time; but there are also commons without stint, and which last all the year. By the statute of Merton however, and other subsequent statutes,[54] the lord of a manor may enclose so much of the waste as he pleases, for tillage or woodground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law "approving;" an ancient expression signifying the same as "improving."[55] The lord has the sole interest in the soil; but the interest of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage.[56]

2, 3. Common of piscary is a liberty of fishing in another man's waters; as common of turbary is a liberty of digging turf upon another's ground.[57] There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much farther: common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and the rest, are a right of carrying away the very soil itself.

4. Common of estovers (from *estoffer*, to furnish) is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, bote, is of the same signification with the French estovers; and therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the house; which latter is sometimes called fire-bote: plow-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote or hedge-bote is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary.[58]

These several species of commons do all originally result from the same necessity as common of pasture; *viz.* for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and bouse-bote, plow-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. A fourth species of incorporeal hereditaments is that of ways; or the right of going over another man's ground. I speak not here of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company.[59] A way may be also by prescription; as if all the owners and occupiers of such a farm have immemorially used to cross another's ground: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land may clearly be created. A right of way may also arise by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may

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cross his land for that purpose without trespass.[60] For when the law does give any thing to one, it gives impliedly whatsoever is necessary for enjoying the same.[61] By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased: which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman.[62]

V. Offices, which are a right to exercise a public or private employment, and the fees and emoluments thereunto belonging, are also incorporeal hereditaments: whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators.[63] Neither can any judicial office be granted in reversion; because, though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient: but ministerial offices may be so granted;[64] for those may be executed by deputy. Also, by statute 5 and 6 Edw. VI. c. 16. no public office shall be sold, under pain of disability to dispose of or hold it. For the law perfumes that he, who buys an office, will by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in the former book:[65] it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is,[66] a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or, in some cases, may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man, or in many: but the same identical franchise, that has before been granted to one, cannot be bestowed on another; for that would prejudice the former grant.[67]

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the county, wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, and the like; which tolls must have a reasonable cause of commencement, (as in consideration of repairs, or the like) else the franchise is illegal and void:[68]

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or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; which species of franchise may require a more minute discussion.

As to a forest: this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws.[69] But a chase differs from a park, in that it is not enclosed, and also in that a man may have a chase in another man's ground as well as his own; being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A park is an enclosed chase, extending only over a man's own grounds. The word park indeed properly signifies any enclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescription, is necessary to make it so.[70] Though now the difference between a real park, and such enclosed grounds, is in many respects not very material: only that it is unlawful at common law for any person to kill any beasts of park or chase,[71] except such as possess these franchises of forest, chase, or park. Free-warren is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren;[72] which, being *ferae naturae*, every one had a natural right to kill as he could: but upon the introduction of the forest laws at the Norman conquest, as will be shown hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game, so far as his warren extended, on condition of his preventing other persons. A man therefore that has the franchise of warren, is in reality no more than a royal game-keeper: but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free-warren.[73] This franchise is almost fallen into disregard, since the new statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in ancient times, who have sold their estates, and reserved the free-warren over another's ground.[74] A free fishery, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feudal polity has prevailed:[75] though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by king John's great charter, and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested.[76] This opening was extended, by the second[77] and third[78] charters of Henry III, to those also that were fenced under Richard I; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II. This differs from a several fishery; because he that has a several fishery must also be the owner of the soil, which in a free fishery is not requisite. It differs also from a common of piscary before-mentioned, in that the free fishery is an exclusive right, the common of piscary is not so: and therefore, in a free fishery, a man has a property in the fish before they are caught; in a common of piscary, not till afterwards.[79] Some indeed have considered a free fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the several fishery of the grantor.[80] But the considering such right as originally a flower of the prerogative, till restrained by Magna Carta, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, may remove some difficulties in respect to this matter, with which our books are embarrassed.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance.[81] In lieu of which (especially when due from ecclesiastical persons) a pension

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or sum of money is sometimes substituted.[82] And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

IX. Annuities, which are much of the same nature; only that these arise from temporal, as the former from spiritual, persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burden imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor.[83] Therefore, if a man by deed grant to another the sum of 20£ per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity: which is of so little account in the law, that, if granted to an eleemosynary corporation, it is not within the statutes of mortmain;[84] and yet a man may have a real estate in it, though his security is merely personal.

X. Rents are the last species of incorporeal hereditaments. The word, rent, or render, *reditus*, signifies a compensation, or return; it being in the nature of an acknowledgment given for the possession of some corporeal inheritance.[85] It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a profit; yet there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent.[86] It may also consist in services or manual operations; as, to plow so many acres of ground, to attend the king or the lord to the wars, and the like; which service in the eye of the law are profits. This profit must also be certain; or that which may be reduced to a certainty by either party. It must also issue yearly; though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year:[87] yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold and enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must issue out of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted.[88] It must, lastly, issue out of lands and tenements corporeal; that is, form some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like.[89] But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt;[90] though it does not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law[91] three manner of rents; rent-service, rent-charge, and rent-seck. Rent-service is so called because it has some corporal service incident to it, as at the least fealty, or the feudal oath of fidelity.[92] For, if a tenant holds his land by fealty, and ten shillings rent; or by the service of plowing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided the has in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired.[93] A rent-charge, is where the owner of the rent has no future interest, or reversion expectant in the land; as where a man by deed makes over to others his whole estate in fee simple, with a certain rent payable there out, and adds to the deed a covenant or clause of distress, that if the rent be *arrere*, or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but

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by virtue of the clause in the deed: and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it.[94] Rent-seck, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

There are also other species of rents, which are reducible to these three. Rents of assize are the certain established rents of the freeholders and ancient copyholders of a manor,[95] which cannot be departed from or varied. Those of the freeholders are frequently called chief rents, *reditus capitals*; and both sorts are indifferently denominated quit rents, *quieti reditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called white-rents, or blanch-farms, *reditus albi*;[96] in contradistinction to rents reserved in work, grain, etc. which were called *reditus nigri*, or black-maile.[97] Rack-rent is only a rent of the full value of the tenement, or near it. A feefarm-rent is a rent-charge issuing out of an estate in fee; of at least one fourth of the value of the lands, at the time of its reservation:[98] for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee simple instead of the usual methods for life or years.

These are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assize, and chief-rents, as in case of rents reserved upon lease.[99]

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation:[100] but, in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country.[101] And, strictly, the rent is demandable and payable before the time of sunset of the day whereon it is reserved;[102] though some have thought it not absolutely due till midnight.[103]

With regard to the original of rents, something will be said in the next chapter: and, as to distresses and other remedies for their recovery, the doctrine relating thereto, and the several proceedings thereon, these belong properly to the third part of our commentaries, which will treat of civil injuries, and the means whereby the are redressed.

NOTES

1. Co. Litt. 19, 20.

2. Vol. I. pag. 109.

3. This original of the *jus patronatus* [right of patronage], by building and endowing the church, appears also to have been allowed in the empire. Nov. 56. t. 12. c. 2. Nov. 118. c. 23.

4. Co. Litt. 119.

5. Ibid. 121.

6. Ibid. 397.

7. Ibid. 120.

8. Ibid.

9. Co. Litt. 344.

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10. Seld. Tith. c. 12. §. 2.
11. Decretal. l. 3. t. 7. c. 3.
12. A. D. 1239.
13. 1Roll. Abr. 635. 2 Inst. 649.
14. Ibid.
15. 1 Roll. Abr. 656.
16. 2 Inst. 651.
17. Selden, c. 8. §. 2.
18. A.D. 778.
19. Book1, ch. 11. Seld. c. 6 §7. Sp. of Laws, b. 31, c. 12.
20. Wilkins, p. 51.
21. cap. 6.
22. cap. 1.
23. Book 1, Introd. §4.
24. 2 Inst. 646. Hob. 296.
25. Seld. c. 9, §4.
26. LL Edgar, c. 1 & 2. Canut. c. 11.
27. Selden. c. 11.
28. Opera Innocent. III. tom. 2. pag. 452.
29. Decretal. l. 3. t. 30. c. 19.
30. Ibid. c. 26.
31. 2 Inst. 641.
32. Regist. 46. Hob. 296.
33. Book I. pag. 372.
34. In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See book I. pag. 110.
35. 2 Inst. 490. Regist. 38. 13 Rep. 40.
36. 1 Keb. 602.
37. 1 Roll. Abr. 649.
38. 1 Lev. 179.
39. Cro. Eliz. 446. Salk. 657.
40. 2 P. Wms. 462.
41. 11 Mod. 60.
42. This rule was adopted, when by the statute of Westm. 1. (3 Edw. I. c. 39.) the reign of Richard I. was made the time of limitation in a writ of right. But, since by the statute 32 Hen. VIII. C. 2. this period (in a writ of right) has been very rationally

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reduced to sixty years, it seems unaccountable, that the date of legal prescription or memory should still continue to be reckoned from an era so very antiquated. See 2 Roll. Abr. 269.;p. 16.

43. Cro. Eliz. 511.

44. Ibid. 479.

45. Ibid. 511.

46. Hob. 309. Cro. Jac. 308.

47. 2 Rep. 44. Seld. tith. c. 13. §. 2.

48. Finch, law. 157.

49. Co. Litt. 122.

50. 2 Inst. 86.

51. Stiernh. de jure Suconum. l. 2. c. 6.

52. Co. Litt., 122.

53. Co. Litt. 122.

54. 20 Hen. III. c. 4. 29 Geo. II. c. 36. and 31 Geo. II. c. 41.

55. 2 Inst. 474.

56. 9 Rep. 113.

57. Co. Litt. 122.

58. Co. Litt. 41.

59. Finch. law. 31.

60. Ibid. 63.

61. Co. Litt. 56.

62. Lord Raym. 725. 1 Brownl. 212.2 Show. 28. 1 Jon. 297.

63. 9 Rep. 97.

64. 11 Rep. 4.

65. See Book I. ch. 12.

66. Fiach. L. 164.

67. 2 Roll. Abr. 191. Keilw 196.

68. 2 Inst.220.

69. 4 Inst. 314.

70. Co. Litt. 233. 2 Inst. 199. 11 Rep. 86.

71. These are properly buck, doe, fox martin, and roe; but in a common and legal sense extend likewise to all the beasts of the forest: which, besides the other, are reckoned to be hart, hind, hare, boar, and wolf, and in a word, all wild beasts of venary or hunting (Co. Litt. 233.)

72. The beasts are hares, conies, and roes: the fowls are either *campestres* [those frequenting fields], as partridges, rails, and quails; or *sylvestres* [those frequenting woods], as woodcocks and pheasants; or *aquatiles* [water-fowls], as mallards and

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herons. (Ibid.)

73. Salk. 637.

74. Bro. Abr. tit. Warren. 3.

75. Seld. Mar. claus. 1 24. Dufresne. V. 503. Crag. de Jur feud. II. 8. 15.

76. cap. 47. edit. Oxon.

77. cap. 20.

78. 9 Hen. III. c. 16.

79. F. N. B. 88. Salk, 637.

80. a Sid. 8.

81. Finch. L. 162.

82. See Book I. ch. 8.

83. Co. Litt. 144.

84. Ibid. 2.

85. Co. Litt. 144.

86. Ibid. 142.

87. Ibid. 47.

88. Plowd. 13. 8 Rep. 71.

89. Co. Litt. 144.

90. Ibid. 47.

91. Litt. §. 213.

92. Co. Litt. 142.

93. Litt. §. 215.

94. Co. Litt. 143.

95. 2 Inst. 19.

96. In Scotland this kind of small payment is called blench-holding, or *reditus albas firmae*.

97. 2 Inst. 19.

98. Co. Litt. 143.

99. Stat. 4 Geo. II. c. 28.

100. Co. Litt. 201.

101. 4 Rep. 73.

102. Adnerf. 253.

103. 1 Saund. 287. 1 Chan. Prec. 555.

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CHAPTER 4
Of the Feudal System

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law: a system so universally received throughout Europe, upwards of twelve centuries ago, that Sir Henry Spelman[1] does not scruple to call it the law of nations in our western world. This chapter will be therefore dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time mis-employed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientifical manner, without having recourse to the ancient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the drafts of the same edifices, in their pristine proportion and splendor.

The constitution of feuds[2] had its original from the military policy of the northern or Celtic nations, the Goths, the Hunns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium* [storehouse of nations], as Crag very justly entitles it,[3] poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions: and, to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers.[4] These allotments in the northern languages[5] signifies a conditional stipend or reward.[6] Rewards or stipends they evidently were; and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty:[7] and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.[8]

Allotments thus acquired, naturally engaged such as accepted them to defend them: and, as they all sprang form the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each others possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to and under the command of his immediate benefactor or superior; and so upwards to the prince or general himself. And the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories were always ready enlisted, and mutually prepared to muster, not only in defense of each man's own several property, but also in defense of the whole, and of every part of this their newly acquired country:[9] the prudence of which constitution was soon sufficiently

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visible in the strength and spirit, with which they maintained their conquests.

The universality and early use of this feudal plan, among all those nations which in complaisance to the Romans we still call barbarous, may appear from what is recorded[10] of the Cimbri and Teutones, nations of the same northern original as those whom we have been describing, at their first irruption into Italy about a century before the Christian era. They demanded of the Romans, "*ut martius populus aliquid sibi terrae daret, quasi stipendium: caeterum, ut vellet, minibus atque armis suis uteretur*." The sense of which may be thus rendered; they desired stipendiary lands (that is, feuds) to be allowed them, to be held by military and other personal services, whenever their lords should call upon them. This was evidently the same constitution, that displayed itself more fully about seven hundred years afterwards; when the Salii, Burgundians, and Franks broke in upon Gaul, the Visigoths on Spain, and the Lombards upon Italy, and introduced with themselves this northern plan of polity, serving at once to distribute, and to protect, the territories they had newly gained. And from hence it is probable that the emperor Alexander Severus[11] took the hint, of dividing lands conquered from the enemy among his generals and victorious soldiery, on condition of receiving military service from them and their heirs for ever.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valor, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly allodial; (that is, wholly independent, and held of no superior at all) now they parceled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligation of military fealty.[12] And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto universally obtained, but now became for many centuries lost and forgotten; and Italy itself (as some of the civilians, with more spleen than judgment, have expressed it) *belluinas, atque ferinas, immanesque Longobardorum leges accepit* [received the wild, fierce, and barbarous laws of the Lombards].[13]

But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman.[14] Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use: yet not so extensively, nor attended with all the rigor that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigor and maturity, even on the continent of Europe.[15]

This introduction however of the feudal tenures into England, by king William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the conqueror; but to have been consented to by the great council of the nation long after his title was

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established. Indeed from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favorites. A supposition, grounded upon a mistaken sense of the word conquest; which, in its feudal acceptation, signifies no more than acquisition: and this has led many hasty writers into a strange historical mistake, and one which upon the slightest examination will be found to be most untrue. However, certain it is, that the Normans now began to gain very large possessions in England: and their regard for the feudal law, under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here. And perhaps we may be able to ascertain the time of this great revolution in our landed property with a tolerable degree of exactness. For we learn from the Saxon Chronicle,[16] that in the nineteenth year of king William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenseless: which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operation with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defense. For, as soon as the danger was over, the king held a great council to inquire into the state of the nation;[17] the immediate consequence of which was finished in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person.[18] This seems to have been the era of formally introducing the feudal tenures by law; and probably the very law, thus made at the council of Sarum, is that which is still extant,[19] and couched in these remarkable words: "*statuimus, ut omnes liberi homines foedere et sacramento affirment, quod intra et extra universum regnum Angliae Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere*." ["We decree that all freemen bind themselves by homage and fealty, that within and without the whole kingdom of England, they will be faithful to King William their lord, and everywhere preserve his lands and honors with all fidelity, and defend him against all foreign and domestic enemies."] The terms of this law (as Sir Martin Wright has observed[20]) are plainly feudal: for, first, it requires the oath of fealty, which made in the sense of the feudists every man that took it a tenant or vassal; and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what puts the matter out of dispute is another law of the same collection[21] which exacts the performance of the military feudal services, as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri praedicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et sint semper prompti et bene parati ad servitium suum integrum nobis explendum et peragendum cum opus fuerit; secundum quod nobis debent de feodis et tenementis suis de jure facere; et sicut illis statuimus per commune consilium totius regni nostri praedicti*." ["That all earls, barons, soldiers, servants, and freemen of our whole kingdom aforesaid, keep and hold themselves always well furnished with arms and horses, as is suitable and proper: and be always ready and well prepared for fulfilling and performing their entire service to us when need shall be; according to what they

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are by law bound to do for us by reason of their fees and tenements, and as we have ordained by the common council of our whole kingdom aforesaid."]

This new polity therefore seems not to have been imposed by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the allodial estates of France were converted into feuds, and the freemen became the vassals of the crown.[22] The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually, by the consent of private persons; the latter was done at once, all over England, by the common consent of the nation.[23]

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man does or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services." For, this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defense by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigor and fealty, as if they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But, whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding; and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations;[24] as if the English had in fact, as well as theory, owed every thing they had to the bounty of their sovereign lord.

Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth.[25] However, this king, and his son William Rufus, kept up with a high hand all the rigors of the feudal doctrines: but their successors, Henry I, found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter,[26] whereby the gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broke through, and the former grievances were revived and aggravated, by himself and succeeding prince; till in the reign of king John they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him: which at length produced the famous great charter at Running-mead, which, with some alterations, was confirmed by his son Henry III. And, though its immunities (especially as altered on its last edition by his son[27]) are very greatly short of those

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granted by Henry I, it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

Having given this short of their rise and progress, we will next consider the nature, doctrine, and principal laws of feuds; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the original of such of our own tenures, as were either abolished in the last century, or still remain in force.

The grand and fundamental maxim of al feudal tenure is this; that all lands were originally granted out by the sovereign, and are therefore held, either mediately or immediately, of the crown. The grantor was called the proprietor, or lord; being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or vassal, which was only another name for the tenant or holder of the lands; though, on account of the prejudices we have justly conceived against the doctrines that were afterwards grafted on this system, we now use the word vassal opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi* [given and granted]; which are still the operative words in our modern infeudations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known: and therefore the evidence of property was reposed in the memory of the neighborhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of fealty, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture did usually homage to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him. And there professing that “he did become honor:” and then he received a kiss from his lord.[28] Which ceremony was denominated *homagium*, or manhood, by the feudists, from the stated form of words, *devenio vester homo* [I become your man].[29]

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the service, which, as such, he was bound to render, in recompense for the land he held. This, in pure, proper, and original feuds, was only twofold: to follow, or do suit to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts baron,[30] (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants) in order as well to answer such complaints as might be alleged against themselves,

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as to form a jury or homage for the trial of their fellow-tenants; and upon this account, in all the feudal institutions both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiae*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

At the first introduction of feuds, as they were gratuitous, so also they were precarious and held at the will of the lord,[31] who was the sole judge whether his vassal performed his services faithfully. Then they became certain, for one or more years. Among the ancient Germans they continued only from year to year; an annual distribution of lands being made by their leaders in their general councils or assemblies.[32] This was professedly done, lest their thoughts should be diverted from war to agriculture; lest the strong should encroach upon the possessions of the weak; and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of their new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the life of the feudatory.[33] But still feuds were not yet hereditary; though frequently granted, by the favor of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he wee capable to perform the services:[34] and therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. but the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it re-established the inheritance, or, in the words of the feudal writers, "*incertam et caducam hereditatem relevabat*" ["it raised up the uncertain and fallen inheritance"]. This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

For in process of time feuds came by degrees to be universally extended, beyond the life of the first vassal, to his sons, or perhaps to such one of them, as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his sons, all his sons succeeded him in equal portions; and as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation.[35] But when such a feud was given to a man, and his heirs, in general terms, then a more extended rule of succession took place; and when a feudatory died, his male descendants *in infinitum* [forever] were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was

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of the blood of, that is, lineally descended from, the first feudatory."[36] And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. but this being found upon many accounts inconvenient, (particularly, by dividing the services, and thereby weakening the strength of the feudal union) and honorary feuds (or titles of nobility) being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son;[37] in imitation of these, military feuds (or those we are now describing) began also in most countries to descend according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.[38]

Other qualities of feuds were, that the feudatory could not aliene or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord.[39] For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or his posterity who were perfumed to inherit his valor, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service; therefore the lord could no more transfer his seigniory or protection without consent of his vassal, than the vassal could his feud without consent of his lord:[40] it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

These were the principal, and very simple, qualities of the genuine or original feuds; being then all of a military nature, and in the hands of military persons: though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents. And by this means the feudal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "rere-fiefs") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords.[41] But this at the same time demolished the ancient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds came to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprised all such as do not fall within the other description: such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honorable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new-created feuds did in all other respects follow the nature of an original, genuine, and proper feud.[42]

But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtlety of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon,

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began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defense. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England will appear in the following chapters.

NOTES

1. of parliaments. 57.

2. See Spelman of feuds, and Wright of tenures, per tot.

3. De jure feud. 19, 20.

4. Wright: 7.

5. Spelm. Gl. 216.

6. Pontoppidan in his history of Norway (page 290) observes, that in the northern languages odh signifies *proprietas* [property] and all *totum* [the whole]. Hence he derives the odhal right in those countries; and hence too perhaps is derived the udal right in Finland, etc. (See Mac Doual. Inst. Part. 2.) Now the transposition of these northern syllables, allodh, will give us the true etymology of the *allodium*, or absolute property of the feudists; as, by a similar combination of the latter syllable with the word fee (which signifies, we have seen, a conditional reward or stipend) feeodh or *feodum* will denote stipendiary property.

7. See this Oath explained at large in Feud. l. 2. t. 7.

8. Feud. l. 2. t. 24.

9. Wright. 8,

10. L. Florus. l. 3. c. 3.

11. "*Sola, quae de hostibus capta sunt limitaneis ducibus et militibus donavit; ita ut eorum ita essent, si haeredes illorum militarent, nec unquam ad privatos pertinerent: dicens attentius illos militaturos, si etiam sua rura defenderent. Addidit sane his et animalia et servos, ut possent colere quod acceperant; nec per inopiam hominum vel per senectutem deserentur rura vicina barbariae, quod turpissimum ille ducebat.*" ["The lands which were taken from the enemy on the borders he gave to his generals and soldiers; on condition that their heirs should be soldiers, and never belong to private stations: saying, that they would fight more resolutely, if they at the same time defended their own lands. He also gave animals and slaves with them, that they might cultivate what they had acquired; lest, through want of men, or by reason of old age, the neighboring lands should be utterly neglected, a thing which he considered most disgraceful."] (Æl. Lamprid. In vita Alex. Severi.)

12. Wright. 10.

13. Gravin. Orig. l. 1. §. 139.

14. Spelm. Gloss. 218. Bract. l. 2. c. 16. §. 7.

15. Crag. l. 1. t. 4.

16. A. D. 108;

17. *Rex tenuit magnum concilium, et graves sermones habuti cum suis proceribus de hac terra, quo modo incoleretur, et a quibus hominibus*. [The King held a great council, and had important debates with his nobles concerning this land, how it should be inhabited and by what men.] Chron. Sax. Ibid.

18. *Omnes praedia tenentes, quotquot essent notae melioris per totam Angliam, ejus homines facti sunt, et omnes sfe illi subdidere, ejusque facti sunt vassalli, ac ei fidelitatis juramenta praestiterunt, se contra alios quoscunque illi fidos futuros.*

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[All holding such estates as were of a better condition throughout all England became his men, subjected themselves to him, were made his vassals, and took the oath of fealty, that they would be faithful to him against all, whomsoever they might be.] Chron. Sax. A. D. 1086.

19. cap. 52. Wilk. 228.

20. Tenures. 66.

21. cap. 58. Wilk. 228.

22. Montesq. Sp. L. b. 31. c. 8.

23. Pharoah thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reserving an annual render of the fifth part of their value. (Gen. c. 47.)

24. Spelm. of feuds, c. 28.

25. Wright. 81.

26. LL. Hen. I. c. 3.

27. 9 Hen. III.

28. Litt. §. 85.

29. It was an observation of Dr. Arbuthnot, that tradition was nowhere preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope. vi. 134. 80.) Perhaps it may be thought puerile to observe (in confirmation of this remark) that in one of our ancient pastimes (the bafilinda of Julius Pollux, Onomastic. l. 9.c. 7.) the ceremonies and language of feudal homage are preserved with great exactness.

30. Feud. l. 2. t. 55.

31. Feud. l. 1. t. 1.

32. Thus Tacitus: (de mor. Germ. c. 26.) "*agri ab universis per vices occupantur: arva per annos mutant.*" ["They all occupy the lands by turns: the arable lands they change annually."] And Caesar yet more fully; (de bell. Gall. l. 6. c. 21.) "*Neque quisquam agri modum certum, aut fines proprios habet; sed magistratus et principes, in annos singulos, gentibus et cognationibus hominum qui una coierunt quantum cis et quo loco visum est, attribuunt agri, atque anno post alio transire cogunt.*" ["Neither has any one a certain proportion or fixed boundaries to his land; but the magistrates and princes every year assign to the people, and the kindred of those men who have assembled together, as much land, and in whatever place, as seems to them fit, and oblige them the next year to remove from it to another portion."]

33. Send. l. t. 1.

34. Wright. 14.

35. Wright. 17.

36. Ibid. 183.

37. Feud. 2. t. 55.

38. Wright. 32.

39. Ibid. 29.

40. Ibid. 30.

41. Wright. 20.

42. Feud. 2. t. 7.

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CHAPTER 5

Of the Ancient English Tenures

In this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments might have been held; as the same stood in force, till the middle of the last century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles and no other; being fruits of, and deduced from, the feudal policy.

Almost all the real property of this kingdom is by the policy of our laws supposed to be granted by, dependent upon, and held of some superior or lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing held is therefore styled a tenement, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be held, mediately or immediately, of the king; who is styled the lord paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B was said to hold of A, and A of the king; or, in other words, B held his lands immediately of A, but mediately of the king. The king therefore was styled lord paramount; A was both tenant and lord, or was a mesne lord; and B was called tenant *paravail*, or the lowest tenant; being he who is supposed to make avail, or profit, of the land.[1] In this manner are all the lands of the kingdom held, which are in the hands of subjects: for, according to Sir Edward Coke,[2] in the law of England we have not properly *allodium*; which, we have seen,[3] is the name by which the feudists abroad distinguish such estates of the subject, as are not held of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honorable species of tenure, but at the same time subjected the tenants to greater and more burdensome services, than inferior tenures did.[4] This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

I. There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either free or base services; in respect of their quantity and the time of exacting them, were either certain or uncertain. Free services such as were not unbecoming the character of a soldier, or a free-man, to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. Base services were such as were fit only for peasants, or persons of a servile rank; as to plow the lord's land, to make his hedges, to carry out his dung, or other mean employments. The certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretense; as, to pay a stated annual rent, or to plow such a field for three days. The uncertain depended upon unknown contingencies; as to do military service in person, or pay an assessment

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in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England, till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the third) seems to give the clearest and most compendious account, of any author ancient or modern;[5] of which the following is the outline or abstract.[6] "Tenements are of two kinds, *frank-tenement*, and *villenage*. And, of frank-tenements, some are held freely in consideration of homage and knight-service; others in free-socage with the service of fealty only." And again,[7] "of villenages some are pure, and others privileged. He that holds in pure villenage shall do whatsoever is commanded him, and always be bound to an uncertain service. The other king of villenage is called *villein-socage*; and these villein-socmen do villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was free, but uncertain, as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not only free, but also certain, as by fealty only, by rent and fealty, etc, that tenure was called *liberum socagium*, or free socage. These were the only free holdings or tenements; the others were villenous or servile: as, thirdly, where the service was base in its nature, and uncertain as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage (from the certainty of its services) but degraded by their baseness into the inferior title of *villanum socagium*, villein-socage.

I. The first, most universal, and esteemed the most honorable species of tenure, was that by knight-service, called in Latin *servitium militare*, and in law French chivalry, or *service de chivaler*, answering to the *fief d' haubert* of the Normans,[8] which name is expressly given it by the mirrour.[9] This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the genuine effect of the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the value of which, not only in the reign of Edward II,[10] but also of Henry II,[11] and therefore probably at its original in the reign of the conqueror, was stated at 20£ per annum and a certain number of these knight's fees were requisite to make up a barony. And he who held this proportion of land to the wars for forty days in every year, if called upon: which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion.[12] And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi*;[13] was transferred by investiture or delivering corporal possession of the land, usually called livery of seizin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; *viz.* aids, relief, primer seizin, wardship, marriage, fines for alienation, and escheat: all which I shall

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endeavor to explain, and show to be of feudal original.

I. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress;[14] but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fidelity; insomuch that the neglect of doing it, whenever it was in the vassal's power, was, by the strict rigor of the feudal law, an absolute forfeiture of his estate.[15] Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms:[16] the intention of it being to breed up the eldest son, and heir apparent of the seigniory, to deeds of arms and chivalry, for the better defense of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely slender; few lords being able to save much out of their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this, or any other encumbrances. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were held) and the marriage of is female descendants.[17] And one cannot but observe, in this particular, the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defense and protection. With regard to the matter of aids, there were three which were usually raised by the client; *viz.* to marry the patron's daughter; to pay his debts; and to redeem his person from captivity.[18]

BUT besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts, (probably in imitation of the Romans) and aids to enable him to pay aids or reliefs to his superior lord; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king who had no superior. To prevent this abuse, king John's Magna Carta[19]ordained, that no aids be taken by the king without consent of parliament, nor in any wise by inferior lords, save only the three ancient ones above-mentioned. But this provision was omitted in Henry III's charter, and the same oppressions were continued till the 25 Edw. I; when the statute called *confirmatio chartarum* [confirming charter] was enacted; which in this respect revived king John's charter, by ordaining that none but the ancient aids should be taken. But though the species of aids was thus restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable;[20] and that the aids taken by the king of his tenants *in capite* should be settled by parliament.[21] But they were never completely ascertained and adjusted till the statute Westm. 1.3 Edw. 1. c. 36. which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of every knight's fee. For making the eldest son a knight, or marrying the eldest daughter; and the same was done with regard to the kin's tenants *in capite* by statute 25 Edw. III. c 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

2. Relief, *relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the

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last tenant. But, though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, they were merely arbitrary and at the will of the lord; of that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir[22]The English ill brooked this consequence of their new adopted policy; and therefore William the conqueror by his laws[23] ascertained the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms and habiliments of war should be paid by the earls, barons, and vavasours respectively; and, if the latter had no arms, they should pay 100 s. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws; thereby in effect obliging every heir to new-purchase or redeem his land:[24] but his brother Henry 1 by the charter before-mentioned restored his father's law; and ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption.[25] But afterwards, when, by an ordinance in 27 Hen. II. Called the assize of arms, it was provided that every man's armor should descend to his heir, for defense of the realm; and it thereby became impracticable to pay these acknowledgments in arms, according to the laws of the conqueror, the composition was universally accepted so 100 s. for every knight's fee; as we find it ever after established.[26] But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.

3. PRIMER *seizin* was a feudal burden, only incident to the king's tenants *in capite* [in chief], and not to those who held of inferior or mesne lords. It was right which the king had, when any of his tenants *in capite* died seized of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life.[27] This seems to be little more than an additional relief: but grounded upon this feudal reason; that, by the ancient law of feuds, immediately upon a death of a vassal the superior was in titled to enter and take seizin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: and, for the time the lord so held it, he was entitled to take the profits; and unless the heir claimed within a year and day, it was by the strict law a forfeiture.[28] This practice however seems not to have long obtained in England, if ever, with regard to tenures under inferior lords; but, as to the king's tenures *in capite*, this *prima seizina* [primer seisin] was expressly declared, under Henry III and Edward II, to belong to the king by prerogative, in contradistinction to other lords.[29] And the king was entitled to enter and receive the whole profits of the land, till livery was sued; which suit being commonly within a year and day next after the death of the tenant, therefore the king used to take at an average the first fruits, that is to say, one year's profits of the land.[30] And this afterwards gave a handle to the popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiae*, or first fruits.

4. THESE payments were only due if the heir was of full age; but if he was under the age of twenty one, being a male, or fourteen, being a female,[31] the lord was entitled to the wardship of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might

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perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty one, or the heir-female of fourteen: yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1. 3Edw.1.c.22. the two additional years being given by the legislature for no other reason but merely to benefit the lord.[32]

THIS wardship, of far as it related to land, though it was not nor could be part of the low of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit person to supply the infants's services, till he should be of age to perform them himself. And, if we consider a feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, to long as the service suspended. Though undoubtedly to our English ancestors, where such stipendiary donation was mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I before-mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity din not continue many years.

THE wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

WHEN the male heir arrived to the age of twenty one, or the heir-female to that of sixteen, they might sue out their livery or *ousterlemain*;[33] that is, the delivery of their lands out their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to Magna Carta.[34] However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seizins.[35] In order to ascertain the profits that arose to the crown by these fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county,[36] commonly called an *inquisitio post mortem* [inquisition after death]; which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was held, and who, and of what age, his heir was; thereby to ascertain the relief and value of the primer seizin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII, that by color of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto.[37] And, afterwards, a court of wards and liveries was erected,[38] for conducting the same inquiries in a more solemn and legal manner.

When the heir thus came of full age, provided he held a knight's fee, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For, in those

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heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony, as was formerly hinted,[39] is supposed to have been the original of the feudal knighthood.[40] This prerogative, of compelling the vassals to be knighted, or to pay a fine, was expressly recognized in parliament, by the statute *de militibus* [of soldiers], I Edw. II; was exerted as an expedient of raising money by many of our best princes, particularly by Edward VI and queen Elizabeth: but yet was the occasion of heavy murmurs when exerted by Charles I: among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion, of prerogative. However, among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of his crown, and it was accordingly abolished by statute 16 Car.I.c.20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of marriage, (*maritagium*, as contradistinguished from *matrimonium*) which in its feudal sense signifies the power, which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without disparagement, or inequality: which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian;[41] that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance:[42] and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*.[43] This seems to have been of the greatest hardships of our ancient tenures. There are indeed substantial reasons why the lord should have the restraint and control of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy.[44] But no tolerable pretense could be assigned why the lord should have the sale, or value, of the marriage. Nor indeed is this claim of strictly feudal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his female- wards;[45] which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since in the often- cited charter of Henry the first, he engages for the future to take nothing for his consent; which also he promises in general to give, provided such female ward were not married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by king John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract;[46] or, as it was expressed in the first draft of that charter, *ita maritentur ne disparagentur, et per consilum propinquorum de consanguinitate sua*.[47] But these clauses in behalf of the relations were omitted in the charter of Henry III; wherein[48] the clauses stands merely thus, "*haeredes maritentur absque disparagatione*" ["heirs should marry without disparagement"]; meaning certainly, *haeredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage of heirs male; and as Glanvil[49]expressly confines it to heirs female. But the king and his great lords thenceforward took a handle from the ambiguity of this expression to claim them both, *sive sit masculus sive soemina* [whether they be male or female], as Bracton more than once expresses it;[50] and also, as nothing but disparagement was restrained by

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Magna Carta, they thought themselves at liberty to make all other advantages that they could.[1] And afterwards this right, of selling the ward in marriage or else receiving the price or value of it, was expressly declared by the statute of Merton;[52] which is the first direct mention of it that I have met with, in our own or in any other law.

6. ANOTHER attendant or consequence of tenure by knight-service was that of fines due to the lord for every alienation, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection; it not being reasonable nor allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and, as the feudal obligation was considered as reciprocal, the lord also could not alienate his seigniory without the consent of his tenant, which consent of his was called an attornment. This restraint upon the lords soon wore away; that upon the tenants continued longer. For, when every thing came in process of time to be bought and sold, the lords would not grant a license to their tenants to aliene, without a fine being paid, apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a license: but, as to common persons, they were at liberty, by Magna Carta,[53] and the statute of *quia emptores*,[54] (if not earlier) to aliene the whole of their estate, to be held of he same lord, as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of these statutes, could not aliene without a license: for if they did, it was in ancient strictness an absolute forfeiture of the lands;[55] though some have imagined otherwise. But this severity was mitigated by the statute I Edw.III.c.12. which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one third of the yearly value should be paid for a license of alienation; but, if the tenant perfumed to aliene without a license, a full year's value should be paid.[56]

7. THE last consequence of tenure in chivalry was escheat; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and abolished. In such cases the land escheated, or fell back, to the lord of the fee; that is, the tenure was determined by breach of the original condition, expressed or implied in the feudal donation. In the one case, there no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended: in the other, the tenant, by perpetrating an atrocious crime, showed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it.[57]

THESE were the principal qualities, fruits, and consequences of the tenure by knight-service: a tenure, by which the greatest part of the lands in this kingdom were held, and that principally of the king *in capite*, till the middle of he last century; and which was created, as Sir Edward Coke expressly testifies,[58] for a military purpose; *viz.* for defense of he realm by the king's own principal

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subjects. Which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; of called, though improperly, because the service or render was of a free and honorable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by grand sergeanty, *per magnum servitium*, whereby the tenant was bound, instead of serving the king generally in wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer at his coronation.[59] It was in most other respects like knight-service;[60] only he was not bound to pay aid,[61] or escuage;[62] and, when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand sergeanty paid one year's value of his land, were it much or little.[63] Tenure by cornage, which was, to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand sergeanty.[64]

THESE services, both of chivalry and grand sergeanty, were all personal, and uncertain as to their quantity or duration. But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this king of tenure was called *scutagium* [scutage] in Latin, or *servitium scuti* [service money]; scutum being then a well-known denomination of money: and, in like manner it was called, in our Norman French, escuage; being indeed a pecuniary, instead of a military, service. The first time this appears to have been taken was in the 5 Hen. II. on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops: and these assessments, in the time of Henry II, seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamor, and king John was obliged to consent, by his Magna Carta, that no scutage should be imposed without consent of parliament.[65] But this clause was omitted in his son Henry III's charter; where we only find,[66] that scutages or escuage should be taken as they were used to be taken tin the time of Henry II; that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw.I.c.5&6;. and many subsequent statutes[67] it was enacted, that the king should take no aids or tasks but by the common assent of the realm. Hence it is held in our old books, that escuage or scutage could not be levied but by consent of parliament;[68] such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

SINCE therefore escuage differed from knight-service in nothing, but as compensation differs from actual service, knight service is frequently confounded with it. And thus Littleton[69] must be understood, when he tell us, that tenant by homage, fealty, and escuage was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected[70] as a tenure in chivalry.[71] But as the actual service was uncertain, and depended upon emergences, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of he legislature suited to those emergences. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less that a mere

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pecuniary rent; and the tenure, instead of knight service, would have then been of another kind, called socage,[72] of which we shall speak in the next chapter.

FOR the present, I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honor, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else, but wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burdens, which (in consequence of the fiction adopted after the conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages they were assessed by themselves in parliament, they might be called upon by the king or lord paramount for aids, whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of relief and primer seizin; and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith[73] very feelingly complains. “when he came to his own, after he was out of wardship, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and plowed to be barren,” to make amend he was yet to pay half a year's profits as a fine for suing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honor of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that poor privilege allowed him, without paying an exorbitant fine for a license of alienation.

A SLAVERY so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of her freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of king James I consented[74] for a proper equivalent to abolish them all; though the plan then proceeded not to effect: in like manner as he had formed a scheme, and began to put it in execution, for removing the feudal grievance of heretable jurisdictions in Scotland,[75] which has since been pursued and effected by the statute 20 Geo. II. c. 43.[76] King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the crown and other lords would sustain, an annual feefarm rent should be settled and inseparably annexed to the crown, and assured to the inferior lords, payable out of every knight's within their respective signories. An expedient, seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages, were destroyed at one blow by the statute 12 Car. II. c. 24. which enacts, “that the court of wards and liveries, and all wardships, liveries, primer seizins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away, And that all fines for alienations, tenures by homage, knights-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of he king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoign,

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copyholds, and the honorary services (without the slavish part) of grand sergeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even Magna Carta itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigor; but the statute of king Charles extirpated the whole, and demolished both root and branches.

NOTES

1. 2 Inst. 296.

2. 1 Inst. L.

3. pag. 47.

4. In the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, etc, which hold directly from the emperor, are called the immediate states of the empire; all other landholders being denominated mediate ones. Mod. Un. Hist. xlii. 61.

5. l. 4. tr. 1. c. 28.

6. *Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libere socagio cum fidelitate tantum*. [Tenements are of two kinds, *frank-tenement*, and *villenage*. And, of frank-tenements, some are held freely in consideration of homage and knight-service; others in free-socage with the service of fealty only.] §. I.

7. *Villenagiorum aliud purum, alium privilegiatum. Qui tenet in puro villenagio faciet quicquid ei praeceptum fuerit, et semper tenebitur ad incerta. Aliud genus villenagii di itur villanum socagium; et hujusmodi villein socmanni – villana faciunt servitia, sed certa et determinata*. [Of villenages some are pure, and others privileged. He that holds in pure villenage shall do whatsoever is commanded him, and always be bound to an uncertain service. The other king of villenage is called *villein-socage*; and these villein-socmen do villein services, but such as are certain and determined.] §. 5.

8. Spelm. Gloss. 219.

9. c. 2. §. 27.

10. Stat. de milit. 1. Edw. II. Co. Litt. 69.

11. Glanvil. l.9. c. 4.

12. Litt. § 95.

13. Co. Litt. 9.

14. *Auxilia fiunt de gratia et non de jure -cum dependeant ex gratia tenentium et non ad voluntatem dominorum*. [Aids arise from favour not from right - since they depend on the good will of the tenant, not on the will of the Lord.] Bracton. l. 2. tr. I.

15. Feud. l. 2. t. 24.

16. 2 Inst. 233.

17. Philips's life of Pole. I. 223.

18. *Erat autem haec inter utrosque officiorum vicissitudo, - ut clientes ad collocandas senatorum filias de suo conferrent; in aeris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent*. [But there was this reciprocity of service between themthat the clients should give a sum of money for marrying the daughters of their lords, pay their debts, and ransom them when taken captive in war.] Paul. Manutius de senatu Romano. C. i.

19. cap. 12. 15.

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20. cap. 15.

21. 1bid. 14.

22. Wright. 99.

23. C. 22, 23, 24.

24. 2 Roll. Abr. 514.

25. "*Haeres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabo eam*." ["An heir shall not redeem his land as he used to do in the time of my brother, but I will release it for a just and lawful relief."] (Text. Ressens. Cap.34.)

26. Glanv. 1. 9. c. 4. Litte. §. 112.

27. Co. Litt.77.

28. Send. 1. 2. 1. 24.

29. State. Marlbr. C. 16. 17 Edw.11. c.3.

30. Staundf. Prerog.12.

31. 1bid.

32. Litt. §.103.

33. Co. Litt.77.

34. Co.Litte. 77.

35. 9 Hen.III. c. 3.

36. Hoveden. Sub Ric. I.

37. 4 Inst. 198.

38. Stat. 32 Hen. VIII. C.46.

39. Vol. I. Pag.392.

40. "*In ipso consilio vel principum aliquis, vel pater, vel propinquus, scuto, frameaque juvenem ornant. Haec apud illos toga, hic primus juventae honos: ante hoc domus pars videntur; mox reipublicae*." ["In that council one of the princes, or the father, or relation, adorns the youth with a spear and buckler: this is the toga among them, the first honor of youth: before this ceremony, he was merely a member of his family, now, he becomes a member of the republic."] Germ. Cap.13.

41. Litt. §. 110.

42. Stat. Mert. C. 6. Co. Litt. 82.

43. Litt. §. 110.

44. Bract. 1.2. c. 37. §.6.

45. Gr.Cuft. 55.

46. cap.6.edit.Oxon.

47. cap. 3. ibid.

48. cap.6.

49. 1.2.c.38. § 1.

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50. Wright. 97.

51. 20 Hen.III.c.6

52. cap. 32.

53. 18 Edw. I. c. I

54. 2 Inst. 66

55. Ibid. 67.

56. Co. Litt.13.

57. Feud.1.2.t.86.

58. 4 Inst.192.

59. Litt. § 153.

60. Ibid. § 158.

61. 2 Inst.233.

62. Litt. § 158.

63. Litt. § 154.

64. Ibid. § 156.

65. "*Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri*." ["Let no scutage be imposed but by the common council of our kingdom.'] Cap.12.

66. cap.37. See Vol.I.pag.136.

67. Old Ten. Tit. Escuage.

68. §. 103.

69. Wrighy.122.

70. *Pro feodo militari reputatur.* [In respect of feudal military policy.] Flet.1.2.

71. .14. § 7.

72. Litt. § 97.120.

73. Commonw.1. 3. c. 5.

74. 4 Inst. 202.

75. Dalrymp of feuds.292.

76. By another statute of the same year (20 Gec II.c.50.) the tenure of wardholding (equivalent to the knight-service of England) is for ever abolished in Scotland.

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CHAPTER 6

Of the Modern English Tenures

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room; since by the statute 123 Car.II. the tenures of socage and frankalmoign, the honorary services of grand sergeanty, and the tenure by copy of court roll were reserved; nay all tenures in general, except frankalmoign, grand sergeanty, and copyhold, were reduced to one general species of tenure, then well known and subsisting, called free and common socage. And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that ancient system; since it is that alone, to which we can recur to explain any seeming, or real, difficulties, that may arise in our present mode of tenure.

THE military tenure, or that by knight-service, consisted of what were reputed the most free and honorable services; but which in their nature were unavoidably uncertain in respect of the time of their performance. The second species of tenure, or free-socage, consisted also of free and honorable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in manner absorbed and swallowed up (since the statute of Charles the second) almost every other species of tenure. And to this we are next to proceed.

II. SOCAGE, in its most general and extensive signification, seems to denote a tenure by any certain and determined service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton;[1] if a man holds by a rent in money, without any escuage or sergeanty, "*id tenementum dici potest socagium*" [that tenure may be called socage]: but if you add thereto any royal service, or escuage to any, the smallest, amount, "*illud dici poterit feudum militare*" ["that shall be called military tenure"]. So too the author of Fleta;[2] "*ex donationibus servitia militaria vel magnae serjantiae non continentibus, oritur nohis quoddam nomen generale, quod est socagium*." ["The general name of socage arises from grants to which military service, or grand sergeanty, is not incident."] Littleton also[3] defines it to be, where the tenant holds his tenement of the lord by any certain service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards[4] he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch,[5] a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20 s. rent; or, by homage, fealty, and 20 s. rent; or, by homage and fealty without rent; or, by fealty and certain corporal service, as plowing the lord's land for three days; or, by fealty only without any other service: for all these are tenures in socage.[6]

BUT socage, as was hinted in the last chapter, is of two sorts: free-socage, where the services are not only certain, but honorable; and villein-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil,[7] and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage. Of this tenure we are first to speak; and this, both in the nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr.

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Somner's etymology of the word;[8] who derives it from the Saxon appellation, *soe*, which signifies liberty or privilege, and, being joined to a usual termination, is called socage, in Latin *socagium*; signifying thereby a free or privileged tenure.[9] This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word denoting (as they tell us) a plow: for that in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plow, sow, or reap for him; but that, in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of socage or plow-service.[10] But this by no means agrees with what Littleton himself tells us,[11] that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plow-service. Besides, even services, confessedly of a military nature and original, (as escuage itself, which while it remained uncertain was equivalent to knight-service) the instant they were reduced to a certainty changed both their name and nature, and were called socage.[12] It was the certainty therefore that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes socage tenure under the name of *fraunke ferme*,[13] tells us, that they are "lands and tenements, whereof the nature of the fee is charged by feoffment out of chivalry for certain yearly services, and in respect whereof neither homage, ward, marriage, nor relief can be demanded." Which leads us also to another observation, that, if socage tenures were of such base and servile original, it is hard to account for the very great immunities which the tenants of them always enjoyed; of highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I and Charles II, a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to fraunke ferme or tenure by socage. We may therefore, I think, fairly conclude in favor of Somner's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself.

TAKING this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty, retained by such persons, as had neither forfeited them to the king, nor been obliged to exchange their tenure for the more honorable, as it was called, but at the same time more burden-some, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure;[14] the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in free and common socage.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands, by certain and invariable rents and duties: and, in particular, petit sergeanty, tenure in burgage, and gavelkind.

WE may remember, that by the statute 12 Car.II. grand sergeanty is not itself totally abolished, but only the slavish appendages belonging to it; for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, etc, at the coronation) are still reserved. Now petit sergeanty bears a great resemblance to grand sergeanty; for as the one is personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. Petit sergeanty,

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as defined by Littleton,[15] consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says,[16] is but socage in effect; for it is no personal service, but a certain rent: and, we may add, it is clearly no predial service, or service of the plow, but in all respects *liberum et commune socagium* [free and common socage]; only, being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit sergeanty. And Magna Carta respects it in this light, when it enacts,[17] that no wardship of the lands or body shall be claimed by the king in virtue of a tenure by petit sergeanty.

TENURE in burgage is described by Glanvil,[18] and is expressly said by Littleton,[19] to be but tenure in socage; and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain.[20] It is indeed only a king o town socage; as common socage, by which other lands are held, is usually of a rural nature. A borough, as we have formerly seen, is distinguished from other towns by the right of sending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificance, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet is impossible ever to have been held by plow-service; since the tenants must have been citizens or burghers, the situation frequently a walled town, the tenement a single house; so that none of the owners was probably master of a plow, or was able to use one, if he had it. The free socage therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting these tenements so held in ancient burgage: the principal and most remarkable of which is that called *Borough-English*, so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil,[21] and by Littleton;[22] *viz.* that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton[23] gives this reason; because the youngest son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors[24] have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right to break the seventh commandment with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest, son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland, (under the name of *mercheta* or *marcheta*) till abolished by Malcolm III.[25] And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent of the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to

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migrate from the father, which one became his heir.[26] So that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Caesar and Tacitus describe. Other special customs there are in burgage tenures; as that the wife shall be endowed of all her husband's tenements,[27] and not of the third part only, as at the common law: and that a man might dispose of his tenements by will,[28] which, in genera, was not permitted after the conquest till the reign of Henry the eighth; though in the Saxon times it was allowable.[29] A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

THE nature of the tenure in gavelkind affords us a still stronger argument. It is universally known what struggles the Kentishmen made to preserve their ancient liberties; and with how much success those struggles were attended. And as it is principally here that we meet with the custom so gavelkind, (though it was and is to be found in some other parts of the kingdom[30]) we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conquest was the general custom of the realm.[31] The distinguishing properties of this tenure are various: some of the principal are these; 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen.[32] 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being, "the father to the bough, the son to the plow."[33] 3. In most places he had a power of devising land by will, before the statute for that purpose was made.[34] 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together;[35] which was indeed anciently the most usual course of descent all over England,[36] though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is held to be only a species of a socage tenure, modified by the custom of the country; being held by suit of court and fealty, which is a service in its nature certain.[37] Wherefore, by a charter of king John,[38] Hubert arch-bishop of Canterbury was authorized to exchange the gavelkind tenures holed of the fee of Canterbury into tenures by knight-service; and by statute 31 Hen.VIII.c.3. for disgavelling the lands of diverse lords and gentlemen in the county of Kent, they are directed to be descendible for the future like other lands, which were never held by service of socage. Now the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere plowmen, or peasants: from all which I think it sufficiently clear, that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

HAVING thus distributed and distinguished the several species of tenure in free socage, I proceed next to show that this also partakes very strongly of the feudal nature. Which may probably arise from its ancient Saxon original; since (as was before observed[39]) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was, and that the rest of the socage tenures differed through England escaped the general fate of other property, partly out of favor and affection to their particular owners, and partly from their own insignificance; since I do not apprehend the number of socage tenures soon after the conquest to have been very considerable, nor their value by any means large; till by successive charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton,[40] their number and value began to swell so far, as to make a distinct, and justly envied, part of our English system of tenures.

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HOWEVER this may be, the tokens of their feudal original will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.

1. IN the first place, then both were held of superior lords; of the king as lord paramount, and sometimes of a subject or mesne lord between the king and the tenant.

2. BOTH were subject to the feudal return, render, rent, or service, of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though perhaps nothing more than bare fealty) and so continues to this day.

3. BOTH were, from their constitution, universally subject (over and above all other render) to the oath of fealty, or mutual bond of obligation between the lord and tenant.[41] Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are held at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reason given by Littleton,[42] that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently has) whether the land be held of the lord or not; and so he may lose his seigniory, and the profit which may accrue to him by escheats and other contingencies.[43]

4. THE tenure in socage was subjects, of common right, to aids for knighting the son and marrying the eldest daughter:[44] which were fixed by the statute Westm. 1.c.36.at 20 s. for every 20£ per annum so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all abolished by the statute 12. Car. II.

5. RELIEF is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5£ or one quarter of the supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small:[45] and therefore Bracton[46] will not allow this to be properly a relief, but *quaedam praestatio loco relevii in recognitionem domini* [a sum of money paid instead of a relief as an acknowledgment of the lord]. So too the statute 28 Edw. I. c.1. declares, that a free sokeman shall give no relief, but shall double his rent after the death of his ancestor, according to that which he has used to pay his lord, and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in socage they were due, even though the heir was under age, because the lord has no wardship over him.[47] The statute of Charles II reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee simple are held by a rent, relief is still due of common right upon the death of the tenant.[48]

6. PRIMER seizin was incident to the king's socage tenants *in capite*, as well as to those by knight-service.[49] But tenancy *in capite* as well as primer seizins, are also, among the other feudal burdens, entirely abolished by the statute.

7. WARDSHIP is also incident to tenure in socage; but of a nature very different from that incident

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to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him shall not belong to the lord of the fee; because, in this tenure no military or other personal service being required, in this tenure no military or other personal service being required, there is no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant: but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend; as was fully explained, together with the reasons for it, in the former book of these commentaries.[50] At fourteen this wardship in socage ceases, and the heir may oust the guardian, and call him to account for the rents and profits:[51] for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular, of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had of much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it; that young heirs, being left at so tender an age to choose their own guardians till twenty one, they might make an improvident choice. Therefore, when almost all the lands of the kingdom were turned into socage tenures, the same statute 12 Car.II.c.24. enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty one. And, if no such appointment be made, the court of chancery will frequently interpose, to prevent an infant heir form improvidently exposing himself to ruin.

8. MARRIAGE, or the *valor maritagii* [value of the marriage], was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage.[52] For the law, in favor of infants, is always jealous of guardians, and therefore in this case it made them account, not only for what they did, but also for what they might, receive on the infants's behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but, the statute having destroyed all values of marriages, this doctrine of course is ceased with them. At fourteen years of out any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts king Edward's laws, that were restored by Henry the first's charter, as might alone convince us that socage was of a higher original than the Norman conquest.

9. FINES for alienations were, I apprehend, due for lands held of the king *in capite* by socage tenure, as well as in case of tenure by knight-service: for the statutes that relate to this point, and Sir Edward Coke's comment on them,[53] speaks generally of all tenants *in capite*, without making any distinction; though now all fines for alienation are demolished by the statute of Charles the second,

10. ESCHEATS are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before-mentioned) subject to no escheats for felony, though they are to escheats for want of heirs.[54]

THUS much for the two grand species so tenure, under which almost all the free lands of lands of the kingdom were held till the restoration in 1660, when the former was abolished and sunk into the latter: so that lands of both sorts are now held by the one universal tenure of free and common

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socage.

THE other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of villenage, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he subdivides into two classes, pure, and privileged, villenage: from whence have arisen two other species of our modern tenures.

III. FROM the tenure of pure villenage have sprung our present copyhold tenures, or tenure by copy of court roll at the will of the lord in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

MANORS are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day:[55] just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest. A manor, *manerium, a manendo* [from remaining], because the usual residence of the owner, seems to have been a district of ground, held by lords or great personages who kept in their own hands so much land as was necessary for the use of their families, which were called *terrae dominicales*, or demesne lands; being occupied by the lord, or *dominus manerii* [lord of the manor], and his servants. The other tenemental lands they distributed among their tenants; which from the different modes of tenure were called and distinguished by two different names. First, book-land, or charter-land, which was held by deed under certain rents and free services, and in effect differed nothing from free socage lands:[56] and from hence have arisen all the freehold which hold of particular manors, and owe suit and service to the same. The other species was called folk-land, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage, which we shall presently describe more at large. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail, as not to leave sufficient to make a jury or homage, that is, two tenants at the least, the manor itself is lost.

BEFORE the statute of *quia emptores* [because purchasers], 18 Edw. I. the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be held of themselves; which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors: and his seigniory is frequently termed an honor, not a manor, especially if it has be longed to an ancient feudal baron, or has been at any time in the hands of the crown. In imitation whereof, these inferior lords began to carve out and grant to other still more minute states, to be held as of themselves, and were so proceeding downwards *in infinitum* [forever]; till the superior lords observed, that by this method of subinfeudation they lost all their feudal profits, of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the terre-tenant, or him who occupied the land. This occasioned the statute of Westm.3.3 or *quia emptores*, 18 Edw. I. to be made; which directs, that upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself

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held it. And from hence it is held, that all manor existing at this day, must have existed by immemorial prescription; or at least ever since the 18 Edw. I. when the statute of *quia emptores* was made. For no new manor can have been created since that statute: because it is essential to a manor, that there be tenants who hold of the lord, and that statute enacts, that for the future no subject shall create any new tenants to hold of himself.

NOW with regard to the sold-land, or estates held in villenage, this was a species of tenure neither strictly feudal, Norman, or Saxon; but mixed and compounded of them all:[57] and which also, no account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks,[58] a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they, who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition.[59] This they called villenage, and the tenants villeins, either from the word *vilis* [vile], or else, as Sir Edward Coke tells us,[60] *a villa* [a village]; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: like the Spartan *belotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honorable employment of mankind.

THESE villeins, belonging principally to lords of manors, were either villeins regardant, that is, annexed to the manor or land; or else they were in gross, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another.[61] They could not leave their lord without his permission; but, if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased: and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices:[62] and these services were not only base, but uncertain both as to their time and quantity.[63] A villein, in short, was in much the same state with us, as lord Molesworth[64] describes to be that of the boors in Denmark, and Stiernhook[65] attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods; but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity.[66]

IN many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord:[67] and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property.[68] For the children of villeins were also in the same state of bondage with their parents; whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife*.[69] In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the

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father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem* [offspring follows the mother]. But no bastard could be born a villein, because by another maxim of our law he is *nullius filius* [son of nobody]; and as he can gain nothing by inheritance, it were hard that he should lose his natural freedom by it.[70] The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill, or maim his villein;[71] though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor or the maim of his own person. Niefes indeed had also an appeal of rape, in case the lord violated them by force.[72]

VILLEINS might be enfranchised by manumission, which is either express or implied: express; as where a man granted to the villein a deed of manumission:[73] implied; as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life, or years:[74] for this was dealing with his villein on the footing of a freeman; it was in some of the instances giving him an action against his lord, and in others vesting an ownership in him entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him;[75] for, as the lord might have a short remedy against his villein, by seizing his goods, (which was more than equivalent to any damages he could recover) the law, which is always ready to catch at any thing in favor of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

VILLEINS, by this and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the good nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands, in spite of any determination of the lord's will. For, though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to show for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called tenants by copy of court roll, and their tenure itself a copyhold.[76]

THUS copyhold tenures, as Sir Edward Coke observes,[77] although very meanly descended, yet come of an ancient house; for, from what has been premised it appears, that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will. Which affords a very substantial reason for the great variety of customs that prevail in different manors, with regard both to the descent of the estates, and the privileges belonging to the tenants. And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished, (though copyholds were reserved) by the statute of Charles II, there was hardly a pure

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villein left in the nation. For Sir Thomas Smith[78] testifies, that in all his time (and he was secretary to Edward VI) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks, and friars, had in their confessions, and specially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was, for one Christian man to hold another in bondage: so that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs; for they also had a scruple in conscience to impoverish and despoil the church so much, as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still." By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders: their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before; though, in general, the villein services are usually commuted for a small pecuniary quit-rent.[79]

As a farther consequence of what has been premised, we may collect these two main principles, which are held[80] to be the supporters of a copyhold tenure, and without which it cannot exist; 1. That the lands be parcel of, and situate within, that manor, under which it is held. 2. That they have been demised, or demisable, by copy of court roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day.

IN some manors, where the custom has been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first in stance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally be the precarious tenure of his lord's will.

THE fruits and appendages of a copyhold tenure, that it has in common with free tenures, are fealty, services (as well in rents as otherwise reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those life also. But, besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter, are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seized them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only.

Wardship, in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian, who usually assigns some relation of he infant tenant to act in his stead: and he, like guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seizins, due on the death of each tenant, others are mere fines for alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and

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in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom: but, even when arbitrary, the courts of law, in favor of the liberty of copyholders, have tied them down to be reasonable in their extent; otherwise they might amount to a *disherison* [disinheritance] of the estate. No fine therefore is allowed to be taken upon descents and alienation, (unless in particular circumstances) of more than two years improved value of the estate.[81] From this instance we Mary judge of the favorable disposition, that the law of England (which is a law of liberty) has always shown to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor:, whereon custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes in an equitable method, and will not suffer the lord to extend his power so far, as to disinherit the tenant.

THUS much for the ancient tenure of pure villenage, and the modern one of copyhold at the will of the lord, which is lineally descended from it.

IV. THERE is yet a fourth species of tenure, described by Bracton under the name sometimes of privileged villenage, and sometimes of villein-socage. This, he tells us,[82] is such as has been held of the kings of England from the conquest downward; that the tenants herein "*villana faciunt servitia, sed certa et determinata*" ["they perform villein services but certain and fixed"]; that they cannot aliene or transfer their tenements by grant or feoffment, any more than our villeins can; but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than exalted species of copyhold, subsisting at this day, *viz,* the tenure in ancient demesne: to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium* [villein socage].

Ancient demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the confessor, or William the conqueror; and so appear to have been by the great survey in the exchequer called domesday book.[83] The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies,[84] continued for a long time pure and absolute villeins, dependent on the will of the lord: and those who have succeeded them in their tenures now differ from common copyholders in only a few points.[85] Others were in great measure enfranchised by the royal favor: being only bound in respect of heir lands to perform some of the better sort of villein services, but those determinate and certain; as, to plow the king's land, to supply his court with provisions, and the like; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them;[86] as, to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated a writ of right close;[87] not to pay toll or taxes; not to contribute to the expenses of knights of the shire; not to be put on juries, and the like.[88]

THESE tenants therefore, though their tenure be absolutely copyhold, yet have an interest equivalent to a freehold: for, though their services were of a base and villenous original,[89] yet the tenants were

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esteemed in all other respects to be highly privileged villeins; and especially in this, that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*it ideo*," say Bracton, "*dicuntur liberi*." ["Therefore they are called free."] Britton also, from such their freedom, calls them absolutely sokemans, and their tenure sokemanries; which he describes[90] to be "by grand sergeanty, nor by Petit, but by simple service, being from their ancient demesne." And the same name is also given them in Fleta.[91] Hence Fitzherbert observes,[92] that no lands; are ancient demesne, but lands held in socage: that is, not in free and common socage, but in this amphibious, subordinate class, of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon predial services, or services of the plow, it may have given cause to imagine that all socage tenures arose from the same original; for want of distinguishing, with Bracton, between free-socage or socage of frank-tenure, and villan-socage or socage of ancient demesne.

LANDS held by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. yet they differ from common copyholds, principally in the privileges before-mentioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton and remaining to this day; *viz.* that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the rest; but must pass by surrender to the lord or his steward, in the manner of common copyholds: yet with this difference,[93] that, in these surrenders of lands in ancient demesne of frank tenure, it is not used to say "to hold at the will of the lord" in their copies, but only "to hold according to the custom of the manor."

THUS have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that, whatever changes and alterations these tenures have in process of time undergone, from the Saxon era to the 12 Car. II, all lay tenures are now in effect reduced to two species; free tenure in common socage; and base tenure by copy of court roll.

I MENTIONED lay tenures only; because there is still behind one other species of tenure, reserved by the statute of Charles II, which is of a spiritual nature, and called the tenure in frankalmoign.

V. TENURE in *frankalmoign*, *in libera eleemosyna*, or free alms, is that, whereby a religious corporation, aggregate or sole, holds lands of the donor to them and their successors for ever.[94] The service, which they were bound to render for these lands was not certainly defined; but only in general to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other services but this[95]) because this divine service was of a higher and more exalted nature.[96] this is the tenure, by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day;[97] the nature of the service being upon the reformation altered, and made conformable to the purer doctrines of the church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shown to religion and religious men in ancient times. Which is also the reason that tenants in frankalmoign were discharged of all other services, except the *trinoda necessitas*, of repairing the

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highways, building castles, and repelling invasions:[98] just as the druids, among the ancient Britons, had *omnium rerum immunitatem*[99] [exemption from all offices]. And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feudal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are held; but merely a complaint to the ordinary or visitor to correct it.[100] Wherein it materially differed from what was called tenure by divine service: in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called free alms; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor.[101] All such donations are indeed now out of use: for, since the statute of *quia emptores*, 18 Edw. I, none but the king can give lands to be held by this tenure.[102] So that I only mention them, because frankalmoign is excepted by name in the statute of Charles II, and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

NOTES

1. 1.2.c.16. § 9.
2. 1.3.c.14. § 9.
3. § 117.
4. § 118.
5. L.147.
6. Litt. § 117,119.
7. 1.3.c.7.
8. Gavelk.138.
9. In like manner Skene in his exposition of the Scots' law, title socage, tells us that it is “anè kind of holding of lands, quhen ony man is infeft freely,”etc.
10. Litt. § 119.
11. § 118.
12. Litt. § 98.120.
13. c. 65.
14. Wright. 211.
15. § 159.
16. § 160.
17. cap.27.
18. Iib.7.cap.3.
19. § 152.
20. Litt. § 162,163.

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21. ubi supra.

22. § 165.

23. § 211.

24. 3 Mod.Pref.

25. Seld.tit.of hon.2.1.47. Reg.Mag. 1.4.c.31.

26. *Pater cunctos filios adultos a se pellebat, praeter unum quem haeredem sui juris relinquebat.* [The father used to send away all his sons when grown up, excepting one who became his heir.] (Walsingh. Upodigm. Neustr.c.1.)

27. Litt. § 166.

28. § 167.

29. Wright.172.

30. Stat.32. Hen.VIII.c.29. Kitch. of

31. *In toto regno, ante ducis adventum, frequens et usitata fuit: postea caeteris adempta, sed privatis quorundam locorum consuetudinibus alibi postea regerminans: Cantianis solum integra et inviolata remansit.* [It was general and customary through the whole kingdom before the arrival of the Duke; afterwards this tenure was abolished with the rest, reviving only in the private customs of certain places: with the Kentish men alone it remained inviolate and entire.] (Analect.1.2.c.7.)

32. Lamb. Peramb. 614.

33. Lamb. 634.

34. F.N.B.198.Cro. Car 361.

35. Litt. § 210.

36. Glanv. 1.7.6.3.

37. wright. 211.

38. Spelm. cea vet. Leg. 355.

39. pag.48.

40. c.66.

41. Litt. § 117.131.

42. § 130.

43. *Eo maxime praestandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur.* [It is chiefly to be taken, lest the right of the lord should be rendered doubtful and obscured by length of time.] (Corvin. Jus feud. l. 2. t. 7.)

44. Co.Litt.91.

45. Litt. § 126.

46. *l.* 2. c. 37. § 8.

47. Litt. § 127.

48. 3 Lev.145.

49. Co.Litt.77.

50. page 449.

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51. Litt. § 123. Co. Litt. 89.

52. Litt. §123.

53. 1 Inst. 43. 2 Inst. 65, 66, 67.

54. Wright. 210

55. Co. Cop. § 2. & 10

56. Co. Cop. § 3.

57. Wright. 215.

58. Introd. Hist.Encl.c0.

59. Wright. 217.

60. § Inst.116.

61. Litt. §

62. Ibid. §172.

63. *Ille qui tenet in villenagio faciet quicquid ei praeceptum fuerit, nec scire debet sero quid facere debet in crastino, et semper tenebitur ad incerta*. [He who holds in villenage shall do whatsoever he is commanded, nor ought he to know on the evening of one day what he must do on the morrow, but shall always be held to an uncertain service.] (Bracton.*l*. 4.tr.1.c.28.)

64. c.8.

65. de jure Sueonum.*l*.2.co.4.

66. Litt. § 177.

67. Co. Litt. 40.

68. Litt. § 202.

69. Litt. § 187.

70. Ibid. § 187, 188.

71. Ibid. § 189, 194.

72. Ibid. ¾.

73. Ibid. § 204.

74. § 204, 5, 6.

75. § 208.

76. F. N. B. 12.

77. Cop. § 32.

78. Commonwealth. B. 3. c. 10

79. In some manors the copyholders were bound to perform the most servile office, as to hedge and ditch the lord's grounds, to lop his trees, to reap his corn, and the like; the lord usually finding them meat and drink, and sometimes (as is still the use in the highlands of Scotland) a minstrel or piper for their diversion. (Rot. Maner. De Edg ware Com. Midd.) As in the kingdom of Whidah, on the slave coast of Africa, the people are bound to cut and carry in the king's corn from off his demesne lands, and are attended by music during all the time of their labor. (Mod. Un. Hist.xvi. 429.)

80. Co. Litt.58.

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81. 2 Charles. Rep.134.
82. *I.* 4. tr.1.c.28.
83. F. N. B. 14, 16.
84. C. 66.
85. F. N. B. 228.
86. 5. Inst. 269.
87. F. N. B. II.
88. Ibid. 14.
89. Gilb. Hist. of the exch.16.& 30.
90. c.66.
91. *l.* 1.c.8.
92. N.B.13.
93. Kitchen on courts. 194.
94. Litt. § 133.
95. Ibid. 131.
96. Ibid.135.
97. Bracton. *l.* 4. tr. 1. c. 28. § 1.
98. Seld. Jan.1. 42.
99. Caesar de bell. Gall.*l.* 6. c. 13.
100. Litt. § 136.
101. Ibid.137.
102. Ibid.140.

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CHAPTER 7

Of Freehold Estates, of Inheritance

THE next objects of our disquisitions are the nature and properties of estates. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant has therein: so that if a man grants all his estate to another and his heirs, every thing that he can possibly grant shall pass thereby.[1] It is called in Latin, *status*; it signifying the condition, or circumstance, in which the owner stands, with regard to his property. And, to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the quantity of interest which the tenant has in the tenement: secondly, with regard to the time at which that quantity of interest is to be enjoyed: and, thirdly, with regard to the number and connections of the tenants.

FIRST, with regard to the quantity of interest which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, month, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates, into such as are free hold, and such as are less than freehold.

AN estate of freehold, *liberum tenementum*, or franktenement, is defined by Britton[2] to be "the possession of the soil by a freeman." And St.Germyn[3] tells us, that "the possession of the land is called in the law of England the franktenement or free-hold." Such estate therefore, and no other, as requires actual possession of the land, is legally speaking freehold: which actual possession can, by the course of the common law, be only given by the ceremony called livery of seizin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seizin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton,[4] that where a freehold shall pass, it behooves to have to have livery of seizin. As therefore estates of inheritance and estates for life could not by common law be conveyed without livery of seizin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates.

ESTATES of freehold then are divisible into estates of inheritance, and estates not of inheritance. The former are again divided into inheritances absolute or fee-simple; and inheritances limited, one species of which we usually call fee-tail.

1. TENANT in fee-simple (or, as he is frequently styled, tenant in fee) is he that has lands, tenements, or hereditaments, to hold to him and his heirs for ever;[5] generally, absolutely, and simply; without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feudum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to allodium;[6] which latter the writers on this subject define to be every man's own land, which he possesses merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof has *absolutum et directum dominium* [absolute and direct ownership], and therefore it is said to be seized

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thereof absolutely *in dominico suo*, in his own demesne. But *feudum*, or fee, is that which is held of some superior, on condition or rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman[7] defines a feud or fee to be the right which the vassal or tenant has in lands, to use the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial propriety of the soil always remaining in the lord. This allodial property no subject in England has;[8] it being a received, and now undeniable, principle in the law, that all the lands in England are held mediately or immediately of the king. The king therefore only has *absolutum et directum dominium*;[9] but all subject's lands are in the nature of *feudum* or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs, which were laid upon the first feudatory when it was originally granted. A subject therefore has only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it,[10] he has *dominium utile*, but not *dominium directum*. And hence it is that, in the most solemn acts of law, we express the strongest and highest estate, that any subject can have, by these words; "he is seized thereof in his demesne, as of fee." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs for ever: yet this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, as of fee; that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

THIS is the primary sense and acceptation of the word fee. But (as Sir Martin Wright very justly observes[11]) the doctrine, "that all lands are held," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word fee in this its primary original sense, in contradistinction to allodium or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A fee therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and, when the term is used simply, without any other adjunct, or has the adjunct of simple annexed to it, (as, a fee, or, a fee-simple) it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seized in fee, he being the feudatory of no man.[12]

TAKING therefore fee for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal.[13] But there is this distinction between the two species of hereditaments; that, of a corporeal inheritance a man shall be said to be seized in his demesne, as of fee; of an incorporeal one he shall only be said to be seized as of fee, and not in his demesne.[14] For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses,[15] their owner has no property, *dominicum*, or demesne, in the thing itself, but has only something derived out of it; resembling the servitudes, or services, of the civil law.[16] The *dominicum* or property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seized as of fee, of a way going over the land, of which Titius is seized in his demesne as of fee. The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though diverse inferior estates may be carved out of it. As if one grants a lease for twenty one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the

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determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in abeyance, that is (as the word signifies) in expectation, remembrance, and contemplation of law; there being no person in esse, in whom it can vest and abide; though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis* [no one is the heir of the living]: it remains therefore in waiting, or abeyance, during the life of Richard.[17] This is likewise always the case of a parson of a church, who has only an estate therein for the term of his life: and the inheritance remains in abeyance.[18] And not only the fee, but the freehold also, may be in abeyance; as, when a parson dies, the freehold of his glebe is in abeyance, until a successor be named, and then it vests in the successor.[19]

The word, heirs, is necessary in the grant or donation in order to make a fee, or inheritance. For if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life.[20] This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness: by which we may remember[21]it was required, that the form of the donation should be punctually pursued; or that, as Crag[22] expresses it, in the words of Baldus, "*donationes sint stricti juris, ne quis plus donasse praesumatur quam in donatione expresserit*." ["Donations should be construed strictly, lest any one be presumed to have given more than is expressed in the donation."] And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by exceptions.[23]

For, 1. It does not extend to devises by will; in which, as they were introduced at the time when the feudal rigor was apace wearing out, a more liberal construction is allowed: and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee has an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he has omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more. 2.Neither does this rule extend to fines or recoveries, considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs:" as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed.[24] 3. In creations of nobility by writ, the peer so created has an inheritance in his title, without expressing the word, "heirs;" for they are implied in the creation, unless it be otherwise specially provided: but in creations by patent, which are *stricti juris* [of strict right], the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so does the successor from the predecessors. Nay, in a grant to a bishop, or other sole spiritual corporation, frankalmoign, the word "frankalmoign" supplies the place of both "heirs" and "successors," *ex vi termini* [from the strict sense]; and in all these cases a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not

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necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one.[25] Lastly, in the case of the king, a fee-simple will vest in him, without the words "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies[26] But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And these we may divide into two sorts: 1. Qualified, or base fees; and 2. Fees conditional, so called at the common law; and afterwards fees-tail, in consequence of the statute *de donis* [of gifts].

I. A base, or qualified, fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A and his heirs, tenants of the manor of Dale; in this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a base or qualified fee in that dignity;[27] and the instant he or his heirs quitted the seigniory of this manor, the dignity was at an end. This estate is fee, because by possibility it may endure for ever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: "*donatio stricta et coarctata*;[28] *sicut certis haeredibus, quibusdarn a successione exclusis*" ["a strict and limited donation; as to certain heirs, others being excluded from the succession"]: as, to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or, to the heirs male of his body, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor.[29] Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser, in our earliest Saxon laws.[30]

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now we must observe, that, when any condition is performed, it is thenceforth entirely gone; and the thing, to which it was before annexed, becomes absolute, and wholly unconditional. So that, as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least, for these three purposes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own issue, but

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also the donor of his interest in the reversion.[31] 2. To subject him to forfeit it for treason: which he could not do, till issue born, longer than for his own life; left thereby the inheritance of the issue, and reversion of the donor, might have been defeated.[32] 3. To empower him to charge the land with rents, commons, and certain other encumbrances, so as to bind his issue.[33] And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and his interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition: for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs of his body, and therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simple took care to aliene as soon as they had performed the condition by having issue; and afterwards re-purchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees: which things, says Sir Edward Coke,[34] though they seem ancient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances, as are not within the statutes of entail, and therefore remain as at the common law.

The inconvenience, which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse, (for such it undoubtedly was) in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second[35] (commonly called the statute *de donis conditionalibus* [of conditional gifts]) to be made; which pays a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revives in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant any issue was born; but the divided the estate, which they denominated a fee-tail;[36] and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion.[37] And hence it is that Littleton tells us,[38] that tenant in fee-tail is by virtue of the statute of Westminster the second.

Having thus shown the original of estates-tail, I now proceed to consider, what things may, or may not, be entailed under the statute *de donis*. Tenements is the only word used in the statute: and this Sir Edward Coke[39] expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which favor of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as, rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and

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certain places, may be entailed.[40] But mere personal chattels, which favor not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands, of the grantor. But in them, if granted to a man and the heirs of his body, the grantee has still a fee conditional at common law, as before the statute; and by his alienation may bar the heir or reversioner.[41] An estate to a man and his heirs for another's life cannot be entailed;[42] for this is strictly no estate of inheritance (as will appear hereafter) and therefore not within the statute *de donis*. Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the lord: but, by the special custom of the manor, a copyhold may be limited to the heirs of the body;[43] for here the custom ascertains and interprets the lord's will.

Next, as to the several species of estates-tail, and how they are respectively created. Estates-tail are either general, or special. Tail-general is where lands and tenements are given to one, and the heirs of his body begotten: which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni* [by form of the gift].[44] Tenant in tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways.[45] I shall instance in only one: as where lands and tenements are given to a man and the heirs of his body, on Mary his now wife to be begotten; here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in fee; but they being heirs to be by him begotten, this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten, (*viz.* Mary his present wife) this makes it a fee-tail special.

Estates, in general and special tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in tail male or tail female. As if hands be given to a man, and his heirs male of his body begotten, this is an estate in tail male general; but if to a man and the heirs female of his body on his present wife begotten, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, *e converso* [on the other hand], the heirs male, in case of a gift in tail female.[46] Thus, if the donee in tail male has a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heirs male.[47] And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man has two estates-tail, the one in tail male, the other in tail female; and he has issue a daughter, which daughter has issue a son; this grandson can succeed to neither of the estates: for he cannot convey his descent wholly either in the male or female line.[48]

As the word heirs is necessary to create a fee, so, in farther imitation of the strictness of the feudal donation, the word body, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If therefore either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his children, or offspring; all these are only estates for life, there wanting the words of inheritance, his heirs.[49] So, on the other hand, a gift to man, and his heirs male, or female, is an estate in fee-simple, and not in fee-tail; for there are no words to

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ascertain the body out of which they shall issue.[50] Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his seed, or to a man and his heirs male; or by other irregular modes of expression.[51]

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio*, or frankmarriage. These are defined[52] to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now by such gift, though nothing but the word frankmarriage is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, frankmarriage, does *ex vi termini* not only create an inheritance, like the word frankalmoign, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee.[53]

The incidents to a tenancy in tail, under the statute Westm. 2. are chiefly these.[54] 1. That a tenant in tail may commit waste on the estate-tail, by stealing timber, pulling down houses, or the like, without being impeached, or called to account, for the same. 2. That the wife of the tenant in tail shall have her dower, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the curtesy of the estate-tail. 4.That an estate-tail may be barred, or destroyed, by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large.

Thus much for the nature of estates-tail: the establishment of which family law (as it is properly styled by Pigott[55]) occasioned infinite difficulties and disputes.[56] Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under color of long leases the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payments, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent books are full: and treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm.[57] But, as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature; and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV: which were then openly declared by the judges to be a sufficient bar of an estate tail.[58] For though the courts had, so long before as the reign of Edward III, very frequently hinted their opinion that a bar might be effected upon these principles,[59] yet it never was carried into execution; till Edward IV observing[60] (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had no families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court:[61] wherein, in consequence

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of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind of *pia fraus* [pious fraud], to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal: and, that these recoveries, however clandestinely begun, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even acts of parliament[62] have by a sidewind countenanced and established them.

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritance, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently re-settled in a similar manner to suit the convenience of families, had address enough to procure a statute,[63] whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

The next attack which they suffered, in order of time, was by the statute 32 Hen. VIII. c. 28. whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines,[64] by the statute 32 Hen. VIII. c. 36. which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII, whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favorably as possible for the defeating of entailed of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they should not be a bar to estates-tail. But the statute of Henry VIII, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20. which enacts, that no feigned recovery had against tenants in tail, where the estate was created by the crown,[65] and the remainder or reversion continues still in the crown, shall be of any force or effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

Lastly, by a statute of the succeeding year,[66] all estates-tail are rendered liable to be charged for

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payment of debts due to the king by record or special contract; as, since, by the bankrupt laws,[67] they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz. c. 4. an appointment[68] by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first, the tenant in tail is now enabled to aliene his lands and tenements by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown: secondly, he is now liable to forfeit them for high treason: and, lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.

NOTES

1. Co. Litt.345.
2. c.32.
3. Dr & Stud.b.2.d.22.
4. § 59.
5. Litt. 1.
6. See pag. 45, 47.
7. of feuds, c.1.
8. Co. Litt. 1.
9. *Praedium domini regis est directum dominium, cujus nullus est author nisi Deus*. [The estate of the king is direct ownership, of which God alone is the author.] Ibid.
10. Ibid.
11. pag.148.
12. Co. Litt. 1.
13. *Feodum est quod quis tenet sibi et haeredibus suis, sive sit tenementum, sive reditus, &c*. [A fee is that estate which a man holds to himself and his heirs, whether it be a tenement or a rent.] Flet. *l*. 5. c. 5. § 7.
14. Litt. § 10.
15. See pag. 20.
16. *Servitus est jus, quo res mea alterius rei vel personae servit*. [Service is that right by which my estate is answerable to the estate or person of another.] Ff.8.1.1.
17. Co. Litt. 342.
18. Litt. § 646.
19. Litt. § 647.
20. Litt. § 1.

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21. See pag. 56.

22. l. 1. t. 9. § 17.

23. Co. Litt. 9, 10.

24. Ibid. 9.

25. See Vol. I. Pag. 472.

26. Ibid. 242.

27. Co. Litt. 27.

28. Flet. l. 3. c. § 5.

29. Plowd. 241.

30. *Si quis terram haereditariam habeat, eam non vendat a cognatis haeredibus suis, si illi viro prohibitum sit, qui eam ab initio acquisivit, ut ita facere nequeat.* [He who possesses an hereditary estate may not, by sale, deprive his heirs by consanguinity of it, if he be prohibited from so doing by him who first acquired the land.] LL. Aelfred. C. 37.

31. Co. Litt. 19. 2 Inst. 233.

32. Co. Litt. Ibid. 2 Inst. 234.

33. Co. Litt. 19.

34. 1 Inst. 19.

35. 13 Edw. I. C. i.

36. The expression fee-tail, or *feudum talliatum*, was borrowed from the feudists; (See Crag. L. t. 10. § 24, 25.) among whom it signified any mutilated or truncated inheritance, from which the heirs general were cut off; being derived from the barbarous verb *taliare*, to cut; from which the French *tailler* and the Italian *tagliare* are formed. (Spelm. Gloss. 531.)

37. 2 Inst. 335.

38. § 13.

39. IInst. 19, 20.

40. 7 Rep. 33.

41. Co. Litt. 19, 20.

42. 2 Vern. 225.

43. 3 Rep. 8.

44. Litt. § 14, 15.

45. Litt. § 16, 26, 27, 28, 29.

46. Ibid. § 21, 22.

47. Ibid. § 24.

48. Co. Litt. 25.

49. Co. Litt. 20.

50. Litt. § 31. Co. Litt. 27.

51. Co. Litt. 9. 27.

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52. Litt. § 17.
53. Ibid. § 19, 20.
54. Co. Litt. 224.
55. Com. Recov. 5.
56. 1 Rep. 131.
57. Co. Litt. 19. Moor. 156. 10 Rep. 38.
58. 1 Rep. 131. 6 Rep. 40.
59. 10 Rep. 37, 38.
60. Pigott. 8.
61. Year Book. 12 Edw. IV. 14. 19. Fitzh. Abr. tit. faux recov. 20. Bro. Abr. ibid. 30. tit. Recov. In value. 19. tit. Taile. 36.
62. 11 Hen. VII. c. 20. 7 Hen. VIII. c. 4. 34 & 35 Hen. VIII. c. 20. 14 Eliz. C. 8. 4 & 5 Ann. c. 16. 14. Geo. II. 20.
63. 26 Hen. VIII. c. 13.
64. 4 Hen. VII. c. 24
65. Co. Litt. 372.
66. 33 Hen. VIII. c. 39. § 75.
67. Stat. 21 Jac. I. C. 19.
68. 2 Vern. 453. Chan. Pree 16

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CHAPTER 8

Of Freeholds, Not of Inheritance

We are next to discourse of such estates of freehold, as are not of inheritance, but for life only. And, of these estates for life, some are conventional, or expressly created by the act of the parties; others merely legal, or created by construction and operation of law.[1] We will consider them both in their order.

I. Estates for life, expressly created by deed or grant, (which alone are properly conventional) are where a lease is made of lands or tenements to a man, to hold for more lives than one: in any of which cases he is styled tenant for life; only, when he holds the estate by the life of another, he is usually called tenant *pur auter vie*[2] [for another's life]. These estates for life are, like inheritances, of a feudal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen[3]) was not in its original hereditary. They are given or conferred by the same feudal rites and solemnities, the same investiture or livery of seizin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

Estates for life may be created, not only by the express word before-mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to A. B. the manor of Dale, this makes him tenant for life.[4] For though, as there are no words of inheritance, or heirs, mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life of the grantee;[5] in case the grantor has authority to make such a grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor,[6] unless in the case of the king.

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone.[7] Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally, it may also determine by his civil death; as if he enters into a monastery, whereby he is dead in law:[8] for which reason in conveyances the grant is usually made "for the "term of a man's natural life;" which can only determine by his natural death.[9]

The incidents to an estate for life, are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those, which are created by act and operation of law.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon

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the land demised to him reasonable estovers[10] or botes.[11] For he has a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber or do other waste upon the premises:[12] for the destruction of such things, as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance.

2.Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such determination is contingent and uncertain.[13] Therefore if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements*, or profits of the crop: for the estate was determined by the act of God; and it is a maxim in the law, that *actus Dei nemini facit injuriam* [the act of God injures no man]. The representatives therefore of the tenant for life shall have the emblements, to compensate for the labor and expense of tilling, manuring, and sowing, the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. wherefore, by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but, if he died between the beginning of March and the end of August, the heirs of the tenant received the whole.[14] From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestuy que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule, if a life-estate be determined by the act of law. Therefore, if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life) and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii* [from the bond of matrimony], the husband shall have the emblements in this case; for the sentence of divorce is the act of law.[15] But if an estate for life be determined by the tenant's own act, (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry) in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements.[16] The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit: but it is otherwise of fruit-trees, grass, and the like; which are not planted annually at the expense and labor of the tenant, but are either the permanent, or natural, profit of the earth.[17] For even when a man plants a tree, he cannot be perfumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11.For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

3. A third incident to estates for life relates to the under-tenants or lessees. For they have the same, nay greater indulgences, than their lessors, the original tenants for life. the same; for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place:[18] and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee who is a third person. as in the case of a woman who holds *durante viduitate* [during widowhood]; her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she

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then marries, this her act shall not deprive the tenant of his emblements, who is a stranger and could not prevent her.[19] The lessees of tenants for life had also at the common law another most unreasonable advantage; for, at the death of their lessors the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to any body for the occupation of the land since the last quarter day, or other day assigned for payment of rent.[20] To remedy which it is now enacted,[21] that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of rent, from the last day of payment to the death of such lessor.

II. The next estate for life is of the legal kind, as contradistinguished from conventional; *viz.* that of tenant in tail after possibility of issue extinct. This happens, where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct; in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue;[22] in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely tenant in fee-tail special, that would not have distinguished him from others; and besides he has no longer an estate of inheritance, or fee,[23] for he can have no heirs, capable of taking *per formam doni* [by form of the gift]. Had it called him tenant in tail without issue, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled tenant in tail without possibility of issue, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of tenant in tail after possibility of issue extinct, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them.[24] A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old.[25]

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as, not to be punishable for waste, etc:[26] or, he is tenant in tail, with many of the restrictions of a tenant for life; as, to forfeit his estate if he alienes it in fee-simple:[27] whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner; who is not concerned in interest, till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

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III. Tenant by the curtesy of England, is where a man marries a woman seized of lands or tenements in fee-simple or fee-tail; that is, of any estate of inheritance; and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England.[28]

This estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is said in the mirrour[29] to have been introduced by king Henry the first: but it appears also to have been the established law of Scotland, wherein it was called *curialitas*:[30] so that probably our word curtesy was understood to signify rather an attendance upon the lord's court or *curtis*, (that is, being his vassal or tenant) than to denote any peculiar favor belonging to this island. And therefore it is laid down[31] that, by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone. It is likewise used in Ireland, by virtue of an ordinance of king Henry III.[32] It also appears[33] to have obtained in Normandy; and was likewise used among the ancient Almains or Germans.[34] And yet it is not generally apprehended to have been a consequence of feudal tenure,[35] though I think some substantial feudal reasons may be given for its introduction. For, if a woman seized of lands has issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it: and therefore the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant.[36] As soon therefore as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis* [court peers], and was called tenant by the curtesy initiate; and this estate being once vested in him by the birth of the child, was not liable to be determined by the subsequent death or coming of age of the infant.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seizin of the wife, issue, and death of the wife.[37] 1. The marriage must be canonical, and legal. 2. The seizin of the wife must be an actual seizin, or possession of the lands; not a bare right to possess, which is a seizin in law, but an actual possession, which is a seizin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seizin of the wife; as in case of an advowson, where the church has not become void in the life time of the wife, which a man may hold by the curtesy, because it is impossible to have had actual seizin of it; and *impotentia excusat legem* [want of power excuses the law].[38] If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the king by prerogative is entitled to them, the instant she herself has any title: and since she could never be rightfully seized of these lands, and the husband's title depends entirely upon her seizin, the husband can have no title as tenant by the curtesy.[39] 3. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying indeed is the strongest evidence of its being born alive; but it is not the only evidence.[40] The issue also must be born during the life of the mother; for, if the mother dies in labor, and the Caesarean operation is performed, the husband in this case shall not be tenant by the curtesy: because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate, being once so vested, shall not afterwards be taken from him.[41] In gavelkind lands, a husband may be tenant by the curtesy without having any issue.[42] Therefore if a woman be tenant in tail male, and has only a daughter born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male.[43] And this seems to be the true reason, why the husband cannot be

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tenant by the curtesy of any lands of which the wife was not actually seized: because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the ancestor of any land, whereof the ancestor was not actually seized; and therefore, as the husband has never begotten any issue that curtesy.[44] And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture: for, whether it were born before or after the wife's seizin of the lands, whether it be living or dead at the time of the seizin, or at the time of the wife's decease, the husband shall be tenant by the curtesy.[45] The husband by the birth of the child becomes (as was before observed) tenant by the curtesy initiate,[46] and may do many acts to charge the lands; but his estate is not consummate till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.[47]

IV. Tenant in dower is where the husband of a woman is seized of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seized during the coverture, to hold to herself for the term of her natural life.[48]

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*; which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there any thing in general more different, than the regulation of landed property according to the English, and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of Edmond,[49] the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands, with a proviso that she remained chase and unmarried;[50] as is usual also in copyhold dowers, or free bench. Yet some[51] have ascribed the introduction of dower to the Normans, as a branch of their local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens, tertia* [third part],[52] and *dotalitium* [dower]) by the emperor Frederick the second;[53] who was contemporary with our king Henry III. It is possible therefore that it might be with us the relic of a Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals.[54] However this be, the reason, which our law gives for adopting it, is a very plain and a sensible one; for the sustenance of the wife, and the nurture and education of the younger children.[55]

In treating of this estate, let us, first, consider, who may be endowed; secondly, of what she may be endowed; thirdly, the manner how she shall be endowed; and, fourthly, how dower may be barred or prevented.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos* [where there is no marriage there is no dower due].[56] But a divorce *a mensa et thoro* [from bed and board] only does not destroy the dower;[57] no, not even for adultery itself, by the common law.[58] Yet now by the statute Westm.2[59] if a woman elopes from her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. It was formerly held,

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that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy:[60] but as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde,[61] that, if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may: though Britton[62] gives it another turn; *viz.* that it is presumed the wife was privy to her husband's crime. However, the statute I Edw. VI. c. 12. abated the rigor of the common law in this particular, and allowed the wife her dower. But a subsequent statute[63] revived this severity against the widows of traitors, who are now barred of their dower, but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands.[64] The wife must be above nine years old at her husband's death, otherwise she shall not be endowed:[65] though in Bracton's time the age was indefinite, and dower was then only due, "*si uxor possit dotem promereri, et virum sustinere*" ["if the wife is entitled to dower and marriageable"].[66]

2. We are next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seized in fee-simple or fee-tail at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir[67]Therefore if a man, seized in fee-simple, has a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue, that she could have, could by any possibility inherit them.[68] A seizin in law of the husband will be as effectual as a seizin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seizin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seized in deed.[69] The seizin of the husband, for a transitory instant only, when the same act which gives him the estate conveys it also out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the same fine) such a seizin will not entitle the wife to dower:[70] for the land was merely *in transitu* [passing through], and never rested in the husband. But, if the land abides in him for a single moment, it seems that the wife shall be endowed thereof.[71] And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before-mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle, built for defense of the realm:[72] nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint; the common would be doubly stocked.[73] Copyhold estates also are not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free-bench.[74] But, where dower is allowable, it matters not, though the husband aliene the lands during the coverture; for he alienes them liable to dower.[75]

3. Next. As to the manner in which a woman is to be endowed. There are now subsisting four species of dower; the fifth, mentioned by Littleton,[76] *de la plus belle* [of the handsomest], having been abolished together with the military tenures, of which it was a consequence. 1. Dower by the

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common law; or that which is before described. 2. Dower by particular custom;[77] as that the wife shall have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiae* [at the church door]:[78] which is where tenant in fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coke in his translation adds) troth plighted between them, does endow his wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same: on which the wife, after her husband's death, may enter without farther ceremony. 4. Dower *ex assensu patris* [by father's assent];[79] which is only a species of dower *ad ostium ecclesiae*, made when the husband's father is alive, and the son by his consent, expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) be made[80] *in facie ecclesiae et ad ostium ecclesiae; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere conjugia*. [In the face of the church, and at the church door; for those made on a death-bed, in a chamber or elsewhere, where the nuptials have been private, are not valid.]

It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before-mentioned; *viz.* a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I, this condition, of widowhood and chastity, was only required in case the husband left any issue:[81] and afterwards we hear no more of it. Under Henry the second, according to Glanvil,[82] the dower *ad ostium ecclesiae* was the most usual species of dower; and here, as well as in Normandy,[83] it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feudal rigor, was the husband allowed to endow her *ad ostium ecclesiae* with more than the third part of the lands whereof he then was seized, though he might endow her with less; lest by such liberal endowments the lord should be defrauded of his wardships and other feudal profits.[84] But if no specific donation was made at the church porch, then she was endowed by the common law of the third part (which was called her *dos rationabilis* [reasonable dower]) of such lands and tenements, as the husband was seized of at the time of the espousals, and no other; unless he specially engaged before the priest to endow her of his future acquisitions:[85] and, if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower[86] in lands which he afterwards acquired.[87] In king John's Magna Carta, and the first charter of Henry III.,[88] no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217, and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of all such lands as the husband had held in his life time:[89] yet, in case of a specific endowment of less *ad ostium ecclesiae*, the widow had still no power to waive it after her husband's death. And this continued to be law, during the reigns of Henry III. and Edward I.[90] In Henry IV's time it was denied to be law, that a woman can be endowed of her husband's goods and chattels:[91] and, under Edward IV, Littleton lays it down expressly, that a woman may be endowed *ad ostium ecclesiae* with more than a third part;[92] and shall have her election, after her husband's death, to accept such dower, or refuse it and betake herself to her dower at common law.[93] Which state of uncertainty was probably the reason, that these specific dowers, *ad ostium ecclesiae* and *ex assensu patris*, have since fallen into total disuse.

I proceed therefore to consider the method of endowment, or assigning dower, by the common law, which is now the only usual species. By the old law, grounded on the feudal exactions, a woman

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could not be endowed without a fine paid to the lord: neither could she marry again without his license; lest she should contract herself, and so convey part of the feud, to the lord's enemy.[94] This license the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But, to remedy these oppressions, it was provided, first by the charter of Henry I,[95] and afterwards by Magna Carta,[96] that the widow shall pay nothing for her marriage, nor shall be distrained to marry afresh, if she chooses to live without a husband; but shall not however marry against the consent of the lord: and farther, that nothing shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's quarantine; a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other.[97] The particular lands to be held in dower, must be assigned[98] by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so held. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation or under-tenancy, completed by this investiture or assignment: which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it.[99] If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but, if it be indivisible, she must be endowed specially; as, of the third part of the profits of an office, the third sheaf of tithe, and the like.[100]

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for, the claim of the wife to her dower happens very seldom: for, the claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the ancient law respecting dower *ad ostium ecclesiae*, which has occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to inquire, lastly,

4. How dower may be barred or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before-mentioned, but also by detaining the title deeds, or evidences of the estate from the heir; until she restores them:[101] and, by the statute of Gloucester,[102] if a dowager alienes the land assigned her for dower, she forfeits it ipso facto, and the heir may recover it by action. A woman also may be barred of her dower, by levying a fine or suffering a recovery of the lands, during her coverture.[103] But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. c. 10.

A jointure, which strictly speaking signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke;[104] “a competent livelihood of freehold “for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least.” This description is framed from the purview of the statute 27 Hen. VIII. c. 10. before-mentioned; commonly called the statute of uses, of which we shall speak fully hereafter. At

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present I have only to observe, that, before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the use, or profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the use of lands in absolute fee-simple, yet the wife was not entitled to any dower therein; he not being seized thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy or jointure; which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained, that such as had the use of lands, should, to all intents and purposes, be reputed and taken to be absolutely seized and possessed of the soil itself. In consequence of which legal seizin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure; had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower.[105] But then these four requisites must be punctually observed. 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her after marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiae*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statue) have her dower pro tanto at the common law.[106]

There are some advantages attending tenants in dower that do not extend to jointresses; and so, *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and here is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt; if contracted during the coverture.[107] But, on the other hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiae*, which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state: whereas no small trouble and a very tedious method of proceeding, is necessary to compel a legal assignment of dower.[108] And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow.[109] Wherefore Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiae*, the most eligible species of any.

NOTES

1. Wright. 190.
2. Litt. § 56.
3. pag. 55.
4. Co. Litt. 42.

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5. Ibid.
6. Ibid. 36.
7. Co. Litt. 42.3 Rep. 20.
8. 2 Rep. 48.
9. See Vol. I. Pag. 129.
10. See pag 25.
11. Co. Litt. 41.
12. Ibid. 53.
13. Ibid. 55.
14. Feud. l. 2. t. 28.
15. 5 Rep. 116.
16. Co. Litt. 55.
17. Co. Litt. 55, 56.1 Roll. Abr. 728.
18. Co. Litt. 55.
19. Cro. Eliz. 461.1 Roll. Abr. 727.
20. 10 Rep. 127.
21. Stat. 11 Geo. II. C. 19. § 15.
22. Litt. § 32.
23. 1 Roll. Rep. 184.ii. Rep. 80.
24. Co. Litt. 28.
25. Litt. § 34.Co. Litt. 28.
26. Co. Litt. 27.
27. Ibid. 28.
28. Litt. § 35, 52.
29. c. i. § C.
30. Crag. L. 2. t 19. § 4.
31. Litt. § 90. Co. Litt. 30. 67.
32. Pat. IiH. III. m. 30. in 2 Bac. Abr. 659.
33. Grand Coustum. C. 119.
34. Lindenbrog. LL. Alman. T. 92.
35. Wright. 294.
36. F. N. B. 143.
37. Co. Litt. 30.

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38. Ibid. 29.

39. Co. Litt. 30. Plowd. 263.

40. Dyer. 25.8 Rep. 34.

41. Co. Litt. 29.

42. Ibid. 30.

43. Litt. § 56.

44. Co. Litt. 29.

45. Ibid. 40.

46. Ibid. 29.

47. Ibid. 30.

48. Ibid.

49. Litt. § 36.

50. Wilk. 75.

51. Somner. Gavelk. 51. Co. Litt. 33. Bro. Dower. 70.

52. Wright. 192.

53. Crag. L. 2. t. 22. § 9.

54. Ibid.

55. Mod. Un. Hist. xxxii. 91.

56. Bract. l. 2. c. 39.Co. Litt. 30.

57. Bract. l. 2. c. 39.§ 4.

58. Co. Litt. 32.

59. Yet, among the ancient Goths, an adulteress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri*. [Of her dower and thirds from the moveable goods of her husband.] (Stiernh. l. 3. c. 2.)

60. 13 Edw. I. c. 34.

61. Co. Litt. 31.

62. P. C. b. 3. c. 3.

63. c. 110.

64. 5 & 6 Edw. VI. c. II.

65. Co. Litt. 31.

66. Litt. § 36.

67. l. 2. c. 9. § 3.

68. Litt. § 36. 53.

69. Ibid. § 53.

70. Co. Litt. 31.

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71. This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seized of an estate by survivorship, in consequence of which seizin his widow had a verdict for her dower. (Cro. Eliz. 503.)

72. Co. Litt. 31. 3 Lev. 401.

73. Co. Litt. 32. 1 Jon. 315.

74. 4 Rep. 22.

75. Co. Litt. 32.
76. § 48, 49.

77. Litt. § 37.

78. Ibid. § 39.

79. Ibid. § 40.

80. Bracton. l. 2. c. 39. § 4.

81. *Si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam habebit — si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitimè servaverit.* [If the wife survive her husband and there be no children she shall have her dower — but if there be children she shall have her dower only so long as she lives chastely.] (Cart. Hen. I. A. D. 1101. Introd. To great charter, edit. Oxon. Pag. Iv.)

82. l. 6. c. 1. & 2.

83. Gr. Coustum. C. 101.

84. Bract. l. 2. c. 39. § 6.

85. *De questu suo*, (Glanv. Ibid.) *de terris acquisitis et acquirendis*. [Of his lands already in possession, and which may be acquired hereafter.] (Bract. ibid.)

86. Glanv. C. 2.

87. When special endowments were made *ad ostium ecclesiae*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, (*quod dotat eam de tali manerio cum pertinentiis, &c*. [That I will endow her of such a manor with its appurtenances, etc.] (Bract. ibid) and therefore in the old York ritual (Seld. Ux. Hebr. L. 2. c. 27) there is, at this part of the matrimonial service, the following rubric; "*sacerdos interroget dotem mulieris; et, si terra ei in dotem detur, tunc dicatur psalmus iste, &c*." ["The priest shall ask what is the woman's dower; and if land be given to her for her dower, then let that psalm be read, etc."] When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terries et tenementis* [Where any one shall have endowed his wife generally, with all his lands and tenements]; (Bract. ibid.) the husband seems to have said, "with all my lands and tenements I thee endow;" and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "with all my worldly goods" (or, as the Salisbury ritual has it, with all "my worldly chatel) I thee endow;" which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by Magna Carta, cap. 26. and will be farther treated of in the concluding chapter of this book: though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

88. A. d. 1216. c. 7. edit. Oxon.

89. *Assignetur autem ei pro dote sua tertia pars totius terrae mariti sui quae sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesia*. [But the third part of all the lands of which her husband was possessed in his lifetime shall be assigned to her for her dower, except she has been endowed with less at the church door.] C. 7. (Ibid.)

90. Bract. *ubi supr*. Britton. C. 101, 102. Flet. L. 5. c. 23. § 11, 12.

91. P. 7 he. IV. 13, 14.

92. § 39.F. N. B. 150.

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93. § 41.

94. Mirr. C. i. § 3.

95. ubi supra.

96. cap. 7.

97. It signifies, in particular, the forty days, which persons coming from infected countries are obliged to wait, before they are permitted to land in England.

98. Co. Litt. 34, 35.

99. Co. Litt. 34. 35.

100. Ibid. 32.

101. Ibid. 39.

102. 6. Edw. I. c. 7.

103. Pig. Of recov. 66.

104. 1 Inst. 36.

105. 4 Rep. 1, 2.

106. These settlements, previous to marriage, seem to have been in use among the ancient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account. "*Dotem non uxor marito, sed uxori maritus affert; intersunt parentes et propinqui, et munera probant*." ["The wife does not bring the portion to the husband, but the husband to the wife; the parents and relations are present and approve of the gifts."] (de mor- erm. C. 18.) And Caesar, (de bello. Balico, l. 6. c. 18.) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure. "*Viri, quantas pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis bonis, aestimatione facta, cum dotibus communicant. Hujus omnis pecuniae conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit*." ["Whatever portion a wife has brought to her husband, an estimate being made, he adds as much from his own goods. An account is taken of all this money jointly, and the produce laid by. The share of both, with all the profits that have accrued, falls to the survivor."] The dauphin's commentator on Caesar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (Nov. 97.) with regard to the provision for widows among the Romans: but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

107. Co. Litt. 31. a. F. N. B. 150.

108. Co. Litt. 36.

109. Ibid. 37.

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CHAPTER 9

Of Estates, Less than Freehold

Of estates, that are less than freehold, there are three sorts; 1. Estates for years: 2. Estates at will: 3. Estates by sufferance.

I. An estate for years is a contract for the possession of lands or tenements, for some determinate period: and it happens where a man lets them to another for the term of a certain number of years, agreed upon between the lessor and the lessee,[1] and the lessee enters thereon.[2] If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of.[3] And this may, not improperly, lead us into a short explanation of the division and calculation of time by the English law.

The space of a year is a determinate and well-known period, consisting commonly of 365 days: for, though in bissextile or leap-years it consists properly of 366, yet by the statute 21 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty eight days, the supposed revolution of the moon, thirteen of which make a year; or, as calendar months, of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for “twelve month” in the singular number, it is good for the whole year.[4] For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution. In the space of a day all the twenty four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes.”[5] Therefore, if I am bound to pay it before twelve o'clock at night; after which the following day commences. But to return to estates for years.

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of to little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated, by a common recovery suffered by the tenant of the freehold;[6] which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

While estates for years were thus precarious, it is no wonder that they were usually very short, like

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our modern leases upon rack rent; and indeed we are told[7] that by the ancient law no leases for more than forty years were allowable. because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if it ever existed, was soon antiquated: for we may observe, in Madox's collection of ancient instruments, some leases for years of a pretty early date, which considerable exceed that period;[8] and long terms, for three hundred years at least, were certainly in use in the time of Edward III.,[9] and probably of Edward I.[10] But certainly, when by the statute 21 Hen. VIII. c. 15. the tremor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, terminus, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning, and certain end.[11] But *id certum est, quod certum reddi potest* [that is certain which can be made certain]: therefore if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years;[12] for though it is at present uncertain, yet when J. S. has named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease.[13] A lease for so many years as J. S. shall live, is void from the beginning;[14] for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he shall so long continue parson, is good:[15] for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S. or his ceasing to be parson there.

We have before remarked, and endeavored to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even it be *pur auter vie* [for another's life], is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate.[16] Hence it follow, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it cannot be created at common law without livery of seizin, or corporal possession of the land: and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter.[17] And, because no livery of seizin is necessary to a lease for years, such lessee is not said to be seized, or to have true legal seizin, of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his interest in the term, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then and not before vested in him, and he is possessed, not properly of the land, but of the term of years:[18] the possession or seizin of the land remaining still in him who has the freehold. Thus the word, term, does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease: and therefore the term may expire, during the

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continuance of the time; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A for the term of three years, and after the expiration of the said term to B for six years, and A surrenders or forfeits his lease at the end of one year, B's interest shall immediately take effect: but if the remainder had been to B from and after the expiration of the said three years, or from and after the expiration of the said three years, or from and after the expiration of the said time, in this case B's interest will not commence till the time is fully elapsed, whatever may become of A's term.[19]

Tenant for term of years has incident to, and inseparable from his estate, unless by special agreement, the same estovers, which we formerly observed[20] that tenant for life was entitled to; that is to say, house-bote, fire-bote, plow-bote, and hay-bote:[21] terms which have been already explained.[22]

With regard to emblements, or profits of land sowed by tenant for years, there is this difference between him, and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration f his term, and therefore it was his own folly to sow what he never could reap the profits of.[23] But where the lease for years depends upon an uncertainty; as, upon the death of the lessor, being himself only tenant for life, or being a husband seized in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases, the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner, that a tenant for life or his executors shall be entitled thereto.[24] Not so, if it determine by the act of the party himself; as if tenant for years does any thing that amounts to a forfeiture: in which case the emblements shall go to the lessor, and not to the lessee, who has determined his estate by his own default.[25]

II. The second species of estates not freehold are estates at will. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession.[26] Such tenant has no certain indefeasible estate, nothing that can be assigned by him to any other; for that the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant, so that either of them may determine his will, and quit his connections with the other at his own pleasure.[27] Yet this must be understood with some restriction. For, if the tenant at will sows his land, and the landlord before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits.[28] And this for the same reason, upon which all the cases of emblements turn; *viz.* the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.[29]

What act does, or does not, amount to a determination of the will on either side, has formerly been mater of great debate in our courts. But it is now, I think settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either

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be made upon the land,[30] or notice must be give to the lessee[31]) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber,[32] taking a distress for rent and impounding them thereon,[33] or making a feoffment, or lease for years of the land to commence immediately;[34] any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure;[35] or, which is *instar omnium* [equal to all], the death or outlawry, of either lessor or lessee;[36] puts an end to or determines the estate at will.

The law is however careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements before-mentioned; and, by a parity of reason, the lessee after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils.[37] And, if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year.[38] And, upon the same principle, courts of law have of late years leant as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other.

There is one species of estates at will, that deserves a more particular regard than any other; and that is, an estate held by copy of court roll; or, as we usually call it, a copyhold estate. This, as was before observed,[39] was in its original and foundation nothing better than a mere estate at will. But, the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom, being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom, as a tenant at will, the custom having arisen from a series of uniform wills. And therefore it is rightly observed by Calthorpe,[40] that "copyholders and customary tenants differ not so much in nature as in name: for although some be called copyholders, some customary, some tenants by the virge, some base tenants, some bond tenants, and some by one name and some by another, yet do they all agree in substance and kind of tenure: all the said lands are held in one general kind, that is, by custom and continuance of time; and the diversity of their names does not alter the nature of their tenure."

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor; which customs differ as much as the humor and temper of the respective ancient lords, (from whence we may account for their great variety) such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, to hold united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition: subject however to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulg[at]ed by immemorial

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custom, has declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the nonpayment of a fine, and the like. Yet none of these interests amount to freehold; for the freehold of the whole manor abides always in the lord only,[41] who has granted out the use and occupation, but not the corporal seizin or true possession, of certain parts and parcels thereof, to these his customary tenants at will.

The reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein.[42] The lords therefore. Though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes by descendible to their issue, yet did not care to manumit them entirely; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord, should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposes it to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing the usual services, but yet continued to be styled in their admissions tenants at the will of the lord,) the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest: and therefore continued, and still continues, to determine, that the freehold of lands so held abides in the lord of the manor, and not in the tenant: for though he really holds to him and his heirs for ever, yet he is also said to hold at another's will. But, with regard to certain other copyholders of free or privileged tenure, which are derived from the ancient tenants in villein-socage,[43] and are not said to hold at the will of the lord, but only according to the custom of the manor, there is no such absurdity in allowing them to be capable of enjoying a freehold interest; and therefore the law does not suppose the freehold of such lands to rest in the lord of whom they are held, but in the tenants themselves;[44] who are allowed to have freehold in the rest, though not a freehold tenure.

However, in common cases, copyhold estates are still ranked (for the reasons above – mentioned) among tenancies at will; though custom, which is the life of the common law, has established a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himself, in the tenements held of the manor: nay sometimes even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and in other respects, particularly in the clearness and security of his title, to be frequently in a better situation.

III. An estate at sufferance, is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man makes a lease at will, and dies, the estate at will is thereby determined; but if the tenant continues possession, he is tenant at sufferance.[45] But no man can be tenant at sufferance against the king, to whom no laches, or neglect, in not entering and ousting the tenant, is ever imputed by law: but his tenant, so holding over, is considered as an absolute intruder.[46] But, in the case of a subject, this

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estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for, before entry, the cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger:[47] and the reason is because the tenant being once in by a lawful title, the law (which perfumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortuous, or, in common language, wrongful.

Thus stands the law, with regard to tenants by sufferance; and landlords are obliged in these cases to make formal entries upon their lands,[48] and recover possession by the legal process of ejectment: and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II. c.2. in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall willfully hold over after the determination of the term, and demand made in writing for recovering the possession of the premises, by him to whom the remainder or reversion thereof hall belong; such person, so holding over, shall pay, for the time he continues, at the rate of double the yearly value of the lands so detained. This has almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement.

NOTES

1. We may here mark, once for all, that the terminations of "-or" and "-ee" obtain. In law, the one an active, the other a passive signification; the former usually denoting the doer of any act, the latter him to whom it is done: the feoffor is he that takes a feoffment; the feoffee is he to whom it is made: the donor is one that gives lands in tail; the donee is he who receives it: he that grants a lease is denominated the lessor; and he to whom it is granted the lessee. (Litt. § 57.)

2. Ibid. 58.

3. Ibid. 67.

4. 6 Rep. 61.

5. Co. Litt. 135.

6. Co. Litt. 46.

7. Mirror. C.2. § 27. co. Litt. 45, 46.

8. Madox *Formulare Anglican*. no. 239. fol. 140. Demise for eighty years, 21 Ric. II . . . Ibid. no. 245. fol. 146: for the like term, A. D. 1429 . . . Ibid. no. 248. fol. 148. for fifty years, 7 Edw. IV.

9. 32 Aff. Pl. 6.

10. Stat. of mortmain, 7 Edw. I.

11. Co. Litt. 45.

12. 6 Rep. 35.

13. Co. Litt. 46.

14. Ibid. 45.

15. Ibid.

16. Ibid. 46.

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17. 5 Rep. 94.

18. Co. Litt. 46.

19. Ibid. 45.

20. pag. 122.

21. Co. Litt. 45.

22. pag. 35.

23. Litt. § 68.

24. Co. Litt. 56.

25. Ibid. 55.

26. Litt § 68.

27. Co. Litt. 55.

28. Co. Litt. 56.

29. Ibid. 55.

30. Ibid.

31. 1 Ventr. 248.

32. Co. Litt. 55.

33. Ibid. 57.

34. 1 Roll. Abr. 860.2 Lev. 88.

35. Co. Litt. 57.

36. 5 Rep. 116. Co. Litt. 57. 62.

37. Litt. § 69.

38. Salk. 414.1 Sid. 339.

39. pag. 93.

40. on copyholds. 51. 54.

41. Litt. § 81. 2 Inst. 325.

42. Mirr. c. 2. § 28. Litt. § 204, 5, 6.

43. See page 98, etc.

44. Fitzh. Abr. tit. Corone. 310. custom. 12. Bro. Abr. tit. Custom. 2. 17. tenant per copie. 22. 9 Rep. 76. Co. Litt. 59. Co. Copyh. § 32. Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. Carth. 432. Lord Raym 1225.

45. Co. Litt. 57.

46. Ibid.

47. Ibid.

48. 5 Mod. 384.

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CHAPTER 10

Of Estates upon Condition

BESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate upon condition; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.[1] And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of them selves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates then upon condition, thus understood, are of two sorts: 1. Estates upon condition implied: 2. Estates upon condition expressed: under which last may be included, 3. Estates held in *vadio*, *gage*, or pledge: 4. Estates by statute merchant or statute staple: 5. Estates held by *elegit*.

1. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office,[2] on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person.[3] For an office, either public or private, may be forfeited by mis-user or non-user; both of which are breaches of this implied condition. 1. By mis-user, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By non-user, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture: but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby.[4] For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention; but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief; upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.[5]

Upon the same principle proceed all the forfeitures which are given by law of life estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, *viz.* that they shall not attempt to create a greater estate then they themselves are entitled to.[6] So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feudal donation.

II. An estate on condition expressed in the grant itself, is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition.[7] These conditions are therefore either precedent, or subsequent. Precedent are such as

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must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or nonperformance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no estate[8] is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passes not till the hundred marks be paid.[9] But if a man grant an estate in fee-simple reserving to himself and his heirs a certain rent; and that, if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate; in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed.[10] To this class may also be referred all base fees, and fee-simples conditional at the common law.[11] Thus an estate to a man and his heirs, tenants of the manor of Dale, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the statute of Westminster the second, it remains, as at common law, a fee-simple on c condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter; as *durante viduitate* [during widowhood], etc: these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these subsequent conditions by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

A distinction is however made between a condition in deed and a limitation, which Littleton[12] denominates also a condition in law. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation: as when land is granted to a man, so long as he is parson of Bale, or while he continues unmarried, or until out of the rents and profits he shall have made 500£ and the like.[13] In such cases the estate determines as soon as the contingency happens, (when he ceases to be parson, marries a wife, or has received the 500£) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of 40£ by the grantor, or so that the grantee continues unmarried, or provided he goes to York, etc.[14]) the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate.[15] But, though strict words of condition be used in the creation of the estate, yet if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives, (as if an estate be granted by granted by A to B, on condition that within tow years B intermarry with C, and on failure thereof then to D and his heirs) this the law construes to be a limitation and not a condition:[16] because, if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B determines, and that of D commences, the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for

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a breach of condition.[17]

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold;[18] because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner, (as a grant for ninety nine years, provided A, B, and C, and the survivor of them, shall so long live) this still continues a mere chattel, and is not, by its uncertainty, ranked among estates of freehold.

These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty four hours; or unless the marries with Jane S. by such a day; (within which time the woman dies, or the feoffor marries her himself) or unless the kills another; or in case he alienes in fee; then and in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he has by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant.[19] But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he has no estate until the condition be performed.[20]

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are

III. Estates held in *vadio*, in *gage*, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200£) of another; and grants him an estate, as, of 20£ per annum, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and, immediately on the discharge of that, results back to the borrower.[21] But *mortuum vadium*, a dead pledge, or mortgage, (which is much more common than the other) is where a man borrows of another a specific (e.g. 200£) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200£ on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that the mortgagee shall re-convey the estate to the mortgagor: in this case the land, which is so put in pledge, is by law, in

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case of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage.[22] But, as it was formerly a doubt,[23] whether, by taking such estate in fee, it did not become liable to the wife's dower, and other encumbrances of the mortgagee (though that doubt has been long ago over-ruled by our courts of equity[24]) it therefore became usual to grant only a long term of years, by way of mortgage; with condition to be void on re-payment of the mortgage money: which course has been since continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility at law of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to re-call or redeem his estate; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1000£ might be forfeited for non-payment of 100£ or a less sum. This reasonable advantage, allowed to mortgagors, is called the equity of redemption: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his estate presently, or, in default thereof, to be for ever foreclosed from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages,[25] the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not therefore usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands, in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was where the possession of the thing pledged remained with the debtor.[26] But, by statute 7 Geo. II. c. 20. after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to reassign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seizin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet*" ["if delivery of the pledge itself do not follow, the king's court is not accustomed to take cognizance of private agreements of this kind"]: for which the reason given is, to prevent subsequent and fraudulent pledges of the same land; "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*" ["since in such a case

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the same thing might be pledged to many creditors as well before as afterwards"].[27] And the frauds which have arisen, since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

IV. A fourth species of estates, defeasible on condition subsequent, are those held by statute merchant, and statute staple; which are very nearly related to the *vivum vadium* before-mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into pursuant to the statute 13 Edw. I. *de mercatoribus* [of merchants], and thence called a statute merchant; the other pursuant to the statute 27 Edw. III. c. 9. before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns,[28] and thence this security is called a statute staple. They are both, I say, securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied: and during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, which extends the benefit of this mercantile transaction to all the king's subjects in general, by virtue of the statute 23 Hen. VIII. c. 6.

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an elegit is, an why so called, will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute[29] of Westm. 2. by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be held, occupied, and enjoyed, until his debt and damages are fully paid: and, during the time he so holds them, he is called tenant by elegit. It is easy to observe, that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable, that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores*,[30] it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute therefore of Westm. 2. permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in the same year[31]) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only half of them was liable to be taken in execution for any other debt of the owner.

I shall conclude what I had to remark of these estates, by statute merchant, statute staple, and elegit, with the observation of Sir Edward Coke.[32] "These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds;" (which makes them an exception to the general rule) "because though they may hold an estate of inheritance, or for life, *ut liberum tenementum* [as a freehold], until their debt be paid; yet it shall go to their executors: for it is similitudinary; and though, to recover their estates, they shall have the same remedy (by assize) as a tenant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem* [things similar are not the same]." This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold: but it does not assign

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the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir; which is probably owing to this: that, being a security and remedy provide for personal debts owing to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in them, to whom the debts if recovered would belong. And, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to his executors:[33] because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund, out of which he has directed them to be paid.

NOTES

1. Co. Litt. 201
2. Litt. § 378.
3. Litt. § 379.
4. Co. Litt. 233.
5. 9 Rep. 50.
6. Co. Litt. 215.
7. Co. Litt. 201.
8. Show. Parl. Cas. 83. etc.
9. Co. Litt. 217.
10. Litt. § 325.
11. See pag. 109, 110, 111.
12. § 380. 1. Inst. 234.
13. 10 Rep. 41.
14. Ibid. 42.
15. Litt. § 347. Stat. 32 Hen. VIII. c. 34.
16. Ventr. 202.
17. Cro. Eliz. 205. 1 Roll. Abr. 411.
18. Co. Litt. 42.
19. Co. Litt. 206.
20. Ibid.
21. Ibid. 205.
22. Litt. § 332.
23. Ibid. § 357. Cro. Car. 191.
24. Hardr. 466.

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25. Stat. 4 & 5 W. & M. c. 16.

26. *Pignoris appellatione eam propriè rem contineri dicimus, quae simul etiam traditur creditori. At eam, quae sine traditione nuda conventione tenetur, propriè hypothecae appellatione contineri dicimus.* [The appellation of pledge is properly given to that security which is delivered immediately to the creditor. But that which is bound by a naked compact without delivery we properly call a mortgage.] Inst. l. 4. t. 6. § 7.

27. l. 10. c. 8.

28. See Book I. ch. 8.

29. 13 Edw. I. c. 18.

30. 18 Edw. I.

31. 13 Edw. I.

32. 1 Inst. 42, 43.

33. Co. Litt. 42.

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CHAPTER 11

Of Estates in Possession, Remainder, and Reversion

HITHERTO we have considered estates solely with regard to their duration, or the quantity of interest which the owners have therein. We are now to consider them in another view; with regard to the time of their enjoyment, when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates therefore, with respect to this consideration, may either be in possession, or in expectancy: and of expectancies there are two sorts; one created by act of the parties, called a remainder; the other by act of law, and called a reversion.

I. Of estates in possession, (which are sometimes called estates executed, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates executory) there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

II. An estate then in remainder may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As if a man seized in fee-simple grants lands to A for twenty years, and, after the determination of the said term, then to B and his heirs for ever: here A is tenant for years, remainder to B in fee. In the first place an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee.[1] They are indeed different parts, but they constitute only one whole: they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life; and, after the determination of B's estate for life, it be limited to C and his heirs for ever: this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions: there is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing; upon a principle grounded on mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple:[2] because a fee-simple is the highest and largest estate, that a subject is capable of enjoying; and he that is tenant in fee has in him the whole of the estate: a remainder therefore, which is only a portion, or residuary part, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee-simple; as 40£ is part of 100£ and 60£ is the remainder of it: wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than after the whole 100£ is appropriated there can be any residue subsisting.

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Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

1. And, first, there must necessarily be some particular estate, precedent to the estate in remainder.[3] As, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail. This precedent estate is called the particular estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that remainder is a relative expression, and implies that some part of the thing is previously disposed of: for, where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder: it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interest, which were considered in the light of mere contracts by the ancient law,[4] to be executed either now or hereafter, as the contracting parties should agree: but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that no estate of freehold can be created to commence *in futuro*; but it ought to take effect presently either in possession or remainder:[5] because at common law no freehold in lands could pass without livery of seizin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time it completed; and for the grantor to deliver immediate possession of the land to the tenant of his particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seizin to A; here by the livery the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at one from the grantor to the grantees, and the remainder-man is seized of his remainder at the same time that the tremor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in praesenti* [immediately], though to be occupied and enjoyed *in futuro* [in the future].

As no remainder can be created, without such a precedent particular estate, therefore the particular estate is said to support the remainder. But a lease at will is not held to be such a particular estate, as will support a remainder over.[6] For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder livery of seizin must be given at the time of its creation; and the entry of the grantor, to do this, determines the estate at will in the very instant in which it is made:[7] or, if it be a chattel interest, though perhaps it might operate as a future contract, if the tenant for years be a party to the deed of creation, yet it is void by way of

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remainder: for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken.[8] And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also:[9] as where the particular estate is an estate for the life of a person not in esse;[10] or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate;[11] in either of these cases the remainder over is void.

2. A second rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate.[12] As, where there is an estate to A for life, with remainder to B in fee: here B's remainder in fee passes from the grantor at the same time that seizin is delivered to A of his life estate in possession. And it is this, which induces the necessity at common law of livery of seizin being made on the particular estate, whenever a freehold remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seizin, in order to convey the freehold from and out of the grantor; otherwise the remainder is void.[13] Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law.[14]

3. A third rule respecting remainders is this; that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* [from the instant] that it determines.[15] As, if A be tenant for life, remainder to B in tail; here B's remainder is vested in him, at the creation of the particular estate to A for life: or, if A and B be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B has any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and, even supposing that B should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever.[16] And this depends upon the principle before laid down, that the precedent particular estate and the remainder are one estate in law; they must therefore subsist and be in esse at one and the same instant of time, either during the continuance of the first estate or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby:[17] the thing supported must fall to the ground, if once its support be severed from it.

It is upon these rules, but principally the last; that the doctrine of contingent remainders depends. For remainders are either vested or contingent. Vested remainders (or remainders executed, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat, or set aside.

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Contingent or executory remainders (whereby on present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect.[18]

First, they may be limited to a dubious and uncertain person. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his own eldest son in tail and A died without issue born, but leaving his wife *enseint* or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this remainder; for the particular estate determined before there was any person *in esse* [in being], in whom the remainder could vest.[19] But, to remedy this hardship, it is enacted by statute 10 & 11 W III. c. 16. that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb[20]

This species of contingent remainders, to a person not in being, must however be limited to some one, that may by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines.[21] As if an estate be made to A for life, remainder to the heirs of B: now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est haeres viventis* [no one is heir to the living]: but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law.[22] But a remainder to the right heirs of B (if there be no such person as B in esse) is void.[23] For here there must two contingencies happen; first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who has none, (we have seen) is good; for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name.[24] A limitation of a remainder to a bastard before it is born, is not good:[25] for though the law allow the possibility of having bastards, it perfumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the person who is to take it.

A remainder may also contingent, where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee: here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is for ever gone; but if A dies first, the remainder to B becomes vested.

Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate

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for years, or any other particular estate, less than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void:[26] but if granted to A for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest no where: unless therefore the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders may be defeated, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested.[27] Therefore when there is tenant for life, with diverse remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate, before any of those remainders vest; the consequence of which is that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son: for his son not being in esse, when the particular estate determined, the remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases therefore it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his determines. If therefore his estate for life determines otherwise than by his death, their estate, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders de pending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffery Palmer, and other eminent council, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life[28] and when, after the restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons, upon which this nicety is founded. It were endless to attempt to enter upon the particular subtleties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not however omit, that in devises by last will and testament, (which, being often drawn up when the party is *inops concilii* [without counsel], are always more favored in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice) in these divises, I say, remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of executory devises, or devises hereafter to be executed.

An executory devise of lands is such disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points: 1. That it needs not any particular estate to support it. 2. That by it a fee-simple or other less estate, maybe limited after a fee-simple. 3. That by this means a remainder may be limited

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of a chattel interest, after a particular estate for life created in the same.

1. The first case happens when a man devises a future estate, to arise upon a contingency; and, till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise[29] For, since by a devise a freehold may pass without corporal tradition or livery of seizin. (as it must do, if it passes at all) therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seizin, which always operates *in praesenti*. And, since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.[30]

2. By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs; but, if he dies before the age of twenty one, then to B and his heirs: this remainder, though void in a deed, is good by way of executory devise.[31] But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors:[32] because by perpetuities, (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation[33]) estates are made incapable of answering those ends, of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed, for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this has been decreed to be a good executory devise.[34]

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed: for by law the first grant of it, to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years.[35] And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place:[36] for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held,[37] that the devisee for life has no power of aliening the term, so as to bar the remainder-man: yet in order to prevent the danger of perpetuities, it was settled,[38] that, though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must all be in esse during the life of the first devisee; for then all the candles are li9ghted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest: or, that such remainder may be limited to take effect upon such

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contingency only, as must happen (if at all) during the life of the first devisee.[39]

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

III. An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.[40] Sir Edward Coke[41] describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is therefore never created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in praesenti*, though taking effect *in futuro*.

The doctrine of reversions is plainly derived from the feudal constitution. For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent, or other services; then, on his death or the failure of issue male, the feud was determined and resulted back to the lord or proprietor, to be again disposed of at his pleasure. And hence the usual incidents to reversions are said to be fealty and rent. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are held at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion[42] The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by special words: but by a general grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not e converso [on the other hand]: for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale*" ["the accessory does not precede but follows his principal"].[43]

These incidental rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one, seized of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion,[44] to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done:[45] for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A, reserving rent, with reversion to B and his heirs, B has a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A's estate.[46]

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the

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death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Ann. c. 18. that all persons on whose lives any lands or tenements are held, shall (upon application to the court of chancery and order made thereupon) once in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate,[47] the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en auter droit*) there is no merger. Therefore, if tenant for years dies, and makes him who has the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he has the fee in his own right, and the term of years in the right of the testator, and subject to is debts and legacies. So also, if he who has the reversion in fee marries the tenant for years, there is no merger; for he has the inheritance in his own right, the lease in the right of his wife.[48] An estate-tail is an exception to this rule: for a man may have in his own right both an estate-tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee.[49] For estates-tail are protected and preserved from merger by the operation and construction, though not by the express word, of the statute *de donis*: which operation and construction have probably arisen upon this consideration; that, in the common cases of merger of estates for life or years by uniting with the inheritance, the particular tenant has the sole interest in them, and has full power at any time to defeat, destroy, or surrender them to him that has the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate.[50] But, in an estate-tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or to destroy it; and now can only do it by certain special modes, by a fine, a recovery, and the like:[51] it would therefore have been strangely improvident, to have permitted the tenant in tail, b purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue: and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

NOTES

1. Co. Litt. 143.
2. Plowd. 29.
3. Co. Litt. 49. Plowd. 25.
4. Raym. 151.
5. Rep. 94.
6. 8 Rep. 75.
7. Dyer. 18.

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8. Raym. 151.
9. Co. Litt. 298.
10. 2 Roll. Abr. 415.
11. 1 Jon. 58.
12. Litt. § 671. Plowd. 25.
13. Litt. § 60.
14. Co. Litt. 49.
15. Plowd. 25. 1 Rep. 66.
16. 1 Rep. 138.
17. 3 Rep. 21.
18. 3 Rep. 20.
19. Salk. 228. 4 Mod. 282.
20. See Vol. I. pag 126.
21. 2 Rep. § 1.
22. Co. Litt. 378.
23. Hob. 33.
24. 5 Rep. 51.
25. Cro. Eliz. 509.
26. 1 Rep. 130.
27. Ibid. 66. 135.
28. See Moor. 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.
29. 1 Sid. 153.
30. Cro. Jac. 593.
31. 2 Mod. 289.
32. 12 Mod.187. 1 Vern. 164.
33. Salk 229.
34. Forr. 232.
35. 8 Rep. 95.
36. Bro. tit. chatteles. 23. Dyer. 74.
37. Dyer. 358. 8 Rep. 96.
38. 1 Sid. 451.
39. Skinn. 341. 3 P. Wms. 258.
40. Co. Litt. 22.

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41. 1 Inst. 142.
42. Co. Litt. 143.
43. Ibid. 151. 152.
44. Cro. Eliz. 321.
45. 3 Lev. 407.
46. 1 And. 23.
47. 3 Lev. 437.
48. Plow. 418. Cro. Jac. 275. Co. Litt. 338.
49. 2 Rep. 61. 8. Rep. 74.
50. Cro. Eliz. 302.
51. See pag. 116.

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CHAPTER 12

Of Estates in Severalty, Joint-Tenancy, Coparcenary, and Common

We come now to treat of estate, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common.

1. He that holds lands or tenements in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that, in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a plurality of tenants.

II. An estate in joint-tenancy is where lands of tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants the estate is called an estate in joint-tenancy,[1] and sometimes an estate in jointure, which word as well as the other signifies a union or conjunction of interest; though in common speech the term, jointure, is now usually confined to the joint estate, which by virtue of the statute 27 Hen. VIII. c. 10. is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.[2]

In unfolding this title, and the two remaining ones in the present chapter, we will first inquire, how these estates may be created; next, their properties and respective incidents; and lastly, how they may be severed or destroyed.

I. The creation of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title; for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. For the properties of a joint estate are derived from its unity, which is fourfold; the unity of interest, the unity of title, the unity of time, and the unity of possession: or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

First, they must have one and the same interest. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different: one cannot be tenant for life, and the other for years: one cannot be tenant in fee, and the other in tail.[3] But, if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs,

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it makes them joint-tenants of the inheritance.[4] If land be granted to A and B for their lives and to the heirs of A; here A and B are joint-tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty: or, if land be given to A and B, and the heirs of the body of A; here both have a joint estate for life, and A has a several remainder in tail.[5] Secondly, joint-tenants must also have an unity of title: their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseizin.[6] Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of time: their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another.[7] Yet, where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he after-wards married; in this case it seems to have been held that the husband and wife had a join estate, though vested at different times:[8] because the use of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in join-tenancy, there must be an unity of possession. Joint-tenants are said to be seized *per my et per tout* [by half and by all], by the half or *moiety*, and by all; that is they each of them have the entire possession, as well of every parcel as of the whole.[9] They have not, one of them a seizin of one half or moiety, and the other of the other moiety; neither can one be exclusively seized of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety.[10]

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall inure to both, in respect of the joint reversion.[11] If their lessee surrenders his lease to one of them, it shall also inure to both, because of the privity, or relation of their estate.[12] One the same reason, livery of seizin, made to one joint-tenant, shall inure to both of them:[13] and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both.[14] In all actions also relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other.[15] But if two or more joint-tenants be seized of an advowson, and they present different clerks, the bishop may refuse to admit either; because neither joint-tenant has a several right of patronage, but each is seized of the whole: and, if they do not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued; so as to incur a lapse: and, if the clerk of one joint-tenant be so admitted, this shall keep up the title in both of them; in respect of the privity and union of their estate.[16] Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land;[17] for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases,

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or to grant copyholds:[18] and, if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute Westm. 2. c. 22.[19] So too, tough at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver,[20] yet now by the statute 4 Ann. c. 16. joint-tenant may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenant.

From the same principle also arises the remaining grand incident of joint estates; *viz.* the doctrine of survivorship: by which, when two or more persons are seized of a joint estate of inheritance, for their own lives, or *pur auter vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate.[21] This is the natural and regular consequence of the union and entirely of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest become separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest, which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a joint estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a separate interest in any part of tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors[22] the *jus accrescendi* [right of survivorship], because the right, upon the death of one joint-tenant, accumulates and increases to the survivors; or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem*" ["that common share accumulates to the survivors from one person to another even to the last Survivor"]. And this *jus accrescendi* ought to be mutual; which I apprehend to be the reason why neither the king,[23] nor any corporation,[24] can be a joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seized of the entirety, by benefit of survivorship, for the king and the corporation can never die.

3. We are, lastly, to inquire, how an estate in joint-tenancy may be severed and destroyed. And this may be done by destroying any of its constituent unities. 1. That of time, which respects only the original commencement of the joint estate, cannon indeed (being now past) by affected by any subsequent trans-actions. But, 2. the joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their possession. For joint-tenants being seized *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seized throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two join-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants; for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And,

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for that reason also, the right of survivorship is by such separation destroyed.[25] By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the others so to do:[26] for, this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent.[27] But now by the statutes 31 Hen. VIII. c. i. and 32 Hen. VIII. c. 32. Joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands.3.The jointure may be destroyed, by destroying the unity of title. As if one joint-tenant alienes and conveys his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common;[28] for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the subsequent, grantor) though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure: for no testament takes effect till after the death of the testator, and by such death the right so the survivor (which accrued at the other[29]) is already vested.[30] 4. It may also be destroyed, by destroying the unity of interest. And therefore, if there by or descends upon either, it is a severance of the jointure:[31] though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance, they are not separate estates, (which is requisite in order to a merger) but branches of one in-tire estate.[32] In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure;[33] for it destroys the unity both of title and of interest. And, whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it.[34] Yet, if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship:[35] and, if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure;[36] for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, an undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes however it is disadvantageous to dissolve the joint estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety.[37] And therefore, if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture:[38] for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another: which grant, by a tenant for his own life merely, is a forfeiture of his estate;[39] for it is creating an estate which may by possibility last longer then that which he is legally entitled to.

III. An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law, or particular custom. By common law: as where a person seized in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will

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be more fully shown, when we treat of descents hereafter: and these co-heirs are then called coparceners; or, for brevity, parceners only.[40] Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, etc.[41] And, in either of these cases, all the parceners put together make but one heir; and have but one estate among them.[42]

The properties of parceners are in some respects like those of joint-tenants; they having the same unities of interest, title, and possession. They may sue and be sued jointly for matters relating to their own lands:[43] and the entry of one of them shall in some cases inure as the entry of them all.[44] They cannot have an action of waste;[45] for coparceners could at all times put a stop to any waste by a writ of partition, but till the statute of Henry the eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points:1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants:[46] and hence it likewise follows, that no lands can be held in coparcenary, but for life or years, may be held in joint-tenants. 2. There is no unity of time necessary to an estate in coparcenary. For if a man has two daughters, to whom his estate descends in coparcenary. For if a man has two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners;[47] the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have a unity, have not an entirety, of interest. They are properly entitled each to the whole of a distinct moiety;[48] and of course there is no *jus accrescendi,* or survivorship between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants thereof, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener aliens her share, though no partition be made, then are the lands no longer held in coparcenary, but in common.[49]

Parceners are so called, says Littleton,[50] because they may be constrained to make partition. And he mentions many methods of making it;[51] four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age; or otherwise, as shall be agreed. But this privilege of seniority is then personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger.[52] And the reason given is that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, ulterius est electio* [she who makes the division has the last choice]. The fourth method is where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion is, where one or more sue out a writ of partition against the others, whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanneled,and assign to each of the parceners her part in severalty.[53] But there are some things which are in their

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nature impartible [indivisible]. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance; or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson.[54]

There is yet another consideration attending the estate in coparcenary; that if one of the daughters has had an estate given with her in frankmarriage by her ancestor (which we may remember was species of estates-tail, freely given by a relation for advancement of his kinswoman in marriage[55]) in this case, if lands descend from the same ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending.[56] This general division was known in the law of the Lombards,[57] which direct the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum* [to bring into hotchpot with her sisters, when she shall marry, as much as her father or brother may have given her]. With us it is denominated bringing those lands into botchpot;[58] which term I shall explain in the very words of Littleton:[59] "it seems that this word, hotchpot, is in English, a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifely metaphor our ancestors meant to inform us,[60] that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage, and if she did not choose to put her lands in hotchpot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. The law of hotchpot took place then only, when the other lands descending from the ancestor were fee-simple; for, if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotchpot.[61] And the reason is, because lands descending in fee-simple are distributed by the policy of law, for the maintenance of all the daughters; and, if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more: but lands, descending in tail, are not distributed by the operation of law, so properly as *per formam doni*; it matters not therefore how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotchpot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage-portion.[62] And therefore, as gifts in frankmarriage are fallen into disuse, I should hardly have mentioned the law of hotchpot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large.

The estate in coparcenary may be dissolved, either by partition; which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

IV. Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knows his own severalty, and therefore they all occupy promiscuously.[63] This tenancy therefore happens, where there is an unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold is part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold

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by descent, the other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not fever the unity of possession, but only the unity of title or interest. As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common: for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation;[64] and they also have several interests, the former joint-tenant in sm fee-simple, the alienee for his own life only. So, if one joint-tenant give his part to A in tail, and the other gives is to B in tail, the donees are tenants in common, as holding by different titles and conveyances.[65] If one of two parceners alienes, the alienee and the remaining parcener are tenants in common;[66] because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two men, or two women, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to a man and woman, and the heirs of their bodies begotten:[67] and in this, and the like cases, their issues shall be tenants in common; because they must claim by different titles, one as heir of A, and the other as heir of B; and those too not titles by purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed: but here care must be taken not to insert words which imply a joint estate; and then if lands be give to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is pat in its constructions to favor joint-tenancy rather than tenancy in common;[68] because the divisible services issuing from land (as rent, etc) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be held the one, and the other moiety to the other, is an estate in common;[69] and, if one grants to another half his land, the grantor and grantee are also tenants in common:[70] because, as has been before[71] observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint interest in the whole of the tenements. But a devise to two persons, to hold jointly and severally, is a joint-tenancy; because that is implied in the word “jointly,” even though the word “severally” seems to imply the direct reverse:[72] and an estate given to A and B, equally to be divided between then, though in deeds it has been said to be a joint-tenancy,[73] (for it implies no more than the law has annexed to that estate, *viz.* divisibility[74]) yet in wills it is certainly a tenancy in common;[75] because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grant makes it the most usual as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B, to hold as tenants in common, and not as joint-tenants.

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As to the incidents attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII. and William III, before-mentioned,[76] to make partition of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon the account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2. c. 22. and 4 Ann. c. 16. For by the common law no tenant in common was liable to account to his companion for embezzling the profits of the estate;[77] though, if one actually turns the other out of possession, an action of ejectment will lie against him.[78] But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions,[79] unless in the case where some entire or indivisible thing is to be recovered[80]) these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.

Estates in common can only be dissolved two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty: 2. By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of estates.

NOTES

1. Litt. § 277.
2. See pag. 137.
3. Co. Litt. 188.
4. Litt. § 277.
5. Ibid. § 285.
6. Ibid. § 278.
7. Co. Litt. 188.
8. Dyer. 340. 1 Rep. 101.
9. Litt. § 288. 5 Rep. 10.
10. *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se*. [Each holds the entirety and yet holds nothing; that is, the entirety in common, and nothing separately by itself.] Bract. 1. 5. tr. C. 26.
11. Co. Litt. 214.
12. Ibid. 192.
13. Ibid. 49.
14. Ibid. 319. 364.
15. Ibid. 195.
16. Co. Litt. 185.
17. 3 Leon. 262.

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18. 1 Leon. 234.

19. 2 Inst. 403.

20. Co. Litt. 200.

21. Litt. § 280. 281.

22. Bracton, 1. 4. ir. 3. c. 9. § 3. Fleta. 1. 3. c. 4.

23. Co. Litt. 190. Finch L. 83.

24. 2 Lev. 12.

25. Co. Litt. 188. 193.

26. § 290.

27. Thus, by the civil law, *nemo invitus compellitur ad communionem* [no one is compelled to a joint possession against his will]. (Ff. 12. 6. 26. § 4.) And again: *si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest* [if only some of those who hold a thing in common desire a partition, this judgment may be received between them]. (Ff. 10.3.8.)

28. Litt. § 292.

29. *Jus accrescendi praefertur ultimae voluntati*. [The right of survivorship is preferred to the last will.] Co. Litt. 185.

30. Litt. § 287.

31. Cro. Eliz. 470.

32. 2 Rep. 60. Co. Litt. 182.

33. Litt. § 302. 303.

34. *Nihil de re accrescit ei, qui nihil in re quando jus accresceret habet*. [No part of the estate accrues to him, who has nothing in the estate when the right accrues.] Co. Litt. 188.

35. Litt. § 294.

36. Ibid. § 304.

37. 1 Jones. 55.

38. 4 Leon. 237.

39. Co. Litt. 252.

40. Litt. § 241. 242.

41. Ibid. § 265.

42. Co. Litt. 163.

43. Co. Litt. 164.

44. Ibid. 188.

45. 2 Inst.403.

46. Litt. § 254.

47. Co. Litt. 164. 174.

48. Ibid. 163, 164.

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49. Litt. § 309.

50. § 241.

51. § 243 to 264.

52. Co. Litt. 166. 3 Rep. 22.

53. By statute 8 & 9 W. III. c. 3. An easier method of carrying on the proceedings on a writ of partition, of lands held either in joint-tenants, parcenary, or common, than was used at the common law, is chalked out and provided.

54. Co. Litt. 164, 165.

55. See pag. 115.

56. Bracton. l. 2. c. 34.Litt. § 266 to 273.

57. l. 2. t. 14. c. 15.

58. Britton. c. 72.

59. § 267.

60. Litt. § 268.

61. Litt. § 274.

62. Ibid. 275.

63. Ibid. 292.

64. Litt. § 293.

65. Ibid. 295.

66. Ibid. 309.

67. Ibid. 283.

68. Salk. 392.

69. Litt. § 298.

70. Ibid. 299.

71. See pag. 182

72. Poph. 52.

73. 1 Equ. Cas. Abr. 291.

74. 1. P. Wms. 17.

75. 3 Rep. 39.1 Ventr. 32.

76. pag. 185, & 186.

77. Co. Litt. 199.

78. Ibid. 200.

79. Litt § 311.

80. Co. Litt. 197.

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CHAPTER 13

Of the Title to Things Real, in General

The foregoing chapters having been principally employed in defining the nature of things real, in describing the tenures by which they may be held, and in distinguishing the several kinds of estate or interest that may be had therein, I come now to consider, lastly the title to things real, with the manner of acquiring and losing it. A title is thus defined by Sir Edward Coke,[1] *titulus est justa causa possidendi id quod nostrum est*; or, it is the means whereby the owner of lands has the just possession of his property.

There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

1. The lowest and most imperfect degree of title consists in the mere naked possession, or actual occupation of the estate; without any apparent right, or any shadow or pretense of right, or any shadow or pretense of right, to hold and continue such possession. This may happen, when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a disseizin, being a deprivation of that actual seizin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of these commentaries. But in the mean time, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, prima facie, evidence of a legal title in the possessor; and it may, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good.

II. The next step to a good and perfect title is the right of possession, which may reside in one man, while the actual possession is either in himself or in another. For if a man be disseized, or otherwise kept out of possession, by any of the means before-mentioned, though the actual possession be lost, yet he has still remaining in him the right of possession; and may exert it whenever eh thinks proper, by entering upon the disseizor, and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts: an apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents. Thus if the disseizor, or other wrongdoer, dies possessed of the land whereof he so became seized by his own unlawful act, and the same descends to his heir; now the heir has obtained an apparent right, though the actual right of possession resides in the person disseized; and it shall not be lawful for the person disseized to divest this apparent right by mere entry or other act of his own, but only by an action at law.[2] For, until the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir, whose ancestor died seized, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feudal law, which, after feuds became hereditary, much favored the right of descent; in order that there might be a person always on the spot to perform the feudal duties and

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services:[3] and therefore, when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feudal court. But if he, who has the actual right of possession, puts in his claim and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seized, he will then by sentence of law recover that possession, to which he has such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; *viz.*

III. The mere right of property, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the mere right, *jus merum*; and the estate of the owner is in such cases said to be totally divested, and put to a right.[4] A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseized, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law; by this means the disseizor or his heirs gain the actual right of possession: for the law presumes that either he had a good right originally, in virtue of which he entered on the lands on question, or that since such his entry he has procured a sufficient title; and therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet, still, if the person disseized or his heir has the true right of property remaining in himself, his estate is indeed said to be turned into a mere right; but, by proving such his better right, he may at length recover the lands. Again; if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail has no right of possession, independent of the right of property: for the law presumes prima facie that the ancestor would not disinherit, or attempt to disinherit, his heir, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by showing the absolute right of property to reside in another person. The heir therefore in this case has only a mere right, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any possessory action, (that is, such wherein the right of possession only, and not that of property, is contested) and the other party has indeed in himself the right of property, this is now turned to a mere right; and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seizin of the lands.

Thus, if a disseizor turns me out of possession of my lands, he thereby gains a mere naked possession, and I still retain the right of possession, and right of property. If the disseizor dies, and the lands descend to his son, the son gains an apparent right of possession; but I still retain the actual right both of possession and property. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the actual right of possession, and I retain nothing but the mere right of property. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years. So also if the father be tenant in tail, and alienes the estate-tail to a stranger in fee, the alienee thereby gains the right of possession, and the

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son has only the mere right or right of property. And hence it will follow, that one man may have the possession, another the right of possession, and a third the right of property, For if tenant in tail enfeoffs to A in fee simple, and dies, and B disseizes A; now B will have the possession, A the right of possession, and the issue in tail the right of property: A may recover the possession against B; and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property. In which union consists,

IV. A complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law,[5] that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit*.[6] And when to this double right the actual possession is also united, when there is, according to the expression of Fleta,[7] *juris et seisinae conjunctio* [a conjunction of the right and seizin], then, and then only, is the title completely legal.

NOTES

1. 1 Inst. 345.
2. Litt. § 386.
3. Gild. Ten. 18.
4. Co. Litt. 345.
5. Mirr. l. 2. c. 27.
6. Co. Litt. 266. Bract. l. 5. tr. 3. c. 5.
7. l. 3. c. 15.§ 5.

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CHAPTER 14

Of Title by Descent

The several gradations and stages, requisite to form a complete title to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several manners, in which this complete title (and therein principally the right of propriety) may be reciprocally lost and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or its correlative some other man has lost it. As where the heir acquires by descent, the ancestor has first lost or abandoned the estate by his death: where the lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary blood: where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession: where one man claims by prescription or immemorial usage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors for ages: and so, in case of forfeiture, the tenant by his own misbehavior or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default: and, in alienation by common assurances, the two considerations of loss and acquisition are so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the idea as well of the grantor as the grantee.

The methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: descent, where the title is vested in a man by the single operation of law; and purchase, where the title is vested in him by his own act or agreement.[1]

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents in broken and altered, perpetually refer to this settled law of inheritance, as a datum or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive, that this in an estate confined in its descent to such heirs only of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; this is a point, that we must result back to the standing law of descents in fee-simple to be informed of.

In order therefore to treat a matter of this universal consequence the more clearly, I shall endeavor to lay aside such matters as will only tend to breed embarrassment and confusion in our inquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present

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who are, and who are not, capable of being heirs; reserving that for the chapter of escheats. I shall also pass over the frequent division of descents, into those by custom, statute, and common law: for descents by particular custom, statute, and common law: for descents by particular custom, as to all the sons in gavelkind, and to the youngest in borough-english, have already been often[2] hinted at, and may also be incidentally touched upon again; but will not make a separate consideration by themselves, in a system so general as the present: and descents by statute, or fee-tail *per formam doni* [by form of the gift], in pursuance of the statute of Westminster the second, have also been already[3] copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue the common law doctrine of inheritance; which, and which only, it will now be our business to explain.

And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary so state, as briefly as possible, the true notion of this kindred or alliance in blood.[4]

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium*;" the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other: as between John Stiles (the propositus in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire, and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil,[5] and canon,[6] as in the common law.[7]

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees: and so many different bloods[8] is a man said to contain in his veins, as he has lineal ancestors. Of these he has two in the first ascending degree, his own parents; he has four in the second, the parents of his father and the parents of his mother; he has eight in the third, the parents of his two grandfathers and two grandmothers; and, by the same rule of progression, he has an hundred and twenty eight in the seventh; a thousand and twenty four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man has above a million of ancestors, as common arithmetic will demonstrate.[9] This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum personarum ab eodem stipite descendentium* [relation of persons descended from the same stock]; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend from each other. Collateral kinsmen as such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to

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each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos* [relations].

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus Titius and his brother are related; why? because both descend from the same grandfather: and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. For indeed, if we only supposed each couple of our ancestors to have left, one with another, two children; and each of those children on an average to have left two more; (and, without such a supposition, the human species must be daily diminishing) we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more.[10] And, if this calculation should appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

The method of computing these degrees in the canon law,[11] which our law has adopted,[12] is as follows. We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus Titius and his brother are related in the first degree; for from the father to each of them is counted only one: Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; *viz.* his own grandfather, the father of Titius. Or, (to give a more illustrious instance from our English annals) king Henry the seventh, who flew Richard the third in the battle of Bosworth, was related to that prince in the fifth degree. Let the propositus therefore in the table of consanguinity represent king Richard the third, and the class marked (e) king Henry the seventh. Now their common stock or ancestor was king Edward the third, the *abavus* [great great grandfather] in the same table: from him to Edmond duke of York, the *proavus* [great grandfather], is one degree; to Richard earl of Cambridge, the *avus* [grandfather], two; to Richard duke of York, the pater, three; to king Richard the third, the propositus, four: and from king Edward the third to John of Gant (a) is one degree; to John earl of Somerset (b) two; to John duke of Somerset (c) three; to Margaret countess of Richmond (d) four; to king Henry the seventh (e) five. Which last mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians, (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other; reckoning a degree for each person both ascending and descending) these two princes were related in the ninth degree: for from king Richard the third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York, three; to king Edward the third, the common ancestor, four; to John of Gant, five; to John earl of Somerset, six; to John duke of Somerset, seven; to Margaret countess of Richmond, eight; to king Henry the seventh, nine.[13]

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The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules, or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

I. The first rule is, that inheritances shall lineally descend to the issue of the person last actually seized, *in infinitum* [forever]; but shall never lineally ascend.

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est haeres viventis* [no one is the heir of the living]. Before that time the time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heirs to the father whenever he happens to die. Heirs presumptive are such, who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate has descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases the estate shall be divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous son.[14]

We must also remember, that no person can be properly such an ancestor, as that an inheritance in lands or tenements can be derived from him, unless he has had actual seizin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or be receiving rent from a lessee of the freehold:[15] or unless he has had what is equivalent to corporal seizin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson,[16] and the like. But he shall not be accounted an ancestor, who has had only a bare right or title to enter or be otherwise seized. And therefore all the cases, which will be mentioned in the present chapter, are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seized thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. Which notoriety has succeeded in the place of the ancient feudal investiture, whereby, while feuds were precarious, the vassal on the descent of lands was formerly admitted in the lord's court (as is still the practice in Scotland) and there received his seizin, in the nature of a renewal of his ancestors grant, in the presence of the feudal peers: till at length, when the right of succession became indefeasible, an entry on any part of the lands within the county (which if disputed was afterwards to be tried by those peers) or other notorious possession, was admitted as equivalent to the formal grant of seizin, and made the tenant capable of transmitting his estate by descent. The seizin therefore of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *seisina facit stipitem* [seizin makes the stock].[17]

When therefore a person dies so seized, the inheritance first goes to his issue: as if there be Geoffrey,

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John, and Matthew, grandfather, father, and son; and John purchases land and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey; to whom the land shall never ascend, but shall rather escheat to the lord.[18]

This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have give being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother.[19] And, by the laws of Rome, in the first place the children or lineal descendants were preferred; and, on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters;[20] though by the law of the twelve tables the mother was originally, on account of her sex, excluded.[21] Hence this rule of our laws has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice.[22] Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing in into our laws.

We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* [positive law] merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor; after which the land by the law of nature would again become common, and liable to be seized by the next occupant: but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued, and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures. For it was an express rule of the feudal law,[23] that *successionis feudi talis est natura, quod ascendentes non succedunt* [the nature of feudal succession is such that those in the ascending line do not inherit]; and therefore the same maxim obtains also in the French law to this day.[24][25]Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line:[26] but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the second, we find it laid down as established law,[27] that *haereditas nunquam ascendit* [inheritance never ascends]; which has remained an invariable maxim ever since. These circumstances evidently show this rule to be of feudal original; and, taken in that light, there are some arguments in its favor, besides those which are drawn merely from the reason of the thing. For if the feud, of which the son died seized, was really *feudum antiquum* [an ancient fee], or one descended to him from his ancestors, the father could not possibly succeed to it, because if must have passed him in the course of descent, before it could to the son; unless it were *feudum maternum*

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[a maternal fee], or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. and if it were *feudum novum* [a new fee], or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feudal constitutions;[28] which was founded as well upon the personal merit of the vassal, which might be transmitted to his children but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum* [as an ancient fee], or with all the qualities annexed of a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an ancient feud; and therefore could not go to the father, because, if it had been an ancient feud, the father must have been dead before t could have come to the son. Thus whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton,[29] adopted by Sir Edward Coke,[30] which regulates the descent of lands according to the laws of gravitation.

II. A second general rule or canon is, that the male issue shall be admitted before the female.

Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred.[31] As if John Stiles has two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession in preference to both the daughters.

This preference of males to females is entirely agreeable to the law of succession among the Jews,[32] and also among the states of Greece, or at least among the Athenians;[33] but was totally unknown to the laws of Rome,[34] (such of them, I mean, as are at present extant) wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the roman and the other constitutions is this particular, nor examine into the greater dignity of blood in the male or female sex; but shall only observe, that our present preference of males to females seems to have arisen entirely from the feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males,[35] yet our subsequent Danish predecessors seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance.[36] But the feudal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident preference of the male to the female sex. "*Pater aut mater defuncti, filio non filiae haereditatem relinquent .... Qui defunctus non filios sed filias reliquerit, ad eas omnis haereditas pertineat.*"[37] ["The father or mother at their death shall leave their inheritance to their son not to their daughter .... If a man at his death leave no sons, but only daughters, then the whole inheritance shall belong to them."] It is possible therefore that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest; especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king Henry the first, it is not (like many Norman innovations) given up, but rather enforced.[38] The true reason of preferring the males must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud,[39] inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others,

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where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations: our law, like that of the Saxon feudists before-mentioned, thus steering a middle course, between the absolute rejection of females, and the putting them on a footing with males.

III. A third rule, or canon of descent, is this; that, where there are two or more males in equal degree, the eldest only shall inherit; but the females all together.

As if a man has two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew his eldest son shall alone succeed to his estate, in exclusion of Gilbert the second son and both the daughters: but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners.[40]

This right of primogeniture in males seems anciently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance;[41] in the same manner as with us, by the laws of king Henry the first,[42] the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary.[43] The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible [indivisible],[44] or (as they styled them) *feuda individua* [an impartible fee], and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments.[45] These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feudal constitution was established in England by William the conqueror.

Yet we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil[46] wrote, in the reign of Henry the second; and it is mentioned in the mirror[47] as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However in Henry the third's time we find by Bracton[48] that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands: except in Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons;[49] and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the ancient law: for they were all equally incapable of performing any personal service; and therefore, one main reason of preferring the eldest

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ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown;[50] wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honor. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honor, may confer it on which of them he pleases.[51] In which disposition is preserved a strong trace of the ancient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper:) " *progressum est ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare*."[52] ["It was customary for it to descend to the sons, that is, to him on whom the lord wished to settle the estate."]

IV. A fourth rule, or canon of descents, is this; that the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*.[53] And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles the father of the two sisters dies, without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one apiece.

This taking by representation is called a succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed;[54] but the Roman somewhat differed from it. In the descending line the right of representation continued *in infinitum*, and the inheritance still descended *in stirpes*: as if one of three daughters died, leaving ten children, and then the father died; the two surviving daughters had the remaining third divided between them. And so among collaterals, if any persons of equal degree with the persons represented were still subsisting, (as if the deceased left one brother, and two nephews the sons of another brother) the succession was still guided by the roots: but, if both the brethren were dead leaving issue, then (I apprehend) their representatives in equal degree became themselves principals, and shared the inheritance *per capita* [per person], that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation.[55] So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to each of the nieces: whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus; one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

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This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the firstborn among the males, to both which the Roman law is a stranger. For if all the children of three sisters were in England to claim *per capita*, in their own rights as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the firstborn, among persons in equal degree. Whereas, by dividing the inheritance according to the roots or stirpes, the rule of descent is kept uniform and steady: the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As if a man has two sons, A and B, and A dies leaving two sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estate: and if A had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B and his issue. But if a man has only three daughters, C, D, and E; and C dies leaving two sons, D leaving two daughters, and E leaving a daughter and a son who is younger than his sister: here, when the grandfather dies, the eldest son of C shall succeed to one third, in exclusion of the younger; the two daughters of D to another third in partnership; and the son of E to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum*.

Yet this right does not appear to have been thoroughly established in the time of Henry the second, when Glanvil wrote; and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother, and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of their common ancestor: for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief; and besides had frequently superior interest and strength, to back his pretensions and crush the right of his nephew. And even to this day, in the lower Saxony, proximity of blood takes place of representative primogeniture; that is, the younger surviving brother is admitted to the inheritance before the son of an elder deceased: which occasioned the disputes between the two houses of Mecklenburg, Schwerin and Strelitz, in 1692.[56] Yet Glanvil, with us, even in the twelfth century, seems[57] to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, (or as the civil law would call it) had not been forisfamiliated, in his life-time. King John, however, who kept his nephew Arthur from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm:[58] but in the time of his son, king Henry the third, we find the rule indisputably settled in the manner we have here laid it down,[59] and so it has continued ever since. And thus much for lineal descents.

V. A fifth rule is, that, on failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to the blood of the first purchaser; subject to the three preceding rules.

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Thus if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seized thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey the first purchaser of this family.[60] The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale, or by gift, or by any other method, except only that of descent.

This is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seized of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. but the law of Normandy[61] agrees with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feudal original; and this rule or canon cannot otherwise be accounted for than by recurring to feudal principles.

When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died possessed of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule, "*frater fratri, sine legitimo haerede defuncto, in beneficio quod eorum patris fuit succedat: sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo haerede, frater ejus in feudum non succedit.*"[62] ["A brother may succeed to his brother dying without a lawful heir, in the estate which was their father's: but if one of the brothers shall have received the fee from his lord, and die without a lawful heir, his brother does not succeed."] The true feudal reason for which rule was this; that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled) so in the feudal donation, "*nomen haeredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant*"[63] ["the name of heir expressed in the first investiture extends only to the descendants of the body of the first vassal, and not to the collaterals unless they descend from the body of the first vassal or stock"]: the will of the donor, or original lord, (when feuds were turned from life estates into inheritances) not being to make them absolutely hereditary, like the Roman allodium, but hereditary only *sub modo* [in a particular way]; not hereditary to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

However, in process of time, when the feudal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is descended from, the first imaginary purchaser. For since it is not ascertained in such general grants, whether this feud shall be held *ut feudum paternum*, or *feudum avitum*, but *ut feudum antiquum* merely, as a feud of indefinite antiquity; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have

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descended; the law will not ascertain it, but will supposed any of his ancestors, *pro re nata* [for the occasion], to have been the first purchaser: and therefore it admits any of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum*; unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted: but every grant of lands in fee-simple is with us a *feudum novum* to held *ut antiquum*, as a feud whose antiquity is indefinite; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance.

Yet, when an estate has really descended in a course of inheritance to the person last seized, the strict rule of the feudal law is still observed; and none are admitted, but the heirs of those through whom the inheritance has passed: for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to John Stiles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be h is heir of these lands; and, vice versa, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles; the relations of his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father. This is also the rule of the French law,[64] which is derived from the same feudal fountain.

Here we may observe, that, so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited it from his father Walter Stiles, or his mother Christian Smith; or if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate: because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

This then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have, originally descended: according to the rule laid down in the yearbooks,[65] Fitzherbert,[66] Brook,[67] and Hale;[68] "that he who would have been heir to the father of the deceased" (and, of course, to the mother, or any other purchasing ancestor) "shall also be heir to the son."

The remaining rules are only rules of evidence, calculated to investigate who that purchasing ancestor was; which, *in feudis vere antiquis* [in fees really ancient], has in process of time been forgotten, and is supposed so to be in feuds that are held *ut antiquis*.

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VI. A sixth rule or canon therefore is, that the collateral heir of the person last seized must be his next collateral kinsman, of the whole blood.

First, he must be his next collateral kinsman, either personally or *jure representationis* [by right of representation]; which proximity is reckoned according to the canonical degrees of consanguinity before-mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the on hand, and it the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great-nephew but also his first-cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the great-nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second; the former being distant three degrees from the common ancestor, and therefore deriving only one fourth of his blood from the same fountain with propositus; the later, and also the propositus, being each of them distant only two degrees from the common ancestor, the therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents; and, having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respect the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore courts its degrees in the same manner. Indeed the designation of person (in seeking for the next of kin) will come to exactly the same end (though the degrees will be differently numbered) whichever method of computation we supposed the law of England to use; since the right of representation (of the father by the son, etc) is allowed to prevail *in infinitum*. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, though no inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants therefore of John Stiles's brother are all of them in the first degree of kindred with respect so inheritances, as their father also, when living was; those of his uncle in the second; and so on; and are severally called to the succession in right of such their representative proximity.

The right of representation being thus established, the former part of the present rule amounts to this; that, on failure of issue of the person last seized, the inheritance shall descend to the issue of his next immediate ancestor. Thus if John Stiles dies without issue, his estate shall descend to Francis his brother, who is lineally descended from Geoffrey Stiles his next immediate ancestor, or father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. Very similar to which was the law of inheritance among the ancient Germans, our progenitors: "*haeredes successoresque sui cuique liberi et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi*."[69] ["Every man's children are his heirs and successors if there be no will. If there be no children the next in degree shall be seised, as brothers, uncles on the father's side, uncles on the

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mother's side."]

Now here it must be observed, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely corresponds with ours,[70] the father or other lineal ancestor is himself said to be the heir, though long since dead as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, etc, but in right of representation, as the sons of the father, grandfather, etc, of the deceased.[71] But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to name him in making out the pedigree or descent. For the descent between two brothers is held to be an immediate descent; and therefore title may be made by one brother or his representatives to or through another, without mentioning their common father.[72] If Geoffrey Stiles has two sons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey: and so the son of Francis may claim as cousin and heir to Matthew the son of John, without naming the grandfather; viz as son of Francis, who was the brother of John, who was the father Matthew. But through the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood: and therefore in order to ascertain the collateral heir of John Stiles, it is in the first respects them as the fountains of inheritable blood: and therefore in order to ascertain the collateral heir of John Stiles, it is in the first place necessary to recur to his ancestors in the first degree; and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher to the ancestors in the second degree, and then to those in the third, and fourth, and so upwards *in infinitum*; till some ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. Form these ancestors the heir of John Stiles must derive his descent; and in such derivation the same rules must be observed, with regard to sex, primogeniture, and representation, that have just been laid down with regard to lineal descents from the person of the last proprietor.

But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the whole blood; for, if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who has (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other has. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, has entirely the same blood with John Stiles; or, he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and has issue by him; the blood of this issue, being compounded of the blood of Lucy Baker (if is true) on the one part, but of that of Lewis Gay (instead of Geoffrey Stiles) on the other part, it has therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord.

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Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seized without issue; still B shall not be heir to this estate, because he is only of the half blood to A, the person last seized: but, had A died without entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the person last actually seized.[73]

This total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a stranger hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule; which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that an heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to show that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible; proof: for it remits the proof of an actual descent from the first purchaser; and only requires, in lieu of it, that the claimant be next of the whole blood to the person last in possession; (or derived from the same couple of ancestors) which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser. For he who is my kinsman of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are vice versa his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestors above the common stock the same as mine; and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchaser.

To illustrate this by example. Let there be John Stiles, and Francis, brothers by the same father and mother, and another son of the same mother by Lewis Gay a second husband. Now, if John dies seized of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchaser, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchaser, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely not to be descended from the line of the first purchaser, as to be descended: and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

And, as this is the case in *feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten; it is also the case in *feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchaser (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are

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excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchaser, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law; since it is only upon a like supposition and fiction, that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all: for we have seen that in *feudis strictè novis* [in fees strictly new] neither brethren nor any other collaterals were admitted. As therefore in *feudis antiquis* we have seen the reasonableness of excluding the half blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

Perhaps by this time the exclusion of the half blood does not appear altogether so unreasonable, as at first fight it is apt to do. It is certainly a very fine-spun and subtle nicety: but, considering the principles upon which our law is founded, it is neither an injustice nor a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals: and, though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchaser, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though all the ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole flood; yet, unless that common stock be in the first degree, (that is, unless they have the same father and mother) there will be intermediate ancestors below the common stock, that may belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors, than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher, (that is, the grandfather and grandmother) one half of John's ancestors will not be the ancestors of his uncle: his *patruus*, or father's brother, derives not his descent from John's maternal ancestors; nor his *avunculus*, or mother's brother, from those in the paternal line. Here then the supply of proof is deficient, and by no means amounts to a certainty: and, the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than the whole blood in the same degree. As, in the first degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great uncle of the whole blood, but they are seven to one against his great uncle of the half blood, for seven eighths so John's ancestors have no connection in blood with him. Therefore the much less probability of the half blood's descent from the first purchaser, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half blood in all.

But, while I thus illustrate the reason of excluding the half blood in general, I must be impartial enough to own, that, in some instances, the practice is carried farther than the principle upon which it goes will warrant. Particularly, when a man has two sons by different venters, and the estate on his death descends from him to the eldest, who enters, and dies without issue: now the younger son

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cannot inherit this estate, because he is not of the whole blood to the last proprietor. This, it must be owned, carries a hardship with it, even upon feudal principles: for the rule was introduced only to supply the proof of a descent from the first purchaser; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half brother must be of the blood of the first purchaser, who was either the father or some of the father's ancestors. When therefore there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance can be evidently traced back, there seems no need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother indeed been a purchaser, there would have been no hardship at all, for the reasons already given: or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

Indeed it is this very instance, of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *a patre* [from the father], that Craig[74] has singled out, on which to ground his strictures on the English law of half blood. And, really, it should seem, as if the custom of excluding the half blood in Normandy[75] extended only to exclude a *frater uterinus*, when the inheritance descended *a patre*, and vice versa: as even with us it remained a doubt, in the time of Bracton,[76] and of Fleta,[77] whether the half blood on the father's side were excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly purchased lands. And the rule of law, as laid down by our Fortescue,[78] extends no farther than this; *frater fratri uterino non succedet in haereditate paternâ* [a brother shall not succeed in the paternal inheritance to his brother by the mother's side]. It is moreover worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign,[79] so as it be the blood of the first monarch, purchaser, or (in the feudal language) conqueror, of the reigning family. Thus it actually did descend from king Edward the sixth to queen Mary, and from her to queen Elizabeth, who were respectively of the half blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock; which was formerly king William the Norman, and is now (by act of parliament[80]) the princess Sophia of Hanover. Hence also it is, that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent:[81] because, when the lineage is clearly made out, there is no need of this auxiliary proof. How far it might be desirable for the legislature to give relief, by amending the law of descents in this single instance, and ordaining that the half blood might inherit, where the estate notoriously descended from its own proper ancestor, but not otherwise; or how far a private inconvenience should be submitted to, rather than a long established rule should be shaken; it is not for me to determine.

The rule then, together with its illustration, amounts to this: that, in order to keep the estate of John Stiles as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from two.

But here another difficulty arises. In the second, third, fourth, and every superior degree, every man

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has many couples of ancestors, increasing to the distances in a geometrical progression upwards,[82] the descendants of all which respective couples are (representatively) related to him in the same degree. Thus in the second degree, the issue of George and Cecilia Stiles and of Andrew and Esther Baker, the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which therefore of these ancestors must we first resort, in order to find out descendants to be preferably called to the inheritance? In answer to this, and to avoid the confusion and uncertainty that must arise between the several stocks, wherein the purchasing ancestor may be sought for,

VII. The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female; (that is, kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female)) unless where the lands have, in fact, descended from a female.

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all;[83] and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden,[84] and Petit;[85] though among the Greeks, in the time of Hefiod,[86] when a man died without wife or children, all his kindred (without any distinction) divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Justinian[87] abolished all distinction between them. It is also conformable to the customary law of Normandy,[88] which indeed in most respects agrees with our law of inheritance.

However, I am inclined to think, that this rule of our laws does not owe its immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule or canon before laid down; that every heir must be of the blood of the first purchaser. For, when such first purchaser was not easily to be discovered after a long course of descents, the lawyers not only endeavored to investigate him by taking the next relation of the whole blood to the person last in possession; but also, considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchaser to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father, rather than the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards; imagining with reason that this was the most probable way of continuing it in the line of the first purchaser. A conduct much more rational than the preference of the *agnati* by the Roman laws: which, as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one: upon which account this preference was very wisely abolished by Justinian.

That this was the true foundation of the preference of the *agnati* or male stocks, in our law, will

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farther appear if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed, and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchaser. And so, *e converso,* if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe the father of Cecilia, is excluded. Whereas when the side from which they descended is forgotten, or never known, (as in the case of an estate newly purchased to be held *ut feudum antiquum*) here the right of inheritance first runs up all the father's side, with preference to the male stocks in every instance; and, if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchaser. The greatest probability of finding such was among those descended from the male ancestors; but, upon failure of issue there, they may possibly be found among those derived from the females.

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, though all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that, if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchaser: but, as males have not been perpetually admitted, but only generally preferred; as females have not been utterly excluded, but only generally postponed to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchaser; which, joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty.

Before we conclude this branch of our inquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search for the heir of a person, as John Stiles, who dies seized of land which he acquired, and which therefore he held as a feud of indefinite antiquity.[89]

In the first place succeeds the eldest son, Matthew Stiles, or his issue: (No. 1.)) if his line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue: (No. 2.)) in default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue. (No. 3.)) On failure of the descendants of John Stiles himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in: *viz.* first, Francis Stiles, the eldest brother of the whole blood, or his issue: (No. 4.)) then Oliver Stiles, and the other whole brothers, respectively, in order of birth, or their issue: (No. 5.)) then the sisters of the whole blood, all together, Bridget and Alice Stiles, or their issue. (No. 6.)) In defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being fill had to their age and sex: (No. 7.)) then the issue of Walter and Christian Stiles the parents of his paternal grandfather: (No. 8.)) then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (No. 9)) and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (No. 10.)) and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum;* till both the immediate bloods of George Stiles, the

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paternal grandfather, are spent.) Then we must resort to the issue of Luke and Frances Kempe, the parents of John Stiles's paternal grandmother: (No. 11.)) then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (No. 12.)) and so on in the paternal grandmother paternal line, or blood of Luke Kempe, *in infinitum*.) In default of which, we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (No. 13)) and so no in the paternal grandmother's maternal line, or blood of Frances Holland, *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent,) Whereby the paternal blood of John Stiles entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers, (No. 14, 15, 16.) Willis's, (No. 17.) Thorpes, (No. 18, 19.) and Whites; (No. 20.) in the same regular successive order as in the paternal line.

The student should however be informed, that the class, No. 10, would be postponed to No. 11, in consequence of the doctrine laid down, *arguendo* [for argument's sake], by justice Manwoode, in the case of Clere and Brooke;[90] from whence it is adopted by lord Bacon,[91] and Sir Matthew Hale.[92] And yet, notwithstanding these respectable authorities, the compiler of this table has ventured to give the preference therein to No. 10 before No. 11; for the following reasons: 1. Because this point was not the principal question in the case of Clere and Brooke; but the law concerning it is delivered *obiter* [hastily] only, and in the course of argument, by justice Manwoode; though afterwards said to be confirmed by the three other justices in separate, extrajudicial, conferences with the reporter. 2. Because the chief-justice, Sir James Dyer, in reporting the resolution of the court in what seems to be the same case,[93] takes no notice of this doctrine. 3. Because it appears, from Plowden's report, that very many gentlemen of the law were dissatisfied with this position of justice Manwoode. 4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table; and destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before given, besides the mere dignity of blood. 5. Because it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author;[94] and establishes a collateral doctrine, incompatible with the principal point resolved in the case of Clere and Brooke, *viz.* the preference of No. 11 to No. 14. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all. 6. Because by the reason that is given for this doctrine, in Plowden, Bacon, and Hale, (*viz.* that in any degree, paramount the first, the law respects proximity, and not dignity of blood) No. 18 ought also to be preferred to No. 16; which is directly contrary to the eighth rule laid down by Hale himself.[95] 7. Because this position seems to contradict the allowed doctrine of Sir Edward Coke;[96] who lays it down (under different names) that the blood of the Kempes (alias Sandies) shall not inherit till the blood of the Stiles's (alias Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both No. 9 and No. 10 are extinct. Wherefore No. 11 (being the blood of the Kempes) ought not to inherit till then. 8. Because in the case, Mich. 12 Edw. IV. 14.[97] (much relied on in that of Clere and Brooke) it is laid down as a rule, that "*cestuy, que doit inheriter al pere, doit inheriter al fits*" ["he who is heir to the father is heir to the son"]. And so Sir Matthew Hale[98] says, "that though the law excludes the father from inheriting, yet it substitutes and directs the descent, as it should have been, had the father inherited." Now it is settled, by the resolution in Clere and Brooke, that No. 10 should have inherited to Geoffrey Stiles, the father, before No. 11; and therefore No. 10 ought also to be preferred in inheriting to John Stiles, the son.

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In case John Stiles was not himself the purchaser, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, can never inherit. Thus, if it descended from Geoffrey Stiles, the father the blood of Lucy Baker, the mother, is perpetually excluded: and so, vice versa, if it descended from Lucy Baker, it cannot descend to the blood of Geoffrey Stiles. This, in either case, cuts off one half of the table from any possible succession. And farther, if it can be shown to have descended from George Stiles, this cuts off three fourths; for now the blood, not only of Lucy Baker, but also of Cecilia Kempe, is excluded. If, lastly, it descended from Walter Stiles, this narrows the succession still more, and cuts off seven eighths of the table; for now, neither the blood of Lucy Baker, nor of Cecilia Kempe, nor of Christian Smith, can ever succeed to the inheritance. And the like rule will hold upon descents from any other ancestors.

The student should bear in mind, that, during this whole process, John Stiles is the person supposed to have been last actually seized of the estate. For if ever it comes to vest in any other person, as heir to John Stiles, anew order of succession must be observed upon the death of such heir; since he, by his own seizin, now becomes himself an ancestor, or stipes, and must be put in the place of John Stiles. The figures therefore denote the order, in which the several classes would succeed to John Stiles, and not to each other: and, before we search for an heir in any of the higher figures, (as No. 8.) we must be first assured that all the lower classes (from No. 1 to 7.) were extinct, at John Stiles's decease.

NOTES

1. Co. Litt. 18.

2. See Vol. I. pag. 74, 75.Vol. II. Pag. 83, 85.

3. See pag. 112, etc.

4. A fuller explanation of the doctrine of consanguinity, and the consequences resulting from a right apprehension of its nature, fee an essay on collateral consanguinity, in the first volume of law tracts. Oxon. 1762. 80.

5. Ff. 38. 10. 10.

6. Decretal. l. 4. tit. 14.

7. Co. Litt. 23.

8. Ibid. 12.

9. This will seem surprising to those who are unacquainted with the increasing power of progressive numbers; but is palpably evident from the following table of a geometrical progression, in which the first term is 2, and the denominator also 2: or, to speak more intelligibly, it is evident, for that each of us has two ancestors in the first degree; the number of whom is doubled at every remove, because each of our ancestors has also two immediate ancestors of his own.

Lineal Degrees.	Number of Ancestors.
1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256

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9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072
18	262144
19	524288
20	1048576

A shorter method of finding the number of ancestors at any even degree is by squaring the number of ancestors at half that number of degree. Thus 16 (the number so ancestors at four degrees) is the square of4,the number of ancestors at two; 256 is the square of 16; 65536 of 256; and the number of ancestors at 40 degrees would be the square of 1048576, or upwards of a million millions.

10. This will swell more considerably than the former calculation: or here, though the first term is but1,the denominator is4; that is, there is one kinsman (a brother) in the first degree, who makes, together with the propostus the two descendants from the first couple of ancestors; and in every other degree the number of kindred must be the quadruple of those in the degree which immediately precedes it. For, since each couple of ancestors has two descendants, who increase in a duplicate ratio, it will follow that the ratio, in which all the descendants increase downwards, must be double to that in which the ancestors increase upwards: but we have seen that the ancestors increase in a duplicate ratio: therefore the descend. Ants must increase in a double duplicate, that is, in a quadruple, ratio.

Collateral Degrees.	Number of Kindred.
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

This calculation may also be formed by a more compendious process, *viz.* by squaring the couples, or half the number, of ancestors at any given degree; which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; its half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several families within our own knowledge, and observe how far they agree with this account; that is, whether, on an average, every man has not one brother or sister, four first cousins, sixteen second confines, and so on; we shall find that the present calculation is very far from being over-charged.

11. Decretal. 4. 14. 3 & 9.

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12. Co. Litt. 23.

13. See the table of consanguinity annexed; wherein all the degrees of collateral kindred to the propositus are computed, so far as the tenth of the civilians and the seventh of the canonists inclusive; the former being distinguished by the numeral letters, the latter by the common ciphers.

14. Bro. tit. descent. 58.

15. Co. Litt. 15.

16. Ibid. 11.

17. Flet. l. 6. c. 2. § 2.

18. Litt. § 3.

19. Selden. De successe. Ebracor. C. 12.

20. Ff. 38. 15. 1. Nov. 118. 127.

21. Inst. 3. 3. 1.

22. Craig. De jur. Feud. l. 2. t. 13. § 15. Locke on gov. part. 1. § 90.

23. 2 Feud. 50.

24. Domat. P. 2. l. 2. t. 2. Montesqu. Esp.

25. LL. Hen. I. C 70.

26. l.7. c. 1.

27. 1 Feud. 20.

28. *Descendit itaque jus, quasi ponderosum quid cadens deorsum recta linea, et nunquam reascendit*. [Therefore the right descends, like a heavy weight falling downwards in a straight line, and never reascends.] l. 2. c. 29.

29. 1 Inst. 11.

30. Hal. H. C. L. 235.

31. Numb. C. 27.

32. Petit. LL. Attic. L.6. r. 6.

33. Inst. 3. 1. 6.

34. Stat. Wall. 12 Edw. I.

35. LL. Canut. c. 68.

36. tit. 7. § 1 & 4.

37. c. 70.

38. 1 Feud. 8.

39. Litt. § 5. Hale. H. C. L. 238.

40. Selden. De succ. Ebr. c. 5.

41. c. 70.

42. Glanvil. l. 7. c. 3.

43. Feud. 55.

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44. Hale. H. C. I. 221.
45. l. 7. c. 3.
46. l. 1. § 3.
47. l. 2. co. 30, 31.
48. Somner. Gavelk. 7.
49. c. Litt. 165.
50. Ibid.
51. 1 Feud. i.
52. Hale. H. C. L. 236, 237.
53. Selden de succ. Ebr. c. 1.
54. Nov. 118. c.3.Inst. 3. 1. 6.
55. Mod. Un. Hist. xliii. 334.
56. l. 7. c. 3.
57. Hale. H. C. L. 217, 229.
58. Bracton. L. 2. c. 30. § 2.
59. Co. Litt. 12.
60. Gr. Coustum. 6. 25.
61. 1 Feud. 1. § 2.
62. Crag. L. 1. t. 9. § 36.
63. Domat. Part. 2. pr.
64. M. 12. Edw. IV. 14.
65. Abr. T. discent. 2.
66. Ibid. 38.
67. H. C. L. 243.
68. Tacitus de mor. Germ. 21.
69. Numb. C. 27.
70. Selden. de succ. Ebr. c. 12.
71. 1 Sid. 193. 1 Lev. 60. 12 Mod. 619.
72. Hale. H. C. L. 238.
73. Tenures. 186.
74. l. 2. t. 15. § 14.
75. Gr. Coustum. c. 25.
76. l. 2. c. 30. § 3.

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77. l. 6. c. i. § 14.
78. de laud. LL. Angl. 5.
79. Plowd. 245. Co. Litt. 15.
80. 12 Will. III. C. 2.
81. Litt. § 14, 15.
82. See pag. 204.
83. Litt. § 4.
84. de succ. Ebracor. c. 12.
85. LL. Attic. l. 1. t. 6.
86. (Symbol). 606.
87. Nov. 118.
88. Gr. Coustum. c. 25.
89. See the table of descents annexed.
90. Plowd. 450.
91. Elem. c. 1.
92. H. C. L. 240, 244.
93. Dyer. 314.
94. Law of inheritances. 2d. edit. Pag. 30, 38, 61, 62, 66.
95. Hist. C. L. 247.
96. Co. Litt. 12. Hawk. Abr. In loc.
97. Fitzh. Abr. Tit. Discent. 2. Bro. Abr. T. discent. 3.
98. Hist. C. L. 243.

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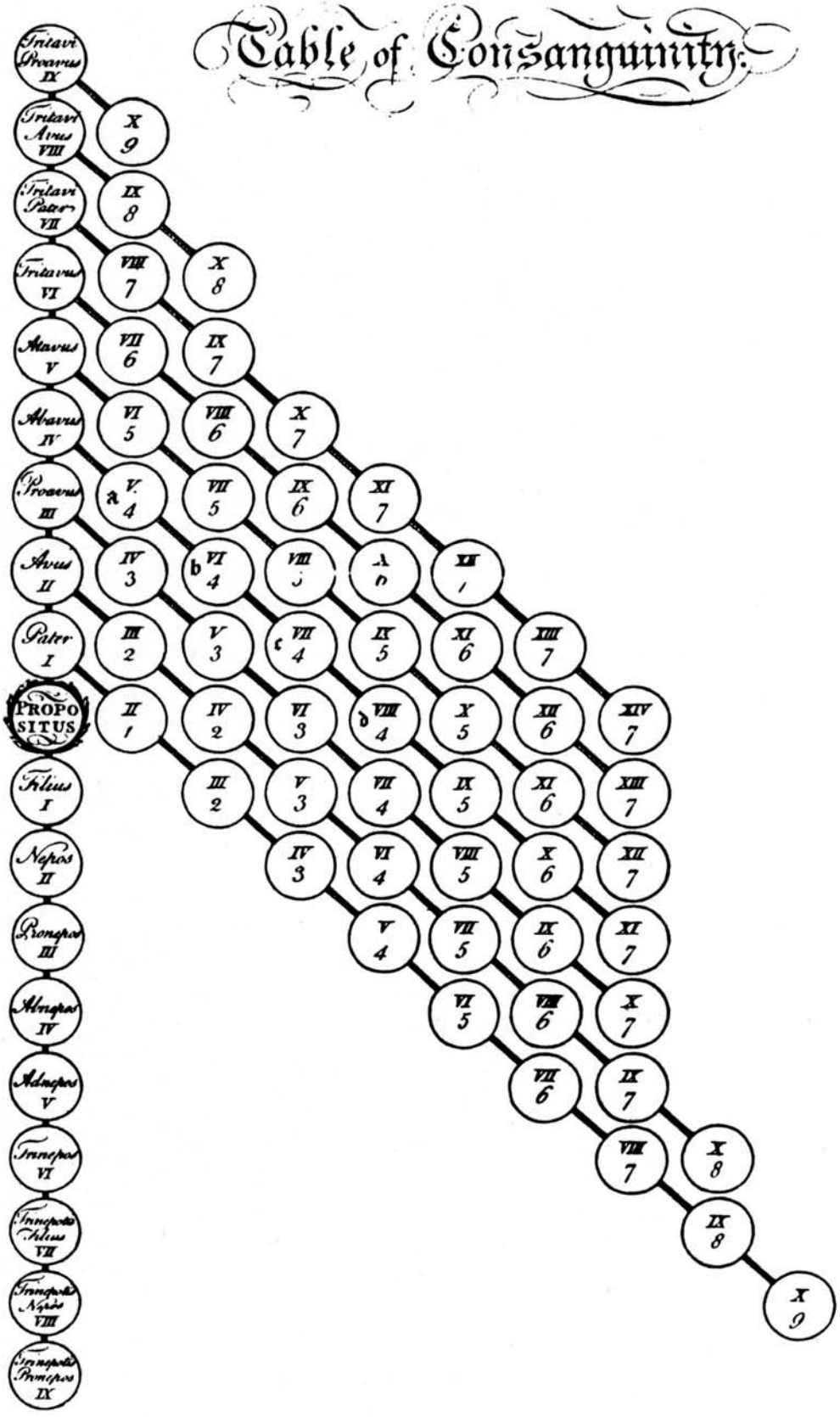
Table of Consanguinity.



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CHAPTER 15

Of Title by Purchase, And First by Escheat

PURCHASE, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton;[1] the possession of lands and tenements, which a man has by his own act or agreement; and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance; wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law.[2]

PURCHASE, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I give land freely to another, he is in the eye of the law a purchaser;[3] and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he is born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. Nay even if the ancestor devises his estate to his heir at law by will, with other limitations or in any other shape than the course of descents would direct, such heir shall take by purchase.[4] But if a man, seized in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent,[5] even though it be charged with encumbrances;[6] for the benefit of creditors, and others, who have demands on the estate of the ancestor. If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but, if he dies during the continuance of the particular estate, his heirs shall take as purchasers.[7] But, if an estate be made to A for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an ancient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by purchase, but only by descent.[8] And, if A dies before entry, still his heir shall take by descent, and not by purchase; for, where the heir takes any thing that might have vested in the ancestor, he takes by way of descent.[9] The ancestor, during his life, bears in himself all his heirs;[10] and therefore, when once he is or might have been seized of the land, the inheritance to limited to his heirs vests in the ancestor himself: and the word “heirs” in this case is not esteemed a word of purchase, but a word of limitation, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchasers originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name; then, in the times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his seigniory, arising from a descent to the heir.

WHAT we call purchase, *perquisitio*, the feudists call conquest, *conquaestus*, or *conquisitio*:[11] both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland;[12] as it was, among the Norman jurists, who styled the first purchaser (that is, he who first brought the estate into the family which at present owns it) the conqueror or *conquereur*.[13] Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquaestus*, and himself

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conquaestor or *conquisitor*;[14] signifying, that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feudal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of victory to this name of *conquest* or *conquisition*; a title which, however just with regard to the crown, the conqueror never pretended with regard to the realm of England, nor, in fact, ever had.[15]

THE difference in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudem paternum* [as a paternal fee] or *maternum* [maternal fee], which would descend only to the heirs by the father's or the mother's side: but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity; whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line.[16] 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For, if the ancestor by any deed, obligation, covenant, or the like, binds himself and his heirs, and dies; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he had any estate of inheritance vested in him (or in some other in trust for him[17]) by descent from that ancestor, sufficient to answer the charge;[18] whether he remains in possession, or has aliened it before action brought:[19] which sufficient estate is in law called assets; from the French word, *assez*, enough.[20] Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or assets, by descent from the covenanter: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent.[21]

THIS is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

1. ESCHEAT, we may remember,[22] was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman,[23] in which language it signifies chance or accident; and with us denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee.[24]

ESCHEAT therefore being a title frequently vested in the lord by inheritance, as being the fruit of a seigniory to which he was entitled by descent, (for which reason the lands escheating shall attend the seigniory, and be inheritable by such only of his heirs as are capable of inheriting the other[25]) it may seem in such cases to fall more properly under the former general head of acquiring title to estates, *viz.* by descent, (being vested in him by act of law, and not by his own act or agreement) than under the present, by purchase. But it must be remembered that in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by entering on the lands and tenements so escheated, or suing out a writ of escheat:[26] on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps

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the possession, his title by escheat is barred.[27] It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed this may also be said of descents themselves, in which an entry or other seizin is required, in order to make a complete title; and therefore this distribution by our legal writers seems in this respect rather inaccurate: for, as escheats must follow the nature of the seigniory to which they belong, they may vest by either purchase or descent, according as the seigniory is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant,[28] and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus haeres* [the last heir], and therefore taking by descent in a kind of caducary succession.

THE law of escheats is founded upon this single principle, that the blood of the person last seized in fee-simple is, by some means or other, utterly extinct and gone: and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum* [an open fee]; and must result back again to the lord of the fee, by whom, or by those whose estate he has, it was given.

ESCHEATS are frequently divided into those *propter defectum sanguinis* [through failure of issue] and those *propter delictum tenentis* [through the fault of the tenant]: the one sort, if the tenant dies without heirs; the other, if his blood be attainted.[29]

But both these species may well be comprehended under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta,[30] "*dominus capitalis feodi loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis*." ["The chief lord of the fee is accounted heir whenever the blood of the tenant is extinct either by failure of issue or corruption."]

ESCHEATS therefore arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

1, 2, 3. THE first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors: secondly, when he dies without any relations on the part of those ancestors from whom his estate descended: thirdly, when he dies without any relations of the whole blood. In two of these cases the blood of the first purchaser is certainly, in the other it is probably, at an end; and therefore in all of them the law directs, that the land shall escheat to the lord of the fee: for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to lands, who is not of the blood of the first feudatory, to whom for his personal merit the estate is supposed to have been granted.

4. A MONSTER, which has not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, has no inheritable blood, and cannot be heir to any land, albeit

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it be brought forth in marriage: but, although it has deformity in any part of its body, yet if it has human shape, it may be heir.[31] This is a very ancient rule in the law of England;[32] and its reason is too obvious, and too shocking, to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions:[33] yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby;[34] (as the *jus trium liberorum* [the right of three children], and the like) esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be such an issue, as shall entitle the husband to be tenant by the curtesy;[35] because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious, birth, the land shall escheat to the lord.

5. BASTARDS are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination.[36] Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur* [the offspring of an illicit connection are not reckoned as children].[37] Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord.[38] The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father:[39] and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one twelfth of the inheritance,[40] and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not.[41] But our law, in favor of marriage, is much less indulgent to bastards.

THERE is indeed one instance, in which our law has shown them some little regard; and that is usually termed the case of *bastard eignè* [an elder son, born before the marriage of his parents] and *mulier puisnè* [a legitimate son, whose elder brother is illegitimate]. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law is called a *mulier*, or as Glanvil[42] expresses it in his Latin, *filius mulieratus*; the woman before marriage being *concubina* [concubine], and afterwards *mulier* [wife]. Now here the eldest son is bastard, or *bastard eignè*; and the younger son is legitimate, or *mulier puisnè*. If then the father dies, and the *bastard eignè* enters upon his land, and enjoys it to his death, and dies seized thereof, whereby the inheritance descends to his issue; in this case the *mulier puisnè*, and all other heirs,(though minors, feme-coverts, or under any incapacity whatsoever) are totally barred of their right.[43] And this, I. As a punishment on the *mulier* for his negligence, in not entering during the bastard's life, and evicting him. 2. Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seized, and so passed for legitimate in his lifetime. 3. Because the canon law (following the civil) did allow such *bastard eignè* to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shown to no other king of bastard; for, if the mother was never married to the father, such bastard could have no colorable title at all.[44]

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As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchases land, and dies seized thereof without issue, and intestate, the land shall escheat to the lord of the fee.[45]

6. ALIENS also are incapable of taking by descent, or inheriting:[46] for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defense of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his land shall escheat to the lord.

As aliens cannot inherit, so far they are on a level with bastards; but, as they are also disabled to hold by purchase,[47] they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit: but so it is expressly held,[48] because they have not in them any inheritable blood.

AND father, if an alien be made a denizen [citizen] by the king's letters patent, and then purchases lands, (which the law allows such a one to so) his son, born before his denization [citizenship], shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires an hereditary quality, which will be transmitted to his subsequent posterity. Yet, if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not.[49]

SIR Edward Coke[50] also holds, that if an alien comes into England, and there has issue two sons, who are thereby natural born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common stock of their consanguinity, is the father; and, as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the ancient law; not only from the rule before cited,[51] that *cestuy, que doit inheriter al pere, doit inheriter al fits* [he who is heir to the father is heir to the son]; but also because we have seen that the only feudal foundation upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors: but in this case as the immediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum* [as a fee strictly new]; that is, by none but the lineal descendants of the purchasing brother; and, on failure of them, should escheat to the lord of the fee. But this opinion has been since overruled:[52] and it is now held for law, that the sons of an alien, born here, may inherit to each other. And reasonably enough upon the whole: for, as (in common purchases) the whole of the supposed descent from

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indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent.

IT is also enacted, by the statute II & 12 W III. c. 6. that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors lineal or collateral; although their father, or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seized. As, if Francis the elder brother of John Stiles be an alien, and Oliver the younger be a natural-born subject, upon John's death without issue his lands will descend to Oliver the younger brother: now, if afterwards Francis has a child, it was feared that, under the statute of king William, this newborn child might defeat the estate of his uncle Oliver. Wherefore it is provided, by the statute 25 Geo. II. c. 39. that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seized:) with an exception however to the case, where lands shall descend to the daughter of an alien; which daughter shall resign such inheritance to her after-born brother, or divide it with her after-born sisters, according to the usual rule[53] of descents by the common law.

7. BY attainder also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable.

GREAT care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law,[54] as a part of punishment for the offense; and does not at all relate to the feudal system, nor is the consequence of any seignory or lordship paramount:[55] but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction if the Norman tenures; a fruit and consequence of which escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

THE doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprised[56]) is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit* [during good behavior]. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feudal escheat was brought into England at the conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in case of treason, for ever; in case of other felony, for only a year and a day, after which time it goes to the lord in a regular course of escheat,[57] as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And that this

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is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands, (which seem to be the old Saxon tenure) that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason.[58]

As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the statute I Edw. VI. c. 12. enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the ancient law of forfeiture operates, for it is expressly provided by the statute 5 & 6 Edw. VI. c. II. that the wife of one attaint of high treason shall not be endowed at all.

HITHERTO we have only spoken of estates vested in the offender, at the time of his offense, or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all he now has should escheat from him, but also that he should be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seized in fee, and the son commits treason and is attainted, and then the father dies: here the land shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life: but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit.[59] In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood: here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king so long as the offender lives.[60]

THERE is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the person attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel, which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony.[61] But, by the law of England, a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor to any other ancestor,[62] at least on the part of their attainted father.

THIS corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned: but he cannot wipe away the corruption of blood; for therein a third person has an interest, the lord who claims by escheat. If therefore a man has a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood, being once throughly corrupted by his father's attainder, must continue fo: but if the son had been born after the pardon, he might inherit; because by the pardon the father is made a new man, and may convey new inheritable blood

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to his after-born children.[63]

HEREIN there is however a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we have seen, that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise: for if a man has issue a son, and is attainted, and afterwards pardoned, and then has issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir: neither can the youngest be heir, for he has an elder brother living, of whom the law takes notice, as he once had a possibility of being heir; and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though, had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he has no corruption of blood.[64] So if a man has issue two sons, and the elder in the lifetime of the father has issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord.[65] Sir Edward Coke in this case allows,[66] that if the ancestor be attainted, his sons born before the attainder may be heirs to each other: and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father: but he makes a doubt (upon the same principles, which are now overruled[67]) whether sons, born after the attainder, can inherit to each other; for they never had any inheritable blood in them.

UPON the whole it appears, that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feudal property, is blotted out, corrupted, and extinguished for ever: the consequence of which is, that estates, thus impeded in their descent, result back and escheat to the lord.

THIS corruption of blood, thus arising from feudal principles, but perhaps extended farther than even those principles will warrant, has been long looked upon as a peculiar hardship: because, the oppressive parts of the feudal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty, (which, however severe, is sufficiently justified upon reasons of public policy) but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore in most (if not all) of the new felonies, created by parliament since the reign of Henry the eighth, it is declared that they shall not extend to any corruption of blood: and by the statute 7 Ann. c. 21. (the operation of which is postponed by the statute 17 Geo. II. c. 39.) it is enacted, that, after the death of the pretender, and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself: which provisions have indeed carried the remedy farther, than was required by the hardship above complained of; which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor.

BEFORE I conclude this head, of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and has left no

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heirs to inherit them. And this is the case of a corporation: for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat: which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told,[68] does tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant fails. This is indeed founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be held as of himself; till that practice was restrained by the statute of *quia emptores* [because of purchasers], 18 Edw. I. St. I. to which this very singular instance still in some degree remains an exception.

THERE is one more incapacity of taking by descent, which, not being productive of any escheat, is not properly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute II & 12 Will. III. c. 4. that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking, by descent as well as purchase, any real estates whatsoever; and his next of kin, being a protestant, shall hold them to his own use till such time as he complies with the terms imposed by the act. This incapacity is merely personal; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion and became a monk professed was incapable of inheriting lands, both in our own[69] and the feudal law; *eo quod desiit esse miles seculi qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium*.[70] ["He who becomes a soldier of Christ has ceased to be a soldier of the world, nor is he entitled to any reward who acknowledges no duty."] But yet he was accounted only *civiliter mortuus* [dead in law]; he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.

THESE are the several deficiencies of hereditary blood, recognized by the law of England; which, so often as they happen, occasion lands to escheat to the original proprietary or lord.

NOTES

1. § 12.
2. Co. Litt. 18.
3. Ibid.
4. Lord Raym. 728.
5. I Roll. Abr. 626.
6. Salk. 241. Lord Raym. 728.
7. I Roll. Abr. 627.
8. I Rep. 104. 2 Lev. 60. Raym. 334.
9. I Rep. 98.
10. Co. Litt. 23.

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11. Crag. l. I. t. 10. § 18.

12. Dalrymple of feuds. 210.

13. Gr. Coustum. Gloss. c.25. pag. 40.

14. Spelm. Gloss. 145.

15. See Book I. ch. 3.

16. See pag 236.

17. Stat. 29 Car. II. c. 3.

18. I P. Wms. 777.

19. Stat. 3 & 4 W. & M. c. 14.

20. Finch. law. 119.

21. Finch. Rep. 86.

22. See pag. 72.

23. *Eschet* or *êchet*, formed from the verb *eschoir* or *êchoir*, to happen.

24. I Feud. 86. Co. Litt. 13.

25. Co. Litt. 13.

26. Bro. Abr. tit. escheat. 26.

27. Ibid. tit. acceptance. 25. Co. Litt. 268.

28. I Inst. 215.

29. Co. Litt. 13. 92.

30. l. 6. c. I.

31. Co. Litt. 7, 8.

32. *Qui contra formam humani generis converso more procreantur, ut si mulier monstrosum vel prodigiosum enixa sit, inter liberos non computentur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut si sex vel tantum quatuor digitos habuerit, bene debet inter liberos connumerari; et, si membra sint inutilia aut tortuosa, non tamen est partus monstrosus.* [Those who are born with a form not human are not considered children; as when a woman by a perversion of nature brings forth something monstrous or prodigious. Nevertheless the offspring to which nature has only added, or from which withheld something, as if it should have six or only four fingers, ought to be reckoned among children; and though its limbs be useless or distorted, yet is it not a monstrous birth.] Bracton. l. I. c. 6. & l. 5. tr. 5. c. 30.

33. Ff. I. 5. 14.

34. Ff. 50. 16. 135. Paul. 4 sent. 9. § 63.

35. Co. Litt. 29.

36. See Book I. ch, 16.

37. Co. Litt. 8.

38. Finch. law. 1147.

39. Nov. 89. c. 8.

40. Ibid. c. 52.

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41. Cod. 6. 57. 5.
42. l. 7. c. I.
43. Litt. § 399. Co. Litt. 244.
44. Litt. § 400.
45. Bract. l. 2. c. 7. Co. Litt. 244.
46. Co. Litt. 8.
47. Ibid. 2.
48. Ibid. I. Lev. 59.
49. Co. Litt. 129.
50. I Inst. 8.
51. See pag. 223 and 239.
52. I Ventr. 473. I Lev. 59. I Sid. 193.
53. See pag. 208 and 214.
54. LL. Aelfred. c. 4. LL. Canut. C. 54.
55. 2 Inst. 64. Salk. 85.
56. 3 Inst. 15. Stat. 25 Edw. III. c. 2. § 12.
57. 2 Inst. 36.
58. Somner. 53. Wright. Ten. 118.
59. Co. Litt. 13.
60. 3 Inst. 47.
61. Van Leeuwen in 2 Feud. 31.
62. Co. Litt. 391.
63. Ibid. 392.
64. Co. Litt. 8.
65. Dyer. 48.
66. Co. Litt. 8.
67. I Hal. P. C. 357.
68. Co. Litt. 13.
69. Co. Litt. 132.
70. 2 Feud. 21.

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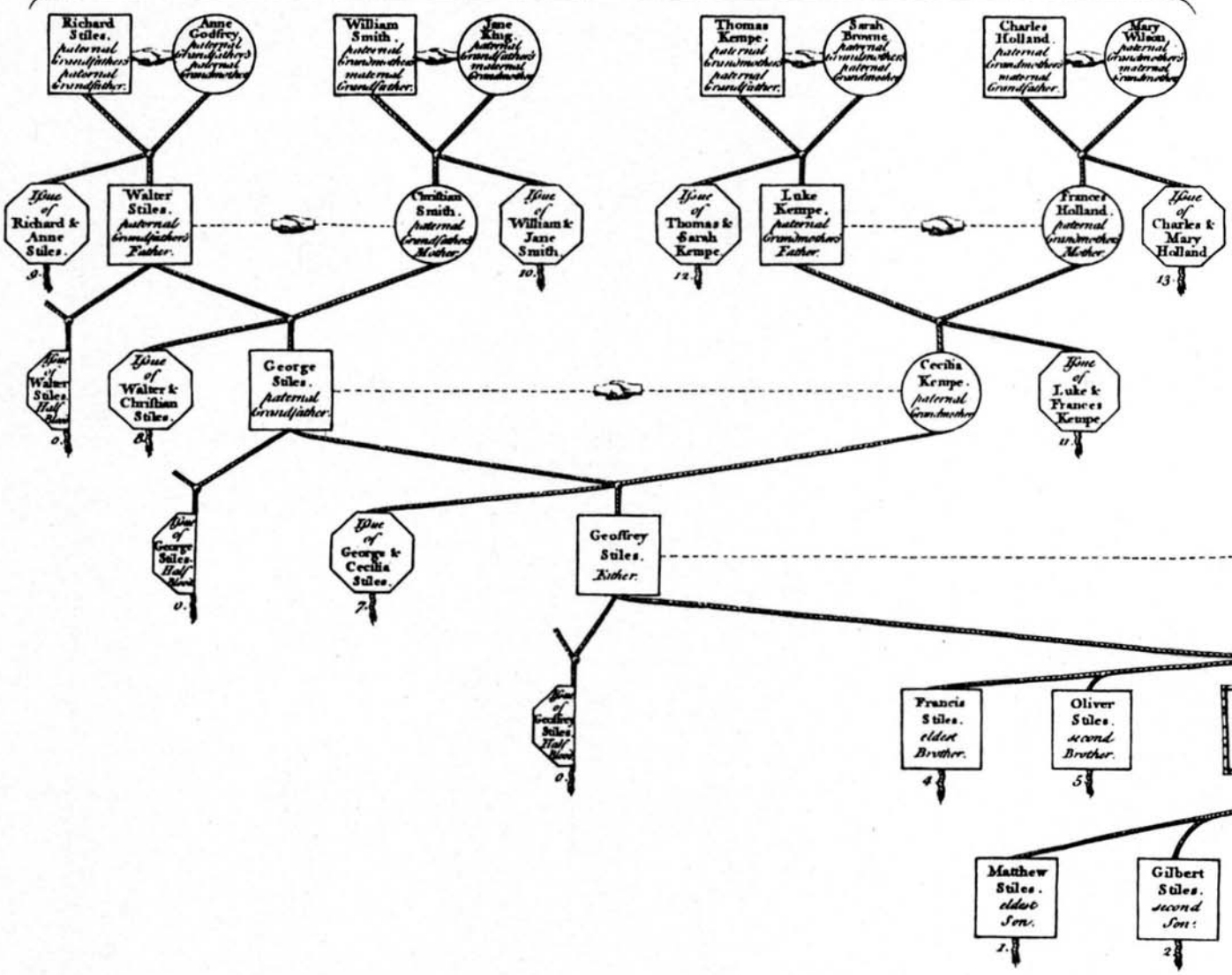

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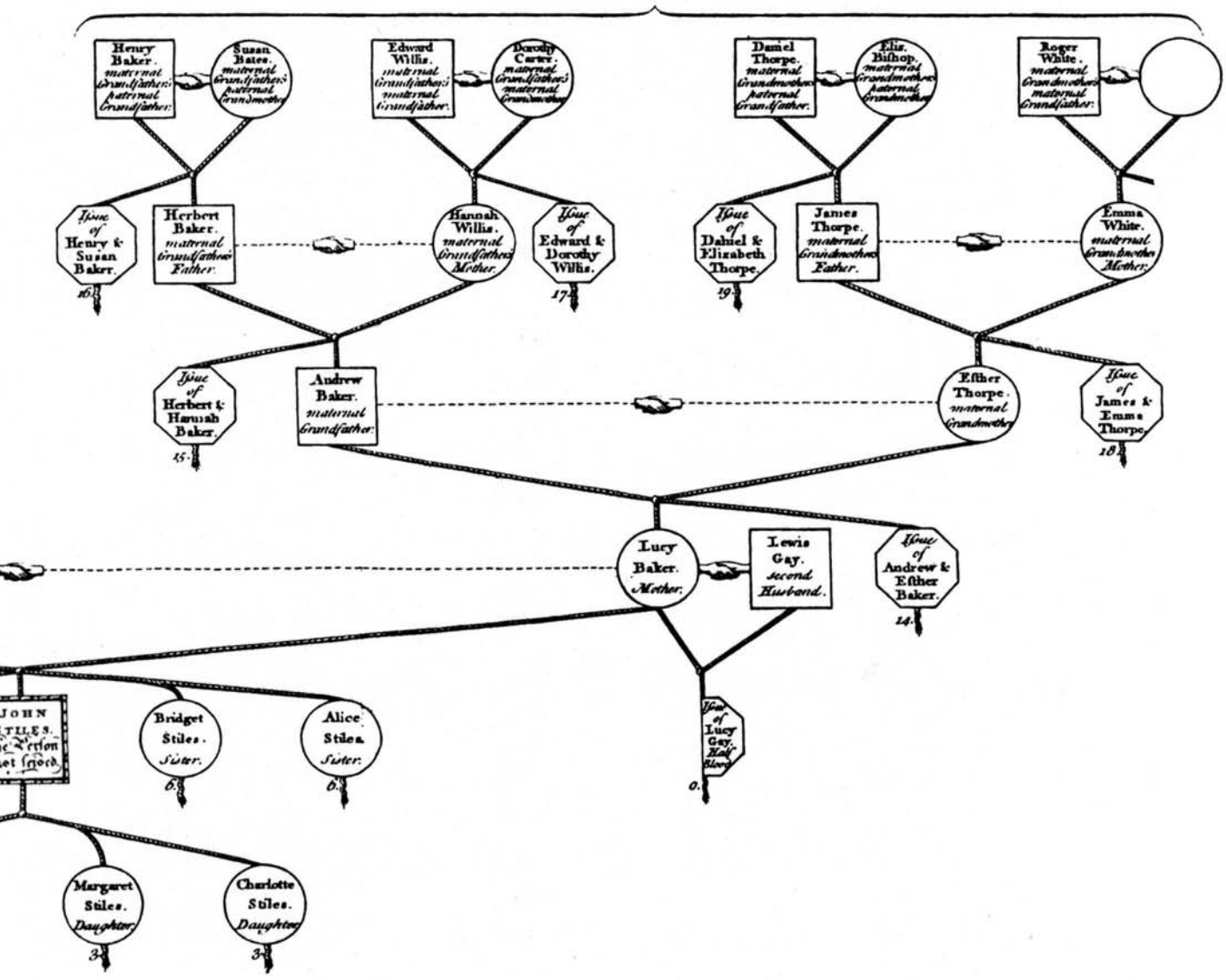

CHAPTER 16

Of Title by Occupancy

OCCUPANCY is the taking possession of those things, which before belonged to nobody. This, as we have seen,[1] is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But, when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome,[2] *quod nullius est, id ratione naturali occupanti conceditur* [what belongs to no one, natural reason concedes to the occupant].

THIS right of occupancy, so far as it concerns real property, (for of personal chattels I am not in this place to speak) has been confined by the laws of England within a very narrow compass; and was extended only to a single instance: namely, where a man was tenant *pur auter vie* [for another's life], or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie* [that other life], or him by whose life it was held: in this case he, that could first enter on the land, might lawfully retain the possession so long as *cestuy que vie* lived, by right of occupancy.[3]

THIS seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor; who had parted with all his interest, so long as *cestuy que vie* lived: it did not escheat to the lord of the fee; for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it; much less of so minute a remnant as this: it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the *haereditas jacens* [unoccupied inheritance] of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands; for the reversioner has an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king therefore there could be no prior occupant, because *nullum tempus occurrit regi* [no time runs against the king].[4] And, even in the case of a subject, had the estate *pur auter vie*, been granted to a man and his heirs during the life of *cestuy que vie*, there the heir might, and still may, enter and hold possession, and is called in law a special occupant; as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *haereditas jacens*, during the residue of the estate granted: though some have thought him so called with no very great propriety;[5] and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes; the one, 29 Car. II. c. 3. which enacts, that where there is no special occupant, in whom the estate may vest, the tenant *pur auter vie* may devise it by will, or it shall go to the executors and be assets in their hands for payment of debts: the other that of 14 Geo. II. c. 20. which enacts, that it shall vest not only in the executors, but, in case the tenant dies intestate, in the administrators also; and go in a course of distribution like a chattel interest.

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BY these two statutes the title of common occupancy is utterly extinct and abolished: though that of special occupancy, by the heir at law, continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant, specially marked out and appointed by the original grant. The doctrine of common occupancy may however be usefully remembered on the following account, among others: that, as by the common law no occupancy could be of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like,[6] (because, with respect to them, there could be no actual entry made, or corporal seizin had; and therefore by the death of the grantee *pur auter vie* a grant of such hereditaments was entirely determined[7]) so now, I apprehend, notwithstanding these statutes, such grant would not be devisable, nor vest in the executors, nor go in a course of distribution. For the statutes must not be construed so as to create any new estate, or to keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which therefore was left open to the first occupant. When there is a residue left, the statutes give it to the executors, etc, instead of the first occupant; but they will not create a residue, on purpose to give it the executors. They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner, of lands which before were nobody's; and thereby to supply this *casus omissus* [omitted case], and render the disposition of law in all respects entirely uniform: this being the only instance wherein a title to a real estate could ever be acquired by occupancy.

THIS, I say, was the only instance; for I think there can be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no actual owner of the land till a successor be appointed, yet there is a legal, potential ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in a river, or by the alluvion or dereliction of the sea; in these instances the law of England assigns them an immediate owner. For Bracton tells us,[8] that if an island arise in the middle of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law.[9] Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores: for if the whole soil is the freehold of any one man, as it must be whenever a several fishery is claimed,[10] there it seems just (and so is the usual practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owns the piscary and the soil. However, in case a new island rise in the sea, though the civil law gives it to the first occupant,[11] yet ours gives it to the king.[12] And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma* [firm land]; or by dereliction, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, if shall go to the owner of the land adjoining. For *de*

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minimis non curat lex [the law takes not cognizance of small things]: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge of loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry.[13] So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, he shall have what the river has left in any other place, as a recompense for this sudden loss.[14] And this law of alluvions and derelictions, with regard to rivers, is nearly the same in the imperial law;[15] from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to marine increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before-mentioned, as upon this other general ground of prerogative, which was formerly remarked,[16] that whatever has no other owner is vested by law in the king.

NOTES

1. See pag. 3 & 8.
2. Ff. 41. I. 3.
3. Co. Litt. 41.
4. Ibid.
5. Vaugh. 201.
6. Co. Litt. 41.
7. Vaugh. 201.
8. l. 2. c. 2.
9. Inst. 2. I. 22.
10. Salk. 637.
11. Inst. 2. I. 18.
12. Bract. l. 2. c. 2. Callis of sewers. 22.
13. Callis. 24. 28.
14. Callis. 28.
15. Inst. 2. I. 20, 21, 22, 23, 24.
16. See Vol. I. pag. 289.

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CHAPTER 17

Of Title by Prescription

A THIRD method of acquiring real property by purchase is that by prescription; as when a man can show no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at large in the preceding part of these commentaries.[1] At present therefore I shall only, first, distinguish between custom, strictly taken, and prescription; and then show, what sort of things may be prescribed for.

AND, first, the distinction between custom and prescription is this; that custom is properly a local usage, and not annexed to any person; such as, a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a personal usage; as, that Sempronius, and his ancestors, or those whose estate he has, have used time out of mind to have such an advantage or privilege.[2] As for example: if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation; (which is held[3] to be a lawful usage) this is strictly a custom, for it is applied to the place in general, and not to any particular persons: but if the tenant, who is seized of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he has in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the person of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he has;[4] which last is called prescribing in a *que estate*. And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors of predecessors at any distance of time, though his or their enjoyment of it had been suspended[5] for an indefinite series of years. But by the statute of limitations, 32 Hen. VIII. C.2. it is enacted, that no person shall make any prescription by the seizin or profession has been within threescore years next before such prescription, unless such seizin or profession has been within threescore years next before such prescription made.[6]

Secondly, as to the several species of things which may, or may not, be prescribed for: we may in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription; as a right way, a common, etc; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had.[7] For no man can be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title; a title by corporal seizin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But, as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seizin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription must always be laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates.[8]For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the

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tenant in fee-simple; and must plead, that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus a lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by any grant, it shall not be good by prescription[9] 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record: such as for instance, the royal franchises of deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record.[10] 5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribes in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate*, (that is, in himself and those whose estate he holds) nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix, of an estate, with which the thing claimed has no connection: but, if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross.[11] Therefore a man may prescribe, that he, and those whose estate he has in the manor of Dale, have used to hold the advowson of Dale, as appendant to that manor: but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common appurtenant to a manor; but, if he would prescribe for a common in gross, he must prescribe in a *que estate* for a common appurtenant to a manor; but, if he would prescribe for a common in gross he must prescribe in himself and his ancestors. 6. Lastly, we may observe, that estates pained by prescription ane not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule, For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as a acquisition de novo: and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase: for every accessory follows the nature of its principal.

NOTES

1. See Vol. I. pag. 75, etc.
2. Co. Litt. 113.
3. I Lev. 176.
4. 4 Rep. 32.
5. Co Litt. 113.
6. This title, of prescription, was well known in the Roman law by the name of *usucapio*; (*Ff.* 41.3.3.) so called, because

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a man, that gains a title by prescription, may be said *usu rem capere* [to take the thing by use].

7. Dr & St. dial. I. c. 8. Finch. 132.
8. Rep. 31, 32.
9. I Ventr. 387.
10. Co. Litt.114
11. Litt.§ 183.Finch. L.104.

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CHAPTER 18

Of Title by Forfeiture

Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, has sustained.

Lands, tenements, and hereditaments, may be forfeited in various degrees and by various means: i. By alienation contrary to law. 3. By non-presentation to a benefice, when the forfeiture is denominated a lapse. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

I. The foundation and justice of forfeitures for crimes and misdemeanors, and the several degrees of those forfeitures, preceding volume;[1] but will be more properly considered, and more at large, in the fourth book of these commentaries. At present I shall only observe in general, that the offenses which induce a forfeiture of lands and tenements to the crown are principally the following six; 1. Treason. 2. Felony. 3. Misprision of treason. 4. *Praemunire*. 5. Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. 6. Popish recusancy, or non-observance of certain laws enacted in restraint of papists. But at what time they severally commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future inquiries.

II. Lands and tenements may be forfeited by alienation, or conveying them to another, contrary to law. This is either alienation in mortmain, alienation to an alien, or alienation by particular tenants; in the two former of which cases the forfeiture arises from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. Alienation in mortmain, *in mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this has occasioned the general appellation of mortmain to be applied to such alienations,[2] and the religious houses themselves to be principally considered in forming the statutes of mortmain: in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses; how new remedies were still the parents of new evasions; till the legislature at last, though with difficulty, has obtained a decisive victory.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away. Yet in consequence of these it was always, and is still, necessary,[3] for corporations to have a license of mortmain from the crown, to enable them to purchase lands: for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants that can never be attainted or die. And such licenses of mortmain seem

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to have been necessary among the Saxons, above sixty years before the Norman conquest.[4] But, besides this general license from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his license also (upon the same feudal principles) for the alienation of the specific land. And if no such license was obtained, the king or other lord might respectively enter on the lands so aliened in mortmain, as a forfeiture. The necessity of this license from the crown was acknowledged by the constitutions of Clarendon,[5] in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations.[6] Yet such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the conquest. And (when a license could not be obtained) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seizin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly acquired seigniory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feudal services, ordained for the defense of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs, and the like: and therefore, in order to prevent this, it was ordained by the second of king Henry III's great charters,[7] and afterwards by that printed in our common statute-books, that all such attempts should be void, and the land forfeited to the lord of the fee.[8]

But, as this prohibition extended only to religious houses, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who, Sir Edward Coke observes,[9] in this were to be commended, that they ever had of their counsel the best learned men that they could get) found many means to creep out of this statute, by buying in lands that were *bona fide* held of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute *de religiosis* [of religious persons], 7 Edw. I; which provided, that no person, religious or other whatsoever, should buy, or sell, or receive, under pretense of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain: but, as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant; who, by fraud and collusion, made no defense, and thereby judgment was given for the religious house, which then recovered the land by sentence of law upon a supposed prior title. And thus they had the honor of inventing those fictitious adjudications of right. which are since become the great assurance of the kingdom, under the name of common recoveries. But upon this the statute of Westminster the second, 13 Edw. I. c. 32. enacted, that in such cases a jury shall

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try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seizin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter,[10] in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers [knights of Malta]) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. And so careful was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I. abolished all subinfeudations, and gave liberty for all men to alienate their lands to be held of the next immediate lord,[11] a proviso was inserted[12] that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's license by writ of *ad quod damnum* [at what loss] was marked out, by the statute 27 Edw. I. St. 2. it was farther provided by statute 34 Edw. I. St. 3. that no such license should be effectual, without the consent of the mesne or intermediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity: for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees to the use of the religious houses; thus distinguishing between the possession and the use, and receiving the actual profits, while the seizin of the land remained in the nominal feoffee: who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* for the rents and emoluments of the estate. And it is to these inventions that our practitioners are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device, for the statute 15 Ric. II. c. 5. enacts, that the lands which had been so purchased to uses should be amortized by license from the crown, or else be sold to private persons; and that, for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtle imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute 23 Hen. VIII. c. 10. declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

But, during all this time, it was in the power of the crown, by granting a license of mortmain, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity: which prerogative is declared and confirmed by the statute 18 Edw. III. St. 3. c. 3. But, as doubts were conceived at the time of the revolution how far such license was valid,[13] since the king had no power to dispense with the statutes of mortmain by a clause of non obstante,[14] which was the usual course, though it seems to have been unnecessary;[15] and as, by the gradual declension of mesne seigniories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very

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small compass; it was therefore provided by the statute 7 & 8 W. III. c. 37. that the crown for the future at its own discretion may grant licenses to aliene or take in mortmain, of whomsoever the tenements may be held.

After the dissolution of monasteries under Henry VIII, though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. & M. c. 8. and, during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any license whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. c. 3. that appropriators may annex the great tithes to the vicarages; and that all benefices under 100£ per annum may be augmented by the purchase of lands, without license of mortmain in either case: and the like provision has been since made, in favor of the governors of queen anne's bounty.[16] It has also been held,[17] that the statute 23 Hen. VIII. before-mentioned did not extend to any thing but superstitious uses; and that therefore a man may give lands for the maintenance of a school, an hospital, or any other charitable uses. But as it was apprehended from recent experience, that persons on their deathbeds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c. 36. that no lands or tenements, or money to be laid out thereon, shall be given for or charged with any charitable uses whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the court of chancery within six months after its execution, (except stocks in the public funds, which may be transferred within six months previous to the donor's death) and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eaton, Winchester, and Westminster, are excepted out of this act: but such exemption was granted with this proviso, that no college shall be at liberty to purchase more advowsons, than are equal in number to one moiety of the fellows or students, upon the respective foundations.

2. Secondly, alienation to an alien is also a cause of forfeiture to the crown of the lands so alienated, not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land,[18] but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property; as was observed in the preceding volume.[19]

3. Lastly, alienations by particular tenants, when they are greater than the law entitles them to make, and divest the remainder or reversion,[20] are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life alienes by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion.[21] For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feudal connection and dependence; it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one; and it ends in its consequences to defeat and divest the remainder or reversion expectant: as therefore that is put in jeopardy, by such act of the particular tenant, it is but just that,

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upon discovery, the particular estate should be forfeited and taken from him, who has shown so manifest an inclination to make an improper use of it. The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire and to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. The same law, which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold, or of chattel interests; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere discontinuance (as it is called[22]) of the estate-tail, which he issue may afterwards avoid by due course of law:[23] for he in remainder or reversion has only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law.[24] For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself has created.

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of disclaimer; as where a tenant, who holds of any lord, neglects to render him the due services, and upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord,[25] upon reasons most apparently feudal. And so likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first infeudation, or takes upon himself those rights which belong only to tenants of a superior class;[26] if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like;[27] such behavior amounts to a forfeiture of his particular estate.

III. Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For it being for the interest of religion, and the good of the public, that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron; who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority[28]) of the council of Lateran,[29] which was in the reign of our Henry the second, when the bishops first began to exercise universally the right of institution to churches.[30] And therefore, where there is no right of institution, there is no right of lapse: so that no donative can lapse to the ordinary,[31] unless it has been augmented by the queen's bounty.[32] But no right of lapse can accrue, when the original presentation is in the crown.[33]

The term, in which the title to present by lapse accrues from the one to the other successively, is six calendar months;[34] (following in this case the computation of the church, and not the usual one of the common law) and this exclusive of the day of the avoidance.[35] But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in;[36] for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also, if the bishop does not collate his own clerk immediately to the living, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the

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patron's clerk.[37] For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the arch-bishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the arch-bishop.[38] For he had no permanent right and interest in the advowson, as the patron has, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the king, prerogative here intervenes and makes a difference; and the patron shall never recover his right, till the king has satisfied his turn by presentation: for *nullum tempus occurrit regi* [no time runs against the king].[39] And therefore it may seem, as if the church might continue void for ever, unless the king shall be pleased to present; and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hands, of as it were compelling the king to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the king indeed by presenting another may turn out the patron's clerk; but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king has lost his right, which was only to the next or first presentation.[40]

In case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is perfumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwise he can take no advantage by way of lapse.[41] Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the arch-bishop or the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and has exceeded his time: for the first step or beginning fails, *et quod non habet principium, non habet finem* [and that which has no beginning has no end].[42] If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is styled a disturber by the law, and shall not have any title to present by lapse; for no man shall taken advantage of his own wrong.[43] Also if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided.[44]

IV. BY simony, the right of presentation to a living is forfeited, and vested *pro hac vice* [for this time] in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offense. It was by the canon law a very grievous crime: and is so much the more odious, because, as Sir Edward Coke observes,[45] it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However it is not an offense punishable in a criminal way at the common law;[46] it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, diverse acts of parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, with regard to spiritual preferments, calls aloud to be put in execution. I shall briefly consider them in this place, because they divest the corrupt patron of the right of

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presentation, and vest a new right in the crown.

BY the statute 31 Eliz. c. 6. it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity; such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the crown shall present to it for that turn only.[47] Also by the statute 12 Ann. stat. 2. c. 12. if any person for money or profit shall procure, in his own name or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

UPON these statutes many questions have arisen, with regard to what is, and what is not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony;[48] this being expressly in the face of the statute. 2. That for a clerk to bargain for the next presentation, the incumbent being sick and about to die, was simony, even before the statute of queen Anne:[49] and now, by that statute, to purchase, either in his own name or another's, the next presentation, and be thereupon presented at any future time to the living, is direct and palpable simony. But, 3. It is held that for a father to purchase such a presentation, in order to provide for his son, is not simony: for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him.[50] 4. That if a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture.[51] 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal,[52] provided the patron or his relations be not benefitted thereby;[53] for this is no corrupt consideration, moving to the patron. 6. That bonds of resignation, in case of non-residence or taking any other living, are not simoniacal.;[54] there being no corrupt consideration herein, but such only as is for the good of the public. So also bonds to resign, when the patron's son comes to canonical age, are legal; upon the reason before given, that the father is bound to provide for this son.[55] 7. Lastly, general bonds to resign at the patron's request are held to be legal:[56] for they may possibly be given for one of the legal considerations before-mentioned; and where there is a possibility that a transaction may be fair, the law will not suppose it iniquitous without proof. But, if the party can prove the contract to have been a corrupt one, such proof will be admitted, in order to show the bond simoniacal, and therefore void. Neither will the patron be suffered to make an ill use of such a general bond of resignation; as by extorting a composition for tithes, procuring an annuity for his relation, or by demanding a resignation wantonly and without good cause, such as is approved by the law; as, for the benefit of his own son, or on account of non-residence, plurality of livings, or gross immorality in the incumbent.[57]

V. THE next kind of forfeitures are those by breach or nonperformance of a condition annexed to the estate, either expressly by deed at its original creation, or impliedly by law from a principle of natural reason. Both which we considered at large in a former chapter.[58]

VI. I THEREFORE now proceed to another species of forfeiture, *viz.* by waste. Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison

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[disinheritance] of him that has the remainder or reversion in fee-simple or fee-tail.[59]

WASTE is either voluntary, which is a crime of commission, as by pulling down a house; or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste.[60] Therefore removing wainscot, floors, or other things once fixed to the freehold of a house, is waste.[61] If a house be destroyed by tempest, lightening, or the like, which is the act of providence, it is no waste: but otherwise, if the house be burnt by the statute 6 Ann. c. 3. no action will lie against a tenant for an accident of this kind, lest misfortune be added to misfortune. Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance.[62] Timber also is part of the inheritance.[63] Such are oak, ash, and elm in all places: and in some particular countries, by local custom, where other trees are generally used for building, they are thereupon considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste.[64] But underwood the tenant may cut down at any seasonable time that he pleases;[65] and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions.[66] The conversion of land from one species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture; are all of them waste.[67] For, as Sir Edward Coke observes,[68] it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value.[69] To open the land to search for mines of metal, coal, a, is waste; for that is a detriment to the inheritance:[70] but, if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use;[71] for it is now become the mere annual profit of the land. These three are the general heads of waste, *viz.* in houses, in timber, and in land. Though, as was before said, whatever tends to the destruction, or depreciating the value, of the inheritance, is considered by the law as waste.

LET us next see, who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories; "*si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur*" ["if a vassal shall have wasted the fee, or lessened its value by any notorious injury, he shall be deprived of it"].[72] But in our ancient common law the rule was by no means so large; for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons; guardian in chivalry, tenant in dower, and tenant by the curtesy;[73] and not in tenant for life or years.[74] And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them: but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But, in favor of the owners of the inheritance, the statutes of Marlbridge[75] and Gloucester[76] provided, that the writ of waste shall not only lie against tenants by the law of England (or curtesy) and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for above five hundred years past, all tenants for life or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases

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be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti*; that is, with a provision or protection that no man shall *impetere*, or sue him, for waste committed.

THE punishment for waste committed was, by common law and the statute of Marlbridge, only single damages;[77] except in the case of a guardian, who also forfeited his wardship[78] by the provisions of the great charter:[79] but the statute of Gloucester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages, to him that has the inheritance. The expression of the statute is, "he shall "forfeit the thing which he has wasted;" and it has been determined, that under these words the place is also included.[80] And if waste be done *sparsim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a house, the whole house shall be forfeited;[81] because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood (or perhaps in one room of a house) if that can be conveniently separated from the rest, that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner.[82]

VII. A SEVENTH species of forfeiture is that of copyhold estates, by breach of the customs of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste; whereupon the lord may seize them without any presentment by the homage;[83] but also to peculiar forfeitures, annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. and we may observe that, as these tenements were originally held by the lowest and most abject vassals, the marks of feudal dominion continue much the strongest upon this mode of property. Most of the offenses, which occasioned a resumption of the fief by the feudal law, and were denominated *feloniae, per quas vasallus amitteret feudum* [felonies, by which the vassal would lose his fee],[84] still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service;[85] *si dominum deservire noluerit*:[86] by disclaiming to hold of the lord, or swearing himself not his copyholder;[87] *si dominum ejuravit, i.e. negavit se a domino feudum habere*:[88] by neglect to be admitted tenant within a year and a day;[89] *si per annum et diem cessaverit in petenda investitura*:[90] by contumacy in not appearing in court after three proclamatons;[91] *si a domino ter citatus non comparuerit*:[92] or by refusing, when sworn of the homage, to present the truth according to his oath;[93] *si pares veritatem noverint, et dicant se nescire, cum sciant*.[94] In these, and a variety of other cases, which it is impossible here to enumerate, the forfeiture does not accrue to the lord till after the offenses are presented by the homage, or jury of the lord's court baron;[95] *per laudamentum parium suorum*:[96] or, as it is more fully expressed in another place,[97] *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa, quae sit laudanda*[98] *per judicium parium suorum* [no soldier shall be removed from the possession of his benefice, unless convicted of some offence, which must be declared by the judgment of his peers].

VIII. THE eighth and last method, whereby lands and tenements may become forfeited, is that of bankruptcy, or the act of becoming a bankrupt: which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined; a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.

WHO shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the

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several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter; when we shall endeavor more fully to explain its nature, as it most immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and tenements are transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission of bankrupt is awarded and issued against him.

BY the statute 13 Eliz. c. 7. the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tenements which were purchased by him jointly with his wife or children to his own use, (or such interest therein as he may lawfully part with) or purchased with any other person upon secret trust for his own use; and to cause them to be appraised to their full value, and to sell the same by deed indented and enrolled, or divide them proportionably among the creditors. The statute expressly includes not only free, but copyhold, lands: but did not extend to estates tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. I. c. 19. enacts, that the commissioners shall be empowered to sell or convey, by deed indented and enrolled, any lands or tenements of the bankrupt, wherein he shall be seized of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issues in tail, remaindermen, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means: and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to sell them. And also, by this and a former act,[99] all fraudulent conveyances to defeat the intent of these statutes are declared void; but that no purchaser *bona fide*, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed.

BY virtue of these statutes a bankrupt may lose all his real estates; which may at once be transferred by his commissioners to their assignees, without his participation or consent.

NOTES

1. Vol. I. pag. 289.
2. See Vol. 1. pag. 467.
3. F. N. B. 121.
4. Selden. Jan. Angl. l. 2. § 45.
5. *Ecclesiae de feudo domini regis non possunt in perpetuum dari, absque assensu et consensione ipsius*. [Advowsons, of which the king has the fee, cannot be given in perpetuity without his consent and approval.] c. 2. A. D. 1164.
6. See Vol. I. pag. 373.
7. A.D. 1217. cap. 43. edit. Oxon.
8. *Non licet alicui de caetero dare terram suam alicui domui religiosae, ita quod illam resumat tenendam de eadem domo;*

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nec liceat alicui domui religiosae terram alicujus sic accipere, quod tradat illam ei a quo ipsum recepit tenendam: si quis autem de caetero terram suam domui religiosae sic dederit, ut super hoc convincatur, donum suum penitus cassetur, ut terra illa domino suo illius feodi incurratur. [It is not lawful for any one to give his land to a religious house for the purpose of taking it again to hold of that house; neither is it lawful for any religious house thus to receive land in order to restore it to its original owner to hold of that house: but if any one shall have so given his land, and can be convicted of the fact, his gift shall be utterly void, and the land escheat to the lord of the fee.] Mag. Cart. 9 Hen. III. c. 36.

9. 2 Inst. 75.

10. capt. 33.

11. 2 Inst. 501.

12. cap. 3.

13. 2 Hawk. P. C. 391.

14. Stat. 1. W. & M. St. 2. c. 2.

15. Co. Litt. 99.

16. Stat. 2 & 3 Ann. c. 11.

17. 1 Rep. 24.

18. See pag. 249. 250.

19. Book I. ch. 10.

20. Co. Litt. 251.,

21. Litt. § 415.

22. See Book III.

23. Litt. § 595, 6, 7.

24. Co. Litt. 233.

25. Finch. 270, 271.

26. Co. Litt. 252.

27. Ibid. 253.

28. 2 Roll. Abr. 336. pl. 10.

29. Bracton. l. 4. tr. 2. c. 3.

30. See pag. 23.

31. Bro. Abr. tit. 2uar. Imped. 131. Cro. Ja c. 518.

32. Stat. 1 Geo. I. St. 2. c. 10.

33. stat. 17 Edw. II. c. 8. 2 Inst. 273.

34. 6 Rep. 62. Registr. 42.

35. 2 Inst. 361.

36. Gibf. Cod. 769.

37. 2 Inst. 273.

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38. 2 Roll. Abr. 368.
39. Dr. & St. d. 2. c. 36. Cro. Car. 355.
40. 7 Rep. 28. Cro. Eliz. 44.
41. 4 Rep. 75. 2 Inst. 632.
42. Co. Litt. 344. 345.
43. 2 Roll. Abr. 369.
44. Co. Litt. 344.
45. 3 Inst. 156.
46. Moor. 564.
47. For other penalties inflicted by this statute, see Book IV.
48. Cro. Eliz. 788. Moor. 914.
49. Hob. 165.
50. Cro Eliz. 686. Moor. 916.
51. 3 Inst. 154. Cro. Jac. 385.
52. Noy 142.
53. Star. 534.
54. Cro. Car. 180.
55. Cro. Jac. 248. 274.
56. Cro. Car. 180. Star. 227.
57. 1 Vern. 411. 1 Equ. Cas. abr. 86, 87. Stra. 534.
58. See chap. 10. pag. 152.
59. Co. Litt. 53.
60. Hetl. 35.,
61. 4 Rep. 64.
62. Co. Litt. 53.
63. 4 Rep. 62.
64. Co. Litt. 53.
65. 2 Roll. Abr. 817.
66. Co.Litt. 41.
67. Hob. 296.
68. 1 Inst. 53.
69. 1 Lev. 309.
70. 5 Rep. 12.

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71. Hob. 295.

72. Wright. 44.

73. It was however a doubt whether waste was punishable at the common law in tenant by the curtesy. Regist. 72. Bro. Abr. tit. waste. 88. 2 Inst. 301.

74. 2 Inst. 299.

75. 52 Hen. III. c. 24.

76. 6 Edw. I. c. 5.

77. 2 Inst. 146.

78. Ibid. 300.

79. 9 Hen. III. c. 4.

80. 2. Inst. 303.

81. Co. Litt. 51.

82. 2 Inst. 304.

83. 2 Ventr. 38. Cro. Eliz. 499.

84. Feud. l. 2. t. 26. in cale.

85. 3 Leon. 108. Dyer. 211.

86. Feud. l. 1. t. 21.

87. Co. Copyh.§ 57.

88. Feud. l. 2. t. 34. & t. 26. § 3.

89. Plowd. 372.

90. Feud. l. 2. t. 24.

91. 8 Rep. 99. Co. Copyh. § 57.

92. Feud. l. 2. t. 22.

93. Co. Copyh. § 57.

94. Feud. l. 2. t. 58.

95. Co. Copyh. § 58.

96. Feud. l. 1. t. 21.

97. Ibid. t. 22.

98. *i.e. arbitranda, definienda* [to be judged, to be declared]. Du Fresne. IV. 79.

99. 1 Jac. 1. c. 15.

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CHAPTER 19

Of Title by Alienation

THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense: under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another; whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.

THIS means of taking estates, by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law,[1] a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him, to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for, if he might, the feudal restraint of alienation would have been easily frustrated and evaded.[2] And, as he could not aliene it in his lifetime, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent, or presumptive, heir.[3] And therefore it was very usual in ancient feoffments to express, that the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant.[4] And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his seigniory without the consent of his vassal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighboring clan.,[5] This consent of the vassal was expressed by what was called attorning[6] or professing to become the tenant of the new lord; which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser, and to become his tenant, the grant or contract was in most cases void, or at least incomplete:[7] which was also an additional clog upon alienations.

BUT by degrees this feudal severity is worn is worn off; and experience has shown, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of king Henry the first, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power, than over what had been transmitted to him in a course of descent from his ancestors:[8] a doctrine, which is countenanced by the feudal constitutions themselves:[9] but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate.[10] Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his assigns by name; but, if his assigns were not specified in the purchase deed, he was not empowered to aliene:[11] and also he might part with one fourth of the

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inheritance of his ancestors without the consent of his heir.[12] By the great charter of Henry III,[13] no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land.[14] But these restrictions were in general removed by the statute of *quia emptores*,[15] whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion.[16] And even these tenants *in capite* were by the statute 1 Edw. III. c. 12. permitted to aliene, on paying a fine to the king.[17] By the temporary statutes 11 Hen. VII. c. 3. and 3 Hen. VIII. c. 4. all persons attending the king in his wars were allowed to aliene their lands without license, and were relieved from other feudal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of charging lands with the debts of the owner, this was introduced so early as statute Westm. 2. which[18] subjected a moiety of the tenant's lands to executions, for debts recovered by law; as the whole of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III. c. 9. and in other similar recognizances by statute 23 Hen. VIII. c. 6. And now, the whole of them is not only subject to be pawned for the debts of the owner, but likewise to be absolutely sold for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of devising lands by will, except in some places by particular custom, lasted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till, at last, they were made no longer necessary, by statutes 4 & 5 Ann. c. 16. and 11 Geo. II. c. 19.

IN examining the nature of alienation, let us first inquire, briefly, who may aliene and to whom; and then, more largely, how a man may aliene, or the several modes of conveyance.

1.WHO may aliene, and to whom; or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties: for all persons in possession are, prima facie, capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. But, if a man has only in him the right of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed.[19] Yet reversions and vested remainders may be granted; because the possession of the particular tenant is the possession of him in reversion or remainder: but contingencies, and mere possibilities, though they may be released, or devised by will, or may pass to the heir or executor, yet cannot (it has been said) be assigned to a stranger, unless coupled with some present interest.[20]

PERSONS attainted of treason, felony, and *praemunire* [forewarning], are incapable of conveying, from the time of the offense committed, provided attainder follows:[21] for such conveyance by them may tend to defeat the king of his forfeiture, or the lord of his escheat. But they may purchase for the benefit of the crown, or the lord of the fee, though they are disabled to hold: the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat as well as forfeiture, according to the nature of the crime.[22] So also corporations, religious or others, may purchase lands; yet, unless they have a license to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.

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IDIOTS and persons of nonsane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* [to a degree] only. For their conveyances and purchases are voidable, but not actually void. The king indeed, in behalf of an idiot, may avoid his grants or other acts.[23] But it has been said, that a non compos himself, though he be afterwards brought to a right mind shall not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edward I, non compos was a sufficient plea to avoid a man's own bond:[24] and there is a writ in the register[25] for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suae, ut dicit* [while he was of unsound mind, as he says], etc. But under Edward III a scruple began to arise, whether a man should be permitted to blemish himself, by pleading his own insanity:[26] and, afterwards, a defendant in assize having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore tenus* [by word of mouth], as the manner then was) that he was out of his mind when he gave it, the court adjourned the assize; doubting, whether as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it.[27] Under Henry V1 this way of reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument;[28] upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities which Fitzherbert does not scruple to reject as being contrary to reason,[29] the maxim that a man shall not stultify himself has been handed down as settled law:[30] though later opinions, feeling the inconvenience of the rule, have in many points endeavored to restrain it.[31] And, clearly, the next heir, or other person interested, may, after the death of the idiot or non compos, take advantage of his incapacity and avoid the grant.[32] And so too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option.[33] In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him.[34] Persons also, who purchase or convey under duress is ceased.[35] For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases.

THE case of a feme-covert is somewhat different. She may purchase an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent.[36] And, though he does nothing to avoid it, or even if he actually consents, the feme- covert herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement.[37] But the conveyance or other contract of a feme-covert (except by some matter of record) is absolutely void, and not merely voidable;[38] and therefore cannot be affirmed or made good by any subsequent agreement.

THE case of an alien born is also peculiar. For he may purchase any thing; but after purchase he can hold nothing, except a lease for years of a house for convenience of merchandise, in case he be an alien-friend: all other purchases (when found by an inquest of office) being immediately forfeited

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to the king.[39]

PAPISTS, lastly, and persons professing the popish religion, are by statute 11 & 12 W. III. c. 4. disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void. But this statute is construed to extend only to papists above the age of eighteen; such only being absolutely disabled to purchase: yet the next protestant heir of a papist under eighteen shall have the profits, during his life; unless he renounces his errors within the time limited by law.[40]

II. WE are next, but principally, to inquire, how a man may aliene or convey; which will lead us to consider the several modes of conveyance.

IN consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; which, we have more than once observed was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose therefore, of continuing the possession, the municipal law has established descents and alienations: the former to continue the possession in the heirs of the proprietors, after his involuntary dereliction of it by his death; the latter to continue it in those persons, to whom the proprietor, by his own voluntary act, shall choose to relinquish it in his lifetime. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or with regard to the subject matter, as what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the common assurances of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

THESE common assurances are of four kinds: 1. By matter in pais, or deed; which is an assurance transacted between two or more private persons in pais, in the country; that is (according to the old common law) upon the very spot to be transferred. 2. By matter of record, or an assurance transacted only in the king's public courts of record. 3. By special custom, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect, till after his death, and that is by devise, contained in his last will and testament. We shall treat of each in its order.

NOTES

1. See pag. 57.
2. Feud. l. 1. t. 27.
3. Co. Litt. 94. Wright, 168.

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4. Madox, Formul. Angl. No. 316. 319. 427.

5. Gilb. Ten. 75.

6. The same doctrine and the same denomination prevailed in Bretagne. – *Possessiones in jurisdictionalibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vasallus, ejurato prioris domini obsequio et fide, novo se sacramento novo item domino acquirenti obstringebat; idque jussu auctoris.* [Possessions with a right of jurisdiction can only be taken by attorning or professing to become tenant, as it is usually called; when the vassal resigning his former obedience and faith, bound himself by a fresh oath to the new lord, and that by the command of his ancient lord.] D'Argentre Antiq. Consuet. Brit. apud Dufresne. I. 819, 820.

7. Litt. § 551.

8. *Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt non mittat extra cognationem suam*. [He may give his purchases or acquisitions to whomsoever he pleases. But the land which descended to him he cannot alien from his kindred.] LL. Hen. 1. c. 70.

9. Feud. l. 2. t. 39.

10. *Si questum tantum habuerit is, qui partem terrae suae donare voluerit, tunc quidem hoc ei licet: sed non totum questum, quia non potest filium suum haeredem exhaeredare.* [If he, who wishes to give a part of his land, has only what he has acquired himself, he may lawfully do it: but he cannot alien the whole, because he cannot disinherit his son and heir.] Glanv. l. 7. c. 1.

11. Mirr. C. 1. § 3. This is also borrowed from the feudal law. Feud. l. 2. t. 48.

12. Mirr. ibid.

13. 9 Hen. 111. c. 32.

14. Dalrymple of feuds. 95.

15. 18 Edw. 1. c. 1.

16. See pag. 72.

17. 2 Inst. 67.

18. 13 Edw. 1. c. 18.

19. Co. Litt. 214.

20. Sheppard's touchstone. 238, 239, 322. 11 Mod. 152. 1p. Wms. 574. Stra. 132.

21. Co. Litt. 42.

22. Ibid. 2.

23. Ibid. 247.

24. Britton, c. 28. fol. 66.

25. fol. 228.

26. 5 Edw. 111. 70

27. 35 Affif. pl. 10.

28. 39 Hen. V1. 42.

29. F. N. B. 202.

30. Litt. § 405. Cro. Eliz. 398. 4 Rep. 123.

31. Comb. 469. 3 Mod. 310, 311. 1 Equ. Cas. Abr. 270.

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32. Perkins. § 21.
33. Co. Litt. 2.
34. Ibid.
35. 2 Inst. 483. 5 Reo. 119.
36. Co. Litt. 3.
37. Ibid.
38. Perkins. § 154. 1 Sid. 120.
39. Co. Litt. 2.
40. I p. Wms. 354.

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CHAPTER 20

Of Alienation by Deed

IN treating of deeds I shall consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And in explaining the former, I shall examine, first, what a deed is; secondly, its requisites; and, thirdly, how it may be avoided.

1. FIRST than, a deed is a writing sealed and delivered by the parties.[1] It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, ξατ εξοχην [by way of pre-eminence], because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be estopped by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed.[2] If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium* [like teeth], but at present in a waving line) on the top or side, to tally or correspond with the other; which deed, so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a strait or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists;[3] and with us *chirographa*, or hand-writings;[4] the word *cirographum* or *cyrographum* being usually that which was divided in making the indenture: and this custom is still preserved in making out the indentures of a fine, whereof hereafter. But at length indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose, than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts: though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but polled or shaved quite even; and is therefore called a deed-poll, or a single deed.[5]

II. WE are in the next place to consider the requisites of a deed. The first of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing, or subject matter to be contracted for; all which must be expressed by sufficient names.[6] So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

SECONDLY; the deed must be founded upon good and sufficient consideration. Not upon an usurious contract;[7] nor upon fraud or collusion, either to deceive purchasers *bona fide*,[8] or just and lawful creditors;[9] any of which bad considerations will vacate the deed. A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to inure, or to be effectual, only to the use of the grantor himself.[10]

The consideration may be either a good, or a valuable one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded

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in motives of generosity, prudence, and natural duty: a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant;[11] and is therefore founded in motives of justice. Deeds, made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favor of creditors, and *bona fide* purchasers.

THIRDLY; the deed must be written, or I presume printed; for it may be in any character or any language; but it must be upon paper, or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed.[12] Wood or stone may be more durable, and linen less liable to erasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps, imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing, but this giving a handle to a variety of frauds, the statute 29 Car. II. c. 3. enacts, that no lease or estate in lands, tenements, or hereditaments, (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two thirds of the real value) shall be looked upon as of greater force than a lease or estate at will; unless put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

FOURTHLY; the matter written must be legally and orderly set forth: that is, there must be words sufficient to specify the agreement and bind the parties: which sufficiency must be left to the courts of law to determine.[13] For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual[14] order.

1.THE premises may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded: and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.[15]

2. 3. NEXT come the *habendum* [to have] and *tenendum* [to hold].[16] The office of the habendum is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* cannot lessen, but it may enlarge, the estate granted in the premises; as if a grant be "to A and the heirs of his body" in the premises, *habendum* "to him and his heirs for ever," here A has an estate-tail, and a fee-simple expectant thereon.[17] But had it been in the premises "to him and his heirs," the *habendum* would be utterly void;[18] for the larger and more beneficial estate is vested in him before the *habendum* comes, and shall not afterwards be narrowed, or divested, by it. The *tenendum*, "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure, by which the estate granted was to be held; *viz.* "*tenendum per servitium militare, in burgagio, in libero socagio*," ["to hold by military service, in burgage, in free socage"] etc. But, all these being now

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reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 Edw. I. it was also sometimes used to denote the lord of whom the land should be held; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* has been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be held *de capitalibus dominis feodi* [of the chief lords of the fee]:[19] but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

4. NEXT follow the terms or stipulations, if any, upon which the grant is made: the first of which is the *reddendem* or reservation, whereby the grantor does create or reserve some new thing to himself out of what he had before granted. As "rendering therefore yearly the sum of ten shillings, or a pepper corn, or two days plowing, or the like."[20] This render, *reditus*, return, or rent, under the pure feudal system consisted, in chivalry, principally of military services; in villenage, of the most slavish offices; and, in socage, it usually consists of money, though it may consist of services still, or of any other certain profit.[21] To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed.[22] But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee.[23]

5. ANOTHER of the terms upon which a grant may be made is a condition; which is a clause of contingency, on the happening of which the estate granted may be defeated; as "provided always, that if the mortgagor shall pay the mortgagee 500£ upon such a day, the whole estate granted shall determine," and the like.[24]

6. NEXT may follow the clause of warranty; whereby the grantor does, for himself and his heirs, warrant and secure to the grantee the estate so granted.[25] By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might vouch, or call, the lord or donor to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense.[26] And so, by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originall stipulated to be rendered.[27] Or if a man and his ancestors had immemorially held land of another and his ancestors by the service of homage (which was called *homage auncestral*) this also bound the lord to warranty;[28] the homage being an evidence of such a feudal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty,[29] because they enjoy the equivalent. And, so even at this day, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) are bound to warrant the title.[30] But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs;[31] because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, no warranty whatsoever is implied;[32] they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty, to bind the grantor and his heirs; which is

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a kind of covenant real, and can only be created by the verb *warrantizo* or warrant.[33]

THESE express warranties were introduced, even prior to the statute of *quia emptores,* in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet, if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging such heir to yield him recompense in lands of equal value: the law, in favor of alienations, supposing that no ancestor would wantonly disinherit his next of blood;[34] and therefore presuming that he had received a valuable consideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee-simple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir: and this, whether that warranty was lineal, or collateral to the title of the land. Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty; as where a father, or an elder son in the life of the father, released to the disseizor of either themselves or the grandfather, with warranty, this was lineal to the younger son.[35] Collateral warranty was where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor; as where a younger brother released to his father's disseizor, with warranty, this was collateral to the elder brother.[36] But where the very conveyance, to which the warranty was annexed, immediately followed a disseizin, or operated itself as such (as, where a father tenant for years, with remainder to his son in fee-simple with warranty) this, being in its original manifestly founded on the tort or wrong of the warrantor himself, was called a warranty commencing by disseizin; and, being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor.[37]

IN both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent form the warranting ancestor.[38] But though, without assets, he was not bound to insure the title of another, yet, in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land himself; for, if he could succeed in such claim, he would then gain assets by descent (if he had them not before) and must fulfil the warranty of his ancestor: and the same rule[39] was with less justice adopted also in respect of collateral warranties, which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to aliene their lands with warranty; which collateral warranty of the father descending upon his son (who was the heir of both his parents) barred him from claiming his maternal inheritance: to remedy which the statute of Gloucester, 6 Edw. I. c. 3. declared, that such warranty should be no bar to the son, unless assets descended from the father. It was afterwards attempted in 50 Edw. III. to make the same provision universal, by enacting that no collateral warranty should be a bar, unless where assets descended from the same ancestor,[40] but it then proceeded not to effect. However, by the statute II Hen. VII. c. 20.

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notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife. And by statute 4 & 5 Ann. c. 16. all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession shall be void against his heir. By the wording of which last statute it should seem, that the legislature meant to allow, that the collateral warranty of tenant in tail, descending (though without assets) upon a remainder-man or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute *de donis*, held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar:[41] which was therefore formerly mentioned[42] as one of the ways whereby an estate tail might be destroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. They also held that collateral warranty was not within the statute *de donis*; as that act was principally intended to prevent the tenant in tail from disinheriting his own issue: and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon.[43] And so it still continues to be, notwithstanding the statute of queen Anne, if made by tenant in tail in possession: who therefore may now, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion.

7. AFTER warranty usually follow covenants, or conventions; which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he has a right to convey, or for the grantee's quiet enjoyment; or the like: the grantee may covenant to pay his rent, to repair the premises, etc.[44] If the covenanter covenants for himself and his heirs, it is then a covenant real, and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his executors and administrators, his personal assets as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty, and it has therefore in modern practice totally superseded the other.

8. LASTLY, comes the conclusion, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before-mentioned.[45] Not but a deed is good, although it mention no date; or has a false date; or even if it has an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is, delivered, can be proved.[46]

I PROCEED now to the fifth requisite for making a good deed; the reading of it. This is necessary, wherever any of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited: unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party.[47]

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SIXTHLY, it is requisite that the party, whose deed it is, should seal, and in most cases I apprehend should sign it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history.[48] And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase.[49] In the civil law also,[50] seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use here. For though Sir Edward Coke[51] relies on an instance of king Edwyn's making use of a seal about an hundred years before the conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumstance, of being sealed; since we are assured by all our ancient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross: which custom our illiterate vulgar do, for the most part, to this day keep up; by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters.[52] In like manner, and for the same unsurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the confessor to Westminster abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England.[53] At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross.[54] The impressions of these seals were sometimes a knight on horseback, sometimes other devises: but coats of arms were not introduced into seals, not indeed into any other use, till about the reign of Richard the first, who brought them from the crusade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

THIS neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds,) “sealed and delivered,” continues to this day; notwithstanding the statute 29 Car. II. c. 3. before-mentioned revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds; in which therefore signing seems to be now as necessary as sealing, though it has been sometimes held, that the one includes the other.[55]

A SEVENTH requisite to a good deed is that it be delivered, by the party himself or his certain attorney: which therefore is also expressed in the attestation; “sealed and delivered.” A deed takes effect only from this tradition or delivery; for, if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing,[56] and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not

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delivered as a deed, but as an escrow; that is, as a scrowl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes.[57]

THE last requisite to the validity of a deed is the attestation, or execution of it in the presence of witnesses: though this is necessary, rather for preserving the evidence, than for constituting the essence, of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia tastata* [short evidences] mentioned by the feudal writers;[58] which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power) but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum; thus; "*Hiis testibus Johanne Moore, Jacobo Smith, et aliis, ad hanc rem convocatis.*"[59] ["Witness John Moore, Jacob Smith and others, for this purpose assembled."] This, like all other solemn transactions, was originally done only *coram paribus* [before the peers],[60] and frequently when assembled in the court baron, hundred, or county court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.* [witness the county, hundred, etc.][61] Afterwards the attestation of other witnesses was allowed, the trial in case of a dispute being still reserved to the *pares*; with whom the witnesses (if more than one) were associated, and joined in the verdict:[62] till that also was abrogated by the statute of York, 12 Edw. II. St. I. c. 2. And in this manner, with some such clause of *hiis testibus*, are all old deeds and charters, particularly Magna Carta, witnessed. And, in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner.[63] But in the king's common charters writs, or letters patent, the style is now altered: for, at present, the king is his own witness, and attests his letters patent thus; "*teste meipso*, witness ourself at Westminster, etc:" a form which was introduced by Richard the first,[64] but not commonly used till about the beginning of the fifteenth century; nor the clause of *hiis testibus* entirely discontinued till the reign of Henry the eighth:[65] which was also the era of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general: and therefore ever since that time the witnesses have subscribed their attestation, either at the bottom, or on the back, of the deed.[66]

III. WE are next to consider, how a deed may be avoided, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before-mentioned; either, 1. Proper parties, and a proper subject matter: 2. A good and sufficient consideration: 3. Writing, on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and, by the statute, in many cases signing also: or, 7. Delivery: it is a void deed *ab initio* [from the beginning]. It may also be avoided by matter *ex post facto* [after the fact]: as, 1. By erasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation.[67] 2. By breaking off, or defacing, the seal.[68] 3. By delivering it up to be cancelled; that is to have lines drawn over it, in the form of lattice work of *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as, the husband, where a feme covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like. 6. By the judgment or decree of a court of judicature. This was anciently the province of the court of star chamber, and now of the chancery: when it appears that the deed was obtained by fraud, force,

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or other foul practice is proved to be an absolute forgery.[69] In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

AND, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which, from long practice and experience of their efficacy, are generally used in the alienation of real estates: for it would be tedious, nay of in personal concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to convey the property of lands and tenements from man to man, are commonly denominated conveyances: which are either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses.

I. Of conveyances by the common law, some may be called original, or primary conveyances; which are those by means whereof the benefit or estate is created or first arises: others are derivative or estate, originally created, is enlarged, restrained, transferred, or extinguished. Original conveyances are the following; 1. Feoffment: 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition: derivative are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeasance.

1. A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi* [the gift of a fee].[70] It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the feoffor; and the person enfeoffed is denominated the feoffee.

THIS is plainly derived from, or is indeed itself the very mode of the ancient feudal donation; for though it may be performed by the word "enfeoff" or "grant," yet the aptest word of feoffment is "do or *dedi*."[71] And it is still directed and governed by the same feudal rules; insomuch that the principal rule relating to the extent and effect of a feudal grant, "*tenor est qui legem dat feudo*" ["the tenor of the deed gives validity to the fee"], is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*" ["measure gives validity to the grant"].[72] And therefore as in pure feudal donations the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate he meant to confer, "*ne quis plus donasse praesumatur quam in donatione expresserit*" ["lest any one be presumed to have given more than is expressed in the donation"];[73] so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) has barely an estate for life.[74] For, as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, has given it a longer continuance. These express provisions are indeed generally made, for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple,[75] by giving the land to the feoffee, to hold to him and his heirs for ever; though it serves equally well to convey any other estate of freehold.[76]

BUT by the mere words of the deed the feoffment is by no means perfected. There remains a very

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material ceremony to be performed, called livery of seizin; without which the feoffee has but a mere estate at will.[77] This livery of seizin is no other than the pure feudal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit*" ["For a fee can in no wise be perfected without investiture"];[78] and an estate was then only perfect, when, as Fleta expresses it in our law, "*fit juris et seizinae conjunctio*" ["a conjunction of law and seisin"].[79]

INVESTITURES, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the lord; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And, at a time when writing was seldom practiced, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such as claimed title by other means might know against whom to bring their actions.

IN all well-governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain the property of lands. In the Roman law *plenum dominium* [complete ownership] was not said to subsist, unless where a man has both the right, and the corporal possession; which possession could not be acquired without both an actual intention to possess, and an actual seizin, or entry into the premises, or part of them in the name of the whole.[80] And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day, to vest the property completely in the new proprietor; who, according to the distinction of the canonists,[81] acquires the jus ad rem, or inchoate and imperfect right, by nomination and institution; but not the jus in re, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by installment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also even in descents of lands, by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands: for if he dies before entry made, his heir shall not be entitled to take the possession, but the heir of the person who was last actually seized.[82] It is not therefore only a mere right to enter, but the actual entry, that makes a man complete owner; so ad to transmit the inheritance to his own heirs: *non jus, sed seisina, facit stipitem* [not right, but seizin makes the stock].[83]

YET, the corporal tradition of lands being sometimes inconvenient, a symbolic delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book of Ruth:[84] "now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things: a man plucked off his shoe, and gave it to his neighbor; and this was a testimony in Israel." Among the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses, who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession: and a staff or wand was also

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delivered from the vendor to the vendee, which passed through the hands of the witnesses.[85] With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands.[86] And, to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or virge, and then from the lord to the purchaser by re-delivery of the same, in the presence of a jury of a jury of tenants.

CONVEYANCES in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolic, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere, simple, corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed: yet still, for a very long series of years, they were never made use of, but in company with the more ancient and notorious method of transfer, by delivery of corporal possession.

LIVERY of seizin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses: and in leases for years, or other chattel interests, it is not necessary. In leases for years indeed an actual entry is necessary; to vest the estate in the lessee: for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*; and, when he enters in pursuance of that right, he is then and not before in possession of his term, and complete tenant for years.[87] This entry by the tenant himself serves the purpose of notoriety, as well as livery of seizin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot be made but by livery of seizin; which livery, being an actual manual tradition of the land, must take effect *in praesenti*, or not at all.[88]

ON the creation of a freehold remainder, at one and the same time with a particular estate for years, we have before seen that at the common law livery must be made to the particular tenant.[89] But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest*" ["for what is once mine, cannot be mine more fully"]:[90] but it must be made to the remainder-man himself, by consent of the lessee for years: for without his consent no livery of the possession can be given;[91] partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given[92] for introducing the doctrine of attornments.

LIVERY of seizin is either in deed, or in law. Livery in deed is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or hid attorney, (for this may as effectually be done

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by deputy or attorney, as by the principals themselves in person) come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, does deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect. "I deliver these to you in the name of seizin of all the lands and tenements contained in this deed." But, if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others.[93] If the conveyance or feoffment be of diverse lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seizin of any parcel, in the name of the rest, suffices for all;[94] but, if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently this seizin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighborhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law,[95] *pares debent interesse investiturae feudi, et non alii* [the peers, and no others, should be present at the investiture of the fee]: for which this reason is expressly given; because the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though, afterwards, the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed, (like that of all other attestations[96]) was still reserved to the *pares* or jury of the county.[97] Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case, but by the consent of the particular tenant; and the consent of one will not bind the rest.[98] And in all these cases it is prudent, and usual, to endorse the livery of seizin on the back of the deed, specifying the manner, place, and time of making it; together with the names of the witnesses.[99] And thus much for livery in deed.

LIVERY in law is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as possible to the lands,[100] will suffice without an entry.[101] This livery in law cannot however be given or received by attorney, but only by the parties themselves.[102]

2. THE conveyance by gift, *donatio*, is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are do or dedi;[103] and gifts in tail are equally imperfect without livery of seizin, as feoffments in fee-simple.[104] And this is the only distinction that Littleton seems to take, when he says,[105] "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee;" *viz.* feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life, or for years, or at will. In common acceptation gifts are frequently confounded with the next species of deeds: which are,

3. GRANTS, *concessiones*; the regular method by the common law of transferring the property of

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incorporeal hereditaments, or, such things whereof no livery can be had.[106] For which reason all corporeal hereditaments, as lands and houses, are said to lie in livery; and the others, as advowsons, commons, rents, reversions, etc, to lie in grant.[107] And the reason is given by Bracton:[108] "*traditio nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporales, quae sunt ipsum jus rei vel corpori inhaerens, traditionem non patiuntur*." ["Livery is merely the transferring from one person to another, from one band to another, or the induction into possession of a corporeal hereditament; but an incorporeal hereditament, which is the right itself to a thing, or inherent in the person, does not admit of delivery."] These therefore pass merely by the delivery of the deed. And in seigniories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite) were held to be of equal notoriety with, and therefore wquivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject matter: for the operative words therein commonly used are *dedi et concessi*, "have given and granted."

4. A LEASE is properly a conveyance of any lands or tenements, (usually in consideration of rent or other annual recompense) made for life, for years, or at will, but always for a less time than the lessor has in the premises: for if it be for the whole interest, it is more properly an assignment than a lease. The usual words of operation in it are, "demise, grant, and to farm let; *dimisi, concessi, et ad firmam tradidi*." Farm, or *feorme*, is an old Saxon word signifying provisions:[109] and it came to be used instead of rent or, render, because anciently the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at present, by a gradual departure from the original sense, the word farm is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments: though livery of seizin is indeed incident and necessary to one species of leases, *viz.* leases for life of corporeal hereditaments; but to no other.

WHATEVER restrictions, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons seized of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration; for he has the whole interest: but tenant in tail, or reversioner; nor could a husband, seized *jure uxoris* [in right of his wife], make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee-simple: such as parsons and vicars with consent of the patron and ordinary.[110] So also bishops, and deans, and such other sole ecclesiastical corporations as are seized of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power where it was unreasonable, and might be made an ill use of, is restrained; and, where in the other cases the restraint by the common law seemed too hard, it is in some measure removed.

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The former statutes are called the restraining, the latter the enabling statute. We will take a view of them all, in order of time.

AND, first, the enabling statute, 32 Hen. VIII. c. 28. empowers three manner of persons to make leases, to endure for three lives or one and twenty years, which could not do so before. As, first, tenant in tail, may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seized in right of his wife, in fee-simple or fee-tail, provided the wife joins in such lease, may bind her and her heirs thereby. Lastly, all persons seized of an estate of fee-simple in right of their churches, except parsons and vicars, may (without the concurrence of any other person) bind their successors. But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding.[111] 1. The lease must be by indenture; and not by deed poll, or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time. 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be either for twenty one years, or three lives; and not for both. 5. It must not exceed the term of three lives, or twenty one years, but may be for a shorter term. 6. It must be of corporeal hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrain.[112] 7. It must be of lands and tenements most commonly letten for twenty years past; so that if they have been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 8. The most usual and customary feorm or rent, for twenty years past, must be reserved yearly on such lease. 9. Such leases must not be made without impeachment of waste. These are the guards, imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

NEXT follows, in order of time, the disabling or restraining statute, 1 Eliz. c. 19. (made entirely for the benefit of the successor) which enacts, that all grants by archbishops and bishops (which include even those confirmed by the dean and chapter; the which, however long or unreasonable, were good at common law) other than for the term of one and twenty years or three lives from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed (together with the lease in being) the term permitted by the act.[113] But, by a saving expressly made, this statute of I Eliz. did not extend to grants made by any bishop to the crown; by which means queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favorites, whom she thus gratified without any expense to herself. To prevent which[114] for the future, the statute I Jac. I. c. 3. extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

NEXT comes the statute 13 Eliz. c. 10. explained and enforced by the statutes 14 Eliz. c. 11 & 14. 18 Eliz. c. II. and 43 Eliz. c. 29. which extend the restrictions, laid by the last mentioned statute on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other ecclesiastical, or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations: 1. They must not exceed twenty one years, or more, must be yearly reserved thereon. 2. The accustomed rent, or more, must be yearly reserved thereon. 3. Houses in

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corporations, or market towns, may be let for forty years; provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair: and they may also be aliened in fee-simple for lands of equal value in recompense. 4. Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. 5. No lease (by the equity of the statute) shall be made without impeachment of waste.[115] 6. All bonds and covenants tending to frustrate the provisions of the statutes 13 & 18 Eliz. shall be void.

CONCERNING these restrictive statutes there are two observations to be made. First, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore a parson, or vicar, though he is restrained from making longer leases than for twenty one years or three lives, even with the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, without obtaining such consent.[116] Secondly, that though leases contrary to these acts are declared void, yet they are good against the lessor during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong.[117]

THERE is yet another restriction with regard to college leases, by statute 18 Eliz. c. 6. which directs, that one third of the old rent, then paid, should for wheat for each 6 s 8 d, or a quarter of malt for every 5 s; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market-day before the rent becomes due. This is said[118] to have been an invention of lord treasurer Burleigh, and Sir Thomas Smith, then principal secretary of state; who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the newfound Indies, (which effects were likely to increase to a greater degree) devised this method for upholding the revenues of colleges. Their fore-fight and penetration has in this respect been very apparent: for, though the rent so reserved in corn was at first but one third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted; and the money arising from corn rents is, *communibus annis* [on average], almost double to the rents reserved in money.

THE leases of beneficed clergymen are farther restrained, in case of their non-residence, by statutes 13 Eliz. c. 20. 14 Eliz. c. II. and 18 Eliz. c. II. which direct, that, if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish; but that all leases made by him, of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void: except in the case of licensed pluralists, who are allowed to demise the living, on which they are non-resident, to their curates only; provided such curates do not absent themselves above forty days in any one year. And thus much for leases, with their several enlargements and restrictions.[119]

5. AN exchange is a mutual grant of equal interests, the one in consideration of the other. The word “exchange” is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution.[120] The estates exchanged must be equal in quantity;[121] not of value, for that is immaterial, but if interest; as fee-simple for fee-simple,

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a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery.[122] But no livery of seizin, even in exchanges of freehold, is necessary to perfect the conveyance:[123] for each party stands in the place of the other and occupies his right, and each of them has already had corporal possession of his own land. But entry must be made on both sides; for, if either party die before entry, the exchange is void, for want of sufficient notoriety.[124] And so also, if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own.[125] For if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.[126]

6. A PARTITION, is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part. Here, as in some instances there is a unity of interest, and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed: and in both cases the conveyance must have been perfected by livery of seizin.[127] And the statutes of 31 Hen. VIII. c. I. and 32 Hen. VIII. c. 32. made no alteration in this point. But the statute of frauds 29 Car. II. c. 3. has now abolished this distinction, and made a deed in all cases necessary.

THESE are the several species of primary, or original conveyances. Those which remain are of the secondary, or derivative sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. RELEASES; which are a discharge or conveyance of a man's right in lands or tenements, to another that has some former estate in possession. The words generally used therein are “remised, released, and for ever quit-claimed.”[128] And these releases may inure either, 1. By way of enlarging an estate, or *enlarger l' estate*: as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee.[129] But in this case the relessee must be in possession of some estate, for the release to work upon; for if there be lessee for years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the relessee.[130] 2. By way of passing an estate, or *mitter l' estate*: as when one of two coparceners releases all her right to the other, this passes the fee-simple of the whole.[131] And in both these cases there must be a privity of estate between the relessor and relessee;[132] that is one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of passing a right, or *mitter le droit*: as if a man be disseized, and releases to his disseizor all his right; hereby the disseizor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious.[133] 4. By way of extinguishment: as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A; this extinguishes may right to the reversion, and shall inure to the advantage of B's remainder as well as of A's particular estate.[134] 5. By way of entry

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and feoffment: as if there be two joint disseizors, and the disseizee releases to one of them, he shall be sole seized, and shall keep out his former companion; which is the same in effect as if the disseizee had entered, and thereby put an end to the disseizin, and afterwards had enfeoffed one of the disseizors in fee.[135] And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the relessee is a matter of sufficient notoriety already.

8. A CONFIRMATION is of a nature nearly allied to a release. Sir Edward Coke defines it[136] to be a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, "have given, granted, ratified, approved, and confirmed."[137] An instance of the first branch of the definition is if tenant for life leases for forty years, and dies during that term; her the lease for years is voidable by him in reversion: yet, if he has confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure.[138] The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release, which operates by way of enlargement.

9. A SURRENDER, *sur sumeredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater by deed. It is defined,[139] a yielding up of an estate for life or years to him that has the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, "has surrendered, granted, and yielded up." The surrenderor must be in possession;[140] and the surrenderee must have a higher estate, in which the estate surrendered may merge: therefore tenant for life cannot surrender to him in remainder for years.[141] In a surrender there is no occasion for livery of seizin;[142] for there is a privity of estate between the surrenderor, and the surrenderee; the one's particular estate, and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes; since the reversion of the relessor, or confirmor, and the particular estate of the relessee, or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory.[143]

10. AN assignment is properly a transfer, or making over to another, of the right one has in any estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor.

11. A DEFEASANCE is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated[144] or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of

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defeasance, whereby the feoffment was rendered void on re-payment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law;[145] and, therefore only, indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seizin, being allowed in those days of simplicity and truth; though. When uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent, (as rents, of which no seizin could be had till the time of payment; and so also annuities, conditions, warranties, and the like) were always liable to be recalled by defeasances made subsequent to the time of their creation.[146]

II. THERE yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the statute of uses.

USES and trusts are in their original of a nature very similar, or rather exactly the same: answering more to the *fidei-commissum* [trust] than the *usus-fructus* [the usufruct], of the civil law; which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance.[147] But the *fidei-commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence that he should convey it or dispose of the profits at the will of another. And it was the business of a particular magistrate, the *praetor fidei-commissarius* [judge of trusts], instituted by Augustus, to enforce the observance of this confidence.[148] So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice: which occasioned that known division of rights by the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary course of law; *jus fiduciarium*, a right in trust, for which in courtesy, for which the remedy was only by entreaty or request.[149] In our law, a use might be ranked under the rights of the second kind; being a confidence reposed in another who was tenant of the land, or terre-tenant, that he should dispose of the land according to the intentions of *cestuy que*, or him to whose use it was granted, and suffer him to take the profits.[150] As, if a feoffment was made to A and his heirs, to the use of (or in trust for) B and his heirs; here at the common law A the terre-tenant had the legal property and possession of the land, but B the *cestuy que use* was in conscience and equity to have the profits and disposal of it.

THIS notion was transplanted into England from the civil law, about the close of the reign of Edward III,[151] by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to the use of the religious houses:[152] which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction, which Augustus had vested in his *praetor*, of compelling the execution of such trusts in the court of chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet if a testator had enfeoffed another to his own use, and so was possessed of the use only, such, use was devisable by will. But we have seen[153] how this evasion was crushed in its infancy, by statute 15 Ric. II. c. 5. with respect to religious houses.

YET, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes: particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make

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various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long wars in France and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal: through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore about the reign of Edward IV, (before whose time, lord Bacon remarks,[154] there are not six cases to be found relating to the doctrine of uses) the courts of equity began to reduce them to something of a regular system.

ORIGINALLY it was held that the chancery could give no relief, but against the very person himself entrusted for *cestuy que use*, and not against his heir or alienee. This was altered in the reign of Henry VI, with respect to the heir;[155] and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use.[156] But a purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king or queen, on account of their dignity royal,[157] nor any corporation aggregate, on account of its limited capacity,[158] could be seized to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife who was assigned her dower, were liable to perform the use;[159] because they were not parties to the trust, but came in by act of law: though doubtless their title in reason was no better than that of the heir.

ON the other hand the use itself, or interest of *cestuy que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, and authorities, *quae ipso usu consumuntur* [consumed by the use itself]:[160] or whereof the seizin could not be instantly given.[161] 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another without any consideration, equity presumes that he meant it to the use of himself:[162] unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions.[163] But, if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration.[164] 3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession;[165] for in this and many other respects *aequitas sequitur legem* [equity follows law], and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties,[166] or be devised by last will and testament:[167] for, as the legal estate in the soil was not transferred by these transactions, no livery of seizin was necessary; and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestuy que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee;[168] to whom he was accounted by law to be only tenant at sufferance.[169] 5. Uses were not liable to any of the feudal burdens; and particularly did not escheat for felony or other defect of blood; for escheats, ac, are the consequence of tenure, and uses are held of nobody: but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use.[170] 6. No wife could be endowed, or husband have his curtesy,

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of a use:[171] for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures.[172] 7. A use could not be extended by writ of elegit, or other legal process, for the debts of *cestuy que use*.[173] For, being merely a creature of equity, the common law, which looked no farther than to the person actually seized of the land, could award no process against it.

IT is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties, which the ingenuity of the times (abounding in subtle disquisitions) deduced from this child of the imagination; when once a departure was permitted from the plain simple rules of property established by the ancient law. These principal outline will be fully sufficient to show the ground of lord Bacon's complaint,[174] that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man, that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestuy que use*;[175] allowed actions for the freehold to be brought against him, if in the actual pernancy or enjoyment of the profits;[176] made him liable to actions of waste;[177] established his conveyances and leases made without the concurrence of his feoffees;[178] and gave the lord the wardship of his heir, with certain other feudal perquisites.[179]

THESE provisions all tended to consider *cestuy que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII. c. 10. which is usually called the statute of uses, or, in conveyances and pleadings, the statute for transferring uses into possession. The hint seems to have been derived from what was done at the accession of king Richard III; who having, when duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But, to obviate so notorious an injustice, an act of parliament was immediately passed,[180] which ordained that, where he had been so infeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely infeoffed, the estate itself should vest in *cestuy que use* in like manner as he had the use. And so the statute of Henry VIII, after reciting the various inconveniences before-mentioned and many others, enacts, that "when any person shall be seized of lands, etc., to the use, confidence, or trust, of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seized or possessed of the land, etc., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seized to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition, as they had before in the use." The statute thus executes the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession: thereby making *cestuy que use* complete owner of the lands and tenements, as well at law as in equity.

THE statute having thus, not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestuy que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party

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to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seized to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments, as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account of the seizin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestuy que use*, as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seizin of *cestuy que use*, who was now become the terre-tenant also; and they likewise were no longer devisable by will.

THE various necessities of mankind induced also the judges very soon to depart from the rigor and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made: but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the mean while the ancient use shall remain in the original grantor: as, when lands are conveyed to the use of A and B, after a marriage shall be had between them,[181] or to the use of A and his heirs till B shall pay him a sum of money, and then to the use of B and his heirs.[182] Which doctrine, when devises by will were again introduced, and considered as equivalent in point of construction to declarations of uses, was also adopted in favor of executory devises.[183] But herein these, which are called contingent or springing, uses differ form an executory devise; in that there must be a person seized to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore, if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever:[184] whereas by an executory devise the freehold itself is transferred to the future devisee. And, in both these cases, a fee may be limited to take effect after a fee;[185] because, though that was forbidden by the common law in favor of the lord's escheat, yet. When the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were before the statute executed the legal estate in the same manner as the use before subsisted. It was also held that a use, though executed, may change from one to another by circumstances ex post facto;[186] as if A makes a feoffment to the use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both.[187] This is sometimes called a secondary, sometimes a shifting, use. And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration or during such impossibility, and is styled a resulting use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail: here, till he marries the use results back to himself; after marriage, it is executed in the wife for life; and, if the dies without issue, the whole results back to him in fee.[188] It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow, was a deed of defeasance coeval with the grant itself (and therefore esteemed a

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part of it) upon events specifically mentioned.[189] And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead.[190] And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who (as lord Bacon observes[191]) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

BY this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held in the first place, that "no use could be limited on a use;"[192] and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a farther use to another person is repugnant and therefore void.[193] And therefore, on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting, that the instant the first use was executed in B, he became seized to the use of C, which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down, through a hundred uses upon uses, till finally executed in the last *cestuy que use*. Again; as the statute mentions only such persons as were seized to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the tremor is not seized, but only possessed;[194] and therefore, if a term of one thousand years be limited to A, to the use of (or in trust for) B, the statute does not execute this use, but leaves it as at common law.[195] And lastly, (by more modern resolutions) where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute: for the land must remain in the trustee to enable him to perform the trust.[196]

OF the two more ancient distinctions the courts of equity quickly availed themselves. In the first case it was evident, that B was never intended by the parties to have any beneficial interest; and, in the second, the *cestuy que use* of the term was expressly driven into the court of chancery to seek his remedy: and therefore that court determined, that though these were not uses, which the statute could execute, yet still they were trusts in equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of trusts: and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance.[197]

HOWEVER, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. They now consider a trust-estate(either when expressly declared or resulting by necessary implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and, by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The treason is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice;[198] which, as *cestuy que use* is generally in possession of the land, is a thing that can rarely

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happen. The trust will descend, may be aliened, is liable to debts, to forfeiture, to leases and other encumbrances, nay even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents,[199] than from any well-grounded principle. It has also been held not liable to escheat to the lord, in consequence of attainder or want of heirs:[200] because the trust could never be intended for his benefit. But let us now return to the statute of uses.

THE only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seizin, the only ancient conveyance of corporeal freeholds: the security and notoriety of which public investiture abundantly overpaid the labor of going to the land, or of sending an attorney in one's stead. But this now has given way to

12. A TWELFTH species of conveyance, called a covenant to stand seized to uses: by which a man, seized of lands, covenants in consideration of blood or marriage that he will stand seized of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefitted, having thus acquired the use, is thereby put at once into corporal possession of the land,[201] without ever seeing it, by a king of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage.

13. A THIRTEENTH species of conveyance, introduced by this statute, is that of a bargain and sale of lands; which is a kind of a real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee; and becomes by such bargain a trustee for, or seized to the use of, the bargainee; and then the statute of uses completes the purchase:[202] or, as it has been well expressed,[203] the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of parliament by statute 27 Hen. VIII. c. 16. that such bargains and sales should not inure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the courts of Westminster-hall or with the *custos rotulorum* [keeper of the rolls] of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious till about six years before;[204] which also occasioned them to be overlooked in framing the statute of uses: and therefore such bargains and sales are not directed to be enrolled. But how impossible is it to foresee, and provide against, all the consequence of innovations! This omission has given rise to

14. A FOURTEENTH species of conveyance, *viz.* by lease and release; first invented by sergeant Moore, soon after the statute of uses, and now the most common of any, and therefore not to be shaken; though very great lawyers (as, particularly, Mr. Noy) have formerly doubted its validity.[205] It is thus contrived. A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now this, without any enrollment, makes the bargainor stand seized to the use of the bargainee, and vest in the bargainee

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the use of the term for a year; and then the statute immediately annexes the possession. He therefore, being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before,[206] must be made to a tenant in possession: and accordingly, the next day, a release is granted to him.[207] This is held to supply the place of livery of seizin; and so a conveyance by lease and release is said to amount to a feoffment.[208]

15. TO these may be added deeds to lead or declare the uses of other more direct conveyances, as feoffments, fines, and recoveries; of which we shall speak in the next chapter: and,

16. DEEDS of revocation of uses; hinted at in a former page,[209] and founded in a previous power, reserved at the raising of the uses,[210] to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation.[211] And this may suffice for a specimen of conveyances founded upon the statute of uses; and will finish our observations upon such deeds as serve to transfer real property.

BEFORE we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to convey, but to charge or encumber, lands, and discharge them again: of which nature are, obligations or bonds, recognizances, and defeasances upon them both.

1. AN obligation, or bond, is a dead[212] whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio* [a simple obligation]; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as, payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a direct, yet a collateral, charge upon the lands. How it affects the personal property of the obligor, will be more properly considered hereafter.

IF the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single and unconditional: for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se* [wrong in itself], the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved: for no prudence or foresight of the obligor could guard against such a contingency.[213] On the forfeiture of a bond, or its becoming single, the whole penalty was recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought; *viz.* his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained, upon non-performance of covenants; and the like. And the statute 4 & 5 Ann. c. 16. has also enacted, in

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the same spirit of equity, that in case of a bond, conditioned for the payment of money, the payment or tender of the principal sum due, with interest, and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

2. A recognizance is an obligation of record, which a man enters into before some court of record or magistrate duly authorized,[214] with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this; that the bond is the creation of a fresh debt or obligation de novo, the recognizance is an acknowledgment of a former debt upon record; the form whereof is, "that A. B. does acknowledge to owe to our lord the king, to the plaintiff, to C. D. or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C. D. etc, is called the cognizee, "*is cui cognoscitur*" ["he who is acknowledged"]; as he that enters into the recognizance is called the cognizor, "*is qui cognoscit*" ["he who acknowledges"]. This, being either certified to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict property a deed, though the effects of it are greater than a common obligation; being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrollment on record.[215] There are also other recognizances, of a private kind, in nature of a statute staple, by virtue of the statute 23 Hen. VIII. c. 6. which have been already explained,[216] and shown to be a charge upon real property.

3. A DEFEASANCE, on a bond, recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeasance of an estate before-mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate and frequently a subsequent deed.[217] This, like the condition of a bond, when performed, discharges and disencumbers the estate of the obligor.

THESE are the principal species of deeds or matter in pais, by which estates may be either conveyed, or at least affected. Among which the conveyances to uses are by much the most frequent of any; though in these there is certainly one palpable defect, the want of sufficient notoriety: so that purchasers or creditors cannot know with any absolute certainty, what the estate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the ancient feudal method of conveyance (by giving corporal seizin of the lands) this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances: and there has never been yet any sufficient guard provided against fraudulent charges and encumbrances; since the disuse of the old Saxon custom of transacting all conveyances at the county court, and entering a memorial of them in the chartulary or ledger-book of some adjacent monastery;[218] and the failure of the general register established by king Richard the first, for mortgages made to Jews, in the *capitula de Judaeis*, of which Hoveden has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deserves to be well considered. In Scotland every act and event, regarding the transmission of property, is regularly entered on record.[219] And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature[220] to erect such registers in their several districts. But, however plausible these provisions may appear in theory, it has been

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doubted by very competent judges, whether more disputes have not arisen in those counties by the inattention and omissions of parties, than prevented by the use of registers.

NOTES

1. Co. Litt. 171.
2. Ploed. 434.
3. Lyndew. L. 1. t. 10. c. 1.
4. Mirror. C. 2. § 27.
5. Ibid. Litt. § 371, 372.
6. Co. Litt. 35.
7. Stat. 13 Eliz. c. 8.
8. Stat. 27. Eliz. c. 4.
9. Stat. 13 Eliz. c. 5.
10. Perk. § 533.
11. 3 Rep. 83.
12. Co. Litt. 229. F. N. B. 122.
13. Co. Litt. 225.
14. Ibid. 6.
15. See appendix, No. 2. § 2. pag. V.
16. Ibid.
17. Co. Litt. 21.
18. S Kep. 154.
19. Append. No. I Madox. Formul. passim.
20. Append. No. II. § 1. pag. Iii.
21. See pag. 41.
22. Plowd. 13. 8. Rep. 71.
23. Append. No. I. pag. I.
24. Append. No. II. § 2. pag. Viii.
25. Ibid. No. I. pag. I.
26. Feud. l 2. t. 8, &25;.
27. Co. Litt. 384.
28. Litt. § 143.
29. Co. Litt. 174.
30. Ibid. 384.

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31. Ibid.

32. Co. Litt. 102.

33. Litt. § 733.

34. Co. Litt. 373.

35. Litt. § 703. 706. 707.

36. Litt. § 705. 707.

37. Ibid. § 698. 702.

38. Co. Litt. 102.

39. Litt. § 711. 712.

40. Co Litt. 373.

41. Litt. § 712. 2 Inst. 293.

42. pag. 116.

43. Co. Litt. 374. 2 Inst. 335.

44. Append. No. II. § 2. pag. Viii.

45. Ibid. pag xiii.

46. Co. Litt. 46. Dyer. 28.

47. 2 Rep. 3. 9. II Rep. 27.

48. 1 Kings. C. 21. Daniel. C. 6. Esther. c. 8.

49. "And I bought the field of Hanameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open." c. 32.

50. Inst. 2. 10. 2 &3;.

51. I Inst. 7.

52. "*Propria manu pro ignorantia literarum signum sanctae crucis expressi et subscripsi*." ["On account of my ignorance of letters, I impress and subscribe the sign of the holy cross."] Seld. Tan Angl. l. I. § 42. And this (according to Procopius) the emperor Justin in the east, and Theodoric king of the Goths in Italy, had before authorized by their example, on account of their inability to write.

53. Lamb. Arcbeiou. 51.

54. "*Normanni chirographorum confectionem, cum crutibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in caeram impressam mutant, modumque scribendi Anglicum rejiciunt*." ["At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross."] Ingulph.

55. 3 Lev. I. Stra. 764.

56. Perk. § 130.

57. Co. Litt. 36.

58. Feud. l. I. t. 4.

59. Co. Litt. 7.

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60. Feud. l. 2. t. 32.

61. Spelm. Gloss. 228. Madox. Formul. No. 221. 322. 660.

62. Co. Litt. 6.

63. 2 Inst. 77.

64. Madox, formul. No. 515.

65. Ibid. Dissert. fol. 32.

66. 2 Inst. 78.

67. II Rep. 27.

68. 5 Rep. 23.

69. Toth. No. 24. 1 Vern. 348.

70. Co. Litt. 9.

71. Ibid.

72. Wright. 21.

73. pag. 108.

74. Co. Litt. 42.

75. See Appendix. No. I.

76. Co. Litt. 9.

77. Litt. § 66.

78. Wright. 37.

79. l. 3. c. 15.§ 5.

80. *Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire*. [To obtain possession, we must enter on the land with an intention to possess, neither entry nor intention alone being sufficient. But it is not to be understood, that he who wishes to take possession must walk over every clod, for it is enough if he enter on any part of the land.] (Cod. 2. 3. 20.)

81. Decretal. I. 3. t. 4. c. 40.

82. See pag. 209. 227, 228.

83. Flet. I. 6. c. 2. § 2.

84. ch. 4. v. 7.

85. Stiernhook. de jure Suton. I. 2. c. 4.

86. Hickes. Dissert. epistolar. 8.

87. Co. Litt. 46.

88. See pag. 165.

89. pag. 167.

90. Co. Litt. 49.

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91. Co. Litt. 48.

92. pag. 288.

93. Co. Litt. 48. West. Symb. 251.

94. Litt. § 414.

95. Feud. l. 2. t. 58.

96. See pag. 307.

97. Gilb. Ten. 35.

98. Dyer. 18.

99. See appendix. No. I.

100. Litt. § 421, etc.

101. Co. Litt. 48.

102. Ibid. 52.

103. West's symbol. 206.

104. Litt. § 59.

105. § 57.

106. Co. Litt. 9.

107. Ibid. 172.

108. l. 2. c. 18.

109. Spelm. Gl. 229.

110. Co. Litt. 44.

111. Co. Litt. 44.

112. But now by the statute 5 Geo. III. c. 17. a lease of tithes or other incorporeal hereditaments, alone, may be granted by any bishop or ecclesiastical or eleemosynary corporation, and the successor shall be entitled to recover the rent by an action of debt, which (in case of a freehold lease) he could not have brought at the common law.

113. Co. Litt. 45.

114. II Rep. 71.

115. Co. Litt. 45.

116. Ibid. 44.

117. Ibid. 45.

118. Strype's annals of Eliz.

119. For the other learning relating to leases, which is very curious and diffusive, I must refer the student to 3 Bac. Abridge. 295. (title, leases) leases and terms for years) where the subject is treated in a perspicuous and masterly manner; being supposed to be extracted from a manuscript of Sir Geoffrey Gilbert.

120. Co. Litt. 50, 51.

121. Litt. § 64, 65.

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122. Co. Litt. 51.
123. Litt. § 62.
124. Co. Litt. 50.
125. Perk. § 288.
126. Pag. 301.
127. Litt. § 250.
128. Co. litt. 169.
129. Litt. § 445.
130. Ibid. § 459.
131. Co. Litt. 273.
132. Ibid. 272, 273.
133. Litt. § 466.
134. Ibid. § 470.
135. Co. Litt. 278.
136. I Inst. 295.
137. Litt. § 515. 531.
138. Ibid. § 516
139. Co. Litt. 337.
140. Ibid. 338.
141. Perk. § 589.
142. Co. Litt. 50.
143. Litt. § 460.
144. From the French verb *defaire*, *infectum reddere* [to defeat].
145. Co. litt. 236.
146. Ibid. 237.
147. Ff. 7. 1. 1.
148. Inst. 2. tit. 23.
149. Ff. 43. 26. 1. Bacon on uses. 8 o. 306.
150. Plowd. 352.
151. Stat. 50 Edw. III. c. 6. I Ric. II. c. 9.
152. See pag. 271.
153. pag. 272.
154. on uses. 313.

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155. Keilw. 42. Yearbook 22 Edw. IV. 6.
156. Keilw. 46. Bacon of uses. 312.
157. Bro. Abr. tit. Feoffm. al uses. 31. Bacon of uses. 346, 347.
158. Bro. Abr. tit. Feoffm. al uses. 40. Bacon. 347.
159. 1 Rep. 122.
160. 1 Jon. 127.
161. Cro. Eliz. 401.
162. See pag 296.
163. 1 And. 37.
164. Moor. 684.
165. 2 Roll. Abr. 780.
166. Bacon of uses. 312.
167. Ibid. 308.
168. Stat. 1 Ric. III. c. 1.
169. Bro. Abr. ibid. 23.
170. Jenk. 190.
171. 4 Rep. 1. 2 And. 75.
172. See pag. 137.
173. Bro. Abr. tit. executions. 90.
174. Use of the law. 153
175. Stat. 50 Edw III. c. 6. 2 Ric. II. Sess. 2. c. 3. 19 Hen V I c. 15.
176. Stat 1 Ric. II. c. 9. 4 Hen. IV. C. 7. II. Hen VI. C. 3. 1 Hen. VII. C. 1.
177. Stat. II Hen. VI. C. 5.
178. Stat. I Ric. III. c. 1.
179. Stat. 4 Hen. VII. C. 17. 19 Hen. VII. C. 15.
180. 1 Ric. III. c. 5.
181. 2 Roll. Abr. 791. Cro. Eliz. 439.
182. Bro. Abr. tit. Feoffm. al uses. 30.
183. See pag. 173.
184. 1 Rep. 134. 138. Cro. Eliz. 439.
185. Pollex f. 78. 10 Mod. 423.
186. Bro. Abr. tit. Feoffm. al uses. 30.
187. Bacon of uses. 351.

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188. Ibid. 350. 1 Rep. 120.
189. See pag. 327.
190. Co. Litt. 237.
191. on uses. 316.
192. Dyer. 155.
193. 1 And. 37. 136.
194. Bacon law of uses. 335. Jenk. 244.
195. Poph 76. Dyer. 369.
196. 1 Equ. Cas. abr. 383, 384.
197. Vaugh. 50. Atk. 591.
198. 2 Freem. 43.
199. 1 Chanc. Rep. 254. 2 P. Wms. 640.
200. Hardr. 494. Burgess & Wheate. Hil. 32 Geo. II. in Cano.
201. Bacon. Use the law. 151.
202. Ibid. 150.
203. Cro. Jac. 696.
204. See pag. 142.
205. 2 Mod. 25.
206. pag. 324.
207. Co. Litt. 270.
208. Cro. Jac. 604.
209. pag. 335.
210. See Appendix. No. II. pag. xi.
211. Co. Litt. 237.
212. See Appendix. No. III. pag. xiii.
213. Co. Litt. 206.
214. Bro. Abr. tit. recognizance 24.
215. Stat. 29 Car. II. c. 3. § 18.
216. See pag. 160.
217. Co. Litt. 237. 2 Saund. 47.
218. Hickes Dissertat. epistolar. 9.
219. Dalrymple on feudal property. 262, etc.
220. Stat. 2 & 3 Ann. c. 4. 6 Ann. c. 35. 7 Ann. c. 20. 8 Geo. II. c. 6.

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CHAPTER 21

Of Alienation by Matter of Record

ASSURANCES by matter of record are such as do not entirely depend on the act or consent of the parties themselves: but the sanction of a court of record is called in, to substantiate, preserve, and be a perpetual testimony of, the transfer of property from one man to another; or of its establishment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. PRIVATE acts of parliament are, especially of the late years, become a very common mode of assurance. For it may sometimes happen, that, by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances; (a confusion unknown to the simple conveyances of the common law) so that it is out of the power of either the courts of law or equity to relieve the owner. Or it may sometimes happen, that, by the strictness or omissions of family settlements, the tenant of the estate is abridged of some reasonable power, (as letting leases, making a jointure for a wife, or the like) which power cannot be given him by the ordinary judges either in common law or equity. Or it may be necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities; who are not bound by any judgments or decrees of the ordinary courts of justice. In these, or other cases of the like kind, the transcendent power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the restoration; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it,[1] every man had raised an equity in his own imagination, that he thought ought to prevail against any descent, testament, or act of law, and to find relief in parliament: which occasioned the king at the close of the session to remark,[2] that the good old rules of law are the best security; and to wish, that men might not have too much cause to fear, that the settlements which they make of their estates shall be too easily unsettled when they are dead, by the power of parliament.

ACTS of this kind are however at present carried on, in both houses, with great deliberation and caution; particularly in the house of lords they are usually referred to two judges, to examine and report the facts alleged, and to settle all technical forms. Nothing also is done without the consent, expressly given, of all parties in being and capable of consent, that have the remotest interest in the matter; unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or persons not in esse, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever; except those whose consent so given or purchased, and who are therein particularly named.

A LAW, thus made, thought it binds all parties to the bill, is yet looked upon rather as a private

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conveyance, than as the solemn act of the legislature. It is not therefore allowed to be a public, but a mere private statute; it is not printed or published among the other laws of the session; and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains however enrolled among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established.

II. THE king's grants are also matter of public record. For, as St. Germain says,[3] the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled; that the same may by narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honors, liberties, franchises, or ought besides, are contained in charters, or letters patent, that is, open letters, *literae patentes*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs close, *literae clausae*; and are recorded in the close-rolls, in the same manner as the others are in the patent-rolls.

GRANTS or letters patent must first pass by bill: which is prepared by the attorney and solicitor general, in consequence of a warrant from the crown; and is then signed, that is, that is, superscribed at the top, with the king's own *sign manual*, and sealed with his privy signet, which is always in the custody of the principal secretary of state; and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, "*per ipsum regem*, by the king himself."[4] Otherwise the course is to carry an extract of the bill to the keeper of the privy seal, who makes out a writ or warrant thereupon to the chancery; so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, "*per breve de privato sigillo*, by writ of privy seal."[5] But there are some grants, which only pass through certain offices, as the admiralty or treasury, in consequence of a sign manual, without the confirmation of either the signet, the great, or the privy seal.

THE manner of granting by the king, does not more differ from that by a subject, than the construction of his grants, when made. 1. A grant made by the king, at the suit of the grantee, shall be taken most beneficially for the king, and against the party: whereas the grant of a subject is construed most strongly against the grantor. Wherefore it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero motu regis*" ["by the special favor, certain knowledge, and mere motion of the king"]; and then they have a more liberal construction.[6] 2. A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted:[7] and if a feoffment of land was made by a lord to his villein, this operated as a manumission;[8] for the was otherwise unable to hold it. But the king's grant shall not inure to any other intent, than that which is precisely expressed in the grant. As, if he grants land to an alien, it

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operates nothing; for such grant shall not also inure to make him a denizen, that so he may be capable of taking by grant.[9] 3. When it appears, from the face of the grant, that the king is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law; in any of these cases the grant is absolutely void.[10] For instance; if the king grants lands to one and his heirs male, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body, out of which the heirs shall issue: neither is it a fee-simple, as in common grants it would be; because it may reasonably be supposed, that the king meant to give no more than an estate-tail:[11] the grantee is therefore (if any thing) nothing more than tenant at will.[12] And, to prevent deceits of the king, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV. c. 6. that no grant of his shall be good, unless, in the grantee's petition for them, express mention be made of the real value of the lands.

III. WE are next to consider a very usual species of assurance, which is also of record; *viz.* a fine of lands and tenements. In which it will be necessary to explain, 1. The nature of a fine; 2. its several kinds; and 3. its force and effect.

1. A FINE is sometimes said to be a feoffment of record:[13] though it might with more accuracy be called, an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seizin is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question become, or are acknowledged to be, the right of one of the parties.[14] In its original it was founded on an actual suit, commenced at law for recovery of the possession of land; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining same security.

A FINE is so called because it puts an end, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an ancient record of parliament,[15] 18 Edw. I. *"non in regno Angliae providetur, vel est aliqua securitas major vel solennior, per quam aliquis statum certiorem habere possit, neque ad statum suum verificandum aliquid solennius testimonium producere, quam finem in curia domini regis levatum: qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet, et hac de causa providebatur."* ["There is no greater or more common security provided in the kingdom of England, or by which a person can acquire a surer title, than by a fine levied in the king's court: nor can any testimony be produced more customary for confirming a title. It is called a fine because it is finis, that is, the end and consummation of all suits; and for this purpose it was provided."] Fines indeed are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil[16] and Bracton[17] in the reigns of Henry II, and Henry III, as things then well known and long established; and instances have been produced of them even before the Norman invasion.[18] So that the statute 18 Edw. I. called *modus levandi fines* [manner of levying fines], did not give them original, but only

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declared and regulated the manner in which they should be levied, or carried on. And that is as follows:

1. THE party, to whom the land is too be conveyed or assured, commences an action or suit at law against the other, generally an action of covenant, by suing out a writ or *praecipe*, called a writ of covenant:[19] the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by ancient prerogative, a primer fine, or a noble for every five marks of land sued for; that is, one tenth of the annual value.[20] The suit being thus commenced, then follows,

2. THE *licentia concordandi*, or leave to agree the suit.[21] For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without license, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative; which is an ancient revenue of the crown, and is called the king's silver, or sometimes the post fine, with respect to the primer fine before-mentioned. And it is as much as the primer fine, and half as much more, or ten shillings for every five marks of land; that is, three twentieths of the supposed annual value.[22]

3. NEXT comes the concord, or agreement itself,[23] after leave obtained from the court; which is usually an acknowledgment from the deforciants (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine is called the cognizor, and he to whom it is levied the cognizee. This acknowledgment must be made either openly in the court of common pleas, or before one of the judges of that court, or else before commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem* [we have given power]; which judges and commissioners are bound by statute 18 Edw. I. St. 4. to take care that the cognizors be of full age, found memory, and out of prison. If there be any feme-covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

BY these acts all the essential parts of a fine are completed; and, if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable,[24] still the fine shall be carried on in all its remaining parts: of which the next is

4. THE note of the fine:[25] which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This must be enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14.

5. THE fifth part is the foot of the fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied.[26] Of this there are indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*haec est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

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BY several statutes still more solemnities are superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin [deceit]. And, first, by 27 Edw. I. c. 1. the note of the fine shall be openly read in the court of common pleas, at two several days in one week, and during such reading all pleas shall cease. By 5 Hen. IV. c. 14. and 23 Eliz. c. 3. all the proceedings on fines either at the time of acknowledgment, or previous, or subsequent thereto, shall be enrolled of record in the court of common pleas. By 1 Ric. III. c. 7. confirmed and enforced by 4 Hen. VII. c. 24. the fine, after engrossment, shall be openly read and proclaimed in court sixteen times; *viz.* four times in the term in which it is made, and four times in each of the three succeeding terms; during which time all pleas shall cease: but this is reduced to once in each term by 31 Eliz. c. 2. and these proclamations are endorsed on the back of the record.[27] It is also enacted by 23 Eliz. c. 3. that the chirographer of fines shall every term write out a table of the fines levied in each county in that term, and shall affix them in some open part of the court of common pleas all the next term: and shall also deliver the contents of such table to the sheriff of every county, who shall at the next assizes fix the same in some open place in the court, for the more public notoriety of the fine.

2. FINES, thus levied, are of four kinds. 1. What in our law French is called a fine "*sur cognizance de droit, come ceo que il ad de son done*;" or, a fine upon acknowledgment of the right of the cognizee, as that which he has of the gift of the cognizor.[28] This is the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment, or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery thus acknowledged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant, or cognizor, acknowledges, *cognoscit*, the right to be in the plaintiff, or cognizee, as that which he has *de son done*, of the proper gift of himself, the cognizor. 2. A fine "*sur cognizance de droit tantum*," or, upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a reversionary interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third person.[29] It is worded in this manner; "that "the cognizor acknowledges the right to be in the cognizee; and "grants for himself and his heirs, that the reversion, after the "particular estate determines, shall go to the cognizee.[30] 3. A fine "*sur concessit*" is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like: for it operates as a new grant.[31] 4. A fine "fur done, grant et render," is a double fine, comprehending the fine fur cognizance de droit come ceo, etc, and the fine *sur concessit*; and may be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo, etc.*, conveys nothing but an absolute estate, either of inheritance or at least of freehold.[32] In this last species of fine, the cognizee, after the right is acknowledged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine, "*sur cognizance de droit come ceo, etc.*," is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seizin in law, without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

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3. WE are next to consider the force and effect of a fine. These principally depend, at this day, on the common law, and the two statutes, 4 Hen. VII. c. 24. and 32 Hen. VIII. c. 36. The ancient common law, with respect to this point, is very forcibly declared by the statute 18 Edw. I. in these words. "And the reason, why such solemnity is required in the passing of a fine, is this; because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas the day of the fine levied; unless they put in their claim within a year and a day." But this doctrine, of barring the right by non-claim, was abolished for a time by a statute made in 34 Edw. I. c. 16. which admitted persons to claim, and falsify a fine, at any indefinite distance:[33] whereby, as Sir Edward Coke observes,[34] great contention arose, and few men were sure of their possessions, till the parliament held 4 Hen. VII reformed that mischief, and excellently moderated between the latitude given by the statute and the rigor of the common law. For the statute, then made,[35] restored the doctrine of non claim; but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is bound unless they make claim, not within one year and a day, as by the common law, but within five years after proclamations made: except feme-coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind; who have five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

IT seems to have been the intention of that politic prince, king Henry VIII, to have covertly by this statute extended fines to have been a bar of estates-tail, in order to unfetter the more easily the estates of his powerful nobility, and lay them more open to alienations; being well aware that power will always could, by mere implication, be adjudged a sufficient bar, (which they were expressly declared not to be by the statute *de donis*) the statute 32 Hen. VIII. c. 36. was thereupon made; which removes all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestor, assigned to her in tail for her jointure;[36] or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

FROM this view of the common law, regulated by these statute, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are parties, privies, and strangers.

THE parties are either the cognizors, or cognizes; and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a feme-covert, or married woman, is permitted by law to do, (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband) it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or encumbrance, of any estate.

PRIVIES to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood, or other right of representation. Such as are the heirs general of the

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cognizor, the issue in tail since the statute of Henry the eighth, the vendee, the devisee and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied.[37]

STRANGERS to a fine are all other persons in the world, except only parties and privies. And these are also bound by a fine, unless, within five years after proclamations made, they interpose their claim; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as has before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons, who are thus incapacitated to prosecute their rights, have fine years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues.[38] And if within that time they neglect to claim, or (by the statute 4 Ann. c. 16.) if they do not bring an action to try the right, within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim.

BUT, in order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might without any risque defraud the owners by levying fines of their lands; for if the attempt be discovered, they can be no sufferers, but must only remain *instatu quo* [as they were]: whereas if a tenant for life or years levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner,[39] if claimed in proper time. It is not therefore to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire,[40] the estate is for ever barred by it. Yet where a stranger, whose presumption cannot thus be punished, officiously interferes in an estate which in no wise belongs to him, his fine is of no effect; and may at any time be set aside (unless by such as are parties or privies thereunto[41]) by pleading that "*partes finis nihil habuerunt*" ["the parties to the fine had no interest in the land"]. And thus much for the conveyance or assurance by fine: which not only like other conveyances binds the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law.

IV. THE fourth species of assurance, by matter of record, is a common recovery. Concerning the original of which, it was formerly observed,[42] that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now therefore only to consider, first, the nature of a common recovery; and, secondly, its force and effect.

I. AND, first, the nature of it; or what a common recovery is. A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious: and in it the lands are recovered against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. A recovery therefore being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular

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stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student, who is not yet acquainted with the course of judicial proceedings; which cannot be thoroughly explained, till treated of at large in the third book of these commentaries. However I shall endeavor to state its nature and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms, and phrases not hitherto interpreted.

LET us, in the first place, suppose David Edwards[43] to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called a *praecipe quod reddat* [command him to restore], because those were its initial or most operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges, that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it.[44] The subsequent proceedings are made up into a record or recovery roll,[45] in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prays, that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the voucher, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the vouchee. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, desires leave of the court to *imparl*, or confer with the vouchee in private; which is (as usual) allowed him. And soon afterwards the demandant, Golding, returns to court, but Morland the vouchee disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question against the tenant, Edwards, who is now the recoveree: and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter.[46] This is called the recompense, or recovery in value. But Jacob Morland having no lands of his own, being usually the cryer of the court (who, from being frequently thus vouched, is called the common vouchee) it is plain that Edwards has only a nominal recompense for the lands so recovered against him by Golding; which lands are now absolutely vested in the said recoveror by judgment of law, and seizin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding the purchaser.

THE recovery, here described, is with a single voucher only; but sometimes it is with double, treble, or farther voucher, as the exigency of the case may require. And indeed it is now usual always to have a recovery with double voucher at the least; by first conveying an estate of freehold to any indifferent person, against whom the praecipe is brought; and then he vouches the tenant in tail, who vouches over the common vouchee.[47] For, if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seized; whereas if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered.[48] If Edwards therefore be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards does first vouch Barker, and then Barker vouches Jacob Morland the common vouchee; who is always the last person vouched, and always makes default: whereby the demandant Golding recovers the land against the

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tenant Edwards, and Edwards recovers a recompense of equal value against Barker the first vouchee; who recovers the like against Morland the common vouchee, against whom such ideal recovery in value is always ultimately awarded.

THIS supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. For, if the recoveree should ever obtain a recompense in lands from the common vouchee (which there is a possibility in contemplation of law, though a very improbable one, of his doing) these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail.[49] This reason will also hold, with equal force, as to most remainder-men and reversioners; to whom the possibility will remain in and revert, as a full recompense for the reality, which they were otherwise entitled to: but it will not always hold; and therefore, as Pigott says,[50] the judges have been even *astuti* [cunning], in inventing other reasons to maintain the authority of recoveries. And, in particular, it has been said, that, though the estate-tail is gone from the recoveree, yet it is not destroyed, but only transferred; and still subsists, and will ever continue to subsist (by construction of law) in the recoveror, his heirs, and assigns: and, as the estate-tail so continues to subsist for ever, the remainders or reversions expectant on the determination of such estate-tail can never take place.

TO such awkward shifts, such subtle refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *de donis*. The design, for which these contrivances were set on foot, was certainly laudable; the unrivetting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Our modern courts of justice have indeed adopted a more manly way of treating the subject; by considering common recoveries in no other light, than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands. But, since the ill consequences of fettered inheritances are now generally seen and allowed, and of course the utility and expedience of setting them at liberty are apparent; it has often been wished, that the process of this conveyance was shortened, and rendered less subject to niceties, by either totally repealing the statute *de donis*, which perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or by vesting in every tenant in tail of full age the same absolute fee-simple at once, which now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though this might possibly bear hard upon those in remainder or reversion, by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or, lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time and enrolled in some court of record; which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, but by the precedent of the statute[51] 21 Jac. I. c. 19. which, in case of a bankrupt tenant in tail, empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And if, in so national a concern, the emoluments of the officers, concerned in passing recoveries, are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrollment.

2. THE force and effect of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the

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lands held in tail to the recoveror his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But, by statute 34 & 35 Hen. VIII. c. 20. no recovery had against tenant in tail, of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate-tail, or the remainder or reversion of the crown. And by the statute 11 Hen. VII. c. 20. no woman, after her husband's death, shall suffer a recovery of lands settled on her in tail by way of jointure by her husband or any of his ancestors. And by statute 14 Eliz. c. 8. no tenant for life, of any sort, can suffer a recovery, so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid recovery; either he, or the tenant to the praecipe by him made, must vouch the remainder-man in tail, otherwise the recovery is void: but if he does vouch such remainder-man, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears, and suffers the recovery to be had, it is as effectual to bar the estate-tail as if he himself were the recoveree.[52]

IN all recoveries it is necessary that the recoveree, or tenant to the praecipe, as he is usually called, be actually seized of the freehold, else the recovery is void.[53] For all actions, to recover the seizin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. And, though these recoveries are in themselves fabulous and fictitious, yet it is necessary that there be *actores fabulae* [actors of the fiction], properly qualified. But the nicety thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the praecipe, is removed by the provisions of the statute 14 Geo. II. c. 20. which enacts, with a retrospect and conformity to the ancient rule of law,[54] that, though the legal freehold be vested in lessees, yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the praecipe: and that, though the deed or fine which creates such tenant be subsequent to the judgment of recovery, yet, if it be in the same term, the recovery shall be valid in law: and that, though the recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the praecipe, and declare the uses of the recovery, shall after a possession of twenty years be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurances by matter of record.

BEFORE I conclude this head, I must add a word concerning deeds to lead, or to declare, the uses of fines, and of recoveries. For if they be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, inure only to the use of him who levies or suffers them.[55] And if a consideration appears, yet as the most usual fine, “fur cognizance de droit come ceo, etc,” conveys an absolute estate, without any limitations, to the cognizee; and as common recoveries do the same to the recoveror; these assurances could not be made to answer the purpose of family settlements, (wherein a variety of uses and designations is very often expedient) unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements, in the vast and intricate machine of a voluminous family settlement. And, if these deeds are made previous to the fine or recovery, they are called deeds to lead the uses; if subsequent, deeds to declare them. As, if A tenant in tail, with remainder to himself in fee, would settle his estate on

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B for life, remainder to C in tail, remainder to D in fee; this is what by law he has no power of doing effectually, while his own estate-tail is in being. He therefore usually covenants to levy a fine (or, if there be any remainders over, to suffer a recovery) to E, and that the same shall inure to the uses in such settlement mentioned. This is now a deed to lead the uses of the fine or recovery; and the fine when levied, or recovery when suffered, shall inure to the uses so specified and no other. For though E, the conusee or recoveree, has a fee-simple vested in himself by the fine or recovery; yet, by the operation of this deed, he becomes a mere instrument or conduit-pipe, seized only to the use of B, C, and D, in successive order: which use is executed immediately, by force of the statute of uses.[56] Or, if a fine or recovery be had without any previous settlement, and a deed be afterwards made between the parties, declaring the uses to which the same shall be applied, this will be equally good, as if it had been expressly levied or suffered, in consequence of a deed directing its operation to those particular uses. For y statute 4 & 5 Ann. c. 16. indentures to declare the uses of fines and recoveries, made after the fines and recoveries had and suffered, shall be good and effectual in law, and the fine and recovery shall inure to such uses, and be esteemed to be only in trust, notwithstanding the statute of frauds 29 Car. II. c. 3. enacts, that all trusts shall be declared in writing, at (and not after) the time when such trusts are created.

NOTES

1. Lord Clar. Contin. 162.
2. Ibid. 163.
3. Dr. & Stud. l. 1. d. 8.
4. 9 Rep. 18.
5. Ibid. 2 Inst. 555.
6. Finch. L. 100. 10 Rep. 112.
7. Co. Litt. 56.
8. Litt. § 206.
9. Bro. Abr. tit. Patent. 62. Finch. L. 110.
10. Freem. 172.
11. Finch. 101, 102.
12. Bro. Abr. tit. Estates. 34. tit. Patents. 104. Dyer. 270. Dav. 45.
13. Co. Litt. 50.
14. Co. Litt. 120.
15. 2 Roll. Abr. 13.
16. l. 8. c. 1.
17. l. 5. t. 5. c. 28.
18. Plowd. 369.
19. See Appendix. No. IV. § 1.

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20. 2 Inst. 511.
21. Append. No. IV. § 2.
22. 5 Rep. 39. 2 Inst. 511.
23. Append. No. IV. § 3.
24. Comb. 71.
25. Append. No. IV. § 4.
26. Ibid. § 5.
27. Append. No. IV. § 6.
28. This is that sort, of which an example is given in the appendix, No. IV.
29. Moor. 629.
30. West. Symb. p. 2. § 95.
31. West. p. 2. § 66.
32. Salk 340.
33. Litt. § 441.
34. 2 Inst. 518.
35. 4 Hen. V. 24.
36. See statute 11 Hen. VII. c. 20.
37. 3 Rep. 87.
38. Co. Litt. 372.
39. Ibid. 251.
40. 2 Lev. 52.
41. Hob. 334.
42. pag. 117. 271.
43. See appendix, No. V.
44. § 1.
45. § 2.
46. pag. 301.
47. See appendix, pag. xviii.
48. Bro. Abr. tit. Taile 32. Plowd. 8.
49. Dr. & St. l. 1. dial. 26.
50. of com. recov. 13, 14.
51. See pag. 286.
52. Salk. 571.

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53. Pigott. 28.

54. Pigott. 41, etc. 4. Burr. I. 115.

55. Dyer. 18.

56. This doctrine may perhaps be more clearly illustrated by example. In the deed or marriage settlement in the appendix, No. II. § 2. we may suppose the lands to have been originally settled on Abraham and Cecilia Barker for life, remainder to John Barker in tail, with diverse other remainders over, reversion to Cecilia Barker in fee; and now intended to be settled to the several uses therein expressed, *viz.* of Abraham and Cecilia barker till the marriage; remainder to John Barker for life; remainder to trustees to preserve the contingent remainders; remainder to his widow for life, for her jointure: remainder to other trustees, for a term of five hundred years; remainder to their first and other sons in tail; remainder to their daughters in tail; remainder to John Barker in tail; remainder to Cecilia Barker in fee. Now it is necessary, in order to bar the estate-tail of John Barker, and the remainders expectant thereon, that a recovery be suffered of the premises; and it is thought proper (for though usual, it is by no means necessary: see Forrester. 167.) that in order to make a good tenant of the freehold, or tenant to the *praecipe*, during the coverture, a fine should be levied by Abraham, Cecilia, and John Barker; and it is agreed that the recovery itself be suffered against this tenant to the *praecipe*, who shall vouch John Barker, and thereby bar his estate-tail; and become tenant of the fee-simple by virtue of such recovery: the uses of which estate, so acquired, are declared to be those expressed in this deed. Accordingly the parties covenant to do these several acts, (see pag. viii.) And in consequence thereof the fine and recovery are had and suffered (No. IV. and No. V.) of which this conveyance is a deed to lead the uses.

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CHAPTER 22

Of Alienation by Special Custom

WE are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property. This therefore is a very narrow title; being confined to copyhold lands, and such customary estates, as are held in ancient demesne, or in manors of a similar nature: which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed; for, as that might tend to defeat the lord of his seigniory, it is therefore a forfeiture of a copyhold.[1] Nor are they transferable by matter of record, even in the king's courts, but only in the court baron of the lord. The method of doing this is generally by surrender; though in some manors, by special custom, recoveries may be suffered of copyholds:[2] but these differing in nothing material from recoveries of free land, save only that they are not suffered in the king's courts, but in the court baron of the manor, I shall confine myself to conveyances by surrender, and their conveyances.

SURRENDER, *sursumredditio*, is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. As, it may be, to the use and be-hoof of A and his heirs; to the use of his own will; and the like. The process, in most manors, is, that the tenant comes to the steward, either in court, (or, if the custom permits, out of court) or else to two customary tenants of the same manor, provided that also have a custom to warrant it; and there by delivering up a rod, a glove or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord, to such persons and for such uses as are named in the surrender, and the custom of the manor will warrant. If the surrender be made out of court, then at the next or some subsequent court, the jury or homage must present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to *cestuy que use*, (who is sometimes, though rather improperly, called the surrenderee) to hold by the ancient rents and customary services; and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender, which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the symbol, of corporal seizin of the lands and tenements. Upon which admission he pays a fine to the lord, according to the custom of the manor, and takes the oath of fealty.

IN this brief abstract, of the manner of transferring copyhold estates, we many plainly trace the visible footsteps of the feudal institutions. The fief, being of a base nature and tenure, is inalienable without the knowledge and consent of the lord. For this purpose it is resigned up, or surrendered into his hands. Custom, and the indulgence of the law, which favors liberty, has now given the tenant a right to name his successor; but formerly it was far otherwise. And I am apt to suspect that this right is of much the same antiquity with the introduction of uses with respect to freehold lands: for the alienee of a copyhold had merely *jus fiduciarium* [a right in trust], for which there was no remedy at law, but only by subpoena in chancery.[3] When therefore the lord had accepted a surrender of his tenant's interest, upon confidence to re-grant the estate to another person, either then expressly named or to be afterwards named in the tenant's will, the chancery enforced this trust as a matter of conscience; which jurisdiction, though seemingly new in the time of Edward IV,[4] was generally

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acquiesced in, as it opened the way for the alienation of copyholds, as well as of freehold estates, and as it rendered the use of them both equally devisable by testament. Yet, even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowledgment for the license of alienation. Add to this the plain feudal investiture, by delivering the symbol of seizin in presence of the other tenants in open court; *"quando hasta vel aliud corporeum quidlibet porrigitur a domino se investituram facere dicente; quae saltem coram duobus vasallis solemniter fieri debet"*[5] ["when a spear, or other corporeal thing, is presented by the lord, saying, that he hereby invested him; which should be solemnly done in the presence of at least two vassals"]: and, to crown the whole, the oath of fealty annexed, the very bond of feudal subjection. From all which we may fairly conclude, that, had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestably prove the very universal reception, which this northern system of property for a long time obtained in this island; and which communicated itself, or at least its similitude, even to our very villeins and bondmen.

THIS method of conveyance is so essential to the nature of a copyhold estate, that it cannot possibly be transferred by any other assurance. No feoffment, fine, or recovery (in the king's courts) has any operation thereupon. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law; but we must surrender to each other's use, and the lord will admit us accordingly. If I would devise a copyhold, I must surrender it to the use of my last will and testament; and in my will I must declare my intentions, and name a devisee, who will then be entitled to admission.[6]

IN order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts; the surrender, the presentment, and the admittance.

1. A SURRENDER, by an admittance subsequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, till admittance of *cestuy que use*, the lord takes notice of the surrenderor as his tenant; and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but *sub modo* [to a degree]; for he cannot pass away the land to any other, or make it subject to any other encumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance. If he enters, he is a trespasser and punishable in an action of trespass: and if he surrenders to the use of another, such surrender is merely void, and by no matter ex post facto can be confirmed. For though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void ab initio; because at the time of such surrender he had but a possibility of an interest, and could therefore transfer nothing: and no subsequent admittance can make an act good, which was ab initio void. Yet, though upon the original surrender the nominee has but a possibility, it is however such a possibility, as may whenever he pleases be deprived or deluded of the effect and fruits of the surrender; but if the lord refuse to admit him, he is compellable to do it by a bill in chancery or a mandamus:[7] and the surrenderor can in no wise defeat his grant; his hands being for ever bound from disposing of the land in any other way, and his mouth forever stopped from revoking or countermanding his own deliberate act;[8] except in the case of a surrender to the use of his will, which is always revocable.[9]

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2. AS to the presentment: that, by the general custom of manors, is to be made at the next court baron immediately after the surrender; but by special custom in some places it will be good, though made at the second or other subsequent court. And it is to be brought into court by the same persons that took the surrender, and then presented by the homage; and in al points material must correspond with the true tenor of the surrender itself. And therefore, if the surrender be conditional, and the presentment be absolute, both the surrender, presentment, and admittance thereupon are wholly void:[10] the surrender, as being never truly presented; the presentment, as being false; and the admittance, as being founded on such nature presentment. If a man surrenders out of court, and dies before presentment, and presentment be made after his death, according to the custom, this is sufficient.[11] So too, if *cestuy que use* dies before presentment, yet, upon presentment made after his death, his heir according to the custom shall be admitted. The same law is, if those, into whose hands the surrender is made, die before presentment; for, upon sufficient proof in court that such a surrender was made, the lord shall be compelled to admit accordingly. And if the steward, the tenants, or others into whose hands such surrender is made, do refuse or neglect to bring it in to be presented, upon a petition preferred to the lord in his court baron the party grieved shall find remedy. But if the lord will not do him right and justice, he may sue both the lord, and them that took the surrender, in chancery, and shall there find relief.[12]

3. ADMITTANCE is the last stage, or perfection, of copyhold assurances. And this is of three sorts: first, an admittance upon a voluntary grant from the lord; secondly, an admittance upon surrender by the former tenant; and thirdly, an admittance upon a descent from the ancestor.

IN admittances, even upon a voluntary grant from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For, though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein; and quite to change their nature from copyhold to socage tenure, so that he may well be reputed their absolute owner and lord; yet, if he will still continue to dispose of them as copyhold, he is bound to observe the ancient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this respect the law accounts him custom's instrument. For if a copyhold for life falls into the lord's hands, by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he grants it out again by copy, he can neither add to nor diminish the ancient rent, nor make any the minutest variation in other respects:[13] nor is the tenant's estate, so granted, subject to any charges or encumbrances by the lord.[14]

IN admittances upon surrender, of another, the lord is to no intent reputed as owner, but wholly as an instrument: and the tenant admitted shall likewise be subject to no charges or encumbrances of the lord; for his claim to the estate is solely under him that made the surrender.[15]

AND, as is admittances upon surrenders, so in admittances upon descents by the death of the ancestor, the lord is used as a mere instrument; and, as no manner of interest passes into him by the surrender or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case, nor the other, is any respect had to the quantity or quality of the lord's estate in the manor. For whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial, acts, which every lord in

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possession is bound to perform.[16]

ADMITTANCES, however, upon surrender differ from admittances upon descent in this; that by surrender nothing is vested in *cestuy que use* before admittance, no more than in voluntary admittances; but upon descent the heir is tenant by copy immediately upon the death of his ancestor: not indeed to all intents and purposes, for he cannot be sworn on the homage nor maintain an action in the lord's court as tenant; but to most intents the law takes notice of him ancestor, especially where he is concerned with any stranger. He may enter into the land before admittance; may take the profits; may punish any trespass done upon the ground;[17] nay, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine, and not so much necessary for the strengthening and completing the heir's title. Hence indeed an observation might arise, that if the benefit, which the heir is to receive by the admittance, is not equal to the charges of the fine, he will never come in and be admitted to his copyhold in court; and so the lord may be defrauded of his fine. But to this we may reply in the words of Sir Edward Coke,[18] "I assure myself, if it were in the election of the heir to be admitted or not to be admitted, he would be best contented without admittance; but the custom in every manor is in this point compulsory. For, either upon pain of forfeiture of their copyhold, or of incurring some great penalty, the heirs of copyholds are enforced, in every manor, to come into court and be admitted according to the custom, within a short time after notice given of their ancestor's decease."

NOTES

1. Litt. § 74.
2. Moor. 637.
3. Cro. Jac. 568.
4. Bro. Abr. tit. Tenant per copie. 10.
5. Feud. l. 2. t. 2.
6. Co. Copyh. § 36.
7. 2 Roll. Rep. 107.
8. Co. Copyh. § 39.
9. 4 Rep. 23.
10. Co. Copyh. 40.
11. Co. Litt. 62.
12. Co. Copyh. § 40.
13. Co. Cop. § 41.
14. 8 Rep. 63.
15. 4 Rep. 27. Co. Litt. 59.
16. 4 Rep. 27. 1 Rep. 140.
17. 4 Rep. 23.
18. Copyh. § 41.

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CHAPTER 23

Of Alienation by Devise

THE last method of conveying real property, is by devise, or disposition contained in a man's last will and testament. And, in considering this subject, I shall not a present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the original and antiquity of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

IT seems sufficiently clear, that, before the conquest, lands were devisable by will.[1] But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord.[2] And some have questioned, whether this restraint (which we may trace even from the ancient Germans[3]) was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbors; since it rarely happens, that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the ancient law of the Athenians directed that he estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go the collateral relations: which had an admirable effect in keeping up equality and preventing the accumulation of estates. But when Solon[4] made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others: which, by a natural progression, first produced popular tumults and dissensions; and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses, (which are the natural consequence of free agency, when coupled with human infirmity) to debar the owner of lands from distributing them after his death, as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar property; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property: which is the natural con of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times; but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

HOWEVER this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament;[5] except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted.[6] And though the feudal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and imposition on the testator in extremis, which made such devises suspicious. Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighborhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

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BUT when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised very frequently,[7] and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert,[8] that, as the popish clergy then generally sat in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer; and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses[9] had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, *viz.* 32. Hen. III. c. 1. explained by 34 Hen. VIII. c. 5. which enacted, that all persons being seized in fee-simple (except feme-coverts, infants, idiots, and persons of nonsane memory) might by will and testament in writing devise to any other person, but not to bodies corporate, two thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage: which now, through the alteration of tenures by the statute of Charles the second, amounts to the whole of their landed property, except their copyhold tenements.

CORPORATIONS were excepted in these statutes, to prevent the extension of gifts in mortmain; but now, by construction of the statute 43 Eliz. c. 4. it is held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an appointment, rather than of a bequest. And indeed the piety of the judges has formerly carried them great lengths in supporting such charitable uses;[10] it being held that the statute of Elizabeth, which favors appointment to charities, supersedes and repeals all former statutes,[11] and supplies all defects of assurances:[12] and therefore not only a devise to a corporation, but a devise by a copyhold tenant without surrendering to the use of his will,[13] and a devise (nay even a settlement) by tenant in tail without either fine or recovery, if made to a charitable use, are good by way of appointment.[14]

WITH regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance: for so loose was the construction made upon this act by the courts of law, that bare notes in the hand writing of another person were allowed to be good wills within the statute.[15] To remedy which, the statute of frauds and perjuries, 29 Car. II. c. 3. directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses. And a similar solemnity is requisite for revoking a devise.

IN the construction of this last statute, it has been adjudged that the testator's name, written with his own hand, at the beginning of his will, as, “I John Mills do make this my last will and testament,” is a sufficient signing, without any name at the bottom;[16] though the other is the safer way. It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times.[17] But they must all subscribe their names as witnesses in his presence, lest by any possibility they should mistake the instrument.[18] And, in a case determined about twenty years ago,[19] the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by

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consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination however alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues, (and these are the persons most likely to be present in the testator's last illness) and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6. which restored both the competency and the credit of such legatees, by declaring void al legacies given to witnesses, and thereby removing all possibility of heir interest affecting their testimony. The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted, but leaving their credit (as well as that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom such will shall be contested. And in a much later case[20] the testimony of three witnesses, who were creditors, was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons of the former determination were adjudged to be insufficient.

ANOTHER inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the heir provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the devisee of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14. has provided, that all wills, and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple or having power to dispose by will, shall (as against such creditors may maintain their actions jointly against both the heir and the devisee.

A WILL of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual subscription of the witnesses is not required by law,[21] though it is prudent for them so to do, in order to assist their memory when living and to supply their evidence when dead; but in devises of lands such subscription is now absolutely necessary by statute,[22] in order to identify a conveyance, which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time purchased lands will pass under such devise,[23] unless, subsequent to the purchase or contract,[24] the devisor re-publishes his will.[25]

WE have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice, for the construction and exposition of them all. These are

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1. THAT the construction be favorable, and as near the minds and apparent intents of the parties, as the rules of law will admit.[26] For the maxims of law are, that "*verba intentioni debent inservire*" ["words are subservient to intention"]; and, "*benignè interpretamur chartas propter simplicitatem laicorum.*" ["We interpret deeds favorably on account of the ignorance of the laity."] And therefore the construction must also be reasonable, and agreeable to common understanding.[27]

2. THAT *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* [where there is no ambiguity in the words, they should be construed according to their obvious meaning]:[28] but that, where the intention is clear, too minute a stress be not laid on the strict and precise signification of words; *nam qui haeret in litera, haeret in cortice* [he who confines himself to the letter, goes but halfway]. Therefore, by a grant of remainder a reversion may well pass, and *e converso*.[29] And another maxim of law is, that "*mala grammatical non vitiat chartam*" ["bad grammar does not vitiate a deed"]; neither false English nor bad Latin will destroy a deed.[30] Which perhaps a classical critic may think to be no unnecessary caution.

3. THAT the construction be made upon the entire deed, and not merely upon disjointed parts of it. "Nam ex antecedentibus et consequentibus fit optima interpretatio."[31] ["A deed is best interpreted by the bearing of all its parts."] And therefore that every part of it, be (if possible) made to take effect; and no word but what may operate in some shape or other.[32] "Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat."[33] ["Words should be understood with an effect that may tend more to strengthen than destroy the subject matter."]

4. THAT the deed be taken most strongly against him that is the agent or contractor, and in favor of the other party. "*Verba fortius accipiuntur contra proserentem.*" For the principle of self-preservation will make men sufficiently careful, not to prejudice their own interest by the too extensive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must betaken between an indenture and a deed poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, but the other party has given his consent to every one of them. But in a deed poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him.[34] However, this, being a rule of some strictness and rigor, is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail.[35]

5. THAT, if the words will bear two senses, one agreeable to, and another against, law; that sense be preferred, which is most agreeable thereto.[36] As if tenant in tail lets a lease for life generally, it shall be construed for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

6. THAT, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected:[37] wherein, it differs from a will; for there, of two such repugnant clauses the latter shall stand.[38] Which owing to the different natures of the two instruments; for the first deed, and the last will are always most available in law. Yet in both cases we should rather attempt to reconcile them.[39]

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7. THAT a devise be most favorably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal and proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance;[40] and an estate-tail without words of procreation.[41] By a will also an estate may pass by mere implication, without any express words to direct its course. As, where A devises lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication;[42] for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. So also, where a devise is of black-acre to A and of white-acre to B in tail, and if they both die without issue, then to C in fee: here A and B have cross remainders by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail.[43] But, to avoid confusion, no cross remainders are allowed between more than two devisees:[44] and, in general, where any implications are allowed, they must be such as necessary (or at least highly probable) and not merely possible implications.[45] And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation to uses,[46] is construed in each with equal favor and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

AND thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the title to things real, or the means by which they may be reciprocally lost and acquired. We have before considered the estates which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connections of the persons entitled to hold them: we have examined the tenures, both ancient and modern, whereby those estates have been, and are now, held: and have distinguished the object of all these inquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal kind; and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws, that differs much from every other system, except those of the same feudal origin, in its notions and regulations of landed estates; and which therefore could in this particular be very seldom compared with any other.

THE subject, which has thus employed our attention, is of very extensive use, and of as extensive variety. And yet, I am afraid, it has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or method; and the multiplicity of acts of parliament which have amended, or sometimes only altered, the common law; these cases have made the study of this branch of our national jurisprudence a little perplexed and intricate. It has been my endeavor principally to select such parts of it, as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers, as were before strangers even to the very terms of art, which I have been obliged to make use of: though, whenever those have first occurred, I have generally attempted a short explication of their meaning.

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These are indeed the more numerous, on account of the different languages which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our inquiries with the words of Sir Edward Coke:[47] "albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself, but proceed; for on some other day, in some other place," (or perhaps upon a second perusal of the same) "his doubts will be probably removed."

NOTES

1. Wright of tenures. 172.
2. See pag. 57.
3. Tacit. de mer. Germ. c. 23.
4. Plutarch. in vita Solon.
5. 2 Inst. 7.
6. Litt. § 167. 1 Inst. 111.
7. Plowd. 414.
8. on devises. 7.
9. 27 Hen. VIII. c. 10.
10. Ch. Prec. 272.
11. Gilb. Rep. 45. 1 P. Wms. 248.
12. Duke's charit. uses. 84.
13. Moor. 890.
14. 2 Vern. 453. Ch. Prec. 16.
15. Dyer. 72. Cro. Eliz. 100.
16. 3 Lev. 1.
17. Freem. 486. 2 Ch. Cas. 109. Pr. Ch. 185.
18. 1 P. Wms. 740.
19. St. a. 1253.
20. M. 31 Geo. II. 4 Burr. I. 430.
21. See pag. 307.
22. 1 P. Wms. 575.
23. Moor. 255. 11 Mod. 127.
24. 1 Ch. Cas. 39. 2 Ch. Cas. 144.
25. Salk. 238.
26. And. 60.

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27. 1 Bulstr. 175. Hob. 304.
28. 2 Saund. 157.
29. Hob. 27.
30. 10 Rep. 133. Co. Litt. 223. 2 Show. 334.
31. 1 Bulstr. 101.
32. 1 P. Wms. 457.
33. Plowd. 156.
34. Plowd. 134.
35. Bacon's Elem. c. 3.
36. Co. Litt. 42.
37. Hardr. 94.
38. Co. Litt. 112.
39. Cro. Eliz. 420. 1 Vern. 30.
40. See pag. 108.
41. See pag. 115.
42. 1 Ventr. 376.
43. Freem. 484.
44. Cro. Jac. 655. 1 Ventr. 224. 2 Show 139.
45. Vaugh. 262.
46. Fitzg. 236. 11 Mod. 153.
47. Proeme to 1 Inst.

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CHAPTER 24

Of Things Personal

UNDER the name of things personal are included all sorts of things moveable, which may attend a man's person wherever he goes; and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and immoveable, as lands, and houses, and the profits issuing thereout. These being constantly within the reach, and under the protection of the law, were the principal favorites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded only as a transient commodity. The amount of it indeed was, comparatively, very trifling, during the scarcity of money and the ignorance of luxurious refinements, which prevailed in the feudal ages. Hence it was, that a tax of the fifteenth, tenth, or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence likewise may be derived the frequent forfeitures inflicted by the common law, of all a man's good and chattels, for misbehaviors and inadvertencies that at present hardly seem to deserve so severe a punishment. Our ancient law-books, which are founded upon the feudal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the mirrour, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians. But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law wherever those rules appeared to be well-grounded and apposite to the case in question, but principally from reason and conveyance, adapted to the circumstances of the times; preserving withal a due regard to ancient usages, and a certain feudal tincture, which is still to be found in some branches of personal property.

BUT things personal, by our law, do not only include things moveable, but also something more. The whole of which is comprehended under the general name of chattels, *catalla*; which, Sir Edward Coke says,[1] is a French word signifying goods. And this is true, if understood of the Norman dialect; for in the *grand coustumier*,[2] we find the word chattels used and set in opposition to a fief or sued: so that not only goods, but whatever was not a feud, were accounted chattels. And it is, I apprehend, in the same large, extended, negative sense, that not sufficiently comprehensive to take in every thing that our law considers as a chattel interest. For since, as the commentator on the *coustumier* observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief;[3] or, according to us, is not a real estate: the consequence of which in both laws is, that it must be a personal estate, or chattel.

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CHATTELS therefore are distributed by the law into two kinds; chattels real, and chattels personal.

1. CHATTELS real, says Sir Edward Coke,[4] are such as concern, or favor of, the realty; as terms for years of land, wardships in chivalry (while the military tenures subsisted) the next presentation to a church, estates by statute-merchant, statute-staple, elegit, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to real estates: of which they have one quality, *viz.* immobility, which denominates them real; but want the other, *viz.* a sufficient, legal, indeterminate duration: and this want it is, that constitutes them chattels. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life: their tenants were considered, upon feudal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII.[5] A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed by corporal investiture and livery of seizin; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act, of voluntary transfer or of forfeiture; or else by the happening of some future contingency, as in estates *pur auter vie*, and the determinable freeholds mentioned in a former chapter.[6] And even these, being of an uncertain duration, may by possibility last for the owner's life; for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life estate, and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seizin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it is sure to expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and elegit are determined as soon as the debt is paid; and so guardianships in chivalry were sure to expire the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that its duration is limited to a time certain, beyond which it cannot subsist.

2. CHATTELS personal are, properly and strictly speaking, things moveable; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household-stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters which were employed upon real estates: that kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteristics of each species of things; the immobility of things real, and the precarious duration of things personal.

CHATTEL interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that property, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the title to that property, or how it may be lost and acquired. Of each of these in its order.

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NOTES

1. 1 Inst. 118.

2. c. 87.

3. *Cateux sont meubles et immeubles: si comme vrais meubles sont qui transporter se peuvent; et ensuivir le corps; immeubles sont choses qui ne peuvent en suivir le corps, niestre transportees, et tout ce qui n'est point en heritage*. [Chattels are moveable and immoveable: those which can be transported and follow the person are moveable; immoveable chattels are such as cannot follow the person, or be transported from place to place; and every thing which is not in the inheritance.] LL. Will. Nothi, c. 4. apud Dufresne. II. 409.

4. 1 Inst. 118.

5. See pag. 141, 142.

6. pag. 121.

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CHAPTER 25

Of Property in Things Personal

PROPERTY, in chattels personal, may be either in possession; which is where a man has not only the right to enjoy, but has the actual enjoyment of, the thing: or else it is in action; where a man has only a bare right, without any occupation or enjoyment. And of these the former, or property in possession, is divided into two sorts, an absolute and qualified property.

I. FIRST then of property in possession absolute; which is where a man has, solely and exclusively, the right, and also the occupation, of any moveable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all inanimate things, as goods, plate, money, jewels, implements of war, garments, and the like: such also may be all vegetable productions, as the fruit or other parts, when severed from the plant, or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these therefore there remains little to be said.

BUT with regard to animals, which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are *domitae* [tame], and such as wild disposition. In such as are of a nature tame and domestic, (as horses, kine, sheep, poultry, and the like) a man may have as absolute a property as in any inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose him property:[1] in which our law agrees with the laws of France and Holland.[2] The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry.[3] But in animals ferae naturae a man can have no absolute property.

OF all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" ["offspring follows the mother"] in the brute creation, though for the most part in the human species it disallows that maxim. and therefore in the laws of England,[4] as well as Rome,[5] "*si equam meam equus tuus pregnantem fecerit, non est tuum sed meum quod natum est*." ["If my mare be with foal by your horse, the offspring is not yours but mine."] And, for this, Pufendorf[6]gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expense and care: wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets [swans]; which belong equally to the owner of the cock and hen, and shall be divided between them.[7] But here the reasons of the general rule cease, and "*cessante ratione cessat et ipsa lex*" "the reason ceasing the law itself ceases": for the male is well known, by his constant association with the female; and for the same reason the owner of the one does not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

II. OTHER animals, that are not of a tame and domestic nature, are either not the objects of property

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at all, or else fall under our other division, namely, that of qualified, limited, or special property: which is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist. In discussing which subject, I shall in the first place show, how this species of property may subsist in such animals, as are *ferae naturae*, or of a wild nature; and then, how it may subsist in any other things, when under particular circumstances.

FIRST then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *ferae naturae*, either *per industriam, propter impotentiam, propter privilegium* [by industry, by impotency in the animal, by privilege].

1. A QUALIFIED property may subsist in animals *ferae naturae, per industriam hominis*: by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom: as, horses, swine, and other cattle; which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity, and are therefore, say they, called *mansueta, quasi manui assueta* [tame, as accustomed to the hand]. But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitae naturae*; and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *ferae naturae*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an enclosed warren, doves in a dovehouse, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: but, if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi* [intention of returning], which is only to be known by their usual custom of returning.[8] A maxim which is borrowed from the civil law;[9] "*evertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint*" ["they seem no longer to have the intention of returning when they forsake the custom"]. The law therefore extends this possession farther than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he has *animum revertendi*. So are my pigeons, that are flying at a distance from their home (especially those of the carrier kind) and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester: all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them.[10] But if a deer, or any wild animal reclaimed, has a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him:[11] but otherwise, if the deer has been long absent without returning, or the swan leaves the neighborhood. Bees also are *ferae naturae*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law.[12] And to the same purpose, not to say in the same words, with the civil law, speaks Bracton:[13] occupation, that is, hiving or including them, gives the property in bees; for, though a

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swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests thereon; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them. But it has been also said,[14] that with us the only ownership in bees is *ratione soli* [by reason of the soil]; and the charter of the forest,[15] which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

IN all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property, that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferae naturae* again; and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine: and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food, as it is to steal tame animals:[16] but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots and singing birds;[17] because their value is not intrinsic, but depending only on the caprice of the owner:[18] though it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action.[19] Yet to steal a reclaimed hawk is felony both by common law and statute;[20] which seems to be a relic of the tyranny of our ancient sportsmen. And, among our elder ancestors the ancient Britons, another species of reclaimed animals, *viz.* cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king's household, and were the *custos horrei regii* [guard of the royal granary], for which there was a very peculiar forfeiture.[21] And thus much of qualified property in wild animals, reclaimed *per industriam*.

2. A QUALIFIED property may also subsist with relation to animals *ferae naturae*, *ratione impotentiae*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneys or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones, till such time as they can fly, or run away, and then my property expires:[22] but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away.[23] For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined: for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him.

3. A MAN may, lastly, have a qualified property in animals *ferae naturae*, *propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty;[24] and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner, in which this privilege is acquired, will be shown in a subsequent chapter.

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THE qualified property which we have hitherto considered, extends only to animals *ferae naturae*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth or land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows,[25] corrupts the air of his house or gardens,[26] fouls his water,[27] or unpins and lets it out, or if he diverts an ancient watercourse that used to run to the other's mill or meadow;[28] the law will animadvert hereon [consider it] as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

THESE kinds of qualification in property depend upon the peculiar circumstances of the subject matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of bailment, or delivery, of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor has only the right, and not the immediate possession; the bailee has the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, mediately, his possession also.[29] So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property therein: the pledgor's property is conditional, and depends upon the performance of the condition of re-payment, etc; and so too is that of the pledgee, which depends upon its non-performance.[30] The same may be said of goods distrained for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distrainor, or party distrained; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who has the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, has not any property or possession either absolute or qualified, nut only a mere charge or oversight.[31]

HAVING thus considered the several divisions of property in possession, which subsists there only, where a man has both the right and also the occupation of the thing; we will proceed next to take a short view of the nature of property in action, or such where a man has not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing or chose, in action.[32] Thus money due on a bond is a chose in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage; the recompense for this damage is a chose in action: for though a right to some recompense vests in me, at the time of the damage done, yet what and how large such recompense shall be, can only

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be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe, that the property, or right of action, depends upon an express contract or obligation to pay a stated sum: and in the latter it depends upon an implied contract, that if the covenanter does not perform the act he engaged to do, he shall pay me the damages I sustain by his breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a chose in action, and of the nature of which we shall discourse at large in a subsequent chapter.

AT present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a chose in action; being a thing rather in *potentia* [potential] than in *esse* [being]: though the owner may have as absolute a property of such things is action, as of things in possession.

AND, having thus distinguished the different degree or quantity of dominion or property to which things personal are subject, we may add a word or two concerning the time of their enjoyment, and the number of their owners; in conformity to the method before observed in treating of the property of things real.

FIRST, as to the time of enjoyment. By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were generally tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted:[33] though originally that indulgence was only shown, when merely the use of the goods, and not the goods themselves, was given to the first legatee;[34] the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded:[35] and therefore if a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good. But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation.[36] For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail; and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

NEXT, as to the number of owners. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. They cannon indeed be vested in coparcenary; because they do not descent from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more,

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absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements.[37] And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship.[38] So also if 100£ be given by will to two or more, equally to be divided between them, this makes them tenants in common;[39] as, we have formerly seen,[40] the same words would have done, in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property; and there shall be no survivorship therein.[41]

NOTES

1. 2 Mod. 319.
2. Vinn. In Inst. l. 2. tit. 1. § 15.
3. 1 Hal. P. C. 511, 512.
4. Bro. Abr. tit. Propertie. 29.
5. Ff. 6. 1. 5.
6. L. of N. l. 4. c. 7.
7. 7 Rep. 17.
8. Bracton. l. 2. c. 1. 7 Rep. 17.
9. Inst. 2. 1. 15.
10. Finch. L. 177.
11. Crompt. of courts. 167. 7 Rep. 16.
12. Puf. l. 4. c. 6. § 5. Inst. 2. 1. 14.
13. l. 2. c. 1. § 3.
14. Bro. Abr. tit. Propertie. 37. cites 43 Edw. III. 24.
15. 9 Hen. III. c. 13.
16. 1 Hal. P. C. 512.
17. Lamb. Eiren. 275.
18. 7 Rep. 18. 3 Inst. 109.
19. Bro. Abr. tit. Trespass. 407.
20. 1 Hal. P. C. 512. 1 Hawk. P. C. c. 33.
21. "*Si quis felem, horrei regii custodem, occiderit vel furto abstulerit, felis summa cauda suspendatur, capite aream attingente, et in eam grana tritici effundantur, usquedum summitas caudae tritico co-operiatur*." ["If any one should kill or steal a cat, being the guard of the royal granary, the cat shall be suspended by the end of its tail, its head touching the floor, and they shall pour on it small measures of wheat until the tip of the tail be covered."] Wotton. LL. Wall. l. 3. c. 5. § 5. An amercement similar to which, Sir Edward Coke tells us (7 Rep. 18.) there anciently was for stealing swans; only suspending them by the beak, instead of the tail.
22. Carta de forest. 9. Hen. III. c. 13.

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23. 7 Rep. 17. Lamb. Eiren. 274.

24. Cro. Car. 554. Mar. 48. 5 Mod. 376. 12 Mod. 144.

25. 9 Rep. 58.

26. Ibid. 59. Lutw. 92.

27. 9 Rep. 59.

28. 1 Leon. 273. Skinn. 389.

29. 1 Roll. Abr. 607.

30. Cro. Jac. 245.

31. 3 Inst. 108.

32. The same idea, and the same denomination, of property prevailed in the civil law. "*Rem in bonis nostris habere intelligimur, quotiens ad recuperandum eam actionem habeamus*." ["We are supposed to have a property in our goods whenever we can have an action to recover them."] (Ff. 41. 1. 52.) And again; "*Aeque bonis adnumerabitur etiam, si quid est in actionibus, petitionibus, persecutionibus. Nam et haec in bonis esse videntur*." ["All things to which we have a right by action, petition, or prosecution, are justly reckoned among our possessions. For these also appear to belong to us."] (Ff. 50. 16. 49.)

33. 1 Equ. Cas. abr. 360.

34. Mar. 106.

35. 2 Freem. 206.

36. 1 P. Wms. 290.

37. Litt. § 282. 1 Vern. 482.

38. Litt. § 321.

39. 1 Equ. Cas. abr. 292.

40. pag. 193.

41. 1 Vern. 217. Co. Litt. 182.

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CHAPTER 26

Of Title to Things Personal by Occupancy

WE are next to consider the title to things personal, or the various means of acquiring, and of losing, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

AND, first, as in goods and chattels may be acquired by occupancy: which, we have more than once[1] remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

1. THUS, in the first place, it has been said, that any body may seize to his own use such goods as belong to an alien enemy.[2] For such enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to seize upon their chattels, without being compelled as in other cases to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority of the state, residing in the crown;[3] and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And therefore it has been held,[4] that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. It has also been adjudged, that if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker; unless they were retaken the same day, and the owner before sun-set puts in his claim of property.[5] Which is agreeable to the law of nations, as understood in the time of Grotius,[6] even with regard to captures made at sea; which were held to be the property of the captors after a possession of twenty four hours: though the modern authorities[7] require, that before the property can be changed, the goods must have been brought into port, and have continued a night *intra praesidia*, in a place of safe custody, so that all hope of recovering them is lost.

AND, as in the goods of an enemy, so also in his person, a man may acquire a sort of qualified property, by taking him a prisoner in war;[8] at least till his ransom be paid.[9] And this doctrine seems to have been extended to negro-servants,[10] who are purchased, when captives, of the nations with whom they are at war, and continue therefore in some degree the property of their masters who buy them: though, accurately speaking, that property consists rather in the perpetual service, than in the body or person, of the captive.[11]

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2. THUS again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen,[12] are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. THUS too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an ancient window overlooking my neighbor's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbor makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and must continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow: for he has by the first occupancy acquired a property in the current.

4. WITH regard likewise to animals *ferae naturae*, all mankind had by the original grant of the creator a right to pursue and take any fowl or infect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his qualified property, or, if dead, are absolutely his own: so that to steal them, or otherwise invade this property, is, according to the respective values, sometimes a criminal offense, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aerial, or aquatic animals as go under the denomination of game; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But those animals, which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly; but the difference, at present made, arises merely from the positive municipal law.

5. TO this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblements,* by any possessor of the land who has sown or planted it, whether he be owner of the inheritance in fee or in tail, or be tenant for life, for years, or at will: which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testaments before the statute of wills,[13] and at the death of the owner shall vest in his executor and not his heir: they are forfeitable by outlawry in a personal action:[14] and by the statute 11 Geo. II. c. 19. though not by the common law,[15] they may be distrained for rent *arrere*. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given;[16] and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distrainable for rent, they are not in other respects considered as personal chattels; and, particularly, they are not

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the object of larceny, before they are severed from the ground.[17]

6. THE doctrine of property arising from accession is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement:[18] but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials, which he had so converted.[19] And these doctrines are implicitly copied and adopted by our Bracton,[20] in the reign of king Henry III; and have since been confirmed by many resolutions of the Courts.[21] It has even been held,[22] that if one takes away another's wife or son, and clothes them, and afterwards the husband or father retakes them back, the garments shall cease to be the property of him who provided them, being now annexed to the person of the child or woman.

7. BUT in the case of confusion of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares.[23] But, if one willfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost.[24] But our law, to guard against fraud, allows no remedy in such a case; but gives the entire property, without any account, to him, whose original dominion is invaded, and endeavored to be rendered uncertain, without his own consent.[25]

8. THERE is still another species of property, which, being grounded on labor and invention, is more property reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke,[26] and many others,[27] to be founded on the personal labor of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property. Now the identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of conveying that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so conveyed; and no other man can have a right to convey or transfer it without his consent, either tacitly or expressly given. This consent may perhaps be tacitly given, when an author permits his work to be published, without any reserve of right, and without stamping on it any marks of ownership: it is then a present to the public, like the building of a church, or the laying out a new highway: but, in case of a bargain for a single impression, or a sale or gift of the copyright, the reversion is plainly continued in the original proprietor, or the whole property transferred to another.

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THE Roman law adjudged, that if one man wrote any thing, though never so elegantly, on the paper or parchment of another, the writing should belong to the original owner of the materials on which it was written:[28] meaning certainly nothing more thereby, than the mere mechanical operation of writing, for which it directed the scribe to receive a satisfaction; especially as, in works of genius and invention, such as a picture painted on another man's canvas, the same law[29] gave the canvas to the painter. We find no other mention in the civil law of any property in the works of the understanding, though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence,[30] Martial,[31] and Statitus.[32] Neither with us in England has there been any direct determination upon the right of authors at the common law.

But much may be gathered from the frequent injunctions of the court of chancery, prohibiting the invasion of this property: especially where either the injunctions have been perpetual,[33] or have related to unpublished manuscripts,[34] or to such ancient books, as were not within the provisions of the statute of queen Anne.[35] Much may also be collected from the several legislative recognitions of copyrights;[36] and from those adjudged cases at common law, wherein the crown has been considered as invested with certain prerogative copyrights;[37] for, if the crown in capable of an exclusive right in any one book, the subject seems also capable of having the same right in another.

BUT, exclusive of such copyright as may subsist by the rules of the common law, the statute 8 Ann. c. 19. has protected by additional penalties the property of authors and their assigns for the term of fourteen years; and has directed that if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration: and a similar privilege is extended to the inventors of prints and engravings, for the term of fourteen years, by the statute 8 Geo. II. c. 13. Both which appear to have been copied from the exception in the statute of monopolies, 21 Jac. I. c. 3. which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof a temporary property becomes vested in the patentee.[38]

NOTES

1. See pag. 3. 8. 258.
2. Finch. L. 178.
3. Freem. 40.
4. Bro. Abr. tit. propertie. 38. forfeiture. 57.
5. Ibid.
6. de j. b. & p. l. 3. c. 6. § 3.
7. Bynkersh. not. 66.
8. Pro. *Abr. tit. propertie.* 18.
9. We meet with a curious writ of trespass in the register (102.) for breaking a man's house, and setting such a prisoner at large. *"Quare domum ipsius A. apud W. (in qua idem A. quendam H. Scotum per ipsum A. de guerra captum tanquam prisonem suum, quousque sibi de centum libris, per quas idem H. redemptionem suam cum praefato A. pro vita sua salvanda fecerat satisfactum foret, detinuit) fregit, et ipsum H. cepit et adduxit, vel quo voluit abire permisit, &c.*" ["Wherefore he broke into the house of the said A. at W. (in which the said A. detained a certain Scotchman named H., taken by him in battle, as his prisoner, until he should satisfy him in the sum of one hundred pounds, which he had agreed upon as his ransom with

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the aforesaid A. for saving his life) and took the said H. and carried him away, or permitted him to go wherever he pleased."]

10. 2 Lev. 201.

11. Carth. 396. Ld. Raym. 147. Salk. 667.

12. Book I. ch. 8.

13. Perk. § 512.

14. Bro. Abr. tit. emblements. 21.5 Rep. 116.

15. 1 Roll. Abr. 666.

16. pag. 122. 146.

17. 3 Inst. 109.

18. Inst. 2. 1. 25, 26, 31. Ff. 6. 1. 5.

19. Inst. 2. 1. 25, 34.

20. *l.* 2. c. 2. & 3.

21. Bro. Abr. tit. propertie. 23. Moor. 20. Poph. 38.

22. Moor. 214.

23. Inst. 2. 1. 27, 28. 1 Vern. 217.

24. Inst. 2. 1. 28.

25. Poph. 38. 2 Bulstr. 325. 2 Vern. 516.

26. on Gov. part 2. ch. 5.

27. See pag. 8.

28. *Si in chartis membranisve tuis carmen vel historian vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris*. [If Titius shall have written any poem, history, or speech on your paper or parchment, the manuscript belongs to you, not to him.] Inst. 2. 1. 33.

29. Ibid. § 34.

30. Prol. in Eunuch. 20.

31. Epigr. i. 67. iv. 72. xiii. 3. xiv. 194.

32. Tuv. vii. 83.

33. Knaplock v. Curl. 9 Nov. 1722. Viner Abr. tit. Books, pl. 3. – Baller v. Watson, 6 Dec. 1737.

34. Webb v. Rose. 24 May 1732. – Pope v. Curl. 5 Jun. 1741. – Forrester v. Waller. 13 Jun 1741. – Duke of Queenfberry v. Sheboeare. 31 July 1758.

35. Knaplock v. Curl. before cited. – Eyre v. Walker. 9 Jun. 1735. – Motte v. Faulkner. 28 Nov. 1735. – Walthoe v. Walker. 27 Jun. 1736. – Tonson v. Walker. 12 May 1739. and 30 Apr. 1752.

36. A. D. 1649. c. 60. Scobell. 92. 13 & 14 Car. II. c. 33. 10 Ann. c. 19. § 112. 5 Geo. III. c. 12. § 26.

37. Cart. 89. 1 Mod. 257. 4 Burr. 661.

38. 1 Vern. 62.

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CHAPTER 27

Of Title by Prerogative, And Forfeiture

A SECOND method of acquiring property in personal chattels is by the king's prerogative: whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown, as by grant or by prescription.

SUCH in the first place are all tributes, taxes, and customs; whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis* or ancient royal revenue, or whether they be occasionally created by authority of parliament; of both which species of revenue we treated largely in the former volume. In these the king acquires and the subject loses a property the instant they become due: if paid, they are a chose in possession; if unpaid, a chose in action. Hither also may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his ancient prerogative, or by particular modern statutes: which revenues created by statute do always assimilate, or take the same nature, with the ancient revenues; and may therefore be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined of amerced, do lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

IN these several methods of acquiring property by prerogative there is also this peculiar quality, that the king cannot have a joint property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king can, neither by grant nor contract, become a joint-tenant of a chattel real with another person;[1] but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and subject, the king shall have the whole penalty; the debt or duty being one single chattel:[2] and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt.[3] For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but, where they interfere, his is always preferred to that of another person:[4] from which two principles it is a necessary consequence, that the innocent, though unfortunate, partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances.

THIS doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the like; which are not transferred to the sovereign from any former owner, but are originally inherent in him by the rules of law, and are derived to particular subjects, as royal Franchises, by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being *bona vacantia* [goods which cannot be owned], and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

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WITH regard to the prerogative copyrights, which were mentioned in the preceding chapter, they are held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulgating to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all acts of parliament, proclamations, and orders of council. 2. As supreme head of the church, he has a right to the publication of all liturgies and books of divine service. 3. He has a right by purchase to the copies of such law books, grammars, and other compositions, as were compiled or translated at the expense of the crown. And upon these two last principles the exclusive right of printing the translation of the bible is founded. 4. Almanacs have been said to be parliament-copies, either as things derelict, or else as being substantially nothing more than the calendar prefixed to out liturgy.[5] And indeed the regulation of time has been often considered as a matter of state. The Roman *fasti* were under the care of the pontifical college: and Romulus, Numa, and Julius Caesar, successively regulated the Roman calendar.

THERE still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals *ferae naturae*, as are known by the denomination of game, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. This may lead us into an inquiry concerning the original of these franchises, or royalties, on which we touched a little in a former chapter;[6] the right itself being an incorporeal hereditament, though the fruits and profits of it are a personal nature.

IN the first place then we have already shown, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore are property of nobody, but liable to be seized by the first occupant. And so it was held by the imperial law, even so late as Justinian's time: "*ferae igitur bestiae, et volucres, et omnia animalia quo mari, coelo et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt. Quod enim nullius est, id naturali ratione occupanti conceditur*."[7] ["Therefore, wild beasts and birds, and all animals which are produced in air, sea, or earth, when taken by any one, immediately become his property by the law of nations. For that which belongs to no one, belongs by natural reason to the taker."] But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the place in which this right may, or may not, be exercised; with respect to the animals that are the subject of this right; or with respect to the persons allowed or forbidden to exercise it. And, in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorize.[8] Many reasons have concurred for making these constitutions: as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness and dissipation in husbandmen, artificers, and others of lower rank; which would be the unavoidable consequence of universal license. 4. For preventing of popular insurrections and resistance to the

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government, by disarming the bulk of the people:[9] which last is a reason oftener meant, than avowed, by the makers of forest or game laws. Nor, certainly, in these prohibitions is there any natural injustice, as some have weakly enough supposed: since, as Pufendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him.

YET, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowledge that, in their present shape, they owe their immediate original to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to persons or animals, for far regarded the article of place, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut aucupandi gratia, potest a domino prohiberi ne ingrediatur*."[10] ["He who enters on another man's ground for the purpose of hunting or fowling may be prohibited from so doing by the owner."] For if there can, by the law of nature, by any inchoate imperfect property supposed in wild animals before they are taken, it seems most reasonable to fix it in him upon whose land they are found. And as to the other restriction, which relates to persons and not to place, the pontifical or canon law[11] interdict "*enationes, et sylvaticas vagationes cum canibus et accipitribus*" ["hunting and excursions in the woods with hawks and hounds"] to all clergymen without distinction; grounded on a saying of St. Jerome,[12] that it never is recorded that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of king Edgar,[13] concur in the same prohibition: though our secular laws, at least after the conquest, did even in the times of popery dispense with this canonical impediment; and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof we may observe, that it is to this day a branch of the king's prerogative, at the death of every bishop, to have his kennel of hounds, or a composition in lieu thereof.[14]

BUT, with regard to the rise and original of our present civil prohibitions, it will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy, as gave birth to the feudal system; when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present kingdoms of Europe, on the ruins of the western empire. For when a conquering general came to settle the economy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations; it behooved him, in order to secure his new acquisitions, to keep the *rustici* or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting: and therefore it was the policy of the conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal constitutions,[15] one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game. This exclusive privilege well suited the martial genius of the conquering

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troops, who delighted in a sport[16] which in its pursuit and slaughter bore some resemblance to war. *Vita omnis*, (says Caesar, speaking of the ancient Germans) *in venationibus atque in studiis rei militaris consistit*.[17] ["Their whole life consists in hunting, and the study of military affairs."] And Tacitus in like manner observes, that *quoties bella non ineunt, multum venatibus, plus per otium transigunt*.[18] ["Whenever not engaged in war they pass much time in hunting, and still more in idleness."] And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; they despising all arts as effeminate, and having no other learning, that was couched in such rude ditties, as were sung at the solemn carousals which succeeded these ancient huntings. And it is remarkable that, in those nations where the feudal policy remains the most uncorrupted, the forest or game laws continue in their highest rigor. In France all game is properly the king's; and in some parts of Germany it is death for a peasant to be found hunting in the woods of the nobility.[19]

WITH us in England also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without enclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed in common. But when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and enclosed, the beasts naturally fled into the woody and defart tracts; which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which our royal sportsmen reserved for their own diversion, on pain of a pecuniary forfeiture for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests: as is fully expressed in the laws of Canute,[20] and of Edward the confessor;[21] "*sit quilibet homo dignus venatione sua, in sylva, et in agris, sibi propriis, et in dominio suo: et abstineat omnis homo a venariis regiis, ubicunque pacem eis habere voluerit*" ["let every man be entitled to hunt in his own wood, fields, and manor: and let every man abstain from the royal forests, if he wish to live in peace"]: which indeed was the ancient law of the Scandinavian continent, from whence Canute probably derived it. "*Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum*."[22] ["For every one is permitted to hunt any wild animal on his own grounds, in whatever manner he pleases."]

HOWEVER, upon the Norman conquest, a new doctrine took place; and the right of pursuing and taking all beast of chase or venary, and such other animals as were accounted game, was then held to belong to the king, or to such only as were authorized under hi. And this, as well upon the principles of the feudal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures at his pleasure: as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are *bona vacantia*, and, having no other owner, belong to the king by his prerogative. As therefore the former reason was held to vest in the king a right to pursue and take them any where; the latter was supposed to give the king, and such as he should authorize, a sole and exclusive right.

THIS right, thus newly vested in the crown, was exerted with the utmost rigor, at and after the time of the Norman establishment; not only in the ancient forests, but in the new ones which the

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conqueror made, by laying together vast tract of country, depopulated for that purpose, and reserved solely for the king's royal diversion; in which were exercised the most horrid tyrannies and oppressions, under color of forest law, for the sake of preserving the beasts of chase; to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance, of the same principle, king John laid a total interdict upon the winged as well as the fourfooted creation: "*capturam avium per totam Angliam interdixit*."[23] ["He forbad fowling throughout all England."] The cruel and insupportable hardships, which these forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feudal rigors and the other exactions introduced by the Norman family; and accordingly we find the immunities of *carta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of Magna Carta itself. By this charter, confirmed in parliament,[24] many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained; particularly[25] killing the king's deer was made no longer a capital offense, but only punished by fine, imprisonment, or abjuration of the realm. And by a variety of subsequent statutes, together with the long acquiescence of the crown without exerting the forest laws, this prerogative is now become no longer a grievance to the subject.

BUT, as the king reserved to himself the forests for his own exclusive diversion, so he granted out from time to time other tracts of land to his subjects under the names of chases or parks;[26] or gave them license to make such in their own grounds; which indeed are smaller forests, in the hands of a subject, but not governed by the forest laws: and by the common law no person in at liberty to take or kill any beasts of chase, but such as has an ancient chase or park; unless they be also beasts of prey.

AS to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise or royalty, derived likewise from the crown, and called free warren; a word, which signifies preservation or custody: as the exclusive liberty of taking and killing fish in a public stream or river is called a free fishery; of which however no new franchise can at present be granted, by the express provision of Magna Carta, c. 16.[27] The principal intention of granting a man these franchises or liberties was in order to protect the game, by giving him a sole and exclusive power of killing it himself, provided he prevented other persons. And no man, but he who has a chase or free warren, by grant from the crown, or prescription which supposes one, can justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all.

HOWEVER novel this doctrine may seem, it is a regular consequence from what has been before delivered; that the sole right of taking and destroying game belongs exclusively to the king. This appears, as well from the historical deduction here made, as because he may grant to his subjects an exclusive right of taking them; which he could not do, unless such a right was first inherent in himself. And hence it will follow, that no person whatever, but he who has such derivative right from the crown, is by common law entitled to take or kill any beasts of chase, or other game whatsoever. It is true, that by the acquiescence of the crown, the frequent grants of free warren in ancient times, and the introduction of new penalties of late by certain statutes for preserving the game, this exclusive prerogative of the king is little known or considered; every man, that is exempted from these modern penalties, looking upon himself as at liberty to do what he pleases with the game: whereas the contrary is strictly true, that no man, however well qualified he may vulgarly

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be esteemed, has a right to encroach on the royal prerogative by killing of game, unless he can show a particular grant of free warren; or a prescription, which perfumes a grant; or some authority under an act of parliament. As for the latter, I know but of two instances wherein an express permission to kill game was ever given by statute; the one by 1 Jac. I. c. 27. altered by 7 Jac. I. c. 11. and virtually repealed by 22 & 23 Car. III. c. 25. which gave authority, so long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40£ per annum in lands of inheritance, or 80£ for life or lives, or 400£ personal estate, (and their servants) to take partridges and pheasants upon their own, or their master's, free warren, inheritance, or freehold: the other by 5 Ann. c. 14. which empowers lords and ladies of manors to appoint gamekeepers to kill game for the use of such lord or lady; which with some alterations still subsists, and plainly supposes such power not to have been in them before. The truth of the matter is, that these game laws (of which we shall have occasion to speak again in the fourth book of these commentaries) do indeed qualify nobody, except in the instance of a gamekeeper, to kill game: but only, to save the trouble and formal process of an action by the person injured, who perhaps too might remit the offense, these statutes inflict additional penalties, to be recovered either in a regular of summary way, by any of the king's subjects, from certain persons of inferior rank who may be found offending in this particular. But it does not follow that persons, excused from these additional penalties, are therefore authorized to kill game. The circumstances, of having 100£ per annum, and the rest, are not properly qualifications, but exemptions. And these persons, so exempted from the penalties of the game statutes, are not only liable to actions of trespass by the owners of the land; but also, if they kill game within the limits of any royal franchise, they are liable to the actions of such who may have the right of chase or free warren therein.

UPON the whole it appears, that the king, by his prerogative, and such persons as have, under his authority, the royal franchises of chase, park, free warren, or free fishery, are the only persons, who may acquire any property, however fugitive and transitory, in these animals *ferae naturae*, while living; which is said to be vested in them as was observed in a former chapter, *propter privilegium* [by privilege]. And it must also be remembered, that such persons as may thus lawfully hunt, fish, or fowl, *ratione privilegii* [by reason of privilege], have (as has been said) only a qualified property in these animals; it not being absolute or permanent, but lasting only so long as the creatures remain within the limits of such respective franchise or liberty, and ceasing the instant they voluntarily pass out of it. it is held indeed, that if a man starts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himself.[28] And this is grounded on reason and natural justice:[29] for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so, if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase or warren; this property arising from privilege,[30] and not being changed by the act of a mere stranger. Or if a man starts game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there;[31] this property arising *ratione soli* [by reason of the soil]. Whereas if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it,[32] though guilty of a trespass against both the owners.

III. I PROCEED now to a third method, whereby a title to goods and chattels may be acquired and lost, *viz.* by forfeiture; as a punishment for some crime or misdemeanor in the party forfeiting, and

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as a compensation for the offense and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby real property might be lost and acquired, we treated in a former chapter.[33] It remains therefore in this place only to mention, by what means or for what offenses goods and chattels become liable to forfeiture.

IN the variety of penal laws with which the subject is at present encumbered, it were a tedious and impracticable task to reckon up the various forfeitures, inflicted by special statutes, for particular crimes and misdemeanors: some of which are *mala in se* [wrong in itself], or offenses against the divine law, either natural or revealed; but by far the greatest part are *mala prohibita* [wrong because prohibited], or such as derive their guilt merely from their prohibition by the laws of the land: such as is the forfeiture of 40 s. per month by the statute 5 Eliz. c. 4. for exercising a trade without having served seven years as an apprentice thereto; and the forfeiture of 10£ by 9 Ann. c. 23. for printing an almanac without a stamp. I shall therefore confine myself to those offenses only, by which all the goods and chattels of the offender are forfeited: referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their proper heads, under which very many of them have been or will be mentioned; or else to the collections of Hawkins and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or sometimes to other persons; and as one total forfeiture, namely that by a bankrupt who is guilty of felony by concealing his effects, accrues entirely to his creditors. I have therefore made it a distinct head of transferring property.

GOODS and chattels then are totally forfeited by conviction of high treason, or misprision of treason; of petit treason; of felony in general, and particularly of *felony de se* [suicide], and of manslaughter; nay even by conviction of excusable homicide;[34] by outlawry for treason or felony; by conviction of petit larceny; by flight in treason or felony, even though the party be acquitted of the fact; by standing mute, when arraigned of felony; by drawing a weapon on a judge, or striking any one in the presence of the king's courts; by *praemunire* [forewarning]; by pretended prophecies, upon a second conviction; by owling; by the residing abroad of artificers; and by challenging to fight on account of money won at gaming. All these offenses, as will more fully appear in the fourth book of these commentaries, induce a total forfeiture of goods and chattels.

AND this forfeiture commences from the time of conviction, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them, by any relation back, would be attended with more inconvenience than in the case of landed estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5.

NOTES

1. See pag. 184.
2. Fitzh. Abr. t. dette. 38. Plowd. 243.
3. Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. 10 Mod. 245.

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4. Co. Litt. 30.

5. 1 Mod. 257.

6. pag. 38, 39.

7. Inst. 2. 1, 12.

8. Puf. L. N. 1. 4. c. 6. § 5.

9. Warburton's alliance. 324.

10. Inst. 2, 1. § 12.

11. Decretal. l. 5. tit. 24. c. 2.

12. Decret. part. 1. dist. 34. l. 1.

13. cap. 64.

14. 4 Inst. 309.

15. Feud. l. 2. tit. 27. § 5.

16. In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, published A. D. 1205. there is one which prohibits the killing of all game from March to October; that the court and soldiery might find plenty enough in the winter, during their recess from war. (Mod. Univ. Hist. iv. 468.)

17. De bell. Gall. l. 6. c. 20.

18. c. 15.

19. Mattheus de Crimin. c. 3. tit. 1. Carpzov. Practic. Saxonic. p. 2. c. 84.

20. c. 77.

21. c. 36.

22. Stiernhook, de jure Sueon. l. 2. c. 8.

23. M. Paris. 303.

24. 9 Hen. III.

25. cap. 10.

26. See pag. 38.

27. Mirr. c. 5. § 2. See pag. 39.

28. 11 Mod. 75.

29. Puf. L. N. l. 4. c. 6.

30. Lord Raym. 251.

31. Ibid.

32. Farr. 18. Lord Raym. ibid.

33. See pag. 267.

34. Co. Litt. 391. 2 Inst. 316. 320.

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CHAPTER 28

Of Title by Custom

A FOURTH method of acquiring property in things personal, or chattels, is by custom: whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless, should I attempt to enumerate all the several kinds of special customs, which may entitle a man to a chattel interest in different parts of the kingdom: I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; *viz.* heriots, mortuaries, and heirlooms.

1. HERIOTS, which were slightly touched upon in a former chapter,[1] are usually divided into two sorts, herio-service, and heriot-custom. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent:[2] the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom.[3] Of these therefore we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

THE first establishment, if not introduction, of compulsory heriots into England, was by the Danes: and we find in the laws of king Canute[4] the several *heregeates* or heriots specified, which were then exacted by the king on the death of diverse of his subjects, according to their respective dignities; from the highest *eorle* down to the most inferior *thegne* or landholder. These, for the most part, consisted in arms, horses, and habiliments of war; which the word itself, according to Sir Henry Spelman,[5] signifies. These were delivered up to the sovereign of the death of the vassal, who could no longer use them, to be put into other hands for the service and defense of the country. And upon the plan of this Danish establishment did William the conqueror fashion his law of reliefs, as was formerly observed;[6] when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to be feudal custom and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money.[7]

THE Danish compulsive heriots, being thus transmuted into reliefs, underwent the same several vicissitudes as the feudal tenures, and in socage estates do frequently remain to this day, in the shape of a double rent payable at the death of the tenant: the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary.[8] These are now for the most part confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy; and perhaps are the only instance where custom has favored the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowledgment of his having been raised a degree above villenage, when all his goods and chattels were quite at the mercy of the lord: and custom, which has on the one hand confirmed the tenant's interest in exclusion of the lord's will, has on the other hand established this discretional piece of gratitude into a permanent duty. An heriot may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due of custom. Bracton[9] speaks of heriots as frequently due on the death of both species of tenants: "*est quidem alia praestatio quae nominatur heriettum; ubi tenens, liber vet servus, in morte sua, dominum suum, de quo tenuerit, respicit de meliori averio suo, vel de*

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secundo meliori, secundum diversam locorum consuetudinem." ["There is indeed another praestation, which is called a heriot; where a tenant at his death, whether a freeman or a slave, acknowledges the lord of whom he held, by giving his best beast or the second best, according to the custom of the place."] And this, he adds, "*magis fit de gratia quam de jure*" ["it is more a matter of favor than of right"]; in which Fleta[10]and Britton[11] agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant; though now the immemorial usage has established it as of right in the lord.

THIS heriot is sometimes the best live beast, or *averium*, which the tenant dies possessed of, (which is particularly denominated the villein's relief in the twenty ninth law of king William the conqueror) sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a personal chattel, which, immediately on the death of the tenant who was the owner of it, being ascertained by the option of the lord,[12] becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and therefore on the death of a feme-covert no heriot can be taken; for she can have no ownership in things personal.[13] In some places there is a customary composition in money, as ten or twenty shillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indisputably ancient custom: but a new composition of this sort will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible.[14]

2. MORTUARIES are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very may parishes on the death of his parishioners. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us from a constitution of archbishop Langham, as king of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in their life-time might have neglected or forgotten to pay. For this purpose, after[15] the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary: "*si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesiae suae, sine dolo, fraude, seu contradictione qualibet, pro recompensatione subtractionis decimarum personalium, necnon et oblationum, secundum melius animal reservetur, post obitum, pro salute animae suae*."[16] ["If a man when dying shall have many animals, the best being reserved for him to whom it was of right due, let the second best, after his death, be set apart for the church for the good of his soul, without any deceit, fraud, or objection, as an amends for the withholding of personal tithes and oblations."] And therefore in the laws of king Canute[17] this mortuary is called soul-scot (raplrceat) or *symbolum animae* [passport of the soul]. And, in pursuance of the same principle, by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death out of his merchandise, jewels, and other moveables.[18] So also, by a similar policy, in France, every man that died without bequeathing a part of his estate to the church, which was called dying without confession, was formerly deprived of Christian burial: or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in case he had made a will. But the parliament, in 1409, redressed the grievance.[19]

IT was anciently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence[20] it is sometimes called a *corse-present*: a term, which bespeaks it to have been once a voluntary donation. However in Bracton's time, so early as Henry III, we find

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it riveted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere; et postea ecclesiam de alia meliori*" ["Whosoever shall make a will, should in the first place acknowledge his lord by a bequest of the best chattel he may possess; and afterwards the church by the second best"]: the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places: "*in quibusdam locis habet ecclesia melius animal de consuetudine: in quibusdam secundum, vel tertium melius; et in quibusdam nihil: et ideo consideranda est consuetudo loci*."[21] ["In some places the church has the best animal by custom: in others the second or third best; and in others again nothing: and therefore it is the custom of the place which determines the matter."] This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales, a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; till abolished, upon a recompense given to the bishop, by the statute 12 Ann. St. 2. c. 6. And in the archdeaconry of Chester a custom also prevailed, that the bishop, who is also archdeacon, should have at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring.[22] But by statute 28 Geo. II. c. 6. this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in its room. The king's claim to many goods, on the death of all prelates in England, seems to be of the same nature; though Sir Edward Coke[23] apprehends, that this is a duty due upon death and not a mortuary: a distinction which seems to be without difference. For not only the king's ecclesiastical character, as supreme

ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by Sir Edward Coke, is entitled to six things; the bishop's best horse or palfrey, with his furniture: his cloak, or gown, and tippet: his cup, and cover: his basin, and ewer: his gold ring: and, lastly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter.[24]

THIS variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper by statute 21 Hen. VIII. c. 6. to reduce them to some king of certainty. For this purpose it is enacted, that all mortuaries, or corse-presents to parsons of any parish, shall be taken in the following manner; unless where by custom less or none at all is due: *viz.* for every person who does not leave goods to the value of ten marks, nothing: for every person who leaves goods to the value of ten marks, and under thirty pounds, 3s. 4d. if above thirty pounds, and under forty pounds, 6s. 8d. if above forty pounds, of what value soever they may be, 10 s. and no more. And no mortuary shall throughout the kingdom be paid for the death of any feme-covert; nor any child; nor for any one of full age, that is not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

3. HEIRLOOMS are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, *loom*, is of Saxon original; in which language it signifies a limb or

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member;[25] so that an heirloom is nothing else, but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold; otherwise the general rule, is that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor.[26] But deer in a real authorized park, fishes in a pond, doves in a dove-house, etc, though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase.[27] For this reason also I apprehend it is, that the ancient jewels of the crown are held to be heirlooms:[28] for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. Charters likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heirlooms, and shall not go to the executor.[29] By special custom also, in some places, carriages, utensils, and other household implements may be heirlooms;[30] but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, "*quod ab aedibus non facile revellitur*,"[31] is become a member of the inheritance, and shall thereupon pass to the heir; as marble chimney-pieces, pumps, old fixed or dormant tables, benches, and the like.[32] A very similar notion to which prevails in the duchy of Brabant; where they rank certain things moveable among those of the immoveable king, calling them, by a very peculiar appellation, *praedia volantia*, or volatile estates: such as beds, tables, and other heavy implements of furniture, which (as an author of their own observes) "*dignitatem istam nacta sunt, ut villis, sylvis, et aedibus, aliisque praediis, comparentur; quod solidiora mobilia ipsis aedibus ex destinatione patrisfamilias cohaerere videantur, et pro parte ipsarum aedium testimentur*."[33] ["Have obtained this estimation; that they are classed with towns, woods, houses, and other estates; because the more solid moveables seem to be fixed to the houses by the will of the ancestor, and are considered as a part of the buildings themselves."]

OTHER personal chattels there are, which also descend to the heir in the nature of heirlooms, as a monument or tombstone in a church, or the coat-armor there hung up, with the pennons and other ensigns of honor, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir.[34] Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir.[35] But though the heir has a property in the monuments and escutcheons of his ancestors, yet he had none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it: and, if any one in taking up a dead body steals the shroud or other apparel, it will be felony;[36] for the property thereof remains in the executor, or whoever was at the charge of the funeral.

BUT to return to heirlooms: these, though they be mere chattels, yet cannot be devised away form the heir by will; but such a devise is void,[37] even by a tenant in fee-simple. For, though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly vested in the heir, the devise (which is subsequent, and not to take effect till after his

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death) shall be postponed to the custom, whereby they have already descended.

NOTES

1. pag. 97.
2. 2 Saund. 166.
3. Co. Cop, § 24.
4. c. 69.
5. of feuds. c. 18.
6. pag. 65.
7. LL. Guil. Conqu. C. 22, 23, 24.
8. Lambard. Peramb. of Kent. 492.
9. l. 2. c. 36. § 9.
10. l. 3. c. 18.
11. c. 69.
12. Hob. 60.
13. Keilw. 84. 4 Leon. 239.
14. Co. Cop. § 31.
15. Co. Litt. 185.
16. Provinc. l. 1. tit. 3.
17. c. 13.
18. Panormitan. ad Decretal. l. 3. t. 20. c. 32.
19. Sp. L. b. 28. c. 41.
20. Selden. hist, of tithes. c. 10.
21. Bracton. l. 2. c. 26. Flet. l. 2. c. 57.
22. Cro. Car. 237.
23. 2 Inst. 491.
24. pag. 413.
25. Spelm. Gloss. 277.
26. Co. Litt. 388.
27. Co Litt. 8.
28. Ibid. 18.
29. Bro. Abr. tit. chatteles. 18.
30. Co. Litt. 18. 185.

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31. Spelm. Gloss. 277.
32. 12 Mod. 520.
33. Stockmans de jure devolutionis. c. 3. § 16.
34. 12 Rep. 105. Co. Litt. 18.
35. 3 Inst. 202. 12 Rep. 105.
36. 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515.
37. Co. Litt. 185.

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CHAPTER 29

Of Title by Succession, Marriage, and Judgment

IN the present chapter we shall take into consideration three other species of title to goods and chattels.

V. THE fifth method therefore of gaining a property in chattels, either personal or real, is by succession: which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies; and therefore the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate.[1] Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed; but the law will of itself imply it. So that a gift to such a corporation, either of lands, or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists.[2] And thus a lease for years, an obligation, a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members, to whom it was originally given.

BUT, with regard to sole corporations, a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some ancient cathedrals, who stands in the place of, and represents in his corporate capacity, the chapter; such sole corporations as these have in this respect the same powers, as corporations aggregate have, to take personal property or chattels in succession. And therefore a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative.[3] Whereas in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession: and therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it.[4] For the word successors, when applied to a person in his politic capacity, is equivalent to the word heirs in his natural: and as such a lease for years, if made to John and his heirs, would not vest in his heirs, but his executors; so, if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for, besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that if any such chattel interest (granted to a sole corporation and his successors were allowed to descend to such successors, the property thereof must be in abeyance from the death of the present owner until the successors be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner;[5] but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never is suspense; nor in the other sole corporations before-mentioned, who are rather to be considered as head of an aggregate body, than subsisting merely in their own right: the chattel interest therefore, in such a

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case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head if the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go or be acquired by right of succession.[6]

YET to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors.[7] The other exception is, where, by a particular custom, some particular corporations sole have acquired a power of taking particular chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and no extended to any other chattel interests than such immemorial usage will strictly warrant. Thus the chamberlain of London, who is a corporation sole, may by the custom of London take bonds and recognizances to himself and his successors, for the benefit of the orphan's fund:[8] but it will not follow from thence, that he has a capacity to take a lease for years to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a bond to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule; that such right of succession to chattels is universally inherent by the common law in all aggregate corporations, in the king, and in such single corporations as represent a number of persons; and may, by special custom, belong to certain other sole corporations for some particular purposes: although, generally, in sole corporations no such right can exist.

VI. A SIXTH method of acquiring property in goods and chattels is by marriage; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property and with the same powers, as the wife, when sole, had over them.

THIS depends entirely on the notion of an unity of person between the husband and wife; it being held that they are one person in law,[9] so that the very being and existence of the woman is suspended during the coverture, or entirely merged and incorporated in that of the husband. And hence if follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate he only gains a title to the rents and profit during coverture: for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes ten ant for life by the curtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined.

THERE is therefore a very considerable difference in the acquisition of this species of property by the husband, according to the subject-matter; *viz.* whether it be a chattel real, or a chattel personal; and, of chattels personal, whether it be in possession, or in action only. A chattel real vests in the husband, not absolutely, not *sub modo* [to a degree]. As, in case of a lease for years; the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or disposed of it during the coverture:[10] if he be outlawed or attainted, it shall be forfeited to the king:[11] it is liable to execution for his debts:[12] and, if he survives his wife, it is to all intents and purposes his own.[13] Yet

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if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot disposed of it by will:[14] for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of chattels personal (or *choses*) in action; as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And, upon such receipt or recovery, they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But, if he dies before he has recovered or reduced them into possession, of that at his death they still continue choses in action, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them.[15] And so, if an estray comes into the wife's franchise, and the husband seizes it, it is absolutely his property: but, if he dies without seizing it, his executors are now at liberty to seize it, but the wife or her heirs;[16] for the husband never exerted the right he had, which right determined with the coverture. Thus is both these species of property the law is the same, in case the wife survives the husband; but, in case the husband survives the wife, the law is very different with respect to chattels real and choses in action: for he shall have the chattel real by survivorship, but not the chose in action;[17] except in the case of arrears of rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this: that the husband is in absolute possession of the chattel real during the coverture by a kind of joint-tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives: though in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a chose in action shall not survive to him, because he never was in possession of it at all, during the coverture; and the only method he had to gain possession of it, was by suing in his wife's right: but as, after her death, be cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture.

THUS, and upon these reasons, stands the law between husband and wife, with regard to chattels real, and choses in action: but, as to chattels personal (or choses) in possession, which the wife has in her own right, as ready money, jewels, household goods, and the like, the husband has therein an immediate and absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again revest in the wife or her representative.[18]

AND, as the husband may thus, generally, acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death, and shall not go to his executors. These are called her paraphernalia; which is a term borrowed from the civil law,[19] and is derived from the Greek language, signifying something over and above her dower. Our law[20] uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; which she becomes entitled to entitled to at the death of her husband over and above her jointure or dower, and preferably to all other representatives: and the jewels of a peeress, usually worn by her, have been held to be paraphernalia.[21] Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he has the power (if unkindly inclined to exert it) to sell them or give

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them away.[22] But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons, except creditors where there is a deficiency of assets.[23] And her necessary apparel is protected even against the claim of creditors.[24]

VII. A JUDGMENT, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the right of which is before vested in the party, and of which only possession is recovered by suit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and choses in action; as if a man gives bond for 20£ or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him at the time of the bond being sealed, and the contract or agreement made; and the law only gives him a remedy to recover the possession of that right, which already in justice belongs to him. But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. SUCH penalties as are given by particular statutes, to be recovered on an action popular; or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of 500£ which those persons are by several acts of parliament made liable to forfeit, that, being in particular offices or situations in life, neglect to take the oaths to the government; which penalty is given to him or them that will sue for the same. Now here it is clear that no particular person, A or B, has any right, claim, or demand, in or upon this penal sum, till after action brought;[25] for he that brings his action and can *bona fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit; but it is not consummated till judgment, for if any collusion appears, he loses the priority he had gained.[26] But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty.[27] For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where a suit and judgment at law are not only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed as it were in a state of nature, accessible by all the king's subjects, but the acquired right of none of them: open therefore to the first occupant, who declares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

2. ANOTHER species of property, that is acquired and lost by suit and judgment at law, is that of damages given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand

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till after verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true, that this is not an acquisition so perfectly original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a new title in him, as fix and ascertain the old one; they do not give, but define, the right. But however, though strictly speaking the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

3. HITHER also may by referred, upon the same principle, all title to costs and expenses of suit; which are often arbitrary, and rest entirely in the determination of the court, upon weighing all circumstances, both as to the *quantum*, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

NOTES

1. 4 Rep. 65.
2. Bro. Abr. t. estates. 90. Cro. Eliz. 464.
3. Dyer. 48. Cro. Eliz. 464.
4. Co. Litt. 46.
5. Brownl. 132.
6. Co. Litt. 46.
7. Ibid. 90.
8. 4 Rep. 65. Cro. Eliz. 682.
9. See Book I. c. 15.
10. Co. Litt. 46.
11. Plowd. 263.
12. Co. Litt. 351.
13. Ibid. 300.
14. Poph. 5. Co. Litt. 351.
15. Co. Litt. 351.
16. Ibid.
17. 3 Mod. 186.
18. Co. Litt. 351.
19. Ff. 23. 3. 9. § 3.

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20. Cro. Car. 343. 1 Roll. Abr. 911. 2 Leon. 166.
21. Moor. 213.
22. Noy's Max. c. 49. – Grahme v. Lord Londonderry. 24 Nov. 1746. Canc.
23. 1 P. Wms. 730.
24. Noy. ibid.
25. 2 Lev. 141. Stra. 1169. Combe v. Pitt. B. R. T. 3. Geo. III.
26. Stat. 4 Hen. VII. c. 20.
27. Cro. Eliz. 138. 11 Rep. 65.

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CHAPTER 30

Of Title by Gift, Grant, and Contract

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by gift of grant, and by contract: whereof the former vests a property in possession, the latter a property in action.

VIII. GIFTS then, or grants, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that gifts are always gratuitous, grants are upon some consideration or equivalent: and they may be divided, with regard to their subject matter, into gifts or grants of chattels real, and gifts or grants of chattels personal. Under the head of gifts or grants of chattels real may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and, in case of leases, always reserving a rent, though it be but a peppercorn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

GRANTS or gifts, of chattels personal, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein: which may be done either in writing, or by word of mouth[1] attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious: and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII. c. 4. all deeds of gift of goods, made in trust to the use of the donor, shall be void; because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5. every grant or gift of chattels, as well as lands, with intent to defraud creditors or others,[2] shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and judicial; but, as against the grantor himself, shall stand good and effectual: and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year.

A TRUE and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately; as if A gives to B 100£ or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it; though he did it without any consideration or recompense:[3] unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretenses, ebriety [intoxication], or surprise. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract: and this a man cannot be compelled to perform, but upon good and sufficient

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consideration; as we shall see under our next division.

IX. A CONTRACT, which usually conveys an interest merely in action, is thus defined: "an agreement, upon sufficient consideration, to do or not to do a particular thing." From which definition there arise three points to be contemplated in all contract; 1. The agreement: 2. The consideration: and 3. The thing to be done or omitted, or the different species of contracts.

FIRST then it is an agreement, a mutual bargain or convention; and therefore there must at least be two contracting parties, of sufficient ability to make a contract: as where A contracts with B to pay him 100£ and thereby transfers a property in such sum to B. Which property in however not in possession, it could not be transferred to another person by the strict rules of the ancient common law: for no chose in action could be assigned or granted over,[4] because it was though to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person, to whom it is transferred, being rather an attorney than an assignee. But the king is an exception to this general rule; for he might always either grant or receive a chose in action by assignment:[5] and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a chose in action, as much as the law will that of a chose in possession.[6]

THIS contract or agreement may be either express or implied. Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate, and which therefore the law perfumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook or contracted, to pay him as much as his labor deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants; *viz.* that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts of one king or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* [from a contract] and *quasi ex contractu* [like a contract].[7]

A CONTRACT may also be either executed, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or in may be executory, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action: for a contract executed (which differs nothing from a grant) conveys a chose in possession; a contract executory conveys only a chose in action.

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HAVING thus shown the general nature of a contract, we are, secondly to proceed to the consideration upon which it is founded; or the reason which moves the party contracting to enter into the contract. “It is an agreement, upon sufficient consideration.” The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal.[8] This thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void. A good consideration, we have before seen,[9] is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another.[10] This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any valuable consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity: for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.

THESE valuable considerations are divided by the civilians[11] into four species. 1. *Do, ut des* [I give, so you give]: as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio ut facias* [I do, so you do]: as when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side in consideration of something done on the other; as, that in consideration A, the tenant, will repaid his house, B, the landlord, will bot sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A will not trade Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of considerations is, *facio, ut des* [I do, so you give]: when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value on it. As when a servant hires himself to his master, for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do ut facias* [I give, so you do]: which is the direct counterpart of the other. As when I agree with a servant to give him such wages upon his performing such work: which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det* [the servant does, so the heir gives], and *herus dat, ut servus faciat* [the heir gives, so the servant does].

A CONSIDERATION of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum* [naked contract] or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it.[12] As if one man promises to give another 100£ here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honor or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted[13] the maxim of civil law,[14] that *ex nudo pacto non oritur actio* [a naked contract cannot support an action]. But any degree of reciprocity will

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prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation, (as a promise to pay a just debt, though barred by the statute of limitations) it is no longer *nudum pactum*. And as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned,[15] it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument,[16] and every note from the subscription of the drawer,[17] carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

WE are next to consider, thirdly, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing." The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of sale or exchange. 2. That of bailment. 3. That of hiring and borrowing. 4. That of debt.

1. SALE or exchange is a transmutation of property from one man to another, in consideration of some recompense in value: for there is no sale without a recompense; there must be quid pro quo.[18] If it be a commutation of goods for goods, it is more properly an exchange; but, if it be a transferring of goods for money, it is called a sale: which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted therefore very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Machpelah;[19] though the practice of exchanges still subsists among several of the savage nations. But with regard to the law of sales and exchanges, there is no difference. I shall therefore treat of them both under the denomination of sales only; and shall consider their force and effect, in the first place where the vendor has in himself, and secondly where he has not, the property of the thing sold.

WHERE the vendor has in himself the property of the goods sold, he has the liberty of disposing of them to whomever he pleases, at any time, and in any manner: unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the statute of frauds,[20] the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing, of the writ,[21] and any subsequent sale was fraudulent; but the law was thus altered in favor of purchasers, though it still remains the same between the parties: and therefore, if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors.[22]

IF a man agrees with another for goods at a certain price, he may not carry them away before he has paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods

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delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may disposed of the goods as he pleases.[23] But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of earnest (which the civil law calls *arrha*, and interprets to be "*emptionis-venditionis contractae argumentum*" ["a token of a contract for purchase and sale"],[24] the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them.[25] And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute 29 Car. II. c. 3. no contract for the sale of goods, to the value of 10£ or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; or unless he gives part of the price of the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And, with regard to goods under the value of 10£ no contract of agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party who is to be charged therewith. Anciently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called handsale, "*venditio per mutuam manuum complexionem*" ["a sale by the mutual joining of hands"];[26] till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

AS soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he renders the price agreed on.[27] But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10£ and B pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the contract, the property was in the vendee.[28] Thus may property in goods be transferred by sale, where the vendor has such property in himself.

BUT property may also in some cases be transferred by sale, though the vendor has none at all in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is,[29] that all sales and contracts of any thing vendible, in fairs or markets overt, (that is, open) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the mirrour informs us,[30] were tools established in markets, *viz.* to testify the making of contract; for every private contract was discountenanced by law. Wherefore our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses.[31] Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day.[32] The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt;[33] but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in.[34] But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and

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I may take them wherever I find them. And it is expressly provided by statute 1 Jac. I. c. 21. that the sale of any goods wrongfully taken, to any pawnbroker in London or within two miles thereof, shall not alter the property. For this, being usually a clandestine trade, is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the king, such sale (though regular in all other respect) will in no case bind him; though it binds infants, feme coverts, idiots or lunatics, and men beyond sea or in prison: or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods.[35] So likewise, if the buyer knows the property not to be in the seller; or there be any other fraud in the transaction; if he knows the seller to be an infant, or feme covert, not usually trading for herself; if the sale be not originally and wholly made in the Sir or market, or not at the usual hours; the owner's property is not bound thereby.[36] If a man buys his own goods in a fair or market, the contract of sale shall not bind him so as that he shall render the price, unless the property had been previously altered by a former sale.[37] And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice.[38] By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, for far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.

BUT there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses; the sale of which, even in fairs or market covert, is void in many instances, where that of other property is valid: because a horse is so fleet an animal, that the stealers of them may flee far off in a short space,[39] and be out of the reach of the most industrious owner. All persons therefore that have occasion to deal in horses, and are therefore liable sometimes to buy stolen ones, would do well to observe, that whatever price they may give, or how long soever they may keep possession before it be claimed, they gain no property in a horse that has been stolen, unless it be bought in a fair or market overt: nor even then, unless the directions be pursued that are laid down in the statute 2 P. & M. c. 7. and 31 Eliz. c. 12. By which it is enacted, that every horse, so to be sold, shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the open and public place used for such sales, and not in any private yard or stable: that the horse shall be brought by both the vendor and vendee to the tollgatherer or bookkeeper of such fair or market: that toll be paid, if any be due; and if not, one penny to the bookkeeper, who shall enter down the price, color, and marks of the horse, with the names additions, and abode of the vendee and the vendor; the latter either upon his own knowledge, or the testimony of some credible witness. And, even if all these points be fully complied with, yet such sale shall not take away the property of the owner, if within six months after the horse if stolen he puts in his claim before the mayor, or some justice, of the district in which the horse shall be found; and within forty days after that, proves such his property by the oath of two witnesses before such mayor or justice; and also tenders to the person in possession such price as he *bona fide* paid for him in market overt. But in case any one of the points beforementioned be omitted, or not observed in the sale, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him. Wherefore Sir Edward Coke observes,[40] that, both by the common

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law and these two statutes, the property of horses is so well preserved, that if the owner be of capacity to understand them, and be vigilant and industrious to pursue the same, it is almost impossible that the property of any horse, either stolen or not stolen, should be altered by any sale in market overt by him that is *malae fidei possessor* [bad faith possessor].

BY the civil law[41] an implied warranty was annexed to every sale, in respect to the title of the vendor: and so too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose.[42] But, with regard to the goodness of the wares so purchases, the vendor is not bound to answer; unless he expressly warrants them to be found and good,[43] or unless he knew them to be otherwise and has used any art to disguise them,[44] or unless they turn out to be different from what he represented to the buyer.

2. BAILMENT, from the French bailer, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered, or (in our legal dialect) bailed, to a tailor to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in workmanlike manner.[45] If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry, them to the person appointed.[46] If a horse, or other goods, be delivered to an inn-keeper or his servants, he is bound to keep them safely, and restore them when his guest leaves the house.[47] If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them safe to the owner.[48] if a pawnbroker receives plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time:[49] for the due execution of which contract many useful regulations are made by statute 30 Geo. II. c. 24. And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainors, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus. If a friend delivers any thing to his friend to keep for him, the receiver is bound to restore it on demand: and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise;[50] unless he expressly undertook[51] to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled upon a much more rational footing;[52] that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is construed to be an evidence of fraud: but, if the bailee undertakes specially to keep the goods safely and securely, he is bound to answer all perils and damages, that may befall them for want of the same care with which a prudent man would keep his own.[53]

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property in the bailee, because of his contract for restitution; and the bailor has nothing left in him but the right to a chose in action, grounded upon such contract, the possession being delivered to the bailee. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting [grazing] farmer, the pawnbroker,

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the distrainor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person.[54] For, as such bailee is responsible to the bailor, if the goods are lost damaged by his willful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right to recover either the specific goods, or else a satisfaction in damages, against all other persons, who may have purloined or injured them; that he may always be ready to answer the call of the bailor.

3. HIRING and borrowing are also contract by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price, a stipend, or additional recompense; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition and agreement to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use in with moderation and not abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled to the premium or price, for which the horse was hired.[55]

THERE is one species of this price or reward, the most usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiae* [as a matter of conscience]. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which is generally called interest by those who think it lawful, and usury by those who do not so. It may not be amiss therefore to enter into a short inquiry, upon what footing this matter of interest or usury does really stand.

THE enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is laid down by Aristotle,[56] that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to serve the purposes of exchange, and not of increase. Hence the school divines have branded the practice of taking interest, as being contrary to the divine law both natural and revealed; and the canon law,[57] has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

BUT, in answer to this, it may be observed, that the Mosaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger:[58] which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se*, since it was allowed where any but an Israelite was concerned. And as to Aristotle's reason, deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed

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houses; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to hire. And though money was originally used only for the purposes of exchange, yet the laws of any state may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few persons would care to lend it; or at least the case of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itself its inseparable companion, the doctrine of loans upon interest.

AND, really, considered abstractedly from this its use, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems no greater impropriety in taking a recompense or price for the hire of this, than of any other convenience. If I borrow 100£ to employ in a beneficial trade, it is but equitable that the lender should have a proportion of my gains. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money: but a reasonable equivalent for the temporary inconvenience the owner may feel by the want of it, and for the hazard of his losing it entirely, if not more immoral in one case than it is in the other. And indeed the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience which it seems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law there will be but few lenders: and those principally bad men, who will break through the law, and take a profit; and then will endeavor to indemnify themselves from the danger of the penalty, by making that profit exorbitant. Thus, while all degrees of profit were discountenanced, we find more complaints of usury, and more flagrant instances of oppression, than in modern times, when money may be easily had at a low interest. A capital distinction must therefore be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury: the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well fumed up by Grotius,[59] “if the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt, by the loan, its allowance is neither repugnant to the revealed nor the natural law: but if it exceeds those bounds, it is then oppressive usury; and though the municipal laws may give it impunity, they never can make it just.”

WE see, that the exorbitance or moderation of interest, for money lent, depends upon two circumstances; the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate therefore of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community there is a certain

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quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be lenders, and the lower ought the rate of the national interest to be: but where there is not enough, or barely enough, circulating cash, to answer the ordinary uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.

SO also the hazard of an entire loss has its weight in the regulation of interest: hence, the better the security, the lower will the interest be; the rate of interest being generally in a compound ratio, formed out of the inconvenience and the hazard. And as, if there were no inconvenience, there should be no interest, but what is equivalent to the hazard; so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to three per cent: a man that has money by him will perhaps lend it upon good personal security at five per cent, allowing two for the hazard run; he will lend it upon landed security, or mortgage, at four per cent, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at three per cent, the hazard being none at all.

BUT, sometimes the hazard may be greater, than the rate of interest allowed by law will compensate. And this give rise to the practice, 1. Of bottomry, or *respondentia*. 2. Of policies of insurance.

AND first, bottomry (which originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*pars pro toto* [part for the whole]) as a security for the repayment. In which case it is understood, that, if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender.[60] And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant 1000£ to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed:[61] which kind of agreement is sometimes called *foenus nauticum* [naval usury], and sometimes *usura maritime* [maritime usury].[62] But, as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II. c. 37. that all monies lent on bottomry or at *respondentia*, on vessels bound to or from the East Indies, shall be expressly lent only upon the ship or upon the merchandise; that the lender shall have the benefit of salvage; and that, if the borrower has not on board effects to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as has not been laid out, with legal interest and all other charges, though the ship and

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merchandise be totally lost.

SECONDLY, a policy of insurance is a contract between A and B, that, upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. This is founded upon one of the principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I calculate the chance that she performs her voyage to be twenty to one against her being lost: and, if she be lost, I lose 100£ and get 5£ Now this is much the same as if I lend the merchant, whose whole fortunes are embarked in this vessel, 100£ at the rate of eight per cent. For by a loan I should be immediately out of my money, the inconvenience of which we have computed equal to three per cent: if therefore I had actually lent him 100£ I must have added 3£ on the score of inconvenience, to the 5£ allowed for the hazard; which together would have made 8£ But as, upon an insurance, I am never out of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus too, in a loan, if the chance of repayment depends upon the borrower's live, it is frequent (besides the the usual rate of interest) for the borrower to have his life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100£ of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent 10 5£ which is therefore the legal interest: but there is also a special hazard in this case; for, if Sempronius dies within the year, Titius must lose the whole of his 100£. Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10£ more; and therefore that the reasonable rate of interest in this case would be fifteen per cent. But this the law, to avoid abuses, will not permit to be taken: Sempronius therefore gives Titius the lender only 5£ the legal interest; but applies to Gaius an insurer, and gives him the other 10£ to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time.

THE learning relating to marine insurances has of late years been greatly improved by a series of judicial decisions, which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence. But, being founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes. Thus much may however be said; that, being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment: and, on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament. But, as a practice had obtained of insuring large sums without having any property on board, which were called insurances, interest or no interest; and also of insuring the same goods several times over; both of which were a species of gaming, without any advantage to commerce, and were denominated wagering policies: it is therefore enacted by the statute 19 Geo. II. c. 37. that all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, (all which had the same pernicious tendency) shall be totally null and void, except upon privateers, or ships in the Spanish and Portuguese trade, for reasons

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sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead; and lastly that, in the East India trade, the lender of money on bottomry, or at *respondentia*, shall alone have a right to be insured for the money lent, and the borrower shall (in case of a loss) recover no more upon any insurance that the surplus of his property, above the value of his bottomry or *respondentia* bond. But, to return to the doctrine of common interest on loans:

UPON the two principles of inconvenience and hazard, compared together, different nations have at different times established different rates of interest. The Romans at one time allowed *centesimae*, or twelve per cent, to be taken for common loans; but Justinian[63] reduced it to *trientes*, or one third of the *as* or *centesimae*, that is, four per cent; but allowed higher interest to be taken of merchants, because there the hazard was greater.[64] So too Grotius informs us,[65] that in Holland the rate of interest was then eight per cent in common loans, but twelve to merchants. Our law establishes one standard for all alike, where the pledge or security itself is not put in jeopardy; lest, under the general pretense of vague and indeterminate hazards, a door should be opened to fraud and usury: leaving specific hazards to be provided against by specific insurances, or by loans upon *respondentia*, or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9. confined interest to ten per cent, and so did the statute 13 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so under her successors the statute 21 Jac. I. c. 17. reduced it to eight per cent; as did the statute 12 Car. II. c. 13. to six: and lastly by the statute 12 Ann. St. 2. c. 16. it was brought down to five per cent yearly, which is now the extremity of legal interest that can be taken. But yet, if a contract, which carries interest, be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made.[66] Thus Irish, American, Turkish, and Indian interest, have been allowed in our courts, to the amount of even twelve per cent. For the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade.

4. THE last general species of contracts, which I have to mention, is that of debt; whereby a chose in action, or right to a certain sum of money, is mutually acquired and lost.[67] This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes, indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a chose in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he shall execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire so the horse, or the like. Any contract in short whereby a determinate sum of money becomes due to any person, and is not paid but remains in action merely, is a contract of debt. And, taken in this light, in comprehends a great variety of acquisition; being usually divided into debts of record, debts by special, and debts by simple contract.

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A DEBT of record is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature. Recognizances also are a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behavior, or the like: and these, together with statutes merchant and statutes staple, etc, it forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, *viz.* debts or record; since the contract, on which they are founded, is witnessed by the highest kind of evidence, *viz.* by matter of record.

DEBTS by specialty, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation: which last we took occasion to explain in the twentieth lecture of the present book; and then showed that it is an acknowledgment or creation or a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

DEBTS by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book of these commentaries, where the breach of such contracts will be considered. I shall only observe at present, that by the statute 29 Car. II. c. 3. no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt of default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not be performed within one year from the making, unless the agreement or some memorandum thereof be in writing, and signed by the party himself or by his authority.

BUT there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of paper credit, deserves a more particular regard. These are debts by bills of exchange, and promissory notes.

A BILL of exchange is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A lives in Jamaica, and owes B who lives in England 1000£ now if C be going from England of Jamaica, he

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may pay B this 1000£ and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any distance of place, by transferring it to C; who carries over his money in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. The invention of them was a little earlier: for the Jews were banished out of Guinea in 1287, and out of England in 1290;[68] and in 1236 the use of paper credit was introduced into the Mogul empire in China.[69] In common speech such a bill is frequently called a draft, but a bill of exchange is the more legal as well as mercantile expression. The person however, who writes this letter, is called in law the drawer, and he to whom it is written the drawee; and the third person, or negotiator, to whom it is payable (whether specially named, or the bearer generally) is called the payee.

THESE bills are either foreign, or inland: foreign, when drawn by a merchant residing abroad upon his correspondent in England, or vice versa; and inland, when both the drawer and the drawee reside within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 W. III. c. 17. the other 3 & 4 Ann. c. 9. inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such,[70] being by those statutes expressly enacted with regard to the other. So that there is now in law no manner of difference between them.

PROMISSORY notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also by the same statute 3 & 4 Ann. c. 9. are made assignable and endorsable in like manner as bills of exchange.

THE payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the express contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his implied contract; *viz.* that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual, in bills of exchange, to express that the value thereof has been received by the drawer;[71] in order to show the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no chose in action is assignable: which assignment is the life of paper credit. It may therefore be of some use, to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to change the drawer with the payment of the debt to other persons, than those with whom be originally contracted.

IN the first place then the payee, or person to whom or whose order such bill of exchange or promissory note is payable, may by endorsement, or writing his name *in dorso* or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the endorsee; and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to A or bearer, is negotiable without any endorsement, and payment

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thereof may be demanded by any bearer of it.[72] But, in case of a bill of exchange, the payee, or the endorsee, (whether it be a general or particular endorsement) is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing,[73] he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20£ or upwards, and expressed to be for value received, the payee or endorsee may protest if for non-acceptance: which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer.

BUT, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called days of grace) the payee or endorsee is then to get in protested for non-payment, in the same manner and by the same persons who are to protest it in case of non-acceptance: and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of non-acceptance or non-payment, is bound to make good to the payee, or endorsee, not only the amount of the said bills, (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law[74]) but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid: since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee.[75]

IF the bill be an endorsed bill, and the endorsee cannot get the drawee to discharge it, he may call upon either the drawer or the endorser, or if the bill has been negotiated through many hands, upon any of the endorsers; for each endorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the endorser, as of the drawer. And if such endorser, so called upon, has the names of one or more endorsers prior to his own, to each of whom he is properly an endorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first endorser has nobody to resort to, but the drawer only.

WHAT has been said of bills of exchange is applicable also to promissory notes, that are endorsed over, and negotiated form one hand to another; only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several endorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior endorsers.

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NOTES

1. Perk. § 57.
2. See 3 Rep. 82.
3. Jenk. 109.
4. Co. Litt. 214.
5. Dyer. 30. Bro. Abr. tit. chose in action. 1 & 4.
6. 3 P. Wms. 199.
7. Inst. 3. 14. 2.
8. *In omnibus contractibus, sive nominates sive innominatis, permutatio continetur.* [In all contracts, there must be something given in exchange, something that is mutual or reciprocal.] Gravin. l. 2. § 12.
9. pag. 297.
10. 3 Rep. 83.
11. Ff. 19. 5. 5.
12. D. & t. d. 2. c. 24.
13. Bro. Abr. tit. uette. 79. Salk. 129.
14. Cod. 2. 3. 10 & 5. 14. 1.
15. Plowd. 308, 309.
16. Hardr 200.
17. 1 Ch. Rep. 157.
18. Noy's Max. c. 42.
19. Gen. 23:16.
20. 29 Car. II. c. 3.
21. 8 Rep. 171. 1 Mod. 188.
22. Comb. 33. 12 Mod. 5. 7 Mod. 95.
23. Hob 41. Ney's Max. c. 42.
24. Inst. 3. tit. 24.
25. Noy. ibid.
26. Stiernhook de jure Gotl. l. 2. c. 5.
27. Hob. 41.
28. Noy, c. 42.
29. 2 Inst. 713.
30. c. 1. § 3.
31. LL. Ethel. 10, 12. LL. Eadg. Wilk. 80.

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32. Cro. Jac. 68.

33. Godb. 131.

34. 5 Rep. 83. 12 Mod. 521.

35. Bacon's use of the law. 158.

36. 2 Inst. 713, 714.

37. Perk. § 93.

38. 2 Inst. 713.

39. Ibid. 714.

40. 2 Inst. 719.

41. Ff. 21. 2. 1.

42. Cro. Jac. 474. 1 Roll. Abr. 90.

43. F. N. B. 94.

44. 2 Roll. Rep. 5.

45. 1 Vern. 268.

46. 12 Mod. 482.

47. Cro. Eliz. 622.

48. Cro. Car. 271.

49. Cro. Jac. 245. Yelv. 178.

50. Co. Litt. 89.

51. 4 Rep. 84.

52. Lord Raym. 909. 12 Mod. 487.

53. By the laws of Sweden, the depositary or bailee of goods is not bound to restitution, in case of accident by fire or theft; provided his own goods perished in the same manner: "*Jura enim nostra dolum praesumunt si una non pereunt*." [For our laws presume guile if they do not perish together.] (De jure Sueon. l. 2. c. 5.)

54. 13 Rep. 69.

55. Yelv. 172. Cro. Jac. 236.

56. Polit. l. 1. c. 10.

57. Decretal. l. 5. tit. 19.

58. "Unto a stranger thou mayest lend upon usury, but unto thy brother thou shalt not lend upon usury." Deut. xxiii. 20.

59. de j. b. & p. l. 2. c. 12. § 22.

60. Moll. de jur. mar. 361. Malyne lex mercat. b. 1. c. 31. Cro. Jac. 208. Bynkersh. quaest. jur. privat. l. 3. c. 16.

61. 1 Sid. 27.

62. Molloy ibid. Malyne ibid.

63. Cod. 4. 32. 26. Nov. 33, 34, 35.

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64. A short explication of these terms, and of the division of the Roman as, will be useful to the student, not only for understanding the civilians, but also the more classical writers, who perpetually refer to this distribution. Thus Horace, ad Pisones. 325.

Romani pueri longis rationibus assem
Discunt in partes centum diducere. Dicat
Filius Albini, si de quincunce remota est
Uncia, quid superet? poterat dixisse, triens: eu
Rem poteris servare tuam! redit uncia, quid fit?
Semis.

But as for us, our Roman youths are bred
To trades, to cast accounts, to write and read:
Come hither, child, (suppose 'tis Albine's son)
Hold up thy head; take five from forty-one;
And what remains? Just thirty-six: Well done.
Add seven, what makes it then? Just forty-eight:
Ah, thou must be a man of an estate!
Creech's *Horace*, p. 325.1. 487.

It is therefore to be observed, that, in calculating the rate of interest, the Romans divided the principal sum into an hundred parts; one of which they allowed to be taken monthly: and this, which was the highest rate of interest permitted, they called *usurae centesimae*, amounting yearly to twelve per cent. Now as the *as*, or Roman pound, was commonly used to express any integral sum, and was divisible into twelve parts or *unciae*, therefore these twelve monthly payments or *unciae* were held to amount annually to one pound, or *as usurarius*; and so the *usurae asses* were synonymous to the *usurae centesimae*. And all lower rates of interest were denominated according to the relation they bore to this centesimal usury, or *usurae asses*: for the several multiples of the *unciae*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans, dextrans, deunx*, containing respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, *unciae* or duodecimal parts of an *as*. (Ff. 28. 5. 50. § 2. Gravin. orig. jur. civ. l. 2. § 47.) This being premised, the following table will clearly exhibit at once the subdivisions of the *as*, and the denominations of the rate of interest.

USURAE	PARTES ASSIS.	PER ANNUM.
Asses, sive centesimae	integer	12 per cent.
Deunces	11/12	11
Dextances, vel decunces	5/6	10
Dodrantes	3/4	9
Besses	2/3	8
Septunces	7/12	7
Semisses	1/2	6
Quincunces	5/12	5
Trientes	1/3	4
Quandrantes	1/4	3
Sextances	1/6	2
Unciae	1/12	1

65. de jur. b. & p. 2. 12. 22.

66. 1 Equ. Cas. abr. 289. 1 P. Wms. 395.

67. F. N. B. 119.

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68. 2 Carte. 203. 206.
69. Mod. Un. Hist. iv. 499.
70. 1 Roll. Abr. 6.
71. Stra. 1212.
72. 2 Show. 235. – Grant v. Vaughan. T. 4 Geo. III. B. R.
73. Stra. 1000.
74. Lord Raym. 993.
75. Salk. 127.

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CHAPTER 31

Of Title by Bankruptcy

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. BANKRUPTCY; a title which we before lightly touched upon,[1] so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us therefore first of all consider, 1. Who may become a bankrupt: 2. What acts make a bankrupt: 3. The proceedings on a commission of bankrupt: and, 4. In what manner an estate in goods and chattels may be transferred by bankruptcy.

1. WHO may become a bankrupt. A bankrupt was before[2] defined to be "a trader, who secretes himself, or does certain other acts, tending to defraud his creditors." He was formerly considered merely in the light of a criminal or offender;[3] and in this spirit we are told by Sir Edward Coke,[4] that we have fetched as well the name, as the wickedness, of bankrupts from foreign nations.[5] But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors; by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor; by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt; whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

IN this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if indeed that law, *de debitore in partes secando* [cutting the debtor into pieces], is to be understood in so very butcherly a light; which many learned men have with reason doubted.[6] Nor do I mean those less inhuman laws (if they may be called so, as their meaning is indisputably certain) of imprisoning the debtor's person in chains; subjecting him to stripes and hard labor, at the mercy of his rigid creditor; and sometimes selling him, his wife, and children, to perpetual foreign slavery trans Tiberim:[7] an oppression, which produced so many popular insurrections, and secessions to the mons facer. But I mean the law of cession, introduced by the Christian emperors; whereby if a debtor ceded, or yielded up, all his fortune to his creditors, he was secured from being dragged to a jail, "*omni quoque corporali cruciatu semoto*" ["all bodily torture being also removed"].[8] For, as the emperor justly observes,[9] "*inhumanum erat spoliatum fortunes suis in solidum damnari*" ["it was inhuman, being deprived of all his fortune, to be utterly ruined"]. Thus far was just and reasonable: but, as the departing from one extreme is apt to produce its opposite, we find it afterwards enacted,[10] that if the debtor by any unforeseen accident was reduced to low circumstances, and would swear that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law, which

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under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

THE laws of England, more wisely, have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, for far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual traders; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortunes therefore of their faults: since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also to discourage extravagance declared, that no one shall be capable of being made a bankrupt, but only a trader; nor capable of receiving the full benefit of the statutes, but only an industrious trader.

THE first statute made concerning any English bankrupts, was 32 Hen. VIII. c. 4. when trade began first to be properly cultivated in England: which has been almost totally altered by statute 13 Eliz. c. 7. whereby bankruptcy is confined to such persons only as have used the trade of merchandise, in gross or by retail, by way of bargaining, exchange, rechange, bartering, chevisance,[11] or otherwise; or have sought their living by buying and selling. And by statute 21 Jac. I. c. 19. persons using the trade or profession of scrivener, receiving other mens monies and estates into their trust and custody, are also made liable to the statutes of bankruptcy: and the benefits, as well as the penal parts of the law, are extended as well to aliens and denizens as to natural born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. By many subsequent statutes, but lastly by statute 5 Geo. II. c. 30.[12] bankers, brokers, and factors, are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I. *viz.* for the relief of their creditors;) whom they have otherwise more opportunities of defrauding than any other set of dealers: and they are properly to be looked upon as traders, since they make merchandise of money, in the same manner as other merchants do of goods and other moveable chattels. But by the same act,[13] no farmer, grazer, or drover, shall (as such) be liable to be deemed a bankrupt: for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of its produce. And,

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besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others, for the payment of their reserved rents: wherefore also, upon a similar reason, a receiver of the king's taxes is not capable,[14] as such, of being a bankrupt; lest the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative. By the same statute,[15] no person shall have a commission of bankrupt awarded against him, unless at the petition of some one creditor, to whom he owes 100£; or of two, to whom he is indebted 150£; or of more, to whom all together he is indebted 200£. For the law does not look upon persons, whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statutes, themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects.

IN the interpretation of these several statutes, it has been held, that buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelihood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or, in one general word, a chapman, who is one that buys and sells any thing. But no handicraft occupation (where nothing is bought and sold, and therefore an extensive credit, for the stock in trade, is not necessary to be had) will make a man a regular bankrupt; as that of a husbandman, a gardener, and the like, who are paid for their work and labor.[16] Also an inn-keeper cannot, as such, be a bankrupt:[17] for his gain or livelihood does not arise from buying and selling in the way of merchandise, but greatly from the use of his rooms and furniture, his attendance, and the like: and though he may buy corn and victuals, to sell again at a profit, yet that no more makes him a trader, than a schoolmaster or other person is, that keeps a boarding house, and makes considerable gains by buying and selling what he spends in the house, and such a one is clearly not within the statutes.[18] But where persons buy goods, and make them up into saleable commodities, as shoe-makers, smiths, and the like, here, though part of the gain is by bodily labor, and not by buying and selling, yet they are within the statutes of bankrupts;[19] for the labor is only in melioration of the commodity, and rendering it more fit for sale.

ONE single act of buying and selling will not make a man a trader; but a repeated practice, and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt; they not being goods, wares, or merchandise, within the intent of the statute, by which a profit may be fairly made.[20] Neither will buying and selling under particular restraints, or for particular purposes; as if a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not thereby made a trader within the statutes.[21] An infant, though a trader, cannot be made a bankrupt: for an infant can owe nothing but for necessaries; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts, which he is not liable at law to pay.[22] But a feme-covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt.[23]

2. HAVING thus considered, who may, and who may not, be made a bankrupt, we are to inquire, secondly, by what acts a man may become a bankrupt. A bankrupt is “a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.” We have hitherto been employed in explaining the former part of this description, “a trader:” Let us now attend to the latter, “who secretes himself, or does certain other acts, tending to defraud his creditors.” And, in general,

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whenever such a trader, as is before described, has endeavored to avoid his creditors or evade their just demands, this has been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. For in this extrajudicial method of proceeding, which is allowed merely for the benefit o commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

TO learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon. Among these may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors.[24] 2. Departing from his own house, with intent to secrete himself, and avoid his creditors.[25] 3. Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause; which is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law.[26] 4. Procuring or suffering himself willingly to be arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise deemed an attempt to defraud his creditors.[27] 5. Procuring his money, goods, chattels, and effects to be attached or sequestered by any legal process; which is another plain and direct endeavor to disappoint his creditors of their security.[28] 6. Making any fraudulent conveyance to a friend, or secret trustee, of his lands, tenements, goods, or chattels; which is an act of the same suspicious nature with the last.[29] 7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavor to elude the justice of the law.[30] 8. Endeavoring or desiring, by any petition to the king, or bill exhibited in any of the king's courts against any creditors, to compel them to take less than their just debts; or to procrastinate the time of payment, originally contracted for; which are an acknowledgment of either his poverty or his knavery.[31] 9. Lying in prison for two months, or more, upon arrest or other detention for debt, without finding bail, in order to obtain his liberty.[32] For the inability to procure bail argues a strong deficiency in his credit, owing either to his suspected poverty, or ill character; and his neglect to do it, if able, can arise only from a fraudulent intention: in either of which cases it is high time for his creditors to look to themselves, and compel a distribution of his effects. 10. Escaping from prison after an arrest for a just debt of 100£ or upwards.[33] For no man would break prison, that was able and desirous to procure bail; which brings it within the reason of the last case. 11. Neglecting to make satisfaction for any just debt to the amount of 100£ within two months after service of legal process, for such debt, upon any trader having privilege of parliament.[34]

THESE are the several acts of bankruptcy, expressly defined by the statutes relating to this title: which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender so extending or multiplying acts of bankruptcy by any construction, or implication. And therefore Sir John Holt held,[35] that a man's removing his goods privately, to prevent their being seized in execution, was no act of bankruptcy. For the statutes mention only fraudulent gifts to third persons, and procuring them to be seized by sham process, in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of those cases, cannot be adjudged an act of bankruptcy. So also it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy; for it is not within the description of any of

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the statutes, and there may be good reasons for his so doing, as, suspicion of forgery, and the like: and if, in consequence of such refusal, he is arrested, and puts in bail, still it is not act of bankruptcy:[36] but if he goes to prison, and lies there two months, then, and not before, is he become a bankrupt.

WE have seen who may be a bankrupt, and what acts will make him so: let us next consider,

3. THE proceedings on a commission of bankrupt; so far as they affect the bankrupt himself. And these depend entirely on the several statutes of bankruptcy;[37] all which shall endeavor to blend together, and digest into a concise methodical order.

And, first, there must be a petition to the lord chancellor by one creditor to the amount of 100£, or by two to the amount of 150£, or by three or more to the amount of 200£; upon which he grants a commission to such discreet persons as to him shall seem good, who are then styled commissioners of bankrupt. The petitioners, to prevent malicious applications, must be bound in a security of 200£ to make the party amends in case they do not prove him a bankrupt. And, if on the other hand they receive any money or effects from the bankrupt, as a recompense for suing out the commission, so as to receive more than their ratable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made, as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commission is a warded and issued, the commissioners are to meet, at their own expense, and to take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20 s. per diem each, at every sitting. And no commission of bankrupt shall abate, or be void, upon any demise of the crown.

When the commissioners have received their commission, they are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; and then to declare him a bankrupt, if proved so; and to give notice thereof in the gazette, and at the same time to appoint three meetings. At the first of these meetings an election must be made of assignees, or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; which assignees are to be first named by the commissioners, and afterwards to be approved or rejected at the said meeting by the major part, in value, of the creditors who shall then prove their debts: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10£ At the second meeting any farther business relating to the commission may be proceeded on. And at the third meeting, at farthest, which must be on the forty second day after the advertisement in the gazette, the bankrupt, upon notice also personally served upon him or left at his usual place of abode, must surrender himself personally to the commissioners, and must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default thereof, shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors.

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, the may by warrant from any judge or justice of the peace be committed to the county jail, in order to be forthcoming to the commissioners; who are also

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empowered immediately to grant a warrant for seizing his goods and papers.

When the bankrupt appears, the commissioners are to examine him touching all matters relating to his trade and effects. They may also summon before them, and examine, the bankrupt's wife and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them shall refuse to answer, or shall not answer fully, any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any jailer, permitting such persons to escape, or go out of prison, shall forfeit 500£ to the creditors.

THE bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessary apparel of himself, his wife, and his children) or, in case he conceals or embezzles any effects to the amount of 20£ or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy.[38]

AFTER the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to five per cent. out of the effects so discovered, and such farther reward as the assignees and commissioners shall think proper. And any trustee willfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100£ and double the value of the estate concealed, to the creditors.

HITHERTO every thing is in favor of the creditors; and the law seems to be pretty rigid and severe against the bankrupt: but, in case he proves honest, it makes him full amends for all this rigor and severity. For if the bankrupt has made an ingenuous discovery, has conformed to the directions of the law, and has acted in all points to the satisfaction of his creditors; and if they, or four parts in five of them in number and value, (but none of them creditors for less than 20£) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the lord chancellor: and he, or two judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it, upon cause shown by any of the creditors of the bankrupt.

IF no cause be shown to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion of his former good behavior, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding three per cent: but if they pay ten shillings in the pound, he is to be allowed five per cent; if twelve shillings and sixpence, then seven and a half per cent; and it fifteen shillings in the pound, then the bankrupt shall be allowed ten per cent: provided, that such allowance do not in the first case exceed 200£, in the second 250£, and in the third 300£.[39]

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BESIDES this allowance, he has also an indemnity granted him, of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts; and, for that among other purposes, all proceedings on commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate properly allowed shall be sufficient evidence of all previous proceedings. Thus the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth: which is the rather to be expected, as he cannot be entitled to these benefits, but by the testimony of his creditors themselves of his honest and ingenuous disposition; and unless his failures have been owing to misfortunes, rather than to misconduct and extravagance.

FOR no allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed, as before-mentioned; and also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he lose all title to these advantages. Neither can he claim them, if he has given with any of his children above 100£ for a marriage portion, unless he had at that time sufficient left to pay all his debts; or if he has lost at any one time 5£ or in the whole 100£ within a twelvemonth before he became bankrupt, by any manner of gaming or wagering whatsoever; or, within the same time, has lost to the value of 100£ by stockjobbing. Also, to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency: which is an occasional act, frequently passed[40] by the legislature; whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile state of life are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, at the sessions or assizes; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death. Persons who have been once cleared by this, or either of the other methods, (of composition with their creditors, or bankruptcy) and afterwards become bankrupts again, unless they pay full fifteen shillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades.

THUS much for the proceedings on a commission of bankrupt, so far as they affect the bankrupt himself personally. Let us next consider,

4. HOW such proceedings affect or transfer the estate and property of the bankrupt. The method whereby a real estate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was shown under its proper head, in a former chapter.[41] At present therefore we are only to consider the transfer of things personal by this operation of law.

BY virtue of the statutes before-mentioned all the personal estate and effects of the bankrupt are considered as vested, by the act of bankruptcy, in the future assignees of his commissioners, whether they be goods in actual possession, or debts, contracts, and other choses in action; and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broken open,

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in order to enter upon the seize the same. And, when the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it.[42]

THE property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. Therefore it is usually said, that once a bankrupt, and always a bankrupt: by which is meant, that a plain direct act of bankruptcy once committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may be;[43] but that, if a commission is afterwards awarded, the commission and the property of the assignees shall have a relation, or reference, back to the first and original act of bankruptcy.[44] Insomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts;[45] for if, after the act of bankruptcy committed and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby.[46] In France this doctrine of relation is carried to a very great length; for there every act of a merchant, for ten days precedent to the act of bankruptcy, is perfumed to be fraudulent, and is therefore void.[47] But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes by secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by statute 19 Geo. II. c. 32. that no money paid by a bankrupt to a *bona fide* or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor, by statute 1 Jac. I. c. 15. shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

THE assignees may pursue any legal method of recovering this property so vested in them, by their own authority; but cannot commence a suit in equity, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the gazette.

WHEN they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, within twelve months after the commission issued, give one and twenty days notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the quantity of their debts; no regard being had to the quality of them. Mortgages indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption.[48] So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. And, upon the equity of the statute 8 Ann. c. 14. (which directs,

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that, upon all executions of goods being on any premises demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord) it has also been held, that under a commission of bankrupt, which is in the nature of a statute-execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors, even though he has neglected to distrain, while the goods remained on the premises; which he is otherwise entitled to do for his entire rent, be the *quantum* what it may.[49] But, otherwise, judgments and recognizances, (both which are debts of record, and therefore at other times have a priority) and also bonds and obligations by deed or special instrument (which are called debts by specialty, and are usually the next in order) these are all put on a level with debts by mere simple contract, and all paid pari passu. Nay, so far is this matter carried, that, by the express provision of the statutes, debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day, shall be paid equally with the rest,[50] allowing a discount or drawback in proportion. And insurances, and obligations upon bottomry or *respondentia*, *bona fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy.

WITHIN eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first. And if any surplus remains, after paying every creditor his full debt, if shall be restored to the bankrupt. This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that, upon satisfaction made to all the creditors, the commission may be superseded.[51] This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice, which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt,[52] or his representatives.

NOTES

1. See pag. 285.

2. Ibid.

3. Stat. 1 Jac. I. c. 15. § 17.

4. 4 Inst. 277.

5. The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman (Dufresne. I. 969.) and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather cause to adopt the word *route*, which in French signifies a trace or track, and tell us that a bankrupt is one who has removed his *banque*, leaving but a trace behind. (4 Inst. 277.) And it is observable that the title of the first English statute concerning this offense, 34 Hen. VIII. c. 4. “against such persons as do make bankrupt,” is a literal translation of the French idiom, *qui font banque route*.

6. Taylor. Common. in L. decemviral. Bynkersh. Observ. Jur. I. 1. Heinece. Antiqu. III. 30. 4.

7. In Pegu, and the adjacent countries in East India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children; insomuch that he may even violate with impunity the chastity of the debtor's wife: but then, by so doing, the debt is understood to be discharged. (Mod. Un. Hist. vii. 128.)

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8. Cod. 7. 71. per tot.

9. Inst. 4. 6. 40.

10. Nov. 135. c. 1.

11. that is, making contracts. (Dufresne. II. 569.)

12. § 39.

13. § 49.

14. § eod.

15. § 23.

16. Cro. Car. 31.

17. Cro. Car. 549. Skinn. 291.

18. Skinn. 292. 3 Mod. 330.

19. Cro. Car. 31. Skinn. 292.

20. 2 P. Wms. 308.

21. 1 Salk. 110. Skin. 292.

22. Lord Raym. 443.

23. La Vic v. Philips. M. 6 Geo. III. B. R.

24. Stat. 13 Eliz. c. 7.

25. Ibid. 1 Jac. I. c. 15.

26. Stat. 13 Eliz. c. 7.

27. Ibid. 1 Jac. I. c. 15.

28. Stat. 1 Jac. I. c. 15.

29. Ibid.

30. Stat. 21 Jac. I. c. 19.

31. Ibid.

32. Ibid.

33. Stat. 21 Jac. I. c. 19.

34. Stat. 4 Geo. III. c. 33.

35. Lord Raym. 725.

36. 7 Mod. 139.

37. 13 Fliz. c. 7. 1 Jac. I. c. 15. 21 Jac. I. c. 19. 7 Geo. I. c. 31. 5Geo. II. c. 30. 19Geo. II. c. 32. & 24Geo. II. 57.

38. By the laws of Naples all fraudulent bankrupts, particularly such as do not surrender themselves within four days, are punished with death: also all who conceal the effects of a bankrupt, or set up a pretended debt to defraud his creditors. (Mod. Un. Hist. xxviii. 320.)

39. By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. (Ff. 42. 3. 4.) But this did not extent to such allowance as was left to him on the

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score of compassion, for the maintenance of himself and family. *Si quid misericordiae causa ei fuerit relictum, puta menstruum vel annum, alimentorum nomine, non oportet propter hoc bona ejus iteratò venundari: nee enim fraudandus est alimentis cottidianis.* [If any thing shall have been left him through compassion, suppose monthly or yearly, as a maintenance, he is not obliged on this account again to sell his goods: for he is not to be deprived of his daily subsistence.] (Ibid 1.6.)

40. Stat. 28 Geo. II. c. 13. 32 Geo. II. c. 28. 1 Geo. III. c. 17. 5. Geo. III. c. 41.

41. pag. 285.

42. 12 Mod. 324.

43. Salk. 110.

44. 4 Burr. 32.

45. Atk. 262.

46. Viner. Abr. t. creditor and bankr. 104.

47. Sp. L. b. 29. c. 16.

48. Finch. Rep. 466.

49. Atk. 103, 104.

50. Lord Raym. 1549.

51. 2 Ch. Cas. 144.

52. Atk. 244.

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CHAPTER 32

Of Title by Testament, and Administration

THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, *viz.* by testament and administration. And there I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

XI. XII. IN the pursuit then of this joint subject, I shall, first, inquire into the original and antiquity of testaments and administrations; shall, secondly, show who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, show what an executor and administrator are, and how they are to be appointed; and, lastly, shall select some few of the general heads of the office and duty of executors and administrators.

FIRST, as to the original of testaments and administrations. We have more than once observed, that, when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations, gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of such appointment or nomination, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons.[1] The former method of acquiring personal property, according to the express directions of the deceased, we call a testament: the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law,[2] we call in England an administration; being the same which the civil lawyers term a succession *ab intestato* [from an intestate], and which answers to the descent or inheritance of real estates.

TESTAMENTS are of very high antiquity. We find them in use among the ancient Hebrews; though I hardly think the example usually given,[3] of Abraham's complaining[4] that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to show that he had made him so by will. And indeed a learned writer[5] has adduced this very passage to prove, that in the patriarchal age, on failure of children or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law.[6] But, (to omit what Eusebius and others have related of Noah's testament, made in writing and witnessed under his seal, whereby he disposed of the whole world[7]) I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings,[8] wherein Jacob bequeaths to his son Joseph a portion of his inheritance double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens;[9] but in many other parts of Greece they were totally discountenanced.[10] In Rome they were unknown, till the laws of the twelve tables

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were compiled, which first gave the right of bequeathing:[11] and, among the northern nations, particularly among the Germans,[12] testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state;[13] which has permitted it in some countries, and denied it in others: and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven.[14]

WITH us in England this power of bequeathing is coeval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest,[15] as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuria, sive morte repentina, fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (praeter eam quae jure debetur hereoti nomine) sibi assumito. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuantur*." ["If any one through negligence or sudden death die intestate, let not the lord take any part of his effects, except what is due to him of right as a heriot. But let his possessions be distributed among his wife, children, and next of kin, to every one according to their right."] But we are not to imagine, that the power of bequeathing extended originally to all a man's personal estate. On the contrary, Glanvil will inform us,[16] that by the common law, as it stood in the reign of Henry the second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso* [conversely], if he had no children, the wife was entitled to one moiety, and he might bequeath the other: but, if he died without either wife or issue, the whole was at his own disposal.[17] The shares of the wife and children was called their reasonable part; and the writ *de rationabili parte bonorum* [the reasonable share of the goods] was given to recover it.[18]

THIS continued to be the law of the land at the time of Magna Carta, which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased: and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partis suis*" ["let them resign all the chattels to the will of the deceased; reserving to his wife and children their reasonable shares"].[19] In the reign of king Edward the third this right of the wife and children was still held to be the universal or common law;[20] though frequently pleaded as the local custom of Berks, Devon, and other counties:[21] and Sir Henry Finch lays it down expressly,[22] in the reign of Charles the first, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began. Indeed Sir Edward Coke[23] is of opinion, that this never was the general law, but only obtained in particular places by special custom: and to establish that doctrine he relies on a passage in Bracton, which in truth, when compared with the context, makes directly against his opinion. For Bracton[24] lays down the doctrine of the reasonable part to be the common law; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanvil, Magna Carta, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which also continues to this day to be the general law of our sister kingdom of Scotland.[25] To which we may add, that, whatever may have been the

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custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the ancient method continued in use in the province of York, the principality of Wales, and the city of London, till very modern times: when, in order to favor the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided; the one 4 & 5 W. & M. c. 2. explained by 2 & 3 Ann. c. 5. for the province of York; another 7 & 8 W. III. c. 38. for Wales; and a third, 11 Geo. I. c. 18. for London: whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of all their personal estates by will; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely, as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter[26]) to remember his lord and the church, by leaving them his two best chattels, which was the original of heriots and mortuaries; and afterwards he was left at his own liberty, to bequeath the remainder as he pleased.

IN case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriae* [parent of the nation], and general trustee of the kingdom.[27] This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined: and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition.[28] Afterwards the crown, in favor of the church, invested the prelates with this branch of the prerogative; which was done, says Perkins,[29] because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; and he might seize them, and keep them without wasting, and also might give, alien, or sell them at his will, and dispose of the money *in pios usus* [for pious uses]: and, if he did otherwise, he broke the confidence which the law reposed in him.[30] So that properly the whole interest and power, which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious.[31] And, as he had thus the disposition of intestates effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

THE goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct.[32] But even in Fleta's time it was complained,[33] "*quod ordinarii, hujusmodi bona nomine ecclesiae occupantes, nullam vel saltem indebitam faciunt distributionem*." ["That the ordinaries, who take possession of goods of this kind in the name of the church, make no distribution of them, or at least no due distribution."] And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of pope Innocent IV,[34] written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum*

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decedentium ab intestato in opus ecclesiae et pauperum dispensanda est." ["In Britain a third part of the goods left by an intestate is to be distributed for the benefit of the church and the poor."] Thus the popish clergy took to themselves[35] (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the statute of Westm. 2.[36] that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any requiem, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands, yet the *residuum* [residual], after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents: and therefore the statute 31 Edw. III. c. 11. provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the next and most lawful friend of the intestate; who is interpreted[37] to be the next of blood that is under no legal disabilities. The statute 21 Hen. VIII. c. 5. enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration either to the widow, or the next of kin, or to both of them, at his own discretion; and, where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

UPON this footing stands the general law of administrations at this day. I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to show the original and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

I PROCEED now, secondly, to inquire who may, or may not make a testament; or what persons are absolutely obliged by law to die intestate. And this law[38] is entirely prohibitory; for, regularly, every person has full power and liberty to make a will, that is not under some special prohibition by law or custom: which prohibitions are principally upon three accounts; for want of sufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct.

1. IN the first species are to be reckoned infants under the age of fourteen if males, and twelve if females; which is the rule of the civil law.[39] For, though some of our common lawyers have held that an infant of any age (even four years old) might make a testament,[40] and others have denied that under eighteen he is capable,[41] yet as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but, if the testator was not of

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sufficient discretion, whether at the age of fourteen or four and twenty, that will overthrow his testament. Madmen, or otherwise *non compotes*, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness,) all these are incapable, by reason of mental disability, to make any will so long as such disability lasts. To this class also may be referred such persons as are born deaf, blind, and dumb; who, as they want the common inlets of understanding, are incapable of having *animum testandi* [testamentary discretion], and their testaments are therefore void.

2. SUCH persons, as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as prisoners, captives, and the like.[42] But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court of judge, upon the consideration of the particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi* [liberty to make a testament]. And, with regard to feme-coverts, our laws differ still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole.[43] But with us a married woman is not only utterly incapable of devising lands, being excepted out of the statute of wills, 34 & 35 Hen. VIII. c. 5. but also she is incapable of making a testament of chattels, without the license of her husband. For all her personal chattels are absolutely his own; and he may dispose of her chattels real, or shall have them of himself if he survives her: it would be therefore extremely inconsistent, to give her a power of defeating that provision of the law, by bequeathing those chattels to another.[44] Yet by her husband's license she may make a testament;[45] and the husband, upon marriage, frequently covenants with her friends to allow her that license: but such license is more properly his assent; for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand has given her permission to make a will.[46] Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed.[47] So that in reality the woman makes no will at all, but only something like a will;[48] operating in the nature of an appointment, the execution of which the husband by his bond, agreement, or covenant, is bound to allow. A distinction similar to which, we meet with in the civil law. For, though a son who was *in potestate parentis* [in the parent's power] could not by any means make a formal and legal testament, even though his father permitted it,[49] yet he might, with the like permission of his father, make what was called a *donatio mortis causa* [donation upon death].[50] The queen consort is an exception to this general rule, for she may dispose of her chattels by will, without the consent of her lord:[51] and any feme-covert may make her will of goods, which are in her possession *in auter droit* [in another's right], as executrix or administratix; for these can never be the property of the husband:[52] and, if she has any pinmoney or separate maintenance, it is said the may dispose of her savings thereout by testament, without the control of her husband.[53] But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation if law, and entirely vacates the will.[54]

3. PERSONS incapable of making testaments, on account of their criminal conduct, are in the first place all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a *felo de se* [suicide] make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture.[55] Outlaws also, though it be but for

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debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time.[56] As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments, (as usurers, libelers, and others of a worse stamp) at the common law their testaments may be good.[57] And in general the rule is, and has been so at least ever since Glanvil's time,[58] *quod libera sit cujuscunque ultima voluntas* [that the last will of every one be free].

LET us next, thirdly, consider what this last will and testament is, which almost every one is thus at liberty to make; or the nature and incidents of a testament. Testaments both Justinian[59] and Sir Edward Coke[60] agree to be so called, because they are *testatio mentis* [mental testimony]; an etymon [root word], which seems to favor too much of the conceit; it being plainly a substantive derived from the verb *testari* [testify], in like manner as *juramentum* [an oath], *incrementum* [increase], and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis nostrae justa sententia de eo, quod quis post mortem suam fieri velit*":[61] which may be thus rendered into English, "the legal declaration of a man's intentions, which he wills to be performed after his death." It is called *sententia* to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostrae sententia*, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically styled his will: it is *justa sententia*; that is, drawn, attested, and published with all due solemnities and forms of law: It is *de eo, quod quis post mortem suam fieri velit*, because a testament is of no force till after the death of the testator.

THESE testaments are divided into two sorts; written, and verbal or *nuncupative*; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator *in extremis* [just before death] before a sufficient number of witnesses, and afterwards reduced to writing. A codicil, *codicillus*, a little book or writing, is a supplement to a will; or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation from, the former dispositions of the testator.[62] This may also be either written or nuncupative.

BUT, as nuncupative wills and codicils, (which were formerly more in use that at present, when the art of writing is become more universal) are liable to great impositions, and may occasion many perjuries, the statute of frauds, 29 Car. II. c. 3. enacts; 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and approved; and unless the same be proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 & 5 Ann. c. 16. must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in any wise be good, where the estate bequeathed exceeds 30£ unless proved by three such witnesses, present at the making thereof (the Roman law requiring seven[63]) and unless they or some of them were specially required to bear witness thereto by the testator himself, and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprised with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hat first issued to call in the widow, or next of kin, to contest it if they

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think proper. Thus has the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself is fallen into disuse; and hardly ever heard of, but in the only instance where favor ought to be shown to it, when the testator is surprised by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must require the bystanders to bear witness of such his intention: the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from strangers: it must be in his last sickness; for, if he recovers, he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or surprised.

AS to written wills, they need not any witness of their publication. I speak not here of devises of lands, which are entirely another thing, a conveyance by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good; provided sufficient proof can be had that it is his hand-writing.[64] And though written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions and approved by him, it has been held a good testament of the personal estate.[65] Yet it is the safer, and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses; which last was always required in the time of Bracton;[66] or, rather, he in this respect has implicitly copied the rule of the civil law.

No testament is of any effect till after the death of the testator. "*Nam omne testamentum morte consummatum est, et voluntas testatoris est ambulatoria usque ad mortem.*"[67] ["For every testament is established by death, and the will of the testator is revocable until his death."] And therefore, if there be many testaments, the last overthrows all the former:[68] but the republication of a former will revokes one of a later date, and establishes the first again.[69]

HENCE it follows, that testaments may be avoided three ways: 1. If made by a person laboring under any of the incapacities before-mentioned: 2. By making another testament of a later date: and, 3. By canceling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words cannot alter the disposition of law, so as to make that irrevocable, which is in its own nature revocable.[70] For this, says lord Bacon,[71] would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is, alteration or repentance. It has also been held, that, without an express revocation, if a man, who has made his will, afterwards marries and has a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy.[72] The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason[73]) any of the children of the testator.[74] But if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause: and in such case no *querela inofficiosi testamenti* [complaint of an unkind will] was allowed. Hence probably has arisen that groundless vulgar error,

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of the necessity of leaving the heir a shilling or some other express legacy, in order to disinherit him effectually: whereas the law of England makes no such wild suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament.

WE are next to consider, fourthly, what is an executor, and what is an administrator; and how they are both to be appointed.

AN executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts, and infants: nay, even infants unborn, or *in ventre sa mere*, may be made executors.[75] But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minore aetate* [during minority].[76] In like manner as it may be granted *durante absentia* [during absence], or *pendente lite* [pending suit]; when the executor is out of the realm,[77] or when a suit is commenced in the ecclesiastical court touching the validity of the will.[78] This appointment of an executor is essential to the making of a will:[79] and it may be performed either by express words, or such as strongly imply the same. But if the testator makes his will, without naming any executors, or if he names incapable persons, or if the executors names refuse to act; in any of these cases, the ordinary must grant administration *cum testamento annexo* [with the will annexed][80] to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore aetate, etc.*, of another, is very little different from that of an executor. And this was law so early as the reign of Henry II, when Glanvil[81] informs us, that "*testamenti executores esse debent ii quos testator ad hoc elegerit, et quibus curam ipse commiserit; si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere.*" ["Those should be executors of a will whom the testator shall have chosen, and to whom he himself shall have committed the trust; but if the testator shall not have named any, the relations of the deceased may take this duty upon themselves."]

BUT if the deceased died totally intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the third, and Henry the eighth, before-mentioned, direct. In consequence of which we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband, or his representatives:[82] and, of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his discretion.[83] 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases.[84] 3. That this nearness or propinquity of degree shall be reckoned according to the computation of the civilians;[85] and not of the canonists, which the law of England adopts in the descent of real estates:[86] because in the civil computation the intestate himself is the *terminus a quo* [limit from which] the several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration: both which are indeed in the first degree; but with us[87] the children are allowed the preference.[88] Then follow brothers,[89] grandfathers,[90] uncles of nephews,[91] (and the females of each class respectively) and lastly cousins. 4. The half blood is admitted to the administration as well as the whole: for they are of the

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kindred of the intestate, and only excluded from inheritances of land upon feudal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood:[92] and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion.[93] 5. If none of the kindred will take out administration, a creditor may, by custom, do it.[94] 6. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin.[95] And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done[96] before the statute Edw. III.) to such discreet person as he approves of: or may grant him letters *ad colligendum bona defuncti* [collecting the goods of the deceased], which neither make him executor nor administrator; his only business being to keep the goods in his safe costody,[97] and to do other acts for the benefit of such as are entitled to the property of the deceased.[98] If a bastard, who has no kindred, being *nullius filius* [no one's son], or any one else that has no kindred, dies intestate and without wife or child, it has formerly been held[99] that the ordinary might seize his goods, and dispose of them *in pios usus*. But the usual course now is for some one to procure letters patent, or other authority, from the king; and then the ordinary of course grants administration of such appointee of the crown.[100]

THE interest, vested in a executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor as A's executor is to all intents and purposes the executor and representative of A himself:[101] but the executor of A's administrator, or the administrator of A's executor, is not the representative of A.[102] For the power of an executor is founded upon the Special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, of the goods of the deceased not administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property.[103] But he may, as well as an original administrator, have only a limited or special administration committed to his care, *viz.* of certain specific effects, such as a term of years and the like; the rest being committed of others.[104]

HAVING thus shown what is, and who may be, an executor or administrator, I proceed now, fifthly and lastly, to inquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and, secondly, that an executor may do many acts before he proves the will,[105] but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate,[106] the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased,[107] and many other transactions[108]) he is called in law an executor of his own wrong, de son tort, and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely

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doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong.[109] Such a one cannot bring an action himself in right of the deceased,[110] but actions may be bought against him. And, in all actions by creditors against such an officious intruder, he shall be named an executor, generally;[111] for the most obvious conclusion, which strangers can form from his conduct, is that he has a will of the deceased, wherein he is named executor, but has not yet taken probate thereof.[112] He is chargeable with the debts of the deceased, so far as assets come to his hands:[113] and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree,[114] himself only excepted.[115] And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages;[116] unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt.[117] But let us now see what are the power and duty of a rightful executor or administrator.

1. HE must bury the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of devastation or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased.[118]

2. THE executor, or the administrator *durante minore aetate* or *durante absentia*, or *cum testamento annexo*, must prove the will of the deceased: which is done either in common form, which is only upon his own oath before the ordinary, or his surrogate; or per testes, in more solemn form of law, in case the validity of the will be disputed.[119] When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually styled the probate. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II. c. 10. enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia* [notable goods], or chattels to the value of a hundred shillings, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative;[120] whence the court where the validity of such wills is tried, and the office where they are registered, are called the prerogative court, and the prerogative office, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to archbishop Chichele, interprets these hundred shillings to signify *solidos legales* [lawful shillings]; of which he tells us seventy two amounted to a pound of gold, which in his time was valued at fifty nobles or 16£ 13 s. 4 d. He therefore computes[121] that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23£ 3 s. 0¼ d. This will account for what is said in our ancient books, that *bona notabilia* in the diocese of London,[122] and indeed every where else,[123] were of the value of ten pounds by composition: for, if we pursue the calculations of Lyndewode to their full extent, and consider that a pound of gold is now almost equal in value to an hundred and fifty nobles, we

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shall extend the present amount of *bona notabilia* to nearly 70£. But the makers of the canons of 1603 understood this ancient rule to be meant of the shillings current in the reign of James I, and have therefore directed[124] that five pounds shall for the future be the standard of *bona notabilia*, so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation: that, as the bishops were themselves originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts very satisfactorily for the reason of taking out administration to intestates, that have large and diffusive property, in the prerogative court: and the probate of wills naturally follows, as was before observed, the power of granting administrations; in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administering the effects.

3. THE executor or administrator is to make an inventory[125] of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in the ordinary upon oath, if thereunto lawfully required.

4. HE is to collect all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased,[126] and having the same property in his goods as the principal had when living, and the same remedies to recover them. And, if there be two or more executors, a sale or release by one of them shall be good against all the rest;[127] but in case of administrators it is otherwise.[128] Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called assets in the hands of the executor or administrator;[129] that is, sufficient or enough (from the French assez) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which are the next thing to be considered; for,

5. THE executor of administrator must pay the debts of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty.[130] Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woolen,[131] money due on poors rates,[132] for letters to the post-office,[133] and some others. Fourthly, debts of record; as judgments (docketed according to the statute 4 & 5 W. & M. c. 20.) statutes, and recognizances.[134] Fifthly, debts due on special contracts; as for rent, (for which the lessor has often a better remedy in his own hands, by distraining) or upon bonds, covenants, and the like, under seal.[135] Lastly, debts on simple contracts, *viz.* upon notes unsealed,

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and verbal promises. Among these simple contracts, servants wages are by some[136]with reason preferred to any other: and so stood the ancient law, according to Bracton[137] and Fleta,[138] who reckon, among the first debts to be paid, *servitia servientium et stipendia famulorum* [the services of attendants and wages of servants]. Among debts of equal degree, the executor or administrator is allowed to pay himself first; by retaining in his hands so much as his debt amounts to.[139] But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of their own wrong, which is contrary to the rule of law.[140] If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no;[141] provided there be assets sufficient to pay the testator's debts: for, though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary.[142] Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole, debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt.[143]

6. WHEN the debts are all discharged, the legacies claim the next regard; which are to be paid by the executor so far as his assets will extend: but he may not give himself the preference herein, as in the case of debts.[144]

A LEGACY is a bequest, or gift, of goods and chattels by testament; and the person to whom it is given is styled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor: for if I have a general or pecuniary legacy of 100£ or a specific one of a piece of plate, I cannot in either case take it without the consent of the executor.[145] For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law,[146] "*de bonis defuncti primo deducenda sent ea quae sunt necessitatis, et postea quae sunt utilitatis, et ultimo quae sunt voluntatis*." ["From the effects of the deceased are to be answered, first, the demands of necessity; afterwards, what expediency requires; and lastly, the requisitions of bequest."] And in case of a deficiency of assets, all the general legacies must abate proportionably, in order to pay the debts; but a specific legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it.[147] Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid.[148]And this law is as old as Bracton and Fleta, who tell us,[149] "*si plura sunt debita, vel plus legatum fuerit, ad quae catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio*." ["If there are more debts, or legacies bequeathed, than the deceased's chattels can satisfy, let an equal abatement be made on all the legacies, except the king's privilege."]

IF the legatee dies before the testator, the legacy is a lost or lapsed legacy, and shall sink into the *residuum*. And if a contingent legacy be left to any one; as, when he attains, or if he attains, the age of twenty one; and he dies before that time; it is a lapsed legacy.[150] But a legacy to one, to be paid when he attains the age of twenty one years, is a vested legacy: an interest which commences *in*

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praesenti [immediately], although it be *solvendum in futuro* [paid in the future]: and, if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived. This distinction is borrowed from the civil law;[151] and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued.[152] but if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir;[153] for, with regard to devises affecting lands, the ecclesiastical court has no concurrent jurisdiction. And, in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannon be immediately got in, it shall carry interest only from the end of the year after the death of the testator.[154]

BESIDES these formal legacies, contained in a man's will and testament, there if also permitted another death-bed disposition of property; which is called a donation *causa mortis* [at death]. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker) to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or mortis causa.[155] This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession;[156] and so far differs from a testamentary disposition: but seems to have been handed to us from the civil lawyers,[157] who themselves borrowed it from the Greeks.[158]

7. WHEN all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will, and, if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship.[159] But, whatever ground there might have been formerly for this opinion, it seems now to be understood[160] with this restriction; that, although where the executor has no legacy at all the *residuum* shall in general be his own, yet wherever there is sufficient on the face of a will, (by means of a competent legacy or otherwise) to imply that the testator intended his executor should not have the residue, the undevised surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator: concerning whom indeed there formerly was much debate,[161] whether or no he could be compelled to make any distribution of the intestate's estate. For though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavored to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law.[162] And the right of the husband not only to administer, but also to enjoy exclusively, the effect of his deceased wife, depends still on this doctrine of the common law: the statute 29 Car. II. declaring only that the statute of distributions does not extend to this case. But now these controversies are quite at an end; for by the statute 22 & 23 Car. II. c. 10. it is enacted, that the surplusage of intestates' estates, except of femes-covert,[163] shall (after the expiration of one full year from the death of the intestate) be

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distributed in the following manner. One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree, and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters.[164] The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have sufficiently spoken.[165] And therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17. if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

IT is obvious to observe, how near a resemblance this statute of distributions bears to our ancient English law, *de rationabili parte honorum*, spoken of at the beginning of this chapter;[166] and which Sir Edward Coke[167] himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of successions *ab intestato*:[168] which, and because the act was also penned by an eminent civilian,[169] has occasioned a notion that the parliament of England copy it from the Roman praetor: though indeed it is little more than a restoration, with some refinements and regulations, of out old constitutional law; which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So likewise there is another part of the statute of distributions, where directions are given, that no child of the intestate, (except his heir at law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision has been also said to be derived from the *collatio bonorum* [equalizing of goods] of the imperial law:[170] which is certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in coparcenary, that it has always been, and still is, the common law of England, under the name of hotchpot.[171]

BEFORE I quit this subject, I must however acknowledge, that the doctrine and limits of representation, laid down in the statute of distributions, seem to have been principally borrowed from the civil law: whereby it will sometimes happened, that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the common law knows no other rule of succession but that *per stirpes* only.[172] They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repraesentationis*, in the right of another person. As if the next of kin be the intestate's three brothers, A, B, and C; here his estate

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is divided into three equal portions, and distributed *per capita*, one to each: but if one of these brothers, A, had been dead leaving three children, and another, B, leaving two; then the distribution must have been *per stirpes*; *viz.* one third to A's three children, another third to B's two children, and the remaining third to C the surviving brother: yet if C had also been dead, without issue, then A's and B's five children, being all in equal degree to the intestate, would take in their own rights *per capita*, *viz.* each of them of fifth part.[173]

THE statute of distributions expressly excepts and reserves the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates effects. So that, though in those places the restraint of devising is removed by the statutes formerly mentioned,[174] their ancient customs remain in full force, with respect to the estates of intestates. I shall therefore conclude this chapter, and with it the present book, with a few remarks on those customs.

IN the first place we may observe, that in the city of London,[175] and province of York,[176] as well as in the kingdom of Scotland,[177] and therefore probably also in Wales, (concerning which there is little to be gathered, but from the statute 7 & 8 W. III. c. 38.) the effects of the intestate, after payment of his debts, are in general divided according to the ancient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children, his substance (deducting the widow's apparel and furniture of her bed-chamber, which in London is called the widow's chamber) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator: if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other:[178] if neither case, take one moiety, and the administrator shall have the whole.[179] And this portion, or dead man's part, the administrator was wont to apply to his own use,[180] till the statute 1 Jac. II. c. 17. declared that the same should be subject to the statutes of distribution. So that if a man dies worth 1800£ leaving a widow and two children, the estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom and two by the statute; and each of the children five, three by the custom and two by the statute: if he leaves a widow and one child, they shall each have a moiety of the whole, or nine such eighteenth parts, six by the custom and three by the statute: if he leaves a widow and no child, the widow shall have three fourths of the whole, two by the custom and one by the statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, in puts her in a state of non-entity, with regard to the custom only;[181] but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement.[182] And if any of the children are advanced by the father in his lifetime with any sum of money (not amounting to their full proportionable part) they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom:[183] but, if they are fully advanced, the custom entitles them to no farther dividend.[184]

THUS far in the main the customs of London and of York agree: but, besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty one, before which they cannot dispose of it by testament:[185] and, if they die under that age, whether sole or married, their share shall survive to the other children; but, after the age of twenty one, it is

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free from any orphanage custom, and, in case of intestacy, shall fall under the statute of distributions.[186] The other, that in the province of York, the heir at common law, who inherits any lands either in fee or in tail, is excluded from any filial portion or reasonable part.[187] But, notwithstanding these provincial variations, the customs appear to be substantially one and the same. And, as a similar policy formerly prevailed in the every part of the island, we may fairly conclude the whole to be of British original; or, if derived from the Roman law of successions, to have been drawn from that fountain much earlier than the time of Justinian, from whose constitutions in many points (particularly in the advantages given to the widow) it very considerably differs: though it is not improbable that the resemblances which yet remain may be owing to the Roman usages; introduced in the time of Claudius Caesar, (who established a colony in Britain to instruct the natives in legal knowledge[188]) inculcated and disused by Papinian (who presided at York as *praefectus praetorio* [judge of the court] under the emperors Severus and Caracalla[189]) and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

THE END OF THE SECOND BOOK.

NOTES

1. Puf. L. of N. b. 4. c. 10.
2. Ibid. b 4. c. 11.
3. Barbeyr. Puf. 4. 10. 4. Godolph. Orph. Leg. 1. 1.
4. Gen. c. 15.
5. Taylor's elem, civ. law. 517.
6. See pag. 12.
7. Selden. De fuce. Ebr. c. 24.
8. Gen. c. 48.
9. Plutarch. In vita Solon.
10. Pott. Antiq. 1. 4. c. 15.
11. Inst. 2. 22. 1.
12. Tacit, de mor. Germ. 21.
13. See pag. 13.
14. Sp. L. b. 27. c. 1. Vinnius in Inst. l. 2. tit. 10.
15. LL. Canut. C. 68.
16. l. 2. c. 5.
17. Bracton. l. 2. c. 26. Flet. L. 2. c. 57.
18. F. N. B. 122.
19. 9 Hen. III. c. 18.

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20. A widow brought an action of detinue against her husband's executors, *quod cum per consuetudinem totius regni Angliae hactenus usitatam et approbatam, uxores debent et solent a tempore, &c. habere suam rationabilem partem bonorum maritorum suorum: ita, videlicet, quod si nullos habuerint liberos, tune medietatem: et si habuerint, tunc tertiam partem, &c.* [by the universal custom of England, hitherto used and approved, wives have a right and are accustomed from time, etc. to have a reasonable share of their husbands' goods, in the following proportion; that if they have no children, they shall take the half: and if they have children, then the third part, etc.]; and that her husband died worth 200,000 marks, without issue had between them; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied; but the rule of law, as stated in the writ, seems to have been universally allowed. (M. 30 Edw. III. 25.) And a similar case occurs in H. 17 Edw. III. 9.

21. Reg. Brev. 142. Co. Litt. 176.

22. Law. 175.

23. 2 Inst. 33.

24. l. 2. c. 26. §. 2.

25. Dalrymp. Of feud. property. 145.

26. pag. 426.

27. 9 Rep. 38.

28. Ibid. 37.

29. §. 486.

30. Finch, Law. 173, 174.

31. Plowd. 277.

32. Plowd. 277.

33. l. 2. c. 57. §. 10.

34. in Decretal. l. 5. t. 3. c. 42.

35. The proportion given to the priest, and to other pious uses, was different in different counties. In the archdeaconry of Richmond in Yorkshire, this proportion was settled by a papal bull A. D. 1254. (Regist. Bonoris de Richm. 101.) and was observed till abolished by the statute 26 Hen. VIII. c. 15.

36. 13 Edw. I. c. 19.

37. 9 Rep. 39.

38. Godolph. Orph. Leg. P. 1. c. 7.

39. Godolph. p. 1. c. 8. Wentw. 212. 2 Vern. 104. 469. Gilb. Rep. 74.

40. Perkins. §. 503.

41. Co. Litt. 89.

42. Godolph. p. 1. c. 9.

43. Ff. 31. 1. 77.

44. 4 Rep. 51.

45. Dr & St. d. 1. c. 7.

46. Bro. Abr. tit devise. 34. Stra. 891.

47. The king v. di Bettesworth. T. 13 Geo. II. B. R.

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48. Cro. Car. 376. 1 Mod. 211.
49. Ff. 28. 1. 6.
50. Ff. 39. 6. 25.
51. Co. Litt. 133.
52. Godolph. 1. 10.
53. Prec. Chan. 44.
54. 4 Rep. 60. 2 p. Wms. 624.
55. Plowd. 261.
56. Fitzh. Abr. t. descent. 16.
57. Godolph. p. 1. c. 12.
58. l. 7. c. 5.
59. Inst. 2. 10.
60. 1 last. 111. 322.
61. Ff. 28. 1. 1.
62. Godolph. p. 1. c. 1. §. 3.
63. Inst. 2. 10. 14.
64. Godolph. p. 1. c. 21. Gilb. Rep. 260.
65. Comyns. 452, 3, 4.
66. l. 2. c. 26.
67. Co. Litt. 112.
68. Litt. §. 168. Perk. 478.
69. Perk. 479.
70. 8 Rep. 82.
71. Flem. c. 19.
72. Lord Raym. 441. 1 p. Wms. 304.
73. See Book I. ch. 16.
74. Inst. 2. 18. 1.
75. West. Symb. p. 1. §. 635.
76. Went. Off. Ex. c. 18.
77. 1 Lutw. 342.
78. 2 P. Wms. 589, 590.
79. Wentw. c. 1. Plowd. 281.
80. 1 Roll. Abr. 907. Comb. 20.

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81. l. 7. c. 6.

82. Cro. Car. 106. Stat. 29 Car. II. c. 3. 1 P. Wms. 381.

83. Salk. 36. Stra. 532.

84. Stat. 28 Hen. VIII. c. 5. See pag. 496.

85. Prec. Chanc. 593.

86. See pag. 203. 207. 224.

87. Godolph. p. 2. c. 24. §. 1. 2 Vern. 125.

88. In Germany there was long a dispute, whether a man's children should inherit his effects during the life of their grandfather; which depends (as we shall see hereafter) on the same principles as the granting of administrations. At last it was agreed at the diet of Arensberg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory; and so the law was established in their favor, that the issue of a person deceased shall be entitled to his goods and chattels in preference to his parents. (Mod. Un. Hist. xxix. 28.)

89. Harris in Nov. 118. c. 2.

90. Prec. Chanc. 527. 1 P. Wms. 41.

91. Atk. 455.

92. 1 Ventr. 425.

93. Aleyn. 36. Styl. 74.

94. Salk. 38.

95. 1 Sid. 281. 1 Ventr. 219.

96. Plowd. 278.

97. Went. ch. 14.

98. 2 Inst. 398.

99. Salk. 37.

100. 3 P. Wms. 33.

101. Stat. 25 Edw. III. St. 5. c. 5. 1 Leon. 275.

102. Bro. Abr. tit. administrator. 7.

103. Styl. 225.

104. 1 Roll. Abr. 908. Godolph. p. 2. c. 30. Salk. 36.

105. Wentw. ch. 3.

106. Comyns. 151.

107. 5 Rep. 33, 34.

108. Wentw. ch. 14. Stat. 43 Eliz. c. 8.

109. Dyer. 166.

110. Bro. Abr. t. administrator. 8.

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111. 5 Rep. 31.
112. 12 Mod. 471.
113. Dyer. 166.
114. 1 Chan Cas. 33.
115. 5 Rep. 30. Moor. 527.
116. 12 Mod. 441, 471.
117. Wentw. ch. 14.
118. Salk. 196. Godolph. p. 2. c. 26. §. 2.
119. Godolph. p. 1. c. 20. §. 4.
120. 4 Inst. 335.
121. Provine. l. 3. t. 13. c. item. V. centum. etc. statutum. V. laicis.
122. 4 Inst. 335. Godolph. p. 2. c. 22.
123. Plowd. 281.
124. can. 92.
125. Stat. 21. Hen. VIII. c. 5.
126. Co. Litt. 209.
127. Dyer. 23.
128. Atk. 460.
129. See pag. 244.
130. 1 And. 129.
131. Stat. 30. Car. II. c. 3.
132. Stat. 17 Geo. II. c. 38.
133. Stat. 9 Ann. c. 10.
134. 4 Rep. 60. Cro. Car. 363.
135. Wentw. ch. 12.
136. 1 Roll. Abr 927.
137. l. 2. c. 26.
138. l. 2. c. 57. §. 10.
139. 10 Mod. 496.
140. 5 Rep. 30.
141. Plowd. 184. Salk. 299.
142. Salk. 303. 1 Roll. Abr. 921.
143. Dyer. 32. 2 Leon. 60.

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144. 2 Vern 434. 2 P. Wms. 25.

145. Co. Litt. 111. Aleyn. 39.

146. l. 2. c. 26.

147. 2 Vern. 11.

148. Ibid. 205.

149. Bract. l. 2. c. 26. Flet. l. 2. c. 57. §. 11.

150. Dyer. 59. 1 Equ. Cas. abr. 295.

151. Ff. 35. 1 1& 2.

152. 1 Equ. Cas. abr. 295.

153. 2 P. Wms. 601.

154. 2 P. Wms. 26, 27.

155. Prec. Chan. 269. 1 P. Wms. 406. 441. 3 P. Wms. 357.

156. Law of forfeit. 16.

157. Inst. 2. 7. 1. Ff. l. 39. t. 6.

158. There is a very complete *donatio mortis causa*, in the Odyssey b. 17. v. 78, made by Telemachus to his friend Piracus; and another by Hercules, in the Alcestes of Euripides, v. 1020.

159. Perkins. 525.

160. Prec. Chanc. 323. 1 P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wms. 43. 194. Stra. 559.

161. Godolph. p. 2. c. 32.

162. 1 Lev. 233. Cart. 125. 2 P. Wms. 447.

163. Stat. 29 Car. II. c. 3. §. 25.

164. Raym. 496. Lord Raym. 571.

165. pag. 504.

166. pag. 492.

167. 2 Inst. 33.

168. The general rule of such successions was this: 1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood; or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. (Ff. 38. 15. 1. Nov. 118. c. 1, 2, 3, 127. c. 1.)

169. Sir Walter Walker. Lord Raym. 574.

170. Ff. 37. 6. 1.

171. See ch. 12. pag. 191.

172. See ch. 14. pag. 217.

173. Prec. Chanc. 54.

174. pag. 493.

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175. Lord Raym. 1329.
176. 2 Burn. eccl. law. 746.
177. Ibid. 782.
178. 1 P. Wms. 341. Salk. 246.
179. 2 Show. 175.
180. 2 Preem. 85. 1 Vern. 133.
181. 2 Vern. 665. 3 P. Wms. 16.
182. 1 Vern. 15. 2 Chan. Rep. 252.
183. 2 Freem. 279. 1 Equ. Cas. abr. 155. 2 P. Wms. 526.
184. 2 P. Wms. 527.
185. 2 Vern. 558.
186. Prec. Chan. 537.
187. 2 Burn. 754.
188. Tacit. Annal. L. 12. c. 32.
189. Selden in Fletam. cap. 4. §. 3.

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APPENDIX

No. I. - ***Vetus Carta Feoffamenti*** [**An old Deed of Feoffment**]

SCIANT *presentes et futuri, quod ego Willielmus, filius Willielmi de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam mihi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere; Habendam et Tenendam totam predictam acram terre cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis foedi: Reddendo et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta: Et ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. In cujus rei testimonium huic presenti carte sigillum meum apposui; Hiis testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho, clerico de Saleford, Johanne, molendario de eadem villa, et aliis. Data apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis Edwardi filii regis Edwardi sexto.*

[KNOW all men present and to come, That I, William, son of William de Segenho, have given and granted, and by this my present deed have confirmed, to John, son of John of Saleford, for a certain sum of money which he has paid into my hands, one acre of my arable land, lying in the plain of Saleford, adjoining to the land of Richard de la Mere; To have and to hold all the aforesaid acre of land, with all its appurtenances, to the aforesaid John, and his heirs and assigns, of the chief lords of the fee: Rendering and performing yearly to the same chief lords the services therefore due and accustomed: And I, the aforesaid William, and my heirs and assigns, warrant all the aforesaid acre of land with all its appurtenances, to the aforesaid John of Saleford and to his heirs and assigns, against all the world for ever. In witness whereof I have put my seal to this present deed. Witness, Nigell de Saleford, John of Seybroke, Radulphus, clerk of Saleford, John, miller of the same town, and others. Given at Saleford, on the Friday next before the feast of St. Margaret the Virgin, in the sixth year of the reign of King Edward, the son of King Edward.]

(L. S.)

MEMORANDUM, quod die et anno infrascriptis plena et pacifica seisina acre infraspecificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford, Johannis de Seybroke, et aliorum.

[MEMORANDUM, That on the day and year within written full and quiet seizin of the within specified acre, with its appurtenances, was given and delivered by the within named William de Segenho to the within named John of Saleford, in their own proper persons, according to the tenor and effect of the within written deed, in the presence of Nigell de Saleford, John of Seybroke, and others.]

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No. II. - A Modern Conveyance by Lease and Release

§ 1. Lease, or Bargain and Sale, for a Year.

THIS indenture, made the third day of September, in the twenty first year of the reign of our sovereign lord GEORGE the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty seven, between Abraham Barker of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards of Lincoln's Inn in the county of Middlesex, esquire, and Francis Golding of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Cecilia his wife, in consideration of five shillings of lawful money of Great Britain to them in hand paid by the said David Edwards and Francis Golding at or before the ensealing and delivery of these presents, (the receipt whereof is hereby acknowledged,) and for other good causes and considerations them the said Abraham Barker and Cecilia his wife hereunto specially moving,

Have bargained and sold, and by these presents do, and each of them does, bargain and sell, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, All that the capital messuage, called Dale Hall in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof:

To have and to hold the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein before mentioned or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next ensuing and fully to be complete and ended: **Yielding** and paying therefore unto the said Abraham Barker, and Cecilia his wife, and their heirs or assigns, the yearly rent of one peppercorn at the expiration of the said term, if the same shall be lawfully demanded:

To the intent and purpose, that by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs, and assigns; to the uses, and upon the trusts, thereof to be declared by another indenture, intended to bear date the day next after the day of the date hereof.

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In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed, and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)

§ 2. Deed of Release.

This indenture of five parts, made the fourth day of September, in the twenty-first year of the reign of our sovereign lord GEORGE the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven, between Abraham Barker, of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the first part; David Edwards of Lincoln's Inn in the county of Middlesex, esquire, executor of the last will and testament of Lewis Edwards, of Cowbridge in the county of Glamorgan, gentleman, his late father, deceased, and Francis Golding of the city of Norwich, clerk, of the second part; Charles Browne of Enstone in the county of Oxford, gentleman, and Richard More of the city of Bristol, merchant, of the third part; Join Barker, esquire, son and heir apparent of the said Abraham Barker, of the fourth part; and Katherine Edwards, spinster, one of the sisters of the said David Edwards, of the fifth part.

Whereas a marriage is intended, by the permission of God, to be shortly had and solemnized between the said John Barker and Katherine Edwards:

Now this indenture witnesseth, that in consideration of the said intended marriage, and of the sum of five thousand pounds, of good and lawful money of Great Britain, to the said Abraham Barker, (by and with the consent and agreement of the said John Barker, and Katherine Edwards, testified by their being parties to, and their sealing and delivery of, these presents,) by the said David Edwards in hand paid at or before the ensealing and delivery hereof being the marriage portion of the said Katherine Edwards, bequeathed to her by the last will and testament of the said Lewis Edwards, her late father, deceased; the receipt and payment whereof the said Abraham Barker does hereby acknowledge, and thereof, and of every part and parcel thereof, they the said Abraham Barker, John Barker, and Katherine Edwards, do, and each of them does, release, acquit, and discharge the said David Edwards, his executors, and administrators, for ever by these presents: and for providing a competent jointure and provision of maintenance for the said Katherine Edwards, in case she shall, after the said intended marriage had, survive and overlive the said John Barker her intended husband: and for settling and assuring the capital messuage, lands, tenements, and hereditaments, hereinafter mentioned, unto such uses, and upon such trusts, as are hereinafter expressed and declared: and for and in consideration of the sum of five shillings of lawful money of Great Britain to the said Abraham Barker and Cecilia his wife in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard More, at or before the ensealing and delivery hereof, (the several receipts whereof are hereby respectively acknowledged,) they the said Abraham Barker and

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Cecilia his Wife,

Have, and each of them has, granted, bargained, sold, released, and confirmed, and by these presents do, and each of them does, grant, bargain, sell, release, and confirm unto the said David Edwards and Francis Golding, their heirs and assigns, All that the capital messuage called Dale Hall, in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, water-course, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made by the said Abraham Barker and Cecilia his wife for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession;) and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker and Cecilia his wife, in, to, or out of, the said capital messuage, lands, tenements, hereditaments, and premises:

To have and to hold the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein before mentioned to be hereby granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns, of such uses, upon such trusts, and to and for such intents and purposes as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behalf of the said Abraham Barker, and Cecilia his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behalf of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for the purpose to make entries, or bring actions, as the case shall require; but nevertheless to permit and suffer the said John Barker, and his assigns, during his life, to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behalf of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can or may have or claims, or, in, to, or out of, all, and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be seized of any estate of freehold or inheritance: and from

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and after the decease of the said Katherine Edwards, or other sooner determination of the said estate, then to the use and behalf of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during, and unto the full end and term of, five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of waste: upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisoes and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same: and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behalf of the first son of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, and of the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behalf of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker of the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: and for default of such issue, then to the use and behalf of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, to be equally divided between them, (if more than one,) share and share alike, as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing: and for default of such issue, then to the use and behalf of the heirs of the body of him the said John Barker lawfully issuing: and for default of such heirs, then to the use and behalf of the said Cecilia, the wife of the said Abraham Barker, and of her heirs and assigns for ever.

And as to, for, and concerning the term of five hundred years herein before limited to the said Charles Browne and Richard More, their executors, administrators and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes and agreements, hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, in case there shall be an eldest or only son and one more or other child or children of the said John Barker, on the body of said Katherine, his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child and children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the mean time and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of

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money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions after the rate of four pounds in the hundred yearly.

Provided always, that in case any of the same children shall happen to die before his, her, or their portions of such of them so dying shall go and be paid unto and be equally divided among the survivor of survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid.

Provided also, that in case there shall be no such child or children of the said John Barker on the body of the said Katherine his intended wife begotten, besides an eldest or only son; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf aforementioned; or in case the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid, or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes, any thing herein contained to the contrary thereof in any wife notwithstanding.

Provided also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor, shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee simple, in possession, in some convenient place or places within the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments and premises, hereby granted and released, and in lieu, and recompense thereof, unto and for such and the life uses, intents and purposes, and upon such and the like trusts, as the said capital messuage, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates herein before limited, expressed, and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behalf of the said Abraham Barker or Cecilia his wife, or the survivor of them so settling, conveying, and assuring and assigns for ever: and to and for no other use, intent, or purpose whatsoever; any thing herein contained to the contrary thereof in any wise notwithstanding.

And, for the considerations aforesaid, and for barring all estates tail, and all remainders or reversions thereupon expectant and depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and the said Cecilia his wife, his and her heirs,

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executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do, and each of them does, respectively covenant, promise, and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wife, and John Barker, shall and will, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, acknowledge and levy, before his Majesty's justices of the court of common pleas at Westminster, one or more fine or fines, *sur cognizance de droit, come ceo, etc.* with proclamations according to the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities, qualities, number of acres, and other descriptions to ascertain the same, as shall be thought meet: which said fine or fines, so as aforesaid or in any other manner levied and acknowledged, or to be levied and acknowledged, shall be and inure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and inure, and are hereby declared by all the said parties to these presents to be and inure, to the use and behalf of the said David Edwards, and his heirs and assigns; to the intent and purpose that the said David Edwards may, by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the fair capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his majesty's high court of chancery one more writ or writs of entry *sur disseizin en le post*, returnable before his majesty's justices of the court of common pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs, of entry he the said David Edwards shall appear *gratis*, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the said Abraham Barker, and Cecilia his wife, and John Barker; who shall also gratis appear in their proper persons, or by their attorney, or attorneys, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default; so as judgment shall and may be thereupon had and given for the said Francis Golding, to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said Abraham Barker, and Cecilia his wife, and John Barker, and for them to recover in value against the said common vouchee, and that execution shall and may be thereupon awarded and had accordingly, and all and every other act and thing be done and executed, needful and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. And it is hereby further declared and agreed by and agreed by and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine and fines, recovery and recoveries, conveyances, and assurances in the law

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whatsoever heretofore had, made, levied, suffered, or executed, or hereafter to be had, made, levied, suffered, or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them or any part thereof, by and between the said parties of these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and inure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and inure, and the recoveror or recoverors in the said recovery or recoveries named or to be names, and his or their heirs, shall stand and be seized of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes, limitations, and agreements, herein before mentioned, expressed, and declared, of and concerning the same.

And the said Abraham Barker, party hereunto, does hereby for himself, his heirs, executors, and administrators, further covenant, promise, grant, and agree, to and with the David Edwards and Francis Golding, their heirs, executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and may at all times hereafter remain, continue, and be, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, hereinbefore mentioned, expressed, and declared, of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust for him, her, them, or any of them, or from, by, or under his or her ancestors, or any of them; and shall so remain, continue, and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said Abraham Barker, or Cecilia his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified or, from and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and encumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker, or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their act, means, assent, consent, or procurement:

And moreover that he the said Abraham Barker, and Cecilia his wife, parties hereunto, and his and her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of, the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges, of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, herein before mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding or either of them, their or either of their

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heirs, executors, or administrators, or their or any of their counsel learned in the law shall be reasonably advised, devised, or required: so as such further assurances contain in them no further or other warranty or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties, who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of above.

Provided lastly, and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, and any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals and attested by two or more credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, any thing herein contained to the contrary thereof in any wife notwithstanding.

In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed, and delivered, being first
duly stamped, in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)
Charles Browne. (L. S.)
Richard More. (L. S.)
John Barker. (L. S.)
Katherine Edwards. (L. S.)

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No. III. - An Obligation, or Bond, with Condition for the Payment of Money

KNOW all men by these presents, that I David Edwards, of Lincoln's Inn in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker of Dale Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty first year of the reign of our sovereign lord George the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty seven.

The condition of this obligation is such, that if the above bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed, and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

David Edwards. (L. S.)

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No. IV. - A Fine of Lands, *sur Cognizance de Droit, come ceo,* etc.

§ 1. Writ of Covenant; or *Praecipe*.

GEORGE the second by the grace of God of Great Britain, France and Ireland king, defender of the faith, and so forth; to the sheriff of Norfolk, greeting. **Command** Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices, at Westminster, from the day of saint Michael in one month, to show wherefore they have not done it: and have you there the summoners, and this writ. **Witness** ourself at Westminster, the ninth day of October, in the twenty first year of our reign.

Pledges of Prosecution,	John Doe. Richard Roe.	Summoners of the within named Abraham, Cecilia, and John.	John Den. Richard Fen.

§ 2. The License to Agree.

Norfolk, to wit. **David Edwards**, esquire, gives to the lord the king ten marks, for license to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale.

§ 3. The Concord.

And the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David has of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted, for themselves and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David has given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§ 4. The Note, or Abstract.

Norfolk, to wit. **Between** David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two

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gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them; to wit, that the said Abraham. Cecilia, and John, have acknowledged the aforesaid tenement, with the appurtenances, to be the right of him the said David, as those which the said David has of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves, and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David has given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§ 5. The Foot, Chirograph, or Indentures, of the Fine.

Norfolk, to wit. } **This is the final agreement**, made in the court of the lord the king at Westminster, from the day of saint Michael in one month, in the twenty first year of the reign of the lord GEORGE the recond by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord the king then there present, between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the same court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David has of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David has given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§ 6. Proclamations, Endorsed upon the Fine, According to the Statutes.

The first proclamation was made the sixteenth day of November, in the term of saint Michael, in the twenty first year of the king withinwritten.

The second proclamation was made the fourth day of February, in the term of saint Hilary, in the twenty first year of the king withinwritten.

The third proclamation was made the thirteenth day of May, in the term of Easter, in the twenty first year of the king withinwritten.

The fourth proclamation was made the twenty eighth day of June, in the term of the holy Trinity, in the twenty second year of the king withinwritten.

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No. V. - A Common Recovery of Lands, with Double Voucher[1]

§ 1. Writ of Entry *sur Disseizin in the Post*; or, *PRAECIPE*.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Norfolk, greeting. **Command** David Edwards, esquire, that justly and without delay he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the said David has not entry, unless after the disseizin, which Hugh Hunt thereof unjustly, and without judgement, has made to the aforesaid Francis, within thirty years now last past, as he says, and whereupon he complains that the aforesaid David deforces him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster, on the octave of saint Martin, to shew wherefore he has not done it: and have you there the summoners, and this writ. **Witness** ourself at Westminster, the twenty ninth day of October, in the twenty first year of out reign.

Pledges of Prosecution,	John Doe. Richard Roe.	Summoners of the within named David,	John Den. Richard Fen.

§ 2. Exemplification of the Recovery Roll.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to all to whom these our present letters shall come, greeting. **Know ye**, that among the pleas of land, enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of saint Michael, in the twenty first year of out reign, upon the fifty second roll it is thus contained. **Entry** returnable on the octave of saint Martin. **Norfolk**, to wit: Francis Golding, clerk, in his proper person demands against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David has not entry, unless after the disseizin, which Hugh Hunt thereof unjustly, and without judgment, has made to the aforesaid Francis, within thirty years now last past. And whereupon he says, that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [[2] of six shillings and eight pence, and more, in rents, corn, and grass:] and into which [the said David has not entry, unless as aforesaid:] and thereupon he brings suit, [and good proof.] **And** the said David in his proper person comes and defends his right, when [and where the court shall award,] and thereupon vouches to warranty "John Barker, esquire; who is present here in court in his proper person, and the tenements aforesaid with the appurtenances to him freely warrants, [and prays that the said Francis may count against him.] **And** hereupon the said Francis demands against the said John, tenant by his own warranty, the tenements aforesaid with the appurtenances, in form aforesaid, etc. And whereupon he says, that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne as of fee and

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right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, etc. And into which, etc. And whereupon he brings suit, etc. **And** the aforesaid John, tenant by his own warranty, defends his right, when, etc. and thereupon he further vouches to warranty" Jacob Morland; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warrants, etc. **And** hereupon the said Francis demands against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, etc. And whereupon he says, that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, etc. And into which, etc. And thereupon the brings suit, etc. And the aforesaid Jacob, tenant by his own warranty, defends his right, when, etc. And says that the aforesaid Hugh did not disseize the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above does suppose: and of this he puts himself upon the country. **And** the aforesaid Francis thereupon craves leave to imparl; and he has it. And afterwards the aforesaid Francis comes again here into court in this same term in his proper person, and the aforesaid Jacob, though solemnly called, comes not again, but has departed in contempt of the court, and makes default. **Therefore it is considered**, that the aforesaid Francis do recover his seizin against the aforesaid David of the tenements aforesaid, with the appurtenances; and that the said David have of the land of the aforesaid "John, to the value [of the tenements aforesaid;] and further, that the said John, have of the land of the said" Jacob to the value [of the tenements aforesaid.] And the said Jacob in mercy. **And** hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seizin of the tenements aforesaid with the appurtenances: and it is granted unto him, returnable here without delay. Afterwards, that is to say, the twenty eighth day of November in this same term, here comes the said Francis in his proper person; and the sheriff, namely Sir Charles Thompson, knight, now sends, that he by virtue of the writ aforesaid to him directed, on the twenty fourth day of the same month, did cause the said Francis to have full seizin of the tenements aforesaid with the appurtenances, as he was commanded. **All and singular** which premises, at the request of the said Francis, by the tenor of these presents we have held good to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the bench aforesaid, to be affixed to these presents. **Witness** Sir John Willes, knight, at Westminster, the twenty eighth day of November, in the twenty first year of our reign.

Cooke.

THE END

NOTES

1. Note, that if the recovery be had with single voucher, the parts marked "thus" in § 2 are omitted.

2. The clauses, between hooks [brackets], are no otherwise expressed in the record than by an etc.

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