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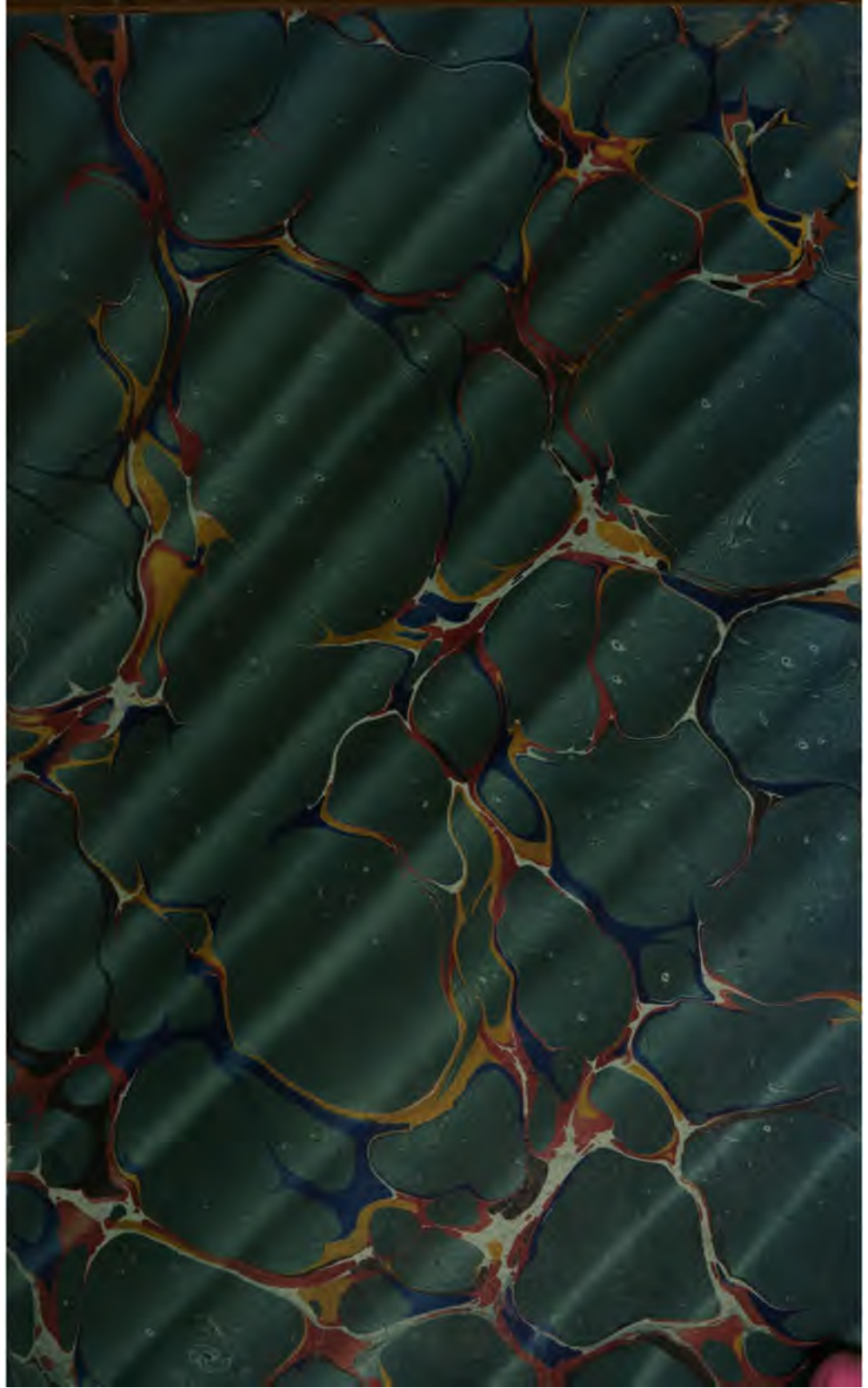

H. Jay

THE

PRINCIPLES

OF THE

LAW OF REAL PROPERTY,

ACCORDING TO THE

TEXT OF BLACKSTONE:

INCORPORATING THE

ALTERATIONS DOWN TO THE PRESENT TIME.

BY

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LONDON:

RICHARDS & Co., 194, FLEET STREET.

1837.

E. Spettigue, Printer, 67, Chaucery Lane.

INTRODUCTION.

THE principles which govern the enjoyment and the alienation of Real Property are of almost universal interest. Some acquaintance with them is requisite for managing, with safety and propriety, many of the common occurrences of life; and a familiarity with them, will perhaps be found more useful than any other branch of legal learning.

The second volume of Mr. Justice Blackstone's Commentaries has long been recognized as the most popular introduction to a knowledge of this subject. Its publication may be said to have formed an æra in the history of the law of Real Property. It rendered this most difficult body of law, comparatively easy of comprehension, and it is constantly referred to by all classes of the community, and more particularly by the law student, for information respecting it. The only drawback at the present day to its practical use—obviously a very great one—is, that since it was written the law of Real Property has been materially altered, both by the legislature and by judicial decision. Indeed, in many parts of this volume, the Commentaries must now be considered chiefly valuable rather as containing a history of the law, down to the time of the author, and as a full exposition of what the law then was, than as shewing how it stands at the present day. Still, however, in those parts which have not been altered, this work remains unrivalled for clearness, precision, and accuracy, and for conveying all that for general purposes need be known, in a style the most beautiful, and with an authority inferior to none.

Under these circumstances it seemed worthy of consideration whether the work might not be adapted to present use, by preserving such parts of the text as remain law, and incorporating the alterations which have been made since it was written; thus endeavouring to render it what it was originally, a brief, but authentic statement of this branch of the law. In pursuance of this idea,—which the writer may take the liberty of stating[a] has long been a favourite project with him—this volume has been undertaken.

If any precedent were necessary for separating a portion of a legal work from the rest, and making it a distinct work, he may be permitted to refer to one of the most popular text books in the profession—Coke upon Littleton, which, it need hardly be stated, forms the first book of Lord Coke's Institutes, and has long been in general use in a separate form, with annotations by various editors, while the remaining books are almost entirely neglected. The portion selected in the present work being all that relates to the law of Real Property,[b] is complete in itself, and, as it appears to the writer, may be separated with advantage.

Having said thus much on the general design, the writer has now to request attention to the particular alterations he has made in the text of Blackstone.

These it was at one time intended to have shewn by brackets or other distinctive marks, and this would have been greatly preferred; but after much consideration this plan was abandoned, as almost every page being altered, it appeared likely to perplex the reader, especially the student; and as it would not have shewn what portions

[a] He has been reminded by several of his professional friends that he adverted to this intention several years ago. He thinks it right to mention this, as, after he had made considerable progress in his labours, he found that other works on a similar plan—with which, however, this volume does not pretend to class itself—were projected.

[b] From page 16 to page 382.

of the text were omitted (which are very considerable), it would not have been complete in its object. All that has been done, therefore, is to insert in the side margin, a reference to the page of Blackstone, by attending to which it may easily be seen, if desired, what alterations and omissions have been made; and this perhaps will be found a useful practice for the student.

All that is attempted in this work is to fix the Principles of the present Law of Real Property. It has therefore been thought advisable to omit much of the historical detail, and reference to the laws of other countries, which Blackstone has most properly given in his Commentaries; and these omissions have been the more readily made from a desire to burthen the reader with no more matter already in his possession than was necessary. In other respects it has been endeavoured to make as few alterations in the text as possible; and those that have been made, although they have been supported by authorities, are proposed with great diffidence.

The only transposition which the writer found himself called on to make, was, to bring the subject of Uses and Trusts into a separate and early chapter, instead of leaving it to be introduced incidentally in the chapter on Alienation by Deed. He considers himself justified in doing this, inasmuch as the doctrine of Uses and Trusts pervades the whole law of Real Property, and few parts of it can be rightly understood without some knowledge of this doctrine.

It would have been easy to have enlarged many parts of the work; and the writer was much tempted to do this, especially in the chapter on Uses and Trusts. It was thought however better, on the whole, to leave the work, where it continues unaltered, as it was, and to refer the reader to other books for information.

It has also been thought that it would be likely to facilitate the mastery of the subject, to divide it into books

and chapters. For this division the present writer is responsible.

It will be seen that very little reference to the feudal system has been preserved. It has been endeavoured to adapt the work to the present law; and it is to be remembered that scarcely any part of that system now remains. This change has been working for the last three hundred years, and may be said to be nearly completed. The introduction of the Statute of Uses in the reign of Henry VII,—the great alterations in the Law of Tenures, which were made in the reign of Charles II,—and lastly, the acts founded on the Reports of the Real Property Commissioners, passed in the reign of the present King, more especially the acts relating to Inheritance and Escheat,—have left scarcely a vestige of the law of Feuds remaining. It was thought right therefore to allude to it only incidentally; and in this course, the writer has considered himself justified by the authority of the most eminent contemporary legal authors.

The writer cannot offer this work to the public without great diffidence. He can only console himself against any charge of presumption which may be made against him, with the thought that he has sincerely endeavoured to smooth the way of the student, to whom he now begs to address the encouraging words quoted from Lord Coke by Blackstone, at the close of his inquiries on the law of Real Property: "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, adds Blackstone, upon a second perusal of the same,) "his doubts will be probably removed.[c]"

4, Lincoln's Inn, Old Square,
March 30, 1837.

[c] Præme to 1st Instit.

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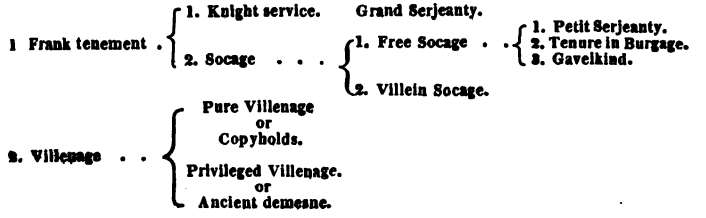

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PRINCIPLES

OF THE

LAW OF REAL PROPERTY.

BOOK THE FIRST.

OF REAL PROPERTY.

CHAPTER THE FIRST.

OF REAL PROPERTY; AND FIRST, OF CORPOREAL HEREDITAMENTS. [16]

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. Property divided into things real, and things personal.

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

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 is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies every thing that may be *holden*, provided it be of [17] Things real consist of land, tenements,

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;[a] and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements.[b] But an *hereditament*, says Sir Edward Coke,[c] 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 incorporeal, real, personal, or mixed. Thus an heir-loom, 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.[d]

and hereditaments.

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.

Hereditaments are of two kinds, corporeal and incorporeal.

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,[e] comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings: for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon: so that, if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a

Corporeal hereditaments; of what they consist.

[18]

Land; its signification, and what will pass under it.

[a] Co. Litt. 6.
[b] *Ibid.* 19, 20.
[c] 1 Inst. 6.
[d] 3 Rep. 2.
[e] 1 Inst. 4.

kind of solecism; but such is the language of the law: and therefore 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 description, as for a pond, a water-course, or a rivulet: but I must bring my action for that the land lies at the bottom, and must call it twenty acres of *land covered with water.*[f] 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 hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum,* 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, except where there is a custom to the contrary[g]. 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 passes but a right of fishing:[h] 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,* every thing terrestrial will pass.[i] [19]

[f] Brownl. 142.
[g] *Curtis* v. *Daniel,* 10 East, 273.
[h] Co. Litt. 4.
[i] *Ibid.* 4, 5, 6.

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CHAPTER THE SECOND.

OF INCORPOREAL HEREDITAMENTS.

Incorporeal hereditaments: what they are.

AN incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisible within, the same.[j] 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.

[21]

Of ten sorts.

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

1. Advowson: Definition of.

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.

[22]

Are appendant or in gross.

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,[k] 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:[l] 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.[m] 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

[j] Co. Litt. 19, 20. [k] *Ibid.* 119. [l] *Ibid.* 121. [m] *Ibid.* 307.

more; but is for the future annexed to the person of its owner, and not to his manor or lands.[n]

Presentative, Collative, or Donative.

Advowsons are also either *presentative, collative,* or *donative.*[o] An advowson presentative is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds 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 [23] any subject by his licence, doth 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.[p]

Difference between Presentative and Donative Presentations.

A material distinction between presentative and donative advowsons is, that if the church become void in the lifetime of the patron, and remain so at the time of his death, then if the advowson be presentative, the right to present *pro hac vice* is in the executor; if donative in the heir: the advowson itself goes of course always to the heir.[q] It should also be remarked, that where an incumbent is made a bishop, the right of presentation is in the King, and is called a prerogative presentation. Until very recently there was no statute of limitations as to advowsons, but by the 3 & 4 W. 4, c. 27, some material alterations have been made with respect to their recovery. By s. 30 it is enacted, that no advowson shall be recovered after three incumbencies, occupying a period of sixty years adverse possession; incumbencies after lapse are to be reckoned within the period, but not incumbencies after promotion to bishopricks (s. 31); and no advowson shall be recovered after 100 years adverse possession, although three incumbencies have not elapsed (s. 33.)

Prerogative presentation; what it is.

Late Act of Limitations as to Advowsons.

[n] Co. Litt. 120.
[o] *Ibid.*
[p] *Ibid.* 344.
[q] *Repington* v. *Governor of Tamworth*, 2 Wils. 150; and see 2 Black. Rep. 770.

[24]

Tithes are Predial, Mixed, or Personal.

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;[s] the second *mixed*, as of wool, milk, pigs, &c.,[t] consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid 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.[u]

For what tithes are paid.

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, except by special custom;[v] nor for creatures that are of a wild nature, or *ferae naturae*, as deer, hawks, &c. whose increase, so as to profit the owner, is not annual, but casual.[w] We shall consider, 1. In whom that right at present subsists. 2. Who may be discharged, either totally or in part, from paying them.

[28]

1.—In whom the right at present subsists.

1. It is now universally held,[x] that tithes are due, of common right, to the parson of the parish, unless there be a special exemption. This parson of the parish, 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.[y]

2.—Who may be discharged from paying tithes.

2. Next let us see, 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; secondly, by custom or prescription; and, thirdly by commutation.

[s] 1 Roll. Abr. 635; 2 Inst. 649.
[t] *Ibid.*
[u] 1 Roll. Abr. 656.
[v] Toll. 152, 153.
[w] 2 Inst. 651.
[x] Regist. 46; Hob. 296; 1 Bla. Com. 385.
[y] In extra-parochial places the King, by his royal prerogative, has a right to all the tithes. See 1 Bla. Com. p. 113, 284.

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 parton, 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.[z] 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 shewing that even this caution was ineffectual, and the possessions of the church being, by this and other means, every day diminished, the disabling statute 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. 1.—By real composition.

Secondly, a discharge by custom or prescription, is where such persons or such lands have been either partially or totally discharged from the payment of tithes. This custom or prescription is either *de modo decimandi*, or *de non decimando*. 2.—By custom or prescription.

A *modus decimandi*, 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 actual 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 labour, as that the parson shall have only the twelfth cock Modus decimandi.

[z] 2 Inst. 490; Regist. 38; 13 Rep. 40.

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.

[30] What is a good modus.

To make a good and sufficient *modus*, the following rules must be observed. 1. It must be *certain* and *invariable*,[a] 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:[b] thus a *modus*, to repair the *church* in lieu of tithes, is not good, because that 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:[c] one load of hay, in lieu of *all* tithe hay, is no good *modus*: for no parson would *bonâ fide* 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.[d] Thus a *modus* of 1*d.* for every *milch* 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:[e] and therefore a *modus* that every *inhabitant* of a house shall pay 4*d.* 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

[a] 1 Keb. 602.
[b] 1 Roll. Abr. 649.
[c] 1 Lev. 179.
[d] Cro. Eliz. 446; Salk. 657.
[e] 2 P. Wms. 462.

large, which is called a *rank modus*: as if the real value of the tithes be 60*l. per annum*, and a *modus* is suggested of 40*l.*, this *modus* will not be established; though one of 40*s.* might have been valid.[f] Indeed, properly speaking, the doctrine of *rankness* in a *modus*, is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law.[g]

[31]

Prescription de non decimando.

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.[h] So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiae.*[i] But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable.[j] And, generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet.*[k]

Late act as to claims of modus and exemption from tithes.

By the 2 & 3 W. 4, c. 100, certain alterations are made as to the time required in proving claims of *modus decimandi*, or exemption from, or discharge of tithes. By s. 1, it is enacted that all prescriptions and claims of any *modus*, or of any exemption or discharge of tithes by composition real or otherwise, shall be sustained and held valid, upon evidence shewing, in case of *modus*, the payment of such *modus*, and in cases of exemption, the enjoyment of the land without payment of tithes for the full period of *thirty* years next before the time of such demand, except under the special circumstances therein mentioned. By s. 2, it is enacted, that every composition for tithes, made or confirmed by the decree of any Court of Equity in England, in a suit to which the ordinary, patron, and incumbent were parties, shall be valid; and that no *modus* or exemption shall be within the act, unless it shall be proved to have existed one year next before the passing of the act.

3.—By Commutation of tithes.

Thirdly, by commutation. A third mode of exemption

[f] 11 Mod. 60.

[g] *Pyke* v. *Dowling*, Hil. 19 G. 3, C. B.

[h] Cro. Eliz. 511.

[i] Cro. Eliz. 479, 511; Sav. 3; Moor, 910.

[j] Cro. Eliz. 479.

[k] *Ibid.* 511.

from payment of tithes, which will soon be the most common of any, is by commutation, and this has frequently been effected by acts of parliament, limited in their operation to particular places, but is now to be rendered general throughout the country, by virtue of the act, the 6 & 7 W. 4, c. 71. This important measure contemplates and provides for two modes of commutation, the one voluntary, the other compulsory; the latter comes into operation on the 1st of October, 1838: the former may now be adopted. Commissioners are appointed under the act, to carry its provisions into effect; the equivalent for tithes is to be a corn rent, payable in money according to the value of a fixed quantity of corn, as ascertained from year to year by the average price of corn for the seven years, ending at the preceding Christmas. Under this act, the whole of the intricate and difficult law relating to tithes will speedily become obsolete.

[32] III. Common, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as, to feed his beasts, to catch fish, to dig turf, to cut wood, or the like.[1] And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

III. Common.

Of four sorts.

[33] I. 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.[m]

I.—Common of pasture.

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 lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity; but may be annexed to lands in other lordships,[n] or extend to other

[1] Finch, Law. 157.

[m] Co. Litt. 122.

[n] Cro. Car. 482; 1 Jon. 397.

beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This not arising from any natural propriety or necessity, like common appendant, is therefore not of general right; but can only be claimed by usage and prescription, or by modern special grant,[o] which the law esteems sufficient proof of a special grant or agreement for this purpose. A right or benefit claimed by prescription, must strictly have been proved to have commenced from the time of legal memory or the reign of Rich. I. But this rule being obviously inconvenient, was not closely adhered to by the Courts, and proof of enjoyment as far back as living witnesses could speak, unless rebutted by other testimony, raised a presumption of an enjoyment from a remote era. By a recent act (2 & 3 W. 4, c. 71,) however, it is enacted that after *thirty* years enjoyment, claims to common and other profits *a prendre* shall not be defeated by shewing that they were first enjoyed at any period prior to the thirty years, but such claims may be defeated in any other way by which the same were then liable to be defeated: and when such rights shall have been enjoyed for *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken by some agreement expressly made for that purpose by deed or writing (s. 1.). Common *because of vicinage*, or neighbourhood, 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 hath any person of one town a right to put his beasts originally into the other's common: but if they escape, and stray thither of themselves, the law winks at the trespass.[p] Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's

Late act as to claims to common.

[34]

[o] Co. Litt. 121, 122; *Cowlam* v. *Slack*, 15 East, 108. [p] Co. Litt. 122.

person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a 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.

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.

Enclosure of common.

By the statute of Merton, however, and other subsequent statutes,[q] the lord of a manor may enclose so much of the waste as he pleases, for tillage or wood ground, 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."[r] The lord hath 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; but the statute of Merton only extends to common of pasture.[s] Commons are now very frequently inclosed under private or general inclosure acts. The general acts are the 41 G. 3, c. 109, amended by the 1 & 2 G. 4, c. 23, and the 6 & 7 W. 4, c. 115.

2 3 Common of piscary.

2, 3. Common of *piscary* is a liberty of fishing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground.[t] 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 those aforementioned, are a right of carrying away the very soil itself.

[35]

4. Common of turbury.

4. Common of estovers or *estouviers*, that is, *necessaries* (from *estoffer*, to furnish) is a liberty of taking ne-

q 20 Hen. 3, c. 4; 29 G. 2, c. 36; 31 G. 2, c. 41; and 10 G. 3, c. 42.

r 2 Inst. 474.

s 9 Rep. 113; Wils. 17; 6 T. R. 741; 1 Taunt. 435.

t Co. Litt. 122.

cessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, *bote*, is used by us as synonimous to 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; plough-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.[u]

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 house-bote, plough-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 the king's highways, which lead from town to town; nor yet 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.[v] A way may be also by prescription; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to

IV.—Ways.

[36]

[u] Co. Litt. 41.

[v] Finch, Law. 31.

cross such a ground, for such a particular purpose: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses 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 cross his land for that purpose without tresspass.[w] For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same.[x]

Late act as to claims of right of way.

By the 2 & 3 W. 4, c. 71, s. 2, it is enacted that no claim of right of way uninterruptedly enjoyed for *twenty* years, shall be defeated by shewing that such way was first enjoyed at any time prior to such period of twenty years: but such claim may be defeated in any other way by which the same was then liable to be defeated; and where such way shall have been enjoyed for the full period of *forty* years, the right shall be deemed absolute and indefeasible, unless it shall appear that there was some agreement expressly made for the purpose by deed or writing. But it has been held under this act that the claimant must shew that he has enjoyed the way for the full period of twenty years, and that he has done so of right, and without interruption, and that such claim may be answered by proof of a license, written or parol, for a limited period, comprising the whole or part of the twenty years.[y]

V.—Offices.

V. Offices, which are a right to exercise a public or private employment, and to take 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 jus-

w Finch, Law. 63.

x Co. Litt. 56.

y *Bright* v. *Walker*, 1 Cr. M. & Ros. 211; 4 Tyr. 502. *Monmouth Canal Company*, 1 Cr. M. & Ros. 614. 5 Tyr. 68. *Payne* v. *Shedden*, 1 Moo. & R. 382.

tice, for then they might perhaps vest in executors or administrators.[z] 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;[a] for those may be executed by deputy. Also by statute 5 & 6 Edw. VI. c. 16, extended by the 49 G. 3, c. 26, and 6 G. 4, c. 82 & 83, no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it. For the law presumes 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. [37]

VI. Dignities bear a near relation to offices. It will here be sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate. VI. Dignities.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is,[c] 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.[d] VII. Franchises.

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 Mention of several.

z 9 Rep. 97.
a 11 Rep. 4.
c Finch, Law. 164.
d 2 Roll. Abr. 191; Keilw. 196.

corporation is also said to have a franchise or freedom. Other franchises are, to hold a court leet: to have a
[38] 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, or 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;[e] 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.

Forest. As to a *forest*: this, in the hands of a subject, is properly the same thing with a chase; being subject to the
Chase. common law, and not to the forest laws.[f] But a *chase* differs from a park, in that it is not inclosed, and also in that a man may have a chase in another man's ground as well as in 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
Park. thereon. A *park* is an inclosed chase, extending only over a man's own grounds. The word *park* indeed properly signifies an 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.[g] 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

e 2 Inst. 220.

f 4 Inst. 314. But see Mannw. For. pl. 77.

g Co. Litt. 233; 2 Inst. 199; 11 Rep. 86.

person to kill any beasts of park or chase,[h] except such as possess these franchises of forest, chase, or park. [39]

Free-warren is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren;[i] 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 might be shewn at length, 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. There are many instances of keen sportsmen in ancient times, who have sold their estates, and reserved the free-warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free-warren over another's ground.[j] 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 feodal polity has prevailed:[k] 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.[l] This differs from a *several* fishery; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil,[m] 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 [40]

Free warren.

Free fishery.

[h] 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.

[i] The beasts are hares, conies, and roes: the fowls are either *campestres*, as partridges, rails, and quails; or *sylvestres*, as woodcocks and pheasants; or *aquatiles*, as mallards and herons. *Ibid.*

[j] Bro. Abr. tit. *Warren*, 3.

[k] Seld. *Mar. Claus. I.* 24, Dufresne. V. 503. Crag. *de Jur. feod. II.* 8, 15.

[l] *Cap.* 47, *edit. Oxon.*

[m] M. 17 Edw. 4, 6. P. 18 Edw. 4; T. 10 Hen. 7, 24, 26. Salk. 637.

man has a property in the fish before they are caught; in a common of piscary not till afterwards.[n] 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.[o] But to consider 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 1.) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect of this matter, with which our books are embarrased. For it must be acknowledged, that the rights and distinctions of the three species of fishery are very much confounded in our law-books; and that there are not wanting respectable authorities[p] which maintain, that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

Limitation of claim as to franchises.

By the 2 & 3 W. 4, c. 71, s. 1, it is enacted, that no claim which may be lawfully made at the common law by custom, prescription, or grant, to any profit or benefit to be taken and enjoyed from or upon any land of the King, shall when such profit or benefit shall have been actually taken and enjoyed by any person, claiming right thereto without interruption for the full period of *thirty* years, be defeated or destroyed by shewing only that such profit or benefit was first taken or enjoyed at any time prior to such period of thirty years; but nevertheless such claim may be defeated in any other way, by which the same was then liable to be defeated; and when such profit or benefit shall have been so taken and enjoyed as aforesaid, for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made for that purpose by deed or writing.

VIII. Corodies.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's main-

[n] F. N. B. 88; Salk. 637.

[o] 2 Sid. 8.

[p] See them well digested in Hargrave's notes on Co. Lit. 122

tenance.[q] In lieu of which (especially when due from ecclsiastical persons) a pension or sum of money is sometimes substituted. 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 burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor.[s] Therefore, if a man by deed grant to another the sum of 20*l. 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;[t] and yet a man may have a real estate in it, though his security is merely personal. IX. Annuities. [41]

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 acknowlegement given for the possession of some corporeal inheritance.[u] 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.[v] It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which services 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 X. Rents, requisites of.

q Finch, Law. 162.
s Co. Litt. 144.
t *Ibid.* 2.
u *Ibid.* 144.
v Co. Litt. 142.

is no occasion for it to issue every successive year: but it may be reserved every second, third, or fourth year:[w] yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or 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.[x] It must, lastly, issue out of *lands and tenements corporeal;* that is, from some in-
[42] heritance 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;[y] (although it may be out of tithes, with all properties of rent, except distress.) 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:[z] though it doth not affect the inheritance, and is no legal rent in contemplation of law.

Of three kinds: rent-service.

There are at common law[a] three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it hath some corporal service incident to it, as at the least fealty or the feodal oath of fidelity.[b]

Rent-charge.

A *rent-charge,* is where the owner of the rent hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee simple, with a certain rent payable thereout, 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 by virtue of the clause in the deed: and therefore it is called a rent-*charge,* because in this manner the land is

Rent-seck.

charged with a distress for the payment of it.[c] *Rent-seck, reditus siccus,* or barren rent, is in effect nothing

w Co. Lit. 47.
x Plowd. 13; 8 Rep. 71.
y Co. Litt. 144; 3 Wils. 25; 2 Saund. 303.
z *Ibid.* 47.
a Litt. s. 213.
b Co. Litt. 142.
c *Ibid.* 143.

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 *assise* are the certain established rents of the freeholders and ancient copyholders of a manor,[d] which cannot be departed from or varied. Those of the freeholders are frequently called *chief* rents, *reditus capitales;* 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;*[e] in contradistinction to rents reserved in work, grain, or baser money, which were called *reditus nigri* or *black mail.*[f] *Rack*-rent is only a rent of the full value of the tenement or near it. A *fee-farm* rent is a rent issuing out of an estate in fee; of at least one fourth of the value of the lands, at the time of its reservation:[g] 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. Other species of rents. [43]

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 assise, and chief-rents, as in case of rents reserved upon lease.[h] Differences now abolished.

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation:[i] but, in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country.[j] And, strictly, the rent is demandable and payable before the time of sun-set of the day whereon it is reserved;[k] though perhaps not absolutely due till midnight.[l] Where rent is payable.

[d] 2 Inst. 19.

[e] In Scotland this kind of small payment is called *blanch-holding*, or *reditus albae firmae*. See *Bradbury* v. *Wright*, Dougl. 604, note 1, as to the definition of a fee-farm rent.

[f] 2 Inst. 19.

[g] Co. Litt. 143.

[h] Stat. 4 G. 2, c. 28.

[i] Co. Litt. 201.

[j] 4 Rep. 73.

[k] Co. Litt. 302; 1 Anders. 253.

[l] 1 Saund. 287; Prec. Chanc. 555; Salk. 578.

BOOK THE SECOND.

OF TENURES.

CHAPTER THE FIRST.

OF THE MANNER IN WHICH REAL PROPERTY MAY BE HELD.

Lay tenures are of two species.

ALL lay tenures are in effect reduced to two divisions, free tenure in common socage, and base tenure, by copy of court roll, called copyhold. And it will be the chief object of this chapter to explain what these are, touching very briefly on their origin and history.

[59]

Tenures: definition of.

By the policy of our laws, originally derived from the feudal system, almost all the real property of this kingdom is supposed to be granted by, dependent upon, and *holden* of some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore stiled 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 holden, mediately or immediately, of the King; who is stiled the lord *paramount*, or above all. And this principle of law it is not intended to disturb.[m]

[61]

Tenements of two kinds; frank-tenement and villenage.

"Tenements (says Bracton) are of two kinds, *frank-tenement*, and *villenage*.[n] 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, "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 kind of villenage is called

[m] See Third Real Property Report, p. 1. [n] Lib. 4, Tr. 1, c. 28.

villein socage; and these villein-socmen do villein services, but such as are certain and determined."

[62] And first, as to frank-tenement.—The first, most universal, and esteemed the most honourable 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,[o] which name is expressly given it by the Mirrour,[p] and which was attended with certain consequences, as aids, relief, primer seisin, wardship, the disposing of the ward on marriage, fines for alienation, and escheat.

I. Frank-tenement. Of two sorts. 1. Knight-service.

[73] This tenure, by which the greatest part of the lands in this kingdom were holden, and that principally of the King *in capite*, till the middle of the last century, was created, as Sir Edward Coke expressly testifies,[q] for a military purpose; *viz.* for defence of the realm by the King's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. This description alludes to knight-service proper; which was to attend the King in his wars. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable 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 serjeanty per magnum servitium*, whereby the tenant was bound instead of serving the King *generally* in his 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.[r]

Various kinds of knight-service.

Grand serjeanty.

[74] These services, both of chivalry and grand serjeanty, 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

Escuage; definition of.

[o] Spelm. Gloss. 219.
[p] C. 2, s. 27.
[q] 4 Inst. 192
[r] Litt. s. 153.

assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti: scutum* being then a well-known denomination for money: and, in like manner, it was called, in our Norman French, *escuage;* being indeed a pecuniary, instead of a military, service.

[75] By the degenerating of knight service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feodal constitution were destroyed, and nothing but the hardships remained. Palliatives were from time to time applied by successive acts of parliament, which assuaged some tempo-

[77] rary grievances; and at length the military tenures, with all their heavy appendages (having during the Usurpation been discontinued) were destroyed at one blow by the statute 12 Car. 2, c. 24, which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisins, 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, knight's-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the 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, copyholds, and the honorary services (without the slavish part) of grand serjeanty." 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 vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches.

A still further alteration of the law of tenures has been proposed by the Real Property Commissioners in their Third Report, as will be noticed in the ensuing pages. But it is proper here to observe, that they consider that the honorary services of grand serjeanty should be preserved.[a]

[a] Third Real Property Report, p. 7.

By the stat. 12 Car. 2, then, all tenures except frankalmoign, the honorary services of grand serjeanty, and copyholds, were reduced to one general species of tenure, then well known and subsisting, called free and common socage. [78]

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to 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 a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure, and this tenure it is not proposed to alter.[s] 2. Socage.

Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. [79] Definition of.

Socage, 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,[t] 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. Of two sorts: free-socage and villein-socage. [80]

The grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, and it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage* and *gavelkind*. [81] Distinguishing marks of.

Petit serjeanty, bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. Petit serjeanty, as defined by Littleton,[u] consists in holding lands of the king by the service of Petit serjeanty. Definition of.

[s] See Third Real Property Report, p. 8.

[t] Lib. 3, c. 7.

[u] Sec. 159.

rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like.

[82] Tenure in burgage.

Tenure in *burgage* is described by Glanvil,[v] and is expressly said by Littleton,[w] 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.[x]

The Commissioners do not propose to make any alteration, either in the tenure of petit serjeanty, or tenure in burgage.

[83] Borough English.

The free-socage 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 many of 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,[y] and by Littleton;[z] *viz.* that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father.

The Commissioners propose entirely to abolish the custom of *Borough English*.[a]

[84] Gavelkind.

The distinguishing properties of the tenure of gavelkind 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.[b] 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 plough;"[c] but it escheats for want of heirs, and in felony, if the felon be outlawed.[d] 3. In most places he had a power of devising lands by will, before the statute for that purpose was made.[e] 4. The lands descend, not to the eldest, youngest, or any son only, but to all the sons together;[f] which was indeed anciently the most usual course of descent all over England.[g] 5. That the widow is dowable

[85]

[v] Lib. 7, c. 3.
[w] Sec. 162.
[x] Litt. s. 102, 163.
[y] *Ubi supra.*
[z] Sec. 165.
[a] See Third Real Prop. Rep. p. 8.
[b] Lamb. Peramb. 614.
[c] Lamb. 634.
[d] Rob. Gav. 229.
[e] F. N. B. 198; Cr. Car. 561.
[f] Lit. s. 210.
[g] Glanvil, *l.* 7, c. 3.

of one half instead of a third; and 6. That the husband is tenant by the curtesy, whether there be issue born or not, but only of one half.[h]

It is proposed entirely to abolish the tenure of gavelkind.[i]

Thus much for the two great species of tenure, under which almost all the free lands of the kingdom were holden till the Restoration in 1660, when the former was abolished and sunk into the latter: so that lands of both sorts are now holden by the one universal tenure of free and common socage. [89]

The other grand division of tenure, is that of *villenage*, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember), Bracton subdivided into two classes, *pure* and *privileged* villenage: from whence have arisen two other species of our modern tenures. II. Villenage. Of two sorts.

1. 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 prievously necessary to take a short view of the original and nature of manors. [90] 1. Pure Villenage: Copyholds.

A manor, *manerium, a manendo*, 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*, and his servants. The other, or *tenemental* lands, they distributed among their tenants: which from the different modes of tenure were 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:[j] and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species are called *folk-land*, which was held by no assurance in writing, but distributed among the com- Manors; what they are.

[h] Robt. Gav. b. 2. c. 1.
[i] Third Real Property Report, p. 12.
[j] Co. Cop. sec. 3.

mon 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, for redressing misdemeanors and nuisances within the manor, 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, subject to escheats,[k] the manor itself is lost.

[92] When they must originate.

All manors existing at this day, must have existed as early as King Edward the First: for it is essential to a manor, that there be tenants who hold of the lord; and by the operation of the statutes 17 Ed. 2, c. 6, and 34 Ed. 3, c. 15, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, 18 Ed. 1, c. 1, could create any new tenants to hold of himself.

Origin of copyholds.

Now with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feodal, Norman, or Saxon; but mixed and compounded of them all:[l] and which also, on 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,[m] 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 removeable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable that

k *Glover* v. *Lane*, 3 T. R. 447. See *contrà*, *Long* v. *Heming*, Cro. Eliz. 210; and Co. Litt. 58 a.

l Wright, 215.

m Introd. Hist. Engl. 59.

they who were strangers to any other than a feodal 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.[n] This they called villenage, and the tenants villeins.

[95] Villeins.

Villeins, 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 shew 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*.[o]

[97] Supporters of copyholds.

As a farther consequence of what has been premised, we may collect these two main principles, which are held[p] to be the supporters of the 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

[n] Wright, 217.
[o] F. N. B. 12.
[p] Co. Litt. 58.

all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day, nor can copyholds be created by operation of law.[q]

Different species of.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are stiled 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 instance, 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 by the precarious tenure of his lord's will.

Appendages of copyhold tenures.

The fruits and appendages of a copyhold tenure that it hath 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 for 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 need not speak at length, 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 seised them even in the villein's lifetime. But it is now proposed to abolish heriots, and to substitute the sum of 5*l.*, to be paid by the succeeding tenant.[s] These are incident to both
[98] 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 the 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 seisins, due on the death of each tenant, others are mere

[q] 2 T. R. 415, 705.

[s] Third Real Property Report, p. 19.

fines for the alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and 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 favour of the liberty of copyholders, have tied them down to be *reasonable* in their extent; otherwise they might amount to a disherison of the estate. No fine therefore is allowed to be taken upon descents and alienations, (unless in particular circumstances) of more than two years improved value of the estate.[t]

2. Ancient demesne, which had its origin from privileged villenage, consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually [99] 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.[u] The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies,[v] 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.[w] Others were in great measure enfranchised by the royal favour: being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain; as, to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them;[x] 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*;[y] not to pay toll or taxes; not to contribute to the expenses of knights of the shire; nor to be put on juries; and the like.[z]

2. Privileged villenage. Ancient demesne.

[t] Ch. Rep. 134. As to the recovery of these fines, see the 11 G. 4, and 1 W. 4, c. 65; and see further as to copyholds, Book IV. Chap. X.

[u] F. N. B. 14, 16.

[v] c. 66.

[w] F. N. B. 228.

[x] 4 Inst, 269.

[y] F. N. B. 11.

[z] *Ibid.* 14.

[100] These tenants therefore, though their *tenure* be absolutely copyhold, yet have an *interest* equivalent to a freehold: for, notwithstanding their services were of a base and villenous original,[a] yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially for 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: "*et ideo*, says Bracton, *dicuntur liberi.*"

Lands holden 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
[101] common copyholds: yet with this distinction,[b] that, of the surrender of these lands in ancient demesne, 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.*"

The Commissioners propose to convert the tenure of ancient demesne into free and common socage, and that courts of ancient demesne shall become courts baron.[c]

I have hitherto mentioned *lay* tenures only; but 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.

Tenure in frank almoign.

Tenure in *frankalmoign, in libera eleemosyna*, or free alms, is that, whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever.[d] 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

a Gilb. Hist. of Exch. 16 & 30.
b Kitchin on Courts, 194.
c See 3d Real Property Rep., p. 13.
d Litt. s. 133.

incident to all other services but this[e]) because this divine service was of a higher and more exalted nature.[f] 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;[g] the nature of the service being upon the Reformation altered, and made comformable to the purer doctrines of the church of England. It was an old Saxon tenure; and continued [102] under the Norman revolution, through the great respect that was shewn 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 highways, building castles, and repelling invasions:[h] just as the Druids, among the ancient Britons, had *omnium rerum immunitatem*.[i] And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feodal, 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 holden; but merely a complaint to the ordinary or visitor to correct it.[j] Wherein it materially differs 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.[k] 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 holden by this tenure.[l] 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.

The Commissioners do not propose making any alteration in the tenure of *frankalmoign*.[m]

e Litt. s. 131.
f *Ibid.* 135.
g Bracton, *l.* 4, tr. 1, c. 28, s. 1.
h Seld. Jan. 1, 42.
i Cæsar de bell. Gal. l. 6, c. 13.
j Litt. s. 136.
k *Ibid.* 137.
l *Ibid.* 140.
m See Third Real Property Report, p. 7.

CHAPTER THE SECOND.

OF USES AND TRUSTS.

Importance of the doctrine of uses and trusts.

WE here propose to give a brief account of the doctrine of uses and trusts, a learning which pervades the whole system of the law of real property, and without some knowledge of which, it is impossible to understand either its theory or its practice. The introduction of uses and trusts, and the passing of the Statute of Uses, almost entirely subverted the feudal system, and the tenures which arose out of it. Nearly all the assurances now employed, operate by virtue of this statute; and we shall see in the ensuing portions of this work, what important alterations the doctrine of uses has made, being in fact the foundation of the modern system of conveyancing. This place appears on the whole the most convenient for introducing an outline of this some-what difficult learning, which however the student will more perfectly understand when he is acquainted with every part of this volume:

[327] Uses and trusts: what they are.

Uses and *trusts* are in their original of a nature very similar, answering more to the *fidei-commissum* than the *usus-fructus* 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.[m] But the *fidei commissum*, which usually was created by will, was the disposal of an inheritance to one, in [328] confidence that he should convey it or dispose of the profits at the will of another. In our law, a use is 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 use*, or him to whose use it was granted, and suffer him to take the profits.[n] As, if a conveyance was made to A. and his

[m] Ff. 7, 1, 1. [n] Plowd. 352.

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.

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The idea which was introduced by the ecclesiastics,[o] however fraudulently, 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 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,[q] 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.

Progress of the doctrine of uses.

Originally it was held that the chancery could give no relief, but against the very person himself intrusted 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;[q] 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.[r] 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,[s] nor any corporation aggregate, on account

[o] See *post*, Book IV. ch. 6.

[p] On Uses, 313. But see 2 Leon. 14, where the origin of Uses is referred to a much earlier period.

[q] Keilw. 42; Year Book, 22 Edw. 4, 6.

[r] Keilw. 46; Bacon of Uses, 312.

[s] Bro. Abr. tit. Feoffm. al. Uses, 31; Bacon of Uses, 346, 347

[330] of its limited capacity,[t] could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the releasee 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 to whom dower was assigned, were liable to perform the use;[u] 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.

Rules relating to uses before the statute.

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*;[v] or whereof the seisin could not be instantly given.[w] 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:[x] unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions.[y] But, if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration.[z] 3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession;[a] for in this and many other respects *aequitas sequitur legem*, 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,[b] or be devised by last will and testament:[c] for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and, as the intention of [331] the parties was the leading principle in this species of pro-

[t] Bro. Abr. tit. Feoffm. al uses, 40; Bacon, 347.
[u] 1 Rep. 122.
[v] 1 Jon. 127.
[w] Cro. Eliz. 401.
[x] See *post*, Book IV. ch. 8.
[y] 1 And. 37.
[z] Moor, 684.
[a] 2 Roll. Abr. 780.
[b] Bacon of Uses, 312.
[c] *Ibid.* 308.

perty, 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 ;[d] to whom he was accounted by law to be only tenant at sufferance.[e] 5. Uses were not liable to any of the feodal burthens ; and particularly did not escheat for felony or other defect of blood; for escheats, &c. 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.[f] 6. No wife could be endowed, or husband have his curtesy, of a use :[g] 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.[h] 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestuy que use*.[i] For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised 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 subtile 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 outlines will be fully sufficient to shew the ground of Lord Bacon's complaint,[j] 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 [332] thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent

[d] Stat. 1 Ric. 3, c. 1.
[e] Bro. Abr. *ibid.* 23.
[f] Jenk. 190.
[g] 4 Rep. 1; 2 And. 75.
[h] See *post*; Book III. ch. 2.
[i] Bro. Abr. tit. *Executions*, 90.
[j] Use of the Law, 153.

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*,[k] allowed actions for the freehold to be brought against him, if in the actual pernancy or enjoyment of the profits;[l] made him liable to actions of waste;[m] established his conveyances and leases made without the concurrence of his feoffees;[n] and gave the lord the wardship of his heir, with certain other feodal perquisites.[o]

Statute of uses, 27 Hen. 8, c. 10.

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*, which after reciting the various inconveniences before-mentioned, and many others, enacts, that "when any person shall be *seised* of lands, &c. to the use, confidence, or trust, of any other person or body [333] 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, &c. of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised 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.

Which executes the use.

Since the statute the courts of law take cognizance of uses.

The statute having thus, not abolished the conveyance to uses, but only annihilated the intervening estate of the releasee, and turned the interest of *cestuy que use* into a legal instead of an equitable ownership; the courts of

[k] Stat. 50 Edw. 3, c. 6; 2 Ric. 2, sess. 2, 3; 19 Hen. 7, c. 15.

[l] Stat. 1 Ric. 2, c. 9; 4 Hen. 4, c. 7, c. 15; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1.

[m] Stat. 11 Hen. 6, c. 5.

[n] Stat. 1 Ric. 3, c. 1.

[o] Stat. 4 Hen. 7, c. 17; 19 Hen. 7, c. 15.

common law began to take cognizance of uses, instead of sending the party 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 seised 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 releasee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account of the seisin of such releasee; 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 seisin of *cestuy que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

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Rules relating to uses since the statute.

The various necessities of mankind induced also the judges very soon to depart from the rigour 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,[p] 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.[q] Which doctrine, when devises by will were again introduced, and considered as

[p] 2 Roll. Abr. 791; Cro. Eliz. 439. [q] Bro. Abr. tit. *Feoffm. al Uses*, 30.

equivalent in point of construction to declarations of uses, was also adopted in favour of *executory devises*.[r]

Contingent or springing uses.

But herein these, which are called *contingent* or *springing* uses, differ from an executory devise; in that there must be a person seised 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 releasee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever:[s] 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;[t] because, though that was forbidden by the common law in favour 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 permitted to be limited in equity; and then 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*;[u] as, if A.

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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.[v] 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 she dies without issue, the whole results back to him in fee.[w] 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 that the grantor reserved to himself such a power at

Secondary or shifting uses.

Resulting use.

Uses arising under powers.

[r] See *post*, Book III. ch. 5.
[s] 1 Rep. 134, 138; Cro. Eliz. 439.
[t] Pollexf. 78; 10 Mod. 423.
[u] Bro. Abr. tit. *Feoffm. al Uses*, 30.
[v] Bacon of Uses, 351.
[w] *Ibid.* 350; 1 Rep. 120.

the creation of the estate; whereas, the utmost that the common law would allow, was a deed of defeazance, coeval with the grant itself, (and therefore esteemed a part of it) upon events specifically mentioned.[x] 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.[y] And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who, (as Lord Bacon observes[z]) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

The jurisdiction of the courts of equity.

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,"[a] 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.[b] And therefore, on a feoffment [336] 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 seised 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 *seised* to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed*;[c] 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

[x] See *post*; Book IV. c. 7.
[y] Co. Litt. 237.
[z] On Uses, 316.
[a] Dyer, 155.
[b] 1 And. 37, 136.
[c] Bacon, Law of Uses, 335; Jenk. 244.

leaves it as at common law.[d] 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.[e]

Doctrine of Trusts.

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.[f] To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts*: and thus, by means of this doctrine of trusts, to use the words of Lord Mansfield[g], a noble, rational, and uniform system has been raised, which is made to answer the exigencies of family and all useful purposes, without producing one inconvenience, fraud, or private mischief, which the Statute of Uses meant to avoid. Blackstone has said,[h] that trusts are now exactly the same as uses were before the statute. A use indeed, before the Statute of Uses was, as a trust is since, a *fiduciary* or beneficial interest, distinct from the legal estate, and so far the expression is correct: but though there is no difference in the principles, there is a wide difference in the exercise of them.[i]

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Rules as to trusts.

For the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The statute of frauds, 29 Car. II. c. 3. having required that every declaration, assignment, or grant of any trust in lands or hereditaments, (except such as arise from implication or construction of law) shall be made in writing signed by the party, or by his written will, the courts now consider

[d] Poph. 76; Dyer, 369.
[e] 1 Equ. Cas. Ab. 383, 384; 1 Sand. Us. 244. 1 Hal. P. C. 248.
[g] 1 Wm. Bla. 160.
[h] 2 Com. page 327.
[i] 1 Wm. Bla. 180; 1 Sand. Us. 266, 4th edit.

a trust estate (either when expressly declared or resulting by such 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 trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consider on to a purchaser without notice;[j] which, as *cestuy que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances, (by the express provision of the Statute of Frauds) to forfeiture, to leases and other incumbrances, nay even to the curtesy of the husband, as if it was an estate at law; and it has recently[k] been subjected to dower. It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs:[l] because the trust could never be intended for his benefit. But let us now return to the Statute of Uses.

Use of the statute.

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain 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 seisin, the only ancient conveyance of corporeal freeholds. These conveyances as we have already observed, are now principally adopted in the transfer of real property; and have nearly superseded the ancient mode of conveyance at common law, as will be more fully seen in the Fourth Book of this work.

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j 2 Freem. 43.

k See *post*, Book III. Chap. 2.

l Hadr. 494, Burgess and Wheat, 1 Eden, 186; H. Bla. 121.

BOOK THE THIRD.

OF ESTATES IN REAL PROPERTY.

CHAPTER THE FIRST.

[103] OF FREEHOLD ESTATES, OR INHERITANCE.

Estate, what it is.

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 hath therein; so that if a man grant all *his estate* in Dale to A. and his heirs, every thing that he can possibly grant shall pass thereby.[m] 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.

To be considered in a three-fold light.

First as to the quantity of interest.

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, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occa-

[m] Co. Litt. 345. But see *Derby* v. *Taylor*, 1 East, 502, as to the effect of the common clause of "*all the estate*," for which see Appendix, No. 1. p. ii.

sions the primary division of estates, into such as are *freehold*, and such as are *less than freehold*.

Estates divided into freehold and less than freehold.

Estates of freehold are either estates *of inheritance*, or 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.

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Estates of freehold are either estates of inheritance or estates not of inheritance

Estates of inheritance are either inheritances in fee-simple or limited fees.

1. Tenant in fee-simple (or, as he is frequently stiled, tenant in fee), is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever;[n] 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 (*feodum*), is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium*; which latter the writers on this subject define to be every man's own land, which he possesseth 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 hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo*, in his own demesne. But *feodum*, or fee, is that which is held of some superior, on condition of rendering him service; in which superior, the ultimate property of the land resides. And therefore Sir Henry Spelman[o] defines a feud or fee to be the right which the vassal or tenant hath 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;[p] it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium*;[q] but all subjects' lands are in the nature of *feodum* 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 feodal clogs, which were laid

1. Tenant in fee simple.

[105]

Difference between feudal and allodial property.

[n] Litt. s. 1.

[o] Of Feuds, c. 1.

[p] Co. Litt. 1.

[q] *Praedium domini regis est directum dominium, cujus nullus est author nisi Deus. Ibid.* See *ante*, p. 22.

upon the first feudatory when it was originally granted. A subject therefore, hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it,[r] he hath *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 the words; "he is seised 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 feodal; 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.

[106] Fee-simple.

This is the primary sense and acceptation of the word *fee*. But (as Sir Martin Wright very justly observes)[s] the doctrine, that "all lands are holden," 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 seised in fee, he being the feudatory of no man.[t]

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

[r] Co. Litt. 1.
[s] Of Ten. 148.
[t] Co. Litt. 1.

kind of hereditaments either corporeal or incorporeal.[u] But there is this distinction between the two species of hereditaments; that of a corporeal inheritance a man shall be said to be seised *in his demesne, as of fee;* of an incorporeal one, he shall only be said to be seised *as of fee,* and not in his demesne.[v] For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses,[w] their owner hath no property, *dominicum,* or demesne, in the *thing* itself, but hath only something derived out of it; resembling the *servitutes,* or services, of the civil law.[x] The *dominicum* or property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seised *as of fee* of a way leading over the land, of which Titius is seised *in his demesne as of fee.*

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Where it resides.

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers 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 determination of those years or lives, the land reverts to the grantor orhis heirs, who shall hold it again in fee-simple. Yet sometimes the fee has been said to be in *abeyance,* that is, (as the word signifies) in expectation, remembrance, and contemplation in 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:* it is said therefore to remain in waiting or abeyance, during the life of Richard.[y] This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance.[z]

But is sometimes said to be in abeyance.

[u] *Feodum est quod quis tenet sibi et haeredibus suis, sive sit tenementum, sive reditus, &c.* Flet. *l.* 5, c. 5, s. 7.

[v] Litt. s. 10.

[w] See page 4.

[x] *Servitus est jus, quo res mea alterius rei vel personae servit. Ff.* 8. 1. 1.

[y] Co. Litt. 342.

[z] Litt. s. 646.

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.[a]

Doctrine of abeyance exploded.

But this doctrine of abeyance is now very generally exploded. The common sense of the matter is certainly with Mr. Fearne, who shews that the inheritance is not in abeyance, but that it remains in the first case mentioned with the grantor or his heirs, *until* the contingency happens;[b] and Mr. Christian contends further, that in the case of the parson the freehold is in his successor. It is to be observed, however, that the opinion of Blackstone on the point, besides its own weight, is in accordance with almost all the older authorities.

What words necessary to the grant of a fee.

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.[c]

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But there are exceptions to this rule. For, 1: It does not extend to devises by will; in which, as they were introduced at the time when the feodal rigour 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 hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath 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; although if this appear in another part of the will, it will be otherwise. 2. Neither does this rule extend to fines or recoveries, considered as a species of conveyance; for thereby an estate in fee passed by act and operation of law without the word "heirs:" as it does also, for particular reasons, by certain other modes of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed.[d] 3. In creations of nobility by writ, the peer

[a] Litt. s. 6, 7.
[b] Fearne, Cont. Rem. 360, 7th edit.
[c] Litt, s. 1.
[d] Co. Litt. 9.

so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided; but in creations by patent, which are *stricti juris*, 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 doth the successor from the predecessor. Nay, in a grant to a bishop, or other sole spiritual corporation, [109] in *frankalmoign;* the word "*frankalmoign*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini;* 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 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. 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "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. 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.*

II. Limited fees, which are,

1. 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

1. Base fees.

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,[g] and, the instant he or his heirs quitted the seignory of this manor, the dignity was at an end. This
[110] estate is a 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; but the owner has the same rights as tenant in fee, while his estate lasts.[h] Where an estate tail shall have been barred, and converted into a base fee, such base fee may be enlarged into an estate in fee-simple under the 3 and 4 W. 4, c. 74.

2. Conditional fees.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others; 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.

But on the passing of the statute of Westminster
[112] the Second, commonly called the statute *de donis*, 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 they divided the estate into two parts, leaving in the donee a new kind

Origin of fee-tail.

of particular estate, which they denominated a *fee-tail*; 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.[i] And hence it is that Littleton tells us,[j] 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

g Co. Litt. 27. See further as to this estate, *post*, Book IV. Chap. 9.

h 1 Cru. Dig. 79.

i 2 Inst. 335.

j Sec. 13.

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[k] expounds to comprehend all corporeal hereditaments whatever, and also all incorporeal hereditaments which savour 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 certain places, may be entailed.[l] But mere personal chattels, which savour 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 these last, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner.[m] An estate to a man and his heirs for another's life cannot be entailed;[n] for this is strictly no estate of inheritance, (as will appear hereafter) and therefore not within the statute *de donis*. But though not strictly entailable under the statute, yet there are frequently limitations of such an estate to a man and the heirs of his body; and this *quasi* entail may be barred by any ordinary mode of alienation as lease and release, bargain and sale, grant, surrender, or in equity by articles.[o] 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;[p] for here the custom ascertains and interprets the lord's will. [113]

What may be entailed.

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

Different species of estates tail.

k 1 Inst. 19, 20.
l 7 Rep. 33.
m Co. Litt. 19, 20.
n 2 Vern. 225.
o 1 Atk. 523; 2 Vern. 225; 1 Bro. P. C. 457.
p 3 Rep. 8.

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*.[q] 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.[r] I shall instance in only one; as where lands and tenements
[114] 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; nor 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 to whom such heirs shall be begotten, (viz. *Mary his present wife*) this makes it a fee-tail special.

Tail male and female.

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 lands 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*, the heirs male, in case of a gift in tail female.[s] Thus, if the donee in tail male hath 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.[t] 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 hath two estates-tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath 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.[u]

q Litt. s. 14, 15.
r Litt. s. 16, 26, 27, 28, 29.
s *Ibid.* s. 21, 22.
t *Ibid.* s. 24.
u Co. Litt. 25.

What words necessary to create an estate tail.

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feodal 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 [115] 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 *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs.[v] So, on the other hand, a gift to a man and his *heirs male*, or *female*, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue.[w] 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.[x]

Incidents to estates tail.

The *incidents* to a tenancy in tail, under the statute Westm. 2, are chiefly these.[y] 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, [116] 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; and 4, until very recently, that an estate-tail might be *barred*, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir.

Fines and recoveries abolished.

But now by the 3 & 4 W. 4, c. 74, s. 2, fines and recoveries are abolished; and by s. 14, all warranties of lands entered into by tenants in tail, are absolutely void against the issue in tail. Estates tail cannot now therefore be barred, either by fines or recoveries, or by lineal warranty; but they may be barred by virtue of a deed enrolled under that act, (s. 15.) as will be more fully explained in a subsequent part of this work.

v Co. Litt. 20.
w Litt. s. 31; Co. Litt. 27.
x Co. Litt. 9, 27.
y Co. Litt. 224.

[119] Powers of tenant in tail.

At their first existence estates tail could not be aliened at all, but by degrees they became unfettered; and now, as we shall shew hereafter, the tenant in tail is enabled to aliene his lands and tenements by deed founded on the late statute,[z] either absolutely or by way of mortgage; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, even where the reversion is vested in the Crown:[a] secondly, he is now liable to forfeit them for high treason; and, lastly, he may charge them with reasonable leases, and they will be liable after his death to the payment as well of his simple contract as his specialty debts.[b]

[z] 3 & W. 4, c. 74. [a] *Ibid.* s. 15 & 21. [b] 3 & 4 W. 4, c. 104.

CHAPTER THE SECOND. [120]

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 acts of the parties; others merely *legal*, or created by construction and operation of law.[a] We will consider them both in their order.

Estates for life are conventional or legal.

1. 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 the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is stiled tenant for life; only, when he holds the estate by the life of another, he is usually called tenant *pur auter vie*.[b] These estates for life are, like inheritances, of a feodal nature; and were, for some time, the highest estate that any man could have in a feud, which was not in its original hereditary. They were given or conferred by the same feodal rights and solemnities, the same investiture or livery of seisin, 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.

1. Estates for life created by grant.

Estates for life may be created, not only by the express words 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.[c] For though, as there are no words of inheritance, or *heirs*, mentioned in the grant, it cannot be con- [121]

What words will create an estate for life.

[a] Wright, 190.
[b] Litt. s. 56.
[c] Co. Litt. 42.

strued 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*;[d] in case the grantor hath 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,[e] unless in the case of the King.

Estates for life granted on a contingency.

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.[f] 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:[g] 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.

Incidents to an estate for life.

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. He may take estovers or botes.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers*[h] or *botes*.[i] For he

[d] Co. Litt. 42.
[e] *Ibid.* 36.
[f] Co. Litt. 42; 3 Rep. 20.
[g] 2 Rep. 48.
[h] See page 13.
[i] Co. Litt. 41.

hath 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, except for necessary repairs, or do other waste upon the premises:[k] 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 a determination is contingent and uncertain.[l] 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 representatives therefore of the tenant for life shall have the emblements, to compensate for the labour 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. [123] So it is also, if a man be tenant for the life of another, and *cestui 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*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law.[m] 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.[n] The doctrine of emblements extends not only to corn sown, but to roots planted, or other annu-

2. Entitled to the emblements, when.

Doctrine of emblements.

[k] Co. Litt. 53.
[l] *Ibid.* 55.
[m] 5 Rep. 116.
[n] Co. Litt. 55.

al artificial profit, but it is otherwise of fruit trees, grass and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural profit of the earth.[o] For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and 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. The lessees of tenants for life have the same privileges as the tenants themselves.

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[p]: 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*: 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 then marries, this her act shall not deprive the tenant of his emblements, who is a stranger and could not prevent her.[q] 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.[r] To remedy which it is now enacted,[s] that the executors or administrators of tenant for life, on whose death any lease determined, shall

[124]

[o] Co. Litt. 55, 56; 1 Roll. Abr. 728.

[p] Co. Litt. 55.

[q] Cro. Eliz. 461; 1 Roll. Abr. 727.

[r] 10 Rep. 127.

[s] Stat. 11 Geo. 2, c. 19, s. 15.

recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor.

It was doubted whether the statute of George the Second applied strictly to tenants for life, or whether persons who were exposed to a similar hardship could claim the benefit of it. Thus it was frequently questioned whether the statute extended to tenants in tail,[t] after possibility of issue extinct. These doubts are now set at rest by the 4 W. 4, c. 22, s. 1, which, after reciting that doubts have been entertained whether the provisions of the statute of George the Second apply to every case in which the interests of tenants determine on the death of the person by whom such interests have been created, it is enacted that rents reserved on leases which shall determine on the death of the person making them, shall be considered to be within the meaning of that act, although such person was not strictly tenant for life. 4 W. 4, c. 22.

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:[u] 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. II. Tenant in tail, after possibility of issue extinct.

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 [125] How this estate is created.

[t] *Paget* v. *Gee*, Ambl. 198; 3 Swanst. 694; *Vernon* v. *Vernon*, 2 B.C.C. 659.

[u] Litt. s. 32.

neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them.[v] 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.[w]

Incidents of this estate.

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, &c.:[x] (although he will be restrained as any other tenant for life, by a court of equity from malicious waste;[y]) 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:[z] 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 [126] all possibility of issue be extinct. Further, this estate is not privileged from merger as an estate-tail is.[a] 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.

III. Tenant by the curtesy.

III. Tenant *by the curtesy of England*, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail; 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.[b]

[127] Requisites to this estate.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife.[c] 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession,

v Co. Litt. 28.
w Litt. s. 34; Co. Litt. 28.
x Co. Litt. 27.
z *Ibid.* 28.
y Co. Litt. 28; *Williams* v. *Williams*, 15 Ves. 427.
a 3 Prest. Conv. 263.
b Litt. s. 35, 52.
c Co. Litt. 30.

which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But it should be observed that entry is not always necessary to an actual seisin, or seisin in deed; for if the land be in lease for years, curtesy may be without entry, or even receipt of rent;[d] and courts of equity allow curtesy of trust estates, which though mere *rights* in law, are estates in equity.[e] And of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seisin 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 ever to have actual seisin of it, and *impotentia excusat legem*.[f] 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.[g] The issue also must be born during the life of the mother; for if the mother dies in labour, 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 [128] 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[h]. In general the issue must be capable of inheriting the mother's estate. Therefore if a woman be tenant in tail *male*, and hath 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.[i] And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised: because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the old rule of law, could be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore, as the husband

[d] Co. Litt. 29 a, n. 3; Hargr. note 162; 3 Atk. 469.
[e] 1 Atk. 603. See *ante*, p. 43.
[f] *Ibid.* 29.
[g] Dyer. 25. 8 Rep. 34.
[h] Co. Litt. 29.
[i] Co. Litt. 29.

had never begotten any issue that could be heir to those lands, he should not be tenant of them by the curtesy.[k] 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 seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy.[l] The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate*,[m] 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.[n]

Proposed alterations as to the law of curtesy.

The Real Property Commissioners in their first Report proposed to make some alterations in the law of curtesy, the principal of which were to abolish the rule that the issue must be born alive, and to restrict the estate to an undivided moiety of the lands; and a bill was brought in in the Session of 1831[o] to carry these recommendations into effect. It was however suffered to drop, and it may therefore be considered that the law on this subject will not be unsettled.

[129] Tenant in dower.

4. Tenant in *dower* is where the husband of a woman is entitled to 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 entitled at any time during the coverture, to hold to herself for the term of her natural life.[p]

[130] 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.

k Co. Litt. 40. But now see 3 & 4 W. 4, c. 106, s. 2, and *post*, Book IV. ch. 2.

l *Ibid.* 29.

m *Ibid.* 30.

n *Ibid.*

o Printed in the 2d vol. of the Legal Observer, p. 310.

p Litt. s. 36.

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.*[q] But a divorce *a mensa et thoro* only doth not destroy the dower;[r] no, not even for adultery itself by the common law.[s] Yet now by the statute Westm. 2,[t] if a woman voluntarily leaves (which the law calls eloping 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, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy:[u] 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,[v] 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[w] gives it another turn; *viz.* that it is presumed the wife was privy to her husband's crime. However, the statute 1 Edw. VI. c. 12, abated the rigour of the common law in this particular, and allowed the wife her dower. But a [131] subsequent statute[x] revived this severity against the widows of traitors, who are now barred of their dower, (except in the case of certain modern treasons relating to the coin[y]) 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[z]. The wife must be above nine years old at her husband's death, otherwise she shall not be en-

1. Who may be endowed.

q Bract. *l.* 2. *c.* 39. s. 4.

r Co. Litt. 32.

s Yet, among the antient Goths, an adultress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. *l.* 3. *c.* 2.)

t 13 Edw. I. c. 34.

u Co. Litt. 31.

v P. C. b. 3. c. 3.

w c. 110.

x 5 & 6 Edw. 6. c. 11.

y Stat. 5 Eliz. c. 11; 18 Eliz. c. 1.; 8 & 9 W. 3. c. 26.; 15 & 16 Geo. 2. c. 28. And see *post*, Book IV. ch. 3.

z Co. Litt. 31; But see Harg. not. 187, where it is said that by an act of Parliament not printed Rot. Parl. 8 H. 5, n. 15, all women aliens, married to Englishmen by license of the King, are enabled to demand their dower in the same manner as English women.

[131] dowed[a]: though in Bracton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere.*[b]

2. Of what a wife may be endowed (c). Alterations made by the 3 & 4 W. 4, c. 105.

2. We are next to inquire, of what a wife may be endowed; and in this respect considerable alterations have been recently made in this estate by the stat. 3 & 4 W. 4, c, 105, which however does not extend to the dower of any widows who shall have been married on or before the 1st of January, 1834, or to any will, deed, contract, or engagement entered into or executed before that time. With respect therefore to such, the old law is still in force, which we shall proceed to state. A widow married before the 1st of January 1834, is entitled to be endowed of all lands and tenements of which her husband was seised 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.[d] Therefore, if a man, seised in fee-simple, had a son by his first wife, and after married 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[e]. A seisin in law of the husband will be as effectual as a seisin 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 seisin, 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 seised in deed.[f] The seisin 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 was granted to a man, and he immediately rendered it back by

[132]

[a] Litt. §. 36; but Litt. queries it, s. 37.
[b] L, 2. *c.* 9. s. 3.
[c] Litt. s. 45.
[d] Litt. s. 36, 53.
[e] *Ibid.* s. 53.
[f] Co. Litt. 31.

the same fine) such a seisin will not entitle the wife to dower[g]: for the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof[h]. It was also well established that a widow was not dowable of an equitable or trust estate, the meaning of which has been already explained.[a] But as to widows, married after the 1st of January 1834, it is now different, for the legal seisin of the husband is no longer necessary, it being enacted, (s. 1.) that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy) then his widow shall be entitled to dower out of the same land; and (s. 2.) that when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

Another difference is introduced by the recent statute; for with respect to widows married on or before the 1st of January 1834, it matters not, as Blackstone himself remarks,[i] though the husband aliene the lands during the coverture, for he alienes them liable to dower; but as to widows married after that time, it is provided (s. 4.) that they shall not be entitled to dower out of any land which shall have been absolutely disposed of by their husbands

[g] Cro. Jac. 615; 2 Rep. 67; Co. Litt. 31.

[h] 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 seised of an estate in fee by survivorship; in consequence of which seisin his widow had a verdict for her dower. Cro. Eliz. 593.

[a] See *ante*, p. 42.

[i] Page 132, citing Co. Litt. 32.

in their life time, or by their wills. However, no woman,
[132] whether married before or after that time shall be endowed of a castle built for defence of the realm, nor of a common without stint,[i] 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.[j] The dower of the wife as to copyholds, called her free-bench, depends entirely on the custom of the manor; it is some times one-half, some times one-third, and often times exists not at all; nor is any widow dowable of estates which her husband holds with others in joint tenancy, but she is of estates held in coparcenary, or in common.[k]

3. The manner in which a woman is endowed.

3. Next, as to the manner in which a woman is to be endowed. There were until very recently four species of dower; the fifth, mentioned by Littleton,[m] *de la plus belle*, having been abolished together with the military tenures, of which it was a consequence. 1. Dower by the *common law*; or that which is before described. 2. Dower by particular *custom*;[n] as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiae*:[o] which is
[133] 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 of Littleton adds) troth plighted between them, doth 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*;[p] 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.

But of these the dowers, *ad ostium ecclesiae* and *ex assensu patris*, have long since fallen into total disuse, and were lately abolished by the 3 & 4 W. 4, c. 105, s. 13.

[i] Co. Litt. 31; 3 Lev. 401.
[k] Co. Litt. 32; 1 Jon. 315.
[l] 1 Com. Dig. 172, 173.
[m] Sec. 48, 49.
[n] Litt. s. 37.
[o] *Ibid.* s. 39.
[p] Litt. s. 40.

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 charter of Henry I., and afterwards by *magna charta*, it is provided that the widow 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 *quarentine*; a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other.[q] The particular lands, to be held in dower, must be assigned[r] 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 holden. 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 quarentine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it;[s] or by bill in equity, which is now the more usual remedy. Or if the heir (being under age) or his guardian assign more than she ought to have, it might have been afterwards remedied by writ of *admeasurement* of dower.[t] 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 presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.[u] By a very late act[v] almost all real and mixed actions were abolished from the 31st of

[135]

Dower at the common law.

Her quarentine, what it is.

[136]

q 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.

r Co. Litt. 34, 35.

s Co. Litt. 34, 35.

t F. N. B. 148; Finch. L. 314; Stat. Westm. 2; 13 Edw. 1. c. 7.

u Co. Litt. 32.

v 3 & 4 W. 4, c. 27. s. 36.

December, 1834; but the writ of right of dower, and the writ of dower *unde nihil habet* are preserved.

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for, the claim of the wife to her dower at the common law diffusing itself so extensively, it was before the recent act[w] a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the antient law respecting dower *ad ostium ecclesiae*, which hath 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.

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien,[x] 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:[y] and, by the statute of Gloucester,[z] if a dowager alienes the land assigned her for dower she forfeits it *ipso facto*, and the heir may recover it by action. [137] A woman also might be barred of her dower by levying a fine, or suffering a recovery of the lands, during her coverture, when those fictitious assurances existed.[a] But the most usual methods of barring dowers are by jointures, as regulated by the statute 27 Hen. VIII. c. 10; and, 2. by the act of the husband.

1st, of jointures.

And first as to jointures.—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 Ed. Coke;[b] "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; which

Definition of jointures.

w 3 & 4 W. 4. c. 105.
x But see *ante*, p. 63, n. z.
y Co. Litt. 39.
z 6 Edw. 1. c. 7.
a Pig. of Recov. 66.
b 1 Inst. 36.

statute provided, that upon making an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower.[c] 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, or during widowhood[d] 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; although a trust estate is a good equitable jointure.[e] 4. It must be made in satisfaction of her whole dower, and not of any particular part of it; and this should properly be expressed in the deed, but if not expressed, it seems that evidence will be let in to prove the fact.[f] 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 statute) have her dower *pro tanto* at the common law.

[138] Requisites of.

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 hers is almost the only estate on which, when derived from the King's debtor, the king cannot distrein for his debt; if contracted during the coverture.[g] 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,

[139]

[c] 4 Rep. 1, 2.
[d] 4 Rep. 3.
[e] Harg. Co. Litt. 226.
[f] Co. Litt. 36 b; 4 Rep. 3; Owen, 33; Pres. Est. 599.
[g] Co. Litt. 31 a; F. N. B. 150.

[139] and a very tedious method of proceeding, is necessary to compel a legal assignment of dower.[h] And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow.[i] 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.

2. By the act of the husband.

We are now to consider the second mode of barring dower, *viz.* by the act of the husband. Before the act 3 & 4 W. 4, c. 105, the husband and wife by levying a fine, or suffering a recovery, could bar the right of dower in the wife;[j] but by the late act the power of the husband over the dower of the wife is greatly enlarged; for it is enacted in the first place, (s. 5.) that all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his land shall be liable, shall be valid and effectual as against the right of his widow to dower. In the second place it it enacted, (s. 6.) that a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, or by his will, (s. 7.) it shall be declared that his widow shall not be entitled to dower out of such land. So that by this act, the husband by any deed executed in his lifetime, or even by his will, may deprive his widow of all title to dower; but it is to be borne in mind that this act only extends to the dower of widows married after the 1st of January 1834. The title to or estate in dower of widows married on or before that time could only be defeated by fine or recovery when those assurances existed, and since their abolition, can be barred by the deed substituted in their room, which will be more fully adverted to hereafter.

This power of the husband over his wife's dower would be more important if the right to dower were more extensive; but, it has in fact been greatly diminished, first

[h] Co. Litt. 36.
[i] Co. Litt. 37.
[j] *Goodrick* v. *Shatbolt*, Prec. Cha. 333; 10 Co. 49 b.

by jointures, and next by the almost universal practice, which has existed for the last fifty years, of conveying lands on a purchase, in such a manner that the dower of the purchaser's widow could not attach, or as it is generally called, *to uses to bar dower*,—an ingenious contrivance which is said to have been suggested by Mr. Fearne, to evade the claim of dower.[a]

[a] See *Duncombe* v. *Duncombe*, 3 Lev. 437; Fearne Cont. Rem. 347, 7th edit.; 2 Sand. on Us. 321. These uses will be found in the Appendix No. I, p. ii, and the student on attentively considering them and the rules laid down in this chapter, will see that if lands are so conveyed, dower cannot attach. In the Appendix No. I. the purchaser is supposed to have been married on or before the 1st of January 1834, in which case, in order to defeat the dower of his wife, the land should be conveyed to uses to bar dower. In No. II. the purchaser is supposed to be unmarried, or to have married after the 1st of January 1834, when the declaration that dower shall not attach, p. vii, will be sufficient.

CHAPTER THE THIRD.

[140] OF ESTATES LESS THAN FREEHOLD.

Estates less than freehold of three sorts.

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

1. Estates for years.

An estate for *years* is a contract for the possession of lands or tenements, for some determinate period: and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee,[a] and the lessee enters thereon.[b] 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 stiled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of.[c] And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law.

Legal computation of time.

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

[a] We may here remark, 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 maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee. Litt. s. 57.

[b] *Ibid.* 58.

[c] *Ibid.* 67.

make a year; or, as calendar months of unequal lengths, [141] 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, or clearly to be intended; 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 months" is only for forty-eight weeks; but if it be for "*a* twelve month" in the singular number, it is good for the whole year.[d] 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.[e] Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences. But to return to estates for years.

Every estate which must expire at a period certain and [143] 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.[f] But *id certum est, quod certum reddi potest:* 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,[g] for though it is at present uncertain, yet when J. S. hath 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.[h] A lease for so many years as J. S. shall live, is void from the beginning;[i] for it is neither certain, nor can ever be reduced to a certainty, during the

How terms of years may be limited.

[d] 6 Rep. 61; *Lacon* v. *Cooper*, 2 T. R. 224; *Cockell* v. *Gray*, 3 Brod. and Bing. 186. S. C. 6 Moo. 483.
[e] Co. Litt. 135.
[f] Co. Litt. 45.
[g] 6 Rep. 35.
[h] Co. Litt. 46.
[i] *Ibid.*

[143] 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 should so long continue parson, is good:[k] 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.

Terms for years inferior to estates of freehold.

It is a settled principle of law, that an estate for years is inferior when compared with an estate for life, or an inheritance: as an estate for life, even if it be *pur auter vie*, is a freehold; but an estate for a thousand years is only a chattel, and reckoned part of the personal estate. Hence it follows, 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 [144] for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no

No estate of freehold can at common law commence in futuro.

estate of freehold can, at common law commence *in futuro*; because it cannot be created at common law without livery of seisin, or corporal possession of the land: and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter.[1] And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin 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;[m] the possession or seisin of the *land* remaining still in him who hath 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 continuance of the *time*; as by surrender, forfeiture, and the like. For which rea-

Distinction between terms for years and freeholds, in this and other respects.

[k] Co. Litt. 46.

[m] Co. Litt. 46.

[1] 5 Rep. 94.—But see *post*, p. 95.

son, 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 *time*, in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term.[n]

Incidents to tenancy for years.

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

[145]

Emblements; see ante, p. 57.

With regard to emblements, or the profits of lands 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 except there be a custom to the contrary;[r] for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of.[s] 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 seised 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.[t] Not so, if it determine by the act of the party himself: as if tenant for years does anything that amounts to a forfeiture: in which case the emble-

[n] Co. Litt. 45.
[o] Page 13.
[p] Co. Litt. 45.
[q] Page 35.
[r] 1 Dougl. 201.
[s] Litt. s. 68.
[t] Co. Litt. 56.

ments shall go to the lessor, and not to the lessee, who hath determined his estate by his own default.[u]

2. Estates at will.

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.[v] Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because 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 connexions with the other at his own pleasure.[w] Yet this must be understood with some re-
[146] striction. 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.[x] 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.[y]

What act determines a tenancy at will.

What act does, or does not, amount to a determination of the will on either side, has formerly been matter 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 be made upon the land,[z] or notice must be given to the lessee[a]) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber,[b] taking a distress for rent and impounding

[u] Co. Litt. 55.
[v] Litt. s. 68.
[w] Co. Litt. 55.
[x] *Ibid.* 56.
[y] *Ibid.* 55.
[z] *Ibid.*
[a] 1 Ventr. 248.
[b] Co. Litt. 55.

it thereon,[c] or making a feeoffment, or lease for years of the land to commence immediately;[d] 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;[e] or, which is *instar omnium*, the death or outlawry of either lessor or lessee;[f] 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 [147] lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils.[g] 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.[h] And, upon the same principle, courts of law have of late years leaned 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, which is generally understood to be six months.[i]

Tenancy at will may still be created.

And this leaning has gone so far of late, that some have doubted whether an estate at will can now exist, but it is quite clear that it may be created by the express contract of the parties;[k] although it is also well settled, "that what was formerly a tenancy at will by implication, shall now be considered a tenancy from year to year, determinable by half a years notice, expiring at the end of a current year."[l]

Copyholds.

Under the head of tenants at will, copyholders are some-

[c] Co. Litt. 57.
[d] 1 Roll. Abr. 860; 2 Lev. 88.
[e] Co. Litt. 55.
[f] 5 Rep. 116; Co. Litt. 57, 62.
[g] Litt. s. 69.
[h] Salk. 414; 1 Sid. 339.
[i] This kind of lease was in use as long ago as the reign of Henry VIII. when half a year's notice seems to have been required to determine it. (T. 13, Hen. VIII. 15, 16.)
[k] *Richardson* v. *Langridge*, 4 Taunt. 128.
[l] See Mr. J. Coleridge's note; *Clayton* v. *Blackey*, 8 T. R. 3; *Timmins* v. *Rowlison*, 3 Burr. 1609.

times classed, but although they were so originally, they seem now more properly tenants by the custom.[j]

[150] However, in common cases, copyhold estates are still ranked (according to their origin) 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 holden 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.

3. Estates at sufferance.

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 maketh a lease at will, and dies, the estate at will is thereby determined; but if the tenant continueth possession, he is tenant at sufferance.[m] 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.[n] But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger:[o] and the reason is, because the tenant being once in by a lawful title, the law (which presumes 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 tortious, or, in common language, wrongful.

[151] Thus stands the law with regard to tenants by suffer-

[j] See *ante*, pp. 27—31.
[m] Co. Litt. 57.
[n] *Ibid.*
[o] *Ibid.*

ance; and landlords are strictly obliged in these cases to make formal entries upon their lands,[p] 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 the landlord may enter and take peaceable possession, and the tenant will be liable to an action for any disturbance of that possession; and even if he enter forcibly, the tenant cannot complain, except by a criminal proceeding for a breach of the peace.[q] And now, by statute 4 Geo. II. c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over, after the determination of the term, and demand made and notice in writing given, by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. By statute 11 Geo. II. c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent*, for such time as he continues in possession. And by statute 1 Geo. IV, c. 87, landlords on bringing ejectments, may give notice to tenants holding over, to appear in term, and on production of the lease or agreement, may move for a rule *nisi* on the tenant to enter into a recognizance for costs; and on the rule being made absolute, if the tenant shall not conform, judgment shall be given for the landlord. And it has been decided that this last statute extends to a tenancy by virtue of an agreement in writing for three months certain,[r] but not to a tenancy from year to year, *without* any written agreement or lease,[s] nor to a tenancy for years determinable on lives, though under a written lease.[t] These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement.

Remedies of landlords for the recovery of possession.

[p] 5 Mod. 384.

[q] *Taunton* v. *Costar*, 7 T. R. 431; *Turner* v. *Meymott*, 1 Bing. 158.

[r] *Doe* d. *Phillips* v. *Roe*, 5 B. and A. 766.

[s] *Doe* d. *Bradford* v. *Roe*, 5 B. and A. 771.

[t] *Doe* d. *Pemberton* v. *Roe*, 7 B. and C. 2.

CHAPTER THE FOURTH.

[152] OF ESTATES UPON CONDITION.

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.[a] 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 themselves; 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,

of two sorts.

are of two sorts: I. Estates upon condition *implied:* II. Estates upon condition *expressed:* under which last may be included, 1, Estates held *in vadio, gage,* or *pledge:* 2. Estates by *statute merchant* or *statute staple:* 3. Estates held by *elegit*.

Estates upon condition.

I. 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,[b] on breach of which

[153] condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person.[c] 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.

[a] Co. Lit. 201.
[b] Litt. s. 378.
[c] *Ibid.* 379.

[153]

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.[d] 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.[e]

Mis-user, and non-user.

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 than they themselves are entitled to.[f] So if any tenant for years, for life, or in fee, committed felony, the king in the first instance, and the king or other lord of the fee in the others, is entitled to have their lands, because their estate was determined by the breach of the condition "that they should not commit felony," which the law tacitly annexed to every feudal donation; but this will now only be to the prejudice of the offender himself; for, first, it was enacted by the 54 Geo. 3, c. 145, that after the passing of that act, no attainder for felony, except in cases of high treason, petit treason or murder, should extend to the disinheriting of any heir, or to the prejudice of any other person than the offender during his natural

The doctrine of forfeiture of estates.

Attainder on felony now only extends to the offender himself.

[d] Co. Litt. 233.
[e] 9 Rep. 50.
[f] Co. Litt. 215.

life; and still more recently, by the 3 and 4 W. 4, c. 106, s. 10, it was enacted that after the death of *any* person attainted, his descendants may inherit.[g]

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II. Estate on condition expressed, which may be either precedent or subsequent.

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.[h] These conditions are therefore either *precedent*, or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or non-performance 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[i] 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 passeth not till the hundred marks be paid.[j] 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.[k] To this class may also be referred all base fees, and fee simples conditional at the common law.[l] 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 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 second chapter: as *durante viduitate, &c.*: these

g And see *post*, Book IV. Chap. 3.
h Co. Litt. 201.
i Show. Parl. Cas. 83, &c.
j Co. Litt. 217.
k Litt. s. 325.
l See *ante*, p. 49, 50.

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 grantees'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. [155]

A distinction is however made between a *condition in deed* and a *limitation*, which Littleton[m] 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 Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like.[n] In such case the estate determines as soon as the contingency happens, (when he ceases to be parson, marries a wife, or has received the 500*l.*) 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*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.[o]), 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.[p] Yet, though strict words of condition be used in the creation of the estate, 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 A. to B., on condition that within two 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

Distinction between condition in deed and a limitation.

[m] Sec. 380; 1 Inst. 234.
[n] 10 Rep. 41.
[o] *Ibid.* 42.
[p] Litt. s. 347; stat. 32 Hen. 8, c. 34.

[156] condition;[q] because, if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry; but, when it is a limitation, the estate of B. determines, and that of D. commences, and he may enter on the lands 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 a breach of condition.

Conditional limitation: Description of.

A conditional limitation, to which we may here shortly advert, partakes of the nature both of a condition and a remainder. It is to be observed that at the common law, whenever either the whole fee or a particular estate, as an estate for life or in tail was first limited, no condition or other quality could be annexed to this prior estate, which would have the double effect of defeating the estate, and passing the land to a stranger, for as a remainder it was void, being an abridgement or defeasance of the estate first granted; and as a condition it was void, as no one but the donor or his heirs could take advantage of a condition broken; and the entry of the donor or his heirs unavoidably defeated the livery upon which the remainder depended. On these principles, it was impossible by the old law to limit by deed, if not by will, an estate to a stranger upon any event which might abridge or determine an estate previously limited. But the expediency of such limitations, assisted by the revolution effected by the Statute of Uses, which has already been mentioned, at length established them, in spite of the maxim of law that a stranger cannot take advantage of a condition. These limitations are now become frequent, and their mixed nature has given them the name of conditional limitations; they so far partake of the nature of conditions, as they abridge or defeat the estates previously limited, and they are so far limitations, as upon the contingency taking effect, the estate passes to a stranger. Such is the limitation to A. for life, in tail or in fee, provided that when

[q] 1 Ventr. 202. [r] Cro. Eliz. 205; 1 Roll. Abr. 411.

C. returns from Rome, it shall from thenceforth remain to the use of B. in fee.[s] [156]

Grantee on condition may have an estate of freehold.

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;[t] 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., or the survivor of them, shall so long live) this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

What conditions are void

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 he marries with Jane S. by such a day; (within which time the woman dies, or the feoffor marries her himself) or unless he kills another; or in case he aliens in fee; that then and in any of such cases the estate shall be vacated and determined: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or re- [157]

[s] See Fearn. Cont. Rem. p. 9, 7th ed.; Dougl. Rep. 727, n.; and Butl. Co. Litt. 203, b. n.

[t] Co. Litt. 42.

pugnant.[u] 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 hath no estate until the condition be performed.[v]

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

Estates in pledge are vivum vadium

1. 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*l.*) of another; and grants him an estate, as of 20*l. 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 is now called a Welsh mortgage.[w] 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.[x] But *mortuum vadium*,

and mortgage.

a dead pledge, or *mortgage*, (which is much more common than the other) is where a man borrows of another a

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specific sum (*e. g.* 200*l.*), and grants him an estate in

Description of a mortgage.

fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* 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 then the mortgagee shall reconvey the estate to the mortgagor: in this case the land, which is so put in pledge, is by law, in 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.[y]

[u] Co. Litt. 206.
[v] *Ibid.*
[w] Powell on Mort. 373, a., 6th ed.
[x] Co. Litt. 205.
[y] Litt. s. 332.

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 the courts of equity interpose: and, though a mortgage be thus forfeited, and the estate absolutely [159] vested in the mortgagee at the common law, yet they consider the lands only as a security for the money advanced, and will therefore enquire into 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 recall or redeem his estate; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for non-payment of 100*l.* or a less sum. And this reasonable time is now fixed by statute[z], following a long established rule of the courts of equity, to be twenty years, from the time at which the mortgagee took possession, or from the last written acknowledgment, at the end of which period the mortgagor will be absolutely barred. This 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*. And this equity of redemption is considered an actual estate in equity, and has all the incidents thereof. Thus it may be mortgaged again, is subject to dower and curtesy, and is in almost all respects similar to a legal estate. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get

Rights of mortgagee.

Mortgagor must now redeem in 20 years.

Equity of redemption, what it is.

[z] 3 & 4 W. 4, c. 27, s. 28.

the whole of his money immediately; or else call upon the mortgagor to redeem 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,[a] the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not however 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.[b] 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 re-assign his securities.

Foreclosure, what it is.

[160] Mortgages are made, either in fee, or for a term of years. A mortgage in fee is in general a preferable security to a mortgage for a term of years, and since the introduction of trusts and powers of sale, the advantage is more peculiarly striking. Indeed, the only obvious advantage to the mortgagee, in a term of years, is that on his decease, the lands devolve on his personal representatives, who are also entitled to the beneficial interest in the mortgage sum. The latter is also a less expensive security, as a mortgage in fee is now almost always effected by lease and release, and two deeds are therefore necessary.

How mortgages are made.

In a mortgage the following clauses are usually introduced:—The mortgagor conveys the lands to the mortgagee in fee; provided that, if the mortgage money and interest shall be paid on a particular day, usually six months after the conveyance, the deed shall be void: or, according to the more modern form, and particularly if the mortgage is in fee, that the mortgagee will convey the premises to the mortgagor free from all incumbrances: the mortgagor then covenants that he will pay the sum bor-

Mortgages, what clauses are introduced.

[a] Stat. 4 & 5 W. & M. c. 16.

[b] *Pignoris appellatione eam proprie rem contineri dicimus, quae simul etiam traditor creditori. At eum, quae sine traditione nuda conventione tenetur, proprie hypothecae appellatione contineri dicimus.* Inst. l. 4, t. 6, s. 7.

rowed and interest, and for title: that is, that he is seised in fee and has good right to convey, and that if the sum borrowed or interest thereon be not paid, the mortgagee may enter upon the premises and quietly enjoy them, free from all incumbrances whatever; and moreover, that if the sum and interest be not paid, then that he, the mortgagor, will do any other act for assuring the lands to the mortgagee that he may require. Then follows a proviso for quiet enjoyment by the mortgagor until default shall be made in the payment of the mortgage money and interest. These are the clauses that are usually introduced. But of late a power is frequently given to the mortgagee to sell the mortgaged premises, if default in payment of the money be made, and if they consist of houses or buildings, provisions for insurance and for repairing should be inserted, to indemnify the mortgagee for their loss, or to preserve their value, and under them he may himself insure or repair; and the mortgagor cannot redeem without paying the sums so advanced, together with the mortgage debt.[c] The mutual interest will be attended to by giving the mortgagor power to lease, which, of himself, he cannot[d] exercise with effect, being a tenant for years until default is made in payment of the money, and a tenant by sufferance afterwards;[e] but this power may also be given to the mortgagee. When a power of sale enabling the mortgagee to sell the premises is introduced, the mortgagor may neglect his other remedies and exercise his power,[f] which, if the security be sufficient, will give him complete justice in his own hands, as he may exercise this power without the concurrence of the mortgagor, although notice to him is sometimes required.[g]

2. 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*

2. Statute merchant and statute staple.

[c] *Gordon* v. *Graham*, 7 Vin. Abr. 52, *pl.* 237; *Ex parte Hooper, and others*, 1 Mer. 7.

[d] *Keech* v. *Hall*, Doug. 21; 3 East. Rep. 449.

[e] Coote, 328.

[f] *Clay* v. *Sharpe*, Sug. Vend. 20; 18 Ves. 344.

[g] *Corder* v. *Morgan*, *Lewis* v. *Moxham*, 1 Mer. 179. See a form of a mortgage in fee, Append. No. III.

[160] 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 before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I. *de mercatoribus*, 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, from whence this security is called a statute staple. They are both, I say, securities for debts acknowleged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seised in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the 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, acknowleged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the Recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the statute 23 Hen. VIII. c. 6, amended by 8 Geo. I. c. 25, which direct such recognizances to be enrolled and certified into Chancery. But these by the statute of frauds, 29 Car II. c. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record.

3. Estate by elegit.

[161] What it is.

3. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. An *elegit* is the name of a writ, founded on the statute[1] 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 occupied and enjoyed until his

[1] 13 Edw. I. c. 18.

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.

Nature of these three last estates.

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,[j] "These tenants have [162] 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*, until their debt be paid; yet it shall go to their executors: for *ut* is similitudinary; and though, to recover their estates, they shall have the same remedy (by assise) as a tenant of the freehold shall have,[k] yet it is but the similitude of a freehold, and *nullum simile est idem*." 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 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 provided for personal debts due 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 those to whom the debts if recovered would belong. For, 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* executor:[l] 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.

j 1 Inst. 42, 43.

k The words of the statute *de mercatoribus* are, "*puisse porter bref de novele disseisine, auxi ricum de franktenement.*"

l Co. Litt. 42.

CHAPTER THE FIFTH.

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 the act of the parties, called a *remainder*; the other by act of law, and called a *reversion*.

Estates are in possession, remainder, or in 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.

1. Estates in possession.

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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 seised in fee-simple granteth 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.

II. Estate in remainder, description of.

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.[a] 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 in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And at common law, no remainder can be limited after grant of an estate in fee simple:[b] because he that is tenant in fee hath in him the *whole* of the estate: a remainder therefore, which is only a portion or residuary *part* of the estate, connot be reserved after the whole is disposed of. But under the statute of uses a remainder may in effect be limited after the grant of a fee simple. Thus a limitation may be made to the use of B. and his heirs, but upon the happening of a particular event, then to the use of C. and his heirs, and on the happening of the event, the lands will go over to C. and his heirs. This limitation would have been void at common law, and can only take effect under the statute of uses, under the name of a springing or shifting use.[c]

Shifting uses.

[a] 2 Co. Litt. 143.

[b] Plowd. 29; Vaugh. 269.

[c] See *ante*, p. 40.

[165] 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; and in laying down those rules care must be taken to distinguish between what may be done at common law, and what under the statute of uses.

Rules on the creation of remainders.

1. There must be a particular estate.

1. And, first, there must necessarily be some particular estate, precedent to the estate in remainder.[d] 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* in strictness 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, what ever it be, will be an estate in possession.

Estates of freehold could not be created in futuro at common law

An estate created to commence at a distant period of time, without any intervening estate, is therefore strictly no remainder. And such future estates can only at the common law be made of chattel interests, which were considered in the light of mere contracts by the ancient law,[e] 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 an estate of freehold cannot be created to commence *in futuro*; but it ought to take effect presently either in possession or remainder:[f] because [166] at common law no freehold in lands could pass without livery of seisin; 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 pos-

[d] Co. Litt. 49; Plowd. 25.
[e] Raym. 151.
[f] 5 Rep. 94.

session. 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 at common law. 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 is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate andthat 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 seisin to A.; here by the livery the freehold is immediately created, and vested in B., during the continuace of A.'s term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the termor 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*, though to be occupied and enjoyed *in futuro*.

Under the statute of uses an estate may be limited in futuro.

But under the statute of uses an estate may be limited to commence *in futuro*. Thus if a man covenant to stand seised to the use of the heirs of his own body, or to the use of another after his own death, or if he bargain and sell his lands after seven years, in each of these cases the grant is good, and until the event takes place the use results to the grantor. But in conveyances operating by way of transmutation of possession, it is necessary that a present seisin should be transferred in order to serve the resulting use. Thus if a feoffment or lease and release be made to J. S. and his heirs, to commence four years from thence, or after the death of the grantor, the limitation of the use to J. S. is good; for during the four years or the life of the grantor it will result and be executed. But if the conveyance had been to J. S. and his heirs, after the death of the grantor, to the use of J. S. and his heirs, it

would have been void, because it is the grant of an estate of freehold to commence *in futuro*.[g]

Proposed alteration of commissioners.

The Real Property Commissioners propose to abolish this distinction between the rule of the common law and the rule under the statute of uses, and to enact that estates may at common law be conveyed or created to commence at a future time, whether certain or uncertain.[h] If this be done, the first rule laid down by Blackstone will so far as it relates to future estates be abolished, and in effect a remainder may then be created without any particular estate to support it.

What estate will support a remainder.

As no remainder can in strictness 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.[i] 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 seisin must at common law 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:[j] or, if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *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.[k] 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:[l] as where the particular estate is an estate for the life of a person not *in esse*;[m] or an estate for life upon condition, on breach of which condition the grantor enters and voids the estate;[n] in either of these cases the remainder over is void.

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If the particular estate be void, the remainder will be defeated.

g Sand. Uses, 4th edit.
h See 3rd Real Property Rep.
i 8 Rep. 75.
j Dyer, 18.
k Raym. 151.
l Co. Litt. 298.
m 2 Roll. Abr. 415.
n 10 Jon. 58.

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.[o] 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 seisin is delivered to A. of his life estate in possession. And it is this, which induces the necessity at common law of livery of seisin 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 seisin, in order to convey the freehold from and out of the grantor; otherwise the remainder is void.[p] 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.[q] But this rule, although undoubted at common law, it is to be observed, does not apply to limitations which take effect under the statute of uses. Thus if A. covenant to stand seised to the use of B. after his own death, this will be in effect a valid remainder.

2. The remainder must commence at the time of the creation of the particular estate.

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* that it determines.[r] 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. hath any son; here the remainder will be void,

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3. The remainder must vest during the continuance of the particular estate, or *eo instanti* that it determines.

[o] Litt. s. 671; Plowd. 25.
[p] Litt. s. 60.
[q] Co. Litt. 49.
[r] Plowd. 25; 1 Rep. 66.

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.[s] 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;[t] the thing supported must fall to the ground, if once its support be severed from it.

Remainders are either vested or contingent.

Vested remainders what they are.

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 remainders, what they are.

Contingent or *executory* remainders (whereby no 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*; and the true definition of a contingent remainder seems now established to be, that it is a remainder limited so as to depend on an event or condition which may never happen to be performed till after the determination of the preceding estate;[u] whereas a vested remainder is where there is a present capacity of taking effect in possession if the particular estate were to determine. By these rules every remainder should be tried, to ascertain whether a remainder be vested or contingent.

[s] 1 Rep. 138.

[t] 3 Rep. 21.

[u] Fearne Cont. Rem. p. 3, 215, 7th edit.

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 whom the remainder could vest.[v] But, to remedy this hardship, it is enacted by statute 10 and 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.[w]

Instances of contingent remainders, where the person is uncertain.

Posthumous children may take in remainder.

This species of contingent remainders, to a person not in being, must however, according to Blackstone, be limited to some one, that may by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines.[x] 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*: 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.[y] But a remainder to the right heirs of B. (if there be no such person as B. *in esse*) is void.[z] 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 par-

Possibility on a possibility.

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v 3 Rep. 20.
w Salk. 228; 4 Mod. 282.
x 2 Rep. 51.
y Co. Litt. 378.
z Hob. 33.

ticular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath 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 possibillity that he should not only have a son, but a son of a particular name.[a] A limitation of a remainder to a bastard before it is born, is not good;[b] for though the law allows the possibility of having bastards, it presumes 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.

But this doctrine of a possibility on a possibility being void, although derived from Lord Coke, [c]seems of late to be considered untenable. Mr. Preston considers it quaint and unintelligible, and is of opinion that a remainder to an unborn son of a particular name would be valid;[d] and Mr. Butler says that at any rate the doctrine must not be understood in too large a sense, and cites the case of *Routledge* v. *Dorril*,[e] where, so far as concerns personal estate, it was disregarded. It should be also remarked that a limitation to a bastard of which a particular woman is pregnant, is valid.[f]

Where the event is uncertain.

A remainder may also be 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.

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Contingent remainders

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

[a] 5 Rep. 51.
[b] Cro. Eliz. 509.
[c] Co. Litt. 25 b, 184 a.
[d] 1 Prest. Abr. 129.
[e] 2 Ves. jun., 357; Butl. Fearne, n. (i), p. 251, 7th edit.
[f] *Gordon* v. *Gordon*, 1 Meriv. 141; *Dawson* v. *Dawson*, 6 Mad. & Geld. 292.

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: 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. But a right of entry will support a contingent remainder.[h]

must be limited on a freehold.

Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested.[i] Therefore when there is tenant for life, with divers remainders in contingency, he may not only by his death, but by feoffment, and also fine or recovery (when these assurances existed), by 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 estate determines. If therefore his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect and become a particular estate in possession, sufficient to support the remainders depending in contingency. But equitable contingent remainders cannot be destroyed by any act of the tenant for life; and the Real Property

How contingent remainders may be destroyed.

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Proposed alteration of the Real Pro-

g 1 Rep. 130. h Fearne Cont. Rem. 286, 7th ed. i 1 Rep. 66, 135.

perty Commissioners.

Commissioners propose[i] to establish the same rule with respect to legal contingent remainders.

How contingent remainders may be transferred.

A contingent remainder is not transferrable at law, except by way of estoppel (and for this purpose a fine was usually employed, although a deed was sufficient).[j] But equity has not adopted this rule of law, and has allowed contingent remainders to be transferrable, or (which is the same thing) capable of being bound by contract. It is proposed[j] to abolish this distinction, and to render them transferrable at law also. Of course, *vested* remainders may be transferred at present, as well at law as in equity.

Executory devises.

In devises by last will and testament, (which, being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, fore-thought, and advice) in these devises, I say, remainders may be created in some measure contrary to the rules before laid down as existing at common law: 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.

What they are.

An executory devise is such a limitation of a future estate or interest in lands or chattels, (though in the case of chattels it is more properly an executory bequest) as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.[k]

Wherein they differ from a remainder.

It differs from a remainder at common law in three very material points: 1. That it needs not any particular estate

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to support it. 2. That by it a fee-simple or other less estate may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

Executory devise without any particular estate to support it.

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 with-

[i] Third Real Property Report.

[j] *Doe* v. *Martyn*, 8 B. and C. 497; *Christmas* v. *Oliver*, 10 B. and C. 181; *Bensley* v. *Burdon*, 2 Sim. and Stu. 519; 2 B. and Ad. 278.

[k] Fearne, Ex. Dev. 386, 7th edit.

out any particular estate to support it; a freehold commencing *in futuro*. This limitation would be void in a deed, which operated by virtue of the common law, (although it would be valid in a deed taking effect under the statute of uses,) but it is good at common law[l] in a will, by way of executory devise.[m] For, since by a devise a freehold may pass without corporal tradition or livery of seisin, (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* at common law, is the necessity of actual seisin, 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.[n]

Executory devise limited after a fee.

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, (which operates by virtue of the common law, although valid, as we have seen, by way of springing use,) is good at common law by way of executory devise.[o] 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 lives 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;[p] because by perpetuities, (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation[q]) 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

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Executory devises must be limited within a certain time.

[l] Fonbl. Eq. vol. 2, p. 86.
[m] 1 Sid. 153.
[n] Cro. Jac. 593.
[o] 2 Mod. 289. See *ante*, p. 93.
[p] 12 Mod. 287; 1 Vern. 164.
[q] Salk. 229.

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; and the ordinary period of gestation, where gestation exists; but where gestation does not exist, then for a life and lives in being and twenty-one years afterwards only; but this term of twenty-one years may be a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.[r]

Executory devises of terms of years.

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 at law 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.[s] 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:[t] 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,[u] that the devisee for life hath 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[v] that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they
[175] must all be *in esse* during the life of the first devisee; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest: and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee.[w]

Rule as to accumulations of rents and profits.

But Courts of Equity allow such limitations of a trust term, even in a deed.[x] And it should be here observed,

[r] *Bengough* v. *Edridge*, 1 Sim. 267; *Cadell* v. *Palmer*, 10 Bing. 140.
[s] 8 Rep. 95.
[t] Bro. tit. *Chatteles*, 23; Dyer, 74.
[u] Dyer, 358; 8 Rep. 96.
[v] 1 Sid. 451.
[w] Skinn. 341; 3 P. Wms. 358.
[x] *Warmstrey* v. *Tanfield*, 1 Cha. Rep. 16; *Massenburgh* v. *Ash*, 1 Vern. 234; 1 Fonbl. Eq. 214.

that by the 39 and 40 G. III. c. 98, it is enacted that no person shall, by any deed will, or other mode, settle or dispose of any real or personal property, so that the rents and profits may be wholly or partially accumulated for a longer term than the *life of the grantor, or the term of twenty-one years after the death of the grantor or testator, the minority of any person who shall be living or* en ventre sa mere *at the death of the grantor or the testator, or the minority of any persons who would be beneficially entitled to the profits under the settlement, if of full age.* All directions to accumulate rents or interest beyond those periods are void, except for the purpose of paying debts, raising portions for children, or touching the produce of timber.[y]

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.

Estate in reversion: what it is.

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.[z] Sir Edward Coke[a] 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 never therefore 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 feodal constitution. For, when a feud was granted to a

y See *Thelusson* v. *Woodford*, 4 Ves. jun. 227; 11 Ves. 112.

z Co. Litt. 22.

a 1 Inst. 142.

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 [176] 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 holden at all. Where rent is reserved, it is also incident; though not inseparably so, to the reversion.[b] The rent 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*: for the maxim of law is "*accessorium non ducit, sed sequitur, suum principale.*"[c]

Incidents of a reversion.

Reversions carefully distinguished from remainders.

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, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion,[d] 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;[e] 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. hath 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.[f]

[b] Co. Litt. 143.
[c] *Ibid.* 151, 152.
[d] Cro. Eliz. 321.
[e] 3 Lev. 407.
[f] 1 And. 23.

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the 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 holden, 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. [177] Tenants for life may be ordered to be produced.

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,[g] 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 hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife.[h] 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.[i] For estates-tail are protected and preserved from The doctrine of merger.

g 3 Lev. 437.

h Plow. 418; Cro. Jac. 275; Co. Litt. 338; but see 4 Leon. 37, and 3 Prest. Conv. pp. 273—278, who considers that the position here laid down should be qualified.

i 2 Rep. 61; 8 Rep. 74.

[178] merger by the operation and construction, though not by the express words, 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 hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath 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.[j] 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, to be mentioned hereafter:[k] it would therefore have been strangely improvident to have permitted the tenant in tail, by 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; but immediately the issue can no longer be injured, as in tenancy in tail after possibility of issue extinct, the privilege from merger ceases, as also when the possibility of inheriting by the issue is done away with.[l] It is now settled that one term of years may merge in another,[m] and as all terms of years are equal in the eye of the law, a term of 1000 years may merge in a term of one year, if the latter be the term in reversion. This doctrine is of much practical importance, particularly in marriage settlements, where terms are frequently created.

Estate tail not liable to merger,

but on failure of issue, this privilege ceases.

One term of years may merge in another.

j Cro. Eliz. 202.

k See Book IV. ch. 9.

l 3 Prest. Conv. 360—363.

m *Hughes* v. *Robotham*, Cro. Eliz. 303; *Stephens* v. *Bridges*, 6 Mad. 66; and see 3 Prest. Conv. 183.

CHAPTER THE SIXTH.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

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Estates may be held in severalty, in joint tenancy, in co-parcenary and in common.

WE come now to treat of estates, with respect to the number and connexions 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. Estates in severalty.

I. 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. Estates in joint-tenancy.

II. An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint-tenancy,[a]

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[a] Litt. sec. 277.

and sometimes an estate in *jointure*, which word as well as the other signifies an union or conjunction of interest; though in common speech the term *jointure*, is now usually confined to that 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.[b]

Who may be joint-tenants in tail.

Blackstone lays it down, that lands may be granted to two or more persons as joint tenants in tail; but as he mentions afterwards, this cannot be unless the donees can lawfully intermarry. Thus if lands be limited to two men or two women in tail, as to John and Robert, and to the heirs of their bodies begotten; or to Ann and Mary, and the heirs of their two bodies begotten; John and Robert in the one case, and Ann and Mary in the other, will have a joint estate for the term of their lives, and on the death of the survivor, the issue of each shall take a moiety of the lands.[c]

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*.

How joint-tenancy may be created.

1. 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 joint-tenancy are derived from its unities, which are—

2. 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, com-

b See page 68.

c Litt. sec. 283, sec. 286; Co. Litt. 182 b.; *Cook* v. *Cook*, 2 Vern. 545, cit. 2 P. Williams, 530, and *post*, p. 122.

mencing 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.[d] 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, it makes them joint-tenants of the inheritance.[e] 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. hath a several remainder in tail.[f] 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 disseisin.[g] 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, when the estates take effect under the common law, 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

1. Unity of interest.

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2. Unity of title.

3. Unity of time: in what estates it is necessary.

[d] Co. Litt. 188.
[e] Litt. sec. 277.
[f] *Ibid.* sec. 285.
[g] *Ibid.* sec. 278

one moiety vested at one time, and the other moiety vested at another.[h] But unity of time is not a necessary incident to estates taking effect under the Statute of Uses, or by executory devise. In these estates the seisin will remain in the releasee to uses, or the heir at law until the uses arise. Thus where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for the term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at
[182] different times;[i] because the *use* of the wife's estate remained in the releasee to uses till the intermarriage; and then had relation back, and took effect from the original time of creation. Thus also lands were limited to the following uses, to A. and B. his wife, for their lives, remainder to their first and other sons in tail, remainder to the issues female of their bodies begotten. A. had two daughters, Anne and Martha. Martha died without issue, and afterwards Anne died. And it was held that Anne and Martha took as joint-tenants for life, with several inheritances, and the time of vesting was thought unimportant.[j] And in a subsequent case Lord Thurlow held that the vesting of the estate at different times would not prevent joint-tenancy.[k] Lastly, in joint-tenancy there must be an unity of *possession*. Joint-tenants are said to be seised *per my et per tout*, 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*.[l] They have not, one of them a seisin of one half or moiety, and the other of the other half or moiety; neither can one be exclusively seised 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.[m] And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common;

Unity of possession.

Tenancy by entireties.

h Co. Litt. 188.

i Dyer 340; 1 Rep. 101.

j *Earl of Sussex* v. *Temple*, 1 Lord Raym. 310; *Oates* v. *Jackson*, 2 Stra. 1172.

k *Stratton* v. *Best*, 2 Bro. C. C. 233; and see *Mogg* v. *Mogg*, 1 Meriv. 654.

l Litt. sec. 288; 5 Rep. 10.

m *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatum per se.* Bract. *l.* 5, *tr.* 5, *c.* 26.

for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.[n]

Consequences of the unity of possession of joint tenants.

Upon these principles of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenants' estates. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both in respect of the joint reversion.[o] If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate.[p] On the same reason, livery of seisin, made to one joint-tenant shall enure to both of them;[q] and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both.[r] In all actions also, relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other;[s] and, until very recently, the possession of one joint-tenant was the possession of the other or others, but this is altered by the 3 and 4 W. IV. c. 27, s. 12, by which it is enacted, that when any one or more of several persons entitled to any land or rents as joint-tenants, have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such person or persons or any of them. But if two or more joint-tenants be seised of an advowson, and they present different clerks, the bishop may refuse to admit either: because neither joint-tenant hath a several right of patronage, but each is seised of the whole; and, if they

Possession of one joint tenant, not the possession of all.

[183]

[n] Litt. sec. 665; Co. Litt. 187; Bro. Abr. tit. *Cui in vita*. 8; 2 Vern. 120; 2 Lev. 39.
[o] Co. Litt. 214.
[p] *Ibid.* 192
[q] *Ibid.* 49.
[r] *Ibid.* 319, 364.
[s] *Ibid.* 195.

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.[t] Upon the same ground it is held, that one joint-tenant cannot have an action against another for tresspass, in respect of his land,[v] 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 or to grant copyholds;[w] 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 of Westm. 2. c. 22.[x] So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver,[y] yet now by the statute 4 Ann. c. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy, or as is now more usual, may file a bill in equity for an account.[z]

The doctrine of survivorship.

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 seised of a joint estate, of inheritance, for their own lives, or *per 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
[184] even a less estate.[a] This is the natural and regular consequence of the union and entirety of their interest. The

[t] Co. Litt. 185.
[v] 3 Leon. 262.
[w] 1 Leon. 234.
[x] 2 Inst. 403.
[y] Co. Litt. 200.
[z] *Lorimer* v. *Lorimer*, 5 Mad. 363.
[a] Litt. sec. 280, 281.

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 becomes 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 devested 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 the 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[b] the *jus accrescendi*, 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.* And this *jus accrescendi* ought to be mutual; which I apprehend to be one reason why neither the King,[c] nor any corporation,[d] 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 seised of the entirety, by benefit of survivorship; for the King and the corporation can never die.

[185] 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

How joint tenancy may be destroyed.

[b] Bract. *l.* 4, *tr.* 3, *c.* 9, sec. 3; Fleta. *l.* 3, c. 4.

[c] Co. Litt. 181 b, 190; Finch. L. 83

[d] 2 Lev. 12.

of *time*, which respects only the original commencement of the joint-estate, cannot indeed, (being now past) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint-tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-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 for that reason also, the right of survivorship is by such separation destroyed.[e] By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do:[f] 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. But by the statutes 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32, joint tenants, either of inheritances or other less estates, were compellable by writ of partition to divide their lands.[g] However by the 3 & 4 W. 4, c. 27, s. 36, no writ of partition shall be brought after the 31st of December 1834; and before the writ was thus abolished, the usual mode of enforcing a partition which is now the only mode, was by bill in equity, praying that a commission might issue, under which a partition might be effected. 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;[h] (and in equity a covenant to convey for a valuable consideration will be sufficient,[i]) for the grantee and the remain-

[e] Co. Litt. 188, 193.

[f] Litt. sec. 290.

[g] Thus, by the civil law, *nemo invitus compellitur ad communionem.* (*Ff.* 12, 6, 26, sec. 4). And again: *si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest.* (*Ff.* 10, 3, 8.)

[h] Litt. sec. 292.

[i] *Brown* v. *Raindle*, 3 Ves. 257.

ing 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 [186] testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other[j]) is already vested.[k] 4. It may also be destroyed, by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure:[l] 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; because, being created by one and the same conveyance, they are not separate estates, (which is requisite in order to a merger) but branches of one entire estate.[m] In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure;[n] 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.[o] Yet, if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship:[p] 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;[q] 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 indispensible properties, a sameness of interest, and undivided possession, a title vesting at one and the

j *Jus accrescendi praefertur ultimae voluntati.* Co. Litt. 185.

k Litt. sec. 287.

l Cro. Eliz. 470.

m 2 Rep. 60; Co. Litt. 182.

n Litt. sec. 302, 303.

o *Nihil de re accresit ei, qui nihil in re quando jus accresceret habet.* Co. Litt. 188.

p Litt. sec. 294.

q *Ibid.* sec. 304.

same time, and by one and the same act or grant; the jointure is instantly dissolved.

[187] 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.[r] 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:[s] 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;[t] for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

Advantages and disadvantages of dissolving the jointure.

III. Estates in coparcenary.

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

[188] The *properties* of parceners are in some respect like those of joint-tenants; they having the same unities of

Properties of coparcenary.

[r] 1 Jones, 55.
[s] 4 Leon. 237.
[t] Co. Litt. 252.
[u] Litt. sec. 241, 242.
[v] *Ibid.* sec. 265.
[w] Co. Litt. 163.

interest, title, and *possession.* They may sue and be sued jointly for matters relating to their own lands;[x] and the entry of one of them shall in some cases enure as the entry of them all.[y] They cannot have an action of trespass against each other; but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste;[z] for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the VIII. 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:[a] and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man hath 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;[b] 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 an *unity,* have not an *entirety,* of interest. They are properly entitled each to the whole of a distinct moiety;[c] 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 therein, whether male or female, called parceners. But if the possession [189] be once severed by partition, they are no longer parceners but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no

In what parceners differ from joint-tenants.

x Co. Litt. 164.
y *Ibid.* 188, 243.
z 2 Inst. 403.
a Litt. sec. 254.
b Co. Litt. 164, 174.
c *Ibid.* 163, 164.

longer held in *coparcenary*, but in *common*.[d] By the 3 and 4 W. 4, c. 27, s. 12, the same provision is made with respect to the possession of one coparcener as has already been mentioned with respect to that of a joint-tenant.[e]

Modes of effecting a partition.

Parceners are so called, saith Littleton,[f] because they may be constrained to make *partition*. And he mentions many methods of making it;[g] 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. The privilege of seniority is in this case 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.[h] 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, alterius est electio*. The fourth method is where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion was, where one or more sued out a writ of partition against the others; but as we have seen the writ of partition is now abolished, and the mode of enforcing a partition is by bill in equity.[i]

[190]

What is not capable of partition.

There are some things which are in their nature impartible. 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

[d] Litt. sec. 309.
[e] See *ante*, p. 113.
[f] Litt. sec. 241.
[g] Sec. 243 to 264.
[h] Co. Litt. 166; 3 Rep. 22.
[i] See *ante*, p. 116.

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.[j]

The estate in co-parcenary 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. [191] How coparcenary may be dissolved.

IV. Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously.[k] This tenancy therefore happens, where there is a 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 his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest; one may hold 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. IV. Tenants in common. [192]

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and co-parcenary, or by special limitation in a deed or will. By the destruction of the two other estates, I mean such destruction as does not sever 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, and the alienee by the new alienation;[l] and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life How tenancy in common may be created.

j Co. Litt. 164, 165.
k Litt. sec. 292.
l Litt. sec. 293.

only. So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles, and conveyances.[m] If one of two parceners alienes, the alienee and the remaining parcener are tenants in common:[n] 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:[o] 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.

[193]

How tenancy in common may be created.

A tenancy in common may also be created by express limitation in a deed or will: but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. The law at one time favoured joint-tenancy rather than tenancy in common;[p] but this favour has of late been losing ground even at law,[q] and in courts of equity the leaning is decidedly towards tenancy in common.[r] Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common;[s] and, if one grants to another *half* his land, the grantor and grantee are also tenants in common;[t] because, as has been before[u] observed, joint-tenants do not take by distinct halves or moieties;

[m] Litt. sec. 295.
[n] *Ibid.* 309.
[o] *Ibid.* 283.
[p] Salk. 392.
[q] *Staples* v. *Maurice*, 4 B.C.C. 580, arg. *Hawes* v. *Hawes*, 1 Wils. 165.
[r] *Lake* v. *Cradock*, 3 P. Wms. 158; *Aveling* v. *Knipe*, 19 Ves. 44; *Rigden* v. *Vallier*, 2 Ves. sen., 258; *Morley* v. *Bird*, 3 Ves. 631.
[s] Litt. sec. 298.
[t] *Ibid.* 299.
[u] See page 112

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 said to be a joint tenancy;[v] because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition; and an estate given to A. and B., *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy,[w] (for it implies no more than the law has annexed to that estate, *viz.* divisibility[x]) yet in *wills* it is certainly a tenancy in common;[y] 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 grants 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 [194] exclusion as well as description, and limit the estate to A. and B., to hold *as tenants in common, and not as joint-tenants.*

As to the *incidents* attending a tenancy in common; tenants in common, (like joint-tenants) were compellable by the statutes of Henry VIII. before mentioned,[z] and now by bill in equity, 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 that account: such as being liable to reciprocal actions of waste, and of account; by the statute of Westm. 2, c. 22, and 4 Ann. c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate;[a] though, if one actually turns the other out of possession, an action of ejectment will lie against him.[b] But as for other in-

Incidents of tenancy in common.

[v] Poph. 52.
[w] 1 Equ. Cas. Abr. 291.
[x] 1 P. Wms. 17.
[y] 3 Rep. 39; 1 Ventr. 32.
[z] Page 116.
[a] Co. Litt. 199.
[b] *Ibid.* 200,

cidents 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,[c] unless in the case where some entire or indivisible thing is to be recovered[d]) these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several. By the 3 and 4 W. 4, c. 27, s. 12, the same provision is made with respect to the possession of one tenant in common, as has already been mentioned with respect to that of a joint-tenant.[e]

How tenancy in common may be dissolved.

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*.

[c] Litt. sec. 311. [d] Co. Litt. 197. [e] See *ante*, p. 113.

BOOK THE FOURTH.

OF THE TITLE TO REAL PROPERTY.

CHAPTER THE FIRST.

OF THE TITLE TO REAL PROPERTY IN GENERAL.

THE foregoing books having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, 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. [195]

The title to things real.

A title is thus defined by Sir Edward Coke,[a] *titulus est justa causa possidendi id quod nostrum est;* or, it is the means whereby the owner of lands hath the just possession of his property.

Definition of a title.

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

I. 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 pretence 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 *disseisin*, being a deprivation of that actual seisin, 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 [196]

The lowest title is naked possession.

Disseisin, what it is

[a] 1 Inst. 345.

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. But in the mean time, till some act be done by the rightful owner to devest this possession and assert his title, such actual possession is, *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good.

The right of possession.

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 not in himself but in another. For if a man be disseised, 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 he thinks proper, by entering upon the disseisor, 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 disseisor, or other wrongdoer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now by the common law the heir obtained an *apparent* right, though the *actual* right of possession resides in the person disseised, and it was not lawful for the person disseised to devest this apparent right by mere entry or other act of his own, but only by an action at law.[b] For, until the contrary was proved by legal demonstration, the law would rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. But it has very recently been enacted that no descent cast or discontinuance which shall

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[b] Litt. sec. 385.

have happened after the 31st day of December, 1833, shall defeat any right of entry for the recovery of land.[b] But if he who has the actual right of possession omits to bring his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the others' 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.*

The right of property.

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 devested, and *put to a right*.[c] A person in this situation may have the true ultimate property of the lands in himself: but the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession; for the law [198] presumes that either he had a good right originally, in virtue of which he entered on the lands in 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 disseised or his heir hath 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 discontinued his estate-tail, by alienating the lands to a stranger in fee, and died; there the issue in tail had by the common law no right of *possession*, independent of the right of *property*: for the law presumed *prima facie* that

[b] 3 & 4 W. 4, c. 27, s. 39.

[c] Co. Litt. 345.

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 had transferred the same to a stranger, the law would not permit that possession now to be disturbed, unless by shewing the absolute right of property to reside in another person. The heir therefore in that case had only a *mere right*, and was strictly held to the proof of it, in order to recover the lands. But the right of entry, as we have seen, will not now be taken away by the discontinuance of the tenant in tail.[d] Lastly, if by accident, neglect, or otherwise, judgment was 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 had indeed in himself the right of property, that was then turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right, he should recover his seisin of the lands.

But a writ of right is now abolished by the 3 and 4 Will. 4, c. 27, s. 36, and by the same act (s. 2), one period of limitation is established for all lands and rents, it being enacted that after the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

Thus, if a disseisor 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 disseisor 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 before the

[d] See *ante*, p. 126.

act referred to came into operation, I acquiesced for thirty years, without bringing any action to recover possession of the lands, the son gained the *actual right of possession*, and I retained nothing but the *mere right of property*. And even this right of property would fail, or [199] at least it would be without a remedy, unless I pursued it within the space of sixty years. So also if the father before the 31st of December, 1833, were tenant in tail, and aliened the estate-tail to a stranger in fee, the alienee thereby gained the *right of possession*, and the son had only the *mere right*, or *right of property*. And hence it followed that one man might have the *possession*, another the *right of possession*, and a third the *right of property*. For if tenant in tail infeoffed A. in fee-simple, and died, and B. disseised A.; B. had the *possession*, A. the *right of possession*, and the issue in tail the *right of property*: A. might recover the possession against B.; and afterwards the issue in tail might evict A., and unite in himself the possession, the right of possession, and also the right of property; in which union consists.

What is a complete title.

IV. A complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law,[e] 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*.[f] And when to this double right the actual possession is also united, when there is, according to the expression of Fleta,[g] *juris et seisinae conjunctio*, then, and then only, is the title completely legal.

It should be observed that throughout this chapter the actual possession of the lands, means either the personal possession of the tenant, or that of his tenant for years or at will.

[e] Mirr. *l.* 2, *c.* 27.

[f] Co. Litt. 266. Bract. *l.* 5, *tr.* 7, *c.* 5.

[g] *l.* 3, *c.* 15, sec. 5.

CHAPTER THE SECOND.

OF TITLE BY DESCENT.

[200]

How property is lost and acquired.

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 *property*) 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 his 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 misbehaviour 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 ideas as well of the grantor as the grantee.

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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: which are thus laid down by Lord Coke,[a] *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; but, as will be seen, the title by descent is now much narrowed.

The methods are reduced to two: by descent and purchase.

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 immediataly on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

Descent, definition of.

And it has recently been enacted,[b] that in every case arising on descents after the 31st of December, 1833, descent shall be traced from the purchaser, and to the intent that the pedigree may never be carried further back then the circumstances of the case and the nature of the title shall require, the person last entitled to the lands shall be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same; in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that *he* inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same. By the former law, if a man devised lands to a person who was his next heir and his heirs, the devise was void, and the heir took by descent.[c] But by the 3 and 4 W. 4, c. 105, s. 3, it is enacted that when any land shall have been devised by any testator, who shall die after the 31st of December, 1833, to the heir or person who shall be the heir of the testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited by any assurance executed after the 31st of December, 1833, to the person or to the heirs of the person who shall thereby have acquired the same land,

The person last entitled to the lands shall be considered the purchaser thereof, unless it shall be proved that he inherited the same.

When land shall be devised to the heir of the testator, he shall be considered to have acquired the land as devisee.

[a] Co. Litt. 18.

[b] 3 & 4 W. 4, c. 106, s. 2.

[c] Dy. 124, pl. 38, 354, pl. 33; Plowd. 545.

such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to have been entitled thereto as his former estate.

When heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

And further (by s. 4.) when any person shall have acquired any land by purchase, under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the 31st day of December, 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator, who shall depart this life after such day; then such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation, had been the purchaser of such land. It will be seen therefore that the title by descent is now much narrowed.

Importance of the doctrine of descents.

The doctrine of descents, or law of inheritances in fee-simple, is still, however, 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 is 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 is 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; and this is a point, that we must result back to the standing law of descents in fee-simple to be informed of.

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What is to be treated of in this chapter.

In order therefore to treat a matter of this universal consequence the more clearly, I shall endeavour 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 de-

cline considering at present 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, in those by *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[c] 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 fees tail *per formam doni*, in pursuance of the statute of Westminster the second, have also been already[d] 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 to state, as briefly as possible, the true notion of this kindred or alliance in blood.

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

Consanguinity, definition of. 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 and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards; the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and his grandson in the second; his great grandsire

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Lineal consanguinity, what it is.

What constitutes a degree.

[c] See page 26. [d] See page 50.

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,[e] and canon,[f] as in the common law.[g]

[204] 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 one from the other. Collateral kinsmen are 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 hath two sons, [205] 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 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*; and we must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor.

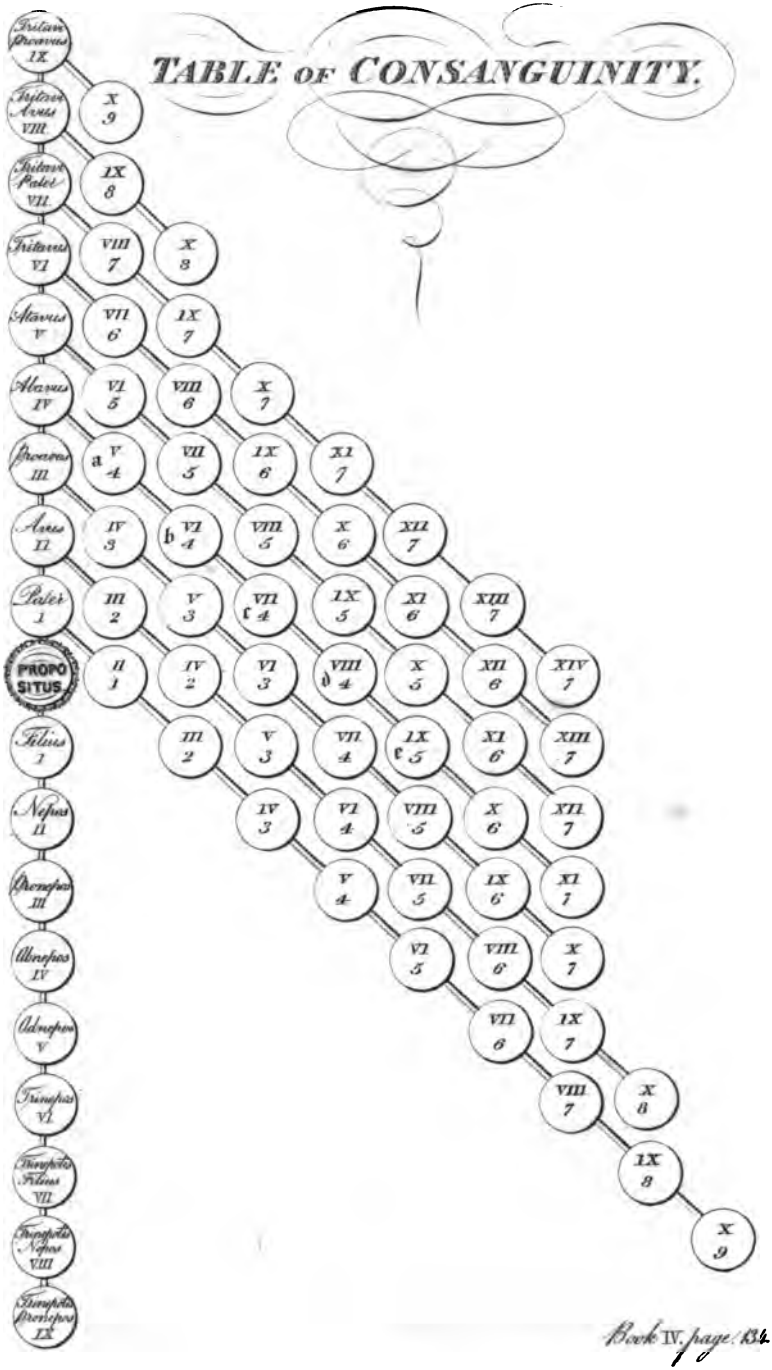
Collateral consanguinity.

[206] The method of computing these degrees in the canon law,[h] which our law has adopted,[i] 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, [207] 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 slew 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,

Method of computing degrees.

[e] *Ff.* 38, 10, 10.
[f] *Decretal. l.* 4, *tit.* 14.
[g] Co. Litt. 23.
[h] *Decretal*, 4, 14, 3 & 9.
[i] Co. Litt. 23.

TABLE OF CONSANGUINITY.



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and the class marked (ε) king Henry the seventh. Now their common stock or ancestor was king Edward the third, the *abavus* in the same table; from him to Edmond Duke of York, the *proavus*, is one degree; to Richard Earl of Cambridge, the *avus*, 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 (α) is one degree; to John Earl of Somerset (β) two; to John Duke of Somerset (γ) three; to Margaret Countess of Richmond (δ) four; to King Henry the seventh (ε) 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.[k]

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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, having reference to the table which will be found at the end of the chapter; and in applying these rules or canons, it will be of importance to bear in mind that the legislature has recently made considerable alterations in the law of descent, which however, do not extend to any descent which has taken place on the death of any per-

Recent alteration in the law of descent by the 2 & 3 W. 4, c. 106.

[k] 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 cyphers.

son who died before the first day of January, 1834.[1] With respect to these, therefore, the former rules obtain, and must regulate all titles anterior to the period mentioned. We shall therefore first mention the old rules, and where they have been altered, afterwards state the new ones.

I. Inheritances shall lineally descend.

I. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*; and under the former law they could never lineally ascend.

Nemo est haeres viventis.

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.* Before that 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 heir 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 hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son.[m]

Heir apparent and heir presumptive, definition of.

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The rule *seisina facit stipitem*, to what titles it now extends.

Under the former law no person could be properly such an ancestor, as that an inheritance of lands or tenements could be derived from him, unless he had had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by

[1] 3 & 4 W. 4, c. 106, s. 11. [m] Bro. tit. *Descent*, 58. See *ante*, p. 99.

receiving rent from a lessee of the freehold:[n] or unless he had had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson,[o] and the like. But he could not be accounted an ancestor, who had had only a bare right or title to enter or be otherwise seised. The seisin therefore of any person, thus understood, made him the root or stock, from which all future inheritance by right of blood must have been derived: which was very briefly expressed in this maxim, *seisina facit stipitem.*[p]

And this is still the law with respect to descents which have taken place on the deaths of persons who have died before the 1st day of January 1834. But with respect to descent which takes place on deaths after that period, the law has been entirely altered by the 3 & 4 W. 4, c. 106, for in the first place it is enacted (s. 1.) that in the construction of that act, the expression "person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain possession or receipt of the rents and profits thereof,[q] and (s. 2.) that such person shall be deemed the purchaser.

When therefore a person dies so seised or entitled, as the case may be, the inheritance first goes to his issue: as [210] if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases lands, and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey; to whom by the former law, grounded on the uses of the feudal tenures, the land never ascended, but rather escheated to the lord.[r] But with respect to descents on deaths on or after the 1st of January 1834, it is enacted, (3 & 4 W. 4, c. 106, c. 6) that every lineal ancestor shall be capable of being heir to any of his issue, and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir, in preference to any person who would have been entitled to inherit either by tracing his descent through such lineal ancestor, or in consequence of there being no such lineal ancestor, so that the descen-

By the former law, the land descended but never ascended;

but this is now altered.

[n] Co. Litt. 15. But see Co. Litt. 32 a; and 3 Rep. 42 a; Hargr. not. 83; 7 T. R. 390; 8 T. R. 213.

[o] *Ibid.* 11.

[p] Flet. *l.* 6, *c.* 2, *s.* 2.

[q] See *ante*, p. 131.

[r] Litt. s. 3.

dant of the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. But (by s. 7.) it is provided that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person nor any of her descendants shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed. And this brings us to the second rule or canon,

[212] II. Which is, that the male issue shall be admitted before the female; and this rule remains unaltered by the recent act.

II. The male issue shall be admitted before the female.

Thus sons shall be admitted before daughters; or, as [213] our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred.[s] As if John Stiles hath 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.

[214] 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 altogether; and this rule also remains unaltered.

III. The eldest male inherits, but the females altogether.

As if a man hath 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 [216] inherit the estate as coparceners.[t]

In what primogeni-

However, the succession by primogeniture, even among females, takes place as to the inheritance of the crown;[u]

[s] Hal. H. C. L. 235.
[t] Litt. s. 5; Hale. H. C. L. 238.
[u] Co. Litt. 165.

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, is also established with respect to female dignities and titles of honour. 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 suspence or abeyance till the King shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases.[v]

ture takes place with females.

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; and this rule likewise is unaltered.

IV. Lineal ancestors shall represent their ancestors.

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Thus the child, grandchild, or great grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*.[w] 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 a-piece.

This taking by representation is called succession *in stirpes* according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. Thus, if the next heirs of *Titius* be six nieces, three by one sister, two by another, and one by a third; the law of England in this case would divide it only in three parts, and distribute it *per stirpes*, thus; one third to the three children who represent her sister, another third to the two who represent the second, and the

Which is called succession *in stirpes*.

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Examples of this rule.

[v] Co. Litt. 165.

[w] Hale. H. C. L. 236, 237.

remaining third to the one child who is the sole representative of her mother.

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. For if all the children of three sisters were in England to claim *per capita*, in their own right 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 hath two sons, A. and B., and A. dies leaving two sons, and then the grandfather dies; now
[219] 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 hath 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*.

And thus much for lineal descents. [220]

V. A fifth rule is, that on failure of lineal descendants, or issue, of the person last seised, and also on failure of his lineal ancestors with the qualification before-mentioned, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the four preceding rules.

V. On failure of lineal descendants, the inheritance shall descend to collaterals.

Thus if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family.[x] 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 the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue and lineal ancestors, 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 year books,[y] Fitzherbert,[z] Brook,[a] and Hale,[b] "that he who would have been heir to the father of the deceased" (and, of course, to the mother, or any other real or supposed purchasing ancestor) "shall also be heir to the son;" a maxim, that will hold universally, except in the case of a brother or sister of the half blood, which exception (as we shall see hereafter) depends upon very special grounds, and is now almost entirely abolished. [223]

The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was.

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman. [224]

VI. That the collateral heir must be the next collateral kinsman.

He must be his next collateral kinsman, either person-

[x] Co. Litt. 12.
[y] *M.* 12 *Edw. IV.* 14.
[z] Abr. tit. *Discent.* 2.
[a] *Ibid.* 38.
[b] H. C. L. 243.

ally or *jure representationis*; which proximity is reckoned according to the canonical degrees of consanguinity beforementioned. 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. The common law regards consanguinity principally with respect to descents.

[225] The issue or descendants therefore of John Stiles's brother are all of them in the first degree of kindred with respect to inheritances, those of his uncle in the second, and those of his great uncle in the third, as their respective ancestors, if living, would have been; and are severally called to the succession in right of such their representative proximity.

The right of representation being thus established, the present rule amounts to this; that on failure of issue and lineal ancestors,[c] of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue and lineal ancestors, his estate shall descend to Francis his brother, or his representatives; he being lineally descended from Geoffrey Stiles, John's 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*.

[226] Now here it must be observed, that the lineal ancestors, though (according to the former law) incapable themselves of succeeding to the estate, were yet the common stocks from which the next successor must spring. But though the common ancestor be thus the root of the inheritance in descents on deaths before the 1st of January 1834, yet it was not necessary to *name* him in making out the pedigree or descent. For the descent between two brothers was held to be an *immediate* descent; and therefore title might be made by one brother or his representatives *to* or *through* another, without mentioning their common father.[d]

The descent between brothers was immediate:

But this rule is now altered with respect to descents on the deaths of persons who shall die before the 1st of January 1834, it being enacted that no brother or sister shall

but this is now altered.

[c] See *ante*, p. 137.

[d] 1 Sid. 196; 1 Ventr. 423; 1 Lev. 60; 12 Mod. 619.

be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.[e] Though the common ancestors, according to the former law, were not named in deducing the pedigree, yet the law still respected them as the fountains of inheritable blood: and therefore in order to ascertain the collateral heir of John Stiles, it is both according to the former and the existing law, first 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 couple of ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent; [227] and in such derivation the same rules must be observed, with regard to sex, primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor.

How collateral heirs are traced.

But, in descents which took place on the death of any person who died before the 1st of January 1834, 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; nay in such descents, the estate shall escheat to the lord, sooner than the half blood shall inherit.

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 hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other hath. 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

The rule as to the exclusion of the half-blood, to what titles it extends.

[e] 3 & W. 4, c. 106, s. 5.

descended from both the same parents, hath 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 hath issue by him; the blood of this issue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay, (instead of Geoffrey Stiles) on the other part, it hath 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 could never, according to the former law, 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 could never, according to the former law, inherit to each other, but the estate should rather escheat to the lord. Nay, even if the father died, and his lands descended to his eldest son A., who entered thereon, and died seised without issue; still B. should not be heir to this estate, because he was only of the half blood to A., the person last seised: but it should descend to a sister (if any) of the whole blood to A.; for in such cases the maxim is, that the seisin or *possessio fratris facit sororem esse haeredem*. Yet, had A. died without entry, then B. might [228] have inherited; not as heir to A. his half brother, but as heir to their common father, who was the person last actually seised.[f]

But this rule excluding the half-blood, which was considered a harsh one by Blackstone himself, is now altered, so far as it relates to descents on deaths after the 1st of January 1834, it being enacted by the 3 & 4 W. 4, c. 106, s. 9, that any person related to the person from whom the descent is to be traced by the half-blood, shall be capable of being his heir; and the place in which any such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor, where such common ancestor shall be a female; so that the brother of the half-

[f] Hale H. C. L. 238. But see *ante*, p. 136, as to the necessity of entry since the recent statute.

blood, on the part of the father, shall inherit next after the sisters of the whole blood, on the part of the father and their issue; and the brother of the half-blood, on the part of the mother, shall inherit next after the mother.[f] [233]

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 both. Rule VI. further exemplified.

But here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances in a geometrical progression upwards, 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 likewise to avoid all other confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor may be sought for, another qualification is requisite, besides the *proximity* and *entirety*, which is that of *dignity* or *worthiness*, of blood. For, [234]

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, however remote, shall be admitted before those from the blood of the female, however near,)—un- VII. In collateral inheritances, the male stocks shall be preferred to the female.

[f] See this exemplified in the table of descents, *post*, p. 150.

less 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;[g] and the relations of the father's father, before those
[236] of the father's mother; and so on. And whenever the lands have notoriously descended to a man from his mother's side, 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, or as we have seen the rule now to be, it cannot be proved that they were inherited;[h] here the right of inheritance first runs up all the father's side, with a 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.

Reasons for the agnatic succession.

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through 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

[g] Litt. sec. 4. [h] See *ante*. p. 131.

last have inevitably brought us up to the first purchaser: [237] 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.

How search must be made for an heir, according to the former and the present law.

Before we conclude this branch of our enquiries, it may not be amiss to exemplify these rules, both as they formerly existed and as they have been altered, by a short sketch of the manner in which we must search for the heir of a person, as *John Stiles*, who dies seised of land which he acquired; and we shall first trace this with respect to descents which have taken place on the deaths of persons who have died before the 1st of January, 1834; and here we beg to refer the reader to the Roman numerals in the table annexed, with the observation that wherever a table occurs to which there is no such number attached, but only the Arabian numbers, the inheritance according to the old rules would never come to the person mentioned in such table.[j]

Descent traced according to the former law.

In the first place succeeds the eldest son, Matthew Stiles, or his issue: (No. I.)—if his line be extinct, then Gilbert Stiles and the other sons, respectively in order of birth, or issue; (No. II.)—in default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue; (No. III.)—On failure of the descendants of *John Stiles* himself, the issue of Geoffery and Lucy Stiles, his parents, is called in: *viz.* first, Francis Stiles, the eldest brother of the whole blood, or his issue: (No. IV.)—then Oliver Stiles, and the other whole brothers, respectively in order of birth, or their issue; (No. V.)—then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue. (No. VI.)—In defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being still had to their age and sex: (No. VII.)—then the issue of Walter and Christian Stiles, the parents

[j] See the table of descents, facing p. 150.

of his paternal grandfather: (No. VIII.)—then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (No. IX.)—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. X.)—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 paternal grandfather, are spent.—Then we must
[238] resort to the issue of Luke and Frances Kempe, the parents of *John Stiles's* paternal grandmother: (No. XI.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (No. XII.)—and so on in the paternal grandmother's 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. XIII.)—and so on 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. (Nos. XIV, XV, XVI.) Willis's, (XVII.) Thorpes, (No. XVIII, XIX.) and Whites (No. XX.), in the same regular successive order as in the paternal line.

Whether No. X or No. XI. is to be preferred.

There has been some conflict of opinion, whether, according to the former rules, the class No. X. should not be postponed to No. XI.—(that is to say) whether *proximity* of blood is not to have preference to *worthiness* of blood: and much learning has been devoted to this discussion.[k] Blackstone, among others, opposed however by several great authorities, contended that No. X. should be preferred; and the legislature has adopted his view, by enacting that in all descents on deaths after the 31st of December, 1833, when there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced and their descendants, the mother of the

[k] See Hale, C. L. c. 11; Watk. Desc. 111, n. (*a*); Bacon's Elem., c. 1.

more remote male paternal ancestor or her descendants, (that is to say, Jane King and her issue,) shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor or his descendants (as Frances Kempe and her issue); and when there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor and her descendants shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants.[a]

Descent traced according to the new law.

We shall now search for the heir of a person who, having acquired lands, has died seised of them since the 31st of Decem. 1833. And here we must refer the reader, in looking at the annexed table, to the Arabian, and not to the Roman numerals, which will at once serve to show the true line of descent since the statute, and the difference between the rules as they formerly stood and as they have been altered.

In the first place, as under the old law, succeeds the eldest son, Matthew Stiles or his issue (1). If his line be extinct, then Gilbert Stiles and other sons respectively in order of birth, or their issue (2). In default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue (3). On failure of the descendants of John Stiles himself, a great difference now exists; for the inheritance goes to his father, Geoffery Stiles (4), and then to his issue, Francis Stiles, the eldest brother of the whole blood of John Stiles, and the eldest son of Geoffery Stiles or his issue (5); then to Oliver Stiles and the other brothers of John Stiles of the whole blood, respectively in order of birth, or their issue (6). Then the sisters of John Stiles, of the whole blood altogether, Bridget and Alice Stiles or their issue (7). And it is to be remembered that these descents of Francis, Oliver, Bridget and Alice, are to be traced through their father Geoffery, and not to be taken immediately from John Stiles.[b] In default of issue of Geoffery Stiles of the whole blood, to John Stiles, recourse under the new law will be had to the issue of Geoffery of the half blood to John, that is, to Peter Stiles, his half brother or his issue (8), and to Margaret Stiles and Emma Stiles (9),

[a] 3 & 4 W. 4, c. 106, s. 8.

[b] See *ante*, p. 142.

his half sisters together, or their issue. In default of all issue of Geoffery Stiles, George Stiles (10), his father first, if alive, and then the issue of George and Cecilia Stiles, his parents (11), and next the issue of George Stiles of the half blood (12) will take, respect being still had to their age, sex, and blood; then in the same way Walter, the father of the paternal grandfather (13), the issue of Walter and Christian Stiles (14), and the issue of the half blood of Walter (15); and so on in the paternal grandfather's paternal life (16, 17, 18) *in infinitum*. In default of these, it is expressly enacted, as we have already seen,[a] that Christian Smith (19) would take; then her issue of the half blood (20); then William Smith her father (21); then his issue (22), then Jane Smith (23), and so on in the paternal grandfather's maternal line *in infinitum*, till both the bloods of George Stiles, the paternal grandfather, are spent. Then we must resort to Cecilia Kempe, the paternal grandmother (24); then to her half blood (25); then to Luke Kempe, the father of the paternal grandmother (26); then to his issue of the whole and half blood (27 and 28); and so on in the paternal grandmother's paternal line *in infinitum*. In default of which we must call in Frances Holland (32); then her issue of the half blood (33); then Charles Holland (34); his issue (35); and then Mary Holland (36), and so on in the paternal grandmother's maternal line, or blood of Francis 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 the maternal relations; in the first place, to his mother (37) and her issue (38, 39), and then to the blood of the Baker's (40 to 48), Willis's (49 to 53), Thorpes' (54 to 61), and Whites' (62 to 66), in the same regular successive order as has last been laid down in the paternal line.

[240] If John Stiles was not the purchaser, what blood can inherit.

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: as was formerly fully ex-

[a] See page 148.

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plained.[m] And the like rule as is there exemplified, will hold upon descents from any other ancestors.

In the table, John Stiles is supposed to be the person last entitled.

The student should also bear in mind, that, during this whole process, *John Stiles* is the person supposed to have been last actually seised or entitled[n] of the estate. For, if ever it comes to vest in any other person, as heir to *John Stiles*, a new order of succession must be observed upon the death of such heir; since he, by his own seisin or title, 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 will succeed to *John Stiles*, and not to each other; and before we search for an heir in any of the higher figures, (No. VIII.) or (14.), we must be first assured that all the lower classes (from No. (I) to No. (VII), or from (1) to (13) were extinct at *John Stiles's* decease.

What property the new act extends to.

It should further be observed, that the new act extends to all hereditaments, corporeal and incorporeal, whether freehold or copyhold, and whether descendible according to the common law or according to the custom of gavelkind, borough English, or other custom.[b]

[m] See page 146.

[n] See *ante*, p. 136, 137.

[b] 3 & 4 W. 4, c. 106, s. 1.

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CHAPTER THE THIRD.

OF TITLE BY PURCHASE; AND FIRST, BY ESCHEAT.

Purchase. Legal definition of.

PURCHASE, *perquisitio*, taken in its largest and most extensive sense, may now be defined to be the possession of lands and tenements, which a man hath by his own act or agreement,[a] or by the devise or gift of his ancestor,[b] and not by mere 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;[c] which title we have seen[b] has been recently much narrowed. It is proper, however, to observe, that in the construction of the late inheritance act, (3 & 4 W. IV. c. 106.) the word *purchaser*, has a more limited meaning than formerly.[d]

Examples of purchase.

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[e]; 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 was 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

[a] Litt. Sec. 12.
[b] See *ante*, p. 131.
[c] Co. Litt. 18.
[d] See 3 & 4 W. 4, 106, sec. 1, cited *post*, p. 155.
[e] Co. Litt. 18. [f] See *post*, p. 155.

take by purchase.[f] But if a man seised in fee, before the recent statute, devised his whole estate to his heir at law, so that the heir took neither a greater nor a less estate by the devise than he would have done without it, he was adjudged to take by descent,[g] even though it were charged with incumbrances;[h] this being for the benefit of creditors, and others, who had demands on the estate of the ancestor. But as we have seen[i] this rule is now altered with respect to devises by testators who shall die after the 31st day of December 1833. 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.[j] 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, commonly called the rule in Shelley's case, from the name of a leading case in which it was recognized, 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*.[k] 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.[l] The ancestor, during his life, beareth in himself all his heirs;[m] and therefore, when once he is or might have been seised of the lands, the inheritance so 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 purchaser 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 feodal tenure, the lord would have been defrauded by such a limitation of the fruits of his signiory, arising from a descent to the heir.

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The rule in Shelley's case.

[f] Lord Raym. 728.
[g] Roll. Abr. 626.
[h] Salk. 241; Lord Raym. 728.
[i] See *ante*, p. 131.
[j] 1 Roll. Abr. 627.
[k] 1 Rep. 93, 104; 2 Lev. 60; Raym. 334.
[l] 1 Rep. 98.
[m] Co. Litt. 22.

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Difference between estates by descent and by purchase.

The difference in effect, between the acquisition of an estate by descent and by purchase, consisted 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 to the blood only of some particular ancestor. For when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *maternum*, 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. 2. An estate taken by purchase, would not, until recently, make the heir answerable for the acts of the ancestor, as an estate by descent would. For, if the ancestor by any deed, obligation, covenant, or the like, bound himself and his heirs, and died; this deed, obligation or covenant, was binding upon the heir, so far forth only as he (or any other in trust for him[n]) had any estate of inheritance vested in him by descent from (or any estate *pur auter vie* coming to him by special occupancy, as heir to[o]) that ancestor, sufficient to answer the charge;[p]

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whether he remained in possession, or aliened it before action brought;[q] which sufficient estate is in the law called

Assets, definition of.

assets; from the French word, *assez*, enough.[r] Therefore if a man covenanted, for himself and his heirs, to keep my house in repair, I could then (and then only) compel his heir to perform this covenant, when he had an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descended to the heir, whether he inherited any estate or no, it lay dormant, and was not compulsory, until he had assets by descent.[s] But by

Where lands shall have been acquired under limitations to the heirs.

the 3 & 4 W. 4, c. 106. s. 4, it is enacted that when any person shall have acquired any land by purchase under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance, executed after the 31st of Dec. 1833, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect contained in

[n] Stat. 29, Car. II. c. 3, sec. 12.
[o] Ibid. s. 12.
[p] 1 P. Wms. 777.
[q] Stat. 3 & 4 W. & M. c. 14.
[r] Finch. Law. 119.
[s] Finch. Rep. 86.

the will of any testator who shall die after the 31st of Dec. 1833, such land shall descend, and the descent thereof shall be traced, as if the ancestor named in such limitation had been the purchaser of such land. By this provision, as far as it extends, the distinction between lands taken by purchase and descent is abolished, and they would in either case be liable for the acts of the ancestor. And in the construction of the above act, the word "purchaser" shall mean the person who last purchased the land otherwise than by descent, or by any escheat by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent (s. 1).

What purchase includes.

Such is the legal signification of the word *perquisitio*, or purchase; and in its full 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:

Escheat. Definition of.

1. Escheat, was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman,[s] in which language it signifies chance or accident; and with us it 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.[t]

Escheat is a title partly by descent and partly by purchase.

Escheat therefore being a title frequently vested in the lord by inheritance, as being the fruit of a signiory to which he was entitled by descent, (for which reason the lands escheating shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the other)[u] 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

[245]

[s] *Eschet* or *échet*, formed from the verb *eschoir* or *échoir*, to happen.

[t] 1 *Feud.* 86; Co. Litt. 13.

[u] Co. Litt. 13.

escheated, or suing out a *writ of escheat*[v]: 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 the possession, his title by escheat is barred.[w] It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed this might also be said of descents themselves, in which an entry or other seisin was required, in order to make a complete title; and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the signiory to which they belong, they may vest by either purchase or descent, according as the signiory is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant,[x] and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus haeres*, and therefore taking by descent in a kind of caducary succession.

Foundation of the law of escheats.

The law of escheats is founded upon this single principle, that the blood of the person last seised 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 feodal writers denominate *feudum apertum*; and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Escheats sometimes divided into those *propter defectum sanguinis*, and *propter delictum tenentis*.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*: the one sort, if the tenant dies without heirs; the other if his blood be attainted.[y] 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

[246]

[v] Bro. Abr. *tit. Escheat.* 26.
[w] *Ibid. tit. Acceptance.* 25. Co. Litt 268.
[x] 1 Inst. 215.
[y] Co. Litt. 13. 92.

other; or, as the doctrine of escheats is very fully expressed in Fleta,[a] "*dominus capitalis feodi loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.*"

How hereditary blood may be deficient.

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. Where tenant dies without relations.

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. But this last case, as we have seen,[b] is now much qualified. 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, to the extent mentioned in the last chapter, 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 the 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.

By the common law trust estates escheated.

It was a rule of the common law, that when a person died without heirs, or was convicted of treason or felony, the lands which he held as the legal owner in trust for others, escheated or became forfeited to the lord, who held them discharged of the trust.[c] This rule was so obviously unjust, that it was altered by several recent statutes, in all cases where the superior lord was the crown; and the king was thereby enabled, by sign manual, or under the seal of the Duchy of Lancaster, to grant lands devolving upon the crown by escheat or forfeiture, or from having been pur-

[a] *l.* 6. *c.* 1.

[b] See *ante*, p. 143.

[c] Harg. Co. Litt. 13, n. (7); *Pimb's* case, Moore, 196.

chased by or in trust for an alien, for the purpose of executing any trusts to which they had been directed to be applied, or of restoring the same to the family of the persons whose estates they had been, or to carry into effect any intended disposition of such persons, or to reward persons making discoveries of such forfeiture, &c.; or to direct the lands to be sold, and the rents, or the produce of the sale, to be applied to these purposes, or to pay any debt or debts of the persons whose estates they had been.[a] And by statute 6 G. 4, c. 17, the provisions of these statutes were extended to leaseholds. Personal chattels were, however, still within the operation of the rule of common law.

Entire alteration by 4 & 5 W. 4, c. 23.

But by the 4 & 5 W. 4, c. 23, this rule of the common law is entirely altered; it being enacted (s. 2), that where any person seised of any land upon any trust, or by way of mortgage, dies without an heir, the Court of Chancery may appoint a person to convey such land, in like manner as is provided under Sir Edward Sugden's act (11 G. 4, and 1 W. 4, c. 60) in case such trustee or mortgagee had left an heir, and it was not known who was such heir. It is further enacted (s. 3), that no land, chattels, or stock, vested in any person, or by way of mortgage, or any profits thereof, shall escheat or be forfeited by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee or survive to his co-trustee, or descend or vest in his representative, as if no such attainder or conviction had taken place. By s. 1, the estates and matters included in the act are specified; and by s. 4, it is mentioned to whom, and to what cases, its provisions shall extend. But the escheat or forfeiture of any land, chattels, or stock, vested beneficially in any trustee or mortgagee, is not to be prevented by the act (sec. 5).

The sixth section has a retrospective effect, and enacts, that where any person possessing lands, chattels, or stock, as a trustee thereof, shall have died without heirs, or have been convicted before the passing of the act, the lands, chattels, or stock, are to be subject to the control of the

[a] 39 & 40 G. 3, c. 88; 47 G. 3, sec. 2, c. 24; 59 G. 3, c. 94.

Court of Chancery, for the use of the party beneficially interested therein, and are to be considered within the provisions of the 11 G. 4, and 1 W. 4, c. 60, as if such person so dead without heirs, or so convicted, were out of the jurisdiction of, or not amenable to the process of the court, without having been so convicted. But this section is not to relate to any land, chattels, or stock, vested by virtue of any grant made subsequently to the time when such escheat or forfeiture first occurred, or to any land, chattels, or stock, which more than twenty years prior to the act shall have been actually vested in possession by the parties thereto entitled.

4. A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but, although it hath deformity in any part of its body, yet if it hath human shape, it may be heir.[c] This is a very ancient [247] rule in the law of England;[d] and its reason is too obvious and too shocking to bear a minute discussion. And 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;[e] because it is not capable of inheriting. And therefore, if there appears no other heir than such prodigious birth, the land shall escheat to the lord. 4. A monster.

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. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntar, inter liberos non computantur.*[g] Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of 5. Bastards.

[c] Co. Litt. 7, 8.

[d] *Qui contra formam humani generis converso more procreantur, ut si mulier monstrosum vel prodigiosum enixa sit, inter libros 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.* Bract. *l.* 1, *c.* 6, *and l.* 5, *tr.* 5, *c.* 30.

[e] Co. Litt. 29.

[g] Co. Litt. 8.

the first purchaser: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord.[h] The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother were married to the father;[i] and the Scotch law conforms to the civil law in this respect, but such bastard, though thus legitimized in Scotland, cannot inherit lands in England.[j]

[248] There is one instance, however, in which our law has shewn a bastard some little regard: and that is usually termed the case of a *bastard eignè* and *mulier puisnè*. 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[k] expresses it in his Latin, *filius mulieratus:* the woman before marriage being *concubina*, and afterwards *mulier*. 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 seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puisnè*, and all other heirs, (though minors, feme coverts, and under any incapacity whatsoever) are totally barred of their right.[l] And this, 1. 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 seised, 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

Case of bastard *eigne* and *mulier puisne*.

[h] Finch. law. 117.

[i] Nov. 89, c. 8.

[j] *Doe* d. *Birtwhistle* v. *Vardill*, 5 B. & C. 438; 6 Bli. 479, N. S.; 9 Bli. 32, N. S. and see *Munro* v. *Saunders*, 6 Bli. 467, N. S.

[k] *l.* 7, *c.* 1.

[l] Litt. sec. 399; Co. Litt. 244.

his estate to be shaken. But this indulgence was shewn to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all.[m]

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 seised thereof without issue, and intestate, the land shall escheat to the lord of the fee.[n] [249]

Bastard has no heirs but those of his own body.

6. Aliens[o] unless they have been naturalised by Act of Parliament, or made denizens by the King's letters patent, are incapable of taking by descent, or inheriting:[p] 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 feodal. 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 defence of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his lands shall escheat to the lord.

6. Aliens.

But all children or grandchildren, born out of the King's allegiance, are capable of inheriting lands, whose father or grandfathers were, at the birth of such children or grandchildren, natural born subjects. If, however, the parents are not in actual obedience to the crown, their children are aliens. Thus since the recognition of the independence of the United States of America in 1785, the children of persons continuing to reside there after that time, and adhering to that Government, are incapable of being heirs to lands in England.[q]

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase,[r]

Have no heirs.

[m] Litt. s. 400.
[n] Bract. *l.* 2, c. 7; Co. Litt. 244.
[o] See 1 Bla. Com. c. 10.
[p] Co. Litt. 8.
[q] 25 Edw. 3, c. 2; 7 Anne, c. 5; 4 Geo. 2, c. 21; 13 Geo. 3, c. 21; *Doe* d. *Thomas* v. *Acklan*, 2 B. & C. 773; *Auchmuty* v. *Mulcaster*, 5 B. & C. 771.
[r] Co. Litt. 2.

except by the King's licence,[s] 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 holden,[t] because they have not in them any inheritable blood.

Where an alien is made a denizen, who inherits.

And farther, if an alien be made a denizen by the King's letters patent, and then purchases lands, (which the law allows such a one to do) his son, born before his denization, 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
[250] 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.[u]

Where alien has natural born sons, whether they can inherit to each other.

Sir Edward Coke[v] also holds, that if an alien cometh into England, and there hath 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 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. But this opinion hath been since overruled:[w] and it is now held for law, that the sons of an alien born here, may inherit to each other; the descent from one brother to another being an *immediate* descent by the former law.[x] But as the descent is now[y] to be traced through the parent, perhaps Sir Edward Coke's doctrine would be held to
[251] be the right one.

Statutes relating to the children of

It is also enacted, by the statute 11 & 12 W. III. c. 6, that all persons, being natural-born subjects of the king,

[s] Harg. Co. Litt. 2 b, n 2.
[t] Co. Litt. 2; 1 Lev. 59.
[u] Co. Litt. 129.
[v] 1 Inst. 8.
[w] 1 Ventr. 413; 1 Lev. 59; 1 Sid. 193.
[x] See page 142.
[y] See *ante*, *ib.*

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 seised. 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 born in England, it was feared that, under the statute of King William, this new-born child might defeat the estate of his uncle Oliver. Wherefore it was provided by the stat. 25 G. 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 seised:—with an exception however to the case, where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule[z] of descents by the common law.

Aliens inheriting.

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

7. Attainder.

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,[a] as a part of punishment for the offence; and does not at all relate to the feodal system, nor is the consequence of any signiory or lordship paramount:[b] but, being a prerogative vested in

Distinction between escheat and forfeiture in this respect.

[252]

[z] See page 136.

[a] *L. L. Aelfred*, c. 4, *LL. Canut.* c. 54.

[b] 2 Inst. 64; Salk. 85.

the crown, was neither superseded nor diminished by the introduction of 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.

Doctrine of escheat on attainder.

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[c]) 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*. Upon the thorough demonstration of which guilt, by legal attainder, the feodal 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 feodal 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,[d] as it would have done to the heir of the felon in case the feodal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands, (which seems 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[e]

[253]

Wife of felon, when entitled to dower.

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 1 Edw. 6, c. 12, enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife

[c] 3 Inst. 15; Stat. 25 Edw. 3, c. 2, sec. 12.

[d] 2 Inst. 36.

[e] Somner. 53; Wright. Ten. 118.

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 and 6 Edw. 6, c. 11, that the wife of one attaint of high treason, and petit treason,[f] shall not be endowed at all.

Effect of escheat as to rendering the person incapable of inheriting.

Hitherto we have only spoken of estates vested in the offender, at the time of his offence 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 that he now has shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seised 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.[g] 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 for a year and a day, and so long after as the offender lives.[h]

The person attainted was incapable of transmitting his property to posterity.

There was yet a farther consequence of the corruption and extinction of hereditary blood, which was this: that the person attainted should not only be incapable himself of inheriting, or transmitting his own property by heirship, but should also obstruct the descent of lands or tenements to his posterity, in all cases where they were obliged to derive their title through him from any remoter ancestor.

[254]

Corruption of blood abolished.

But by the statute 54 G. 3, c. 145, corruption of blood was abolished in all cases except the crimes of petit treason or murder; and by the 3 & 4 W. 4, c. 106, s. 10, it is enacted, that when any person from whom the descent

Descents to be made

[f] Co. Litt. 37, a; Staundf. 195 b.
[g] Co. Litt. 13.
[h] 3 Inst. 47.

through attainted persons.

of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land, who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such lands shall have escheated in consequence of such attainder before the 1st of January, 1834.

[256] And indeed this corruption of blood, arising from feodal principles, has been long looked upon as a peculiar hardship; and therefore in most (if not all) of the new felonies created by parliament since the reign of Henry VIII. it is declared that they shall not extend to any corruption of blood.

Lands vested in corporation, not liable to escheat.

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 hath left no 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,[1] doth tacitly annex a condition to every such gift or grant, that if the corporation be dis-

[257] solved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. 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 vasal to be holden as of himself; till that practice was restrained by the statute of *quia emptores*, 18 Edw. I. st. 1, to which this very singular instance still in some degree remains an exception.

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

[1] Co. Litt. 13; but see Harg. note, on the point, *contra*. See also 1 Fonb. Eq. 309, who agrees with Coke and Blackstone.

CHAPTER THE FOURTH.

OF TITLE BY OCCUPANCY.

[258]

Occupancy, definition of.

OCCUPANCY is the taking possession of those things, which before belonged to nobody.

In what it existed.

This right of occupancy, so far as it concerns real property, hath 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*, 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*, or him by whose life it was holden: 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[j].

[259]

But the title of common occupancy is now reduced almost to nothing by two statutes: the one, 29 Car. II. c. 3. which enacts (according to the ancient rule of law[k]) 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 or administrators and be assets in their hands: the other, that of 14 Geo. II. c. 20, which enacts, that the surplus of such estate *pur auter vie*, after payment of debts, shall be applied and distributed in the same manner as the personal estate of the testator[l].

By these 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 de-

j Co. Litt. 41.

k Bract. *Ibid.*; Flet. *Ibid.*

l And it has very recently been enacted that where any person shall die seised of any real estate, whether freehold or copyhold, the same shall be assets for all his just debts, whether specialty or simple contract. 3 & 4 W. 4, c. 104.

scent, for then he must take an estate of inheritance; but as an occupant specially marked out and appointed by the original grant. And it has been held, contrary, however, to the opinion of Blackstone,[l] that these statutes apply to rents, and as it would seem to all other incorporeal hereditaments, but not to copyholds.[m]

[261] 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.

Difference between actual and potential ownership.

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 the sea or in a river, or by the alluvion or the dereliction of the waters; in these instances the law of England assigns them an immediate owner. For Bracton tells us,[n] 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.[o] 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 usually is whenever a several fishery is claimed,[p] there it seems just (and so is the constant practice) that the eyotts or little islands,

Case of the rising of an island, or dereliction of land by the water.

[l] *Rawlinson* v. *Dss.* of *Montague*, 3 P. Wms. 264. n.

[m] *Zouch* v. *Force*, 7 East, 186.

[n] *l.* 2. c. 2.

[o] *Inst.* 2. 1. 22.

[p] Salk. 637. See page 17.

arising in any part of the river, shall be the property of him who owneth 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,[q] yet ours gives it to the king.[r] And as to lands gained from the sea, either by [262] *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*: 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, it shall go to the owner of the land adjoining.[s] For *de minimis non curat lex*: 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 or 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.[t] 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, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss.[u] And this law of alluvions and derelictions with regard to *rivers*, is nearly the same in the imperial law;[v] from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as

q *Inst.* 2, 1, 18.

r Bract. *l.* 2, *c.* 2; Callis of sewers, 22.

s 2 Roll. Abr. 170; Dyer, 326; *Rex* v. *Harborough*, 3 B. & C. 106; Aff. Dom. Proc. 5 Bing. 170.

t Callis, 24, 28.

u *Ibid.* 28.

v *Inst.* 2, 1, 20, 21, 22, 23, 24. See further *Blundell* v. *Cotterell*, 5 B. & A. 268; *Rex* v. *Lord Yarborough*, 2 B. & C. 91; *Scratton* v. *Brown*, 5 B. & C, 505.

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, that whatever hath no other owner, is vested by law in the king.

CHAPTER THE FIFTH.

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OF TITLE BY PRESCRIPTION.

Title by prescription.

A THIRD method of acquiring real property by purchase is that by *prescription*; as when a man can shew no other title to what he claims than that he, and those under whom he claims, used to enjoy it for a considerable period.

Until very recently all rights or benefits claimed by prescription must strictly have been proved to have commenced from time immemorial;[a] and although this rule was controlled by the courts presuming that after the right had been enjoyed for a considerable time, and nothing appeared to the contrary, it was rightly acquired, yet much injustice was frequently worked by showing the commencement of the right within the strict time of prescription. To remedy this inconvenience, an act, relating to all the usual prescriptive rights, has been passed (2 & 3 W. 4, c. 71), some of the provisions of which we have already had occasion to state.[b] This statute has considerably shortened the time of prescription in claims to rights of common and other profits *a prendre*, which are not to be defeated after thirty years enjoyment by showing the commencement thereof; and after sixty years enjoyment the right is to be absolute, unless had by consent or agreement (s. 1). In claims of rights of way, or other easements, the periods are to be twenty years, and forty years (s. 2); and the use of light, enjoyed for twenty years, is indefeasible, unless shown to have been by consent (s. 3). In claims not provided for by the act, the old law of prescription, I presume, obtains.

In treating of prescription we shall first distinguish between *custom*, strictly taken, and *prescription*; and then shew what sort of things may be prescribed for.

[a] See p. 11.

[b] See *ante* p. 11. & 14.

Distinction between custom and prescription.

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 hath, have used for a considerable time to have such an advantage or privilege.[b] 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[c] 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 seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used, for the period mentioned in the statute 2 & 3 W. 4, c. 71, 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 hath:[d] 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 or predecessors at any distance of time, though his or their enjoyment of it had been suspended[e] 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 seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such prescription made.[f] And the time of prescription, as we have just seen, has been, in certain cases, much shortened by the 2 & 3 W. 4, c. 71; and by a still more recent act, (3 & 4 W. 4, c. 27), to which we have already adverted, actions and suits relating to real property must be brought within twenty

Limitation of rights by prescription.

[b] Co. Litt. 113.

[c] 1 Lev. 176.

[d] 4 Rep. 32.

[e] Co. Litt. 113.

[f] This title of prescription, was well known in the Roman law by the name of *usucapio*; (*Ff.* 41, 3, 3), so called because a man, that gains a title by prescription may be said *usu rem capere*.

years after the right has accrued, except in cases of persons labouring under disability. By the 2 & 3 W. 4, c. 100, the time for making claims to tithes is also considerably reduced, as we have already stated.[g]

What things may be prescribed for;

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 of way, a common, &c.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had.[h] For a man shall not be said to prescribe, that he and his ancestors have used to hold the castle of Arundel: for this is clearly another sort of title; a title by corporal seisin 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 the periods mentioned in the stat. 2&3 W. 4; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but usage.

And how and by whom.

2. A prescription, before the recent act, must always have been laid in him that was tenant of the fee. [264] A tenant for life, for years, at will, or a copyholder, could not prescribe, by reason of the imbecility of their estates.[i] For, as prescription was usage beyond time of memory, it was absurd that they should pretend to prescribe for any thing, whose estates commenced within the remembrance of man. And therefore the copyholder must have prescribed under cover of his lord's estate, and the tenant for life under cover of the tenant in fee simple. But now by the 2 & 3 W. 4, c. 71, s. 5, it is enacted, that in all pleadings wherein, before the passing of the act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement, in respect whereof the same is claimed, for such

g See *ante*, p. 9.

h Dr. & St. dial. 1, c. 8; Finch, 132. But see as to negative prescription of lands which arises from the several statutes of limitation; in consequence of which, no action can be maintained for the recovery of corporeal property, after an uninterrupted possession of a certain number of years, 3 Cru. Dig. 490, 2d edit.

i 4 Rep. 31, 32.

of the periods as may be applicable to the case, and without claiming in the name or right of the owner of the fee. 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 the 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 prescription.[j] 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.[k] 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 prescribe 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 connexion: 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.[l] Therefore a man may prescribe, that he and those whose estate he hath 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

Every prescription supposes a grant.

What arises by matter of record cannot be prescribed for.

Distinction between prescription in a *que estate* & for ones self and ancestors.

[j] 1 Ventr. 387; Cowp. 102.
[k] Co. Litt. 114.
[l] Litt. sec. 183; Finch. L. 104.

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 gained by prescription are 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 an 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 followeth the nature of its principal.

How estates gained by prescription descend.

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CHAPTER THE SIXTH.

OF TITLE BY FORFEITURE.

Forfeiture, definition of.

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 on to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.

How lands may be forfeited.

Lands, tenements, and hereditaments, may be forfeited in various degrees and by various means: 1. By crimes and misdemeanors. 2. 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. By crimes and misdemeanors.

I. The offences which induce a forfeiture of lands and tenements to the crown are principally the following six: 1. Treason. 2. Felony. 3. Misprison 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. But considerable alterations have recently been made in the law of forfeiture for crimes and misdemeanors, which have already been stated in a preceding chapter[a].

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II. By alienation.

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.

[a] See *ante*, p. 165.

I. Alienation in *mortmain, in mortui monu,* 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 hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain.

I. By alienation in *mortmain.*

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feodal restraints of alienation were worn away. Yet in consequence of these it was always, and is still, necessary,[c] for corporations to have a licence in 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 feodal profits, by the vesting of lands in tenants that they cannot be attainted or die. And if no such licence was obtained, the King might enter on the lands so aliened in mortmain, as a forfeiture. 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 licence 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 seisin 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 signiory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feodal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that

Corporations must have a licence from the crown.

to enable them to purchase lands.

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History of the contrivances of the monks to evade the law, and of the statutes of mortmain.

[c] F. N. B. 121.

[270] the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their signiories, their escheats, wardships, reliefs, and the like: and therefore, in order to prevent this, it was ordered by the second of King Henry III's great charters,[g] and afterwards by that printed in our common statute-book, that all such attempts should be void, and the land forfeited to the lord of the fee.[h] 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,[i] 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* holden 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*, 7 Edw. I, which provided, that *no person*, religious or other whatsoever, should buy, or sell, or receive, under pretence 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 defence, 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 honour of inventing those fictitious adjudications of right, which were until lately

9 Hen. 3, c. 36.

7. Edw. I, statute de religiosis.

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[g] *A. D.* 1217, *cap.* 43, edit. Oxon.
[h] Mag. Cart. 9 Hen. III. *c.* 36.
[i] 2 Inst. 75.

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 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 seisin; 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. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I. abolished all sub-infeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord,[l] a proviso was inserted[m] that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the King's licence by writ of *ad quod damnum* 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 licence should be effectual, without the consent of the mesne or intermediate lords.

Invention of common recoveries.

13 Edw 1. c. 32.

18 Edw.1. c.3.

34 Edw. I. st. 3.

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 seisin of the lands 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 practisers 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 amortised by licence from the crown,

Invention of uses.

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15 Ric. 2.c, 5

[l] 2 Inst. 501.

[m] Cap. 3.

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 subtile imagination is also declared to be within the compass of the statute 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.

23 Hen. 8, c. 10.

Power of the crown to grant licence of mortmain.

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,[n] since the kings had no power to dispense with the statutes of mortmain by a clause of *non obstante*,[o] which was the usual course, though it seems to have been unnecessary;[p] and as, by the gradual declension of mesne signiories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very 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 holden.

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Confirmed by the 7 & 8 W. 3, c. 37.

[n] 2 Hawk P. C. 391.

[o] Stat. 1 W. & M. st. 2. c. 2.

[p] Co. Litt. 99.

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*l. per annum* may be augmented by the purchase of lands, without license of mortmain in either case; and the like provision hath been since made, in favour of the governors of Queen Anne's Bounty.[q] And by the statute 43 G. 3, c. 137, any real or personal property may be given by deed enrolled, or by will, for the augmentation of this bounty, notwithstanding the statutes of mortmain, including the 9 G. 2, c. 36, mentioned below. It hath also been held,[r] 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 death beds might make large and improvident dispositions even for these good purposes, and defeat the political end 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 be void. The two

1 & 2. P. & M. c. 8.

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q Stat. 2 & 3 Ann. c. 11. r 1 Rep. 24.

universities, their colleges, and the scholars upon the foundation of the colleges of Eton, 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. But this proviso has been repealed by the statute 45 G. 3, c. 101.

2. Alienation to an alien.

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,[s] but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property.

3. Alienations by particular tenants.

3. Lastly, alienations by *particular tenants*, when they are greater than the law entitles them to make, and devest the remainder or reversion,[t] are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life aliens by feoffment, fine, or recovery, (when these last assurances existed) 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.[u] For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feodal connexion and dependence; it implies a refusal to perform the due renders and services [275] to the lord of the fee, of which fealty is constantly one; and it tends in its consequence to defeat and devest the remainder or reversion expectant: as therefore that is put in jeopardy by such act of the particular tenant, it is but just that, 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 end to his own original interest; and

[s] See page 161.
[t] Co. Litt. 251.
[u] Litt. s. 415.

on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. But if a tenant for life aliene by lease and release, or bargain and sale, as no estate passes by these conveyances but what may legally pass, it will be no forfeiture, and alienation in fee by *deed* by tenant for life of any thing which lies in grant, as an advowson, &c., does not amount to a forfeiture, but conveyance by fine of such an estate would have been a forfeiture. The fine of an equitable tenant for life would not work a forfeiture.[u] 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) of the estate-tail, which the issue may afterwards avoid by due course of law:[v] for he in remainder or reversion hath 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.[w] 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.

Effect of disclaimer.

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,[x] upon reasons most apparently feodal. And so likewise, if in any court of [276] 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 infeodation, or takes

[u] Co. Litt. 251 b; 1 Prest. Conv. 202.

[v] Litt. s. 595. 6. 7.

[w] Co. Litt. 233.

[x] Finch. 270, 271.

upon himself those rights which belong only to tenants of a superior class;[a] if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like:[b] such behaviour amounts to a forfeiture of his particular estate.

III. By lapse.

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)[c] of the council of Lateran,[d] which was in the reign of our Henry the second, when the bishops first began to exercise universally the right of institution to churches. And therefore, where there is no right of institution, there is no right of lapse; so that no donative can lapse to the ordinary,[f] unless it hath been augmented by the queen's bounty.[g] But no right of lapse can accrue, when the original presentation is in the crown.[h]

When a title by lapse accrues.

The term, in which the title to present by lapse accrues from one to the other successively, is six *calendar* months;[i] (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 avoidance.[k] But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in;[l] for the forfeiture accrues by law, whenever the negligence has continued six months in

[277]

[a] Co Litt. 252.
[b] *Ibid.* 253.
[c] 2 Roll. Abr. 336. pl. 10.
[d] Bracton. *l.* 4, *tr.* 2, c. 3.
[f] Bro. *Abr. tit. Quar. Imped;* 3 Cro. Jac. 518.
[g] St. 1 Geo. 1, st. 2, c. 10.
[h] Stat. 17 Edw. 2, c. 8, 2 Inst. 273.
[i] 6 Rep. 62. Regist. 42.
[k] 2 Inst. 361. But it has been doubted whether the day is exclusive, 15 Ves. 255.
[l] Gibs. Cod. 769.

the same person. And also if the bishop doth 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 patron's clerk.[m] 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 patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop 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 archbishop.[n] For he had no permanent right and interest in the advowson, as the patron hath, 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*.[o] 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; or, after induction, may remove him by *quare impedit:* but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation.[p]

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: [278]

[m] 2 Inst. 273.
[n] 2 Roll. Abr. 368.
[o] Dr.&St. d. 2, c. 36; Cro. Car. 355.
[p] 7 Rep. 28. Cro. Eliz. 44.

but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, or from being under the proper age, these being matters of which the bishop alone is presumed 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.[q] Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the archbishop nor the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time; for the first step or beginning faileth, *et quod non habet principium, non habet finem*:[r] If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is stiled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong.[s] 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.[t]

IV. By simony.

IV. By *simony*, the right of presentation to a living is forfeited and vested *pro hac vice* 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 offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as Sir Edward Coke observes,[u] it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However it was not an offence punishable in a criminal way at the common law;[w] it being thought sufficient to leave the clerk to [279] ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parlia-

[q] 4 Rep. 75. 2 Inst. 632. 44 G. 3. c. 43.
[r] Co. Litt. 344, 345.
[s] 2 Roll. Abr. 369.
[t] Co. Litt. 344.
[u] 3 Inst. 156.
[w] Moor. 564.

ment 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 presentation, and vest a new right in the crown.

Statutes relating to Simony.

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. But if the presentee dies, without being convicted of such simony in his life-time, it is enacted by statute 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any other innocent patron, on pretence of lapse to the crown or otherwise. 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.

31 Eliz. c. 6.

1 W. & M. c. 16.

12 Ann. stat. 2, c. 12.

What is and what is not Simony.

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;[x] this being expressly in the face of the statute. There has however been some conflict in the authorities, as to the purchase of a next presentation where the incumbent is *in extremis*. In *Barret v. Glubb*,[y] it was held, that if the clerk was not privy to the contract, it would be valid. But in the case of *Fox v. Bishop of Chester*,[z] a similar transaction was held by the Court of King's Bench to be simoniacal, and consequently void; and that the privity of the clerk was not essential to make

Whether a next presentation can be purchased when the purchaser is in *extremis*.

[x] Cro. Eliz. 788. Moor. 914.

[y] 2 W. Bla. 1052. Bac. Abr. Simony, A. S. C.

[z] 2 B. & C. 635.

it so. But this decision has been reversed by the House of Lords, who directed a question for the opinion of the Judges; and *Best*, C. J., delivered the unanimous opinion of the Judges of the Courts of Common Pleas and Exchequer, to be, that if the clergyman were not privy to the agreement, the sale, under the above circumstances, could not be simoniacal; and that the right to sell the presentation continues as long as the incumbent is in existence.[c]

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:[d] and now, by that statute, to purchase, either in his own name or another's, the next presentation, and be thereupon presented at any
[280] 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.[e] 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.[f] 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal,[g] provided the patron or his relations be not benefited thereby;[h] 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;[i] there being no corrupt consideration herein, but such only as is for the good of the public. And it was at one time held, that bonds, both of general and special resignation were valid; but after very great discussion and many conflicting decisions, it has been settled,[j] that bonds, as well of special as general resignation, are void. But, nevertheless, it has recently been enacted, that a bond may be taken to secure the resig-

As to bonds of resignation

[c] 6 Bing. 1; and 2 Bli. 1 N. S.
[d] Hob 165.
[e] Cro. Eliz. 686; Moor. 916; see *ante*, p. 187.
[f] 3 Inst. 154; Cro. Jac. 385.
[g] Noy. 142.
[h] Stra. 534.
[i] Cro. Car. 180.
[j] *Fletcher* v. *Lord Sondes*, 2 B. & A. 835; 3 Bing. 501; and 1 Bli. 144, N. S.

nation of a living in favour of any one person whomsoever, and in favour of any two persons, if they are the near relations of the patron. But all bonds of this kind not provided for by this statute, are void.[h]

V. The next kind of forfeitures are those by *breach* or non-performace 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 book.[i] [281]

V. By breach of condition.

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 injury of the inheritance.[k]

VI. By waste.

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.[l] Therefore removing wainscot, floors, or other things, once fixed to the freehold of a house, is waste.[m] But during the term, the lessee may move marble chimney pieces, &c., which he has erected, but he cannot remove them after the term. If a house be destroyed by tempest, lightning, or the like, which is the act of providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee; though now by the statute 6 Ann. c. 31, re enacted by the 14 Geo. 3. c. 78, s. 86, no action will lie against a tenant for an accident of this kind. But the lessee will be liable for rent, if he has made no agreement on the subject, as well during the time that the house remains unbuilt as afterwards.[n] 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.[o] Timber also is part of the inheritance.[p] Such are oak, ash, and elm in all

Waste is voluntary or permissive.

What will be considered waste.

[h] 9 G. 4, c. 94.
[i] See Book III. ch. 4.
[k] Co. Litt. 53; 3 Atk. 95, 754.
[l] Hetl. 35.
[m] 4 Rep. 64. See *Elwes* v. *Maw*, 3 East. 38.
[n] *Balfour* v. *Weston*, 1 T. R. 312; *Holzapfel* v. *Baker*, 18 Ves. 119.
[o] Co. Litt. 53.
[p] 4 Rep. 62.

places, and in some particular countries, by local custom, where other trees are generally used for building, they
[282] are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste.[q] But underwood the tenant may cut down at any seasonable time that he pleases;[r] and may take sufficient estovers of common right for housebote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions.[s] 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.[t] For, as Sir Edward Coke observes,[u] 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.[v] To open the land to search for mines of metal, coal, &c. is waste; for that is a detriment to the inheritance:[w] but, if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use;[x] 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 else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste.

Who may be punished for waste.

Let us next see, who are liable to be punished for committing waste. And it may be laid down that all tenants
[283] merely for life, or for any less estate, are punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases 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. But although

[q] Co. Litt. 53.
[r] 2 Roll. Abr. 817.
[s] Co. Litt. 41.
[t] Hob. 296.
[u] 1 Inst. 53.
[v] 1 Lev. 309.
[w] 5 Rep. 12.
[x] Hob. 295.

this clause in a lease enables the tenant to cut down trees or open mines, it will not sanction destruction or malicious waste, such as cutting timber which serves for the shelter or ornament of the estate.[y] Tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes.[z] Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit*; because against them the debtor may set off the damages in account:[a] but it seems reasonable that it should lie *for the reversioner*, expectant on the determination of the debtor's own estate, or of these estates derived from the debtor.[b]

The remedies against waste.

The statutes of Marlbridge, 52 Hen. III. c. 23, and of Gloucester, 6 Edw. I. c. 5, provided a writ of waste, under which, *locus vastatus*, the place wasted and damages could be recovered; but this remedy at common law has long fallen into disuse, the ends of justice being found to be better answered by a Court of Equity, which granted an injunction to restrain the waste, and an account of the profits made; and very recently, by the 3 & 4 W. IV. c. 27, s. 36, the writ of waste has been abolished. An injunction to restrain waste will be granted at the suit not only of a remainder-man in fee-simple, or fee-tail, but also of a remainder-man for life, or of trustees to preserve contingent remainders.[c]

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VII. By breach of the customs of the manor.

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;[d] 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 holden by the lowest and most abject vasals, the marks of feodal dominion continue much the strongest

[y] 2 Vern. 738; 5 Bac. Abr. 491.
[z] Co. Litt. 27; 2 Roll. Abr. 826, 828.
[a] Co. Litt. 54.
[b] F. N. B. 58.
[c] *Perrott* v. *Perrott*, 3 Atk. 95; *Stansfield* v. *Habergham*, 10 Ves. 281.
[d] 2 Ventr. 38; Cro. Eliz. 499.

upon this mode of property. Most of the offences, which occasioned a resumption of the fief by the feodal law, and were denominated *feloniae, per quas vassallus amitteret feudum*,[e] still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service;[f] *si dominum deservire noluerit*:[g] by disclaiming to hold of the lord, or swearing himself not his copyholder;[h] *si dominum ejuravit, i. e. negavit se a domino feudum habere*:[i] by neglect to be admitted tenant within a year and a day;[k] *si per annum et diem cessaverit in petenda investitura*;[l] by contumacy in not appearing in court after three proclamations;[m] *si a dominuo ter citatus non comparuerit*:[n] or by refusing when sworn of the homage, to present the truth according to his oath;[o] *si pares veritatem noverint, et dicant se nescire, cum sciant*.[p] And in none of these cases does presentment by the homage now seem to be necessary, because as a matter of prudence, the lord will procure it.[q]

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VIII. By bankruptcy.

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 several connected consequences resulting from that unhappy situation, need not here be considered. I shall only here observe the manner in which the property of lands and tenements is transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission or fiat of bankruptcy is awarded and issued against him.

e *Feud, l.* 2, *t.* 26, *in calc.*
f 3 Leon. 108; Dyer, 211.
g *Feud l.* 1 *t.* 21.
h Co. Copy. s. 57.
i *Feud. l.* 2, *t.* 34, & *t.* 26, *s.* 3.
k Plowd. 372.
l *Feud. l.* 2, *t.* 24.
m 8 Rep. 99; Co. Copy. s. 57.
n *Feud. l.* 2, *t.* 22.
o Co. Copy. s. 57.
p *Feud. l.* 2, *t.* 58.
q Scriv. on Cop. 511.

Provisions in the Bankrupt Act.

By the statute 6 G. 4, c. 16, (by which the former acts on the subject are consolidated,) s. 12, which re-enacts s. 7 of the stat. 45 G. 3, c. 124, it is enacted, that under a commission, the commissioners shall have full power to take the order and direction of all the bankrupt's lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary-hold as freehold, as he had in his own right before he became bankrupt; and also all such interest in any such lands, tenements, and hereditaments, as such bankrupt might lawfully depart withal, and to make sale thereof, or otherwise order the same, for the satisfaction and payment of his creditors. And, by s. 64, founded on the stat. 13 Eliz. c. 7, s. 11, and 5 G. 2, c. 30, s. 20, it was further enacted, that the commissioners shall, by deed indented and enrolled, convey to his assignees, for the benefit of his creditors, all lands, tenements, and hereditaments, (except copy or customary-hold) in any part of the dominions or colonies belonging to his Majesty, to which such bankrupt is entitled. But by the stat. 1 & 2 W. 4, c. 56, s. 26, this conveyance by the commissioners to the assignees is rendered unnecessary; and the real estate of a bankrupt vests in his assignees by virtue of their appointment. By the 68th sec. (6 G.4,) it is enacted, that the commissioners shall have power to make sale of any copyhold or customary-hold lands, or of any interest to which a bankrupt is entitled therein: and by s. 81, which re-enacts the 46 G. 3, c. 135, s. 1, and the 49 G. 3, c. 121, s. 2, it is enacted that all conveyances by, and all contracts by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the issuing of the commission against him, and all executions, and all attachments against the lands and tenements of such bankrupt, executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person so dealing with such bankrupt had not, at the time of such conveyance, contract, dealing, or transaction, notice of any prior act of bankruptcy by the said bankrupt committed. By the 83d section it is enacted, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy, (if an act of bankruptcy

had been actually committed before the issuing of the commission,) if the adjudication has been notified in the London Gazette, and the persons affected by such notice may reasonably be presumed to have seen it. But, the 86th section enacts, that no purchase from any bankrupt *bonâ fide*, and for valuable consideration, though the purchaser had notice at the time of such purchase of any act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission shall have been sued out within twelve calendar months after such an act of bankruptcy. And by the 87th section it is enacted, that no title to any real estate sold under a commission or order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same, within twelve calendar months from the issuing thereof.

Bankrupt tenants in tail. Provisions of 3 & 4 W. 4, c. 74.

By the 65th section of the 6 G. 4, c. 16, it was enacted that the Commissioners of Bankrupts should make sale of any land of which the bankrupt was seised in tail, and every such deed should bar all persons whom the bankrupt might have barred by fine or recovery; but by the recent act for abolishing fines and recoveries, (3 & 4 W. 4, c. 74, s. 55,) this section is repealed, and it is enacted (s. 56,) that the commissioners in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, may by deed dispose of the lands of such bankrupt to a purchaser for the benefit of the creditors, and if the person who is the protector[r] of the settlement shall not concur therein, the commissioner may dispose of as large an estate as the tenant in tail could have done if he had not become bankrupt. And where a tenant in tail entitled to a base-fee becomes bankrupt and there is no protector, the commissioners may dispose of the lands to a purchaser (s. 57). The deed of disposition, if of freeholds, must be enrolled in Chancery, and if

[r] As to the protector of the settlement, see *post*, Chap. IX.

of copyholds, must be entered on the court rolls, and also the deed of consent of the protector, (s. 59.); and all acts of a bankrupt tenant in tail shall be void against any disposition under the act by the commissioner (s. 63). [286]

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

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CHAPTER THE SEVENTH.

OF TITLE BY ALIENATION.

Title by alienation, what is comprised under it.

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.

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Who may aliene.

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, aud the weak oppressed.[a] 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 hath been said) be assigned to a stranger at law, unless coupled with some present interest,[b]

[a] Co. Litt. 214.

[b] Sheppard's Touchstone, 238, 239; 11 Mod. 152; 1 P. Wms. 54; Stra. 132.

although they may be assigned in equity,[d] and bound at law by way of estoppel.[d]

Attainted persons.

Persons attainted of treason, felony, and *praemunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows:[e] 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.[f] So also corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.

All lay civil corporations might aliene their lands as freely as individuals, except for election purposes;[g] but by the stat. 4 & 5 W. 4, c. 76, s. 94, they are restrained from selling or mortgaging any real estate, except in pursuance of some agreement entered into on or before the 5th of June, 1835, by the body corporate; but when the council shall deem it expedient to sell, they may represent the case to the treasury, and with the approbation of three of the Lords, may sell on such terms as they approve; but notice of the application must be given. Ecclesiastical and eleemosynary corporations are restrained by several statutes from every mode of alienation except that of leasing, and exercise that power under considerable restrictions, as will hereafter be seen.

Idiots, infants, and persons under duress.

Idiots and persons of nonsane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. The King indeed, on behalf of an idiot, may avoid his grants or other acts.[h] But it hath been said, that a *non compos* himself, though he be afterwards brought to a

[c] See *Wright* v. *Wright*, 1 Ves. 411; and *ante*, p. 102.

[d] *Weale* v. *Lower*, Pollex. 30; *Bensley* v. *Burdon*. 2 Sim. & Stu. 519.

[e] Co. Litt. 42.

[f] Co. Litt. 2.

[g] 3 & 4 W. 4, c. 69, s. 3.

[h] Co. Litt. 247.

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, although he may plead *non est factum*, and show the insanity in evidence.[i]

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And this maxim that a man shall not stultify himself seems to be now settled law;[k] although the doctrine does not appear to obtain in the ecclesiastical courts.[l] But 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.[m] 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.[n] 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.[o] Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased.[p] For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecillity of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecillity ceases. By two recent acts[q] some important provisions are made respecting the leasing and renewing the leases of lunatics, infants, and other persons under disability, which we need not here mention in detail.

Feme covert.

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,

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till he avoids it by some act declaring his dissent.[r] 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

[i] *Yates* v. *Bowen*, Str. 1104; Sug. Pow. 405.

[k] Litt. s. 405; Cro. Eliz. 398; 4 Rep. 123; Jenk. 40; 1 Fonbl. Eq. 48.

[l] *Turner* v. *Meyers*, 1 Hagg. 414.

[m] Perkins, s. 21.

[n] Co. Litt. 2.

[o] *Ibid.*

[p] 2 Inst. 483; 5 Rep. 119.

[q] 1 W. 4, c. 60; 1 W. 4, c. 65.

[r] Co. Litt. 3.

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.[s] But before the recent statute 3 & 4 W. 4, c. 74, the *conveyance* or other contract of a feme covert, (except by some matter of record) was absolutely void at law, and not merely voidable;[t] and therefore could not be affirmed or made good by any subsequent agreement.

Her powers of alienation under 3 & 4 W. 4, c. 74.

But by this act a very considerable alteration has been made in the law in this respect. Before the passing of the act a married woman had the power of conveying any estate or interest in lands to which she was entitled by fine or recovery; but these assurances have been abolished by this statute, which will be more fully considered in the ninth chapter of the present book, and a married woman has been enabled since the 31st of December, 1833, in every case, (except that of being a tenant in tail, for which provision is made by the act,[u]) by deed to dispose of lands of any tenure, and also to release or surrender or extinguish any estate or power that she alone, or she and her husband in her right, may have in any lands of any tenure as fully and effectually as if she were a *feme sole;* but no such disposition, release, or surrender shall be valid unless the husband concur (3 & 4 W. 4, c. 74, s. 77). But every such deed must be produced and acknowledged before a judge of one of the superior courts at Westminster, or a Master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be appointed under the act (s. 79); and such Judge, Master in Chancery, or Commissioners, before they shall receive such acknowledgment, shall examine her apart from her husband touching her knowledge of such deed, and shall ascertain whether she voluntarily consents to such deed, and unless she so consents, shall not permit her to acknowledge the same; and in such case such deed, so far as it relates to the execution thereof by the married woman, shall be void (s. 80). When such acknowledgment shall be made, the Judge, Master in Chancery, or Commissioners, shall

[s] Co. Litt, 3.

[t] Perkins, s. 154; 1 Sid. 120.

[u] See *post*, Chap. IX.

sign a memorandum to be indorsed on the deed, and a certificate of taking such acknowledgment (s. 84), and the certificate, with an affidavit verifying the same, is to be lodged with the proper officer of the Court of Common Pleas, who shall cause the same to be filed of record in the court (s. 85), and on filing the certificate, the deed by relation is to take effect from the time of acknowledgment (s. 86). A married woman is to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal (s. 90). And it is further provided, that where the husband is a lunatic, or of unsound mind, the Court of Common Pleas may dispense with his concurrence, except where the Lord Chancellor, or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of the settlement in lieu of the husband (s. 91).

It will be seen, therefore, that since the time above mentioned a substitute has been provided for fines and recoveries, but as before that time, these assurances were constantly employed in the alienation of the estates and interests of a married woman, it will still be necessary to understand their nature and effect; and for these we must refer the reader to a subsequent chapter of this book.

Property settled to the separate use of a married woman.

We have been hitherto speaking of the legal estates of a married woman; but where property is settled to her separate use, without any restraint or alienation, it is now quite clear that to this extent she is in equity considered as a *feme sole*, and may convey or deal with it as such, and her conveyances and contracts will be supported in equity;[v] and this rule existed before the recent statute, and is quite independent of it.

Alien.

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 merchandize, in case he be an alien-friend: all other purchases (when found by an inquest of office) being immediately forfeited to the King.[w]

[v] Sug. Pow. 114, and authorities there cited.

[w] Co. Litt. 2. But see Hargr. note 7.

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. II. How a man may aliene.

[294] For the purpose of continuing the possession of lands when once acquired, the municipal law has established *descents* and *alienations:* the former to continue the possession in the heirs of the proprietor, 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 life-time. 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. Common assurances, what they are.

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. Are of four kinds.

CHAPTER THE EIGHTH.

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OF ALIENATION BY DEED.

Division of the chapter.

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.

Sec. 1. The general nature of deeds.

What a deed is.

I. First then, a deed is a writing sealed and delivered by the parties.[a] 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*, κατ' εξοχην, 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.[b] 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 the teeth of a saw, 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 straight or indented line, in such a manner as to leave half the word on one part and half

Operates by way of estoppel.

Indenture, what it is.

[a] Co. Litt. 71. [b] Plowd. 434; *Bensley* v. *Burdon*, 2 Sim. & Stu. 519.

on the other. Deeds thus made were denominated *syngrapha* by the canonists[c]; and with us *chirographa*, or hand-writings[d]; the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture: and this custom has been until recently 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, and a bill has recently (Session 1835 & 1836) been brought into parliament for dispensing with it altogether. 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 therefore called a *deed-poll*, or a single deed.[e] [296]

Difference between original and counterparts, and between indentures and deeds poll.

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.[f] 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.

II. The requisites of deeds. 1. Persons able to contract and be contracted with.

Secondly; the deed should be founded upon good and sufficient *consideration*. Not upon an usurious contract;[g] nor upon fraud or collusion, either to deceive purchasers *bonâ fide*,[h] or just and lawful creditors;[i] any of which bad considerations will vacate the deed, except between the parties to it, and subject such persons as put the same in ure, to forfeitures, and often to imprisonment. But a consideration is not essential to the actual validity of any

2. A good and sufficient consideration

c Lyndew, *l.* 1, *t.* 10, *c.* 1.
d Mirror, *c.* 2, *s.* 27.
e *Ibid.* Litt. s. 371, 372.
f Co. Litt. 35.
g Stat. 13 Eliz. c. 8.
h Stat. 27 Eliz. c. 4; 9 East 59.
i Stat. 13 Eliz. c. 5.

other deed than a bargain and sale, although a Court of Equity will not lend its assistance to carry a deed into effect, unless it be supported by some consideration.[j] 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 on 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;[k] 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 favour of creditors, and *bonâ fide* purchasers.

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The consideration either good or valuable.

3. The deed must be written or printed

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.[l] Wood or stone may be more durable, and linen less liable to rasures; 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, estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only, (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; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments

Stat. of Frauds, 29 Car. 2, c. 3.

j *Osgood* v. *Strode*, 2 P. Wms. 245, 6th edit.

k 3 Rep. 83.

l Co. Litt. 229; F. N. B. 122.

be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorised 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.[n] 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[o] order. [298]

4. Must be legally and orderly set forth.

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.[p]

The formal parts are— 1. The premises.

2, 3. Next come the *habendum* and *tenendum*.[q] 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* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, 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," or *vice versa*; here A. has an estate-tail, and a fee-simple expectant thereon.[r] But, had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would

2, 3. The habendum and tenendum.

[n] Co. Litt. 225.
[o] *Ibid.* 6.
[p] See Appendix, No. I. p. i. No. II, p. v.
[q] See Appendix, No. I. p. i. & No. II. p. vi.
[r] Co. Litt. 21; 2 Roll. Rep. 19, 23; Cro. Jac. 476.

be utterly void;[s] for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away, or devested, by it. The *tenendum* "and to hold," is now of very little use, and is only kept in by
[299] custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden; *viz.*: "*tenendum per servitium militare, in burgagio, in libero socagio, &c.*" But, all these being now reduced to free and common socage, the tenure is never specified.

4. Reddendum.

4. Next follow the terms of stipulation, if any, upon which the grant is made: the first of which is the *reddendum* or reservation, whereby the grantor doth 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' ploughing, or the like."[t] Under the pure feodal system, this render, *reditus*, return, or rent, 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 still consist of services, or of any other certain profit. 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.[v] 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.

5. Conditions.

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 de-
feated; as "provided always, that if the mortgagor shall
[300] pay the mortgagee 500*l.* upon such a day, the whole estate granted shall determine;" and the like.[w]

Blackstone[x] and others have, however, seemed to mention the *reddendum* and conditions, as usual in all deeds; but this is not so, as they are only applicable to particular deeds and to peculiar circumstances. Thus the *reddendum* is scarcely ever employed but in leases, and conditions in

[s] 2 Rep. 23; 8 Rep. 56.
[t] Append. No. II, § 1, p. iv.
[v] Plowd. 13; 8 Rep. 71.
[w] Append. No. III, p. ix.
[x] 2 Com. Page 299; 4 Cru. Dig. 26, 3d edit.

leases, mortgage deeds, and settlements, and it is with this qualification, that what is said of these parts of a deed should be read.

6. Next followed the clause of *warranty*; whereby the [300] grantor did, for himself and his heirs, warrant and secure to the grantee the estate so granted. But warranty has long been out of use, and by the 3 & 4 W. 4, c. 74, s. 6, all warranties made after the 31st of December, 1833, shall be absolutely void against the issue in tail and all persons whose estates are to take effect after the determination of the estate tail; and the Real Property Commissioners have recommended the entire abolition of the doctrine of warranty.[a]

7. After warranty, when it was used, usually followed [304] *covenants*, or conventions, which are clauses of agreement r. Covenants. 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 hath a right to convey; or for the grantee's quiet enjoyment; or the like; the grantee may covenant to pay his rent, or keep the premises in repair, &c.[b] Covenants which are intimately attached to the thing granted, as to repair, pay rent, &c., are said to run with the land, and bind not only the lessee but his assignee also, and enure to the heir of the lessor even though not named in the covenant, as do also those which the grantor makes, that he is seised in fee, has a right to convey, &c., which enure not only to the grantee, but also to his assignee and to his heirs.[c] If the covenantor covenants for himself and his *heirs*, it 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. It is also in some respects a less security, and therefore more beneficial to the grantor; who usually *covenants* only for the acts of himself, or himself and his ancestors, whereas a general *warranty* extends to

[a] See Third Real Prop. Rep.

[b] See Appendix No. I. p. ii. iii.; No. II., p. vi. vii.

[c] *Lougher* v. *Williams*, 2 Lev. 92; *Gill* v. *Vermuden*, 2 Freem. 199; *Spencer's case*, 5 Co. 17; Dougl. 445.

all mankind. For which reasons the covenant has in modern practice (long before the recent statute) totally superseded the other.

8. The conclusion.

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.[b] Not but a deed is good, although it mention no date: or hath a false date; or even if it hath an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is, delivered, can be proved.[c]

5th. Reading.

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 mis-recited: unless it be agreed by collu-

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sion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party.[d]

6th. Sealing and signing.

Sixthly, it is requisite that the party, whose deed it is, should *seal*, and now in most cases, I apprehend, should *sign* it also.

The 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, 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 hath been sometimes held that the one includes the other.[e]

But the more modern opinion, however, is that the statute of frauds is applicable only to mere agreements, and that signing is not essential to the validityof a deed.[f]

7th. Delivery.

A seventh requisite to a good deed is that it be *delivered* by the party himself or his certain attorney: which

[b] Appendix, No. I. p. iii.
[c] Co. Litt. 46; Dyer 28.
[d] 2 Rep. 3, 9; 11 Rep. 27.
[e] 3 Lev. 1; Stra. 764.
[f] 3 Prest. Abs. 61; 1 Prest. Abs. 154; Sug. Pow. 242, and Vend. & P. pp. 65 & 93.

therefore is also expressed in the attestation; "sealed and [307] *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,[f] 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 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[g], and no express words that it is delivered as an escrow are necessary, but that conclusion may be drawn from all the circumstances.[h]

Escrows, what they are.

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. But in the [308] king's common charters, writs, or letters patent, at present the king is his own witness, and attests his letters patent thus: "*teste meipse*, witness ourself at Westminster, &c." a form which was introduced by Richard the First,[i] but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijs testibus* entirely discontinued till the reign of Henry the Eighth:[k] which was also the æra 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 usually subscribed their attestation, either at the bottom or on the back of the deed.[l]

5th. Attestation.

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

III. How a deed may be avoided.

f Perk. s. 130.
g Co. Litt. 36.
h *Johnson* v. *Baker*, 4 B. & A. 440; *Murray* v. *Earl of Stair*, 2 B. & C. 82, overruling Shep. Touch. 58.
i Madox. *Formul.* N. 515.
k *Ibid.* Dissert. fol. 32.
l 2 Inst. 78.

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 most cases signing also: or, 7. Delivery; it is a void deed, to the extent before mentioned. It may also be avoided by matter *ex post facto:* as, 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation.[m] 2. By intentionally breaking off, or defacing the seal;[n] but if the seal is broken off by the party bound, this will not avoid the deed so far as he is concerned; and no estate will in any case be devested if it has once passed by the
[309] deed.[o] 3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of lattice work or *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. 5. 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, and the courts of common law also on a plea of *non est factum,* when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery.[p] 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.

Sec. II. The several species of deeds. Deeds divided into those which operate at common law, and by virtue of the Stat. of Uses.

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 infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our

m 11 Rep. 27.

n 5 Rep. 23; Touch. c. 4, s. 6; Palmer 403.

o *Bolton* v. *Bishop of Carlisle,* 2 H. B. 263.

p Toth. *numo.* 24; 1 Vern. 348.

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 *secondary*; whereby the benefit or estate, originally created, is enlarged, restrained, transferred, or extinguished.

I. Those at common law are either original or derivative.

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. Defeazance.

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Original are,

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*.[q] 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 conveyance of corporeal hereditaments from one person to another, by delivery of the possession of the hereditaments conveyed and evidenced by an instrument in writing, for since the statute of Frauds, 29 Car. 2. c. 3, no valid feoffment can be made without a written instrument. He that so gives, or enfeoffs, is called the *feoffor*; and the person enfeoffed is denominated the *feoffee*.

1. Feoffment.

This is plainly derived from, or is indeed itself the very mode of the ancient feodal donation; for though it may be performed by the word, "*enfeoff*" or "grant," yet the aptest word of feoffment is, "*do* or *dedi*."[r] And it is still directed and governed by the same feodal rules; insomuch that the principal rule relating to the extent and effect of the feodal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*."[s] And

[q] Co. Litt. 9.
[r] *Ibid.*
[s] Wright. 21.

therefore as in pure feodal donations, the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donasse præsumatur, quam in donatione expresserit*;" 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) hath barely an estate for life.[u] 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
[311] the creation and constitution of the estate, hath 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, 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 or freehold.[v]

Livery of seisin, what it is.

But by the mere words of the deed the feoffment is by no means perfected: there remains a very material ceremony to be performed, called *livery of seisin*, without which the feoffee has but a mere estate at will.[w] This livery of seisin is no other than the pure feodal 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:*[x]" and an estate was then only perfect, when, as the author of Fleta expresses it in our law, "*fit juris et seisinæ conjunctio.*[y]"

[312] In ecclesiastical promotions, corporal possession is now requisite.

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,[z] acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or

[u] Co. Litt. 42.
[v] Co. Litt. 9.
[w] Litt. s. 66.
[x] Wright. 37.
[y] *l.* 3, *c.* 15, *s.* 5.
[z] Decretal. *l.* 3, *t.* 4, *c.* 40.

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. And, [313] 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 verge, and then from the lord to the purchaser by re-delivery of the same, in the presence of a jury of tenants, and these tenants are hence called yard tenants.

Yard tenants.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, 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 incumbering 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 [314] 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.

Advantages of conveyances in writing

Livery of seisin, 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 operating under the common law, an actual

Livery of seisin, when it must be made.

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.[a] This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin 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 at the common law be made to commence *in futuro*, because they cannot (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in praesenti*, or not at all.[b]

Interesse termini.

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.[c] 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*;"[d] but it must be made to [315] the remainder-man himself, by consent of the lessee for years; for without his consent no livery of the possession can be given;[e] partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons depending on the doctrine of attornments, now abolished.

Livery of seisin is either in deed or in law.

Livery of seisin 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 his attorney, (for this may as effectually be done by deputy or attorney, as by the principals themselves in person, if the attorney be authorised by deed for the purpose)[g] 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

[a] Co. Litt. 46.
[b] See page 94.
[c] Page 97.
[d] Co. Litt. 49.
[e] Co. Litt. 48.
[g] 2 Roll. Ab. 8; R. pl. 4; Co. Litt. 52 b.

to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all persons[h] having any lawful estate or possession therein, as lessees or such like, 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 seisin 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, (no person having any lawful estate or interest therein being within) 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.[i] If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all;[k] 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 seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feodal law,[l] *pares debent interesse investiturae feudi, et non alii:* 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) was still reserved to the *pares* or jury of the county.[m] 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 con-

Livery in deed.

[316]

h *Doe* v. *Taylor*, 5 B. & Ad. 575.
i Co. Litt. 48; West Symb. 251.
k Litt. s. 414.
l *Feud. l.* 2, *t.* 58.
m Gilb. 10, 35.

sent of the particular tenant; and the consent of one will not bind the rest.[p] And in all these cases it is prudent, and usual, to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it; together with the names of the witnesses. But this is not absolutely necessary, as after twenty years' possession, livery of seisin will be presumed to have been made, although not endorsed.[q] And thus much for livery in deed.

Indorsement of livery.

Livery in law.

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,[r] will suffice without an entry.[s] This livery in law cannot however be given or received by attorney, but only by the parties themselves.[t]

Where a feoffment is used in practice.

A Feoffment has of late been generally resorted to in practice rather for its peculiar powers and effects than as a simple mode of assurance from one person to another. Thus a feoffment, by a particular tenant, destroys the contingent remainders depending on the particular estate,[u] and if made by a tenant in tail in possession discontinues the estate tail;[v] and until lately it seemed quite settled, that a feoffment might be employed to convey a fee to the feoffee by disseisin, whatever might have been the estate of the feoffor, provided he had possession of the lands enfeoffed.[w] But this doctrine, must now be considered to be exploded, and a feoffment has no longer this effect.[x]

Doctrine of disseisin altered.

p Dyer. 18.

q *Jackson* v. *Jackson*, Sel. Cha. Ca. 81; Fitzgib. 146; *Doe* d. *Wilkins* v. *Marquis of Cleveland*, 9 B. & C. 864.

r Litt. s. 421, &c.

s Co. Litt. 48.

t *Ibid.* 52.

u *Archer's case*, 1 Co. 66 b; *Hasker* v. *Sutton*, 6 Bing. 500; 2 Sim. & Stu. 513, S. C.

v Co. Litt. 327 b; *Doe* d. *Jones* v. *Jones*, 1 B. &C. 238. See *ante*, p. 127.

w See the authorities referred to in Butl. Co. Litt. 330 b, n. (*l*); 2 Sand. Us. & Tr. 15; 2 Prest. Abs. 293.

x *Doe* d. *Maddock* v. *Lynes*, 3 B. & C. 388; *Doe* d. *Dormer* v. *Moody*, 2 Prest. Conv. Pref. 32; 1 Saund. Us. 40; *Jerritt* v. *Weare*, 3 Pri. 575, and see *Reynolds* v. *Jones*, 2 Sim. & Stu. 206

It is proper to mention that it has recently been proposed to dispense with livery of seisin in a feoffment altogether, (session 1835-1836), which would probably have the effect of entirely superseding this mode of conveyance. Should this proposition become law, it will still be necessary, for a considerable period of time, to understand its effect and operation, so far as past titles are concerned.

2. Gifts.

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*;[y] and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee-simple.[z] And this is the only distinction [317] that Littleton seems to take, when he says,[a] "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. But this kind of gift is entirely out of use, and in common acceptation gifts are frequently confounded with the next species of deeds: which are,

3. Grants.

3. Grants, *concessiones*; the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had.[b] For which reason all corporeal hereditaments, as land and houses, are said to lie *in livery;* and the others, as advowsons, commons, rents, reversions, &c., to lie *in grant.*[c] And the reason is given by Bracton:[d] "*traditio,* or livery, *nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporales, quæ sunt ipsum jus rei vel corpori inhærens, traditionem non patiuntur.*" These therefore pass merely by the delivery of the deed. And in signiories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite) were held to be of equal notoriety

y West. Symbol. 256.
z Litt. s. 59.
a Sec. 57.
b Co. Litt. 9.
c *Ibid.* 172.
d 2, c. 18.

with, and therefore equivalent 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. Lease.

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 hath 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; *demisi, concessi, et ad firmam tradidi.*" *Farm*, or *feorme*, is an old Saxon word, signifying provisions:[e] 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 seisin is indeed incident and necessary to one species of leases, *viz.* leases for life of corporeal hereditaments; but to no other.

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For what terms leases may be made, and by whom.

Whatever restriction, by the severity of the feodal 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 seised 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 hath the whole interest: but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner; nor could a husband, seised *jure uxoris*, 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,

[e] Spelm. *Gl.* 229.

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.[c] So also bishops, and deans, and such other sole ecclesiastical corporations as are seised 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 [319] 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. The former statutes are called the *restraining*, the latter the *enabling* statute. We will take a view of them all, in order of time.

The restraining and enabling statutes as to leases.

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 seised 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 seised of an estate of fee-simple in right of their churches, which extends not to 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.[d] 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 have been of corporeal

The enabling stat. 32 Hen. 8, c. 28.

[c] Co. Litt. 44. [d] *Ibid.*

hereditaments, and not of such things as lay merely in grant; for no rent could be reserved thereout by the common law, as the lessor could not resort to them to distrain. 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 any such ecclesiastical or eleemosynary corporation, for one, two, or three lives or terms not exceeding twenty-one years, 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. 7. It must be of lands and tenements
[320] most commonly letten for twenty years past; so that if they had been let for above half the time (or eleven years out of 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.

Disabling stat. 1 Eliz. c. 19.

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.[h] But, by a saving expressly made, this statute of 1 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

h Co. Litt. 45.

again to her favourites, whom she thus gratified without any expense to herself. To prevent which[i] for the future, the statute 1 Jac. I. c. 3, extends the prohibition to grants and leases made to the King, as well as to any of his subjects. Disabling stat. 1 Jac. 1, c. 3.

Next comes the statute 13 Eliz. c. 10, explained and enforced by the statutes 14 Eliz. c. 11 & 14, 18 Eliz. c. 11, 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 three lives, from the making. 2. The accustomed rent, or more, must be yearly reserved thereon, and the premises demised must have been commonly letten.[k] 3. Houses in 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; but by the 57 G. III. c. 99, s. 32, all contracts for the letting of the house of residence on any benefice, or the buildings, garden, &c., to which any spiritual person shall be ordained by his bishop to proceed and reside in, shall be void. 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.[l] 6. All bonds and covenants tending to fustrate the provisions of the statutes of 13 & 18 Eliz., shall be void. 13 Eliz. c. 10 [321]

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 Observations on the statutes.

[i] 11 Rep 71. [k] Co. Litt. 45 a; *Doe* v. *Yarborough*, 1 Bing. 24.
[l] Co. Litt. 45.

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.[m] 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.[n]

[322] In college leases, one-third of the rent to be in wheat or malt.

There is yet another restriction with regard to college leases, by statute 18 Eliz. ch. 6, which directs, that one-third of the old rent, then paid, should for the future be reserved in wheat or malt, reserving a quarter of 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[o] 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 new-found Indies, (which effects were likely to increase to a greater degree) devised this method for upholding the revenues of colleges. Their foresight 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*, almost double to the rents reserved in money.

Statutes relating to the non-residence of clergymen.

The leases of beneficed clergymen were farther restrained in case of their non-residence, by the 13 Eliz. c. 20; 14 Eliz. c. 11; 18 Eliz. c. 11; and 43 Eliz. c. 9. But these statutes were repealed by the 43 G. 3, c. 84, and the 57 G. 3, c. 99.

[m] Co. Litt. 44.

[n] *Ibid.* 45.

[o] Strype's Annals of Eliz.

6 W. 4, c. 20, as to the renewal of ecclesiastical leases.

By the statute 6 W. 4, c. 20, certain provisions are made with respect to the renewal of leases granted by ecclesiastical persons; and it is provided, that from the 1st of March, 1836, no ecclesiastical person shall grant any new lease of any land or tithes, parcel of his ecclesiastical possessions, by way of renewal of any lease granted for two or more lives, until one of the persons for whose life such lease was made shall die, and then only for the surviving lives or life and such new life or lives, as with the life or lives of the survivor or survivors shall make up the number of lives, not exceeding three, for which such lease shall have been made; and where any lease shall have been granted for forty years, no ecclesiastical person shall grant any new lease by way of renewal until fourteen years of such lease shall have expired, or where for thirty years, until ten years shall have expired; or where for twenty-one years, until seven years have expired; and when any such lease shall have been granted for years, it shall not be renewed for life or lives (ss. 1 & 9). By s. 2, it is provided, wherever any ecclesiastical person shall grant any renewed lease, it shall contain a recital, if a lease for lives, of the names of the *cestuis que vie*, and stating which are dead, &c.; and if a lease for years, for what term of years the last preceding lease was granted; and every such recital is to be deemed evidence of the truth of the matter recited; and a penalty is imposed on persons introducing recitals into such leases, knowing them to be false (s. 3). But it is not to be supposed that such recitals or statements are necessary for the validity of the lease: it being expressly enacted by a subsequent act of the same session, (6 & 7 W. 4, c. 64,) that leases granted under the provisions of the 6 & 7 W. 4, c. 20, are not void by reason of not containing such recitals as are mentioned in that act.

But where a practice has existed for ten years past, to renew such leases for forty, thirty, or twenty-one years, at shorter periods than fourteen, ten, or seven years, the lease may be renewed conformably to such practice, provided that such practice shall be proved to the satisfaction of the archbishop or bishop (s. 4). Neither is this act to prevent ecclesiastical persons exchanging any life or lives in their leases with the approbation of the king, archbishop, or bishop, as the case may be (s. 5). Nor is the act to

prevent grants under acts of Parliament (s. 6); nor leases for the same term as preceding leases (s. 7); nor is it to render illegal leases valid (s. 8). It does not extend to Ireland (s. 10.)

5. An exchange.

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.[p] The estates exchanged must be equal in quantity;[q] not of *value*, for that is immaterial, but of *interest*; as fee-simple for fee-simple, and the like. But one estate for years is in the eye of the law not larger than another. And the exchange may be of things that lie either in grant or in livery.[r] But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance:[s] for each party stands in the place of the other and occupies his right, and each of them hath already had corporal possession of his own land. Entry, where the assurance operates by the common law, must be made on both sides; for, if either party die before entry, the exchange is void for want of sufficient notoriety.[t] 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.[u] However, where the exchange is made by lease and release, or other conveyance operating under the statute of uses, an entry is unnecessary, as the party is in possession by force of the statute.[v] 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. But

[p] Co. Litt. 50, 51.
[q] Litt. s. 64, 65.
[r] Co. Litt. 51.
[s] Litt. s. 62.
[t] Co. Litt. 50.
[u] Perk. s. 288. See the 55 G. 3, c. 147, which authorizes an exchange between a rector and his parishioners.
[v] 4 Cru. Dig. 140.

although this warranty and right of re-entry are incident to an exchange at common law, it has been considered doubtful by some whether they are incident to an exchange effected by mutual conveyances under the statute of uses. Mr. Cruise appears to think that they are so incident.[w] But where mutual conveyances are used, the one in consideration of the other, the incidents of an exchange may be avoided and the objects retained, but in such cases the word "exchange" need not and should not be used.

6. Partition.

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 the cases of tenants in common and coparceners the conveyance must have been perfected by livery of seisin;[x] although in the case of joint-tenants, livery of seisin was unnecessary.[y] And the statutes of 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, made no alteration in these points. But the statute of frauds, 20 Car. II. c. 3, hath now abolished this distinction, and made a deed or writing in all cases necessary.

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The derivative conveyances are

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.

7. Releases; which are a discharge or conveyance of a man's right in lands or tenements, to another that hath some vested estate in the lands.[z] The words generally

[w] 4 Cru.Dig.140; and see Mr. Parken's note on exchanges, 4 Byth. 138; to which, for further information as to exchanges, the reader is referred.

[x] Litt. s. 250; Co. Litt. 169.

[y] Co. Litt. 200 b.

[z] 2 Prest. Conv. 214.

used therein are "remised, released, and for ever quitclaimed:[a]" and these releases may enure 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.[b] But in this case the releasee must have a vested estate, giving a present or future right of enjoyment 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 releasee.[c] 2. By way of *passing an estate*, or *mitter l'estate*: as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole.[d] And in both these cases there must be a privity of estate between the releasor and the releasee;[e] 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 disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful.[f] 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 my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate.[g] 5. By way of *entry and feoffment*: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee.[h] 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

1. Enure by way of enlarging the estate.

2. Passing an estate.

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3. Passing a right.

4. Extinguishment.

5. Entry & feoffment.

a Litt. s. 445.
b *Ibid.* s. 465.
c *Ibid.* s. 459.
d Co. Litt. 273.
e *Ibid.* 272. 273.
f Litt. s. 466.
g *Ibid.* s. 470.
h Co. Litt. 278.

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 releasee is a matter of sufficient notoriety already.

8. A *confirmation* is of a nature nearly allied to a release. Sir Edward Coke defines it[i] 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 encreased: and the words of making it are these, "have given, granted, ratified, approved, and confirmed."[k] An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion: yet, if he hath confirmed the estate of the lessee for years, [326] before the death of tenant for life, it is no longer voidable but sure.[l] 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. 8. Confirmation.

9. A surrender, *sursumredditio*, 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. It is defined,[m] a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is usually done by these words, "hath surrendered, granted, and yielded up:" but these words[n] are not essential to a surrender. The surrenderor must be in possession;[o] 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 of years,[p] although, as we have seen,[q] one term of years may merge in another. In a surrender there is no occasion for livery of seisin;[r] for there is a pri- 9. Surrender.

[i] 1 Inst. 295.
[k] Litt. s. 515, 531.
[l] Litt. s. 516.
[m] Co. Litt. 337.
[n] 1 Wils. 127; Cro. Jac. 169.
[o] Co. Litt. 338.
[p] Perk. s. 589.
[q] *Ante*, p. 108; 5 Co. 11; 2 Prest. Conv. 138.
[r] Co. Litt. 50.

vity 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 releasor, or confirmor, and the particular estate of the releasee 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.[s]

10. Assignment.

10. An *assignment* is properly a transfer, or making over to another, of the interest one has in *any* estate; but it is usually applied to disposition of chattels real and personal estate. And it differs from a lease only in this:

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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.

Defeazance.

11. A *defeazance* is a collateral deed, made at the same time with a feoffment or other deed, containing certain conditions upon the performance of which the estate there created or the other deed, may be defeated or totally undone.[t] It is now very seldom used in conveyancing, except in reviving the condition of a lease.

11. The deeds operating under the statute of uses.

II. There yet remain to be spoken of the conveyances which have their force and operation by virtue of the statute of uses, and these are now much more frequently used than any we have hitherto mentioned, which are nearly superseded in practice. The principal conveyances under the statute of uses are,

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12. Covenant to stand seised.

12. A twelfth species of conveyance, called a *covenant to stand seised to uses*, by which a man seised of lands, covenants, in consideration of blood or marriage with one of the covenantor's blood,[u] that he will stand seised of the same to the use of his child, wife, or kinsman for life, in tail or in fee, and although an existing estate for years cannot be transferred by a covenant to stand seised, yet a new estate for years may be created by this assurance.[v]

[s] Litt. s. 460.

[t] From the French "*defaire*," "*defectum*," "*reddere*."

[u] Com. Dig. Covenant, G. 3,

[v] See 3 Byth. Conv. 52 b.

Under this assurance there is no transmutation of possession, but the statute executes at once the estate; for the party intending to be benefited, having thus acquired the use, is thereby put into possession of the legal estate,[w] without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate when made upon such weighty and interesting considerations as those of blood or marriage; and for this reason this assurance is now almost entirely out of use in this country, because as no use can be declared on it, except on these considerations,[x] it is disqualified for effecting most of the usual purposes of a conveyance. A covenant to stand seised is what is called an *innocent* conveyance, and passes no interest but that which the covenantor can lawfully transfer. Contingent remainders, therefore, cannot be destroyed by it, nor will it discontinue an estate tail.[y]

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13. Bargain and sale.

13. A thirteenth species of conveyance introduced by this statute is that by *bargain and sale* of lands, which is a kind of real contract, whereby the bargainor for some pecuniary consideration, (for this is essential) bargains and sells, that is, contracts to convey the land to the bargainee, and becomes by such a bargain a trustee for or seised to the use of the bargainee; and then the statute of uses completes the purchase,[a] or as it hath been well expressed,[b] 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 H. 8, c. 16, that such bargains and sales should not enure 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* of the county.[c] Clandestine bargains and sales of chattel interests or leases for years, were

[w] Bacon, Use of the Law, 151.

[x] *Tyrrell's case*, Dy. 155.

[y] Gilb. Us. 140; *Seymour's case*, 10 Rep. 95; 1 Atk. 2.

[a] Bacon 150.

[b] Cro. Jac. 697; *Barker* v. *Keate*, 2 Mod. 252.

[c] There is a similar act, (10 Car. 2, c. 1, s. 18) as to Ireland.

thought not worth regarding, as such interests were very precarious till about six years before, 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. A bargain and sale is also what is termed an innocent conveyance, and operates only on what the grantor may lawfully convey. It will not therefore create a forfeiture[c] or destroy contingent remainders dependent upon a particular estate.[d] Uses under the statute cannot be declared on the seisin of the bargainee; they will be trusts, recognized only in courts of equity. From this circumstance, together with the publicity and trouble occasioned by the necessity of the enrolment, a bargain and sale is now rarely adopted, and it has been almost entirely superseded by,

[339] lg. Lease and release.

14. A fourteenth species of conveyance, *viz.* by *lease and release;* first invented by serjeant 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, attorney-general to Charles I.) have formerly doubted its validity.[e] 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 enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and then the statute immediately annexes the *possession*. He therefore having thus a vested interest in the lands, is capable of receiving a release of the freehold and reversion; which we have seen before, must be made to a person having a vested interest; and, accordingly, the next day, a release is granted to him.[f] This is held to supply the place of livery of seisin: and so a conveyance by lease and release is said to amount to a feoffment.[g]

In conveying real property, whether corporeal or incorporeal, unless some special purpose is to be answered, which requires the peculiar properties of the other assurances, the lease and release is now universally adopted. This

b See *ante*, p. 102.
c Gilb. Us. 102.
d Gilb. Us. 102, Fearne, 472, 7th edit.
e 2 Mod. 252.
f See Appendix, No. II. s. 1, 2.
g Co. Litt. 270; Cro. Jac, 604.

mode of conveyance is to be preferred to a feoffment, as it requires no additional ceremony, such as livery of seisin, to complete it; and to a bargain and sale or covenant to stand seised, as it is more capable of carrying into effect the usual intentions of the parties, as uses can be declared of the seisin of the releasee, but not of that of the bargainee or covenantee: and in the conveyance of incorporeal hereditaments, it is generally more convenient than a grant, as all doubt as to the insertion of the word "*grant*" is thereby avoided.

Whatever may be conveyed to uses, may be conveyed by lease and release. Therefore any incorporeal hereditaments *in esse*, and which savours of the realty, may be conveyed by it.[h] But it would be an improper conveyance for a personal annuity, or any other mere personalty, as in this case an assignment should be employed. Remainders and reversions are now very generally conveyed by this assurance, as it will obviate the necessity of proving that the particular estate was in existence at the time of the conveyance, which would be necessary if a grant were employed; although some practitioners endeavour to avoid this difficulty by endorsing on the grant the fact of the existence of the particular tenant. But a contingent remainder cannot be the subject of a lease and release, as there can be no seisin of it.[i]

15. To these assurances 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, 15. Deeds to lead and declare uses.

16. Deeds of *revocation of uses*: hinted at in a former page,[k] and founded in a previous power, reserved at the raising of the uses,[l] to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation.[m] 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. 16. Deeds of revocation of uses.

[h] Cro. Eliz. 166.
[i] Fearne Cont. Rem. 366, 7th edit.
[k] Page 41.
[l] See Appendix, No. V.
[m] Co. Litt. 237; 2 Ch. Ca. 36; 3 Keb. 7.

[340] Deeds used to charge lands.

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 incumber lands, and to *discharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeazances* upon them both.

1. Bond.

1. An *obligation* or bond is a deed[n] whereby the obligor obliges himself, and usually 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;* 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 if named, 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.

Is a charge on the obligor's lands.

Obligees may now, under the stat. 11 G. 4, and 1 W. 4, c. 47, maintain an action of *debt* against the heirs or devisees of obligors, though such heirs or devisees may have aliened the lands or hereditaments descended or devised to them before process sued out against them; and they are answerable for the bond debts of their ancestors or devisors to the value of the land so descended or devised. And by the 3 & 4 W. 4, c. 104, it is enacted, that where any person shall die seised of any real estate, whether freehold or copyhold, the same shall be assets for the payment of all his just debts, as well due on simple contract as on specialty.

What conditions of bonds are void.

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

[n] See Appendix, No. IV.

be released. If it be to do a thing that is *malum in se*, 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.[o] On the forfeiture of a bond, or its becoming single, the whole penalty was formerly 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 like practice having gained some footing in the courts of law,[p] the statute 4 & 5 Ann. c. 16, at length enacted, in 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.

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When a bond is forfeited, what may be recovered.

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorized,[q] 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 acknowledgement of a former debt upon record; the form whereof is, "that A. B. doth acknowlege 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., &c. is called the cognizee, "*is cui cognoscitur*;" as he that enters into the recognizance is called the cognizor, "*is qui cognoscit.*" This, being either certified to, or taken by the officer of some

2. Recognizance.

[o] Co. Litt. 206.

[p] 2 Keb. 553, 555; Salk. 596, 597; 6 Mod. 11, 60, 101.

[q] Bro. Abr. tit. *Recognizance*, 24.

court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict propriety a deed, though the effects of it are greater than a
[342] common obligation; being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrolment on record.[s] 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,[t] and shewn to be a charge upon real property.

3. Defeazance.

3. A defeazance, on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeazance 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.[u] This, like the condition of a bond, when performed, discharges and disincumbers 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

Defects of conveyances to uses.

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 feodal method of conveyance (by giving corporal seisin 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 incumbrances; 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 leger-book of some adjacent monas-

[s] Stat. 29 Car. II, c. 3. See page 90.

[t] See page 90.

[u] Co. Litt. 237; 2 Sand. 47.

tery ;[v] and the failure of the general register established by King Richard the First, for the starrs or mortgages made to Jews, in the *capitula de Judacis*, of which Hoveden has [343] 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.[w] And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature[x] to erect such registers in their several districts. But, however plausible these provisions may appear in theory, it hath been 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. The establishment of a general registry for all deeds relating to real property has however been recommended by the Real Property Commissioners in their second report; and a bill, founded on their recommendation, has been several times introduced into parliament, but never hitherto with success.

[v] Hickes *Dissertat. epistolar.* 9.

[w] Dalrymple on Feodal Property, 262, &c.

[x] Stat. 2 & 3 Ann, c. 4; 6 Ann, c. 35; 7 Ann, c. 20; 8 Geo. 2, c. 6.

CHAPTER THE NINTH.

OF ALIENATION BY MATTER OF RECORD.

Assurances by matter of record, what they are.

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 rocoveries. Which last two assurances have been recently abolished.

1. Private acts of Parliament.

I. Private *acts of parliament* are, especially of 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; to enable him to raise money for the

Objects usually effected by them.

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payment of necessary repairs, 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,[a] every man had raised an equity in his own imagination, that he thought was intitled 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,[b] 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.

Private acts are proceeded in with caution.

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 is so given or purchased, and who are therein particularly named: though it hath been holden, that, even if such saving be omitted, the act shall bind none but the parties.[c]

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Are looked upon as conveyances.

A law, thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not therefore al-

[a] Lord Clar. Contin. 162. [b] *Ibid.* 163. [c] Co. 138; Godb. 171.

lowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against, when obtained upon fraudulent suggestions;[d] it hath been holden to be void, if contrary to law and reason;[e] 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.

II. The *king's grants* are also matter of public record. For, as St. Germyn says,[f] 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 be 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, honours, 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 pendent 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*.

Must first pass by bill.

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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, subscribed at the top, with the king's own *sign*

[d] *Richardson* v. *Hamilton*. *Canc.* 8, Jan. 1773; *M'Kenzie* v. *Stuart*. *Dom. Proc.* 13 Mar. 1754.

[e] 4 Rep. 12.

[f] Dr. & Stud. b. 1, d. 8.

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."[g] 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."[h] 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.

Signed with the sign manual.

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*;" and then they have a more liberal construction.[i] 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:[j] and if a feoffment of land was made by a lord to his villein, this operated as a manumission;[k] for he was otherwise unable to hold it. But the king's grant shall not enure to any other intent, than that which is precisely expressed in the grant. As, if he grants land to an alien, it operates nothing; for such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant.[l]

Different construction of a grant by the king and a private person.

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[g] 9 Rep. 18.
[h] *Ibid*; 2 Inst. 555.
[i] Finch. L. 100; 10 Rep. 112.
[j] Co. Litt. 56.
[k] Litt. s. 206.
[l] Bro. Abr. tit. *Patent*. 62; Finch. L. 110.

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.[m] 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:[n] the grantee is therefore (if any thing) nothing more than tenant at will.[o] 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.

3. Fine.

III. We are next to consider what was, until very recently, a very usual species of assurance, which is also of record; *viz. a fine* of lands and tenements. And although no fine has been or could be levied since the 31st of December, 1833, after which time they were abolished by the stat. 3 & 4 W. 4, c. 74, yet as they must occur for a considerable period in titles to real property, it will still be necessary to explain briefly, 1st, The *nature* of a fine; 2. Its several *kinds*; and 3, Its *force* and *effect*.

1. The nature of a fine.

I. A fine is sometimes said to be a feoffment of record:[p] though it might with more accuracy be called, an acknowledgement 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 seisin
[349] is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however

m Freem. 172.
n Finch. 101, 102.
o Bro. Abr. tit. *Estates*. 34, tit. *Patents*, 104; Dyer, 270; Dav. 45.
p Co. Litt. 50.

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 became, or were acknowledged to be, the right of one of the parties.[q] In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were every day commenced, for the sake of obtaining the same security. By the 18 Edw. I. called *modus levandi fines*, fines were ordered to be levied as follows:

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Mode in which fines were levied. Writ of *praecipe*.

I. The party to whom the land was to be conveyed or assured, commenced an action or suit at law against the other, generally an action of covenant, by suing out a writ of *praecipe*, called a writ of covenant: the foundation of which was a supposed agreement or covenant, that the one should convey the lands to the other; on the breach of which agreement the action was brought. On this writ there was 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.[u] The suit being thus commenced, then followed,

Licentia concordandi.

2. The *licentia concordandi*, or leave to agree the suit. For, as soon as the action was brought, the defendant, knowing himself to be in the wrong, was 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 endangered if he deserted it without licence, he therefore applied to the court for leave to make the matter up. This leave was readily granted, but for it there was also another fine due to the king by his prerogative, which was an ancient revenue of the crown, and was called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before-mentioned. And it was as much as the *primer fine*, and half as much more, or ten shillings for every five

[q] Co. Litt. 120.

marks of land: that is, three-twentieths of the supposed annual value.

Concord. 3. Next came the *concord*, or agreement itself, after leave obtained from the court, which was usually an acknowledgment from the deforciants (or those who kept the other out of possession) that the lands in question were the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the [351] fine was called the *cognizor*, and he to whom it was levied the *cognizee*. This acknowledgment must have been made either openly in the court of Common Pleas, or before the lord chief justice of that court; or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem*; which judges and commissioners were bound by statute 18 Edw. I. st. 4, to take care that the cognizors were of full age, sound memory, and out of prison. If there were any feme-covert among the cognizors, she was privately examined whether she did it willingly and freely, or by compulsion of her husband.

By these acts all the essential parts of a fine were completed: and, if the cognizor died the next moment after the fine was acknowledged, provided it were subsequent to the day on which the writ was made returnable, still the fine was carried on in all its remaining parts: of which the next was,

The note. 4. The *note* of the fine: which was only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This must have been enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14.

Foot. 5. The fifth part was the *foot* of the fine, or conclusion of it: which included the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there were indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*hæc est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine was completely levied at common law.

By several statutes still more solemnities were superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin. And, first, by 27 Edw. I. c. 1, the note of the fine was to be openly read in the court of Common Pleas, at two several days in one week, and during such reading all pleas were to 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, were to 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, was to be openly read and proclaimed in court (during which all pleas were to cease) sixteen times; *viz.* four times in the term in which it was made, and four times in each of the three succeeding terms; which was reduced to once in each term by 31 Eliz. c. 2, and these proclamations were indorsed on the back of the record. It was also enacted by 23 Eliz. c. 3, that the chirographer of fines should every term write out a table of the fines levied in each county in that term, and should affix them in some open part of the court of Common Pleas all the next term: and should also deliver the contents of such table to the sheriff of every county, who should at the next assizes fix the same in some open place in the court, for the more public notoriety of the fine.

Statutes relating to fines.

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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 hath of the gift of the cognizor. This was 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 and livery, acknowledges in court a former 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

2. Fines are of four kinds. Fine *sur cognizance de droit come ceo.*

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to be in the plaintiff, or cognizee, as that which he hath *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 was commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there could be no feoffment, or donation with livery, supposed; as the possession during the particular estate belonged to a third person. 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. 3. A fine "*sur concessit*" was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this might be done reserving a rent, or the like: for it operated as a new grant. 4. A fine, "*sur done, grant, et render*," was a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.* and the fine *sur concessit*: and might be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo, &c.* conveyed nothing but an absolute estate, either of inheritance or at least of freehold. In this last species of fine, the cognizee, after the right was acknowledged to be in him, granted back again, or rendered 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, &c.* was the most used, as it conveyed a clean and absolute freehold, and gave the cognizee a seisin in law, without any actual livery; and was therefore called a fine executed, whereas the others were but executory. The third, however, was also not unfrequently resorted to for conveying life estates, and the interests of married women, and for creating terms of years to bind by way of estoppel their contingent or executory estates and interests. The second and fourth have been rarely used of late.[a]

Fine *sur cognizance de droit tantum.*

Fine *sur concessit.*

Fine *sur done, grant, et render.*

Fine *sur cognizance de droit come ceo*, the most common.

[a] See 1 Real Prop. Rep.

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 on the foot of the fine 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. III, c. 16, which admitted persons to claim, and falsify a fine, at any indefinite distance: whereby, as Sir Edward Coke observes, 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 rigour of the common law. For the statute then made, 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, by way of action or lawful entry, 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.

3. The force and effect of a fine.

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Effect of a fine in barring by non-claim.

Doubts having arisen whether fines 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 removed all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors land had been entailed, should be a perpetual bar to them and their heirs claiming by force of such entail: unless

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32 Hen. VIII. c. 36, enacts, that a fine shall bar an entail.

the fine were levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestors, assigned to her in tail for her jointure; or unless it were of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

Who are bound by a fine.

From this view of the common law, regulated by these statutes, 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*.

Parties. Effect of a fine in conveying the estate of a married woman.

The *parties* are either the cognizors, or cognizees; 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 was almost the only act that a *feme covert*, or married woman, was permitted by law to do, (and that because a real action for the freehold[a] was pending and because she was privately examined as to her voluntary consent, which removed the general suspicion of compulsion by her husband) it was therefore the usual and almost the only safe method, whereby she could join in the sale, settlement, or incumbrance, of any estate.

Privies.

Privies to a fine are such as are any way related to the parties who levied the fine, and claimed under them by any right of blood, or other right of representation. Such as are the heirs general of the 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
[356] 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.

Strangers.

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 hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons who are thus incapacitated to prosecute their rights had five years allowed them to put in their claims after such impediments were removed. Per-

Persons under disability.

[a] Harg. Co. Litt. 121 a, n.

sons also that have not a present, but a future interest only, as those in remainder or reversion, had five years allowed them to claim in, from the time that such right accrued. And if within that time they neglected to claim, or (by the statute 4 Ann. c. 16), if they did not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever were barred of whatever right they might have, by force of the statute of non-claim.

Parties to a fine must have had an interest in the land.

But, in order to make a fine of any avail at all, it is necessary that the parties should have had some interest or estate in the lands to be affected by it. Else it had been possible that two strangers, by a mere confederacy, might without any risk have defrauded the owners by levying fines of their lands; for if the attempt were discovered, they could be no sufferers, but must have only remained *in statu quo:* whereas if a tenant for life levied a fine, it was an absolute forfeiture of his estate to the remainderman or reversioner, if claimed in proper time. It is not therefore to be supposed that such tenants would frequently run so great a hazard; but if they did, and the claim was not duly made within five years after their respective terms expire, the estate was for ever barred by it. Yet where a stranger, whose presumption could not thus be punished, officiously interfered in an estate which in no wise belonged to him, his fine was of no effect; and might at any [357] time have been set aside (unless by such as are parties or privies thereunto) by pleading that "*partes finis nihil habuerunt.*" And, even if a tenant for years, who had only a chattel interest, and no freehold in the land, levied a fine, it operated nothing, but was liable to be defeated by the same plea. Wherefore, when a lessee for years was disposed to levy a fine, it was usual for him to make a feoffment first, to displace the estate of the reversioner, and create a new freehold by disseisin; but as we have seen [a] this effect of a feoffment is now much disputed. And thus much for the conveyance or assurance by fine: which not only, like other conveyances, bound the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or not, if they failed to put in their claims within the time allotted by law.

[a] See *ante*, p. 216.

IV Common recovery.

IV. The fourth species of assurance, by matter of record, was a *common recovery*; but by the stat. 3 & 4 W. 4, c. 74, which took effect on the 31st of December 1833, it is abolished after that time. Concerning the original of this assurance it was formerly observed, 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*.

The nature of a common recovery.

1. And, first, the *nature* of it; or what a common recovery is, or rather was, for as we have before observed, it is now abolished. A common recovery then was so far like a fine, that it was a suit or action, either actual or fictitious: and in it the lands were *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, bound all persons, and vested 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 stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood
[358] by the student. However I shall endeavour 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.

How a recovery was suffered.

Let us, in the first place, suppose David Edwards 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 brought an action against him for the lands; and he accordingly sued out a writ, called a *praecipe quod reddat*, because those were its initial or most operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleged that the defendant Edwards (there called the tenant) had 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. The subsequent proceedings were made up into a record or recovery roll, in which the writ and complaint of the demandant were first recited: whereupon the tenant appeared and called upon one Jacob Morland, who was supposed at the original purchase to have warranted the title to the tenant; and thereupon he prayed that the said Jacob Morland might be called in to defend the title which he so warranted. This was called the *voucher, vocatio,* or calling of Jacob Morland to warranty; and Morland was called the *vouchee.* Upon this, Jacob Morland, the vou chee, appeared, was impleaded, and defended the title. Whereupon Golding, the demandant, desired leave of the court to *imparl,* or confer with the vouchee in private; which was (as usual) allowed him. And soon afterwards the demandant, Golding, returned to court, but Morland the vouchee disappeared or made default. Whereupon judgment was given for the demandant, Golding, then called the recoveror, to recover the lands in question against the tenant, Edwards, who was then the recoveree: and Edwards had judgment to recover of Jacob Morland [359] lands of equal value, in recompense for the lands so warranted by him, and then lost by his default; which is agreeable to the doctrine of warranty. This was 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, was called the *common vouchee*) it is plain that Edwards had 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 seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding the purchaser.

Recovery was with single, double or treble voucher.

The recovery, here described, was with a *single* voucher only; but sometimes it was with *double, treble,* or farther voucher, as the exigency of the case might require. And indeed it was 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* was brought; and then he vouched the tenant in tail, who

vouched over the common vouchee. For, if a recovery were had immediately against a tenant in tail, it barred only such estate in the premises of which he was then actually seised; whereas if the recovery were had against another person, and the tenant in tail were vouched, it barred every latent right and interest which he might have in the lands recovered. If Edwards therefore were tenant of the freehold in possession, and John Barker tenant in tail in remainder, here Edwards first vouched Barker, and then Barker vouched Jacob Morland, the common vouchee, who was always the last person vouched, and always made default: whereby the demandant Golding recovered the land against the tenant Edwards, and Edwards recovered a recompense of equal value against Barker the first vouchee; who recovered the like against Morland the common vouchee, against whom such ideal recovery in value was always ultimately awarded.

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The force and effect of a common recovery.

2. The *force* and *effect* of common recoveries may appear, from what has been said, to have been 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 might, by this method of assurance, convey the 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 remained in the king,[s] barred 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, could suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors. And by statute 14 Eliz. c. 8, no tenant for life, of any sort, could suffer a recovery, so as to bind them in remainder or reversion. For which reason, if there were tenant for life, with remainder in tail, and other remainders over, and the tenant for life were desirous to suffer a valid recovery; either he, or the tenant to the *praecipe* by him made, must have *vouched*

To bar entails and remainders.

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[s] Co. Litt. 372 b; Hard. 409.

the remainder-man in tail, otherwise the recovery was void: but if he vouched such remainder-man, and he appeared and vouched the common vouchee, it was then good; for if a man were vouched and appeared and suffered the recovery to be had against the tenant to the *praecipe*, it was as effectual to bar the estate-tail as if he himself had been the recoveree.

In recoveries the tenant to the præcipe must have been seised of the freehold; but this rule is now altered in certain cases by statute 14 G. 2., c. 20.

In all recoveries it was necessary that the recoveree, or tenant to the *praecipe*, as he was usually called, should be actually seised of the freehold, else the recovery was void. For all actions to recover the seisin of lands, must have been brought against the actual tenant of the freehold, else the suit would lose its effect; since the freehold cannot be recovered of him who has it not. And, though these recoveries were in themselves fabulous and fictitious, yet it was necessary that there be *actores fabulae*, 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*, was removed in some measure by the provisions of the statute 14 Geo. II. c. 20, which enacted, with a retrospect and conformity to the ancient rule of law, that though the legal freehold were vested in lessees, yet those who were entitled to the next freehold estate in remainder or reversion might make a good tenant to the *praecipe*; that though the deed or fine which created such tenant were subsequent to the judgment of recovery, yet if it were in the same term, the recovery should be valid in law: and that, though the recovery itself did not appear to be entered, or were not regularly entered, on record, yet the deed to make a tenant to the *praecipe*, and declare the uses of the recovery, should, [363] after a possession of twenty years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. And by the stat. 3 & 4 W. 4, c. 74, s. 10, it is enacted, that no recovery shall be invalid in consequence of the neglect to inrol, in due time, the bargain and sale for making the tenant to the *praecipe*, (provided such recovery would otherwise have been valid), nor, by s. 11, in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the *praecipe*, provided the person who was the

3 & 4 W. 4. c. 74.

owner of an estate in possession, not less than an estate for life in the lands, shall, within the time limited for making such tenant, have conveyed such estate in possession to the tenant to such writ, and an estate shall be deemed to be an estate in possession, notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved. And this may suffice to give the student a general idea of common recoveries.

Deeds to lead or declare the uses of fines and recoveries.

Before I leave the subject of fines and recoveries, I must add a word concerning deeds to *lead*, or to *declare*, the *uses* of these assurances. For if they have been levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, would have enured only to the use of him who levied or suffered them. And if a consideration appeared yet as the most usual fine, "*sur cognizance de droit come ceo, &c.*" conveyed an absolute estate, without any limitations, to the cognizee; and as common recoveries do the same to the recoveror, these assurances could not have been made to answer the purpose of family settlements, (wherein a variety of uses and designations is very often expedient) unless their force and effect had been subjected to the direction of other more complicated deeds, wherein particular uses could be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, might 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 were made previous to the fine or recovery, they were called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As, if A. tenant in tail, with reversion to himself in fee, would have settled his estate on B. for life, remainder to C. in tail, remainder to D. in fee; this was what by law he had no power of doing effectually, while his own estate-tail was in being. He therefore usually, after making the settlement proposed, covenanted to levy a fine (or, if there were any intermediate remainders, to suffer a recovery) to E., and directed that the same should enure to the uses in such

settlement mentioned. This was a deed to *lead* the uses of the fine or recovery; and the fine when levied, or recovery when suffered, enured to the uses so specified and no other. For though E., the cognizee or recoveror, had a fee-simple vested in himself by the fine or recovery; yet, [364] by the operation of this deed, he became a mere instrument or conduit-pipe, seised only *to the use* of B., C., and D., in successive order: which use was executed immediately by force of the statute of uses. Or, if a fine or recovery were had without any previous settlement, and a deed were *afterwards* made between the parties, *declaring* the uses to which the same should be applied, this would have been equally good, as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by statute 4 & 5 Ann. c. 16, indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, should be good and effectual in law, and the fine and recovery should enure to such uses, and be esteemed to be only in trust, notwithstanding any doubts that had arisen on the statute of frauds, 29 Car. II. c. 3, to the contrary.

Amendment of fines and recoveries.

Where the description of the names of the parties or of the premises comprised in a fine did not accord with the deed leading or declaring the uses of fines and recoveries, the Court of Common Pleas, on an application for that purpose, would allow the record of the fine or recovery to be amended;[u] but by the 3 & 4 W. 4, c. 74, the necessity for an application of this nature is dispensed with, it being enacted (ss. 7 & 8), that when it is apparent from the deed declaring the uses of a fine, or for making the tenant to the *praecipe* for suffering a recovery, that there is in the record of the fine or recovery any misdescription of this nature, the fine or recovery shall be as valid as the same would have been if there had been no such error or misdescription. But the jurisdiction of the Court of Common Pleas to amend a fine or recovery in any other case is preserved by s. 9.

[u] *Tregare* v. *Gennys*, Pig. 218; *Foster* v. *Ballington*, Barnes, 216; 5 Cru. Dig. 143.

Fines and recoveries abolished by the 3 & 4 W. 4, c. 74.

Having thus given a pretty full account of these fictitious assurances called fines and recoveries, which were in constant use down to the end of the year 1833, when they were abolished by the 3 & 4 W. 4, c. 74, s. 2,[v] we now propose to give the chief particulars relating to the assurance which is substituted by that statute in their place. But I shall first mention the guard which the legislature in removing these restrictions, has thrown round the alienation of property; for it is to be remembered, that although most of the rules relating to fines and recoveries were purely technical, and in this liable to objection, yet that great practical benefits resulted from them. They gave parents the means of checking the improvidence of their children in their dealings with their property, and facilitated advantageous family arrangements. In altering the law, therefore, it was proper to preserve its benefits, and for this purpose, although the concurrence of the person having the immediate estate of freehold is dispensed with as seised of that estate, yet instead of such concurrence, where a benefical estate either for life or years determinable on lives, or of any greater estate, not being a lease on which rent shall be reserved, shall be limited prior to the estate tail intended to be barred, any disposition by the tenant in tail shall be made with the concurrence of the person to whom such prior estate shall have been limited.[w] This person is called the protector of the settlement, and we shall proceed to specify who is to be considered as such.

Benefits of fines and of recoveries preserved by the recent act.

Protector of the settlement.

Who shall be such.

Whenever there shall be a tenant in tail, and there shall be subsisting in the same lands, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail, then such owner of the prior estate, or the first of such estates if more than one, shall be the protector of the settlement (3 & 4 W. 4, c. 74, s. 22); and where two or more persons shall be owners under a settlement of the prior estate, each of them shall be

[v] "Except where parties intending to levy a fine or common recovery, shall on or before the 31st day of December, 1833, have sued out a writ of *dedimus*, or any other writ, in the regular proceedings of such fine or recovery," s. 2.

[w] See First Real Prop. Rep.

the sole protector as to his share (s. 23). Where a married woman would if single be the protector, in respect of a prior estate which is not settled to her separate use, she and her husband shall in respect of such estate be the protector, but if such prior estate shall have been settled to her separate use, then she alone shall be the protector (s. 24). But no tenant in dower, heir, executor, administrator, or bare trustee, shall be the protector (s. 27); and there are some other special cases of protectorship provided for by the act, which need not be here particularly mentioned.

Power to appoint protector.

Any person entailing lands may in the settlement appoint any number of persons *in esse*, not exceeding three, not being aliens, the protector of the settlement in lieu of the person who would have been the protector, if a clause of this nature had not been inserted (s. 32). And when the protector shall be a lunatic, or person of unsound mind, the Lord Chancellor, or where a traitor or felon, the Court of Chancery, shall be the protector (s. 33).

Consent of Protector, where necessary, on alienation by tenant in tail.

Where there is a protector of a settlement, his consent is requiste to enable an actual tenant in tail to create a larger estate than a base fee[x] (s. 34); and where an estate tail shall have been converted into a base fee, the consent of the protector shall be requisite to enable the owner thereof to acquire the fee under the act (s. 35); and the protector in exercising his power of consent is to be under no control whatever (s. 36).

The assurance substituted in lieu of fines and recoveries.

We have now to consider the assurance which is substituted by the late act for the fine or recovery. By s. 40, it is enacted that every tenant in tail may effect a disposition under the act by any of the assurances (not being a will) by which such tenant in tail could have made the disposition if he had been a tenant in fee-simple. It may therefore be a feoffment, a bargain and sale, or lease and release, or if the estate tail be not in possession, a grant; but for the reasons already given, a lease and release is in general to be preferred in all cases to any other.[y] But

[x] As to a base fee, see *ante*, p. 49.

[y] As to these assurances, see *ante*, pp. 211, 217, 229, 230, and Appendix, I, II, III, V.

every such assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rack-rent, or not less than five-sixth parts of a rack-rent, shall be inoperative unless enrolled in Chancery within six calendar months of the execution thereof (s. 41); but when enrolled it takes effect from the execution, as if enrolment had not been required (s. 74). And the consent of the protector, if there be one, must be given either by the same assurance, or by a distinct deed (s. 42); and if by a distinct deed, it is to be considered unqualified unless the assurance be referred to (s. 43); and once given, the protector cannot revoke his consent (s. 44). Where a married woman, as in the case before adverted to, is protector, she may consent as a feme sole (s. 45), and the consent of a protector by a distinct deed is void, unless enrolled with or before the assurance (s. 46). Courts of Equity are excluded from giving any effect to dispositions by tenants in tail or consents of protectors of settlements, which in courts of law would not be effectual (s. 47); and when the Lord Chancellor is protector, he shall have power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary, and if any other person is joint protector the disposition shall not be valid without the consent of such person (s. 48); and the order of the Lord Chancellor is to be evidence of his consent (s. 49).

Consent of Protector, how it may be given.

Here we may close our account of this important act, which has abolished a mass of legal fiction, and introduced a substitute which, preserving all the benefits of the old assurances, is admirable for its simplicity, and well adapted to the present state of society, and which has answered the ends for which it was designed.[z]

[z] This statute has several important objects besides the abolition of fines and recoveries, as the enabling a bankrupt tenant in tail to bar the estate tail and remainders, (see *ante*, p. 194)—the enabling a married woman to convey her estates and rights in real property (see *ante*, p. 199)—and the conveyance of estates tail in copyholds, see *post*, p. 257.

CHAPTER THE TENTH.

OF ALIENATION BY SPECIAL CUSTOM.

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Assurances by special custom; to what lands they are confined.

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 holden 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 signiory, it is therefore a forfeiture of a copyhold.[a] Nor are copyholds strictly transferrable 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 might have been suffered of copyholds:[b] but these differed in nothing material from recoveries of free land, save only that they were not suffered in the king's courts, but in the court baron of the manor; and they are now altogether abolished by the statute 3 & 4 W. 4, c. 74, which we have already fully considered.[c] But copyholds may now be recovered by ejectment in the king's courts.[d]

Surrender.

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 behoof 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 [366] or out of court, even without a special custom,[e] or else

[a] Litt. s. 74.

[b] Moor. 637; and 1 Prest. Conv. 159, 156.

[c] See *ante*, p. 254, and *post*, p. 259.

[d] See Litt. s. 76; and *Widdowson v. Earl of Harrington*, 1 J. & W. 549.

[e] *Dudfield* v. *Andrews*, 1 Salk. 184; *Tukely* v. *Hawkins*, 1 Lord Raym. 76.

to two customary tenants of the same manor, provided there be also 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 seisin 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.

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Surrender is essential to the conveyance of a copyhold estate.

This method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance. No feoffment or grant 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 until lately have surrendered it to the use of my last will and testament; and in my will I must have declared my intentions, and have named a devisee, who would then be entitled to admission.[c] But now copyhold devises are good without surrender to the use of the will.[d] A fine or recovery had of copyhold lands in the King's court might indeed, if not

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[c] Co. Copyh. s. 36.

[d] 55 Geo. 3, c. 192.

duly reversed, alter the tenure of the lands, and convert them into frank fee,[g] which is defined in the old book of tenures[h] to be "land pleadable at the common law:" but upon an action on the case, in the nature of a writ of a *deceit*, brought by the lord in the King's court, such fine or recovery would have been reversed, the lord would have recovered his jurisdiction, and the lands would have been restored to their former state of copyhold. But as we have already seen[i] fines and recoveries are now abolished by the 3 & 4 W. 4, c. 74.

Alienation of copyholds by tenant in tail under the statute 3 & 4 W. 4, c. 74.

This statute and all its clauses, so far as the different tenures will admit, are to apply to copyholds, except that a disposition of any such lands shall be made by surrender (s. 50); and if the consent of the protector[k] of a settlement to the disposition of such lands shall be given by deed, such deed shall be produced to the steward, who shall indorse an acknowledgment to that effect, and such deed with the indorsement shall be entered on the court rolls of the manor, and the indorsement shall be *primâ facie* evidence that the deed was so produced (s. 51). When the consent of the protector of a settlement of copyholds is not given by deed, evidence of such consent shall be preserved on the court rolls (s. 52). Power is given to equitable tenants in tail of copyholds, to dispose of their lands by deed (s. 53); and it is further enacted, that the provisions of the statute relating to inrolment[l] shall not extend to copyholds (s. 54). The only mode of alienating copyholds, therefore, now existing is by surrender, which we shall proceed to consider; but it will be proper first to advert to assurances by matter of record of lands in ancient demesne.

Lands in ancient demesne.

Lands of this tenure are within the jurisdiction of the Court of Common Pleas, and a fine or recovery levied or suffered of them was in force between the parties, and was voidable only by the lord,[m] by writ of deceit, and the lands became frank fee. But by the statute 3 & 4 W. 4, c. 74, s. 4,

g Old *Nat. Brev. t. briefe de recto clause.* F. N. B. 13.

h *T. tenir en franke fee.*

i See *ante*, p. 240.

k As to the Protector, see *ante*, p. 254.

l See *ante*, p. 256.

m 1 Prest. Conv. 266; and First Real Prop. Rep.

Fines and recoveries of lands in ancient demesne.

it is enacted, that fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court might be reversed, as to the lord by writs of deceit, the proceedings in which were then pending, or by writs of deceit thereafter to be brought, but should be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord; and (by s. 5) fines and recoveries of land in ancient demesne, levied or suffered in the manor court after other fines and recoveries in a superior court, shall be as valid as if the tenure had not been changed, and fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised; and it is further provided, (s. 6,) that the tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, shall be restored in cases in which the right of the lord of the manor, shall have been recognized within twenty years. It is further to be observed that the writ of deceit is abolished, by the 3 & 4 W. 4, c. 27, s. 36.[u] Having mentioned thus much as to fines and recoveries of lands in ancient demesne, let us return to surrenders of copyhold lands.

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. Surrender, effect of.

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 taketh 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;* for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before

[u] As to lands in ancient demesne, see further *ante*, pp. 31, 32.

admittance, according to Blackstone. If he enters, he is a trespasser, and punishable in an action of trespass:[o] 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.[p] Yet, [369] though upon the original surrender the nominee hath but a possibility, it is however such a possibility, as may whenever he pleases be reduced to a certainty; for he cannot either by force or fraud 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*:[q] 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 for ever stopped from revoking or countermanding his own deliberate act;[r] and a surrenderor on admittance may maintain an action of trespass for the mesne profits from the time of the surrender,[s] and may devise his interest.

Remedies of cestui que use.

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 to be presented by the homage; and in all 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:[t] the surrender, as being

2. Presentment.

[o] *Sed quære*, as the surrenderor is a trustee for the surrenderee, until the latter is admitted, 1 T. R. 600; 5 Burr. 2764.

[p] But see *contra*, Watk. Gilb. Ten. 163, 275. 281, 457.

[q] 2 Roll. Rep. 107; See *Rex* v. *Hexham*, 1 Nev. & P. 53.

[r] Co. Copyh. s. 39.

[s] 1 T. R. 600.

[t] Co. Copyh. 40.

never truly presented; the presentment, as being false; and the admittance, as being founded on such untrue 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.[u] 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, 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
[370] both the lord, and them that took the surrender, in chancery, and shall there find relief.[v]

3. Admittance.

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.

Upon a voluntary grant.

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 antient 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 enfran-

[u] Co. Litt. 62. [v] Co. Copyh. s. 40.

chise 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;[w] nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord.[x] But he may grant it for a less estate.[y]

Upon surrender of another.

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 incumbrances of the lord; for his claim to the estate is solely under him that made the surrender.[z]

Upon Descents.

And, as in 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 possession is bound to perform.[a] [371]

In what admittances on surrender, differ from admittances on descents.

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 taketh notice of him as of a perfect tenant of the land instantly upon the death of his 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;[b] nay, upon satisfying the lord for his fine due upon the descent, may

[w] Co. Copyh. s. 41.
[x] 8 Rep. 63.
[y] Co. Litt. 52. b.
[z] 4 Rep. 27; Co. Litt. 59.
[a] 4 Rep. 27; 1 Rep. 140.
[b] 4 Rep. 23.

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 intitle him to his fine, and not so much necessary for the strengthening and completing the heir's title.

Fines on copyholds, rules as to.

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

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in the words of Sir Edward Coke,[c] "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 copyholders 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." And by the statute 1 Will. 4, c. 65, (re-enacting, in part, the 9 Geo. 1, c. 29) s. 3, it is enacted, that infants, feme coverts, and lunatics may be admitted to copyhold estates by their guardian, committee, or attorney; and femes covert and infants who have no guardian may appoint attorneys for that purpose (s. 4); and in default of apppearance the lord may appoint an attorney (s. 5); and if the proper fines are not paid, the lord may enter and receive the profits of the copyhold lands till he is satisfied (s. 6.)

[c] Co. Copyh. s. 41.

CHAPTER THE ELEVENTH. [373]

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 inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the original of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

Difference between wills and testaments.

In stating the rules relating to devises, it will be proper to bear in mind that a bill has been introduced in the present session of Parliament, founded on the recommendations of the Real Property and Ecclesiastical Commissioners, by which it is proposed to make considerable alteration in this branch of the law. Should this measure be passed by the Legislature, it will still be necessary to understand something of the former law, as the act will have only a prospective operation, and will not apply to wills already in operation. We shall, therefore, in this instance, as in the preceding portions of this work, first consider the subject without reference to the alterations which may be made in it.

Projected alterations in the law relating to devises.

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By the common law of England since the Conquest, no estate, greater than for a term of years, could be disposed of by testament;[a] except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities, by special indulgence, subsisted.[b] And though the feodal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and im-

What devises could be made by the common law.

[a] 2 Inst. 7. [b] Litt. s. 167; 1 Inst. 111.

[375] position on the testator *in extremis*, which made such devises suspicious.[c] Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

Devises were first made of uses.

But when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised very frequently,[d] and the devisee of the use could in Chancery compel its execution. For it is observed by Gilbert,[e] that, as the popish clergy then generally sate 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[f] 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.*

Statute of wills, 32 Hen. 8, c. 1.

32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5, which enacted, that all persons being seised 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*, except 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,[g] amounts to the whole of their landed property, except their copyhold tenements. And this exception was first eluded by surrendering the copyholds to the use of the will, and then after the death of the surrenderor his devisee was admitted. But now a direct devise of copyholds is good without any such surrender.[h]

What devises to corporations are valid.

Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain; but now, by con-

[c] Glanv. *l.* 7, *c.* 1.
[d] Plowd. 414.
[e] On devises, 7.
[f] 27 Hen. 8, c. 10. See Dyer 143.
[g] See *ante*, p. 24.
[h] 55 G. 3, c. 192. See *ante*, p. 258.

struction 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 hath formerly [376] carried them great lengths in supporting such charitable uses;[i] it being held that the statute of Elizabeth, which favours appointments to charities, supersedes and repeals all former statutes;[k] and supplies all defects of assurances:[l] and therefore not only a devise to a corporation, but a devise by a copyhold tenant before the recent statute without surrendering to the use of his will,[m] and a devise (nay even a settlement) by tenant in tail without either fine or recovery, before those assurances were abolished, if made to a charitable use, were good by way of appointment.[n] But as copyholds have been held to be within the terms of the statute 9 Geo. 2, c. 36,[o] devises of them to charitable uses, as well as all other interests in lands must be made conformably to its provisions.[p]

Frauds under the Statute of Wills.

With regard to devises in general, experience soon shewed 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.[q] 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 solemnity nearly similar is requisite for revoking a devise by writing; though the same may be also revoked by burning, cancelling, tearing,

Statute of Frauds, 29 Car. 2, c. 3.

[i] Ch. Prec. 272.
[k] Gilb. Rep. 45; 1 P. Wms. 248.
[l] Duke's Charit. Uses, 84.
[m] Moor. 890.
[n] 2 Vern. 453; Ch. Prec. 16.
[o] *Ante*, p. 181.
[p] Scriv. on Copyh. 248.
[q] Dyer 72; Cro. Eliz. 100.

or obliterating thereof by the devisor, or in his presence and with his consent: as likewise *impliedly*, by such a great and entire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child.[r]

Construction of the statute.

[377] 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;[s] 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.[t] But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument.[u] But if the jury find the point that the testator might have seen the signing, though the witnesses were in another room, it will be sufficient. Where however the jury found that from one part of the testator's room, a person by inclining his head might have seen, but the testator from his situation could not do so, it was held that the will was not duly attested.[v] In one case determined by the Court of King's Bench,[w] 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 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,

[r] *Christopher* v. *Christopher*, Scacch. 6 July 1771; *Spragge* v. *Stone*, at the Cockpit, 27 Mar. 1773. By Wilmot de Grey and Parker.

[s] 3 Lev. 1.

[t] Freem. 486; 2 Ch. Cas. 109; Pr. Ch. 185.

[u] 1 P. Wms. 740.

[v] 2 Salk. 687; Carth. 813; Bro. Ch. C. 99; 1 Maule & Sel. 294.

[w] Stra. 1253.

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 all legacies given to witnesses, and thereby removing all possibility of their 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 (like 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[x] 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 given on the former determination were said to be insufficient. [378]

Remedies against devisees.

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, 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, should (as against such creditors only) be deemed to be fraudulent and void: and that such creditors might maintain their actions jointly against both the heir and the devisee.

This statute was repealed by the 1 W. 4, c. 47, but its provisions were re-enacted and extended to certain cases which were not provided for by the first statute. Thus,

[x] M. 31 Geo. 2; 4 Bur. 1. 430.

under the former act, it was held that an action of covenant for uncertain damages did not lie against a devisee.[y] But by the latter statute, (s. 2.) a devisee is expressly made liable to an action of covenant. It also enacts (s. 4.) that if their be no heir at law, actions may be maintained against the devisee alone, and (s. 3.) against the devisee of the devisee.

How a devise is considered, and what it will pass.

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,[z] 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, 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 of executing and publishing his will.[a] Wherefore no after-purchased lands will pass under such devise,[b] unless subsequent to the purchase or contract,[c] the devisor republishes his will.[d]

[379]

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,

General rules of construction of assurances.

1. According to the intention of the parties.

1. That the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law

[y] *Wilson* v. *Knubley*, 7 East. 128; and see *ante*, p. 207.]

[z] See page 209.

[a] 1 P. Wms. 575; 11 Mod. 148.

[b] Moor. 255; 11 Mod. 127.

[c] 1 Ch. Cas. 39; 2 Ch. Cas. 144.

[d] Salk. 238.

will admit.[e] For the maxims of law are, that "*verba intentioni debent inservire*;" and "*benigne interpretamur chartas propter simplicitatem laicorum.*" And therefore the construction must also be *reasonable*, and agreeable to common understanding.[f]

2. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est:*[g] 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.* Therefore, by a grant of a remainder a reversion may well pass, and *e converso.*[h] And another maxim of law is, that "*mala grammatica non vitiat chartam*;" neither false English nor bad Latin will destroy a deed.[i] Which perhaps a classical critic may think to be no unnecessary caution. 2. Construction of words.

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.*"[k] 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.[l] "*Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat.*"[m] 3. Must be made of the entire deed. [380]

4. That the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. "*Verba fortius accipiuntur contra proferentem.*" As, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee.[n] 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 be taken between an indenture and a deed-poll; for 4. Must be taken most strongly against the grantor.

e And. 60.
f 1 Bulstr. 175; Hob. 304.
g 2 Saund. 157.
h Hob. 27.
i 10 Rep. 133; Co. Litt. 223; 2 Show. 334.
k 1 Bulstr. 101.
l 1 P. Wms. 457.
m Plowd. 156.
n Co. Litt. 42.

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, because the other party hath 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.[o] And, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail.[p]

5. Must be construed according to law.

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.[q] As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease 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.

[381]

6. When two clauses are repugnant.

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:[r] wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand.[s] Which is 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.[t]

7. Devises are to follow the intention of the testator.

7. That a devise be most favourably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or 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:[u] and an estate-tail without words of procreation.[v] By a will also an estate may pass by mere implication, without any express words to direct its course. As, where a man devises lands to his heir at

[o] Co. Litt. 134.
[p] Bacon's Elem. c. 3.
[q] Co. Litt. 42.
[r] Hardr. 94.
[s] Co. Litt. 112.
[t] Cro. Eliz. 420; 1 Vern. 30.
[u] See page 48.
[v] See page 53.

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;[w] 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.[x] But according to the former rule no such cross remainders were allowed between more than two devisees;[y] however this doctrine is now over-ruled, and the intention of the testator will alone be attended to;[z] and, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly *probable*) and not merely *possible* implications.[a] 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 of uses,[b] is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law. [293]

[w] H. 13 Hen. 7, 17; 1 Ventr. 376.

[x] Freem. 484.

[y] Cro. Jac. 655; 1 Vern. 224; 2 Show. 139.

[z] *Doe* v. *Webb*, 1 Taunt. 234.

[a] Vaugh. 262; see 1 Ves. & B. 466; 2 Lev. 207.

[b] Fitz. 236; 11 Mod. 153.

APPENDIX.

No. I.

A MODERN FEOFFMENT TO USES TO BAR DOWER.

THIS INDENTURE, made the 1st day of March, in the year of our Lord, 1837, *Between* Abel Smith of, &c. of the first part; Robert Thompson of, &c. of the second part; and James Hicks of &c. of the third part; WHEREAS, the said Robert Thompson hath contracted and agreed with the said Abel Smith for the absolute purchase of the hereditaments hereinafter described, and intended to be hereby granted and enfeoffed, and the inheritance thereof in fee simple, free from incumbrances, at or for the price or sum of · *l.*; NOW THIS INDENTURE WITNESSETH, that in pursuance and performance of the said agreement, and in consideration of the sum of *l.* of lawful money of Great Britain by the said Robert Thompson to the said Abel Smith, in hand paid at or before the sealing and delivery of these presents, (the receipt of which said sum of *l.* he the said Abel Smith doth hereby acknowledge, and of and from the same and every part thereof doth hereby acquit, release, and for ever discharge the said Robert Thompson, his heirs, executors, administrators and assigns, and every of them,) *He* the said Abel Smith *Hath* given, granted and enfeoffed, *And* by these presents *Doth* give, grant and enfeoff unto the said Robert Thompson and his heirs, ALL THOSE, &c. (*describe the parcels,*) *Together* with all and singular houses, &c. (*general words,*) *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and singular the hereditaments and premises, hereby granted and enfeoffed, or intended so to be, and of every part and parcel thereof, *And* all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, both at law and in equity, of him the said Abel Smith, in, to, out of or upon the same premises, and every part and parcel thereof, with their and every of their appurtenances, TO HAVE AND TO HOLD the said hereditaments, and all and singular other the premises hereinbefore described, and granted and enfeoffed, or intended so to be, with their rights, members, and appurtenances, unto the said Robert Thompson and his heirs for ever, *To such uses*, upon such trusts, and to and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations, as the said Robert Thompson by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, shall from time to time direct,

Premises.

Date and parties.

Contract for purchase.

Testatum, whereby, in consideration of purchase-money,

(the receipt of which purchaser acknowledges.)

Vendor enfeoffs.

Premises,

and the reversion,

and all the estate.

Habendum

unto purchaser,

to such uses, as purchaser shall by any deed appoint,

and in default of appointment, to the use of purchaser for life; remainder to trustee to bar dower during the life of purchaser, upon trust for purchaser.

limit or appoint; *And* in default of and until such direction, limitation or appointment, and so far as the same shall not extend, *To the use* of the said Robert Thompson and his assigns during his life, without impeachment of waste; and after the determination of that estate by forfeiture or otherwise in his life-time, *To the use* of the said James Hicks and his heirs, during the life of the said Robert Thompson, in trust for him the said Robert Thompson and his assigns, during his life, and to the end and intent that neither the present nor any future wife of the said Robert Thompson may become entitled to dower out of or in the said premises, or any part thereof; *And* immediately after the determination of the estate hereinbefore limited to the said James Hicks and his heirs during the life of the said Robert Thompson, *To the use* of him the said Robert Thompson, his heirs and assigns, for ever; *And* the said Abel Smith doth hereby for himself, his heirs, executors, administrators and assigns, COVENANT, promise and agree with and to the said Robert Thompson, his appointees, heirs and assigns, in manner following (that is to say) *That* for and notwithstanding any act, deed, matter or thing whatsoever by him the said Abel Smith made, done, omitted, committed, executed, or knowingly or willingly suffered to the contrary, he the said Abel Smith is at the time of the sealing and delivering of these presents lawfully, rightfully and absolutely seised of and in, or well and sufficiently entitled to the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, and every part thereof, with their and every of their appurtenances, for a good, sure, perfect, absolute and indefeasible estate of inheritance, in fee simple in possession, without any manner of condition, trust, power of revocation, equity of redemption, remainder or limitation of any use or uses, or other restraint, cause, matter or thing whatsoever, to alter, charge, defeat, incumber, revoke or make void the same; *And* that for and notwithstanding any such act, deed, matter or thing as aforesaid, he the said Abel Smith now hath in himself good right, full power, and lawful and absolute authority to grant and enfeoff the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, with their appurtenances, unto the said Robert Thompson and his heirs, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents, *And that* the said hereditaments and premises, hereby granted and enfeoffed, or intended so to be, with their appurtenances, shall and may from time to time, and at all times hereafter, remain, continue, and be *To the uses*, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, and agreements and declarations hereinbefore declared and contained of and concerning the same, and be peaceably and quietly held and enjoyed, and the rents, issues and profits thereof, and of every part thereof, received and taken accordingly, without any lawful let, suit, trouble, denial, claim, demand, interruption or eviction whatsoever, of or by him the said Abel Smith or his heirs, or of, from

Remainder to purchaser in fee.

Covenants for title by vendor: that he is seised in fee,

and has good right to convey;

and that the premises shall be held to the uses hereinbefore declared,

or by any other person or persons whomsoever lawfully or equitably claiming or to claim, by, from or under, or in trust for him the said Abel Smith; *And that* free and clear, and freely and clearly and absolutely acquitted, exonerated, released, and for ever discharged or otherwise by the said Abel Smith, his heirs, executors and administrators, well and sufficiently saved, defended, kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, and all rights and titles of or to dower, uses, trusts, entails, wills, mortgages, leases, statutes merchant or of the staple, recognizances, judgments, executions, extents, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entry, cause and causes of forfeiture and re-entry, debts of record, debts due to the King's Majesty, and of and from all other estates, titles, troubles, charges, debts and incumbrances whatsoever, either already had, made, executed, occasioned and suffered, or hereafter to be had, made, executed, occasioned and suffered by the said Abel Smith or his heirs, or by any other person or persons lawfully or equitably claiming or to claim by, from or under, or in trust for him, them or any of them, or by his or their acts, deeds, means, default or procurement; *And further*, that he the said Abel Smith and his heirs, and all and every other person or persons having or claiming, or who shall or may hereafter have or claim any estate, right, title, interest, inheritance, use, trust, property, claim or demand whatsoever, either at law or in equity, of, in, to or out of the said hereditaments and premises, hereby granted and enfeoffed, or intended so to be, with their appurtenances or any of them, or any part thereof, by, from or under, or in trust for him the said Abel Smith or his heirs, shall and will from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges of the said Robert Thompson, his heirs or assigns, make, do, acknowledge and execute all such further and other lawful and reasonable acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, enfeoffing and assuring the said hereditaments and premises, hereby granted and enfeoffed, or intended so to be, and every part thereof, with their appurtenances, unto the said Robert Thompson and his heirs, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents, as by the said Robert Thompson, his heirs or assigns, or his or their counsel in the law shall be reasonably advised, devised, and required. In Witness whereof the said several parties have set their hands and seals the day and year first above written.

free from incumbrances;

and for further assurance.

Conclusion.

Signed, sealed, and delivered, (being first duly stamped) in the presence of } [*Parties*].

[*Witnesses*].

No. II.

A MODERN CONVEYANCE BY LEASE AND RELEASE.

§ 1. *The Lease, or Bargain and Sale for a Year.*

Premises. Parties. THIS INDENTURE, made the day of in the year of our Lord, 18 , BETWEEN Abel Smith of in the county of , of the first part, and Witnesseth that for a nominal consideration Robert Thompson of , of the other part: WITNESSETH that in consideration of ten shillings of lawful money of Great Britain paid by the said Robert Thompson to the said Abel Smith at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), *He* the said Abel vendor bargains and sells Smith *Hath* bargained and sold, and by these presents *Doth* bargain and sell unto the said Robert Thompson, his executors, parcels. administrators and assigns, ALL THAT, &c. (*as in release*); *Together* with all houses, &c.; *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and singular the premises hereby bargained and sold, or intended so to be, and every part and parcel thereof, To Habendum HAVE AND TO HOLD the said messuage or tenement, hereditaments and premises, hereby bargained and sold, or intended so to be, and every part and parcel thereof, with their appurtenances, unto the said Robert Thompson, his executors, administrators and assigns, to purchaser for one whole year. from the day next before the day of the date of these presents, for the term of one whole year thence next ensuing, and Reddendum, fully to be complete and ended; YIELDING AND PAYING therefore the rent of one pepper-corn on the last day of the said term, if to the intent that purchaser may take a release of the premises. the same rent should be lawfully demanded, *To* the intent and purpose that by virtue of these presents and by force of the statute made for transferring uses into possessions, the said Robert Thompson may be in the actual possession of all and singular the said messuage or tenement, hereditaments and premises, hereby bargained and sold, or intended so to be, and every part and parcel thereof, with their appurtenances, and be thereby enabled to accept and take a grant and release of the reversion and inheritance of the same premises to him and his heirs, to the use of him and his heirs, as declared by another indenture already prepared, and intended to be dated the day next after the day of the date hereof. IN WITNESS, &c.

§ 2. *The Release.*

THIS INDENTURE, made the day of , Premises.
BETWEEN Abel Smith of, &c. , of the one part; and Parties.
Robert Thompson of, &c. , of the other part: WHEREAS Recitals that John Smith made his will, whereby he devised the premises unto his son, the vendor in fee.
John Smith, being at the time of making his will hereinafter recited, and thenceforth to the time of his decease, seised of or otherwise well entitled in fee simple in possession to the messuage or tenement, lands and hereditaments, hereinafter described and intended to be hereby conveyed, with their appurtenances, did, in such manner as the law requires for rendering valid devises of freehold estates, duly sign and publish his last will and testament in writing, bearing date on or about the day of , and thereby (amongst other things) gave and devised the same messuage or tenement, lands, hereditaments and premises hereinafter described, unto his son the said Abel Smith, his heirs and assigns, for ever; AND WHEREAS the said Death of John Smith.
John Smith departed this life on or about the day of without having altered or revoked his said will, and on or about the day of the said will was Probate of his will.
duly proved in the Court of by the executors named therein; AND WHEREAS the said Robert Thompson hath contracted and agreed with the said Abel Smith for the Contract for purchase of premises.
absolute purchase of the messuage or tenement, lands, hereditaments and premises, hereinafter described, and intended to be hereby conveyed, and the inheritance thereof in fee simple, with their appurtenances, free from incumbrances, at or for the price or sum of : NOW THIS INDENTURE WITNESSETH that in Testatum, whereby in consideration of the purchase money paid by purchaser to vendor,
pursuance and performance of the said agreement, and in consideration of the sum of of lawful money of Great Britain by the said Robert Thompson to the said Abel Smith in hand well and truly paid at or immediately before the sealing and delivery of these presents (the receipt of which said sum of the said Abel Smith doth hereby admit and acknowledge, and of and from the same and every part thereof doth hereby acquit, release and for ever discharge the said Robert Thompson, his heirs, executors, administrators and assigns,) *He* Vendor conveys unto Robert Thompson
the said Abel Smith *Hath* granted, bargained, sold, released and confirmed, and by these presents *Doth* grant, bargain, sell, release and confirm unto the said Robert Thompson, (in his actual possession, &c.) (*reference to lease for a year, see* post, *p.* viii,) and his heirs, ALL THAT, &c. (*describe the parcels;*) *Together* Parcels.
with all and singular houses, outhouses, edifices, bridges, farms, stables, yards, gardens, orchards, ways, water-courses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the said hereditaments and premises hereby granted and released belonging or in anywise appertaining: *And* the reversion, &c. (*see* ante, *p.* i.:)

Habendum

And all the estate, &c. (*see* ante, *p.* i.) To HAVE AND TO HOLD the said messuage or tenement, lands, hereditaments, and all and singular other the premises hereby granted and released, or intended so to be, with their and every of their appurtenances,

unto the purchaser in fee.

unto the said Robert Thompson, his heirs and assigns, *To the use* of the said Robert Thompson, his heirs and assigns, for ever;

Covenants for title:

And the said Abel Smith doth hereby for himself, his heirs, executors and administrators, COVENANT, promise, and agree with and

that vendor is seised in fee,

to the said Robert Thompson, his heirs and assigns, *That* for and notwithstanding any act, deed, matter or thing whatsoever, by him the said Abel Smith, or the said John Smith the testator, made, done, omitted, committed, executed, or knowingly or willingly suffered to the contrary, he the said Abel Smith is at the time of the sealing and delivering these presents, lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, and every part thereof, with their and every of their appurtenances, for a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple in possession, without any manner of condition, trust, power of revocation, equity of redemption, remainder or limitation of any use or uses, or other restraint, cause, matter, or thing whatsoever, to alter, charge, defeat, incumber, revoke, or make void the same; *And* that for and notwithstanding any such act, deed, matter or thing as aforesaid, he the said Abel Smith now hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, release and convey the said messuage or tenement, lands, hereditaments and premises hereby granted and released, or intended so to be, with their appurtenances, unto and to the use of the said Robert Thompson, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; *And* that it shall and may be lawful to and for the said Robert Thompson, his heirs and assigns, from time to time and at all times hereafter, peaceably and quietly to enter into, hold, occupy, possess and enjoy the said messuage or tenement, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances, and to have, receive and take the rents, issues and profits thereof, and of every part thereof, to and for his and their own use and benefit, without any lawful let, suit, trouble, denial, claim, demand, interruption or eviction whatsoever, of or by him the said Abel Smith, or his heirs, or of, from or by any other person or persons whomsoever, lawfully or equitably claiming or to claim by, from or under, or in trust for him, them or any of them, or the said John Smith the testator; *And that* free and clear, and freely and clearly and absolutely acquitted, exonerated, released and for ever discharged or otherwise by the said Abel Smith and his heirs, executors and administrators, well and sufficiently saved, defended, kept harmless and indemnified of, from and against all and all manner of former and other gifts,

and that he has good right to convey,

and that the purchaser may quietly enjoy the premises,

free from incumbrances;

grants, bargains, sales, dowers, and all rights and titles to dower, uses, trusts, entails, wills, mortgages, leases, statutes merchant or of the staple, recognizances, judgments, executions, extents, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entry, debts of record, debts due to the King's Majesty, and of, from and against all other estates, titles, troubles, charges, debts and incumbrances whatsoever, either already had and made, executed, occasioned and suffered by the said Abel Smith or his heirs, or by any other person or persons lawfully or equitably claiming, or to claim by, from or under, or in trust for him, them, or any of them, or by, from or under, or in trust for the said testator, or by his or their acts, deeds, means, default, or procurement; *And further*, that he the said Abel Smith and his heirs, and every other person or persons having, claiming, or who shall or may hereafter have or claim any estate, right, title, interest, inheritance, use, trust, property, claim or demand whatsoever, either at law or in equity, of, in, to or out of the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances, or any of them or any part thereof, by, from or under, or in trust for him the said Abel Smith or his heirs, or the said testator, shall and will, from time to time and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges of the said Robert Thompson, his heirs or assigns, make, do, acknowledge, levy, suffer and execute, or cause or procure to be made, done, acknowledged, levied, suffered and executed, all such further and other lawful and reasonable acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying and assuring of the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, and every part thereof, with their appurtenances, unto and to the use of the said Robert Thompson, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said Robert Thompson, his heirs or assigns, or his or their counsel in the law, shall be reasonably devised, advised and required. *And it is hereby agreed and declared* between and by the parties to these presents, That neither the present wife of the said Robert Thompson, in case she shall survive the said Robert Thompson, nor any future wife of the said Robert Thompson with whom he may afterwards intermarry, and who shall survive him, shall have any right, title or estate to or in dower out of or in the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances, or to or in any part thereof. IN WITNESS, &c.

and for further assurance.

Declaration that no wife of the purchaser shall be entitled to dower out of the premises.

No. III.

A MORTGAGE IN FEE.

Premises.

Parties.

THIS INDENTURE, made the 1st day of January, 1837, *Between* John Thomas, of the parish of St. John, in the county of Surrey, yeoman, of the one part, and Edward Sikes of the city of London, gentleman, of the other part: *Whereas* the said John Thomas is seised of or well entitled as tenant in fee-simple in possession to the messuage or tenement, lands and hereditaments hereinafter described, and intended to be hereby granted and released, with their rights, members and appurtenances; *And whereas* the said John Thomas, having occasion for the sum of 1000*l.*, hath applied to the said Edward Sikes to advance and lend him the same, which he hath agreed to do on having the repayment thereof, with interest for the same, after the rate of 5*l.* for 100*l.* by the year, secured to him the said Edward Sikes, his executors, administrators or assigns, by a mortgage of the said messuage or tenement, lands, and hereditaments, hereinafter described, and intended to be hereby granted and released, with their appurtenances: NOW THIS INDENTURE WITNESSETH, that in pursuance and performance of the said agreement, and in consideration of the sum of 1,000*l.* of lawful money of Great Britain, by the said Edward Sikes to the said John Thomas in hand well and truly paid at or immediately before the sealing and delivery of these presents, (the receipt of which said sum of 1,000*l.* he the said John Thomas doth hereby acknowledge, and of and from the same and every part thereof doth hereby acquit, release, and for ever discharge the said Edward Sikes, his executors, administrators, and assigns), *He*, the said John Thomas, *Hath* granted, bargained, sold, released and confirmed, and by these presents *Doth* grant, bargain, sell, release and confirm, unto the said Edward Sikes (in his actual possession, now being by virtue of a bargain and sale to him thereof made, by the said John Thomas, in consideration of ten shillings, by an indenture bearing date the day next before the day of the date of these presents, for the term of one year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made

Recital that mortgagor is seised in feeof the premises to be mortgaged.

That mortgagor has applied to mortgagee to lend the money.

Witnessing part, whereby in consideration of the receipt of the mortgage money,

Mortgagor conveys. (Reference to lease for a year.) See form of lease for a year, post, p. iv.

for transferring uses into possessions) and his heirs, ALL THAT messuage or tenement, situate and being in the parish of *A.* in the county of *G.* &c. (*describe the parcels*) *Together* with all and every houses, out-houses, edifices, bridges, barns, stables, yards, gardens, orchards, ways, water-courses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the hereditaments and premises hereby granted and released belonging, or in any way appertaining; *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and singular the lands and tenements hereby granted and released, or intended so to be, and of every part and parcel thereof; *And* all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatever, both at law and at equity, of him the said John Thomas, into, out of, or upon the same premises, and every part and parcel thereof, with their and every of their appurtenances, To HAVE AND TO HOLD the said messuage or tenement, lands, hereditaments, and all and every other the premises hereby granted and released, or intended so to be, and every part and parcel thereof, with their and every of their appurtenances, unto the said Edward Sikes, his heirs and assigns; *To the Use* of the said Edward Sikes, his heirs and assigns for ever, *But* subject nevertheless to the proviso or agreement for redemption hereinafter contained, (that is to say) PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties hereto, that if the said John Thomas, his heirs, executors or administrators shall and do on the —— day of —— now next ensuing, well and truly pay or cause to be paid to the said Edward Sikes, his executors, administrators and assigns, the sum of 1000*l.* of lawful money of Great Britain, together with the interest for the same, after the rate of 5*l.* for every 100*l.* by the year, to be computed from the day of the date of these presents, without making any abatement or deduction whatever out of the same sum and interest, or any part thereof, for or in respect of any present or future taxes, charges, assessments or impositions, or any other cause, matter or thing whatsoever, *Then*, and in such case he the said Edward Sikes, his heirs and assigns, shall and will, at any time thereafter, at the request and expense of the said John Thomas, his heirs and assigns, re-convey the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances, unto the said John Thomas, his heirs and assigns, or as he or they shall in that behalf order or direct, free from all incumbrances whatsoever, made, done, or committed by the said Edward Sikes, his heirs, executors, administrators, or assigns; *And* he the said John Thomas doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said Edward Sikes, his heirs, executors, administrators and assigns, that he the said John Thomas, his heirs, executors, administrators and assigns,

Parcels.

General words.

The reversion

and all the estate.

Habendum

To mortgagee and his heirs, to the use of mortgagor and his heirs, subject to proviso.

Proviso that if the mortgage money shall be repaid,

mortgagee will reconvey.

Covenant by mortgagor that he will pay mortgage money,

shall and will, on the ——— day of ———, well and truly pay, or cause to be paid to the said Edward Sikes, his executors, administrators or assigns, the sum of 1000*l.* of lawful money of Great Britain, and shall and will pay interest for the same in the mean time at the rate of 5*l.* for 100*l.* by the year, to be computed from the day of the date of these presents, by two equal half-yearly payments, on the ——— day of ———, and the ——— day of ———, in each year; and shall and will make the said several payments without any deduction or abatement whatever out of the same or any part thereof for or in respect of any present or future taxes, rates, assessments or impositions, or any other matter, cause or thing whatsoever; *And further* that he the said John Thomas hath now in himself good right, full power and lawful and absolute authority to grant, bargain, sell and convey the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances, unto and to the use of the said Edward Sikes, his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; *And also* that if default be made in the payment of the said sum of 1000*l.* or the interest thereof, or any part thereof respectively, contrary to the aforesaid proviso or condition for payment of the same, and the true intent and meaning of these presents, *Then* and in such case it shall and may be lawful to and for the said Edward Sikes, his heirs and assigns, at any time or times hereafter, into and upon all and every the said hereditaments and premises hereby granted and released, or intended so to be, to enter, and the same from time to time peaceably and quietly to have, hold, occupy, possess, enjoy, and receive and take the rents, issues and profits thereof, to and for his and their own use, without any lawful let, suit, trouble, interruption or disturbance whatsoever of, from or by the said John Thomas, his heirs or assigns, or any person or persons whomsoever, having or lawfully or equitably, or who shall or may have or lawfully or equitably claim any estate, right, title or interest into, out of or upon the said messuage or tenement, lands, hereditaments and premises, hereby granted and released or intended so to be, or any of them or any part or parts thereof; *And* that free and clear, and freely and clearly and absolutely acquitted, exonerated and released, and for ever discharged or otherwise by the said John Thomas, his heirs, executors or administrators, saved, protected, kept harmless and indemnified, of, from and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, trusts, wills, entails, legacies, rent charges, rent seck, and arrears of rent, fines, issues, amercements, statutes, recognizances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, interests, troubles, charges, debts and incumbrances whatsoever; *And moreover*, that if default be made in payment of the said sum of 1000*l.* or the interest thereof, or any part thereof respectively, contrary to the aforesaid proviso or con-

and for title. That mortgagor hath good right to convey;

that if default shall be made,

it shall be lawful for mortgagee to enter,

and the same quietly to enjoy;

free from incumbrances,

and for further assurance.

dition for payment of the same, and the true intent and meaning of these presents, *Then* and in such case he the said John Thomas and his heirs, and all and every other person and persons whomsoever, having or lawfully or equitably claiming, or who shall or may lawfully or equitably claim any estate, right, title or interest of, in, or to the said messuage or tenement, lands, hereditaments and premises, hereby granted and released, or intended so to be, with their appurtenances or any of them, or any part or parts thereof, shall and will from time to time and at all times hereafter, at the request of the said Edward Sikes, his heirs and assigns, but at the expense of the said Edward Sikes, his heirs, executors, administrators, or assigns, make, do, and execute, or cause to be made, done, or executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, conveyances and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, conveying, and assuring of the same hereditaments and premises, hereby granted and released or intended so to be, with their appurtenances, unto and to the use of the said Edward Sikes, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said Edward Sikes, his heirs and assigns, or by his or their counsel in the law shall be reasonably devised, advised, and required; PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, and the true intent and meaning of the parties further is, that until default shall be made in payment of the said sum of 1000*l.* or the interest thereof, or any part thereof respectively, contrary to the said proviso or agreement for payment of the same, and the true intent and meaning of these presents, it shall and may be lawful to and for the said John Thomas, his heirs and assigns, peaceably and quietly to have, hold, occupy, possess and enjoy the said messuage or tenement, lands, hereditaments and premises, hereby granted and released or intended so to be, with their appurtenances, and receive and take the rents, issues and profits thereof, to and for his and their own use, without any let, suit, trouble, interruption or disturbance whatsoever of, from or by the said Edward Sikes, his heirs, executors, administrators, and assigns, or of, from or by any other person or persons whomsoever, lawfully or equitably claiming or to claim, by, from or under, or in trust for him, them or any of them. In WITNESS, &c.

Proviso that until default shall be made, mortgagor may quietly enjoy.

Conclusion.

No. IV.

AN OBLIGATION OR BOND, WITH CONDITION FOR THE PAYMENT OF MONEY.

KNOW ALL MEN by these presents, That I Abel Smith, of , in the county of , gentleman, am held and firmly bound to Robert Thompson, of , esquire, in the sum of one thousand pounds of lawful money of Great Britain, to be paid the said Robert Thompson or to his certain attorney, his executors, administrators or assigns, for which payment to be well and truly made I bind myself, my heirs, executors and administrators, and every of them, firmly by these presents, sealed with my seal. Dated this twenty-second day of March, in the year of our Lord, 1837.

THE CONDITION of the above written bond or obligation is such, That if the above bounden Abel Smith, his heirs, executors or administrators, should well and truly pay or cause to be paid unto the said Robert Thompson, his executors, administrators or assigns, the full sum of five hundred pounds of lawful money of Great Britain with interest for the same, after the rate of five pounds for one hundred pounds by the year, upon the twenty-second day of September now next ensuing, without any deduction or abatement whatsoever, then the above written bond or obligation shall be void and of no effect, or otherwise shall be and remain in full force and virtue.

Sealed and delivered (being first duly stamped) in the presence of } ABEL SMITH.

[*Witnesses.*]

No. V.

DEED FOR BARRING AN ENTAIL, UNDER THE STATUTE 3 & 4 WILL. 4, c. 74.

THIS INDENTURE, made the first day of March, 1837, Premises.
BETWEEN John Smith, of , of the first part; Abel Date. Parties.
Smith, of , of the second part; and Robert Thompson, of , of the third part: WHEREAS William Smith being Recital of
at the time of making his will hereinafter recited, and thenceforth to the time of his decease, seised of or otherwise well entitled in seisin of grandfather,
fee simple in possession to the messuages or tenements, lands and hereditaments hereinafter described, and intended to be hereby released, with their appurtenances, did, in such manner as the and of his will,
law requires for rendering valid devises of freehold estates, duly sign and publish his last will and testament in writing, bearing date on or about the first day of May, 1790, *And* thereby, whereby he devises to his son for life,
amongst other things, gave and devised the same hereditaments and premises hereinafter described unto his son the said John Smith and his assigns, for and during the term of his natural life, to trustees to preserve,
with a limitation *To the use* of A. B. and C. D., and their heirs, to grandson in tail,
during the life of the said Abel Smith, *Upon trust* to preserve the with divers remainders over.
contingent remainders, with a limitation *To the use* of the said Abel Smith in tail, with divers remainders over: AND WHEREAS Death of William Smith without revoking his will.
the said William Smith departed this life on or about the fourth day of May, 1790, without having altered or revoked his said Probate of will.
will, which was duly proved by the executors therein named in the Ecclesiastical Court of the Archbishop of Canterbury: AND Desire of parties to bar the estate tail in the premises.
WHEREAS the said John Smith and Abel Smith are desirous of barring the estate tail of the said Abel Smith in the said hereditaments and premises, and of limiting the same hereditaments and premises to the uses and in the manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in order to bar and Witnessing part, whereby for barring the estate tail and limiting the premises,
destroy as well the estate tail of the said Abel Smith in the hereditaments and premises hereby released, or intended so to be, as all other estates, rights, titles, interests and powers to take effect after the determination or in defeasance of such estate tail, and for disposing of the same hereditaments and premises to the uses and in manner hereinafter mentioned; *And* in consideration and for a nominal consideration
of the sum of ten shillings by the said Robert Thompson to each

of them the said John Smith and Abel Smith paid, at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged,) *They* the said Abel Smith and also the said John Smith, as protector of the settlement under the hereinbefore recited will, *Have* and each of them *Hath* granted, bargained, sold, released and confirmed, *And* by these presents *Do* and each of them *Doth* grant, bargain, sell, release and confirm unto the said Robert Thompson (in his actual, &c.) (*reference to lease for a year, see* ante, *p.* viii,) and his heirs, ALL THAT piece or parcel of land, hereditaments and premises, situate and lying in the parish of, &c. in the county of, &c.; *Together* with all and singular commons, ways, water-courses, liberties, privileges, easements, profits, emoluments, &c. &c. (*see* ante, *p.* v,) thereunto belonging; *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues, profits, &c. &c.; *And* all the estate, &c. (*see* ante, *p.* i,) TO HAVE AND TO HOLD the said pieces or parcels of land, hereditaments, and all and singular other the premises hereby granted and released, or intended so to be, and every part and parcel thereof, with their and every of their appurtenances, *Unto* the said Robert Thompson, his heirs and assigns, free and discharged of and from the said estate tail, and all estates, rights, titles, interests and powers to take effect after the determination or in defeasance of the said estate tail, *But* nevertheless *To the use* of such person or persons, for such estate or estates, with such powers or limitations over, upon, and for such trusts, intents, and purposes charged or chargeable with such sum or sums of money annual or in gross, and with, under, and subject to such powers, conditions, limitations, declarations, and agreements as they the said John Smith and Abel Smith shall by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by both of them sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time or at any time direct or appoint; *And* in default of such joint direction and appointment, and so far as the same, if incomplete, shall not extend, *To the use* of the said John Smith and his assigns during the joint lives of him the said John Smith and Abel Smith; *And* in case the said Abel Smith should survive the said John Smith, then from and after the decease of the said John Smith so dying in the lifetime of the said Abel Smith, *To the use* of the said Abel Smith and his heirs and assigns for ever; *But* in case the said Abel Smith should depart this life in the lifetime of the said John Smith, then immediately from and after the decease of the said Abel Smith so dying in the lifetime of the said John Smith, *To the use* of the said John Smith, his heirs and assigns for ever. IN WITNESS, &c.

tenant in tail and protector convey

parcels.

Habendum

unto Robert Thompson,

To the use of such persons as protector and tenant in tail shall appoint,

and in default of appointment to the use of protector for life, during the joint lives of himself and tenant in tail; and if tenant in tail should survive, to the use of tenant in tail in fee; but if tenant in tail should die first, to the use of protector in fee.

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P. 6, l. 21, for "*that right*," read "*the right to tithes.*"
P. 11, l. 6, transpose the words "*or by special grant*" to l. 8, after the word "*purpose.*"
P. 22. The heading of the Second Book should be, "*Of the Manner in which Real Property may be Held;*" and that of the First Chapter, "*Of Tenures.*" See Table of Contents.
P. 70, l. 20, for "*it,*" read "*is.*"
P. 89, l. 27, for "*mortgagor,*" read "*mortgagee.*"
P. 139, second marginal note, for "*lineal ancestors,*" read "*lineal descendants.*"
P. 142, l. 2 from bottom, for "*die before*, read "*die after.*"
P. 177, l. 1, for "*monu,*" read "*manu.*"
l. 9, for "*forming,*" read "*framing.*"
l. 19, dele "*they.*"
P. 191, l. 2, for "*destruction,*" read "*destructive.*"
P. 200, l. 26, for "*or,*" read "*on.*"

E. SPETTIGUE, Printer, 67, Chancery Lane.