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COMMENTARIES  
ON THE  
**Laws of England.**

*BOOK THE SECOND.*

BY

Sir WILLIAM BLACKSTONE, Knt.  
ONE OF THE JUSTICES OF HIS MAJESTY'S  
COURT OF COMMON PLEAS.

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THE FIFTEENTH EDITION,  
WITH THE LAST CORRECTIONS OF THE AUTHOR;  
*AND WITH NOTES AND ADDITIONS*  
By EDWARD CHRISTIAN, Esq.  
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# COMMENTARIES

ON THE

## LAWS OF ENGLAND.

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BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

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CHAPTER THE FIRST.

OF PROPERTY, IN GENERAL.

**T**HE former Book of these Commentaries having treated at large of the *jura personarum*, or such rights and duties as are annexed to the persons of men, the objects of our inquiry in this second book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider it's several objects.

*immencement*  
*less of the*  
*dominion*

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

IN the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man “dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth<sup>a</sup>.” This is the only true and solid found-

<sup>a</sup> Gen. i. 28.

ation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

THESE general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the antient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of these times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset*."<sup>b</sup> Not that this communion of goods seems ever to have been applicable, even in the earliest stages, to ought but the substance of the thing; nor could it be extended to the use of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer<sup>c</sup>: or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, without injustice. Thus also a vine or other tree might be

<sup>b</sup> Justin. l. 43. c. 1.

<sup>c</sup> Barbeyr. Puff. l. 4. c. 4.

faid to be in common, as all men were equally entitled to it's produce ; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own<sup>d</sup>.

Cicero

Permanent  
dominion

BUT when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion ; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world be continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable ; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession ; — if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young ; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall ; which seem to have been originally mere temporary huts or moveable cabins, suited to the design of

<sup>d</sup> *Quemadmodum theatrum, cum commune locum quem quisque occuparit. De munere sit, recte tamen dici potest, ejus esse Fin. l. 3. c. 20.*

Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant, which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

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

Food  
early  
consideration

Water  
Genesis

Wells

<sup>e</sup> Gen. xxi. 30.

father's property; and after much contention with the Philistines, was suffered to enjoy it in peace <sup>f</sup>.

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

<sup>f</sup> Gen. xxvi. 15. 18, &c.

*campus, ut nemus placuit. De mor.*

<sup>g</sup> *Colunt discreti et diversi; ut fons, ut*

*Ger. 16.*

<sup>h</sup> Gen. c. xiii.



UPON the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants: and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and it's spontaneous produce destroyed, without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now (so graciously has Providence interwoven our duty

*Tillage*

and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Necessity beget property: and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

THE only question remaining is, how this property became actually vested: or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to every body, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the substance of the earth itself: which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that favours too much of nice and scholastic refinement! (1) However, both sides agree in this,

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(1) But it is of great importance that moral obligations and the rudiments of laws should be referred to true and intelligible principles,

that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued

principles, such as the minds of serious and well-disposed men can rely upon with confidence and satisfaction.

Mr. Locke says, "that the labour of a man's body, and the work of his hands, we may say are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it some thing that is his own, and thereby makes it his property." (*On Gov. c. 5.*)

But this argument seems to be a *petitio principii*; for mixing labour with a thing, can signify only to make an alteration in its shape or form; and if I had a right to the substance, before any labour was bestowed upon it, that right still adheres to all that remains of the substance, whatever changes it may have undergone; if the right to it before belonged to another, it is clear that I have none after; and we have not advanced a single step by this demonstration.

The account of Grotius and Puffendorf, who maintain that the origin and inviolability of property are founded upon a tacit promise or compact, and therefore we cannot invade another's property without a violation of a promise or a breach of good faith, seems equally, or more, superfluous and inconclusive.

There appears to be just the same necessity to call in the aid of a promise to account for, or enforce, every other moral obligation, and to say that men are bound not to beat or murder each other, because they have promised not to do so. Men are bound to fulfil their contracts and engagements, because society could not otherwise exist; men are bound to refrain from another's property, because likewise society could not otherwise exist. Nothing therefore is gained by resolving one obligation into the other.

But how, or when, then, does property commence? I conceive no better answer can be given, than by occupancy, or when any thing is separated for private use from the common stores of nature. This is agreeable to the reason and sentiments of mankind, prior to all civil establishments. When an untutored Indian has set before him the fruit which he has plucked from the tree that protects him from the heat of the sun, and the shell of water raised from the fountain that springs at his feet; if he is driven by any daring intruder  
from

use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

*hypothecation*  
*property*

PROPERTY, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure trove<sup>i</sup>.

*treasure trove*

BUT this method of one man's abandoning his property, and another seizing the vacant possession, however well

<sup>i</sup> See Vol. I. p. 295.

---

from this repast, so easy to be replaced, he instantly feels and re-  
sents the violation of that law of property, which nature herself  
has written upon the hearts of all mankind.

This universal principle we find well described in the Laws of  
Menu, Son of Brahma: "Sages, who know former times, pro-  
nounce cultivated land to be the property of him who cut away  
the wood, or who cleared and tilled it; and the antelope, of the  
first hunter, who mortally wounded it." 3 Sir Wm. Jones. 341.

founded

founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which may be considered either as a continuance of the original [ 10 ] possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property: the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property: and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides. (2)

THE most universal and effectual way of abandoning property, is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the

*abandon  
property*

---

(2) Upon whatever principle the right to property is founded, the power of giving and transferring seems to follow as a natural consequence; if the hunter and the fisherman exchange the produce of their toils, no one ever disputed the validity of the contract, or the continuance of the original title. This does not seem to be aptly explained by occupancy, for it cannot be said that in such a case there is ever a vacancy of possession.

property

property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which it's becoming again common would <sup>k</sup> occasion. And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

THE right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much

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

earlier

earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil right*(3). It is true, that the

(3) I cannot agree with the learned Commentator, that the permanent right of property vested in the ancestor himself (that is, for his life), is not a natural but merely a civil right.

I have endeavoured to shew, (Note 1.) that the notion of property is universal, and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinements. (See also Vol. iv. p. 9. n. 4.) If the laws of the land were suspended, we should be under the same moral and natural obligation to refrain from invading each other's property, as from attacking and assaulting each other's persons. I am obliged also to differ from the learned Judge, and all writers upon general law, who maintain, that children have no better claim by nature to succeed to the property of their deceased parents than strangers; and that the preference given to them, originates solely in political establishments. (See the Editor's distinctions between natural and positive laws, Vol. i. p. 58. n. 7.) I know no other criterion by which we can determine any rule or obligation to be founded in nature, than it's universality; and by enquiring whether it is not, and has not been, in all countries and ages, agreeable to the feelings, affections, and reason of mankind. *Omni autem in re consensio omnium gentium lex naturæ putanda est. Cic. 1. Tus.* The affection of parents towards their children is the most powerful and universal principle which nature has planted in the human breast; and it cannot be conceived, even in the most savage state, that any one is so destitute of that affection and of reason, who would not revolt at the position, that a stranger has as good a right as his children to the property of a deceased parent.

*Hæredes successoresque sui cuique liberi*, seems not to have been confined to the woods of Germany, but to be one of the first laws in the code of nature; though positive institutions may have thought it prudent to leave the parent the full disposition of his  
property

transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually [ 12 ] about him on his death-bed, and are the earliest witnesses of his decease. They become therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore also in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For, we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir<sup>1</sup>."

WHILE property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just

<sup>1</sup> Gen. xv. 3.

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property after his death, or to regulate the shares of the children, when the parent's will is unknown.

In the earliest history of mankind we have express authority that this is agreeable to the will of God himself; *and behold the word of the Lord came unto Abraham, saying, this shall not be thine heir: but he that shall come out of thine own bowels shall be thine heir.* Gen. c. xv.

debts,



debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament*; that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased, which we therefore emphatically stile his *will*. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the eighth; and then only of a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present. (4)

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

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(4) By 32 Hen. VIII. c. 1. all socage lands were made devisable and two-thirds of lands of military tenure: when these at the restoration were converted into socage tenure, all lands became devisable, some copyhold excepted. See p. 375.

usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

THIS one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice; while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only two witnesses instead of three, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person, who from the result [ 14 ] of certain local constitutions, appears to be the heir at law. Hence it follows, that where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed: and, where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

BUT, after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such

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

AGAIN ; there are other things in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance ; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands ; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state : or else in his representatives appointed and authorized by him, being usually the lords of manors (5). And thus the legislature

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(5) The learned Judge has frequently repeated in his commentaries that all the game belongs to the king, or to his grantees, being usually the lords of manors. This is a doctrine which the

of England has univerfally promoted the grand ends of civil fociety, the peace and fecurity of individuals, by fteadily purfuing that wife and orderly maxim, of affigning to every thing capable of ownership a legal and determinate owner.

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editor is obliged to controvert. His reafons and authorities are ftated at large in a note to page 419.

## CHAPTER THE SECOND.

OF REAL PROPERTY; AND, FIRST, OF  
CORPOREAL HEREDITAMENTS.

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

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

FIRST, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation

tion it is only applied to houfes and other buildings, yet in it's original, proper, and legal fenfe, it fignifies every thing that may be *holden*, provided it be of a permanent nature ; whether it be of a fubftantial and fenfible, or of an un-fubftantial ideal kind. Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other folid objects, but alfo to offices, rents, commons, and the like <sup>a</sup> : and, as lands and houfes are tenements, fo is an advowfon a tenement ; and a franchife, an office, a right of common, a peerage, or other property of the like un-fubftantial kind, are all of them, legally fpeaking, tenements <sup>b</sup>. But an *hereditament*, fays fir Edward Coke <sup>c</sup>, is by much the largeft and moft comprehensive expreffion : for it includes not only lands and tenements, but whatfoever may be *inherited*, be it corporeal or incorporeal, real, perfonal, or mixed. Thus an heir-loom, or implement of furniture which by custom defcends to the heir together with an houfe, is neither land, nor tenement, but a mere moveable : yet being inheritable, is comprifed under the general word hereditament : and fo a condition, the benefit of which may defcend to a man from his ancestor, is alfo an hereditament <sup>d</sup>.

HEREDITAMENTS then, to ufe the largeft expreffion, are of two kinds, corporeal and incorporeal. Corporeal confift of fuch as affect the fenfes ; fuch as may be feen and handled by the body : incorporeal are not the object of fenfation, can neither be feen nor handled, are creatures of the mind, and exift only in contemplation.

CORPOREAL hereditaments confift wholly of fubftantial and permanent objects ; all which may be comprehended under the general denomination of land only. For *land*, fays fir Edward Coke <sup>e</sup>, comprehendeth in it's legal fignification any ground, foil, or earth whatfoever ; as arable, meadows, paffures, woods, moors, waters, marfhes, furzes, and heath.

<sup>a</sup> Co. Litt. 6.

<sup>b</sup> *Ibid.* 19, 20.

<sup>c</sup> 1 Inft. 6.

<sup>d</sup> 3 Rep. 2.

<sup>e</sup> 1 Inft. 4.

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 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 it's 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 watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*<sup>f</sup>. 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 immovable: 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 it's 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 centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are

<sup>f</sup> Brownl. 142.

equally sufficient to pass them, except in the instance of water; by a grant of which, nothing passes but a right of fishing<sup>g</sup>: but the capital distinction is this, that by the name of a castle (1), 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<sup>h</sup>.

<sup>g</sup> Co. Litt. 4.

<sup>h</sup> *Ibid.* 4, 5, 6.

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(1) By the name of a castle, one or more manors may be conveyed; and *à converso* by the name of a manor, a castle may pass. 1 *Inst.* 5. 2 *Inst.* 31.



## CHAPTER THE THIRD.

## OF INCORPOREAL HEREDITAMENTS.

**A**N incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same<sup>a</sup>. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they being merely a contingent springing

<sup>a</sup> Co. Litt. 19, 20.

right, collateral to or issuing out of lands, can never be the object of sense : that casual share of the annual increase is not, till severed, capable of being shewn to the eye, nor of being delivered into bodily possession.

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

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

THIS instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages ; but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight, nor the touch ; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporeal possession be had of it. If the patron takes corporeal possession of the church, the church-yard, the glebe or the like, he intrudes on another man's property ; for to these the parson has an

<sup>b</sup> Vol. I. pag. 112.

<sup>c</sup> This original of the *jus patronatus*, appears also to have been allowed in the Roman empire. *Nov. 26. t. 12. c. 2. Nov. 118. c. 23.*

exclusive

exclusive right. The patronage can therefore be only conveyed by operation of law, by verbal grant (1), either oral or

(1) The late learned Vinerian professor, Mr. Wooddeson, has taken notice of this inaccuracy, and has observed, that “advowsons, merely as such (*i. e.* in gross), could never, in any age of the English law, pass by oral grant without deed.” (2 *Woodd.* 64.) Lord Coke says expressly, that “grant is properly of things incorporeal, which cannot pass without deed.” (1 *Inst.* 9.) But before the statute of frauds, 29 Car. II. c. 3. any freehold interest in corporeal hereditaments might have passed by a verbal feoffment, accompanied with livery of seisin. (*Litt. S.* 59.) And by such a verbal grant of a manor, Mr. Wooddeson justly observes, before the statute an advowson appendant to it might have been conveyed. (2 Vol. 64.) But he who has an advowson, or a right of patronage in fee, may by deed transfer every species of interest out of it, *viz.* in fee, in tail, for life, for years, or may grant one or more presentations.

Although this is a right of great value, yet the possession of it never can yield any lucrative benefit to the owner, as the law has provided that the exercise of this right must be perfectly gratuitous; yet it may be a provision for relations, a pledge of friendship, or what is its true use and object, the reward of learning and virtue. Hence the mortgagor shall present when the church is vacant, though the advowson alone is mortgaged in fee, for the mortgagee could derive no advantage from the presentation in reduction of his debt. (3 *Atk.* 559.)

If an advowson is sold, when the church is void, it is fully determined, that the grantee cannot have the benefit of the next presentation, and it is doubtful whether the whole grant be not void by the common law. See *Cro. Eliz.* 811. 3 *Bur.* 1510. *Bl. Rep.* 492. 1054. *Amb.* 268. But probably there would be no objection to the grant of an advowson, when the church is vacant, if the next presentation to it were expressly reserved by the grantor. An advowson is affets in the hand of the heirs. 3 *Bro. P. C.* 556.

But if during the avoidance of a church the patron die, the right to that presentation passes to his executor or personal representative, unless it be a donative benefice, and in that case the right of donation descends to the heir. 2 *Wilf.* 150.

written,

written, which is a kind of invisible mental transfer: and being so vested it lies dormant and unnoticed, till occasion calls it forth: when it produces a visible corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter, and receive bodily possession of the lands and tenements of the church.

ADVOWSONS are either advowsons *appendant*, or advowsons *in gross*. Lords of manors being originally the only founders, and of course the only patrons, of churches<sup>d</sup>, 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<sup>e</sup>: 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<sup>f</sup>. But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but it is for the future annexed to the person of its owner, and not to his manor or lands<sup>g</sup>.

ADVOWSONS are also either *presentative*, *collative*, or *donative*<sup>h</sup>: 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 con-

[ 23 ] ferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson donative is when the king, or any subject by his license, 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

<sup>d</sup> Co. Litt. 199.

<sup>g</sup> *Ibid.* 120.

<sup>e</sup> *Ibid.* 121.

<sup>h</sup> *Ibid.*

<sup>f</sup> *Ibid.* 307.

in the clerk by the patron's deed of donation, without presentation, institution, or induction<sup>i</sup> (2). This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of archbishop Becket in the reign of Henry II.<sup>k</sup> And therefore though pope Alexander III.<sup>l</sup> in a letter to Becket, severely inveighs against a *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shews what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of christianity in this island; and in proof of it they allege a letter from the English nobility to the pope in the reign of Henry the third, recorded by Matthew Paris<sup>m</sup>, which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of

Co. Litt. 344.

<sup>i</sup> *Decretal. l. 3. t. 7. c. 3.*<sup>k</sup> Seld. tith. c. 12. § 2.<sup>m</sup> *A. D. 1239.*


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(2) Two peculiar properties of donatives may be mentioned here; one is, that the presentation does not devolve to the king, as in other livings, when the incumbent is made a bishop (*Ca. Parl.* 184.): the other is taken notice of by Mr. Wooddefon, that donatives are within the statute of pluralities, if a donative is the first living; but if a donative is the second benefice taken without a dispensation, the first would not be void, for the words of the statute are, *instituted and inducted to any other*, which are not applicable to donatives. 1 *Woodd.* 330. But though the first might not be void under the statute, if the incumbent took a donative without a dispensation, yet by the canon law it would be voidable; and to hold both, the incumbent must have the consent of the patron of the first benefice.

feodal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

HOWEVER this may be, if, as the law now stands, the true patron *once* waves this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the admission [ 24 ] is now become for ever presentative, and shall never be donative any more<sup>n</sup>. For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will therefore reduce it to the standard of other ecclesiastical livings (3).

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<sup>o</sup>: the second *mixed*, as of wool, milk, pigs, &c.<sup>p</sup>, 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<sup>q</sup> (4).

<sup>n</sup> Co. Litt. 344. Cro. Jac. 63.

<sup>p</sup> *Ibid.*

<sup>o</sup> 1 Roll. Abr. 635. 2 Inst. 649.

<sup>q</sup> 1 Roll. Abr. 656.

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(3) The contrary is held by a later authority than the authorities referred to by the learned Judge; in which it was declared, that although a presentation may destroy an impropriation, yet it cannot destroy a donative, because the creation thereof is by letters patent. 1 *Salk.* 541.

(4) It has been decided by the court of exchequer that agistment is a predial tithe. 3 *Anstr.* 760. Personal tithes are only payable

IT is not to be expected from the nature of these general commentaries, that I should particularly specify what things are titheable, and what not; the time when, or the manner and proportion in which, tithes are usually due (5). For this I must refer to such authors as have treated the matter in detail: and shall only observe, that, in general, tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or *ferae naturae*, as deer, hawks, &c. whose increase, so as to profit the owner, is not annual, but casual (6). It will rather be our business to consider, 1. The original of the right of tithes. 2. In whom that right at present subsists. 3. Who may be discharged, either totally or in part, from paying them. [ 25 ]

1. As to their original, I will not [put the title of the clergy to tithes upon any divine right; though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be. For, besides the positive precepts of the new testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniences, and

<sup>s</sup> 2 Inst. 651.

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payable by a special custom, and perhaps are paid no where now in England, except for fish caught in the sea, and for corn mills.

3 *Burn. Ec. L.* 473.

(5) This is a very important subject, but the discussion of it here would have no immediate reference to the author's text, and it would be too extensive for a note; it will therefore be reserved by the editor for the supplemental volume.

(6) Tithes may be payable of deer and rabbits by special custom.  
moderate

moderate enjoyments of life, at their expence, for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal functions (7).

WE cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of christianity among the Saxons, by Augustin the monk, about the end of the sixth century. But the first mention of them, which I have met with in any written English law, is in a constitutional decree, made in a synod held *A. D.* 786<sup>s</sup>, wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two [ 26 ] kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators, and people. Which was a very few years later than the time that Charlemagne established the payment of them in France, and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy<sup>u</sup>.

<sup>s</sup> Seld. c. 8. § 2.

<sup>t</sup> *A. D.* 778.

<sup>u</sup> Book I. ch. 11. Seld. c. 6. § 7.

Sp. of laws, b. 31. c. 12.

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(7) The clergy have precisely the same right to tithes, as the heir at law has to his ancestor's estate, or the farmer to the possession in consequence of his lease; and the proprietor has no more reason to complain that his land is not tithe-free, than he has that his neighbour's field is not his own.



THE next authentic mention of them is in the *foedus Edwardi et Guthruni*; or the laws agreed upon between king Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws<sup>w</sup>: wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion; and, accordingly, we find<sup>x</sup> the payment of tithes not only *enjoined*, but a *penalty* added upon non-observance: which law is seconded by the laws of Athelstan<sup>y</sup>, about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

2. WE are next to consider the persons to whom they are due. And upon their first introduction (as hath formerly been observed<sup>z</sup>), though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased<sup>a</sup>; which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common<sup>b</sup>. But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first by common consent, or the appointment of lords of manors, and afterwards by the written law of the land<sup>c</sup>.

HOWEVER, arbitrary consecrations of tithes took place [ 27 ] again afterwards, and became in general use till the time of king John<sup>d</sup>. Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under archbishop Dunstan and his successors: who endeavoured to wean the people from paying their dues to the secular or parochial clergy (a much more valuable set of men than themselves), and were then in hopes to have drawn, by

<sup>w</sup> Wilkins, pag. 51.

<sup>x</sup> *cap.* 6.

<sup>y</sup> *cap.* 1.

<sup>z</sup> Book 1. *Introductio*. § 4.

<sup>a</sup> *Instit.* 646. *Hob.* 296.

<sup>b</sup> *Seld.* c. 9. § 4.

<sup>c</sup> *L. L. Edgar*, c. 1. & 2. *Canut.* c. 11.

<sup>d</sup> *Seld.* c. 11.

fanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected: since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by pope Innocent the <sup>e</sup> third about the year 1200 in a decretal epistle, sent to the archbishop of Canterbury, and dated from the palace of Lateran: which has occasioned sir Henry Hobart and others to mistake it for a decree of the council of Lateran held *A. D.* 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen<sup>f</sup>, whereas this letter of pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries<sup>g</sup>. This epistle, says sir Edward Coke<sup>h</sup>, bound not the lay subjects of this realm: but, being reasonable and just, (and, he might have [ 28 ] added, being correspondent to the antient law,) it was allowed of, and so became *lex terrae*. This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps which still continue in those portions of tithes, which the parson of one parish hath, though rarely, a right to claim in another: for it is now universally held<sup>i</sup>, that tithes are due, of common right, to the parson of the parish, unless there be a special exemption. This parson of the parish, we have formerly seen<sup>k</sup>, may be either the actual incumbent, or

<sup>e</sup> *Opera Innocent. III. tom. 2. pag. 452.*

<sup>f</sup> *Decretal. l. 3. t. 30. c. 19.*

<sup>g</sup> *Ibid. c. 2. 6.*

<sup>h</sup> 2 Inst. 641.

<sup>i</sup> Regist. 46. Hob. 296.

<sup>k</sup> Book I. p. 385.

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 <sup>1</sup>.

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

FIRST, a real composition is when an agreement is made between the owner of the lands, and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompence given to the parson, in lieu and satisfaction thereof <sup>m</sup>. 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

<sup>1</sup> In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See book I. p. 113. 284.

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 (8).

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

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

(8) Such a composition made since the 13 Eliz., though confirmed by a decree of the court of chancery, is not binding upon the succeeding incumbent. 2 Woodd. 107.

A real composition cannot now be established without production of the deed by which it was created, or proof that it once actually existed, if it cannot now be found. 3 Bro. 217.

A parson or a vicar may make a lease to bind himself for three lives or twenty-one years, but at his death the lease becomes entirely void, and does not in any degree affect his successor.

With regard to compositions entered into between the tithe-owner and any parishioner, for the latter to retain the tithes of his own estate, it has been decided that they are analogous to leases from year to year, between landlord and tenant; and if they are paid without, or beyond, an agreement for a specific time, they cannot be put an end to without six months' notice before the time of payment; and the parishioner may avail himself of the defect of notice, at the same time that he controverts the right of the incumbent to receive tithes in kind; an objection not permitted to a tenant who denies the right of the landlord. Case of Kensington. 2 Rayner. 992. 2 Bro. 161. 1 Bos. 458.

annual

annual increase. This is sometimes a pecuniary compensation, as two-pence 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 of hay, and not the tenth, in consideration of the owner's making it for him: sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

To make a good and sufficient *modus*, the following rules [ 30 ] must be observed. 1. It must be *certain* and *invariable*<sup>n</sup>, 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<sup>o</sup>; 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<sup>p</sup>; 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<sup>q</sup>. Thus a *modus* of 1d. 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

<sup>n</sup> 1 Keb. 602.

<sup>p</sup> 1 Lev. 179.

<sup>o</sup> 1 Roll Abr 649.

<sup>q</sup> Cro. Eliz. 486. Salk 657.

other. 5. The recompence must be in its nature as durable as the tithes discharged by it; that is, an inheritance certain<sup>r</sup>: 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 recompence will be lost. 6. The *modus* must not be too large, which is called a *rank modus*: as if the real value of the tithes be 6*ol. per annum*, and a *modus* is suggested of 4*ol.*, this *modus* will not be established; though one of 4*os.* might have been valid<sup>s</sup>. 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<sup>t</sup>. For, in these cases of prescriptive or customary *moduses*, it is supposed that an original real composition was antiently made; which being lost by length of time, the immemorial [ 31 ] usage is admitted as evidence to shew that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the beginning of the reign of Richard the first<sup>u</sup>; and any custom may be destroyed by evidence of non-existence in any part of the long period from that time to the present; wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the first, this *modus* is (in point of evidence) *felo de se*, and destroys itself. For, as it would be destroyed by any direct evi-

<sup>r</sup> 2 P. Wms. 462.

<sup>s</sup> 11 Mod. 60.

<sup>t</sup> *Pyke v. Dowling*, Hil. 19 Geo. III. C. B.

<sup>u</sup> 2 Inst. 238, 239. This rule was adopted, when by the statute of Westm. 1. (3 Edw. I. c. 39.) the reign of Richard I. was made the time of limitation in a writ of right. But, since by

the statute 32 Hen. VIII. c. 2. this period (in a writ of right) hath been very rationally reduced to 60 years, it seems unaccountable, that the date of legal prescription or memory should still continue to be reckoned from an æra so very antiquated. See Litt. § 170. 34 Hen. VI. 37. 2 Roll. Abr. 269. pl. 16.

dence to prove it's non-existence at any time since that æra, so also it is destroyed by carrying in itself this internal evidence of a much later original (9).

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<sup>v</sup>. So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiæ*<sup>w</sup>. 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<sup>x</sup> (10). And, generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet*<sup>y</sup>. But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes by various ways<sup>z</sup>; as,  
1. By real composition: 2. By the pope's bull of exemption;

<sup>v</sup> Cro. Eliz. 511.

<sup>x</sup> Cro. Eilz. 479.

<sup>w</sup> Cro. Eliz. 479. 511. Sav. 3.

<sup>y</sup> *Ibid.* 511.

Moor. 910.

<sup>z</sup> Hob. 309. Cro. Jac. 308.

(9) To constitute a good modus, it seems necessary that it should be such as would have been a certain, fair, and reasonable equivalent or composition for the tithes in kind, before the year 1189; and therefore no modus for hops, turkeys, or other things introduced into England since that time, can be good. *Bunb.* 307.

The question of rankness, or rather modus or no modus, is a question of fact, which courts of equity will send to a jury, unless the grossness of the modus is so obvious as to preclude the necessity of it. 2 *Bro.* 163. 1 *Bl. R.* 420. 2 *Bl. R.* 1257.

But in a suit brought to establish a modus they seldom decide upon the question of rankness without a reference to a jury.

(10) But it seems to be determined that the king's tenant for years, or at will, is not liable to pay tithes, on account of the dignity of the king, who cannot be presumed to have leisure or occasion to cultivate his own lands. *Com. Dig. Disfm. E.* 7. 2 *Wcodd.* 100.

[ 32 ] 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession: 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights-templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes<sup>z</sup>. Though upon the dissolution of abbeyes by Hen. VIII. most of these exemptions from tithes would have fallen with them, and the lands become titheable again: had they not been supported and upheld by the statute 31 Hen. VIII. c. 13. which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeyes themselves formerly held them (11). And from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free: for, if a man can shew his lands to have been such abbey-lands, and also immemorially discharged of tithes by any of the means before-mentioned, this is now a good prescription *de non decimando* (12). But he must shew both these requisites;

<sup>z</sup> 2 Rep. 44. Seld. tith. c. 13. § 2.

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(11) This provision is peculiar to that statute, and therefore all the lands belonging to the lesser monasteries, dissolved by the 27 Hen. VIII. c. 28. are now liable to pay tithes. *Com. Dig. Dism. E.* 7.

(12) Posterior usage is evidence of the antecedent, and has always been allowed so in cases of this nature; for what other evidence can be had? *Ld. Hardw. 2 Atk. 137.*

It has been argued in the court of exchequer, that a grant of the tithes might be presumed from a lay-impropriator; but the court held that there was no distinction between a spiritual and a lay rector, and that no grant could be presumed, which would amount to a prescription *de non decimando*. 3 *Anst.* 702.

Lord Eldon has expressed doubts respecting this doctrine in 5 *Ves. Jun.* 186.



for abbey-lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey-lands.

III. COMMON, or right of common, appears from it's 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 <sup>a</sup>. And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

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 grofs <sup>b</sup>.

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. This is a matter of most universal right: and it was originally permitted <sup>c</sup>, not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture: and pasture could not be had but in the lords' wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident to the grant of the

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<sup>a</sup> Finch. law. 157.<sup>b</sup> Co. Litt. 122<sup>c</sup> 2 Inst. 86.

lands; and this was the original of common appendant: which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England<sup>d</sup>. Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity: but may be annexed to lands in other lordships<sup>e</sup>, or extend to other 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 immemorial usage and prescription<sup>f</sup>, which the law esteems sufficient proof of a special grant or agreement for this purpose. 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 inclose and bar out the other, though they have intercommoned time out of mind.

[ 34 ] 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<sup>g</sup>. Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by 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 com-

<sup>d</sup> Stiernh. *de jure Sueonum*, l. 2. c. 6.

<sup>e</sup> Cro. Car. 482. 1 Jon. 397.

<sup>f</sup> Co. Litt. 121, 122.

<sup>g</sup> Ibid. 122.

mons without flint, and which last all the year (13). By the statute of Merton, however, and other subsequent statutes<sup>b</sup>, the lord of a manor may enclose so much of the waste as he pleases for tillage or woodground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law, “approving;” an antient expression signifying the same as “improving<sup>i</sup> (14).” The lord hath

<sup>b</sup> 20 Hen. III. c. 4. 29 Geo. II. c. 36. and 31 Geo. II. c. 41. <sup>i</sup> 2 Inst. 474.

(13) A person, who has a house, but no land annexed to it, cannot claim right of common for cattle levant and couchant; for no levancy and couchancy in such a case can be proved, for they imply the possession of so much land as will support the cattle, for which the right of common is claimed, during the winter; for such cattle only are levant and couchant as the land will maintain throughout the winter. 5 *T. R.* 46. 2 *Woodd.* 77.

(14) Any person, who is seised in fee of part of a waste, may approve, besides the lord of the manor, provided he leaves a sufficiency of common for the tenants of the manor. 3 *T. R.* 445.

It seemed to have been generally understood that the lord could not approve, where the commoners had a right of turbary, piscary, of digging sand, or of taking any species of estovers upon the common. 2 *T. R.* 391. But it is now decided agreeably to the general principles of the subject, that where the tenants have such rights they will not hinder the lord from enclosing against the common of pasture, if sufficient be left, for this is a right quite distinct from the others; but if by such enclosure the tenants are interrupted in the enjoyment of their rights of turbary, piscary, &c. then the lord cannot justify the approvement in prejudice of these rights. *Shakespeare v. Peppin*, 6 *T. R.* 741. The right of the commoners to the pasturage may be subservient to the right of the lord; for if the lord has immemorially built houses or dug clay-pits upon the common without any regard to the extent of the herbage, the immemorial exercise of such acts is evidence that the lord reserved that right to himself, when he granted the right of pasturage to the commoners. 5 *T. R.* 411. If a lord of manor plant trees upon a common, a commoner has no right to cut them down. His remedy is only by an action. 6 *T. R.* 483. *Bof.* 14.

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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<sup>k</sup>.

2, 3. COMMON of *pisicary* is a liberty of fishing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground<sup>l</sup>. 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 further; 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 estovers or *estouviers*, that is, *necessaries*, ('from *estoffer*, to furnish,) is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, *bote*, is used by us as synonymous to the French *estovers*: and therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the house: which later 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 eave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary<sup>m</sup>.

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 pis-

<sup>k</sup> 2 Rep. 113.<sup>l</sup> Co. Litt. 122.<sup>m</sup> Co. Litt. 41.

cary 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 granted on a special permission ; as when the owner of the land grants to another the 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 [ 36 ] the grantee leaves the country, he cannot assign over his right to any other ; nor can he justify taking another person in his company<sup>n</sup>. 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 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 trespass<sup>o</sup>. For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same<sup>p</sup>. By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased : which was the established rule in pub-

<sup>n</sup> Finch. law. 31.

<sup>o</sup> Ibid. 63.

<sup>p</sup> Co. Litt. 56.

lic as well as private ways. And the law of England, in both cafes, feems to correfpond with the Roman<sup>a</sup> (15).

V. OFFICES, which are a right to exercife a public or private employment, and to take the fees and emoluments thereunto belonging, are alfo incorporeal hereditaments; whether public, as thofe of magiftrates; or private, as of bailiffs, receivers, and the like. For a man may have an eftate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: fave only that offices of public trust cannot be granted for a term of years, efpecially if they concern the adminiftration of juftice, for then they might perhaps veft in executors or adminiftrators<sup>r</sup>. Neither can any *judicial* office be granted in reversion: becaufe 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 infufficient: but *minifterial* offices may be fo granted<sup>s</sup>; for thofe may be executed by deputy. Alfo, by ftatute 5 & 6 Edw. VI. c. 16. no public office (a few only excepted) fhall be fold, under pain of difability to difpofe of or hold it. For [ 37 ] the law prefumes that he who buys an office will by bribery, extortion, or other unlawful means, make his purchafe good, to the manifelt detriment of the public (16).

<sup>a</sup> Lord Raym. 725. 1 Brownl. 212.  
2 Show. 28. 1 Jon. 297.

<sup>r</sup> 9 Rep. 97.  
<sup>s</sup> 11 Rep. 4.

(15) Lord Mansfield took notice of the inaccuracy of this paffage, in the cafe of *Taylor v. Whitehead*, *Doug.* 716. in which it was determined, that if a man has a right of way over another's land, unlefs the owner of the land is bound by prefcription or his own grant to repair the way, he cannot juftify going over the adjoining land, when the way is impaffable by the overflowing of a river; but if public highways are foundrous, paffengers are juftified, from principles of convenience and neceffity, in turning out upon the land next the road.

(16) If two offices are incompatible, by the acceptance of the latter, the firft is relinquifhed and vacant, even if it fhould be a fuperior office. 2 *T. R.* 81.

VI. DIGNITIES bear a near relation to offices. Of the nature of these we treated at large in the former book<sup>t</sup>; it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VII. FRANCHISES are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is<sup>u</sup> 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<sup>w</sup>.

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the county; wherein the grantee only, and his officers, are to execute all

[ 38 ]

<sup>t</sup> See book 1. ch. 12.<sup>w</sup> 2 Roll. Abr. 191. Keilw. 196.<sup>u</sup> Finch. l. 164.

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

As to a *forest*; this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws<sup>y</sup> (17). But a *chase* differs from a park, in that it is not enclosed, and also in that a man may have a chase in another man's ground as well as 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 thereon. A *park* is an enclosed 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<sup>z</sup>.

<sup>x</sup> 2 Inst. 220.

<sup>z</sup> Co. Litt. 233. 2 Inst. 199. 11 Rep.

<sup>y</sup> 4 Inst. 314.

: 6.

(17) The king, before the *charta de foresta*, could have made a forest wherever he pleased over the lands of his subject; but after the boundaries of the district fixed upon were marked out and proclaimed by the sheriff, it was only a chase till proper officers were appointed, when it became a forest, and under the jurisdiction of the chief justice in eyre. *Manw.* tit. *Forest*, pl. 7. A forest is not necessarily a chase in the hands of a subject; for it may be granted by the king, subject to the justice seat and the forest laws, as the duke of Lancaster, and duke of Norfolk, and many other noblemen have had forests subject to the forest laws; but if the jurisdiction is not added in the grant, it becomes a chase, and trespassers in it are punishable only by the common law. *ib.* pl. 67. *et seq.* 4 *Inst.* 314.

Thouglt.



Though now the difference between a real park, and such enclosed grounds, is in many respects not very material : only that it is unlawful at common law for any person to kill any beasts of park or chase<sup>a</sup> (18), except such as possess these franchises of forest, chase, or park. *Free warren* is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren<sup>b</sup> ; which, being *ferae naturae*, every one had a natural right to kill as he could ; but [ 39 ] upon the introduction of the forest laws, at the Norman conquest, as will be shewn hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them ; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man therefore that has the franchise of warren, is in reality no more than a royal game-keeper ; but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on

<sup>a</sup> 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.)

<sup>b</sup> The beasts are hares, conies, and roes ; the fowls are either *campesfires*, as partridges, rails, and quails ; or *sylvestres*, as woodcocks and pheasants ; or *aquatiles*, as mallards and herons. (Co. Litt. 233.) (19)

(18) See this controverted in a note to page 419. *post*.

(19) Upon the forest-laws I should consider Manwood higher authority than sir Edward Coke.

Manwood informs us, that a forest is not a privileged place for all manner of beasts or fowls, but only for beasts of forest, chase, or warren, and no other ; that is, for the hart, the hind, and the hare, which are beasts of the forest ; the buck, the doe, the fox, which are beasts of the chase ; the hare, the coney, the pheasant, and the partridge, which are beasts and fowls of warren ; and no other. The game of free-warren are such as may be taken with long winged hawks. *For. pl. 20. Warren.*

his own, unless he had the liberty of free-warren <sup>c</sup> (20). This franchise is almost fallen into disrepute, since the new statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in ancient times who have sold their estates, and reserved the free-warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heir have sometimes free-warren over another's ground <sup>d</sup> (21). A *free fishery*, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feudal polity has prevailed<sup>e</sup>; 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 <sup>f</sup>. This opening was extended by the second<sup>g</sup> and third<sup>h</sup> charters of Henry III. to those also that were fenced under Richard I.; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II. This differs from a *several fishery*; because he that has a several fishery must also be (or at least

<sup>c</sup> Salk. 637.

<sup>f</sup> cap. 47. edit. Oxon.

<sup>d</sup> Bro. Abr. tit. Warren, 3.

<sup>g</sup> cap. 20.

<sup>e</sup> Seld. Mar. Claus. I. 24. Dufresne, V. 503. Crag. de Jur. feod. II. 8. 15.

<sup>h</sup> 9 Hen. III. c. 16.

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(20) But the owner of a free-warren neither kept nor killed the game for the use of the king; the doctrine which the learned Judge frequently repeats, that no one by the common law can justify sporting upon his own ground, is controverted at large by the Editor in a note to page 419, *post*.

(21) Any one may now lease or convey his land, and reserve to himself the right of entering to kill game, without being subject to be sued as a trespasser; but the right of free-warren can only exist by the king's grant, or by prescription, from which such a grant is presumed. *Manuv. Warren. Forest*, pl. 43.

derive

derive his right from) the owner of the foil <sup>i</sup>, which in a free fishery is not requisite (22). 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, [ 40 ] in a free fishery, a man has a property in the fish before they are caught; in a common of piscary not till afterwards <sup>k</sup>. 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 <sup>l</sup>. But to consider such right as originally a flower of the prerogative, till restrained by *magna charta*, and derived by royal grant (previous to the reign of Richard I.) 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 to this matter, with which our books are embarrassed. For it must be acknowledged, that the right and distinctions of the three species of fishery are very much confounded in our law-books; and that there are not wanting respectable authorities <sup>m</sup> which maintain that a *several* fishery may exist distinct from the property of the foil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

VIII. CORODIES are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance <sup>n</sup>. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted <sup>o</sup>. And these may be reckoned another species

<sup>i</sup> *M. 17 Edw. IV. 6 P. 18 Edw. IV.*      <sup>m</sup> See them well digested in Hargrave's notes on Co. Litt. 122. (23).  
<sup>4</sup> *T. 10 Hen. VII. 24. 26. Salk. 637.*

<sup>k</sup> *F. N. B. 88. Salk. 637.*

<sup>n</sup> *Finch, I. 162.*

<sup>l</sup> *2 Sid. 8.*

<sup>o</sup> See book I. ch. 8.

(22) A subject may have, by prescription, a right to a several fishery in an arm of the sea. *4 T. R. 437.*

(23) The alteration made in the text in consequence of the observations of Mr. Hargrave upon this subject, prove the candour and liberality of the learned judge, and his readiness to correct any inaccuracy, when it was pointed out to him.

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 <sup>p</sup>. 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 <sup>q</sup> ; and yet a man may have a real estate in it, though his security is merely personal. (24)

[ 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 acknowledgment given for the possession of some corporeal inheritance <sup>r</sup>. 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 <sup>s</sup>. 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

<sup>p</sup> Co. Litt. 144.

<sup>q</sup> *Ibid.* 2.

<sup>r</sup> Co. Litt. 144.

<sup>s</sup> *Ibid.* 142.

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(24) See annuities for lives, page 461, *post*.

which

which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year<sup>t</sup>; 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<sup>u</sup>. It must, lastly, issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distress. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like<sup>w</sup>. 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<sup>x</sup> (25): though it doth not affect the inheritance, and is no legal rent in contemplation of law.

THERE are at common law<sup>y</sup> three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it hath some corporeal service incident to it, as at the least fealty or his feudal oath of fidelity<sup>z</sup>. For, if a tenant holds his land by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distress

[ 42 ]

<sup>t</sup> Co. Litt. 47.<sup>x</sup> *Ibid.* 47.<sup>u</sup> Plowd. 13. 8 Rep. 71.<sup>y</sup> Litt. § 213.<sup>w</sup> Co. Litt. 144.<sup>z</sup> Co. Litt. 142.

(25) There can be no doubt but the lessee of tithes, an advowson, or any incorporeal hereditament, would be liable to an action of debt for the rent agreed upon. See 2 *Woodd.* 69. where this passage is taken notice of.

of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired<sup>a</sup>. 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 arrears, or behind, it shall be lawful to distress 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 charged with a distress for the payment of it<sup>b</sup> (26). *Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

THERE are also other species of rents, which are reducible to these three. Rents of *assise* are the certain established rents of the freeholders and antient copyholders of a manor<sup>c</sup>, 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 antiently called *white-rents*, or *blanch-farms*, *reditus albi*<sup>d</sup>; in contradistinction to rents reserved in work, grain, or base money, which were called [ 43 ] *reditus nigri*, or *black-mail*<sup>e</sup>. *Rack-rent* is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one-

<sup>a</sup> Litt. § 215.

<sup>b</sup> Co. Litt. 143.

<sup>c</sup> 2 Inst. 19.

<sup>d</sup> In Scotland this kind of small payment is called *blanch-bolding*, or *reditus albae firmac*.

<sup>e</sup> 2 Inst. 19.

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(26) A clear rent-charge must be free from the land-tax.  
Doug. 602.

fourth of the value of the lands, at the time of its reservation <sup>f</sup> : 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 (27).

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 <sup>g</sup> (28).

RENT is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation <sup>h</sup> : but in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country <sup>i</sup>. And strictly the rent is demandable and payable before the time of sunset of the day whereon it is reserved <sup>k</sup> ; though perhaps not absolutely due till midnight <sup>l</sup> (29).

<sup>f</sup> Co. Litt. 143.

<sup>k</sup> Co. Litt. 302. 1 Anderf. 253.

<sup>g</sup> Stat. 4 Geo. II. c. 28.

<sup>l</sup> 1 Saund. 287. Prec. Chanc. 555.

<sup>h</sup> Co. Litt. 201.

Salk. 578.

<sup>i</sup> 4 Rep. 73.

(27) Mr. Hargrave is of opinion, that the quantum of the rent is not essential to create a fee-farm. *Harg. Co. Litt.* 145 b. n. 5. ; where he differs from Mr. Douglas, who had thought that a fee-farm was not necessarily a rent-charge, but might also be a rent-seck. *Doug.* 605.

(28) That is, for such as had been paid for three years, within 20 years before the passing of that act, or for such as have been since created. 4 *Geo. II. c. 28. s. 5.* *Doug.* 602.

(29) If the lessor dies before sunset on the day upon which the rent is demandable, it is clearly settled that the rent unpaid is due to his heir, and not to his executor ; but if he dies after sunset and before midnight, it seems to be the better opinion, that it shall go to the executor, and not to the heir. 1 *P. Wms.* 178.

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



CHAPTER THE FOURTH.  
OF THE FEODAL SYSTEM.

IT is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom (1), or the laws which regulate it's landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law: a system so universally received throughout Europe upwards of twelve centuries ago, that sir Henry Spelman<sup>a</sup> does not scruple to call it the law of nations in our western world. This chapter will be therefore dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrine of our laws are frequently the foundation upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern

<sup>a</sup> Of parliaments, 57.

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(1) An intimate acquaintance with the feudal system is absolutely necessary to the attainment of a comprehensive knowledge of the first principles and progress of our constitution. And this subject, in my opinion, might with great propriety have preceded the chapter upon parliament. The authority of lord Coke, upon constitutional questions, is greatly diminished by his neglect of the study of the feudal law: which sir Henry Spelman, who well knew its value and importance, feelingly laments: "I do marvel many times, that my lord Coke, adorning our law with so many flowers of antiquity and foreign learning, hath not turned into this field, from whence so many roots of our law have, of old, been taken and transplanted." *Spelm. Orig. of Terms*, c. viii.

law, in a scholar-like scientific manner, without having recourse to the antient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour.

[ 45 ]

THE constitution of feuds<sup>b</sup> had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium*, as Crag very justly entitles it<sup>c</sup>, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions: and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers<sup>d</sup>. These allotments were called *feoda*, feuds, fiefs or fees; which last appellation in the northern language<sup>e</sup> signifies a conditional stipend or reward<sup>f</sup>. Rewards or stipends they evi-

<sup>b</sup> See Spelman, of feuds, and Wright, of tenures, *per tot.*

<sup>c</sup> *De jure feod.* 19, 20.

<sup>d</sup> Wright, 7.

<sup>e</sup> Spelm. *Gl.* 216.

<sup>f</sup> Pontoppidan, in his history of Norway, (page 290) observes, that in the northern languages *odh* signifies *proprietas* and *all totum*. Hence he derives the *odhal* right in those countries; and thence too perhaps is

derived the *udal* right in Finland, &c. (See Mac Doual *Inst.* part 2.) Now the transposition of these northern syllables, *allodh*, will give us the true etymology of the *allodium*, or absolute property of the feudists (2); as, by a similar combination of the latter syllable with the word *fer*, (which signifies, we have seen, a conditional reward or stipend) *ferodh* or *feodum* will denote stipendiary property.

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(2) This is the same as *all-hood* in English, and is suggested as the derivation of *allodium* in *Woll. Religion of Nat. del.* p. 136.

This unquestionably is the true etymology. Though Dr. Robertson adopts the derivation of *allodium* from *an* and *lot*, or allotment, the mode of dividing what was not granted as stipendiary

dently were : and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given ; for which purpose he took the *juramentum fidelitatis*, or oath of fealty<sup>e</sup> : and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them<sup>h</sup>.

ALLOTMENTS, thus acquired, naturally engaged such as accepted them to defend them : and, as they all sprang from the same right of conquest, no part could subsist independent [ 46 ] of the whole ; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior ; and so upwards to the prince or general himself : and the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feudal connexion was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several pro-

<sup>e</sup> See this oath explained at large in *Feud. l. 2. t. 7.*

<sup>h</sup> *Feud. l. 2. t. 24.*

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diary property ; and he relates the memorable story of the fierce foldier who refused to grant a sacred vase to his general Clovis, the founder of the French monarchy, who wished to return it at the request of the bishop to the church from which it had been taken as spoil, by striking it violently with his battle-axe, and declaring “ that you should have nothing but that to which the lot “ gives you a right !” *Hist. of Ch. V.* 1 vol. notes 7 and 8.

perty,

perty, but also in defence of the whole, and of every part of this their newly-acquired country<sup>1</sup>; the produce of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.

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

[ 47 ]

SCARCE had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the

<sup>1</sup> Wright, 8.

<sup>k</sup> L. Florus, l. 3. c. 3.

<sup>l</sup> “Sola, quae de hostibus capta sunt limitaneis ducibus & militibus donavit; ita ut eorum ita essent, si haeredes illorum militarent, nec unquam ad privatos pertinerent: dicens attentius illos militaturos, si etiam sua rura

“defenderent. Addidit sane bis et ani-

“malia et servos, ut possent colere quod

“acceperant; ne per inopiam hominum

“vel per senectutem defererentur rura

“vicina barbariae, quod turpissimum

“ille ducebat.” (Æl. Lamprid. in vita

Alex. S. veri.)

princes of Europe, that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial*, (that is, wholly independent, and held of no superior at all,) now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military fealty<sup>m</sup>. And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto so universally obtained, but now became for many centuries lost and forgotten; and Italy itself (as some of the civilians, with more spleen than judgment, have expressed it) *belluinas, atque ferinas, immanisque Longobardorum leges accepti*<sup>n</sup>.

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

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<sup>m</sup> Wright, 10.<sup>o</sup> Spelm. *Gloss.* 218. Bract. *l.* 2.<sup>n</sup> Gravii. *Orig. l.* 1. § 139.<sup>e.</sup> 16. § 7.<sup>p</sup> Crag. *l.* 2. *t.* 4.

THIS introduction however of the feudal tenures into England, by king William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the conqueror ; but to have been gradually established by the Roman barons, and others, in such forfeited lands as they received from the gift of the conqueror, and afterwards universally consented to by the great council of the nation long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions : which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favourites. A supposition, grounded upon a mistaken sense of the word *conquest* ; which, in it's feudal acceptation, signifies no more than *acquisition* ; and this has led many hasty writers into a strange historical mistake, and one which, upon the flightest examination, will be found to be most untrue. However, certain it is, that the Normans now began to gain very large possessions in England ; and their regard for the feudal law under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle <sup>9</sup>, that in the nineteenth year of king William's reign an invasion was apprehended from Denmark ; and the military constitution of the Saxons being then laid aside, and no other introduced in it's stead, the kingdom was wholly

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<sup>9</sup> A. D. 1085.

defenceless; which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For as soon as the danger was over, the king held a great council to inquire into the state of the nation<sup>r</sup>; the immediate consequence of which was the compiling of the great survey called domeſday-book which was finished in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person<sup>s</sup>. This may possibly have been the æra of formally introducing the feudal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is still extant<sup>t</sup>, [ 50 ] and couched in these remarkable words: "*Statuimus, ut omnes liberi homines foedere et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*" The terms of this law (as Sir Martin Wright has observed<sup>u</sup>) are plainly feudal: for, first, it requires the oath of fealty, which made, in the sense of the feudists, every man that took it a tenant or vassal: and, secondly, the tenants obliged themselves to defend their lords' territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection<sup>w</sup>, which exacts the performance of the military feudal services, as ordained by the general council. "*Omnes*

<sup>r</sup> *Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hac terra; quo modo incoleretur, et a quibus hominibus.* Chron. Sax. *ibid.* *subdidere, ejusque facti sunt vassalli, ac ei fidelitatis juramenta præstiterunt, se contra alios quoscunque illi fidos futuros.* Chron. Sax. A. D. 1086.

<sup>s</sup> *Omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi*

<sup>t</sup> *cap. 52.* Willk. 228.

<sup>u</sup> *Tenures, 66.*

<sup>w</sup> *cap. 58.* Willk. 288.

*comites,*

“ *comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet : et sint semper prompti et bene parati, ad servitium suum integrum nobis exhibendum et peragendum, cum opus fuerit : secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti.*”

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

IN consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, “ that the king is the universal lord and original proprietor of all the lands in his kingdom<sup>z</sup>: and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services.” For this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the

<sup>x</sup> Montesqu. Sp. L. b. 31. c. 8.

<sup>y</sup> Pharaoh thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, re-

serving an annual render of the fifth part of their value. (Gen. c. xlvii.)

<sup>z</sup> *Tout fuit in luy, et vient de luy al commencement.* (M. 24 Edw. III. 65.)



same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwife. And indeed, by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding: and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations<sup>a</sup>; as if the English had, in fact as well as theory, owed every thing they had to the bounty of their sovereign lord.

OUR ancestors, therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth<sup>b</sup>. However, this king and his son William Rufus kept up with a high hand all the rigours of the feudal doctrines: but their successor Henry I. found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the confessor, or antient Saxon system; and accordingly, in the first year of his reign, granted a charter<sup>c</sup>, whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till in the reign of

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<sup>a</sup> Spelm. of feuds, c. 28.<sup>b</sup> Wright, 81.<sup>c</sup> LL. Hen. 1. c. 1.

king John they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him ; which at length produced the famous great charter at Runing-mead, which, with some alterations, was confirmed by his son Henry III. And, though it's immunities (especially as altered on it's last edition by his son<sup>d</sup>) are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted : but this, properly considered, will shew, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference ; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness ; but a restoration of that antient constitution, of which our ancestors had been defrauded by the art and finessè of the Norman lawyers, rather than deprived by the force of the Norman arms.

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

THE grand and fundamental maxim of all feodal tenure is this : that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord* : being he who retained the dominion or ultimate property of the feud or fee ; and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or *vassal*, which was only another name for the tenant, or holder of the lands ; though, on

<sup>d</sup> 9 Hen. III.

account of the prejudices which we have justly conceived against the doctrines that were afterwards *grafted* on this system, we now use the word *vafal* opprobriously, as synonymous to slave or bondman (3). The manner of the grant was by words of gratuitous and pure donation, *dedi et conceffi*; which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vafals; which perpetuated among them the æra of the new acquisition, at a time when the art of writing was very little known: and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

BESIDES an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vafal or tenant upon investiture did usually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who fate before him; and there professing, that “ he [ 54 ]  
 “ did become his *man*, from that day forth, of life and limb  
 “ and earthly honour:” and then he received a kiss from his lord<sup>c</sup>. Which ceremony was denominated *homagium*, or

<sup>c</sup> Litt. § 85.

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(3) Nothing, I think, proves more strongly the detestation in which the people of this country held the feudal oppressions, than that the word *vafal*, which once signified a feudal tenant or grantee of land, is now synonymous to slave; and that the word *villain*, which once meant only an innocent inoffensive bondman, has kept its relative distance, and denotes a person destitute of every moral and honourable principle, and is become one of the most opprobrious terms in the English language.

*manhood*, by the feudists, from the stated form of words, *devenio vester homo*<sup>f</sup>.

WHEN the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only two-fold; to follow, or do *suit* to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts *baron*<sup>g</sup>, (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants,) in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants: and upon this account, in all the feudal institutions both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiæ*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence, and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military

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<sup>f</sup> It was an observation of Dr. Arbuthnot, that tradition was no where preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope, vi. 134. 8<sup>o</sup>.) It will not, I hope, be thought puerile

to remark, in confirmation of this observation, that in one of our ancient juvenile pastimes (the *king I am* or *basilinda* of Julius Pollux, *Onomastic*, (l. 9. c. 7.) the ceremonies and language of feudal homage are preserved with great exactness.

<sup>g</sup> *Feud*, l. 2. t. 55.

branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

AT the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the *will* of the lord <sup>h</sup>, who was then the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more *years*. Among the ancient Germans they continued only from year to year; an annual distribution of lands being made by their leaders in their general councils or assemblies <sup>i</sup>. This was professedly done lest their thoughts should be diverted from war to agriculture, lest the strong should encroach upon the possessions of the weak, and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory <sup>k</sup>. But still feuds were not yet *hereditary*; though frequently granted, by the favour of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services <sup>l</sup>: and therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud.

<sup>h</sup> *Feud. l. 1. t. 1.*

Thus Tacitus: (*de mor. Germ. c. 26.*) "*agri ab universis per vices occupantur; arva per annos mutant.*" And Cæsar yet more fully: (*de bell. Gall. l. 6. c. 21.*) "*Neque quisquam agri modicum certum aut fines proprios habet;*

"*sed magistratus et principes, in annos singulos, gentibus et cognationibus hominum qui una coierunt, quantum eis et quo loco visum est, attribuunt agri, atque anno post alio transire cogunt.*"

<sup>k</sup> *Feud. l. 1. t. 1.*

<sup>l</sup> Wright, 14.

[ 56 ] But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud : which was called a relief, because it raised up and re-established the inheritance, or in the words of the feodal writers, “ *incertam et caducam hereditatem relevabat.*” This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

FOR in process of time feuds came by degrees to be universally extended beyond the life of the first vassal, to his sons, or perhaps to such one of them as the lord should name ; and in this case the form of the donation was strictly observed : for if a feud was given to a man and his sons, all his sons succeeded him in equal portions : and, as they died off, their shares reverted to their lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation<sup>m</sup>. But when such a feud was given to a man and his heirs, in general terms, then a more extended rule of succession took place ; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place ; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feodal succession, that “ none was capable of inheriting “ a feud, but such as was of the blood of, that is, lineally “ descended from, the first feudatory<sup>n</sup>.” And the descent, being thus confined to males, originally extended to all the males alike ; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father’s feud. But this being found upon many accounts inconvenient, (particularly, by dividing the services, and thereby weakening the strength of the feodal union,) and *honorary* feuds (or

<sup>m</sup> Wright, 17.

<sup>n</sup> *Ibid.* 183.

titles of nobility) being now introduced, which were not of a dividible nature, but could only be inherited by the eldest son<sup>o</sup>; in imitation of these, *military feuds* (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.<sup>p</sup> [ 57 ]

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

THESE were the principal, and very simple, qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military persons; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants: obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents, and by these means the feudal polity was greatly extended; these inferior feudatories (who held what

<sup>o</sup> Feud. 2. t. 55.<sup>p</sup> Wright, 32.<sup>q</sup> Wright, 29.<sup>r</sup> Ibid. 30.

are called in the Scots law “*rere-fiefs*”) being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of [ 58 ] their immediate superiors or lords <sup>s</sup>. But this at the same time demolished the antient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprized all such as do not fall within the other descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual licence; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud <sup>t</sup>.

BUT as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord

<sup>s</sup> Wright, 20.

<sup>t</sup> *Feud. 2. 1. 7.*



and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised : what effect it has produced on the landed property of England will appear in the following chapters.

## CHAPTER THE FIFTH.

## OF THE ANTIENT ENGLISH TENURES.

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

ALMOST all the real property of this kingdom is, by the policy of our laws, 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. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king: and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B was said to hold  
of

of A, and A of the king; or in other words, B held his lands immediately of A, but mediately of the king. The king therefore was stiled lord paramount; A was both tenant and lord, or was a mesne lord: and B was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit of the land<sup>a</sup>. In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to fir Edward Coke<sup>b</sup>, in the law of England we have not properly *allodium*; which, we have seen<sup>c</sup>, is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

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

I. THERE seems to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier or a freeman to perform; as to serve under his lord in the wars, to pay a sum of money, and the [ 61 ]

<sup>a</sup> 1 Inst. 296.

<sup>b</sup> 1 Inst. 1.

<sup>c</sup> page 47.

<sup>d</sup> In the Germanic constitution, the electors, the bishops, the secular princes,

the imperial cities, &c. which hold directly from the emperor, are called the *immediate* states of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hist. xliii. 61.

like. *Base* services were such as were only fit for peasants or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

FROM the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England, till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the third) seems to give the clearest and most compendious account, of any author ancient or modern<sup>e</sup>; of which the following is the outline or abstract<sup>f</sup>. “Tene-  
“ments are of two kinds, *frank-tenement* and *villenage*. And,  
“of frank-tenements, some are held freely in consideration  
“of homage and *knight-service*; others in *free socage* with the  
“service of fealty only.” And again<sup>g</sup>, “of villenages some  
“are pure, and others privileged. He that holds in *pure*  
“*villenage* shall do whatever is commanded him, and always  
“be bound to an uncertain service. The other kind of vil-  
“lenage is called *villein-socage*; and these villein-socemen do  
“villein services, but such as are certain and determined.”  
Of which the sense seems to be as follows: first, where the service was *free* but *uncertain*, as military service with ho-

<sup>e</sup> l. 4. tr. 1. c. 28.

<sup>f</sup> Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libero socagio cum fidelitate tantum. § 1.

<sup>g</sup> Villenagiorum aliud purum, aliud

privilegiatum. Qui tenet in puro villenagio faciet quicquid ei praeceptum fuerit, et semper tenebitur ad incerta. Aliud genus villenagii dicitur villanum socagium; et hujusmodi villani socmanni — villana faciunt servitia, sed certa, et

determinata. § 5.

mage, that tenure was called the tenure in chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, &c. that tenure was called *liberum focagium*, or free focage. These were the only *free* holdings or tenements; the others were *villenous* or servile, as thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was *base* in its nature, but reduced to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called focage (from the certainty of its services), but degraded by their *baseness* into the inferior title of *villanum focagium*, villain-focage. [ 62 ]

I. 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<sup>h</sup>, which name is expressly given it by the *Mirrouir*. This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the general effect of the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the measure of which in 3 Edw. I. was estimated at twelve ploughlands<sup>k</sup>, and its value (though it varied with the times<sup>l</sup>) in the reigns of Edward I. and Edward II.<sup>m</sup> was stated at 20*l.* *per annum* (1). And he who held this pro-

<sup>h</sup> Spelm. *Gloss.* 219.

<sup>l</sup> 2 Inst. 596.

<sup>i</sup> c. 2. § 27.

<sup>m</sup> Stat. Westm. 1. c. 36. Stat. *de*

<sup>k</sup> *Pafcb.* 3 Edw. I. Co. Litt. 69.

*milit.* 1 Edw. II. Co. Litt. 69.

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(1) Mr. Selden contends, that a knight's fee did not consist of land of a fixed extent or value, but was as much as the king was pleased to grant upon the condition of having the service of one knight.

portion of land (or a whole fee) by knight service, was bound to attend his lord to the wars for forty days in every year, if called upon<sup>n</sup>; which attendance was his *reditus* or return, his rent or service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion<sup>o</sup>. And there is reason to apprehend, that this service was the whole that our [ 63 ] ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

THIS tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi*<sup>p</sup>; was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; *viz.* aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavour to explain, and to shew to be of feudal original (2).

<sup>n</sup> See writs for this purpose in *Memorand. Scacc.* 36. prefixed to Maynard's year book, Edw. II.

<sup>o</sup> Litt. § 95.  
<sup>p</sup> Co. Litt. 9.

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knight. *Tit. of Hon.* p. 2. c. 5. f. 17. and 26. [This is more probable: besides, it cannot be supposed, that the same quantity of land was every where of the same value.

(2) Sir John Dalrymple, in an Essay on Feudal Property, p. 24. says, that "in England, before the 12 of Car. II., if the king had granted lands without reserving any particular services or tenure, the law creating a tenure for him who would have made the grantee hold by knight's service."

Wright also says, that "military tenure was created by pure words of donation." *Wright's Ten.* 141.

1. AIDs were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress<sup>1</sup>; but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three; first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fidelity: inasmuch that the neglect of doing it, whenever it was in the vassal's power, was by the strict rigour of the feudal law an absolute forfeiture of his estate<sup>2</sup>. Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms<sup>3</sup>: the intention of it being to breed up the eldest son and heir apparent of the feigniory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely slender, few lords being able to save much out of their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this or any other incumbrances. From bearing their proportion to these aids, no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden), and the marriage of his female descendants<sup>4</sup>. And one cannot but observe in this particular the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; viz. to marry the

[ 64 ]

<sup>1</sup> *Auxilia sunt de gratia, et non de jure, — cum dependant ex gratia tenentium, et non ad voluntatem dominorum.* Braeton, *l. 2. tr. 1. c. 16. § 8.*

<sup>2</sup> Feud. *l. 2. t. 24.*

<sup>3</sup> 2 Inst. 233.

<sup>4</sup> Philips's Life of Pole. *l. 1. 223.*

patron's daughter ; to pay his debts ; and to redeem his person from captivity †.

BUT besides these antient feudal aids, the tyranny of lords by degrees exacted more and more ; as, aids to pay the lord's debts, (probably in imitation of the Romans,) and aids to enable him to pay aids or reliefs to his superior lord ; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. To prevent this abuse, king John's *magna charta* <sup>u</sup> ordained that no aids be taken by the king without consent of parliament, nor in anywise by inferior lords, save only the three antient ones above mentioned. But this provision was omitted in Henry III.'s charter, and the same oppressions were continued till the 25 Edw. I. when the statute called *confirmatio chartarum* was enacted ; which in this respect revived king John's charter, by ordaining that none but the antient aids should be taken. But though the species of aids was thus restrained, yet the quantity [ 65 ] of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable <sup>w</sup> ; and that the aids taken by the king of his tenants *in capite* should be settled by parliament <sup>x</sup>. But they were never completely ascertained and adjusted till the statute Westm. 1. 3 Edw. I. c. 36. which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter : and the same was done with regard to the king's tenants *in capite* by statute 25 Edw. III. c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

† *Erat autem haec inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent ; in aeris alieni dissolutionem gratuitam pecuniam erogarent ; et ab hosti-*

*bus in bello captos redimerent.* Paul Manutius de senatu Romano, c. 1.

<sup>u</sup> cap. 12. 15.

<sup>w</sup> cap. 15.

<sup>x</sup> *Ibid.* 14.



2. RELIEF, *relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir<sup>y</sup>. The English ill brooked this consequence of their new-adopted policy; and therefore William the conqueror by his law<sup>z</sup> ascertained the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war, should be paid by the earls, barons, and vavasours respectively; and if the latter had no arms, they should pay 100s. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws: thereby in effect obliging every heir to new-purchase or *redeem* his land<sup>a</sup>: but his brother Henry I., by the charter before mentioned, restored his father's law; and ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption<sup>b</sup>. [ 66 ] But afterwards, when, by an ordinance in 27 Hen. II. called the assize of arms, it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgments in arms according to the laws of the conqueror, the composition was universally accepted of 100s. for every knight's fee; as we find it ever after established<sup>c</sup>. But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.

<sup>y</sup> Wright, 99.

<sup>z</sup> c. 22, 23, 24.

<sup>a</sup> 2 Roll. Abr. 514.

<sup>b</sup> "*Haeres non redimet terram suam*

"*sicut faciebat tempore fratris mei, sed*

"*legitima et iusta revelatione relevabo*

"*eam.*" (*Text. Roffens. cap. 34.*)

<sup>c</sup> Glanv. l. 9. c. 4. Litt. § 112.

3. PRIMER *seisin* was a feudal burthen, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession: and half a year's profits, if the lands were in reversion expectant on an estate for life <sup>d</sup>. This seems to be little more than an additional relief, but grounded upon this feudal reason; that by the antient law of feuds, immediately upon the death of a vassal, the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: during which interval the lord was entitled to take the profits; and, unless the heir claimed within a year and day, it was by the strict law a forfeiture <sup>e</sup>. This practice however seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but as to the king's tenures *in capite*, the *prima seisina* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords <sup>f</sup>. The king was entitled to enter and receive the [ 67 ] whole profits of the land, till livery was sued; which suit being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land <sup>g</sup>. And this afterwards gave a handle to the popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiae*, or first fruits.

4. THESE payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male,

<sup>d</sup> Co. Litt.

<sup>e</sup> Feud, l. 2. t. 24.

<sup>f</sup> Stat. Marl. c. 16. 17 Edw. II. c. 3.

<sup>g</sup> Staundf. Prerog. 12.

or fourteen, being a female <sup>b</sup>, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1. 3 Edw. I. c. 22., the two additional years being given by the legislature for no other reason but merely to benefit the lord <sup>i</sup>.

THIS wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit person [ 68 ] to supply the infant's services, till he should be of age to perform them himself (3). And if we consider the feud in it's

<sup>b</sup> Litt. § 103.

<sup>i</sup> *Ibid.*

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(3) If an infant tenant by knight's service was created a knight, the king was no longer entitled to the wardship of his person, nor to the value of his marriage. Sir John Radcliff's case, *Plow.* 267. And the reason there assigned is, that "when he is made a knight  
 " by the king, who is the chief captain of all chivalry, or by some  
 " other great captain assigned by the king for that purpose, he is  
 " thereby allowed and admitted to be able to perform knight's  
 Vol. II. G " service;

original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I. before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

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

WHEN the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ousterlemain*<sup>k</sup>; that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profit of the land; though this seems expressly contrary to *magna carta*<sup>l</sup>. However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer feifins<sup>m</sup>. In order to ascertain the profits that arose to the crown by these first fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county<sup>n</sup>, commonly called an *inquisitio post mortem*;

<sup>k</sup> Co. Litt. 77.

<sup>l</sup> 9 Hen. III. c. 3.

<sup>m</sup> Co. Litt. 77.

<sup>n</sup> Hoveden, *sub Ric. I.*

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“ service; and then his body ought not to be in ward, because his  
“ imbecility ceases, and *cessante causâ, cessabit effectus.*”

which

which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age his heir was; thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principle accusations against Empson and Dudley, the wicked engines of Henry VII., that by colour of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto<sup>o</sup>. And afterwards, a court of wards and liveries was erected<sup>p</sup>, for conducting the same inquiries in a more solemn and legal manner. [ 69 ]

WHEN the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For in those heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony, as was formerly hinted<sup>q</sup>, is supposed to have been the original of the feudal knighthood<sup>r</sup>. This prerogative, of compelling the king's vassals (4) to be knighted, or to

<sup>o</sup> 4 Inst. 198.

<sup>p</sup> Stat. 32 Hen. VIII. c. 46.

<sup>q</sup> Vol. I. page 404.

<sup>r</sup> "In ipso concilio vel principum aliter; vel pater, vel propinquus, scuto

"*frameaque juvenem ornant. Hac*

"*apud illos togâ, hic primus juveniæ*

"*bonos: ante hoc domus pars viden-*

"*tur; mox reipublicæ."* *De Mor.*

*Germ. cap. 13.*

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(4) I do not find that this prerogative was confined to the king's tenants: lord Coke does not make that distinction in his commen-

pay a fine, was expressly recognized in parliament by the statute *de militibus*, 1 Edw. II.; was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI. and queen Elizabeth; but yet was the occasion of heavy murmurs when exerted by Charles I.: among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion of prerogative. However, [ 70 ] among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the crown, and it was accordingly abolished by statute 16 Car. I. c. 20.

5. BUT, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage*, (*maritagium*, as contradistinguished from *matrimony*,) which in it's feudal sense signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality: which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian<sup>s</sup>; that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance<sup>t</sup>: and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*<sup>u(5)</sup>. This seems to have been one of the

<sup>s</sup> Litt. § 110.

<sup>t</sup> Stat. Mert. c. 6. Co. Litt. 82.

<sup>u</sup> Litt. § 110.

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tary on the stat. *de milit.* 2 Inst. 593. Nor is the power of the commissioners limited to the king's tenants in the commissions issued by Edw. VI. and queen Elizabeth; which see in 15 *Rym. Foed.* 124. and 493. See 16 *Car. I. c.* 20. 2 *Rusbw.* 70.; and vol. i. p. 404.

(5) That is, after a suitable match had been tendered by the lord; but female heirs were not subject to the *duplex valor maritagii*. Co. Litt. 82. b.

greatest

greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy<sup>w</sup>: but no tolerable pretence could be assigned why the lord should have the *sale* or *value* of the marriage. Nor indeed is this claim of strictly feudal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards<sup>x</sup>; which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry the first, he engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by king John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract<sup>y</sup>; or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua*<sup>z</sup>. But these provisions in behalf of the relations were omitted in the charter of Henry III.: wherein<sup>a</sup> the clause stands merely thus, "*haeredes maritentur absque disparagatione*:" meaning certainly, by *haeredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage<sup>b</sup> of heirs male; and as Glanvil<sup>c</sup> expressly confines it to heirs female. But the king and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both, *sive sit masculus sive foemina*, as Bracton

[ 71 ]

<sup>w</sup> B. act. l. 2. c. 37. § 6.<sup>x</sup> Gr. Coust. 95.<sup>y</sup> cap. 6. edit. Oxon.<sup>z</sup> cap. 3. *ibid.*<sup>a</sup> cap. 6.<sup>b</sup> The words *maritare* and *maritagium* seem *ex vi termini* to denote the providing of an *husband*.<sup>c</sup> l. 9. c. 9 & 12. & l. 9. c. 4.

more than once expresses it <sup>d</sup>: and also as nothing but disparagement was restrained by *magna carta*, they thought themselves at liberty to make all other advantages that they could <sup>e</sup>. And afterwards this right, of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton <sup>f</sup>; which is the first direct mention of it that I have met with, in our own or any other law (6).

<sup>d</sup> 1. 2. c. 38. § 1.

<sup>e</sup> Wright, 97.

<sup>f</sup> 20 Hen. III. c. 6.

(6) What fruitful sources of revenue these wardships and marriages of the tenants, who held lands by knight's service, were to the crown, will appear from the two following instances collected among others by lord Lyttleton, Hist. Hen. II. 2 vol. 296.

“ John earl of Lincoln gave Henry the third 3000 marks to have the marriage of Richard de Clare, for the benefit of Matilda his eldest daughter; and Simon de Montford gave the same king 10,000 marks to have the custody of the lands and heir of Gilbert de Unfranville, with the heir's marriage, a sum equivalent to a hundred thousand pounds at present.” In this case the estate must have been large, the minor young, and the alliance honourable. For, as Mr. Hargrave informs us, who has well described this species of guardianship, “ the guardian in chivalry was not accountable for the profits made of the infant's lands, during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. And this guardianship, being deemed more an interest for the profit of the guardian, than a trust for the benefit of the ward, was saleable and transferable, like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might devolve upon the most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence.” *Co. Litt.* 88. II. 11.



6. ANOTHER attendant or consequence of tenure by knight-service was that of *finés* due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection; it not being reasonable or allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and, as the feudal obligation was considered as reciprocal, the lord also could [ 72 ] not alienate his feignory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer. For when every thing came in process of time to be bought and sold, the lords would not grant a licence to their tenant, to aliene, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence: but as to common persons, they were at liberty, by *magna carta*<sup>g</sup>, and the statute of *quia emptores*<sup>h</sup>, (if not earlier,) to aliene the whole of their estate, to be holden of the same lord as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of these statutes, could not aliene without a licence: for if they did, it was in ancient strictness

<sup>g</sup> *cap.* 32.<sup>h</sup> 18 Edw. I. c. 1.

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One cannot read this without astonishment, that such should continue to be the condition of the country till the year 1660, which, from the extermination of these feudal oppressions, ought to be regarded as a memorable æra in the history of our law and liberty.

an absolute forfeiture of the land<sup>l</sup>; though some have imagined otherwise. But this severity was mitigated by the statute 1 Edw. III. c. 12. which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one third of the yearly value should be paid for a licence of alienation; but if the tenant presumed to aliene without a licence, a full year's value should be paid<sup>k</sup>.

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

THESE were the principal qualities, fruits, and consequences of tenure by knight-service: a 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

<sup>l</sup> 2 Inst. 66.<sup>k</sup> *Ibid.* 67.<sup>j</sup> Co. Litt. 13.<sup>m</sup> *Feud. l. 2. s. 86.*

the last century (7); and which was created, as sir Edward Coke expressly testifies <sup>n</sup>, 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. The description here given is that of a 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 magnam 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<sup>o</sup>. It was in most other respects like knight-service <sup>p</sup>; only he was not bound to pay aid <sup>q</sup>, or escuage <sup>r</sup>; and, when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little <sup>s</sup>. Tenure by *cornage*, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty <sup>t</sup>.

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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

<sup>n</sup> 4 Inst. 192.

<sup>o</sup> Litt. § 153.

<sup>p</sup> *Ibid.* § 158.

<sup>q</sup> 2 Inst. 233.

<sup>r</sup> Litt. § 158.

<sup>s</sup> *Ibid.* § 154.

<sup>t</sup> *Ibid.* § 156.

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(7) I do not know that we are any where told what proportion, in quantity, the military tenure bore to the socage tenure.

found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination for money (8): and, in like manner, it was called, in our Norman French, *escuage*; being indeed a pecuniary, instead of a military, service. The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our antient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments in the time of Hen. II., seem to have been made arbitrarily, and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and king John was obliged to consent by his *magna carta*, that no scutage should be imposed without consent of parliament <sup>u</sup>. But this clause was omitted in his son Henry III.'s charter, where we only find <sup>v</sup> that scutages or escuage should be taken as they were used to be taken in the time of Henry II.: that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I. c. 5, 6., and many subsequent statutes <sup>x</sup>, it was again provided, that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that

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<sup>u</sup> *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri. cap. 12.*

<sup>v</sup> *cap. 37.*

<sup>x</sup> See Vol. I. pag. 140.

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(8) But Littleton, Coke, and Bracton render it the service of the shield, *i. e.* of arms, being a compensation for actual service. *Cc. Litt.* 68. *b.*

escuage or scutage could not be levied but by consent of parliament<sup>y</sup>; such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

SINCE therefore escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton<sup>z</sup> must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected<sup>a</sup> as a tenure in chivalry<sup>b</sup>. But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure, instead of knight-service, would have then been of another kind, called socage<sup>c</sup>, of which we shall speak in the next chapter.

FOR the present I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens, which (in conse-

[ 76 ]

<sup>y</sup> Old Ten. tit *Escuage*.

<sup>z</sup> § 103.

<sup>a</sup> Wright, 122.

<sup>b</sup> *Pro feodo militari reputatur.* Flet.

<sup>c</sup> *l. 2. c. 14. § 7.*

<sup>c</sup> Litt. § 97. 120.

quence of the fiction adopted after the conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin*; and if under age, of the whole of his estate during infancy. And then, as sir Thomas Smith<sup>d</sup> very feelingly complains, “when he came to his own, after he “was out of *wardship*, his woods decayed, houses fallen “down, stock wasted and gone, lands let forth and ploughed “to be barren,” to reduce him still farther, he was yet to pay half a year’s profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him without paying an exorbitant fine for a *licence of alienation*.

A SLAVERY so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of king James I. consented<sup>e</sup>, in consideration of a proper equivalent, to abolish them all; [ 77 ] though the plan proceeded not to effect; in like manner as he had formed a scheme, and begun to put it in execution, for removing the feudal grievance of heretable jurisdictions

<sup>d</sup> Commonw. l. 3. c. 3.

<sup>e</sup> 4 Inst. 202.

in Scotland<sup>f</sup>, which has since been pursued and effected by the statute 20 Geo. II. c. 43.<sup>g</sup> King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the crown and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient seemingly much better than the hereditary excise, which was afterwards made the principle equivalent for these concessions. For 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. II. c. 24. which enacts, "that the court of wards and liveries, " and all wardships, liveries, primer seigns, and ouster- " lemons, values, and forfeitures of marriage, by reason of " any tenure of the king or others, be totally taken away. " And that all fines for alienation, tenures by homage, " knight-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 (9). And that all

<sup>f</sup> Dalrymp. of Feuds, 292.

*wardholding* (equivalent to the knight-

<sup>g</sup> By another statute of the same service of England) is for ever abolished year (20 Geo. II. c. 50.) the tenure of in Scotland.

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(9) Both Mr. Madox and Mr. Hargrave have taken notice of this inaccuracy in the title and body of the act, *viz.* of taking away tenures *in capite*; (*Mad. Bar. Ang.* 238. *Co. Lit.* 108. n. 5.) for tenure *in capite* signifies nothing more than that the king is the immediate lord of the land-owner; and the land might have been either of military or socage tenure. The same incorrect language was held by the speaker of the house of commons in his pedantic address to the throne upon presenting this bill. "Royal sir, your " tenures *in capite* are not only turned into a tenure in socage, " (though that alone will for ever give your majesty a just right " and title to the labour of our ploughs, and the sweat of our " brows,)

“ forts of tenures, held of the king or others, be turned into  
“ free and common focage; save only tenures in frankal-  
“ moign, copyholds, and the honorary services (without the  
“ slavish part) of grand ferjeanty.” 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.

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“ brows,) but they are likewise turned into a tenure *in corde*.  
“ What your majesty had before in your court of wards you will  
“ be sure to find it hereafter in the exchequer of your people’s  
“ hearts.” *Journ. Dom. Proc.* 11 vol. 234.



## CHAPTER THE SIXTH.

## OF THE MODERN ENGLISH TENURES.

**A**LTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution itself was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since by the statute 12 Car. II. the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court roll, were reserved; nay, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known, and subsisting, called free and common socage. And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that antient system; since it is that alone to which we can recur, to explain any seeming or real difficulties, that may arise in our present mode of tenure.

THE military tenure, or that by knight-service, consisted of what were reputed the most free and 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 honourable 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 to this we are next to proceed.

II. SOCAGE, in it's most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our antient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton<sup>a</sup>; if a man holds by rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium:*" but if you add thereto any royal service, or escuage, to any, the smallest amount, "*illud dici poterit feodum militare.*" So too the author of Fleta<sup>b</sup>; "*ex donationibus, servitia militaria vel magnae serjantiae non continentibus, oritur nobis quoddam nomen generale, quod est socagium.*" Littleton also<sup>c</sup> defines it to be, where the tenant holds his tenement of the lord by any certain service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards<sup>d</sup> he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch<sup>e</sup>, a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20s. rent; or, by homage, fealty, and 20s. rent: or, by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the lord's land for three days; or, by fealty only without any other service: for all these are tenures in socage<sup>f</sup>.

BUT socage, as was hinted in the last chapter, is of two sorts: *free-socage*, where the services are not only certain, but honourable; and *villain-socage*, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil<sup>g</sup>, and other subsequent authors,

<sup>a</sup> l. 2. c. 16. § 9.

<sup>b</sup> l. 3. c. 14. § 9.

<sup>c</sup> § 117.

<sup>d</sup> § 118.

<sup>e</sup> l. 147.

<sup>f</sup> l. 1. § 117, 118, 119.

<sup>g</sup> l. 3. c. 7.

by

by the name of *liberi sokemanni*, or tenants in free-focage. Of this tenure we are first to speak; and this, both in the nature of it's service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of the word<sup>h</sup>; who derives it from the Saxon appellation *soc*, which signifies liberty or privilege, and, being joined to a usual termination, is called *focage*, in Latin *socagium*; signifying thereby a free or privileged tenure<sup>i</sup>. This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word, denoting (as they tell us) a plough: for that in antient time this focage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of it's original, it still retains the name of focage or plough-service<sup>k</sup>. But this by no means agrees with what Littleton himself tells us<sup>l</sup>, that to hold by fealty only, without paying any rent, is tenure in focage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original, (as escuage, which, while it remained uncertain, was equivalent to knight-service,) the instant they were reduced to a certainty changed both their name and nature, and were called focage<sup>m</sup>. It was the *certainty* therefore that denominated it a focage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as the tenures of chivalry. Wherefore also Britton, who describes lands in focage tenure under the name of *fraunke ferme*<sup>n</sup>, tells us, that they are "lands

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<sup>h</sup> Gavelk. 138.<sup>e</sup> ing of lands quhen any man is in feft<sup>i</sup> In like manner Skene, in his exposition of the Scots' law, title *focage*, tells us, that it is 'any kind of hold-<sup>f</sup> *freely,* &c.<sup>k</sup> Litt. § 119.<sup>l</sup> § 118.<sup>m</sup> § 98. 120.<sup>n</sup> c. 66.

“ and tenements, whereof the nature of the fee is changed  
 “ by feoffment *out of chivalry* for *certain* yearly services, and  
 “ in respect whereof neither homage, ward, marriage, nor  
 [ 81 ] “ relief can be demanded.” Which leads us also to another  
 observation, that if socage tenures were of such base and  
 servile original, it is hard to account for the very great  
 immunities which the tenants of them always enjoyed; so  
 highly superior to those of the tenants by chivalry, that it  
 was thought, in the reigns of both Edward I. and Charles II.,  
 a point of the utmost importance and value to the tenants, to  
 reduce the tenure by knight-service to *fraunke ferme* or tenure  
 by socage. We may therefore, I think, fairly conclude in  
 favour of Somner’s etymology, and the liberal extraction of  
 the tenure in free socage, against the authority even of Lit-  
 tleton himself. (1)

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(1) The learned Judge has done Mr. Somner the honour of  
 adopting his derivation of *socage*, which Mr. Somner himself boasts  
 of as a new discovery with no little pride and exultation, as appears  
 from the following sentence: *Derivatio forte hæc nova et nostratibus*  
*adhuc inaudita, qui, à soc quatenus vel aratrum vel saltem vomerem*  
*signat, vocem derivare satagunt. Quam male tamen, eorum veniã*  
*fusus a me jam monitum in tractatu de gavelkind, cap. 4. Somn.*  
*Gloss. Soca.* But notwithstanding this *unheard of* derivation has  
 found an able defender in the learned Commentator, the editor is  
 obliged to prefer the old derivation for the following reasons: —  
 Our most antient writers derive it from *soca* or *soccus*, a plough;  
 and *sock*, in some parts of the north of England, is the common  
 name for a plough-share to this day. The following description of  
*socage* is given by Bracton; *dici poterit socagium à focco, et inde*  
*tenentes sockmanni, eo quod deputati sunt, ut videtur, tantummodo ad*  
*culturam, et quorum custodia et maritagia ad propinquiores parentes*  
*jure sanguinis pertinebant.* (C. 35.) This is not only adopted by  
 Littleton and lord Coke, (*Co. Litt.* 86.) who says that *socagium*  
*est servitium socæ*, which is also the interpretation given by Ducange,  
 (*voc. Soc.*) but Sir Henry Spelman, whose authority is high in  
 feudal antiquities, testifies that *feudum ignobile, plebeium vulgare*  
*Gall. fief roturier nobili opponitur, et propriè dicimus, quod ignobilibus*  
*et*

TAKING this then to be the meaning of the word, it seems probable that the focage tenures were the relics of Saxon

*et rusticis competit, nullo feudali privilegio ornatum, nos foccagium dicimus.* Gloss. voc. *Feod.* And *foccagium* he explains by *Gall. roture, fief roturier. Heretages en roture.* (Ib. voc. *Soc.*)

In a law of Edward the Confessor, the fokeman and villein are classed together: *Manbote de villano et fokeman xii oras, de liberis autem hominibus iii marcas.* (C. 12.) If we consider the nature of focage tenure, we shall see no reason why it should have the pre-eminence of the appellation of a privileged possession.

The services of military tenure were not left, as suggested by the learned Judge in the preceding page, *to the arbitrary calls of the lord*: for, though it was uncertain when the king would go to war, yet the tenant was *certain* that he could only be compelled to serve forty days in the year; the service therefore was as certain in its extent as that of focage; and the fokeman likewise could not know beforehand when he would be called upon to plough the land, or to perform other servile offices, for the lord. The *milites* are every where distinguished from the *fokemanni*, and the wisdom of the feudal polity appears in no view more strongly than in this; *viz.* that whilst it secured a powerful army of warriors, it was not improvident of the culture of the lands, and the domestic concerns of the country. But honour was the invigorating principle of that system, and it cannot be imagined that those who never grasped a sword, nor buckled on a coat of mail, should enjoy privileges and distinctions denied to the barons and milites, the companions of their sovereign. The fokemanni were indebted only to their own meanness and insignificance for their peculiar immunities. The king or lord had the profits of the military tenant's estate, during his nonage, in order to retain a substitute with accoutrements, and in a state suitable to the condition of his tenant; at the same time he took care that the minor was instructed in the martial accomplishments of the age. But they disdained to superintend the education of the fokemanni; and as they had nothing to apprehend from their opposition, and could expect no accession of strength from their connections, their marriages therefore were an object of indifference to them. Hence when the age of chivalry was gone, and nothing but its slavery remained, by no uncommon vicissitude in the affairs of men, the fokemanni derived from their

liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but, at the same time, more burthenfome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure<sup>o</sup>; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free and common socage*.

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

WE may remember that by the statute 12 Car. II. grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it: for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, &c. at the coronation) are still reserved. Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or  
 [ 82 ] render, both tending to some purpose relative to the king's person. Petit serjeanty, as defined by Littleton<sup>p</sup>, consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says<sup>q</sup>, is but socage in effect: for it is no personal service, but a certain rent: and, we may add, it is clearly no predial service, or service of the plough, but in all respects *liberum et commune socagium*:

<sup>o</sup> Wright, 211.

<sup>p</sup> § 159.

<sup>q</sup> § 160.

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obscurity that independence and liberty, which they have transmitted to posterity, and which we are now proud to inherit.

only

only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty. And *magna carta* respected it in this light, when it enacted<sup>u</sup>, that no wardship of the lands or body should be claimed by the king in virtue of a tenure by petit serjeanty.

TENURE in *burgage* is described by Glanvil<sup>s</sup>, and is expressly laid by Littleton<sup>t</sup>, to be but tenure in socage: and it is where the king or other person is lord of an antient borough, in which the tenements are held by a rent certain<sup>u</sup>. It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually distinguished from other towns by the right of sending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage, therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an antient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet could not [ 83 ] possibly ever have been held by plough-service; since the tenants must have been citizens or burghers, the situation frequently a walled town, the tenements a single house; so that none of the owners was probably master of a plough, or was able to use one, if he had it. The free socage therefore, in which these tenements are held, seems to be plainly a rem-

<sup>r</sup> cap. 27.<sup>s</sup> lib. 7. cap. 3.<sup>t</sup> § 162.<sup>u</sup> Litt. § 162, 163.

nant of Saxon liberty; which may also account for the great variety of customs, affecting many of these tenements so held in antient 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<sup>w</sup>, and by Littleton<sup>x</sup>; viz. that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton<sup>y</sup> gives this reason; because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors<sup>z</sup> have indeed given a much stranger reason for this custom, as if the lord of the fee had antiently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland, (under the name of *mercheta* or *marcheta*,) till abolished by Malcolm III.<sup>a</sup> And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son, therefore, who continues latest with his father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all [ 84 ] the sons but one to migrate from the father, which one became his heir<sup>b</sup>. So that possibly this custom, wherever it pre-

<sup>w</sup> *ubi supra*.

<sup>x</sup> § 165.

<sup>y</sup> § 211.

<sup>z</sup> 3 Mod. Pref.

<sup>a</sup> Seld. tit. of hon. 2. 1. 47. Reg.

Mag. l. 4. c. 31.

<sup>b</sup> *Pater cunctos filios adultos a se pellebat, praeter unum quem haeredem sui juris relinquebat. (Walsingh. Upodigm. Neustr. c. 1.*



vails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of *all* her husband's tenements <sup>c</sup>, and not of the third part only, as at the common law: and that, in others, a man might dispose of his tenements by will <sup>d</sup>, which, in general, was not permitted after the conquest till the reign of Henry the eighth; though in the Saxon times it was allowable <sup>e</sup>. A pregnant proof that these liberties of focage tenure were fragments of Saxon liberty.

THE nature of the tenure in *gavelkind* affords us a still stronger argument. It is universally known what struggles the Kentish men made to preserve their antient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of gavelkind, (though it was and is to be found in some other parts of the kingdom <sup>f</sup>;) we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conquest was the general custom of the realm <sup>g</sup>. The distinguishing properties of this tenure are various; some of the principal are these; 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen <sup>h</sup>. 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 <sup>i</sup>." 3. In most places he had a power of devising lands by will, before the statute for that purpose was made <sup>k</sup>. 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together <sup>l</sup>; which was indeed antiently the most

<sup>c</sup> Litt. § 166.

<sup>d</sup> § 167.

<sup>e</sup> Wright, 172.

<sup>f</sup> Stat. 32 Hen. VIII. c. 29. Kitch. of courts, 200.

<sup>g</sup> *In toto regno, ante ducis adventum, frequens et usitata fuit: postea caeteris adempta, sed privatis quorundam loco-*

*rum consuetudinibus alibi postea regerminans: Cantianis solum integra et inviolata remansit. (Analect. l. c. 2. 7.)*

<sup>h</sup> Lamb. Peramb. 614.

<sup>i</sup> Lamb. 634.

<sup>k</sup> F. N. B. 198. Cro. Car. 561.

<sup>l</sup> Litt. § 21C.

usual course of descent all over England <sup>m</sup>, though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in it's nature certain <sup>n</sup>. Wherefore by a charter of King John<sup>o</sup>, Hubert archbishop of Canterbury was authorized to *exchange* the gavelkind tenures holden of the fee of Canterbury into tenures by knight's service; and by statute 31 Hen. VIII. c. 3. for disgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage*. Now the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere ploughmen and peasants; from all which I think it sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

HAVING thus distributed and distinguished the several species of tenure in free socage, I proceed next to shew that this also partakes very strongly of the feudal nature. Which may probably arise from it's antient Saxon original; since (as was before observed <sup>p</sup>) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignificancy: since I do not apprehend the number of socage tenures soon after the conquest to have been very con-

<sup>m</sup> Glanvil. l. 7. c. 3.

<sup>o</sup> Spelm. *cod. vet. leg.* 355.

<sup>n</sup> Wright, 211.

<sup>p</sup> pag. 48.

siderable,

siderable, nor their value by any means large ; till by successive charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton<sup>9</sup>, their number and value began to swell so far, as to make a distinct, and [ 86 ] justly envied, part of our English tenures.

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

1. IN the first place, then, both were held of superior lords ; one of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and the tenant.

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

3. BOTH were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant<sup>r</sup>. Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron ; if it be only for the reason given by Littleton<sup>s</sup>, that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently hath done) whether the land be holden of the lord or not ; and so

<sup>9</sup> c. 66.

<sup>r</sup> Litt. § 117. 131.

<sup>s</sup> § 130.

he may lose his feignory, and the profit which may accrue to him by escheats and other contingencies <sup>t</sup>.

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

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

6. PRIMER SEISIN was incident to the king's focage tenants *in capite*, as well as to those by knight-service<sup>a</sup>. But tenancy

<sup>t</sup> *Eo maxime praestandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur.* (Corvin. *jus feod.* l. 2. t. 7.)

<sup>u</sup> Co. Litt. § 91:

<sup>w</sup> Litt. § 126.

<sup>x</sup> l. 2. c. 37. § 8.

<sup>y</sup> Litt. § 127.

<sup>z</sup> 3 Lev. 145.

<sup>a</sup> Co. Litt. 77.

*in capite* as well as primer feifins are, among the other feodal burthens, entirely abolifhed by the ftatute.

7. **WARDSHIP** is alfo incident to tenure in focage; but of a nature very different from that incident to knight-fervice. For if the inheritance defcend to an infant under fourteen, the wardfhip of him does not, nor ever did, belong to the lord of the fee; becaufe in this tenure, no military or other perfonal fervice being required, there was no occafion for the lord to take the profits, in order to provide a proper fubftitute for his infant tenant; but his neareft relation (to whom the inheritance cannot defcend) fhall be his guardian in focage, and have the cuftody of his land and body till he arrives at the age of fourteen. The guardian muft be fuch a one, to whom the inheritance by no poffibility can defcend; as was fully explained, together with the reafons for it, in the former book of thefe commentaries<sup>b</sup>. At fourteen this wardfhip in focage ceafes; and the heir may ouft the guardian and call him to account for the rents and profits<sup>c</sup>: for at this age the law fupposes him capable of chufing a guardian for himfelf. It was in this particular, of wardfhip, as alfo in that of marriage, and in the certainty of the render or fervice, that the focage tenures had fo much the advantage of the military ones. But as the wardfhip ceafed at fourteen, there was this difadvantage attending it: that young heirs, being left at fo tender an age to chufe their own guardians till twenty-one, might make an improvident choice. Therefore, when almoft all the lands in the kingdom were turned into focage tenures, the fame ftatute 12 Car. II. c. 24. enacted, that it fhould be in the power of any father by will to appoint a guardian, till his child fhould attain the age of twenty-one. (2) And, if no fuch appointment be made, the court of chancery will frequently interpofo, and name

[ 88 ]

<sup>b</sup> Vol. I. page 461.<sup>c</sup> Litt. § 123. Co. Litt. 89.

(2) See 1 Vol. 462.

a guar-

a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

8. MARRIAGE, or the *valor maritagii*, was not in focage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage<sup>d</sup>. For, the law in favour of infants is always jealous of guardians, and therefore in this case it made them account, not only for what they *did*, but also for what they *might*, receive on the infant's behalf; left by some collusion the guardian should have received the value, and not brought it to account: but the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in focage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of king Edward's laws, that were restored by Henry the first's charter, as might alone convince us that focage was of a higher original than the Norman conquest.

9. FINES for alienation were, I apprehend, due for lands holden of the king *in capite* by focage tenure, as well as in case of tenure by knight-service: for the statutes that relate to this point, and sir Edward Coke's comment on them<sup>e</sup>, speak generally of all tenants *in capite*, without making any distinction: but now all fines for alienation are demolished by the statute of Charles the second.

10. ESCHEATS are equally incident to tenure in focage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before mentioned) subject to

<sup>d</sup> Litt. § 123.

<sup>e</sup> 1 Inst. 73. 2 Inst. 65, 66, 67.

no escheats for felony, though they are to escheats for want of heirs f.

THUS much for the two grand 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 the lands of both sorts are now holden by one universal tenure of free and common socage.

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

III. FROM the tenure of pure villanage have sprung our [ 90 ] present *copyhold* tenures, or tenure by copy of court roll at the will of the lord: in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

MANORS are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day<sup>g</sup>: just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest. 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 *terre 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

<sup>f</sup> Wright, 210.

<sup>g</sup> Co. Cop. § 2 & 10.

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 the free-socage lands <sup>h</sup>; 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 was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage, which we shall presently describe more at large. The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads, and for common or 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 [ 91 ] of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself is lost.

IN the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves: which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his feignory is frequently termed an honour, not a manor, especially if it hath belonged to an antient feudal baron, or hath been at any time in the hands of the crown. In imitation whereof these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*: till the superior lords observed, that by this method of subinfeudation they lost all their feudal profits of wardships, marriages, and

<sup>h</sup> Co. Cop. § 3.



escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land : and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *magna carta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the great charter of king John<sup>i</sup>) that no man should either give or sell his land, without reserving sufficient to answer the demand of his lord ; and afterwards the statute of Westm. 3. or *quia emptores*, 18 Edw. I. c. 1. which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions, not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Edw. II. c. 6. and of 34 Edw. III. c. 15. by which last all subinfeudations, previous to the reign of king Edward I., were confirmed : but all subsequent to that period [ 92 ] were left open to the king's prerogative. And from hence it is clear, that 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 these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself.

Now with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feudal, Norman, or Saxon ; but mixed and compounded of them all<sup>k</sup> : and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in it's composition. Under the Saxon government there were, as sir William

<sup>i</sup> See the Oxford editions of the charters.

<sup>k</sup> Wright, 215.

Temple speaks<sup>1</sup>, a sort of people in a condition of downright fervitude, 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 folkland, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition<sup>m</sup>. This they called villenage, and the tenants villeins, either from the word *vilis*, or else, as sir Edward Coke tells us<sup>n</sup>, *a villa*; because they lived chiefly in villages, and were employed in rustic works of the most fordid kind: resembling the Spartan *belotes*, to whom alone the culture of the lands was assigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

[ 93 ] THESE villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferrable by deed from one owner to another<sup>o</sup>. They could not leave their lord without his permission; but if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services that is, to carry out dung, to hedge and ditch the lord's de-

<sup>1</sup> Introd. Hist. Engl. 59.

<sup>m</sup> Wright, 217.

<sup>n</sup> 1 Inst. 116.

<sup>o</sup> Litt. § 181.

mesnes, and any other the meanest offices <sup>p</sup>: and their services were not only base, but uncertain both as to their time and quantity <sup>q</sup>. A villein, in short, was in much the same state with us, as lord Moleworth <sup>r</sup> describes to be that of the boors in Denmark, and which Stiernhook <sup>s</sup> attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods: but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity <sup>t</sup>.

IN many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord <sup>u</sup>; and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property <sup>v</sup>. For the children of villeins were also in the same state of bondage with their parents; whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife* <sup>w</sup>. In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was [ 94 ]

<sup>p</sup> Litt. § 172.

<sup>r</sup> c. 8.

<sup>q</sup> *Ille qui tenet in villenagio faciet de jure sueonum, l. 2. c. 4.*

*quicquid ei praeceptum fuerit, nec scire* <sup>s</sup> Litt. § 177.

*debet sero quid facere debet in crastino, et* <sup>t</sup> Co. Litt. 140.

*semper tenebitur ad incerta.* (Bracton, <sup>v</sup> Litt. § 202.

*l. 4. tr. 1. c. 28.)* (3)

<sup>w</sup> Litt. § 187.

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(3) This is an eloquent description of slavery. Villeins were not protected by *magna charta*; *nullus liber homo capiatur vel imprisonetur, &c.* was cautiously expressed to exclude the poor villein; for, as lord Coke tells us, the lord may beat his villein, and if it be without cause, he cannot have any remedy. What a degraded condition for a being endued with reason!

villein; contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because of another maxim in our law he is *nullius filius*: and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it<sup>y</sup>. The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill, or maim his villein<sup>z</sup>; though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person. Neives indeed had also an appeal of rape in case the lord violated them by force<sup>a</sup>.

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

<sup>y</sup> I.itt. § 187, 188.

<sup>z</sup> *Ibid.* § 189. 194.

<sup>a</sup> *Ibid.* § 19c.

<sup>b</sup> *Ibid.* § 204.

<sup>c</sup> § 204, 5, 6.

<sup>d</sup> § 208.

VILLEINS, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the goodness 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*<sup>e</sup>.

THUS copyhold tenures, as sir Edward Coke observes<sup>f</sup>, although very meanly descended, yet come of an antient house; for, from what has been premised, it appears, that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will (4). Which af- [ 96 ]

<sup>e</sup> F. N. B. 12.

<sup>f</sup> Cop. § 32.

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(4) Lord Loughborough is inclined to question this origin of copyholds: "I cannot help doubting (observes that learned lord) whether this deduction is not founded in mistake. The circumstance which first led me to entertain the doubt is, that in those

fords a very substantial reason for the great variety of customs that prevail in different manors with regard both to the descent of the estates, and the privileges belonging to the tenants. And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute of Charles II., there was hardly a pure villein left in the nation. For sir Thomas Smith<sup>8</sup> testifies, that in all his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that “the holy fathers, monks, and friars, had in their confessions, and especially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was, for one Christian man to hold another in bondage: so that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs; for they also had a scruple in conscience to impoverish and despoil the church so much, as to manumit such as were bond to their churches, or to the manors which the church

<sup>8</sup> Commonwealth, b. 3. c. 10.

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“ parts of Germany from whence the Saxons migrated into England, there *exists, at this day*, a species of tenure exactly the same with our copyhold estates; and there exists likewise, *at this day*, a complete state of *villenage*; so that both stand together, and are not one tenure growing out of another, and by degrees assuming it's place, &c. &c. What I have stated I found in a very accurate treatise of German law by Selchow, one of the professors of the university of Gottingen, entitled *Elementa Juris privati Germanici*. This seems sufficient to negative the idea that copyholders sprang out of villeins. In England, villenage has ceased, and copyholds remain; but here, as in other countries, they both prevailed at the same time.” *Doug.* 698.

“ had

“ had gotten ; and so kept their villeins still (5).” By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders ; their persons being enfranchised by manumission or long acquiescence ; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before ; though, in general, the villein services are usually commuted for a small pecuniary quit rent <sup>h</sup>.

As a farther consequence of what has been premised, we may collect these two main principles, which are held <sup>i</sup> 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 all tenures by copy ; so that no new copyhold can, strictly speaking, be granted at this day.

IN some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance ; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only : for the custom of the manor has in both cases so far superseded the will of the lord, that, provided [ 97 ] the services be performed or stipulated for by fealty, he can-

<sup>h</sup> In some manors the copyholders were bound to perform the most servile offices, as to hedge and ditch the lord's grounds, to lop his trees, and reap his corn, and the like ; the lord usually finding them meat and drink, and sometimes (as is still the use in the highlands of Scotland) a minstrel or piper for their diversion. (*Rot. Maner. de Edgware Comm. Mid.*) As in the kingdom of Whidah, on the Slave coast of Africa, the people are bound to cut and carry in the king's corn from off his demesne lands, and are attended by music during all the time of their labour. (*Mod. Un. Hist.* xvi. 429.)  
<sup>i</sup> *Co. Litt.* 58.

(5) The last claim of villenage, which we find recorded in our courts, was in the 15 Ja. I. *Noy*, 27. 11 *Harg. St. Tr.* 342.

not, 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.

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 shall say more hereafter<sup>k</sup>, are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seized them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Wardship, in copyhold estates, partakes both of that in chivalry [ 98 ] and that in focage. 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 the guardian in focage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seifins, due on the death of each tenant, others are mere 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 copyholds, 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

<sup>k</sup> See ch. 28.



the estate <sup>k</sup>(6). From this instance we may judge of the favourable disposition that the law of England (which is a law of liberty) hath always shewn to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor: and, where no custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes with an equitable moderation, and will not suffer the lord to extend his power so far as to disinherit the tenant.

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

IV. THERE is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged* villenage, and sometimes of *villein-focage*. This, he tells us<sup>l</sup>, is such as has been held of the kings of England from the conquest

<sup>k</sup> 2 Ch. Rep. 134.

<sup>l</sup> l. 4. tr. l. c. 28.

(6) It is now established as an universal rule, that where the fine upon the descent or alienation of a copyhold is arbitrary, it cannot be more than two years improved value. In ascertaining the yearly value, the quit-rents must be deducted, but not the land-tax. *Doug.* 697.

The fine may be recovered by the lord in an action of assumpsit. *Ib.* But he has no right to it till the admittance of the tenant. 2 *T. R.* 484.

The lord assesses the fine at his peril; if he assesses it too high, he is not entitled to recover it. But the assessment need not be entered on the roll of the court. 6 *East*, 56.

downwards; that the tenants herein, “*villana faciunt servitia, sed certa et determinata;*” that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can: but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz. the tenure in *antient demesne*; to which, as partaking of the baseness of villenage in the nature of it's services, and the freedom of focage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum focagium*.

ANTIEN<sup>t</sup> demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the confessor, or William the conqueror; and so appear to have been by the great survey in the exchequer called domesday-book<sup>m</sup>. The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies<sup>n</sup>, 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<sup>o</sup>. Others were in a 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<sup>p</sup>; as to try the right of their property in a peculiar court of their own, called a court of

<sup>m</sup> F. N. B. 14. 56.

<sup>n</sup> c. 66.

<sup>o</sup> F. N. B. 228.

<sup>p</sup> 4 Inst. 269.

antient demefne, by a peculiar procefs, denominated a writ of *right clofe*<sup>q</sup> (7); not to pay toll or taxes; not to contribute to the expences of knights of the ſhire; not to be put on juries; and the like<sup>r</sup>.

THESE tenants therefore, though their tenure be abſolutely [ 100 ] copyhold, yet have an *intereſt* equivalent to a freehold: for notwithstanding their ſervices were of a baſe and villenous original<sup>s</sup>, 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*." Britton alſo, from ſuch their freedom, calls them abſolutely *ſokemans*, and their tenure *ſokemanries*; which he deſcribes<sup>t</sup> to be "lands and tenements, which are not held by knight-ſervice, nor by grand ſerjeanty, nor by petit, but by ſimple ſervices, being, as it were, lands enfranchiſed by the king or his predeceſſors from their antient demefne." And the ſame name is alſo given them in Fleta<sup>u</sup>. Hence Fitzherbert obſerves<sup>v</sup>, that no lands are antient demefne, but lands holden in focage; that is, not in free and common focage, but in this amphibious ſubordinate claſs of villein-focage. And it is poſſible, that as this ſpecies of focage tenure is plainly founded upon predial ſervices, or ſervices of the plough, it may have given cauſe to imagine that all focage tenures aroſe from the ſame original; for want of diſtinguiſhing, with Bracton, between free focage or focage of frank tenure, and villein-focage or focage of antient demefne.

<sup>q</sup> F. N. B. 11.

<sup>t</sup> c. 66.

<sup>r</sup> *Ibid.* 14.

<sup>u</sup> l. 1. c. 8.

<sup>s</sup> Gilb. hiſt. of exch. 16. and 30.

<sup>v</sup> N. B. 15.

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(7) In an action of ejection, it may be pleaded in abatement, that the lands are part of a matter which is held in antient demefne; but ſuch a plea muſt be ſworn to, and is not favoured. 2 *Burr.* 1046.

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 common copyholds: [ 101 ] yet with this distinction <sup>x</sup>, that in the surrender of these lands in antient 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.”

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

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

V. TENURE in *frankalmoign, in libera elemosyna* or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever <sup>y</sup>. The service which they were bound to render for

<sup>x</sup> Kitchen on courts, 194.

<sup>y</sup> Litt. § 133.

these lands was not certainly defined; but only in general to pray for the soul of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other services but this <sup>z</sup>,) because this divine service was of a higher and more exalted nature <sup>a</sup>. This is the tenure, by which almost all the antient 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 <sup>b</sup>; the nature of the service being upon the reformation altered, and made conformable to the purer doctrines of the church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shewn to religion and religious men in antient times. Which is also the reason that tenants in [ 102 ] *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions <sup>c</sup>: just as the Druids, among the antient Britons, had *omnium rerum immunitatem* <sup>d</sup>. And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feudal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden: but merely a complaint to the ordinary or visitor to correct it <sup>e</sup>. 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 distress, without any complaint to the visitor <sup>f</sup>. 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 <sup>g</sup>.

<sup>z</sup> Litt. § 131.

<sup>a</sup> *Ibid.* 135.

<sup>b</sup> *Braeton. l. 4. tr. 1. c. 28. § 1.*

<sup>c</sup> *Seld. Jan. 1. 42.*

<sup>d</sup> *Cæsar de bell. Gall. l. 6. c. 13.*

<sup>e</sup> Litt. § 136.

<sup>f</sup> *Ibid.* 137.

<sup>g</sup> *Ibid.* 140.

So that I only mention them, because *frankalmoign* is excepted by name in the statute of Charles II. and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

## CHAPTER THE SEVENTH.

OF FREEHOLD ESTATES, OF  
INHERITANCE.

THE next objects of our disquisitions are the nature and properties of *estates*. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant hath therein: so that if a man grants all *his estate* in Dale to A and his heirs, every thing that he can possibly grant shall pass thereby<sup>a</sup>. 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 three-fold 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 connexions* of the tenants.

FIRST, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by it's 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 occasions the primary division of estates into such as are *freehold*, and such as are *less than* [ 104 ] *freehold*.

<sup>a</sup> Co. Litt, 345.

AN estate of freehold, *liberum tenementum*, or franktenement, is defined by Britton <sup>b</sup> to be “ the *possession* of the soil “ by a freeman.” And St. Germyn <sup>c</sup> tells us, that “ the “ possession of the land is called in the law of England the “ franktenement or freehold.” Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold*: which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin, or in tenements of any incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton <sup>d</sup>, that where a freehold shall pass, it behoveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates (1).

ESTATES of freehold (thus understood) are either estates of *inheritance*, or estates *not of inheritance*. The former are

<sup>b</sup> c. 32.

<sup>c</sup> Dr. & Stud. b. 2. d. 22.

<sup>d</sup> § 59.

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(1) A freehold estate seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in, or arising from, real property of free tenure; that is, now, of all which is not copyhold. And the learned Judge has elsewhere informed us, that “ tithes and spiritual dues are freehold estates, whether the land out of which they issue are bond “ or free, being a separate and distinct inheritance from the lands “ themselves. And in this view they must be distinguished and “ excepted from other incorporeal hereditament issuing out of “ land, as rents, &c. which, in general, will follow the nature of “ their principal, and cannot be freehold, unless the stock from “ which they spring be freehold also.” 1 *Bl. Traés*, 116.

again



again divided into inheritances *absolute* or fee-simple; and inheritances *limited*, one species of which we usually call fee-tail.

I. TENANT in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever<sup>e</sup>: 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 it's original sense it is taken in contradistinction to *allodium*<sup>f</sup>; which latter the [ 105 ] 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 it's 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<sup>g</sup> 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 *property* of the soil always remaining in the lord. This allodial property no subject in England has<sup>h</sup>; 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*<sup>i</sup>: 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 feudal clogs which

<sup>e</sup> Litt. § 1.

<sup>f</sup> See p. 45. 47.

<sup>g</sup> of feuds, c. 1.

<sup>h</sup> Co. Litt. 1.

<sup>i</sup> *Praedium domini regis est directum dominium, cujus nullus est auctor nisi Deus.* Ibid.

were laid 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<sup>k</sup>, 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 these 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 feudal: it is his demesne, *as of fee*: that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

[ 106 ] THIS is the primary sense and acceptation of the word *fee*. But (as sir Martin Wright very justly observes<sup>l</sup>) the doctrine, “ that all lands are holden,” having been so for many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this it’s 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 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<sup>m</sup>.

TAKING therefore *fee* for the future, unless where otherwise explained, in this it’s secondary sense, as a state of inheritance,

<sup>k</sup> Co. Litt. 1.

<sup>l</sup> of ten. 148.

<sup>m</sup> Co. Litt. 1.

it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal<sup>n</sup>. 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<sup>o</sup>. For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses<sup>p</sup>, their owner hath no property, *dominium*, or demesne, in the *thing* itself, but hath only something derived out of it; resembling the *servitudes*, or services, of the civil law<sup>q</sup>. The *dominium* or property is frequently in one man, while the appendage or service is in another. [ 107 ] 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*.

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 or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in *abeyance*, that is (as the word signifies,) in expectation, remembrance, and contemplation 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 remains therefore in waiting or abeyance, during the life of

<sup>n</sup> *Feodum est quod quis tenet sibi et haeredibus suis, sive sit tenementum, sive redditus, &c.* Flet. l. 5. c. 5. § 7.

<sup>p</sup> See page 20.

<sup>q</sup> *Servitus est jus, quo res mea alterius rei vel personae servit.* Ff. 8. 1. 1.

<sup>o</sup> Litt. § 10.

Richard <sup>r</sup> (2). 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<sup>s</sup>. 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 <sup>t</sup>. (3)

<sup>r</sup> Co. Litt. 342.

<sup>s</sup> Litt. § 646.

<sup>t</sup> Litt. § 647.

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(2) The inheritance or remainder in such a case has been said to be in abeyance, or *in nubibus*, or *in gremio legis*; but Mr. Fearne, with great ability and learning, has exposed the futility of these expressions, and the erroneous ideas which have been conveyed by them. Mr. Fearne produces authorities, which prove beyond controversy, “that where a remainder of inheritance is limited in *contingency* by way of use, or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens to take it out of them.” *Fearne, Cont. Rem.* 513. 4th edition.

But although, as Mr. Fearne observes, “different opinions have prevailed in respect to the admission of this doctrine in conveyances at common law,” (*ib.* 526.) yet he adduces arguments and authorities, which render the doctrine as unquestionable in this case as in the two former of *uses* and *devises*. If therefore in the instance put by the learned Judge, John should determine his estate either by his death, or by a feoffment in fee, which amounts to a forfeiture, in the lifetime of Richard, under which circumstances the remainder never could vest in the heirs of Richard; in that case, the grantor or his heir may enter and resume the estate.

(3) Mr. Fearne having attacked with so much success the doctrine of abeyance, the Editor may venture to observe, with respect to the two last instances, though they are collected from the text of Littleton, that there hardly seems any necessity to resort to abeyance, or to *the clouds*, to explain the residence of the inheritance, or of the freehold. In the first case, the whole fee-simple is conveyed to a sole corporation, the parson and his successors; but if  
any

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<sup>u</sup>. This very great nicety about the insertion of the word "heirs," in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which we may remember<sup>w</sup> it was required that the form of the donation should be punctually pursued; or that, as Cragg<sup>x</sup> expresses it in the words of Baldus, "*donationes sunt stricti juris, ne quis plus donasse praesumatur quam in donatione expresserit.*" And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions<sup>y</sup>. [ 108 ]

FOR, 1. It does not extend to devises by will; in which, as they were introduced at the time when the feudal 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

<sup>u</sup> Litt § 1.    <sup>w</sup> See page 56.    <sup>x</sup> l. 1. r. 9. § 17.    <sup>y</sup> Co. Litt. 9, 10.

any interest is not conveyed, it still remains, as in the former note, in the grantor and his heirs, to whom, upon the dissolution of the corporation, the estate will revert. See 1 vol. 484. And in the second case, the freehold seems, in fact, from the moment of the death of the parson, to rest and abide in the successor, who is brought into view and notice by the institution and induction; for after induction he can recover all the rights of the church, which accrued from the death of the predecessor.

words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more (4). 2. Neither does this rule extend to fines or recoveries considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs," as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed<sup>2</sup>. 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word

<sup>2</sup> Co. Litt. 9.

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(4) But it is not necessary to use any words of perpetuity in a devise, in order to give a fee-simple, where it appears to be the intention of the testator to dispose of all his interest in an estate, and that is implied from the word *estate* alone; as if a testator gives to Richard his estate or *estates in or at Dale*, though neither heirs, assigns, or any other word is annexed to Richard's name, yet he takes an estate in fee-simple. 1 *T. R.* 411. 2 *T. R.* 656. So also where lands are given to Richard charged with the payment of a specific sum, and which is not to be raised out of the rents and profits, such a devise without words of perpetuity will carry a fee-simple; for otherwise the devisee might be a loser by dying before he was repaid the sum charged upon the estate. *Hargr. Co. Litt.* 9b. 3 *T. R.* 356. 8 *T. R.* 1.

And where an estate is given generally without words being added, which would create a fee or an estate tail, and it is charged with the payment of annuities, the devisee takes a fee; but that is not the case where an estate tail is given to the devisee. 5 *T. R.* 335.

But where a testator leaves all his *hereditaments* to A, A takes only an estate for life, 5 *T. R.* 558. A fee also will not pass by general introductory words in a will, by which the testator declares his intention to dispose of *all his estate both real and personal*, if there is not afterwards in the will some specific devise for that purpose. But where such subsequent devise is in some degree ambiguous, then the introductory words may have some effect, as indicative of the intention of the testator, 5 *T. R.* 13. 6 *T. R.* 610.

“ 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, 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<sup>a</sup>. 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<sup>b</sup>. 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*.

I. A *BASE*, or qualified fee, is such a one as hath 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*

<sup>a</sup> See Vol. I. p. 484.

<sup>b</sup> See Vol. I. p. 249.

*Dale*; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kington-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<sup>c</sup>, and, the instant he or his heirs quitted [ 110 ] the feignory of this manor, the dignity was at an end. This 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.

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

<sup>c</sup> Co. Litt. 27.

<sup>d</sup> Flet. l. 3. c. 3. § 5.

<sup>e</sup> Plowd. 241.

<sup>f</sup> *Si quis terram haereditariam ha-*

*beat, eam non vendat a cognatis haeredibus suis, si illi viro prohibitum sit, qui eam ab initio acquisivit, ut ita facere nequeat.*

*LL. Aelfred. c. 37.*

Now,



Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now we must observe, that, when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute, [ 111 ] and wholly unconditional. So that, as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least, for these three purposes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion<sup>e</sup>. 2. To subject him to forfeit it for treason; which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated<sup>h</sup>. 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue<sup>i</sup>. And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs *of his body*, and therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care

<sup>e</sup> Co. Litt. 19. 2 Inst. 233.

<sup>i</sup> Co. Litt. 19.

<sup>h</sup> Co. Litt. *ibid.* 2 Inst. 234.

to aliene as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees: which things, says sir Edward Coke<sup>k</sup>, though they seem antient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances, as are not within the statutes of entail, and therefore remain as at the common law. (5)

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

UPON the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal,

<sup>k</sup> 1 Inst. 19.

<sup>l</sup> 13 Edw. I. c. 1.

the infant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail*<sup>m</sup>; and investing 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<sup>n</sup>. And hence it is that Littleton tells us<sup>o</sup>, that tenant in fee-tail is by virtue of the statute of Westminster the second.

HAVING thus shewn the *original* of estates-tail, I now proceed to consider, *what things* may, or may not, be entailed under the statute *de donis*. *Tenements* is the only word used [ 113 ] in the statute: and this sir Edward Coke<sup>p</sup> expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which favour 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<sup>q</sup>. But mere personal chattels, which favour 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 rever-

<sup>m</sup> The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists (See Crag. l. 1. t. 10. § 24, 25); among whom it signified any mutilated or truncated inheritance, from which the heirs general were *cut* off (6); being derived from the barbarous verb *taliare*, to cut; from which the French *tailer* and the Italian *tagliare* are formed (Spelm. *Gloss.* 531.)

<sup>n</sup> 2 Inst. 335.

<sup>o</sup> § 13.

<sup>p</sup> 1 Inst. 19, 20.

<sup>q</sup> 7 Rep. 33.

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(6) Or is it not rather called so because it is a part *cut* out of the whole?

tioner<sup>r</sup> (7). An estate to a man and his heirs for another's life cannot be entailed<sup>s</sup>: for this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the statute *de donis* (8). 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<sup>t</sup>; for here the custom ascertains and interprets the lord's will. (9)

NEXT, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*: which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni*<sup>u</sup>. Tenant in tail-special is where the

<sup>r</sup> Co. Litt. 19, 20.

<sup>t</sup> 3 Rep. 8.

<sup>s</sup> 2 Vern. 225.

<sup>u</sup> Litt. § 14, 15.

(7) If an annuity is granted out of personal property to a man and the heirs of his body, it is a fee-conditional at common law, and there can be no remainder or further limitation of it; and when the grantee has issue, he has the full power of alienation, and of barring the possibility of it's reverting to the grantor by the extinction of his issue. 2 *Ves.* 170. 1 *Bro.* 325.

But out of a term for years, or any personal chattel, except in the instance of an annuity, neither a fee-conditional nor an estate-tail can be created; for if they are granted or devised by such words as would convey an estate-tail in real property, the grantee or devisee has the entire and absolute interest without having issue; and as soon as such an interest is vested in any one, all subsequent limitations of consequence become null and void. 1 *Bro.* 274. *Harg. Co. Litt.* 20. *Fearne*, 345, 3d ed.

(8) See page 260. *post*.

(9) See page 372. *post*.

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 <sup>w</sup>. I shall instance in only one; as where lands and tenements are given to a man and the heirs of his body, on Mary his now wife to be begotten: here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in fee: but they being heirs to be by him begotten, this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten, (viz. Mary his present wife) this makes it a fee-tail special. [ 114 ]

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, *è converso*, the heirs male, in case of a gift in tail female <sup>x</sup>. 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 <sup>y</sup>. 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 <sup>z</sup>.

<sup>w</sup> Litt. § 16, 26, 27, 28, 29.

<sup>y</sup> *Ibid.* § 24.<sup>n</sup>

<sup>x</sup> *Ibid.* § 21, 22.

<sup>z</sup> Co. Litt. 25.

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feudal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular [ 115 ] the fee is limited. If therefore either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *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 <sup>a</sup>. 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 <sup>b</sup>. 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 <sup>c</sup>. (10)

THERE is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero matrimonio*, or *frankmarriage*. These are defined <sup>d</sup> to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frankmarriage*, does

<sup>a</sup> Co. Litt. 20.

<sup>c</sup> Co. Litt. 9. 27.

<sup>b</sup> Litt. § 31. Co. Litt. 27.

<sup>d</sup> Litt. § 17.

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(10) Or to a man and his children, if he has no children at the time of the devise (6 Co. 17.); or to a man and his posterity (*H. Bl.* 447.); or by any other words, which shew an intention to restrain the inheritance to the descendants of the devisee. See 381. *post.*

*ex vi termini* not only create an inheritance, like the word *frankalmoign*, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee<sup>e</sup>.

THE *incidents* to a tenancy in tail, under the statute Westm. 2. are chiefly these<sup>f</sup>. 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail. [ 116 ] 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate-tail. 4. That an estate-tail may be *barred*, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large.

THUS much for the nature of estates-tail: the establishment of which family law (as it is properly styled by Pigott<sup>g</sup>) occasioned infinite difficulties and disputes<sup>h</sup>. Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under colour of long leases the issue might have been virtually disinherited; creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our antient books are full: and treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they

<sup>e</sup> Litt. § 19, 20.

<sup>f</sup> Co. Litt. 224.

<sup>g</sup> Com. Recov. 5.

<sup>h</sup> 1 Rep. 131.

were justly branded, as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm<sup>i</sup>. But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the contrivance of an active and politic prince, a method was devised to evade it.

[ 117 ] ABOUT two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV.; which were then openly declared by the judges to be a sufficient bar of an estate-tail<sup>k</sup>. For though the courts had, so long before as the reign of Edward III. very frequently hinted their opinion that a bar might be effected upon these principles<sup>l</sup>, yet it was never carried into execution; till Edward IV. observing<sup>m</sup> (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court<sup>n</sup>: wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind of *pia fraus*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal: and that these recoveries, however clandestinely intro-

<sup>i</sup> Co. Litt. 19. Moor, 156. 10 Rep. 38.

<sup>k</sup> 1 Rep. 131. 6 Rep. 40.

<sup>l</sup> 10 Rep. 57, 38.

<sup>m</sup> Pigott. 8.

<sup>n</sup> Year book. 12 Ed. IV. 14. 19. Fitzh. Abr. tit. *faux recov.* 20 Bro. Abr. *ibid.* 30. tit. *recov. in value*, 19. tit. *taile*, 36.

duced,



duced, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even acts of parliament have by a sidewind countenanced and established them.

THIS expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently resettled in a similar manner to suit the convenience of families, had address enough to procure a statute<sup>p</sup>, whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason. [ 118 ]

THE next attack which they suffered in order of time, was by the statute 32 Hen. VIII. c. 28. whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail (11). But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines<sup>q</sup>, by the statute 32 Hen. VIII. c. 36. which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable

<sup>o</sup> 11 Hen. VII. c. 20. 7 Hen. VIII. 14 Geo. II. c. 20.  
 c. 4. 34 & 35 Hen. VIII. c. 20. <sup>p</sup> 26 Hen. VIII. c. 13.  
 14 Eliz. c. 8. 4 & 5 Ann. c. 16. <sup>q</sup> 4 Hen. VII. c. 24.

(11) See page 319. *post*.

to the intention of Henry VII. whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they would *not* be a bar to estates-tail. But the statute of Henry VIII., when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20. which enacts, that no feigned recovery had against tenants in tail, where the estate was created by the crown<sup>r</sup>, and the remainder or reversion continues still in the crown, shall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

[ 119 ]

LASTLY, by a statute of the succeeding year<sup>s</sup>, all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws<sup>t</sup>, they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz. c. 4. an appointment<sup>u</sup> by tenant

<sup>r</sup> Co. Litt. 372.

<sup>s</sup> 33 Hen. VIII. c. 39. § 75.

<sup>t</sup> Stat. 21 Jac. I. c. 19.

<sup>u</sup> 2 Vern. 453. Chan. Prec. 16.

in tail of the lands entailed, to a charitable use, is good without fine or recovery.

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

## CHAPTER THE EIGHTH.

OF FREEHOLDS, NOT OF  
INHERITANCE.

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

I. ESTATES for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for 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 styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur autre vie*<sup>b</sup>. These estates for life are, like inheritances, of feodal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen<sup>c</sup>) was not in its original hereditary. They are 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.

<sup>a</sup> Wright, 190.<sup>b</sup> Litt. § 56.<sup>c</sup> pag. 55.

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 <sup>d</sup>. For though, as there are no words of inheritance or *heirs*, mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life *of the grantee* <sup>e</sup>; in case the grantor hath authority to make such 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 <sup>f</sup>, unless in the case of the king.

SUCH estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice: in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone <sup>g</sup>. 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 <sup>h</sup>: 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 <sup>i</sup>.

<sup>d</sup> Co. Litt. 42.

<sup>e</sup> *Ibid.*

<sup>f</sup> *Ibid.* 36.

<sup>g</sup> Co. Litt. 42. 3 Rep. 20.

<sup>h</sup> 2 Rep. 48.

<sup>i</sup> See Vol. i. p. 132.

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

1. EVERY tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers*<sup>k</sup> or *botes*<sup>l</sup>. For he 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 or do other waste upon the premises<sup>m</sup>: 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 (1).

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<sup>n</sup>. 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 expence of tilling, manuring, and sowing the lands ; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore by the feudal law, if a tenant for life died between the beginning of September and

<sup>k</sup> See p. 35.

<sup>l</sup> Co. Litt. 41.

<sup>m</sup> *Ibid.* 53.

<sup>n</sup> *Ibid.* 55.

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(1) See p. 283. *post.* in what cases the tenant for life may cut down timber, and commit what in law is called waste.

the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole<sup>o</sup>. [ 123 ] From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *vestuy 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<sup>p</sup>. 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<sup>q</sup>. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit-trees, grafts, and the like; which are not planted annually at the expence and labour of the tenant, but are either a permanent or natural profit of the earth<sup>r</sup>. 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 it's 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. (2) For all persons, who are presented to any ecclesiastical benefice, or

<sup>o</sup> *Feud. l. 2. t. 28.*

<sup>p</sup> 3 Rep. 116.

<sup>q</sup> Co. Litt. 55.

<sup>r</sup> Co. Litt. 55, 56. 1 Roll. Abr. 728.

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(2) That statute enables an incumbent to bequeath by will, the corn and grain growing upon the glebe-land.

to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

[ 124 ] 3. A THIRD incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay greater indulgences than the 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<sup>s</sup>: 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<sup>t</sup>. 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<sup>u</sup>. To remedy which it is now enacted<sup>v</sup>, that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent from the last day of payment to the death of such lessor (3).

<sup>s</sup> Co. Litt. 55.

<sup>u</sup> 10 Rep. 127.

<sup>t</sup> Cro. Eliz. 461. 1 Roll. Abr. 727.

<sup>v</sup> Stat. 11 Geo. II. c. 19. § 15.

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(3) This act is confined to the death of the landlord who holds for his own life; and therefore it seems if tenant *pur auter vie* leases, and the *cestuy que vie* dies, the lessee is not compellable to pay any rent from the last day of payment before the death of *cestuy que vie*. 10 Rep. 128.

See



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<sup>w</sup>: in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that would not have distinguished him from [ 125 ] others; and besides, he has no longer an estate of inheritance or fee<sup>x</sup>, for he can have no heirs capable of taking *per formam domi*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been stiled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of *tenant in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

<sup>w</sup> Litt. § 32.

<sup>x</sup> Roll. Rep. 184. 11 Rep. 80.

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See cases of apportionment. 1 *P. Wms.* 177. 392. 3 *Atk.* 260. 582. 2 *Ves.* 672. *Amb.* 198. 279. 2 *Bro.* 659. 3 *Bro.* 99.

See 2 *P. Wms.* 502. where the hardship of the law before the statute is stated.

There is no apportionment of dividends in the case of tenant for life. But there is of interest of mortgages, as that is perpetually accruing.

THIS estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them<sup>y</sup>. 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<sup>z</sup>.

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.<sup>a</sup> (3): 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<sup>b</sup>: 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, [ 126 ] till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

III. TENANT *by the curtesy of England*, is where a man marries a woman seised of an estate of inheritance, that is,

<sup>y</sup> Co. Litt. 28.

<sup>a</sup> Co. Litt. 27.

<sup>z</sup> Litt. § 34. Co. Litt. 28.

<sup>b</sup> *Ibid.* 28.

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(3) But although he is not punishable if he cuts down trees, yet they are not his property, but will belong to the first person living at the time when they are cut, who has an estate of inheritance. *Har. Co. Litt.* 27. *b.* . 3 *P. Wms.* 240.

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<sup>c</sup>.

THIS estate, according to Littleton, has it's denomination, because it is used within the realm of England only; and it is said in the *Mirroure*<sup>d</sup> to have been introduced by king Henry the first; but it appears also to have been the established law of Scotland, wherein it was called *curialitas*<sup>e</sup>, so that probably our word *curtesy* was understood to signify rather an attendance upon the lord's *court* or *curtis*, (that is, being his vassal or tenant,) than to denote any peculiar favour belonging to this island (4). And therefore it is laid down<sup>f</sup> that by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone: whereas, before issue had, they must both have done it together. It is likewise used in Ireland, by virtue of an ordinance of king Henry III.<sup>g</sup> It also appears<sup>h</sup> to have obtained in Normandy; and was likewise used among the antient Almaines or Germans<sup>i</sup>. And yet it is not generally apprehended to have been a consequence of feodal tenure<sup>k</sup>, though I think some substantial feodal reasons may be given

<sup>c</sup> Litt. § 35. 52.

<sup>e</sup> *Pat. II H. III. m. 30.* in 2 Bac. Abr. 659.

<sup>d</sup> c. 1. § 3.

<sup>h</sup> *Grand Coustum. c. 119.*

<sup>e</sup> *Crag. l. 2. c. 19. § 4.*

<sup>i</sup> Lindenbrog. *LL. Alman. t. 92.*

<sup>f</sup> Litt. § 90. Co. Litt. 30. 67.

<sup>k</sup> Wright, 294.

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(4) I should rather think with Mr. Wooddeson, that this estate took it's name from it's peculiarity to England: and that it was afterwards introduced into Scotland and Ireland. 2 *Wood.* 18. Tenant by the *curtesy* of England, perhaps originally signified nothing more than tenants by the *courts* of England; as in Latin he is called *tenens per legem Angliæ*. See stat. *pro tenentibus per legem Angliæ*. App. to Ruff. 29.

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for its introduction. For if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it (5); for which [ 127 ] reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant<sup>1</sup>. As soon therefore as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate*; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

THERE are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife<sup>m</sup>. 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, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual 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*<sup>n</sup>. If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the king by prerogative is entitled to them, the instant she herself has any title: and since she could never

<sup>1</sup> F. N. B. 143.

<sup>m</sup> Co. Litt. 30.

<sup>n</sup> *Ibid.* 29.

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(5) And this estate seems founded upon the natural and rational principle, that it is fitter that the son should be in a state of dependence upon the father, than the father upon the son.

be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy ° (6). 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 it's being born alive; but it is not the *only* evidence p. The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case [ 128 ] shall not be tenant by the curtesy; because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him q. In gavelkind lands, a husband may be tenant by the curtesy, without having any issue r (7). But in general there must be issue born: and such issue as is also capable of inheriting the mother's estate s. 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 t. 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 standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore as the husband hath

° Co. Litt. 30. Plowd. 263.

r *Ibid.* 30.

p Dyer, 25. 1 Rep. 34.

s Litt. § 56.

q Co. Litt. 29.

t Co. Litt. 29.

(6) See this doubted in *Harg. Co. Litt.* 30.

(7) But a tenant by curtesy of gavelkind lands has only a moiety of the wife's estate, which he loses by a second marriage. *Robin. Gavelk. b. 2. c. 1.*

never begotten any issue that can be heir to those lands (8), he shall not be tenant of them by the curtesy<sup>u</sup>. 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 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<sup>w</sup>. The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate*<sup>x</sup>, 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<sup>y</sup>.

[ 129 ] IV. TENANT in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life<sup>z</sup>.

DOWER is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*: which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there any

<sup>u</sup> Co. Litt. 40.

<sup>w</sup> *Ibid.* 29.

<sup>x</sup> *Ibid.* 30.

<sup>y</sup> *Ibid.*

<sup>z</sup> Litt. § 36.

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(8) The issue in this case must be heir to the *lands*, though he is not heir to his *mother*; but he will inherit them by an immediate descent from the person last seised.

thing in general more different, than the regulations of landed property according to the English and Roman laws. Dower out of the lands seems also to have been unknown in the early part of our Saxon constitution; for in the laws of king Edmond <sup>a</sup>, the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands; with a proviso that she remained chaste and unmarried <sup>b</sup>; as is usual also in copyhold dowers, or free bench. Yet some <sup>c</sup> have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for it's invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia* <sup>d</sup>, and *dotalitium*) by the emperor Frederick the second <sup>e</sup>; who was contemporary with our king Henry III. It is possible therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Van- [ 130 ] dals <sup>f</sup>. However this be, the reason which our law gives for adopting it, is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children <sup>g</sup>.

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

1. WHO may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced

<sup>a</sup> Wilk. 75.

<sup>d</sup> Crag. l. 2. t. 22. § 9.

<sup>b</sup> Somner. Gavelk. 51. Co. Litt. 33.  
Bro. Dower, 70.

<sup>e</sup> *Ibid.*

<sup>f</sup> Mod. Un. Hist. xxxii. 91.

<sup>c</sup> Wright, 192.

<sup>g</sup> Bract. l. 2. c. 39. Co. Litt. 30.

*a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos*<sup>h</sup>. But a divorce *a mensa et thoro* only doth not destroy the dower<sup>i</sup>; no, not even for adultery itself by the common law<sup>k</sup>. Yet now by the statute West. 2.<sup>l</sup> 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 (9). 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<sup>m</sup>: 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 antient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde<sup>n</sup>, 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<sup>o</sup> 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 subsequent statute<sup>p</sup> revived this severity against the widows of traitors,

[ 131 ]

<sup>h</sup> Braët. l. 2. c. 39. § 4.

<sup>l</sup> 13 Edw. I. c. 34.

<sup>i</sup> Co. Litt. 32.

<sup>m</sup> Co. Litt. 31.

<sup>k</sup> Yet, among the antient Goths, an adulteress was punished by the loss of her

<sup>n</sup> P. C. b. 3. c. 3.

*dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. l. 3. c. 2.)

<sup>o</sup> c. 110.

<sup>p</sup> 5 & 6 Edw. VI. c. 11.

(9) And in a case where John de Camoys had assigned his wife, by deed, to sir William Paynel knight, which lord Coke calls *concessio mirabilis et inaudita*, it was decided in parliament, a few years after the statute was enacted, notwithstanding the purgation of the adultery in the spiritual court, that the wife was not entitled to dower. 2 *Inst.* 435. This is an indictable offence, being a great public misdemeanour. See Vol. IV. p. 64. n. 12.

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who are now barred of their dower (except in the case of certain modern treasons relating to the coin<sup>4</sup>), 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<sup>5</sup>. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed<sup>6</sup>: though in Bracton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere*."<sup>7</sup> (10)

<sup>4</sup> Stat. 5 Eliz. c. 11.    <sup>5</sup> 18 Eliz. c. 1.    <sup>6</sup> Co. Litt. 31.  
8 & 9 W. III. c. 26.    15 & 16 Geo. II.    <sup>7</sup> Litt. § 36.  
c. 28.    <sup>8</sup> l. 2. c. 9. § 3.

(10) Lord Coke informs us, that "if the wife be past the age of nine years at the time of her husband's death, she shall be endowed, of what age soever her husband be, albeit he were but four years old. *Quia junior non potest dotem promereri, et virum sustinere.*" Co. Litt. 33. This we are told by that grave and reverend judge without any remark of surprize, or reprobation. But it confirms the observation of Montefquieu in the Spirit of Laws, b. 26. c. 3. "There has been (says he) much talk of a law in England, which permitted girls seven years old to chuse a husband. This law was shocking two ways; it had no regard to the time when nature gives maturity to the understanding; nor to the time when she gives maturity to the body." It is abundantly clear, both from our law and history, that formerly such early marriages were contracted as in the present times are neither attempted nor thought of.

This was probably owing to the right which the lord possessed of putting up to sale the marriage of his infant tenant. He, no doubt, took the first opportunity of prostituting the infant to his own interest, without any regard to age or inclinations. And thus what was so frequently practised and permitted by the law, would cease even in other instances to be considered with abhorrence. If the marriage of a female was delayed till she was sixteen, this benefit was entirely lost to the lord her guardian.

Even the 18 Eliz. c. 7. which makes it a capital crime to abuse a consenting female child under the age of ten years, seems

2. WE are next to enquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was 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 <sup>u</sup>. Therefore, if a man seised in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have, could by any possibility inherit them <sup>v</sup>. A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowerable; 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 <sup>w</sup>. The seisin of the husband, for a transitory instant [ 132 ] only, when the same act which gives him the estate conveys it also out of him again (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower <sup>x</sup>: for

<sup>u</sup> Litt. § 36. 53.

<sup>v</sup> *Ibid.* § 53.

<sup>w</sup> Co. Litt. 31.

<sup>x</sup> Cro. Jac. 615. 2 Rep. 67. Co. Litt. 31.

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seems to leave an exception for these marriages, by declaring only *the carnal and unlawful* knowledge of such woman-child to be a felony. Hence the abolition of the feudal wardships and marriage at the restoration may perhaps have contributed not less to the improvement of the morals than of the liberty of the people.

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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<sup>y</sup>. And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle built for defence of the realm<sup>z</sup>: nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked<sup>a</sup>. Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free bench<sup>b</sup>. But, where dower is allowable, it matters not though the husband alienate the lands during the coverture; for he alienates them liable to dower<sup>c</sup>. (11)

3. NEXT, as to the manner in which a woman is to be endowed. There are now subsisting four species of dower;

<sup>y</sup> This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seized of an estate in fee by survivorship, in

consequence of which seisin his widow had a verdict for her dower. (Cro. Eliz. 503.)

<sup>z</sup> Co. Litt. 31. 3 Lev. 401.

<sup>a</sup> Co. Litt. 32. 1 Jon. 315.

<sup>b</sup> 4 Rep. 22.

<sup>c</sup> Co. Litt. 32.

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(11) It is now settled, that, although the husband may be tenant by the curtesy of a trust estate of inheritance, the wife is not entitled to dower out of such an estate. 3 P. Wms. 229. The reason assigned why the wife has not dower out of a trust estate is, that she was not endowed of a use at common law.

And from analogy to trusts it has been determined that a wife shall not be endowed of an equity of redemption, where the estate was mortgaged in fee by the husband previous to the marriage. 1 Bro. 326.

the fifth, mentioned by Littleton<sup>d</sup>, *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*<sup>e</sup>; 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*<sup>f</sup>: which is where tenant in fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (for 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*<sup>g</sup>; which is only a species of dower *ad ostium ecclesiae*, made when the husband's father is alive, and the son by his consent, expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) be made<sup>h</sup> *in facie ecclesiae et ad ostium ecclesiae; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestine fuerit conjugia.*

It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before-mentioned; *viz.* a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition of widowhood and chastity was only required in case the husband left any issue<sup>i</sup>: and afterwards we hear no

<sup>d</sup> Co. Litt. § 48, 49.

<sup>e</sup> Litt. § 37.

<sup>f</sup> *Ibid.* § 39.

<sup>g</sup> *Ibid.* § 40.

<sup>h</sup> Bracton, l. 2. c. 39. § 4.

<sup>i</sup> *Si mortuo viro uxor ejus remanserit et sine liberis fuerit, dotem suam habebit;*

*—si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitime servaverit. (Cart. Hen. I. A. D. 1001. Introd. to great charter, edit. Oxon. pag. iv.)*

more of it. Under Henry the second, according to Glanvil<sup>k</sup>, the dower *ad ofcium ecclesie* was the most usual species of dower; and here, as well as in Normandy<sup>l</sup>, it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feudal rigour, was the husband allowed to endow her *ad ofcium ecclesie* with more than the third part of the lands whereof he then was seised, though he might endow her with less; lest by such liberal endowments the lord should be defrauded of his wardships and other feudal profits<sup>m</sup>. But if no specific dotation was made at the church porch, then she was endowed *by the common law* [ 134 ] of the third part (which was called her *dos rationabilis*) of such lands and tenements as the husband was seised of at the time of the espousals, and no other; unless he specially engaged before the priest to endow her of his future acquisitions<sup>n</sup>: and, if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower<sup>o</sup> in lands which he afterwards acquired<sup>p</sup>. In king John's *magna carta*, and the first chapter of Henry III<sup>q</sup>,

<sup>k</sup> l. 6. c. 1. & 2.

<sup>l</sup> *Gr. Coustum. c. 101.*

<sup>m</sup> *Braët. l. 2. c. 39. § 6.*

<sup>n</sup> *De questu suo.* (Glan. *ib.*) — *de terris acquisitis et acquirendis.* (*Braët. ib.*)

<sup>o</sup> *Glanv. c. 2.*

<sup>p</sup> When special endowments were made *ad ofcium ecclesie*, the husband after affianced, and troth plighted, used to declare with what specific lands he meant to endow his wife, (*quod dotam eam de tali manerio cum pertinentiis, &c.* *Braët. ibid.*) and therefore in the old York ritual (*Seld. Ux. Hebr. l. 2. c. 27.*) there is, at this part of the matrimonial service, the following rubric; “*sacerdos interroget dotem mulieris; et, si terra ei in dotem detur, tunc dicatur psalmus iste, &c.*” When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus*

*terri et tenementis; Braët. ib.*) the husband seems to have said, “with all my lands and tenements I thee endow;” and then they all became liable to her dower. When he endowed her with personalty only, he used to say, “with all my worldly goods (or, as the Salisbury ritual has it, *with all my worldly chattel*) I thee endow;” which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by *magna carta, cap. 26.* and will be farther treated of in the concluding chapter of this book; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

<sup>q</sup> *A. D. 1216. c. 7. edit. Oxon.*

no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217, and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his life-time<sup>r</sup>: yet in case of a specific endowment of less *ad osium ecclesiae*, the widow had still no power to waive it after her husband's death. And this continued to be law, during the reigns of Henry III. and Edward I.<sup>s</sup> In Henry IV.'s time it was denied to be law, that a woman can be endowed of her husband's goods and chattels<sup>t</sup>: and, under Edward IV., Littleton lays it down [ 135 ] expressly, that a woman may be endowed *ad osium ecclesiae* with more than a third part<sup>u</sup>; and shall have her election, after her husband's death, to accept such dower or refuse it, and betake herself to her dower at common law<sup>w</sup>. Which state of uncertainty was probably the reason, that these specific dowers, *ad osium ecclesiae* and *ex assensu patris*, have since fallen into total disuse.

I PROCEED, therefore, to consider the method of endowment or assigning dower, by the common law, which is now the only usual species. By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his licence; lest she should contract herself, and so convey part of the feud, to the lord's enemy<sup>x</sup>. This licence the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But, to remedy these oppressions, it was provided, first by the charter of Henry I.<sup>y</sup> and afterwards

<sup>r</sup> *Assignetur autem ei pro dote sua tertia pars totius terrae mariti sui quae sua fuit in vita sua, nisi de minori dotata fuerit ad osium ecclesiae. c. 7. (Ibid.)*

<sup>s</sup> Braët. *ubi supr.* Britton. c. 101, 102. Flet. l. 5. c. 23. § 11, 12.

<sup>t</sup> P. 7 Hen. IV. 13, 14.

<sup>u</sup> § 39. F. N. B. 150.

<sup>w</sup> § 41.

<sup>x</sup> Mirr. c. 1. § 3.

<sup>y</sup> *ubi supra.*

by *magna carta*<sup>z</sup>, that the widow shall pay nothing for her marriage, nor shall be distrained to marry afresh, if she chooseth to live without a husband; but shall not however marry against the consent of the lord; and farther, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarantine*, a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other<sup>a</sup>. The particular lands, to be held in dower, must be assigned<sup>b</sup> 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 [ 136 ] the heir, by a kind of subinfeudation, or under-tenancy completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it<sup>c</sup>. Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower<sup>d</sup>. 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<sup>e</sup>.

<sup>z</sup> cap. 7.

<sup>a</sup> 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.

<sup>b</sup> Co. Litt. 34, 35.

<sup>c</sup> Co. Litt. 34, 35.

<sup>d</sup> F. N. B. 148. Finch. L. 314. Stat. Westm. 2. 13 Edw. I. c. 7.

<sup>e</sup> Co. Litt. 32.

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 became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the antient law respecting dower *ad osium 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* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before-mentioned, but also by detaining the title deeds or evidences of the estate from the heir, until she restores them<sup>f</sup>: and, by the statute of Gloucester<sup>g</sup>, if a dowager [ 137 ] alienes the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action (11). A woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture<sup>h</sup>. But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. c. 10.

A JOINTURE, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by sir Edward Coke<sup>i</sup>; “a competent livelihood of freehold for the wife, of lands and tene-

<sup>f</sup> Co. Litt. 39.

<sup>g</sup> 6 Edw. I. c. 7.

<sup>h</sup> Pig. of recov. 66.

<sup>i</sup> 1 Inst. 36.

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(11) That is in fee or for the life of a stranger; but lord Coke says, “this is not intended for the life of tenant in dower herself, for such an estate wrought no wrong.” 2 *Inst.* 309.



“ments ; 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 Henry VIII. c. 10. before mentioned ; commonly called  
 the statute of *uses*, of which we shall speak fully hereafter.  
 At present I have only to observe, that before the making of  
 that statute, the greatest part of the land of England was  
 conveyed to *uses*; the property or possession of the soil being  
 vested in one man, and the *use*, or profits thereof, in ano-  
 ther ; whose directions, with regard to the disposition thereof,  
 the former was in conscience obliged to follow, and might be  
 compelled by a court of equity to observe. Now, though a  
 husband had the *use* of lands in absolute fee-simple, yet the  
 wife was not entitled to any dower therein ; he not being  
*seised* thereof : wherefore it became usual, on marriage, to  
 settle by express deed some special estate to the use of the  
 husband and his wife, for their lives, in joint-tenancy, or  
 jointure ; which settlement would be a provision for the wife  
 in case she survived her husband. At length the statute of  
 uses ordained, that such as had the *use* of lands should, to all  
 intents and purposes, be reputed and taken to be absolutely  
*seised* and possessed of the soil itself. In consequence of which  
 legal seisin, all wives would have become dowable of such  
 lands as were held to the use of their husbands, and also en-  
 titled at the same time to any special lands that might be  
 settled in jointure : had not the same statute provided, that  
 upon making such an estate in jointure to the wife before  
 marriage, she shall be for ever precluded from the dower<sup>k</sup>. [ 138 ]  
 But then these four requisites must be punctually observed :

1. The jointure must take effect immediately on the death of the husband.
2. It must be for her own life at least, and not *pur auter vie*, or for any term of years, or other smaller estate.
3. It must be made to herself, and no other in trust for her.
4. It must be made, and so in the deed particularly

<sup>k</sup> 4 Rep. 1, 2.

expressed to be (12), in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiae*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture (13). 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<sup>1</sup>. (14)

<sup>1</sup> These settlements, previous to marriage, seem to have been in use among the ancient Germans, and their kindred nation the Gauls. Of the former Tacitus

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(12) Or it may be averred to be, 4 Rep. 3. An assurance was made to a woman, to the intent it should be for her jointure, but it was not so expressed in the deed. And the opinion of the court was, that it might be averred that it was for a jointure, and that such averment was traversable. *Owen*, 33. But a trust-estate, or an agreement to settle lands as a jointure, is a good equitable jointure in bar of dower.

(13) And where a devise is expressed to be given in lieu and satisfaction of dower, or where that is the clear and manifest intention of the testator, the wife shall not have both, but shall have her choice. *Harg. Co. Litt.* 36 b.

But where the lands are devised out of which the widow is entitled to dower, and the testator leaves her an annuity, she shall not be put to her election, unless it appears to have been the intention of the testator that she should not retain both.

Lord Eldon has declared, that “ the question in all these cases is, whether the testator meant to give away his wife's dower; which he could not do directly. For that it must be seen clearly, that he meant to dispose so, that, if she should claim dower, it would disappoint the will. It must appear there is a repugnancy.” 6 *Ves. Jun.* 616.

(14) It has been determined, that if a woman, who is under age at the time of marriage, agrees to a jointure and settlement

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 distress for his debt; if contracted during the coverture<sup>m</sup>. 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 osium ecclesiae*, which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower<sup>n</sup>. And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow<sup>o</sup>. Wherefore sir Edward Coke very

tus gives us this account. "*Dotem non uxor marito, sed uxori maritus offert; intersunt parentes et propinqui, et mu- nera probant.*" (*de mor. Germ. c. 18.*) And Cæsar (*de bello Gallico, l. 6. c. 18.*) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure. "*Viri, quantus pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis bonis, aestimatione facta, cum dotibus communicant. Hujus omnis pecuniæ conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit,*

"*ad eum pars utriusque cum fructibus superiorum temporum pervenit.*" The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (*Nov. 97.*) with regard to the provision for widows among the Romans; but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

<sup>m</sup> Co. Litt. 31. a. F. N. B. 150.

<sup>n</sup> Co. Litt. 36.

<sup>o</sup> *Ibid.* 37.

in bar of her dower, and her distributive share of her husband's personal property, in case he dies intestate, she cannot afterwards waive it; but is as much bound, as if she were of age at the time of marriage. Lord Northington had decreed the contrary; but his decree was upon both points reversed. *Drury v. Drury*, 4 *Brown's P. C.* 570.

justly

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 (15).

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(15) A jointure is not forfeited by the adultery of the wife, as dower is; and the court of chancery will decree against the husband a performance of marriage articles, though he alleges and proves that his wife lives separate from him in adultery. *Cox's P. Wms.* 277.

## CHAPTER THE NINTH.

## OF ESTATES LESS THAN FREEHOLD.

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

I. AN estate for *years* is a contract for the possession of lands or tenements, for some determinate period; and it 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<sup>a</sup>, and the lessee enters thereon<sup>b</sup>. If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of<sup>c</sup>. And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law.

THE space of a year is a determinate and well-known period, consisting commonly of 365 days; for, though in bissextile or leap-years it consists properly of 366, yet by the statute 21 Hen. III. the increasing day in the leap-year, to-

<sup>a</sup> 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. § 57.)

<sup>b</sup> *Ibid.* 58.

<sup>c</sup> *Ibid.* 67.

gether with the preceding day, shall be accounted for one day only. That of a month is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian division in our common almanacks, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "*a twelvemonth*" in the singular number, it is good for the whole year<sup>d</sup>. 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. (1) In the space of a day all the twenty-four

<sup>d</sup> 6 Rep. 61.

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(1) In all statutes a *month* signifies a lunar month, unless it appears to be clearly intended to be a calendar month. 6 *T. R.* 224. But in bills of exchange and promissory notes a month is always a calendar month; as if a bill or note is dated on the 10th of January, and made payable one month after date, it is due (the three days of grace being included) on the 13th of February. See p. 469. n. 25. *post*.

The six months in cases of *lapse* and *quare impedit*, are also calendar months. 6 *Co.* 61.

It is somewhat remarkable that the difference between six calendar months and half a year does not seem to have been considered by legal writers. Lord Coke says, half a year consists of 182 days. 1 *Inst.* 135. But six calendar months will be one or two days less or more than half a year, accordingly as February is reckoned, or not, one of the six. Lord Coke, in his report of *Cateby's*

hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes\*. 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 (2). But to return to estates for years.

THESE estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords: but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon [ 142 ]

\* Co. Litt. 135.

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Catesby's case, clearly considers the *tempus semestre* to be six calendar months (6 Co. 61.); yet Sir George Croke, in his report of that case, states it as confidently to consist of 182 days; and in neither report is the difference taken notice of. *Cro. Jac.* 167.

From the cases in 3 *Wilf.* 21. and 1 *T. R.* 159. it appears that a notice to a tenant from year to year to quit the premises, must be half a year, and not six calendar months, though the computation by the latter would be more simple and convenient; and that was understood to be the proper notice by the court of common pleas in 2 *Bl. Rep.* 1224. See p. 147. n. 3.

(2) See 4 *T. R.* 170. where there was a difference of opinion in the court upon the question, whether a bill of exchange could be protested for non-payment on the same day that it was due, or the acceptor had the whole of the day to discharge it in?

the farm. The lessee's estate might also, by the antient law, be at any time defeated by a common recovery suffered by the tenant of the freehold <sup>f</sup>; which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

WHILE estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack rent; and indeed we are told <sup>g</sup> that by the antient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated; for we may observe in Madox's collection of antient instruments, some leases for years of a pretty early date, which considerably exceed that period <sup>h</sup>: and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III. <sup>i</sup>, and probably of Edward I. <sup>k</sup> But certainly, when by the statute 21 Hen. VIII. c. 15. the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, [ 143 ] and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.

EVERY estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years.

<sup>f</sup> Co. Litt. 46.

<sup>g</sup> Mirror. c. 2. § 27. Co. Litt. 45, 46.

<sup>h</sup> Madox *Formulare Anglican.* n<sup>o</sup>. 239. fol. 140. Demise for eighty years, 21 Ric. II. . . . . *Ibid.* n<sup>o</sup>. 245. fol.

146. for the like term, *A D.* 1429. . . . . *Ibid.* n<sup>o</sup> 248. fol. 148. for fifty years, 7 Edw. IV.

<sup>i</sup> 32 Aff. pl. 6. Bro. Abr. t. *mor-dauncestor*, 42. *spoliation*, 6.

<sup>k</sup> Stat. of mortmain, 7 Edw. I.



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<sup>l</sup>. 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<sup>m</sup>; 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<sup>n</sup>. A lease for so many years as J. S. shall live, is void from the beginning<sup>o</sup>; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good<sup>p</sup>: for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S. or his ceasing to be parson there.

WE have before remarked, and endeavoured to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur auter vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate<sup>q</sup>. 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 for twenty years, this is good; but to hold from Michaelmas [ 144 ] next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it cannot be

<sup>l</sup> Co. Litt. 45.<sup>m</sup> 6 Rep. 35.<sup>n</sup> Co. Litt. 46.<sup>o</sup> Co. Litt. 45.<sup>p</sup> *Ibid.*<sup>q</sup> *Ibid.* 46.

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<sup>r</sup>. 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<sup>o</sup>; 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 reason if I grant a lease to A for the term of three years, and after the expiration of the said *term*, to B for six years, and A surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect: but if the remainder had been to B from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B's interest will not commence till the time is fully elapsed, whatever may become of A's term<sup>t</sup>.

TENANT for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers, which we formerly observed<sup>u</sup> that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote<sup>w</sup>; terms which have been already explained<sup>x</sup>.

<sup>r</sup> 5 Rep. 94.

<sup>o</sup> Co. Litt. 46.

<sup>t</sup> *Ibid.* 45.

<sup>u</sup> pag. 122.

<sup>w</sup> Co. Litt. 45.

<sup>x</sup> pag. 35.

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; 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<sup>y</sup>. But where the lease for years depends upon an uncertainty : as, upon the death of a lessor, being himself only tenant for life, or being a husband seized in right of his wife ; or if the term of years be determinable upon a life or lives ; in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto<sup>z</sup>. Not so, if it determine by the act of the party himself : as if tenant for years does any thing that amounts to a forfeiture : in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default<sup>a</sup>.

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<sup>b</sup>. 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

<sup>y</sup> Litt. § 68.

<sup>z</sup> Co. Litt. 56.

<sup>a</sup> *Ibid.* 55.

<sup>b</sup> Litt. § 68.

at his own pleasure <sup>c</sup> (3). Yet this must be understood with  
 [ 146 ] some restriction. For if the tenant at will sows his land,  
 and the landlord, before the corn is ripe, or before it is  
 reaped, puts him out, yet the tenant shall have the emble-  
 ments, and free ingrefs, egress, and regrefs, to cut and  
 carry away the profits <sup>d</sup>. 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 land-  
 lord shall have the profits of the land <sup>e</sup>.

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 <sup>f</sup>, or notice must be given to  
 the lessee <sup>g</sup>) the exertion of any act of ownership by the  
 lessor, as entering upon the premises and cutting timber <sup>h</sup>,  
 taking a distress for rent and impounding it thereon <sup>i</sup>, or  
 making a feoffment, or lease for years of the land to com-  
 mence immediately <sup>k</sup>; any act of desertion by the lessee, as

<sup>c</sup> Co. Litt. 55.

<sup>d</sup> *Ibid.* 56.

<sup>e</sup> *Ibid.* 55.

<sup>f</sup> *Ibid.*

<sup>g</sup> 1 Ventr. 248.

<sup>h</sup> Co. Litt. 55.

<sup>i</sup> *Ibid.* 57.

<sup>k</sup> 1 Rol. Abr. 260. 2 Lev. 88.

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(3) Estates at will in the statute of frauds, 29 Car. II. c. 2.  
 (and perhaps in every other instance) are now properly construed  
 to enure as a tenancy from year to year. 8 T. R. 3.

assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure<sup>1</sup>; or, which is *inftar omnium*, the death or outlawry of either lessor or lessee<sup>m</sup>; 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, [ 147 ] the lessee, after the determination of the lessor's will, shall have reasonable ingresses and egresses to fetch away his goods and utensils<sup>n</sup>. 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<sup>o</sup>. 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<sup>p</sup>. (3)

<sup>1</sup> Co. Litt. 55.

<sup>m</sup> 5 Rep. 116. Co. Litt. 57. 62.

<sup>n</sup> Litt. § 69.

<sup>o</sup> Salk. 414. 1 Sid. 339.

<sup>p</sup> 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.)

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(3) See page 141. *ante*, note 1. The learned Judge, in the text, tells us, the notice must be *six months*, and in the note *half a year*; but in addition to the authorities referred to by the Editor in note 1, it is *demý an*, or half a year, in the 13 Hen. VIII. 15. The notice must be to quit at the end of the year. 1 T. R. 159. The time specified in the notice will be presumed to be the end of the year, unless the contrary is shewn. *Ib.* If the notice is not good for one year, it is good for the next, it being supposed that the landlord has waived it. 2 Bro. 161. The defect

THERE is one species of estates at will that deserves a more particular regard than any other; and that is, an estate

of notice cannot be set up by a tenant who controverts the title of the landlord. *Ib.*

Where part of the premises was entered upon at Candlemas, and part at May-day, but the rent was payable at Lady-day, it was held that a notice to quit half a year before Lady-day was sufficient for the whole. 2 *Bl. Rep.* 1224.

Though the tenant does not object to the insufficiency of the notice at the time, he is not precluded from taking advantage of it afterwards at the trial. 4 *T. R.* 361.

A delivery of the notice to the tenant's maid-servant at his house, though not upon the premises, the contents of which were explained to her, was held a sufficient service of the notice, as the jury might presume that she gave it afterwards to her master. 4 *T. R.* 464.

A mistake in the notice in writing 1795 for 1796, as the latter date clearly appeared to be the intention of the parties from the conversation which passed upon delivering the notice, was held not to invalidate it. 7 *T. R.* 64.

It is now determined, that if a landlord gives notice to quit, and afterwards receives rent for the time subsequent to the end of the year, it is a waiver of the notice, it being a clear acknowledgment and affirmance of the tenancy. 6 *T. R.* 219. And a distress for such rent will not admit of any other explanation, and is also an unequivocal waiver of the notice. *H. Bl. Rep.* 311.

Where a parol lease is void, with respect to the duration of the term by the statute of frauds, yet the tenant holds from year to year, according to the time he was to quit, agreed upon by that parol lease. 5 *T. R.* 471.

It is not necessary to give notice to produce the original notice to quit, but a copy of it is evidence. Mr. Justice Wilson, at York, held it was necessary, but having consulted the rest of the judges, they were of opinion it was not necessary; and in the following year, in another cause at York, he decided agreeably to that opinion.

Mr. Justice Chambre, at Carlisle, 1802, after debate and consideration, held the same respecting a notice not to come upon the  
plaintiff's

held by copy of court roll : or, as we usually call it, a *copyhold* estate. This, as was before observed<sup>9</sup>, was in it's original and foundation nothing better than a mere estate at will. But, the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will : his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom as a tenant at will; the custom having arisen from a series of uniform wills. And therefore it is rightly observed by

<sup>9</sup> pag. 93:

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plaintiff's grounds to kill game, and certified that it was a wilful trespass. See vol. 3. p. 215. n. 6.

So a copy of an attorney's bill, delivered to the defendant may be read in evidence without proof of notice to produce the original; the nature of the action in these cases being equivalent to such notice. 2 *Bos.* and *Pul.* 237.

It does not seem necessary that a notice to quit a tenancy from year to year, or not to come upon another's ground to pursue game, should be in writing; but perhaps it is most convenient to deliver a written notice by a witness who preserves a copy of it.

The following notice to a tenant from year to year to quit, was approved by Lord Kenyon:—"To quit at Lady-day, or at the end of the year when your tenancy expires, and if there is not six months between the time of the delivery of this notice and the end of this present year, then you will quit at the end of the ensuing year."

Calthorpe<sup>r</sup>, that “ copyholders and customary tenants differ not so much in nature as in name ; for although some be called copyholders, some customary, some tenants by the virge, some base tenants, some bond tenants, and some by one name and some by another, yet do they all agree in substance and kind of tenure ; all the said lands are holden in one general kind, that is, by custom and continuance of time ; and the diversity of their names doth not alter the nature of their tenure.”

ALMOST every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor ; which customs differ as much as the humour and temper of the respective antient lords, (from whence we may account for their great variety,) such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, and hold them united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition : subject however to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulgated by immemorial custom, has declared to be a forfeiture or absolute determination of those interests ; as in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of these interests amount to a freehold ; for the freehold of the whole manor abides always in the lord only<sup>s</sup>, who hath granted out the use and occupation, but not the corporeal seisin or true legal possession, of certain parcels thereof, to these his customary tenants at will.

THE reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-

<sup>r</sup> On copyholds, 51. 54.

<sup>s</sup> Litt. § 81. 2 Inst. 325



simple and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein <sup>t</sup>. The lords therefore, though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet not caring to manumit them entirely, might probably scruple to grant them any absolute freehold; and for that reason it seems to have been contrived, that a power of re-sumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposed it still to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be styled in their admissions tenants at the will of the lord, — the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest; and therefore continued and now continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs for ever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders of free or privileged tenure, which are derived from the ancient tenants in villein-focage <sup>u</sup>, and are not said to hold *at the will of the lord*, but only *according to the custom of the manor*, there is no such absurdity in allowing them to be capable of enjoying a freehold interest: and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they

<sup>t</sup> Mirr. c. 2. § 28. Litt. § 204, 5, 6.

<sup>u</sup> See page 98, &c.

are holden, but in the tenants themselves<sup>v</sup>; who are sometimes called *customary freeholders*, being allowed to have a freehold *interest*, though not a freehold *tenure*.

[ 150 ] HOWEVER, in common cases, copyhold estates are still ranked (for the reasons above mentioned) among tenancies at will; though custom, which is the life of the common law, has established a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himself, in the tenements 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.

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 a 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<sup>w</sup> (4). But, no man

<sup>v</sup> Fitz. *Abr. tit. corone.* 310. *custom.* Abr. 562. 2 Ventr. 143. Caith. 432.  
12 Bro. *Abr. tit. custom.* 2. 17. *tenant* Lord Raym. 1225.  
*per copie.* 22. 9 Rep. 76. Co. Litt. 59.      <sup>w</sup> Co. Litt. 57.  
Co. Copyh. § 32. Cro. Car. 229. 1 Roll.

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(4) A lease at will being now considered a lease from year to year, which cannot be vacated without half a year's notice to quit, upon the death of the lessor the tenant cannot be ejected without half a year's notice from his heir. 2 *T. R.* 159. And it has also been decided that it is necessary to give that notice to the personal representative of the lessee. 3 *Willf.* 25.

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\*. 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<sup>y</sup>: 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.

THUS stands the law, with regard to tenants by sufferance, and landlords are obliged in these cases to make formal entries upon their lands<sup>z</sup>, and recover possession by the legal process of ejectment; and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II. c. 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*. And, 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. These statutes have almost

\* Co. Litt. 57.

<sup>y</sup> *Ibid.*<sup>z</sup> 5 Mod. 384.

put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement (5).

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(5) Where a tenant has a lease for a term certain, and holds over after the expiration of it, it is not necessary for the landlord to give him any notice to quit, in order to recover possession by ejectment. 1 *T. R.* 53. 162. But if the landlord afterwards receives rent, or does any act by which he proves his assent to the continuance of the tenant, this turns the estate at sufferance into a tenancy from year to year. The notice by 4 *Geo. II. c. 28.* may be given previous to the end of the term. *Bl. Rep.* 1075. But I should think that it may also be given afterwards, though the double value could only be recovered from the delivery of the notice, and demand of possession. The double value may be recovered though it is not mentioned in the notice to quit. 1 *T. R.* 53. The notice by the landlord must be in writing; but that by the tenant, under 11 *Geo. II. c. 19.* may be parol. 3 *Bur.* 1603. The double value can only be recovered by action of debt; but the double rent may be recovered by distress or otherwise, like single rent. 1 *Bl.* 535. No length of time is necessary to the validity of these notices under the statutes, to entitle the landlord to double value.

If the tenant hold over after the expiration of his term, or after the end of the year, when he has had a proper notice to quit, the landlord may turn his cattle upon the premises, but without force, and the cattle cannot be distrained, as damage feasant by the tenant. 7 *T. R.* 431.

## CHAPTER THE TENTH.

## OF ESTATES UPON CONDITION.

**B**ESIDES 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<sup>a</sup>. 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, are of two sorts: 1. Estates upon condition *implied*: 2. Estates upon condition *expressed*: under which last may be included, 3. Estates held *in vadio, gage, or pledge*: 4. Estates by *statute merchant, or statute staple*: 5. Estates held by *elegit*.

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<sup>b</sup>, on breach of which condition

<sup>a</sup> Co. Litt. 201.<sup>b</sup> Litt. § 378.

it is lawful for the grantor, or his heirs, to oust him, and grant it to another person<sup>c</sup>. For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. 1. By *mis-user*, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby<sup>d</sup>. 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<sup>e</sup>.

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<sup>f</sup>. So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit "felony," which the law tacitly annexes to every feodal donation.

<sup>c</sup> Litt. § 379.

<sup>d</sup> Co. Litt. 233.

<sup>e</sup> 9 Rep. 5c.

<sup>f</sup> Co. Litt. 215.

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<sup>g</sup>. 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<sup>h</sup> 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<sup>i</sup>. 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<sup>k</sup>. To this class may also be referred all base fees, and fee-simples conditional at the common law<sup>l</sup>. 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 eighth chapter: as *durante viduitate*, &c.: these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these

<sup>g</sup> Co. Litt. 201.

<sup>k</sup> Litt. § 325.

<sup>h</sup> Show. Parl. Cas. 83, &c.

<sup>l</sup> See pag. 109, 110, 111.

<sup>i</sup> Co. Litt. 217.

subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determinable and void.

A DISTINCTION is however made between a *condition in deed* and a *limitation*, which Littleton<sup>m</sup> 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 denominates 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<sup>n</sup>. 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.°), 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<sup>p</sup>. 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

<sup>m</sup> § 380. 1 Inst. 234.

<sup>n</sup> 10 Rep. 41.

<sup>o</sup> *Ibid.* 42.

<sup>p</sup> Litt. § 347. Stat. 32 Hen. VIII, c. 34.



not a condition <sup>9</sup> : because if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter ; but, when it is a limitation, the estate of B determines, and that of D commences, 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 <sup>r</sup>.

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 <sup>s</sup> ; 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.

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.

<sup>9</sup> 1 Ventr. 202.

<sup>s</sup> Co. Litt. 42.

<sup>r</sup> Cro. Eliz. 205. 1 Roll. Abr. 411.

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 alienes in fee; that then and in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant<sup>t</sup>. 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<sup>u</sup>.

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

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

*VIVUM vadium*, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 2*ol. per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists, and survives the debt; and immediately on the discharge of that, reverts back to the borrower<sup>w</sup>. But *mortuum vadium*, a dead pledge, or *mortgage* (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.* 200*l.*)

<sup>t</sup> Co. Litt. 206.

<sup>u</sup> *Ibid.*

<sup>w</sup> *Ibid.* 205.

and

and grants him an estate in 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<sup>x</sup>. But as it was formerly a doubt<sup>y</sup>, whether, by taking such estate in fee, it did not become liable to the wife's dower, and other incumbrances, of the mortgagee; (though that doubt has been long ago overruled by our courts of equity<sup>z</sup>), it therefore became usual to grant only a long term of years by way of mortgage; with condition to be void on repayment of the mortgage-money: which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the

<sup>x</sup> Litt. § 332.

<sup>z</sup> Hardr. 466.

<sup>y</sup> *Ibid.* § 357. Cro. Car. 191.

estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate (1); 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. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his 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<sup>a</sup>, the fraudulent mortgagor forfeits all equity of redemption whatsoever (2). It is not how-

<sup>a</sup> Stat. 4 & 5 W. & M. c. 16.

(1) In general, if the mortgagee has been twenty years in possession, the court of chancery, in conformity to the time of bringing an ejectment, will not permit the mortgagor to redeem, unless during part of the time the mortgagor has been an infant or a married woman; or unless the mortgagee admits he holds the estate as a mortgage; or he has kept accounts upon it, and treated it as redeemable within twenty years; or there is some other special circumstance, which forms an exception to the general rule. *Eq. Ca. Abr.* 313. 2 *Bro.* 399. 2 *Ves. jun.* 83. Where two different estates are mortgaged by the owner to the same person, one cannot be redeemed without the other. *Amb.* 733.

(2) By the 4 & 5 W. & M. c. 16. if any person mortgages his estate, and does not previously inform the mortgagee in writing of a prior mortgage, or of any judgment or incumbrance, which he has voluntarily brought upon the estate, the mortgagee shall hold the estate

ever 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 (3), and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was, where the possession of the thing pledged remained with the debtor <sup>b</sup>. 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. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet?*" for which the reason given is, to prevent sub-

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<sup>b</sup> *Pignoris appellatione cum proprie traditione nuda conventiono tenetur, rem contineri dicimus, quæ simul etiam proprie hypothecæ appellatione contreditur creditori. At eam, quæ sine veri dicimus. Inst. l. 4. t. 6. § 7.*

estate as an absolute purchaser, free from the equity of redemption of the mortgagor.

(3) The mortgagee is not now obliged to bring an ejectment to recover the rents and profits of the estate, for it has been determined that where there is a tenant in possession, by a lease prior to the mortgage, the mortgagee may at any time give him notice to pay the rent to him; and he may distrain for all the rent which is due at the time of the notice, and also for all that accrues afterwards. *Moss v. Gallimore, Doug. 266.* The mortgagor has no interest in the premises, but by the mere indulgence of the mortgagee; he has not even the estate of a tenant at will, for it is held he may be prevented from carrying away the emblements, or the crops which he himself has sown. *Ib.*

If the mortgagor grants a lease after the mortgage, the mortgagee may recover the possession of the premises in an ejectment against the tenant in possession without a previous notice to quit.

3 *East. 449.*

requent and fraudulent pledges of the same land : “ *cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadari* c.” And the frauds which have arisen since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law (4).

c. l. 10. c. 8.

(4) It has been said by a learned Judge to be an established rule of equity, that a second mortgagee, who has the title deeds without notice of any prior incumbrance, shall be preferred, because if a mortgagee lend money upon real property without taking the title deeds, he enables the mortgagor to commit a fraud. 1 *T. R.* 762. But lord Thurlow afterwards observed upon this, that he did not conceive that the not taking the deeds was alone sufficient to postpone the first mortgagee ; if it were so, there could be no such thing as a mortgage of a reversion ; and he held that the second mortgagee in possession of the title deeds, was preferred only in cases where the first had been guilty of fraud or of gross negligence. 2 *Bro.* 652.

But I should be inclined to think that fraud or gross negligence would be presumed, unless the first mortgagee could shew that it was impossible for him to obtain the possession of the title deeds, or that he had used all due and necessary diligence for that purpose.

Where an estate is divided, it is impossible for every one who has a share to have the title deeds ; in a sale, therefore, under an order of the court of chancery, the chancellor directs one to retain the title deeds, but to covenant to produce them when called upon, to support the title of the other purchasers.

Whatever may be the value of the estate, it is of great importance to those who lend money upon real security, to be certain that there is no prior mortgage upon the estate ; for it has been long settled, that if a third mortgagee, who at the time of his mortgage had no notice of the second, purchases the first mortgage even pending a bill filed by the second to redeem the first, both the first and third mortgages shall be paid out of the estate, before any share of it can be appropriated to the second ; the reason assigned is, that the third, by thus obtaining the legal estate, has both law and equity on his side, which supersede the equity of the second. And even lord Hale held it right that the third should seize what he called the *tabula in naufragio*, a plank in the shipwreck, and thus leave the second

IV. A FOURTH species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into 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<sup>d</sup>, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged 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 seized 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,

<sup>d</sup> See Book I. c. 8.

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second to perish. But a subsequent mortgagee can obtain no advantage over a prior one, if at the time of lending his money, he had notice of the prior incumbrance. 1 *T. R.* 763. But among mortgagees, where none has the legal estate, the rule in equity is *qui prior est tempore, potior est jure.* 2 *P. Wms.* 491. 1 *Bro.* 63.

As this is the equity which is intelligible to ordinary understandings, if it were not presumptuous to reflect a censure upon a doctrine so long sanctioned by illustrious names, it might be observed that the equity of the second ought to have outweighed both the law and equity of the third; for it can hardly be reconciled with substantial justice, that the third by any contrivance or combination should be permitted to run away with the whole estate, and to leave nothing to the second, who had fairly and honestly advanced his property. But this, if wrong, can only be corrected by the authority of the legislature.

acknowledged 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 directs 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 *bonâ fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record (5).

[ 161 ] V. ANOTHER similar conditional estate, created by operation of law, for security and satisfaction of debts, is called, an estate by *elegit*. What an *elegit* is, and why so called will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute<sup>e</sup> 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 debt and damages are fully paid: and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores*<sup>f</sup>, it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute therefore of Westm. 2. permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus*

<sup>e</sup> 13 Ed. I. c. 18.

<sup>f</sup> 18 Edw. I.

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(5) These estates are sometimes referred to in argument, but are now unknown in practice.



(passed in the same year<sup>g</sup>) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only *half* of them was liable to be taken in execution for any other debt of the owner.

I SHALL conclude what I had to remark of these estates, by statute merchant, statute staple, and *elegit*, with the observation of sir Edward Coke<sup>h</sup>. “These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds;” (which makes them an exception to the general rule) “because though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, 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<sup>i</sup>, yet it is but the similitude of a freehold, and *nullum simile est idem*.” This indeed only proves them [ 162 ] 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* executors<sup>k</sup>: 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.

<sup>g</sup> 13 Edw. 1.      <sup>h</sup> 1 Inst. 42, 43. “*vele disseisine, auxi sicum de franktene-*

<sup>i</sup> The words of the statute *de mercantibus* are, “*puisse porter bres de no-*

*ment.*”  
<sup>k</sup> Co. Litt. 42.

## CHAPTER THE ELEVENTH.

OF ESTATES IN POSSESSION,  
REMAINDER, AND REVERSION.

**H**ITHERTO 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 permanency 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*.

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

II. AN

II. AN estate then in remainder may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As if a man seized in fee-simple 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. 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<sup>a</sup>. 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 hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple<sup>b</sup>: because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and 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, cannot be reserved after the whole is disposed of. A particular

<sup>a</sup> Co. Litt. 143.

<sup>b</sup> Plowd. 29. Vaugh. 269.

estate, with all the remainders expectant thereon, is only one fee-simple : as 40*l.* is part of 100*l.* and 60*l.* is the remainder of it : wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than, after the whole 100*l.* is appropriated, there can be any residue subsisting.

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

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

AN estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder ; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the antient law <sup>d</sup>, 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 antient 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 <sup>e</sup> : because

<sup>c</sup> Co. Litt. 49. Plowd. 25.

<sup>d</sup> Raym. 151.

<sup>e</sup> 5 Rep. 94.

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 possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time 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 and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seisin to A; here by the livery the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seized 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 presenti*, though to be occupied and enjoyed *in futuro*.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over<sup>f</sup>. 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 be given at the time of it's creation; and the entry of the grantor to do this determines the estate at will

<sup>f</sup> 8 Rep. 75.

in the very instant in which it is made <sup>g</sup>: 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 <sup>h</sup>. 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 <sup>i</sup>: as where the particular estate is an estate for the life of the person not *in esse* <sup>k</sup>; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate <sup>l</sup>; in either of these cases the remainder over is void.

2. A SECOND rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate <sup>m</sup>. 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 feisin is delivered to A of his life estate in possession. And it is this which induces the necessity at common law of livery of feisin 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 feisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void <sup>n</sup>. 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 enure to him in remainder, as both are but one estate in law <sup>o</sup>.

<sup>g</sup> Dyer, 18.

<sup>h</sup> Raym. 151.

<sup>i</sup> Co. Litt. 298.

<sup>k</sup> 2 Roll. Abr. 415.

<sup>l</sup> 1 Jon. 58.

<sup>m</sup> Litt. § 671. Plowd. 25.

<sup>n</sup> Litt. § 60.

<sup>o</sup> Co. Litt. 49.

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<sup>p</sup>. 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, 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<sup>q</sup>. 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<sup>r</sup>: the thing supported must fall to the ground, if once it's support be severed from it.

IT is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, where by 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 par-

<sup>p</sup> Plowd. 25. 1 Rep. 66.

<sup>r</sup> 3 Rep. 21.

<sup>q</sup> 1 Rep. 138.

ticular 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.

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*; so that the particular estate may chance to be determined, and the remainder never take effect <sup>s</sup>.

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 *enfeint*, 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 <sup>t</sup>. But, to remedy this hardship, it is enacted by statute 10 & 11 W. III. c. 16. that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb <sup>u</sup>. (1)

<sup>s</sup> 3 Rep. 20.

<sup>t</sup> Salk. 288. 4 Mod. 282.

<sup>u</sup> See Vol. I. p. 130.

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(1) A father had devised an estate to his son for life, with a remainder to the first and other sons of the son in tail; the son died, leaving



THIS species of contingent remainders to a person not in being must however be limited to some one, that may by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines<sup>w</sup>. 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<sup>x</sup>. But a remainder to the right heirs of B (if there be no such person as B *in esse*, is void<sup>y</sup>. For here there must two contingencies happen: first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good,

[ 170 ]

<sup>w</sup> 2 Rep. 51.<sup>x</sup> Co. Litt. 378.<sup>y</sup> Hob. 33.

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leaving his wife pregnant, who was afterwards delivered of a son: the court of common pleas and king's bench held clearly, that the grandson not being born at the expiration of the estate for life, was not entitled to take it; but the lords, moved by the hardship of the case, reversed the judgments of the courts below, contrary to the opinions of all the judges. *Reeve v. Long*, 1 *Salk.* 227. But the house of commons, in reproof of this assumption of legislative authority in the lords, immediately brought in the 10 and 11 W. III. which passed into a statute. The statute only mentions *marriage and other settlements*; and it is probable, that devises were designedly omitted to be expressed from a delicacy, that the authority of the judgment of the peers might not be too openly impeached. As the statute says the posthumous son in this case shall take the estate as if born before the death of the father, he is entitled to the intermediate profits from the death of the father, (3 *Atk.* 203.) which is different from the case of a descent devested by the birth of a posthumous child. See 1 Vol. p. 130. note 9.

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for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name<sup>z</sup>. A limitation of a remainder to a bastard before it is born, is not good<sup>a</sup>: for though the law allows the possibility of having bastards, it presumes to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

A REMAINDER may also 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.

[ 171 ] CONTINGENT remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate, less than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void<sup>b</sup>; 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

<sup>z</sup> 5 Rep. 51.<sup>a</sup> Cro. Eliz. 509.<sup>b</sup> 1 Rep. 130.

nature, the freehold cannot vest in him, and consequently the remainder is void.

CONTINGENT remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested<sup>c</sup>. Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate before any of those remainders vest (2); 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 [ 172 ] in possession, sufficient to support the remainders depending

<sup>c</sup> 1 Rep. 66. 135.

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(2) But a conveyance of a greater estate than he has by bargain and sale, or by lease and release, is no forfeiture, and will not defeat a contingent remainder. 2 *Leo.* 60. 3 *Mod.* 151.

But the tenant for life may bar the contingent remainders by a feoffment, a fine, or a recovery. 1 *Co.* 66. *Cro. Eliz.* 630. 1 *Salk.* 224.

Where there is a tenant for life, with all the subsequent remainders contingent, and he suffers a recovery to the use of himself in fee, he has a right to this tortuous fee against all persons but the heirs of the grantor or devisor. 1 *Salk.* 224.

in contingency. This method is said to have been invented by sir Orlando Bridgman, sir Geoffrey Palmer, and other eminent counsel, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life<sup>d</sup>: and when, after the restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use (3).

<sup>d</sup> See Moor. 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

(3) We have seen before, in chapter vii. that, in a grant of a fee-simple to A, it is necessary to give it to A and his heirs; of a fee-tail, to A and the heirs of his body; and that a grant to A, without any additional words, gives him only an estate for life. Hence the word *heirs* in the first case, and the words *heirs of the body* in the second, are said to be words of limitation, because they limit or describe what interest A takes by the grant, *viz.* in one case a fee-simple; in the other, a fee-tail; and the heirs in both instances take no interest any farther than as the ancestor may permit the estate to descend to them. But if a remainder is granted, or estate devised to the heirs of A, where no estate of freehold is at the same time given to A, the heir of A cannot take by descent from A; but he takes by purchase, under the grant, in the same manner as if the estate had been given to him by his proper name. Here the word heirs is called a word of purchase. Having premised the distinction between words of limitation and words of purchase, I may observe, that the rule in Shelley's case, frequently referred to, 1 Co. 104. is this, *viz.* "when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases the heirs are words of limitation, and not words of purchase:" and the remainder is said to be *executed* in the ancestor, where there is no intermediate estate; or *vested*, when an estate for life or in tail intervenes.

As if an estate be given to A for life, and after his death, to the heir of his body; this remainder is executed in A, or it unites

THUS the student will observe how much nicety is required in creating and securing a remainder; and I trust he will

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with his estate for life; and the effect is the same as if the estate had at once been given to A and the heirs of his body; which expression limits an estate tail to A, and the issue have no indefeasible interest conveyed to them, but can only take by descent from A. So also if an estate be given to A for life, with remainder to B for life or in tail, remainder to the heirs, or the heirs of the body, of A—A takes an estate for life, in this case, with a vested remainder in fee or in tail; and his heir under this grant can only take by descent at his death. *Fearne*, 21. But when the estate for life, and the remainder in tail or in fee unite and coalesce, and *heirs* is a word of limitation, the two estates must be created by the same instrument, and must be either both legal, or both trust estates. *Doug.* 490. 2 *T. R.* 444. But an appointment in pursuance of a power, when executed, is to be considered as if it had been inserted in the original deed by which the power of appointment was created. 7 *T. R.* 347. The rule with regard to the execution or coalition of such estates seems now to be the same in equitable as in legal estates. 1 *Bro.* 206. And in all these cases where a person has an estate tail, or a vested remainder in tail, he can cut off the expectations on inheritance of his issue, by a fine, or a recovery. *Doug.* 323. In order therefore to secure a certain provision for children, the method was invented of granting the estate to the father for life, and after his death, to his first and other sons in tail; for the words *son* or *daughter* were held to be words of purchase, and the remainder to them did not, like the remainder to *heirs*, unite with the prior estate of freehold. But if the son was unborn, the remainder was contingent, and might have been defeated by the alienation of the father by feoffment, fine, or recovery: to prevent this, it was necessary to interpose trustees, to whom the estate is given upon such a determination of the life-estate, and in whom it rests, till the contingent estate, if at all, comes into existence: and thus they are said to support and preserve the contingent remainders. This is called a *strict settlement*, and is the only mode (executory devises excepted) by which a certain and indefeasible provision can be secured to an unborn child. But in the case of articles or covenants before marriage, for making a settlement upon the husband and wife, and their offspring,

in some measure see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon

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if there be a limitation to the parents for life, with a remainder to the heirs of their bodies, the latter words are generally considered as words of purchase, and not of limitation: and a court of equity will decree the articles to be executed in strict settlement. See *Fearne*, 124, and examples there cited. It being the great object of such settlements to secure fortunes for the issue of the marriage, it would be useless to give the parents an estate tail, of which they would almost immediately have the absolute disposal. And therefore the courts of equity will decree the estate to be settled upon the parent or parents for life; and upon the determination of that estate by forfeiture, to trustees to support contingent remainders for their lives; and, after their decease, to the first and other sons successively in tail, with remainder to all the daughters in tail as tenants in common, with subsequent remainders or provisions, according to the occasions and intentions of the parties. But a limitation to the heirs of the body in marriage articles will not be decreed to be carried into execution by a strict settlement, where the consent and concurrence of both parents would be necessary to bar the entail. 7 *Ves. Jun.* 390. In these strict settlements, the estate is unalienable till the first son attains the age of 21, who, if his father is dead, has then, as tenant in tail, full power over the estate; or if his father is living, he then can bar his own issue by a fine, independent of the father. *Cruise*, 161. But the father, and the son at that age, can cut off all the subsequent limitations, and dispose of the estate in any manner they please, by joining in a common recovery. This is the origin of the vulgar error, that a tenant of an estate tail must have the consent of his eldest son to enable him to cut off the entail; for that is necessary where the father has only a life-estate, and his eldest son has the remainder in tail. But there is no method whatever of securing an estate to the grandchildren of a person, who is without children at the time of the settlement; for the law will not permit a perpetuity; and lord Thurlow has defined a perpetuity to be "any extension of an estate beyond a life in being, and 21 years after." 2 *Bro.* 30. See n. 4. Hence, where in a settlement the father has a power to appoint an estate to or amongst his children, he cannot afterwards give this to his children in strict settlement, or give any of his sons an estate for life, with a remainder

the particular subtleties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not however omit, that in devises by last will and testament, (which, being often drawn up when the party is *inops 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: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises*, or devises hereafter to be executed.

AN executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the deviser, but only on some future contingency. It differs from a remainder in three very material points; 1. That it needs not any particular estate to support it. 2. That by it a fee-simple, [ 173 ] 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.

1. THE first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency

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remainder in tail to his eldest son; for if he could do this, a perpetuity would be created by the original settlement. 2 *T. R.* 241.

The student who wishes to obtain a clear and comprehensive knowledge of this abstruse branch of legal learning, cannot bestow too great attention upon Mr. Fearne's treatise upon Contingent Remainders and Executory Devises, where it is learnedly and perspicuously discussed and methodized. I have thought it proper to select and to subjoin here these important distinctions, as in innumerable instances, from the ignorance of the persons employed, family settlements, particularly in wills, have proved abortive, and the intentions of parents and testators have been unhappily disappointed.

happens, does not dispose of the fee-simple, but leaves it to descend to his heirs at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage : here is in effect a contingent remainder, without any particular estate to support it ; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise <sup>e</sup>. 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* in other cases, 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 <sup>f</sup>.

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 deed, is good by way of executory devise <sup>g</sup>. 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 <sup>h</sup> : because by perpetuities, (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation <sup>i</sup>;) estates are made incapable of answering those

<sup>e</sup> 1 Sid. 153.

<sup>f</sup> Cro. Jac. 593.

<sup>g</sup> 2 Mod. 289.

<sup>h</sup> 12 Mod. 287. 1 Vern. 164.

<sup>i</sup> Salk. 229.



ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this hath been decreed to be a good executory devise<sup>k</sup>. (4)

<sup>k</sup> Fort. 232.

(4) Lord Kenyon has explained the whole doctrine of executory devises in the following words: "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said, that the estate shall not be unalienable by executory devises for a longer term than is allowed by the limitations of a common law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage, in tail; and until the person to whom the first remainder is limited is of age, the estate is unalienable. In conformity to that rule the courts have said, so far we will allow executory devises to be good. To support this position, I could refer to many decisions; but it is sufficient to refer to the duke of Norfolk's case, in which all the learning on this head was gone into; and from that time to the present, every judge has acquiesced in that decision. It is an established rule that an executory devise is good, if it must necessarily happen within a life or lives in being, and twenty-one years, and the fraction of another year, allowing for the time of gestation." — See *Long v. Blackhall*, 7 *T. R.* 100. In that case it was determined that a child *en ventre sa mere*, was to be considered as a child born, and therefore that an estate might be devised to it for life, and after it's death to it's issue in tail.

In *Doe v. Clark*, 2 *Hen. Black.* 399. a testator had devised his estate to such children as should be living at the time of his death; and the court of common pleas determined that a posthumous child came under that description. See the rights of infants *en ventre sa mere*, 1 vol. p. 130. n. 9.

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in re-

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A devise therefore to the youngest son of A, whether A is born, or *en ventre sa mere*, at the death of the testator, when that youngest son attains the age of twenty-one, will be good; but if it were limited a day after that period, it would be null and void.

The subject of executory devises has undergone much learned investigation, in determining the validity of the will of Peter Theluffon, Esq. an eminent merchant in the city of London.

That gentleman had three sons, to whom he bequeathed some inconsiderable pecuniary legacies; but which, he observed, with their own great success, would be sufficient to procure them comfort; but the rest of his immense property, consisting of lands of the annual value of 4,500*l.* and 600,000*l.* in personal property, he devised to trustees nearly to the following effect: *viz.* in trust that they should receive the rents, interest, and profits, and dispose of them for the purpose of accumulating, during the lives of his three sons, and the lives of all their sons who should be living at the time of his death, or who should be born within due time afterwards, and during the lives and life of the survivors or survivor of them; and then he directs, that, after the decease of the survivor of such persons, the accumulated fund should be divided into three shares, and that one share should be conveyed to the eldest male lineal descendant of each of his three sons; and upon the failure of such a descendant, that share to go to the descendants of the other sons; and upon failure of all such male descendants, he devised all the accumulated property to be applied to the use of the sinking fund. At the time of his death his three sons were living, they had four sons living, and two other twin sons were born soon afterwards, who of course were then *en ventre sa mere*. It was calculated that at the death of the survivor of these nine persons, the accumulated fund would probably amount to above nineteen millions sterling. And if at that time there should be only one male descendant, and he should continue a minor for ten years longer, then the whole would amount to more than thirty-two millions before any part of it could be alienated.

This extraordinary will did not originate from any dissatisfaction which the testator's family had ever occasioned, though he

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mainder to another, which could not be done by deed; for by law the first grant of it, to a man for life, was a

was resolved that none of his descendants, who were born, or were in embryo, at the time of his death, should ever enjoy any part of this property.

Lord chancellor Loughborough, lord Alvanly, then master of the rolls, and the judges, Buller and Lawrence, after hearing counsel for several days, were unanimously and clearly of opinion that the period of accumulation in this case was not more extensive than what had been established in former cases, and that it was within the prescribed limit and boundary of executory devises, as these nine lives were wearing out together, like so many candles burning at once; that this property was rendered unalienable only during one life, that of the survivor of the nine; and therefore they held themselves compelled by the force of authorities to decide in favour of the validity of this will. See the arguments accurately reported by Mr. Vesey, jun. 4 vol. p. 227.

This decision was afterwards affirmed in the House of Lords. See the unanimous opinion of the Judges and the observations of lord Eldon in 11 Ves. jun. 112.

But to prevent similar instances of vanity, illiberality, and folly in future, the 39 and 40 Geo. III. c. 98. was passed, by which the power of settling and devising property for the purpose of accumulation is restrained in general to twenty-one years after the death of the grantor or the testator. It enacts that no person shall, by any deed, will, or by any 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 the testator, or the minority of any person who shall be living, or *en ventre sa mere*, at the death of the grantor or the testator, or during the minority only of such person as would for the time being, if of full age, be entitled to the rents and produce so directed to be accumulated; and where any accumulation is directed otherwise, such direction shall be void, and the rents and profits, during the time that the property is directed to be accumulated contrary to this act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed; provided that this act shall not extend to any provision for the payment

total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years<sup>1</sup>. 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<sup>m</sup>: 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<sup>n</sup>, 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<sup>o</sup>, that though such remainders may be limited to as many persons successively as the de-  
 [ 175 ] visor thinks proper, yet they 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<sup>p</sup>. (5)

<sup>1</sup> 8 Rep. 95.<sup>o</sup> 1 Sid. 451.<sup>m</sup> Bro. tit. *chattelers*, 23. Dyer, 74.<sup>p</sup> Skinn. 341. 3 P. Wms. 258.<sup>n</sup> Dyer, 358. 8 Rep. 96.

payment of debts, or for raising portions for children, or to any direction touching the produce of woods or timber.

A direction for accumulation during a life was held to be good for 21 years after the death of the testator, 9 Vef. jun. 127.

(5) It has long been fully settled that a term for years, or any chattel interest, may be given by an executory devise to an unborn child of a person in existence, when it attains the age of twenty-one; and that the limits of executory devises of real and personal property are precisely the same. *Fearne*, 320. It is very common to bequeath chattel interests to A and his issue, and if he dies without issue, to B. It seems now to be determined, that where the words are such as would have given A an estate-tail in real property, in personal property the subsequent limitations are void, and

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

III. AN estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him<sup>9</sup>. Sir Edward Coke<sup>r</sup> 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 transferrable, when actually vested, being both estates *in praesenti*, though taking effect *in futuro*.

THE doctrine of reversions is plainly derived from the feudal constitution. For when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services; then, on his death or the failure of issue male, the feud was determined, and resulted back to

<sup>9</sup> Co. Litt. 22.

<sup>r</sup> 1 Inst. 142.

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and A has the absolute interest; but if it appears from any clause or circumstance in the will that the testator intended to give it over only in case A had no issue living at the time of his death, upon that event the subsequent limitation will be good as an executory devise. See *Fcarne*, 371. and cases referred to in 3 *Coxe's P. Wms.* 262.

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<sup>s</sup>. 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*."<sup>t</sup>

THESE *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one seized of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion<sup>u</sup>, 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<sup>v</sup>: 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 ascendible 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<sup>x</sup>.

<sup>s</sup> Co. Litt. 143.

<sup>t</sup> *Ibid.* 151, 152.

<sup>u</sup> Cro. Eliz. 321.

<sup>v</sup> 3 Lev. 407.

<sup>x</sup> 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 death, 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 it's commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

BEFORE we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate<sup>y</sup>, 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<sup>z</sup>. 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<sup>a</sup>. For estates-tail are protected and preserved from merger by

<sup>y</sup> 3 Lev. 437

<sup>a</sup> 2 Rep. 61. 8 Rep. 74.

<sup>z</sup> Plow. 418. Cro. Jac. 275. Co. Litt. 338.

[ 178 ] 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 <sup>b</sup>. 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 destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like <sup>c</sup> : 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.

<sup>b</sup> Cro. Eliz. 302.

<sup>c</sup> See page 116.



## CHAPTER THE TWELFTH.

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

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. AN

II. AN estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of [ 180 ] such grants an estate is called an estate in joint-tenancy<sup>a</sup>, 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<sup>b</sup>.

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*.

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,

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, commencing at

<sup>a</sup> Litt, 277.

<sup>b</sup> See page 137.

one and the same time, and held by one and the same undivided possession.

FIRST, they must have one and the same *interest*. One [ 181 ] 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<sup>c</sup>. 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<sup>d</sup>. 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<sup>e</sup>. 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<sup>f</sup>. Joint-tenancy cannot arise by descent or act of law; but merely by purchase or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of *time*: their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir:

<sup>a</sup> Co. Litt. 188.

<sup>b</sup> *Ibid.* § 285.

<sup>d</sup> Litt. § 277.

<sup>e</sup> *Ibid.* § 278.

and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another<sup>f</sup>. Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, [ 182 ] for 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 different times<sup>g</sup>: because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in 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*<sup>h</sup>. They have not, one of them a seisin of one half or moiety, and the other of the other 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<sup>i</sup>. 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: 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<sup>k</sup>. (1)

<sup>f</sup> Co. Litt. 132.

<sup>g</sup> Dyer, 340. 1 Rep. 101.

<sup>h</sup> Litt. § 288. 5 Rep. 10.

<sup>i</sup> *Quilibet totum tenet et nihil tenet*;

*seilicet, totum in communi, et nihil separatim per se.* Brañ. l. 5. tr. 5. c. 26.

<sup>k</sup> Litt. § 665. Co. Litt. 187. Bro.

*Abv. t. cui in vita, 8. 2 Vern. 120. 2 Lev. 39.*

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(1) And if a grant is made of a joint-estate to husband and wife, and a third person, the husband and wife shall have one moiety,

UPON these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint-reversion<sup>l</sup>. 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<sup>m</sup>. On the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them<sup>n</sup>: and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both<sup>o</sup>. In all actions also relating to their joint-estate, one joint-tenant cannot sue or be sued without joining the other<sup>p</sup>. 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 do [ 183 ] 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<sup>q</sup>. Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land<sup>r</sup>; for each has

<sup>l</sup> Co. Litt. 214.<sup>p</sup> *Ibid.* 195.<sup>m</sup> *Ibid.* 192.<sup>q</sup> *Ibid.* 185.<sup>n</sup> *Ibid.* 49.<sup>r</sup> 3 Leon. 262.<sup>o</sup> *Ibid.* 319. 364.

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moiety, and the third person the other moiety, in the same manner as if it had been granted only to two persons. So if the grant is to husband and wife and two others, the husband and wife take one third in joint-tenancy. *Litt.* § 291.

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 leafes, or to grant copyholds<sup>a</sup>: and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute Westm. 2. c. 22.<sup>b</sup> 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<sup>c</sup>, 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. (2)

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 *pur auter vie*, or are jointly possessed of any chattel-interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate<sup>d</sup>. This is the natural and regular consequence of the union and entirety of their interest. The interest of [ 184 ] 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 alien-

<sup>a</sup> 1 Leon. 234.

<sup>b</sup> 2 Inst. 403.

<sup>c</sup> Co. Litt. 200.

<sup>d</sup> Litt. § 280, 281.

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(2) This action is now perhaps never brought; but the practice is to apply to a court of equity to compel an account; which is also the jurisdiction generally resorted to in order to obtain a partition between joint-tenants, parceners, and tenants in common. *Com. Dig. Chanc.* 3 V. 6. & 4 *E. Mitf.* 109.

ation 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 antient authors <sup>x</sup> 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 <sup>y</sup>, nor any corporation <sup>z</sup>, can be a joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seized of the entirety, by benefit of survivorship; for the king and the corporation can never die. (3)

<sup>x</sup> Bracton, l. 4. tr. 3. c. 9. § 3.  
Fleta, l. 3. c. 4.

<sup>y</sup> Co. Litt. 190. Finch. L. 83.

<sup>z</sup> 2 Lev. 12.

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(3) But lord Coke says expressly, "there may be joint-tenants, though there be not equal benefit of survivorship; as if a man

3. WE are, lastly, to inquire how an estate in joint-tenancy may be severed and destroyed. And this may be done by destroying any of its constituent unities. 1. That of *time*, which respects only the original commencement of the joint-estate, 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<sup>a</sup>. 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<sup>b</sup>: 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 now by the statutes 31 Hen. VIII. c. 1.

<sup>a</sup> Co. Litt. 188. 193.

<sup>b</sup> Litt. § 290.

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“ let lands to A and B during the life of A ; if B die, A shall have all by survivorship ; but if A die, B shall have nothing.” Co. Litt. 181. The mutuality of survivorship does not therefore appear to be the reason why a corporation cannot be a joint-tenant with a private person ; for two corporations cannot be joint-tenants together ; but whenever a joint-estate is granted to them, they take as tenants in common. Co. Litt. 190. But there is no survivorship of a capital, or a stock in trade, among merchants and traders ; for this would be ruinous to the family of the deceased partner ; and it is a legal maxim, *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. Co. Litt. 182. See p. 399. *post*.

and



and 32 Hen. VIII. c. 32. joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands<sup>c</sup>. 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<sup>d</sup>; for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the subsequent, grantor,) though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure: for no testament takes [ 186 ] effect till after the death of the 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<sup>e</sup>) is already vested.<sup>f</sup> (4) 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<sup>g</sup>; 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

<sup>c</sup> Thus, by the civil law, *nemo invitus compellitur ad communionem*, (Ff. 12. 6. 26. § 4.) And again; *si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc iudicium inter eos accipi potest*. (Ff. 10. 3. 8.)

<sup>d</sup> Litt. § 292.

<sup>e</sup> *Jus accrescendi præfertur ultimæ voluntati*. Co. Litt. 185.

<sup>f</sup> Litt. § 287.

<sup>g</sup> Cro. Eliz. 470.

(4) If a will is made by a joint-tenant of real property, devising his interest in the premises, and after the execution of the will there is a partition of the estate, the testator's share cannot pass by the devise unless there is a republication of the will subsequent to the partition. 3 Burr. 1488. Amb. 617.

For a joint-tenant is not enabled to devise his estate by the statute of wills 32 Hen. VIII. c. 1. explained by 34 & 35 Hen. VIII. c. 5. as tenants in common and coparceners. But if a tenant in common devises his estate, a subsequent partition is not a revocation of the will. 3 P. Wms. 169.

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<sup>b</sup>. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure<sup>c</sup>: 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<sup>d</sup>. Yet, if one of three joint-tenants alienates his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship<sup>e</sup>: and if one of three joint-tenants release 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<sup>f</sup>; for they still preserve their original constituent unities. But when, by an act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

[ 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

<sup>a</sup> 2 Rep. 6c. Co. Litt. 182.

<sup>b</sup> Litt. § 302, 303.

<sup>c</sup> *Nilil de re accrescit ei, qui nihil in*

*re quando jus accresceret habet.* Co. Litt. 188.

<sup>d</sup> Litt. § 294.

<sup>e</sup> *Ibid.* § 304.

moiety<sup>n</sup>. 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<sup>o</sup>: 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<sup>p</sup>: for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

III. AN estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law or particular custom. By common law: as where a person 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<sup>q</sup>. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c.<sup>r</sup> And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them<sup>s</sup>.

THE *properties* of parceners are in some respects like those [ 188 ] of joint-tenants; they having the same unities of *interest*, *title*, and *possession*. They may sue and be sued jointly for matters relating to their own lands<sup>t</sup>; and the entry of one of them shall in some cases enure as the entry of them all<sup>u</sup>. 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<sup>w</sup>; for copar-

<sup>n</sup> 1 Jones, 55.

<sup>o</sup> 4 Leon. 237.

<sup>p</sup> Co. Litt. 252.

<sup>q</sup> Litt. § 241, 242.

<sup>r</sup> *Ibid.* § 265.

<sup>s</sup> Co. Litt. 163.

<sup>t</sup> *Ibid.* 164.

<sup>u</sup> *Ibid.* § 188. 245.

<sup>w</sup> 2 Inst. 403.

ceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points. 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchased lands, to hold to them and their heirs, they are not parceners, but joint-tenants<sup>x</sup>; 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 and in tail, 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 had 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<sup>y</sup>; 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<sup>z</sup>; 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 be once severed by partition, [ 189 ] 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 longer held in *coparcenary*, but in *common*<sup>a</sup>.

PARCENERS are so called, saith Littleton<sup>b</sup>, because they may be constrained to make *partition*. And he mentions many methods of making it<sup>c</sup>; four of which are by consent,

<sup>x</sup> Litt. § 254.

<sup>y</sup> Co. Litt. 164. 174.

<sup>z</sup> *Ibid.* 163, 164.

<sup>a</sup> Litt. § 309.

<sup>b</sup> § 247.

<sup>c</sup> § 243 to 264.

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 chuse some friend to make partition for them, and then the sisters shall chuse 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 chuse 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<sup>d</sup> (6). 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 chuse last; for the rule of law is, *cujus est divisio, ulterius 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 is, where one or more sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impaneled, and assign to each of the parceners her part in severalty<sup>e</sup> (7). But there are some things which are in their nature impartible.

<sup>d</sup> Co. Litt. 166. 3 Rep. 22.

held either in joint-tenancy, parcenary, or common, than was used at the common law, is chalked out and provided.

<sup>e</sup> By statute 8 & 9 W. III. c. 37. an easier method of carrying on the proceedings on a writ of partition, of lands

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(6) It has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after death. *Harg. Co. Litt.* 266. But it was expressly determined in favour of such a grantee in 1 *Vef.* 340.

(7) Another, and the most usual mode of compulsion, is by a decree of a court of equity. See page 183. n. 2. *ante*.

The

The mansion-house, common of estovers, common of piscary uncertain, or any other common without flint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance: or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson<sup>f</sup>.

THERE is yet another consideration attending the estate in coparcenary; that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor, (which we may remember was a species of estates-tail, freely given by a relation for advancement of his kinswoman in marriage<sup>g</sup>;) in this case, if lands descend from the *same* ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending<sup>h</sup>. This mode of division was known in the law of the Lombards<sup>i</sup>; which directs the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum*. With us it is denominated bringing those lands into *hotch-pot*<sup>k</sup>: which term I shall explain in the very words of Littleton<sup>l</sup>: “it seemeth that this word *hotch-pot*, is in English “a pudding; for in a pudding is not commonly put one “thing alone, but one thing with other things together.” By this housewifely metaphor our ancestors meant to inform us<sup>m</sup>, that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage: and if she did not chuse to put her lands into hotch-pot, she was presumed to be sufficiently provided

<sup>f</sup> Co. Litt. 164, 165.

<sup>g</sup> See page 115.

<sup>h</sup> Bracton, l. 2. c. 34. Litt. § 266.

<sup>50</sup> 273.

<sup>i</sup> l. 2. l. 14. c. 15.

<sup>k</sup> Britton, c. 72.

<sup>l</sup> § 267.

<sup>m</sup> Litt. § 268.

for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place then only, when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotch-pot<sup>n</sup>. And the reason is, because lands descending in fee-simple are distributed, by the policy of law, for the maintenance of all the daughters; and if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more: but lands, descending in tail, are not distributed by the operation of the law, but by the designation of the giver, *per formam doni*: it matters not therefore how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotch-pot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage-portion<sup>o</sup>. And, therefore, as gifts in frankmarriage are fallen into disuse, I should hardly have mentioned the law of hotch-pot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large.

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

IV. TENANTS in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously<sup>p</sup>. 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

<sup>n</sup> Litt. § 274.

<sup>p</sup> Litt. 292.

<sup>o</sup> *Ibid.* 275.

[ 192 ] 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.

TENANCY in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not 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 have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation<sup>a</sup> ; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life 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<sup>r</sup>. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common<sup>s</sup> ; 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<sup>t</sup> : and in this, and

<sup>a</sup> Litt. § 293.

<sup>r</sup> *Ibid.* 295.

<sup>s</sup> Litt. 309.

<sup>t</sup> *Ibid.* 283.



the like cases, their issue 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 two 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 ]

A TENANCY in common may also be created by express limitation in a deed: but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favour joint-tenancy rather than tenancy in common<sup>u</sup>; because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common<sup>w</sup>; and, if one grants to another *half* his land, the grantor and grantee are also tenants in common<sup>x</sup>: because, as has been before<sup>y</sup> observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint-interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally*, is said to be a joint-tenancy<sup>z</sup>; 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<sup>a</sup>, (for it implies no more than the law has annexed to that estate, *viz.* divisibility<sup>b</sup>;) yet in *wills* it is certainly a tenancy in common<sup>c</sup>;

<sup>u</sup> Salk. 392.

<sup>w</sup> Litt. § 298.

<sup>x</sup> *Ibid.* 299.

<sup>y</sup> See p. 182.

<sup>z</sup> Poph. 52.

<sup>a</sup> 1 Eq. Caf. Abr. 291.

<sup>b</sup> 1 P. Wms. 17.

<sup>c</sup> 3 Rep. 39. 1 Vent. 32.

because

because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. (8) 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 [ 194 ] express words of exclusion as well as description, and limit the estate to A and B, to hold *as tenants in common, and not as joint-tenants*.

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII. and William III., before mentioned<sup>d</sup>, to make partition of their lands; which they were

<sup>d</sup> pag. 185. & 189.

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(8) In antient times joint-tenancy was favoured by the courts of law, because it was more convenient to the lord, and more consistent with feudal principles; but those reasons have long ceased, and a joint-tenancy is now every where regarded, as lord Cowper says it is in equity, as an odious thing. 1 *Salk.* 158. It wills the expressions *equally to be divided, share and share alike, respectively, between, and amongst*, have been held to create a tenancy in common. 2 *Atk.* 121. 4 *Bro.* 15. 1 *Cox's P.'Wms.* 14. I should have little doubt but the same construction would now be put upon the word *severally*, which seems peculiarly to denote separation or division. But those words are only evidence of intention, and will not create a tenancy in common, where the contrary from other parts of the will appears to be the manifest intention of the testator. 3 *Bro.* 215.

The words *equally to be divided* make a tenancy in common in surrenders of copyholds, and also in deeds, which derive their operation from the statute of uses. 1 *P. Wms.* 14. 1 *Wilf.* 341. 2 *Ves.* 257. And though lord Hardwicke seems to be of opinion in 1 *Ves.* 165, 2 *Ves.* 257, that these words are not sufficient to create a tenancy in common law conveyances, yet I am inclined to think, that in such a case, nothing but invincible authority would now induce the courts to adopt that opinion, and to decide in favour of a joint-tenancy.

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 statutes 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<sup>c</sup>; though, if one actually turns the other out of possession, an action of ejectment will lie against him<sup>f</sup> (9). But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions<sup>g</sup>, unless in the case where some entire or indivisible thing is to be recovered<sup>h</sup>;) these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.

ESTATES in common can only be dissolved two ways;  
1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one seve-

<sup>c</sup> Co. Litt. 199.

<sup>f</sup> *Ibid.* 20c.

<sup>g</sup> Litt. § 311.

<sup>h</sup> Co. Litt. 197.

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(9) But adverse possession, or the uninterrupted receipt of the rents and profits, is now held to be evidence of an actual ouster. And where one tenant in common has been in undisturbed possession for twenty years, in an ejectment brought against him by the co-tenant, the jury will be directed to presume an actual ouster, and consequently to find a verdict for the defendant, the plaintiff's right to recover in ejectment after twenty years being taken away by the statute of limitations. *Cowp.* 217.

If a lessee of two tenants in common pay the whole of the rent to one after notice from the other to pay them each a moiety, the tenant in common, who gave such notice, may distrain for his share. 5 *T. R.* 246.

ralty : 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*.

## CHAPTER THE THIRTEENTH.

OF THE TITLE TO THINGS REAL,  
IN GENERAL.

THE foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein; I now come to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

A TITLE is thus defined by fir Edward Coke <sup>a</sup> — *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.

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 surprize 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

<sup>a</sup> 1 Inst. 345.

after the death of a particular tenant and before the entry of him in remainder of reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of these commentaries. But in the mean time, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in the possessor; and it may, by 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.

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 hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to divest this apparent right by mere entry or other act of his own, but only by an action at law<sup>b</sup>: for, until the contrary be proved by legal demonstration, the law will rather presume the right to

<sup>b</sup> Litt. § 385.

reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feudal law, which, after feuds became hereditary, much favoured the right of descent; in order that there might be a person always upon the spot to perform the feudal duties and services<sup>c</sup>; and therefore when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feudal court. But if he, who has the actual right of possession, puts in his claim, and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; *viz.*

III. THE mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right, jus merum*; and the estate of the owner is in such cases said to be totally divested, and *put to a right*<sup>d</sup>. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of 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:

<sup>c</sup> Gilb. Ten. 18.<sup>d</sup> Co. Litt. 345.

for the law 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 discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession*, independent of the right of *property*: for the law presumes *prima facie* that the ancestor would not disinherit, or attempt to disinherit, his heirs, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by shewing the absolute right of property to reside in another person. The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action, (that is, such wherein the right of possession only, and not that of property, is contested,) and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.

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 I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and I retain nothing



thing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years. So also if the father be tenant in tail, and alienes the estate-tail to a stranger in fee, the alienee thereby gains the *right of possession*, and the son hath only the *mere right or right of property*. And hence it will follow, that one man may have the *possession*, another the *right of possession*, and a third the *right of property*. For if tenant in tail enfeoffs A in fee-simple, and dies, and B disseises A; now B will have the *possession*, A the *right of possession*, and the issue in tail the *right of property*. A may recover the possession against B; and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property. In which union consists,

IV. A COMPLETE title to lands, tenements, and hereditaments. For it is an antient maxim of the law<sup>e</sup>, 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*<sup>f</sup>. And when to this double right the actual possession is also united, when there is, according to the expression of Fleta<sup>g</sup>, *juris et seisinæ conjunctio*, then, and then only, is the title completely legal.

<sup>e</sup> Mirr. l. 2. c. 27.

<sup>g</sup> l. 3. c. 15. § 5.

<sup>f</sup> Co. Litt. 266. Bract. l. 5. tr. 3. c. 5.

## CHAPTER THE FOURTEENTH.

## OF TITLE BY DESCENT.

THE several gradations and stages, requisite to form a complete title to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several manners in which this complete title (and therein principally the right of *propriety*) may be reciprocally lost and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or it's 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 antient 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 inter-

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.

THE methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: *descent*, where the title is vested in a man by the single operation of law; and *purchase*, where the title is vested in him by his own act or agreement<sup>a</sup> (1).

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

THE doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents 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

<sup>a</sup> Co. Litt, 18.

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(1) Purchase in law is used in contradistinction to descent, and is any other mode of acquiring real property, *viz.* by devise, and by every species of gift, or grant; and as the land taken by purchase has very different inheritable qualities from land taken by descent, the distinction is important. See page 241. *post.*

the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heirs; this is a point that we must refer back to the standing law of descents in fee-simple to be informed of.

[ 202 ] 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 decline 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 into 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 <sup>b</sup> 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 <sup>c</sup> 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 <sup>d</sup>.

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 de-

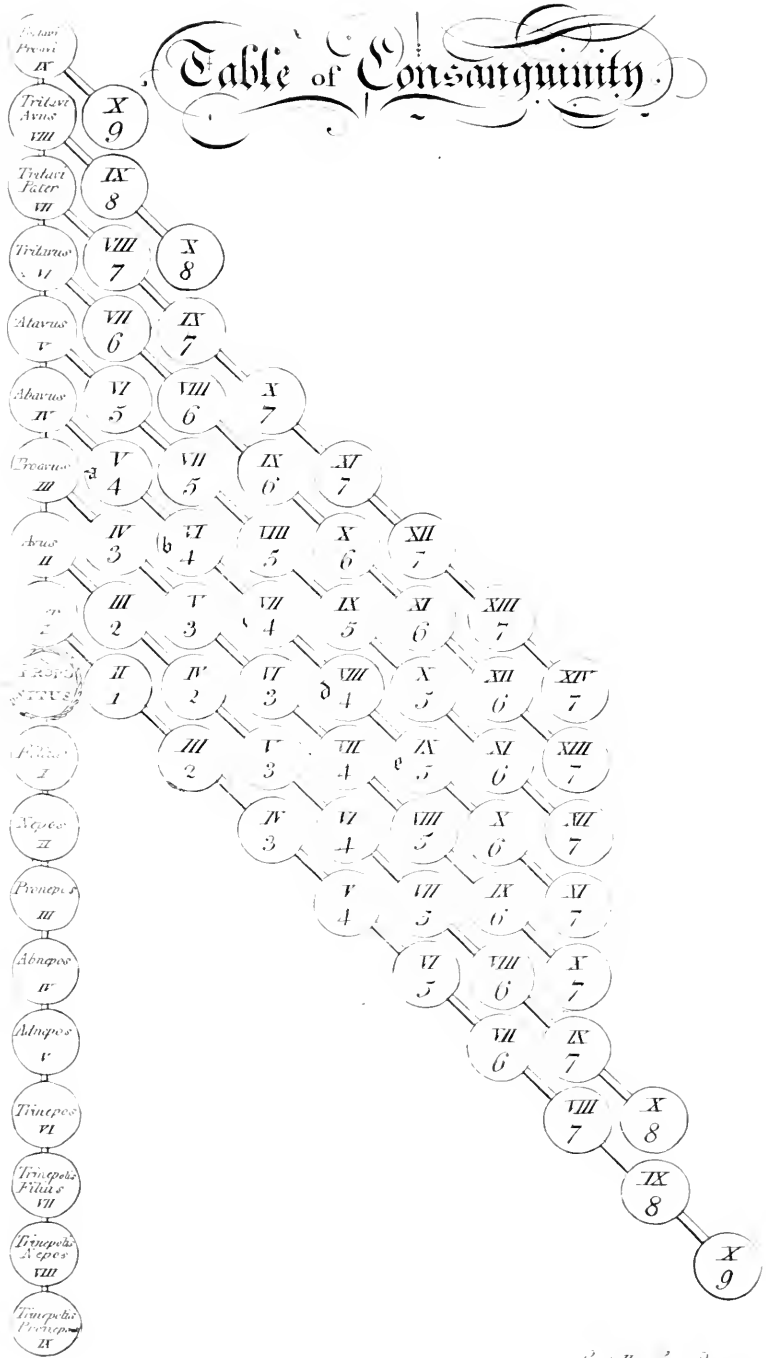
<sup>b</sup> See vol. I. pag. 74, 75. Vol. II. ces resulting from a right apprehension of it's nature, see *An essay on collateral consanguinity*. (Law tracts, Oxon, 1762. pag. 83, 85.)

<sup>c</sup> See pag. 112, &c.

<sup>d</sup> For a fuller explanation of the doctrine of consanguinity, and the consequen-



# Table of Consanguinity.



scended from the same stock or common ancestor. This confanguinity is either lineal, or collateral.

LINEAL confanguinity 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 confanguinity) 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 confanguinity, 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 grandfire and grandson in the second; his great-grandfire 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 <sup>c</sup>, and canon <sup>f</sup>, as in the common law <sup>g</sup>. [ 203 ]

THE doctrine of lineal confanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees; and so many different bloods <sup>h</sup> is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth: and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate <sup>i</sup>. This lineal confanguinity, we may ob-

<sup>c</sup> *Ff.* 38. 10. 10.

<sup>f</sup> *Decretal. l. tit. 14.*

<sup>g</sup> *Co. Litt.* 23.

<sup>h</sup> *Ibid.* 12.

<sup>i</sup> This will seem surprising to those

who are unacquainted with the increasing power of progressive numbers: but is palpably evident from the following table of a geometrical progression, in which the first term is 2, and the denominator also

serve, falls strictly within the definition of *vinculum personarum ab eodem stipite descendantium*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

COLLATERAL kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend 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, who have

also 2; or, to speak more intelligibly, it is evident, for that each of us has two ancestors in the first degree: the number of whom is doubled at every remove, because each of our ancestors has also two immediate ancestors of his own.

<i>Lineal Degrees.</i>	<i>Number of Ancestors.</i>
1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072
18	262144
19	524288
20	1048576

A shorter method of finding the number of ancestors at any even degree is by squaring the number of ancestors at half that number of degrees. Thus 16 (the number of ancestors at four degrees) is the square of 4, the number of ancestors at two; 256 is the square of 16; 65536 of 256; and the number of ancestors at 40 degrees would be the square of 1048576, or upwards of a million millions,

each



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*.

WE must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related ; why ? because both are derived from one father : *Titius* and his first cousin are related ; why ? because both descend from the same grandfather ; and his second cousin's claim to consanguinity is this, that they are both derived from one and the same great grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. For indeed, if we only suppose each couple of our ancestors to have left, one with another, two children ; and each of those children on an average to have left two more ; (and, without such a supposition, the human species must be daily diminishing) (2) we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth

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(2) To keep population without increase or diminution, each child must not produce two, but only one upon an average, that is, every one must leave another to supply his or her place : it is true then that every two must leave two ; but every married couple must, upon an average, produce considerably more than two ; or they must leave two to supply their own places, and also others to supply the great number of those who die without contributing to the stock of population. But if we suppose the number of the sexes equal ; it is then true that each individual male, and individual female, must produce two upon an average ; or we can say, that every woman that is born must, upon an average, bear two children ; and consequently every married woman considerably more.

degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more<sup>k</sup>. And if this calculation should

<sup>k</sup> This will swell more considerably than the former calculation; for here, though the first term is but 1, the denominator is 4; that is, there is one kinsman (a brother) in the first degree, who makes, together with the *propofitus*, the two descendants from the first couple of ancestors; and in every other degree the number of kindred must be the *quadruple* of those in the degree which immediately precedes it. For, since each

couple of ancestors has two descendants, who increase in a duplicate *ratio*, it will follow that the *ratio*, in which all the descendants increase downwards, must be double to that in which the ancestors increase upwards; but we have seen that the ancestors increase upwards in a duplicate *ratio*: therefore the descendants must increase downwards in a double duplicate, that is, in a quadruple *ratio* (3).

*Collateral*

(3) The learned Judge's reasoning is just and correct; and that the collateral relations are quadrupled in each generation may be thus demonstrated:—As we are supposed, upon an average, to have one brother or sister, the two children by the father's brother or sister will make two cousins, and the mother's brother or sister will produce two more, in all, four. For the same reason, my father and mother must each have had four cousins, and their children are my second cousins; so I have eight second cousins by my father, and eight by my mother; together sixteen. And thus again, I shall have 32 third cousins on my father's side, and 32 on my mother's, in all, 64. Hence it follows that each preceding number in the series must be multiplied by twice two or four.

This immense increase of the numbers depends upon the supposition that no one marries a relation; but to avoid such a connexion it will very soon be necessary to leave the kingdom. How these two tables of consanguinity may be reduced by the intermarriage of relations, will appear from the following simple case: If two men and two women were put upon an uninhabited island, and became two married couple, if they had only two children each, a male and female, who respectively intermarried, and in like manner produced two children, who are thus continued *ad infinitum*; it is clear, that there would never be more than four persons in each generation; and if the parents lived to see their

great-

appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

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

This calculation may also be formed by a more compendious process, *viz.* by squaring the couples, or half the number of ancestors, at any given degree; which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; it's half, or the couples, amount to 512; the number of kindred in the

tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several families within our own knowledge, and observe how far they agree with this account; that is, whether on an average every man has not one brother or sister, four first cousins, sixteen second cousins, and so on; we shall find that the present calculation is very far from being overcharged.

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great-grandchildren, the whole number would never be more than sixteen; and thus the families might be perpetuated without any incestuous connexion.

THE method of computing these degrees in the canon law<sup>l</sup>, which our law has adopted.<sup>m</sup>, is as follows: We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus [ 207 ] *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, and the class marked (e) 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 (a) is one degree; to John earl of Somersset (b), two; to John duke of Somersset (c), three; to Margaret countess of Richmond (d), four; to king Henry the seventh (e), five. Which last-mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though, according to the computation of the civilians, (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other: reckoning a degree for each person both ascending and descending,) these two princes were related in the ninth degree, for from king Richard the third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York,

<sup>l</sup> *Decretal.* 4. 14. 3 & 9.

<sup>m</sup> *Co. Litt.* 23.

three;

three; to king Edward the third, the common ancestor, four; to John of Gant, five; to John earl of Somersfet, six; to John duke of Somersfet, seven; to Margaret countess of Richmond, eight; to king Henry the seventh, nine<sup>a</sup> (4).

THE nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules or canons of inheritance, according to which, estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are [ 208 ]

<sup>a</sup> See the table of consanguinity civilians and the seventh of the canonists inclusive; the former being collateral kindred to the *propositis* are distinguished by the numeral letters, computed so far as the tenth of the latter by the common cyphers.

(4) The difference of the computation by the civil and canon laws may be expressed shortly thus: the civilians take the sum of the degrees in both lines to the common ancestor; the canonists take only the number of degrees in the longest line. Hence when the canon law prohibits all marriages between persons related to each other within the seventh degree, this would restrain all marriages within the 14th degree of the civil law. In the 1st vol. 435. n. 2. it is observed that all marriages are prohibited between persons who are related to each other within the third degree, according to the computation of the civil law. This affords a solution to the vulgar paradox, that first cousins may marry and second cousins cannot. For first cousins and all cousins may marry by the civil law; and neither first nor second cousins can marry by the canon law. But all the prohibitions of the canon law might have been dispensed with. It is said, that the canon law computation has been adopted by the law of England; yet I do not know a single instance in which we have occasion to refer to it. But the civil law computation is of great importance in ascertaining who are entitled to the administration, and to the distributive shares, of intestate personal property. See *post*, 504. 515.

founded, and in some cases their agreement with the laws of other nations.

I. THE first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seized *in infinitum*; but shall never lineally ascend.

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est haeres viventis*. 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 divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous son<sup>o</sup> (5).

<sup>o</sup> *Ero. tit. descent, 58.*

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(5) But besides the case of a posthumous child, if lands are given to a son, who dies, leaving a sister his heir; if the parents have, at any distance of time afterwards, another son, this son shall divest the descent upon the sister, and take the estate as heir  
to

WE must also remember, that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath 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 receiving rent from a lessee of a freehold<sup>p</sup>: or unless he hath 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<sup>q</sup>, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised. And therefore all the cases which will be mentioned in the present chapter, are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. Which notoriety had succeeded in the place of the ancient feudal investiture, whereby, while feuds were precarious, the vassal on the descent of lands was formerly admitted in the lord's court (as is still the practice in Scotland), and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers; till at length, when the right of succession became indefeasible, an entry on any part of the lands within the

<sup>p</sup> Co. Litt. 15.

<sup>q</sup> Co. Litt. 11.

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to his brother. *Co. Litt.* 11. *Doct. & Stud.* 1 *Dial. c.* 7. So the same estate may be frequently devested by the subsequent birth of nearer presumptive heirs, before it fixes upon the nearest presumptive heir. As if an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it, by an after-born uncle, on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother.

It seems to be determined, that every one has a right to retain the rents and profits which accrued whilst he was thus legally possessed of the inheritance. *Harg. Co. Litt.* 11. 2 *Wilf.* 526.

county (which if disputed was afterwards to be tried by those peers), or other notorious possession, was admitted as equivalent to the formal grant of feifin, and made the tenant capable of transmitting his estate by descent. The feifin therefore of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived : which is very briefly expressed in this maxim, *seifina facit stipitem* † (6).

[ 210 ] WHEN therefore a person dies so feifed, the inheritance first goes to his issue : as 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 the land shall never ascend, but shall rather escheat to the lord ‡.

THIS rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations ; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow, and raised up seed to his brother †. And by the laws of Rome, in the first place, the children or

† Flet. l. 6. c. 2. § 2.

‡ Seld. de success. Ebraeor. c. 12.

§ Litt. § 3.

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(6) See examples of this, page 228. note, *post*.



lineal descendants were preferred; and on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters<sup>v</sup>; though by the law of the twelve tables the mother was originally, on account of her sex, excluded<sup>u</sup>. Hence this rule of our laws has been censured and declaimed against as absurd, and derogating from the maxims of equity and natural justice<sup>w</sup>. Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good legal reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws.

WE are to reflect, in the first place, that all rules of suc- [ 211 ]  
cession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no further than the life of the present possessor: after which the land by the law of nature would again become common, and liable to be seized by the next occupant; but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures. For it was an express rule of the feudal law<sup>x</sup>, that *successionis feudi talis*

<sup>v</sup> *Ff.* 38. 15. 1. *Nov.* 118. 127.

<sup>u</sup> *Inst.* 3. 3. 1.

<sup>w</sup> *Craig. de jur. feud. l. 2. t. 13.*

§ 15. *Locke on gov. part 1. § 90.*

<sup>x</sup> 2 *Feud.* 50.

*est natura, quod ascendentes non succedunt*; and therefore the same maxim obtains also in the French law to this day<sup>y</sup>. Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line<sup>z</sup>: but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the second, we find it laid down as established law<sup>a</sup>, that *haereditas nunquam ascendit*; which has remained an invariable maxim ever since. These circumstances evidently shew this rule to be of feudal original; and taken in that light, there are some [ 212 ] arguments in its favour, besides those which are drawn merely from the reason of the thing. For if the feud of which the son died seised, was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feudal constitutions<sup>b</sup>; which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandfire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, or with all the qualities annexed to a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an antient feud; and therefore could not go to the father, because, if it had been an antient feud, the father must have been dead before it could have come to the son.

<sup>y</sup> Domat. p. 2. l. 2. s. 2. Montesq. *Ess. L. l. 3. c. 33.*

<sup>z</sup> LL. Hen. I. c. 70.

<sup>a</sup> l. 7. c. 1.

<sup>b</sup> 1 Feud. 20.

Thus whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton<sup>c</sup>, adopted by sir Edward Coke<sup>d</sup>, which regulates the descent of lands according to the laws of gravitation (7).

<sup>c</sup> *Descendit itaque jus, quasi ponderosum quod cadens deorsum recta linea, et nunquam reascendit. l. 2. c. 29.*

<sup>d</sup> 1 Inst. 11.

(7) However ingenious and satisfactory these reasons may appear, there is little consistency in the application of them; for if the father does not succeed to the estate, because it must be presumed that it has passed him in the course of descent, the same reason would prevent an elder brother from taking an estate by descent from the younger. And if it does not pass to the father, lest the lord should have been attended by an aged decrepit feudatory, the same principle would be still stronger to exclude the father's eldest brother from the inheritance, who is now permitted to succeed to his nephew.

The father was probably excluded from the immediate inheritance to his children upon the same principle that the heir of an infant cannot be his socage guardian.

See 462. n. 2. *post*. It might be thought dangerous to make parents the heirs to their own children, or to give them an interest in the death or the destruction of those, whom it was their duty to protect and preserve.

The father may take his son's estate by an intermediate descent; for if the son has neither issue, nor brothers or sisters, the estate will descend to an uncle, or some collateral relation, to whom the father may be the next heir. But in some cases the father or mother may inherit immediately from a child. And this may happen when either the husband or wife is heir to the other. As if the husband is heir to the wife, and she dies seised of an estate, which descends to an only child, if that child dies without issue, the father will take the estate by an immediate descent, agreeably to the maxim *que doit inheriter al pere, doit inheriter al fitz*; yet in this case he does not inherit as father, but as a collateral kinsman. See such a case, 2 *P. Wms.* 613. The student

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

[ 213 ] THUS sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred<sup>e</sup>. 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.

THIS preference of males to females is entirely agreeable to the law of succession among the Jews<sup>f</sup>, and also among the states of Greece, or at least among the Athenians<sup>g</sup>; but was totally unknown to the laws of Rome<sup>h</sup> (such of them I mean as are at present extant), wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the Roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex: but shall only observe, that our present preference of males to females seems to have arisen entirely from the feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males<sup>i</sup>, yet our Danish predecessors (who succeeded them) seem to have made no distinction of sexes, but to have admitted all the children at once

<sup>e</sup> Hal. H. C. L. 235.

<sup>h</sup> *Infl.* 3. 1. 6.

<sup>f</sup> Numb. c. 27.

<sup>i</sup> *Stat. Wall.* 12 Edw. I.

<sup>g</sup> *Petit. LL. Attic.* 1. 6. 1. 6.

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must be careful to recollect that the rules of succession to intestate personal property are very different from these rules of descent of real property and hereditaments. For if a child dies intestate without wife or issue, his father will take the whole of his personal property; and if there be no father living, the mother will have an equal share with the brothers and sisters. See page 516. *post.*

to the inheritance <sup>k</sup>. But the feudal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident preference of the male to the female sex. “*Pater aut mater defuncti, filio non filiae haereditatem relinquunt. . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis haereditas pertineat*<sup>1</sup>.” It is possible therefore that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest; especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king Henry the first, it is not (like many Norman innovations) given up, but rather enforced <sup>m</sup>. The true reason of preferring the males must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud <sup>n</sup>, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for though daughters are excluded by sons, yet they succeed before any collateral relations; our law, like that of the Saxon feudists before mentioned, thus steering a middle course, between the absolute rejection of females, and the putting them on a footing with males. [ 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 all together.

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

<sup>k</sup> *LL. Canut. c. 68.*

<sup>1</sup> *tit. 7. § 1 & 4.*

<sup>m</sup> *c. 70.*

<sup>n</sup> *§ Feud. 8.*

Margaret and Charlotte shall both inherit the estate as coparceners<sup>o</sup>.

[ 215 ] THIS right of primogeniture in males seems antiently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance<sup>p</sup>; in the same manner as with us, by the laws of king Henry the first<sup>q</sup>, the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary<sup>r</sup>. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible<sup>s</sup>, or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments<sup>t</sup>. These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feudal constitution was established in England by William the conqueror.

<sup>o</sup> Litt. § 5. Hale, H. C. L. 238.

<sup>p</sup> Selden, *de succ. Ebr. c. 5.*

<sup>q</sup> c. 70.

<sup>r</sup> Glanvil. l. 7. c. 3.

<sup>s</sup> 2 Feud. 55.

<sup>t</sup> Hale, H. C. L. 221.

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

[ 216 ]

As to the females, they are still left as they were by the antient law: for they were all equally incapable of performing any personal service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown <sup>z</sup>; wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of 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 suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honour, may

<sup>u</sup> l. 7. c. 3.<sup>w</sup> c. 1. § 3.<sup>x</sup> l. 2. c. 30, 31.<sup>y</sup> Somner. Gavelk. 7.<sup>z</sup> Co. Litt. 165.

confer it on which of them he pleases<sup>a</sup> (8). In which disposition is preserved a strong trace of the antient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper—"pro-gressum est ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare<sup>b</sup>."

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

THUS the child, grandchild, or great grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*<sup>c</sup>. And these representatives shall

<sup>a</sup> Co. Litt. 165.

<sup>b</sup> 1 Feud. 1.

<sup>c</sup> Hale. H. C. L. 236, 237.

(8) The king, in the case of coparceners of a title of honour, may direct which one of them and her issue shall bear it; and if the issue of that one become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining. But upon the failure of the issue of all, except one, the descendant of that one being the sole heir, will have a right to claim, and to assume the dignity.

There are instances of a title, on account of a descent to females, being dormant, or in abeyance, for many centuries. *Harg. Co. Litt.* 165.

Lord Coke says, there is a difference in an office of honour, which shall be executed by the husband or deputy of the eldest. *Ib.* Yet when the office of great chamberlain had descended to two sisters co-heiresses of the duke of Ancafter, one of whom was married to Peter Burrell, esq.; the judges gave it as their opinion in the house of lords, "that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy, to be approved of by them; such deputy not being of a degree inferior to a knight, and to be approved of by the king." *Ib. et Journ. Dom. Proc.* May 25, 1781.



take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one apiece.

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

<sup>d</sup> Selden, *de succ.*, *Elr.* c. 1.

<sup>e</sup> *Nov.* 110. c. 3. *Instit.* 3. l. 6.

bute it *per stirpes*, thus; one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

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 first-born among the males, to both which the Roman law is a stranger. For if all the children of three sisters were in England to claim *per capita*, in their own 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 first-born, 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. And if a man hath two sons, A and B, and A dies [ 219 ] leaving two sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estate: and if A had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B and his issue. But if a man 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

the two daughters of D to another third in partnership; and the son of E to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum*.

YET this right does not appear to have been thoroughly established in the time of Henry the second, when Glanvil wrote: and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of their common ancestor: for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief; and besides had frequently superior interest and strength to back his pretensions, and crush the right of his nephew. And even to this day, in the lower Saxony, proximity of blood takes place of representative primogeniture; that is, the younger surviving brother is admitted to the inheritance before the son of an elder deceased: which occasioned the disputes between the two houses of Mecklenburg Schwerin and Strelitz, in 1692<sup>f</sup>. Yet Glanvil, with us, even in the twelfth century, seems<sup>g</sup> to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, or (as the civil law would call it) had not been foris-familiated, in his lifetime. King John, however, who kept his nephew Arthur [ 220 ] from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm<sup>h</sup>; but in the time of his son, king Henry the third, we find the rule indisputably settled in the manner we have here laid it down<sup>i</sup>, and so it has continued ever since. And thus much for lineal descents.

<sup>f</sup> Mod. Un. Hist. xlii. § 34.

<sup>g</sup> l. 7. c. 3.

<sup>h</sup> Hale, H. C. L. 217. 229.

<sup>i</sup> Bracton, l. 2. c. 30. § 2.

V. A FIFTH rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

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<sup>k</sup> (9). The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

THIS is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seised of the

<sup>k</sup> Co. Litt. 12.

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(9) To be of the blood of Geoffrey, is either to be immediately descended from him, or to be descended from the same couple of common ancestors. Two persons are *consanguinei*, or are of the blood (that is, whole blood) of each other, who are descended from the same two ancestors.

The heir and ancestor must not only have two common ancestors with the original purchaser of the estate, but must have two common ancestors with each other; and therefore if the son purchases lands and dies without issue, and it descends to any heir on the part of the father, if the line of the father should afterwards become extinct, it cannot pass to the line of the mother. *Hale's Hist. C. L.* 246. 49 *E.* III. 12. And for the same reason, if it should descend to the line of any female, it can never afterwards, upon failure of that line, be transmitted to the line of any other female, for according to the next rule, *viz.* the sixth, the heir of the person last seised must be a collateral kinsman of the whole blood.

estate

estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy<sup>1</sup> agrees with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feodal original; and this rule or canon cannot otherwise be accounted for than by recurring to feodal principles.

WHEN feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule; “*frater* “ *fratri, sine legitimo haerede defuncto, in beneficio quod eorum* “ *patris fuit succedat: sin autem unus e fratribus a domino feu-* “ *dum acceperit, eo defuncto sine legitimo haerede, frater ejus in* “ *feudum non succedit*”<sup>m</sup>. The true feodal reason for which rule was this; that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled,) so in the feodal donation, “*nomen haeredis, in prima investitura expressum,* “ *tantum ad descendentes ex corpore primi vassalli extenditur;* “ *et non ad collaterales, nisi ex corpore primi vassalli sive stipitis* “ *descendant*”<sup>n</sup>; the will of the donor, or original lord, (when feuds were turned from life-estates into inheritances,) not being to make them absolutely hereditary, like the Ro-

<sup>1</sup> *Gr. Constum. c. 25.*

<sup>n</sup> *Craig. l. 1. t. 9. § 36.*

<sup>m</sup> *1 Feud. l. § 2.*

man *allodium*, but hereditary only *sub modo* : not hereditary to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

HOWEVER, in process of time, when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum* ; that is, with all the qualities annexed of a feud derived from his ancestors, and then the collateral relations were admitted to succeed even *in infinitum*, because they might [ 222 ] have been of the blood of, that is, descended from, the first imaginary purchaser. For since it is not ascertained in such general grants, whether this feud shall be held *ut feudum paternum* or *feudum avitum*, but *ut feudum antiquum* merely ; as a feud of indefinite antiquity : that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended ; the law will not ascertain it, but will suppose *any* of his ancestors, *pro re nata*, to have been the first purchaser : and therefore it admits *any* of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

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

YET,

YET, when an estate hath really descended in a course of inheritance to the person last seized, the strict rule of the feodal law is still observed; and none are admitted but the heirs of those through whom the inheritance hath passed: for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to John Stiles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and *vice versa*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto, for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles; the relations of his father's mother, Cecilia Kempe, [ 223 ] shall for the same reason never be admitted, but only those of his father's father (10). This is also the rule of the French law<sup>o</sup>, which is derived from the same feodal fountain.

HERE we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited it from his father Walter Stiles, or his mother Christian Smith,

<sup>o</sup> Domat. *part 2. pr.*

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(10) Hence the expression *heir at law* must always be used with a reference to a specific estate; for if an only child has taken by descent an estate from his father, and another from his mother, upon his death without issue, these estates will descend to two different persons: so also, if his two grandfathers and two grandmothers had each an estate, which descended to his father and mother, whom I suppose also to be only children, then, as before, these four estates will descend to four different heirs.

or if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate; because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

THIS then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall revert 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<sup>p</sup>, Fitzherbert<sup>q</sup>, Brook<sup>r</sup>, and Hale<sup>s</sup>, “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.

THE rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was; which *in feudis vere antiquis* has in process of time been forgotten, and is supposed so to be in feuds that are held *ut antiquis*.

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

<sup>p</sup> *M. 12 Edw. IV. 14.*

<sup>q</sup> *Abr. t. descent. 2.*

<sup>r</sup> *Abr. t. descent. 38.*

<sup>s</sup> *H. C. L. 243.*



FIRST, he must be his next collateral kinsman, either personally or *jure representationis* (11); which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity, principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great-nephew but also his first-cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the great-nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second; the former being distant three degrees from the common ancestor (the father of the *propositus*), and therefore deriving only one-fourth of his blood from the same fountain; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor (the grandfather of each), and therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect

(11) This is only true in the paternal line; for when the paternal and maternal lines are both admitted to the inheritance, the most remote collateral kinsman *ex parte paternâ* will inherit before the nearest *ex parte maternâ*. See p. 236. *post*.

[ 225 ] to descents; and having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts it's degrees in the same manner. Indeed the designation of person, in seeking for the next of kin, will come to exactly the same end (though the degrees will be differently numbered), whichever method of computation we suppose the law of England to use; since the right of representation, of the parent by the issue, is allowed to prevail *in infinitum* (12). This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants therefore of John Stiles's brother are all of them in the first degree of kindred with respect 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 se-

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(12) The Editor conceives that the true and only way of ascertaining an heir at law in any line or branch is by the representation of brothers or sisters in each generation, and that the introduction of the computation of kindred, either by the canon or civil law, into a treatise upon descents, may perplex, and can never assist; for if we refer this sixth rule either to the civil or canon law, it will in many instances be erroneous. It is certain that a great-grandson of the father's brother will inherit before a son of the grandfather's brother; yet the latter is the *next collateral kinsman* according to both the canon and civil law computation; for the former is in the fourth degree by the canon and the sixth by the civil law; the latter is in the third by the canon and the fifth by the civil; but in the descent of real property the former must be preferred.

verally

verally called to the succession in right of such their representative proximity.

THE right of representation being thus established, the former part of the present rule amounts to this; that, on failure of issue of the person last seized, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, 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*. Very similar to which was the law of inheritance among the antient Germans, our progenitors: "*haeredes successoresque, sui cuique liberi, et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patru, avunculi*."

Now here it must be observed, that the lineal ancestors, [ 226 ] though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely corresponds with ours<sup>u</sup>, the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed, not in their own rights, as brethren, uncles, &c., but in right of representation, as the offspring of the father, grandfather, &c. of the deceased<sup>w</sup>. But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to name him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent; and therefore title may be made

<sup>u</sup> Tacitus *de mor. Germ.* 21.

<sup>w</sup> Selden, *de juer. Ebr.* c. 12.

<sup>x</sup> Numb. c. 27.

by one brother or his representatives *to* or *through* another without mentioning their common father\*. If Geoffrey Stiles hath two fons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey; and so the fon of Francis may claim as coufin and heir to Matthew the fon of John, without naming the grandfather; *viz.* as fon of Francis, who was the brother of John, who was the father of Matthew. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of John Stiles, it is 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; and in such derivation the same rules must be observed, with regard to the sex, primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor.

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

\* Sid. 196. 1 Vent. 423. 1 Lev. 60. 12 Mod. 619.

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 had. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, 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 shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue; still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised: but it shall 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 haeredum*. Yet, had A died without entry, then B might have inherited; not as heir to A his half-brother, [ 228 ] but as heir to their common father, who was the person last actually seised<sup>y</sup> (13).

<sup>y</sup> Hale, H. C. L. 238.

(13) The meaning of the maxim is, that the possession of a brother will make a sister of the whole blood his heir in preference to a brother of the half-blood.

THIS total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence: an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to shew that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible; then the law substituted what Sir Martin Wright<sup>2</sup> calls a *reasonable*, in the stead of an *impossible*, proof; for it remits the proof of an actual descent from the first purchaser; and only requires in lieu of it, that the claimant be next of the whole blood to the person last in possession, (or derived from the same couple of

<sup>2</sup> Tenures, 186

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Of some inheritances there cannot be a feisin, or a *possessio fratris*; as if the eldest brother dies before a presentation to an advowson, it will descend to the half-brother as heir to the person last seised, and not to the sister of the whole blood. <sup>1</sup> *Burn Ec.* 11. So of reversions, remainders, and executory devises, there can be no feisin or *possessio fratris*; and if they are reserved or granted to A and his heirs, he who is heir to A when they come into possession, is entitled to them by descent; that is, that person who would have been heir to A, if A had lived so long, and had then died actually seised. <sup>2</sup> *Wood.* 256. *Fearne*, 448. <sup>2</sup> *Wilf.* 29.

ancestors);

ancestors); which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser. For he who is my kinsman of the whole blood, can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are *vice versa* his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestors above the common stock the same as mine; and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchaser.

To illustrate this by example. Let there be John Stiles, [ 229 ] and Francis, brothers, by the same father and mother, and another son of the same mother by Lewis Gay, a second husband. Now, if John dies seized of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchaser, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchaser, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely *not to be* descended from the line of the first purchaser, as *to be* descended; and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

AND, as this is the case in *feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten; it is also the case in *feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they

they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchaser (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchaser, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law: since it is only upon a like supposition and fiction, that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all; for we have seen that *in feudis strictè novis* neither [ 230 ] brethren nor any other collaterals were admitted. As therefore in *feudis antiquis* we have seen the reasonableness of excluding the half blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

PERHAPS by this time the exclusion of the half blood does not appear altogether so unreasonable as at first sight it is apt to do. It is certainly a very fine-spun and subtle nicety; but considering the principles upon which our law is founded, it is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals; and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchaser, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though all the  
ancestors



ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood; yet, unless that common stock be in the first degree, (that is, unless they have the same father and mother,) there will be intermediate ancestors, below the common stock, that belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher, (that is, the grandfather and grandmother,) one half of John's ancestors will not be the ancestors of his uncle: his *patruus*, or father's brother, derives not his descent from John's maternal ancestors: nor his *avunculus*, or mother's brother, from those in the paternal line. Here then the supply of proof is deficient, and by no means amounts to a certainty: [ 231 ] and the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than the whole blood in the same degree. As, in the first degree, the whole brother of John Stiles is sure to be descended from that unknown ancestor; his half brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three-fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great-uncle of the whole blood, but they are seven to one against his great-uncle of the half blood, for seven-eighths of John's ancestors have no connexion in blood with him. Therefore the much less probability of the half blood's descent from the first purchaser, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half blood in all.

BUT,

BUT, while I thus illustrate the reason of excluding the half blood in general, I must be impartial enough to own, that, in some instances, the practice is carried farther than the principle upon which it goes will warrant. Particularly when a kinsman of the whole blood in a remoter degree, as the uncle or great-uncle, is preferred to one of the half blood in a nearer degree, as the brother; for the half brother hath the same chance of being descended from the purchasing ancestor as the uncle; and a thrice (14) better chance than the great-uncle or kinsman in the third degree. It is also more especially overstrained, when a man has two sons by different venters, and the estate on his death descends from him to the eldest, who enters and dies without issue; in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor<sup>a</sup>. This, it must be owned, carries a hardship with it, even upon feodal [ 232 ] principles: for the rule was introduced only to supply the proof of a descent from the first purchaser; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half brother must be of the blood of the first purchaser, who was either the father or some of the father's ancestors. When, therefore, there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance

<sup>a</sup> A still harder case than this happened, and that the youngest daughter should retain only her original fourth part of their common father's lands. (10 *Aff.* 27.) And yet it was clear law in *M. 19 Edw. II.* that where lands had descended to two sisters of the half-blood, as coparceners, each might be heir of those lands to the other. *Mayn. Edw. II. 628. Fitzh. abr. tit. quare impedit. 177.*

(14) This ought to be twice; for the half-brother has one chance in two, the great-uncle one in four; the chance of the half-brother is therefore twice better than that of the great-uncle.

can be evidently traced back, there seems no need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother, indeed, been a purchaser, there would have been no hardship at all, for the reasons already given: or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

INDEED it is this very instance, of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *a patre*, that Craig<sup>b</sup> has singled out on which to ground his strictures on the English law of half blood. And, really, it should seem as if originally the custom of excluding the half blood in Normandy<sup>c</sup> extended only to exclude a *frater uterinus*, when the inheritance descended *a patre*, and *vice versa*, and possibly in England also; as even with us it remained a doubt, in the time of Bracton<sup>d</sup>, and of Fleta<sup>e</sup>, whether the half blood on the father's side was excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly-purchased lands. So also the rule of law, as laid down by our Fortescue<sup>f</sup>, extends no farther than this: *frater fratri uterino* [ 233 ] *non succedet in hereditate paterna*. It is moreover worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign<sup>g</sup>, so that it be the blood of the first monarch purchaser, or (in the feudal language) conqueror of the reigning family. Thus it actually did descend from king Edward the sixth to queen Mary, and from her to queen Elizabeth, who were respectively of the half blood to each other. For the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to

<sup>b</sup> l. 2. t. 15. § 14.

<sup>c</sup> *Gr. Consuetum.* c. 25.

<sup>d</sup> l. 2. c. 30. § 3.

<sup>e</sup> l. 6. c. 1. § 14.

<sup>f</sup> *de laud. LL. Angl.* 5.

<sup>g</sup> Plowd. 245. Co. Litt. 15.

render probable the descent from the royal stock, which was formerly king William the Norman, and is now (by act of parliament<sup>b</sup>) the princess Sophia of Hanover. Hence also it is that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent<sup>i</sup>: because, when the lineage is clearly made out, there is no need of this auxiliary proof (15). How far it might be desirable for the legislature to give relief, by amending the law of descents in one or two instances, and ordaining that the half blood might always inherit, where the estate notoriously descended from its own proper ancestor, and in cases of new-purchased lands, or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience should be still submitted to, rather than a long-established rule should be shaken, it is not for me to determine (16).

<sup>b</sup> 12 Will. III. c. 2.

Litt. § 14, 15.

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(15) And also in titles of honour half-blood is no impediment to the descent: but a title can only be transmitted to those who are descended from the first person ennobled. *Co. Litt.* 15. Half-blood is also no obstruction in the succession to personal property. Page 505. *post*.

(16) The learned Judge has exerted great ability and ingenuity in apologising for the exclusion of the half-blood. But whatever learning or eloquence may be displayed in its favour, I conceive nothing more in effect can be said for it than this, *viz.* that if the half-blood were universally admitted to inherit, an estate might pass out of one family into another, between whom there was no union of blood. As where a son inherits an estate from his father, and his mother marries again, and has a child by her second husband; if this child could inherit from its half-brother, it would acquire the estate of the first husband, to whom it is not related by blood; and, in order to avoid this inconvenience, the half-blood is universally excluded. But surely nothing can be more cruel or contrary to our notions of propriety and consistency, than to give the estate to a distant relation, or to the lord, in preference to a half-brother, either when it has descended from the common parent, or when the half-brother has himself acquired it.

A case

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.

BUT here another difficulty arises. In the second, third, [ 234 ] fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances

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A case was determined in the common pleas, a few years ago, under the following circumstances: A father died intestate, leaving two daughters by his first wife, and his second wife pregnant, who was delivered of a son; this infant lived only a few weeks; and it was held, that as the mother had resided upon one of the father's estates, and had received rent for others after the father's death, she being the guardian in socage of the infant, this amounted to a legal seisin in him, and of consequence his two sisters could not inherit, but the estate descended perhaps to a remote relation. 3 *Wilf.* 516. And in a late case, where a father died leaving two daughters by different mothers, the mother of the youngest entered upon the premises, and the eldest daughter died; it was held that, the mother being guardian in socage to the youngest, and having a right to enter for her own daughter, the entry of the mother was also an entry for the coparcener the half sister, which created a seisin in her, and therefore, upon her death, her moiety descended to some of her relations of the whole blood. And lord Kenyon held generally that an infant may consider whoever enters on his estate as entering for his use. And he referred to the distinction laid down by lord Coke (*Co. Litt.* 15 a.), *viz.* that if the father die, his estate being out on a freehold lease, that is not such a possession as to induce a *possessio fratris*, unless the elder son live to receive rent after the expiration of the lease, but if the father die leaving his estate out on a lease for years, the possession of the tenant is so far the possession of the eldest son as to constitute a *possessio fratris*. 7 *T. R.* 390.

in a geometrical progression upwards<sup>k</sup>, 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 grandfathers 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,

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,) — unless where the lands have, in fact, descended from a female.

THUS the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all<sup>l</sup>; and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden<sup>m</sup>, and Petit<sup>n</sup>: though among the Greeks in the time of Hesiod<sup>o</sup>, when a man died without wife or children, all his kindred

<sup>k</sup> See page 204.

<sup>l</sup> Litt. § 4.

<sup>m</sup> *de succ. Ebraeor.* c. 12.

<sup>n</sup> *L.L. Attic.* l. 1. t. 6.

<sup>o</sup> *Θεσγρον*, 606.

(without any distinction) divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Justinian<sup>p</sup> abolished all distinction between them. It is also conformable to the customary law of Normandy<sup>q</sup>, which indeed in most respects agrees with our English law of inheritance.

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

<sup>p</sup> Nov. 118.<sup>q</sup> Gr. Custom, c. 25.

one : upon which account this preference was very wisely abolished by Justinian.

[ 236 ] THAT this was the true foundation of the preference of the *agnati* or male stocks, in our law, will farther appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed ; and no relation of his by the father's side, as such, can ever be admitted to them ; because he cannot possibly be of the blood of the first purchaser. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother Cecilia Kempe ; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe the father of Cecilia, is excluded. Whereas, when the side from which they descended is forgotten, or never known, (as in the case of an estate newly purchased to be holden *ut feudum antiquum*,) 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.

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



utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchaser: but as males have not been *perpetually admitted*, but only *generally preferred*: [ 237 ] as females have not been *utterly excluded*, but only *generally postponed* to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchaser; which, joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty.

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

IN the first place succeeds the eldest son, *Matthew Stiles*, or his issue: (n° 1.) — if his line be extinct, then *Gilbert Stiles* and the other sons, respectively, in order of birth, or their issue: (n° 2.) — in default of these, all the daughters together, *Margaret* and *Charlotte Stiles*, or their issue: (n° 3.) — On failure of the descendants of *John Stiles*, himself, the issue of *Geoffrey* and *Lucy Stiles*, his parents, is called in: *viz.* first, *Francis Stiles*, the eldest brother of the whole blood, or his issue: (n° 4.) — then *Oliver Stiles*, and the other whole brothers, respectively, in order of birth, or their issue: (n° 5.) — then the sisters of the whole blood all together, *Bridget* and *Alice Stiles*, or their issue: (n° 6.) — In defect of these, the issue of *George* and *Cecilia Stiles*, his father's parents; respect being still had to their age and sex: (n° 7.) — then the issue of *Walter* and *Christian Stiles*, the parents of his paternal grandfather: (n° 8.) — then the issue of *Richard* and *Anne Stiles*, the parents of his paternal grandfather's father, (n° 9.) — and so on in the

† See the table of descents annexed.

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: (n° 10.) — and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*: till both the immediate bloods of George Stiles, the paternal grandfather, are spent. — Then we must resort to the [ 238 ] issue of Luke and Frances Kempe, the parents of *John Stiles's* paternal grandmother: (n° 11.) — then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (n° 12.) — 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: (n° 13.) — 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, (n° 14, 15, 16.) Willis's, (n° 17.) Thorpe's, (n° 18, 19.) and White's, (n° 20.) in the same regular successive order as in the paternal line.

THE student should however be informed, that the class, n° 10, would be postponed to n° 11, in consequence of the doctrine laid down, *arguendo*, by justice Manwoode, in the case of Clere and Brooke<sup>s</sup>; from whence it is adopted by lord Bacon<sup>t</sup>, and sir Matthew Hale<sup>u</sup>: because, it is said, that all the female ancestors on the part of the father are equally worthy of blood; and in that case proximity shall prevail. And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured (in point of theory, for the case never yet occurred in practice) to give the preference to n° 10 before n° 11; for the following reasons: 1. Because this point was not the principal

<sup>s</sup> Plowd. 450.

<sup>u</sup> H. C. L. 240. 244.

<sup>t</sup> Elem. c. 1.

question in the case of Clere and Brooke : but the law concerning it is delivered *obiter* only, and in the course of argument by justice Manwoode ; though afterwards said to be confirmed by the three other justices in separate, extrajudicial conferences with the reporter. 2. Because the chief justice, sir James Dyer, in reporting the resolution of the court in what seems to be the same case <sup>w</sup>, takes no notice of this doctrine. 3. Because it appears from Plowden's report that very many gentlemen of the law were dissatisfied with this position of justice Manwoode ; since the blood of n<sup>o</sup> 10 was derived to the purchaser through a greater number of males than the blood of n<sup>o</sup> 11, and was therefore in their opinion the more worthy of the two. [ 239 ]

4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table ; wherein n<sup>o</sup> 16, which is analogous in the maternal line to n<sup>o</sup> 10 in the paternal, is preferred to n<sup>o</sup> 18, which is analogous to n<sup>o</sup> 11, upon the authority of the eighth rule laid down by Hale himself : and it destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before <sup>x</sup> given, besides the mere dignity of blood. 5. Because it introduces all that uncertainty and contradiction, which is pointed out by that ingenious author <sup>y</sup> ; and establishes a collateral doctrine (*viz.* the preference of n<sup>o</sup> 11 to n<sup>o</sup> 10) seemingly, though perhaps not strictly, incompatible with the principal point resolved in the case of Clere and Brooke, *viz.* the preference of n<sup>o</sup> 11 to n<sup>o</sup> 14. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty ; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all. 6. Because the reason that is given for this doctrine by lord Bacon (*viz.* that in any degree, paramount the first, the law respecteth proximity, and not dig-

<sup>w</sup> Dyer, 314.

<sup>x</sup> Pag. 235, 6, 7.

<sup>y</sup> Law of inheritances, 2d edit. pag. 30. 38. 61, 62. 66.

nity of blood) is directly contrary to many instances given by Plowden and Hale, and every other writer on the law of descents. 7. Because this position seems to contradict the allowed doctrine of sir Edward Coke<sup>z</sup>; who lays it down (under different names) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles's (*alias* Fairfields) fail. Now the blood of the Stiles's does certain' not fail, till both n<sup>o</sup> 9 and n<sup>o</sup> 10 are extinct. Wherefore n<sup>o</sup> 11 (being the blood of the Kempes) ought not to inherit till then. 8. Because in the case, Mich. 12 Edw. IV. 14.<sup>a</sup> (much relied on in that of Clere and Brooke) it is laid down as a rule, that "*cestuy, que doit inheriter al pere, doit inheriter al fits.*"<sup>b</sup> And so sir Matthew Hale<sup>c</sup> [ 240 ] says, "that though the law excludes the father from inheriting, yet it substitutes and directs the descent as it should have been had the father inherited." Now it is settled, by the resolution of Clere and Brooke, that n<sup>o</sup> 10 should have inherited before n<sup>o</sup> 11 to Geoffrey Stiles, the father, had he been the person last seized; and therefore n<sup>o</sup> 10 ought also to be preferred in inheriting to *John Stiles*, the son.

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 explained<sup>d</sup>. And the like rule, as there exemplified, will hold upon descents from any other ancestors.

THE student should also bear in mind, that during this whole process, *John Stiles* is the person supposed to have been last actually seized of the estate. For if ever it comes to vest in any other person, as heir to *John Stiles*, a new

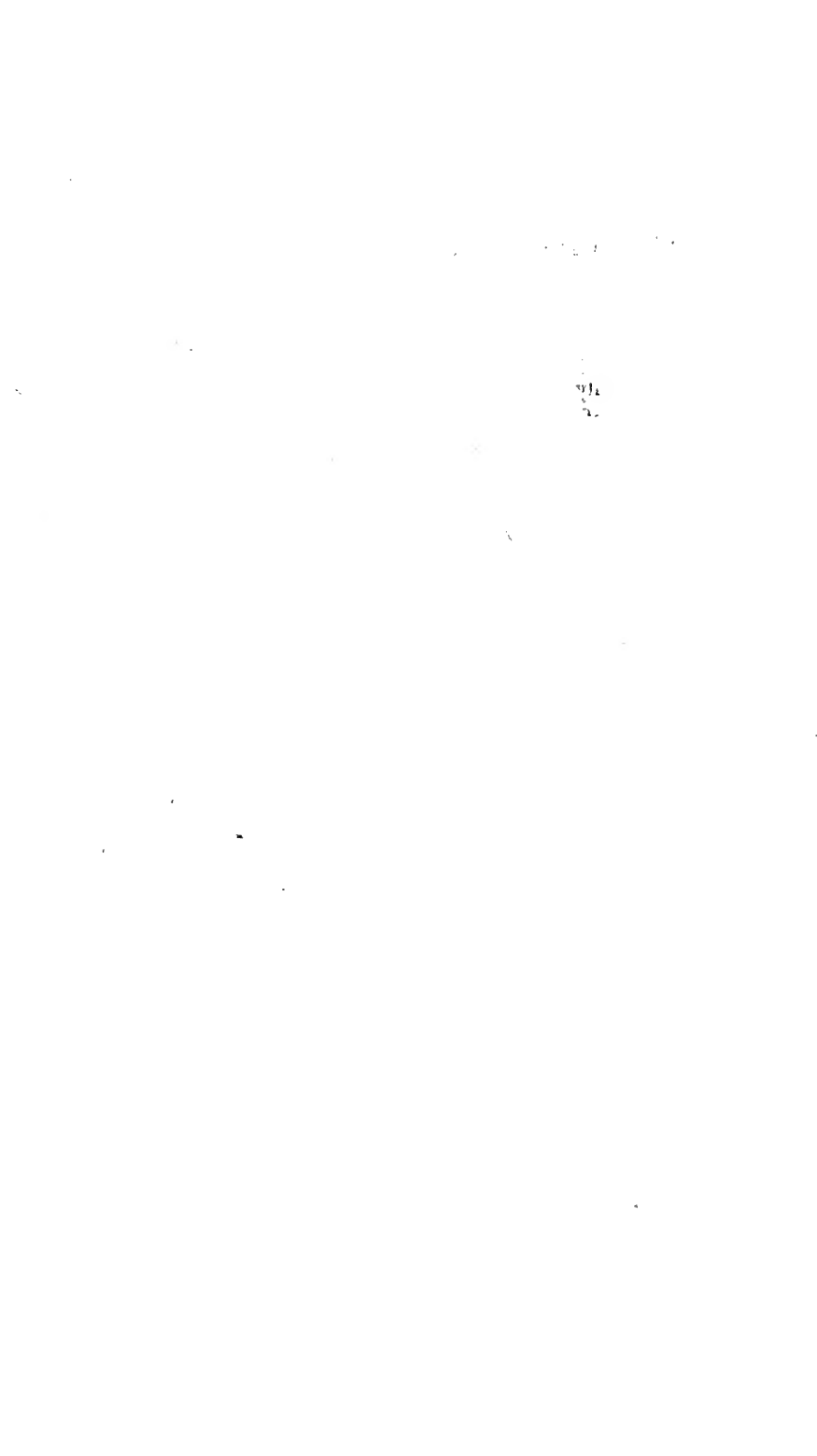
<sup>z</sup> Co. Litt. 12. Hawk. abr. *in loc.*

<sup>b</sup> See pag. 223.

<sup>a</sup> Fitzh. Abr. tit. descent. 2. Bro. Abr. tit. descent. 3.

<sup>c</sup> Hist. C. L. 243.

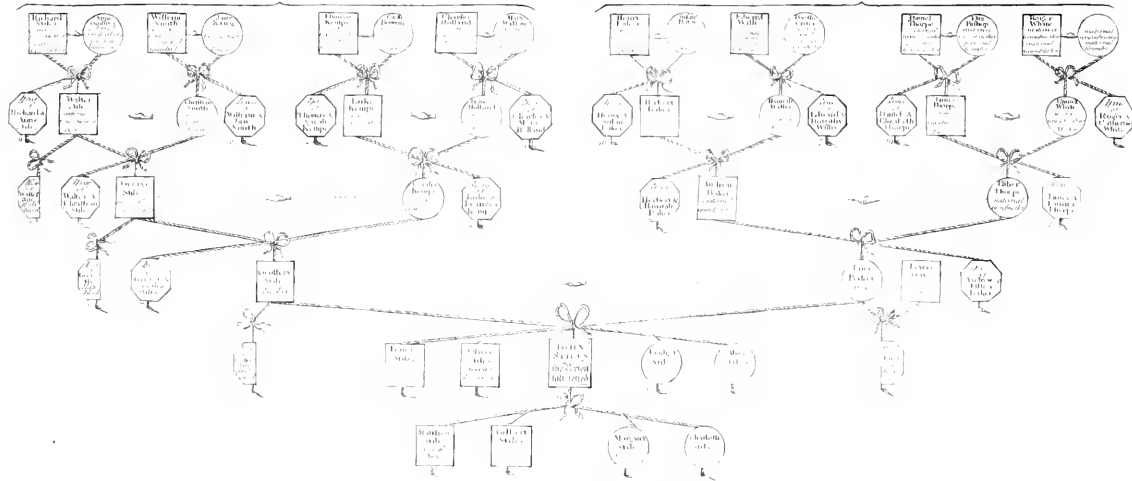
<sup>d</sup> See pag. 236.



# Table of Descent

## PATERNAL LINE

## MATERNAL LINE



order of fucceffion muft be obferved upon the death of fuch heir; fince he, by his own feifin, now becomes himfelf an ancestor or *ftipes*, and muft be put in the place of *John Stiles*. The figures therefore denote the order in which the feveral claffes would fucceed to *John Stiles*, and not to each other: and before we fearch for an heir in any of the higher figures, (as n<sup>o</sup> 8) we muft be firft affured that all the lower claffes (from n<sup>o</sup> 1 to n<sup>o</sup> 7) were extinct, at *John Stiles's* deceafe. (17)

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(17) Some professional gentlemen have not been fatisfied with the learned Judge's arguments for his preference of n<sup>o</sup> 10 to n<sup>o</sup> 11. In the year 1779 an anonymous pamphlet was published, entitled "Remarks on the Laws of Defcent," in which thefe arguments were very fully confidered and controverted. The late learned Vinerian Profeflor has alfo declared, that he can "by no means accede to this opinion of Sir William Blackftone." 2 *Woodd.* 262. But from the confideration which I have beftowed upon the fubject, I am inclined to concur with the learned Judge in giving a preference to n<sup>o</sup> 10 before n<sup>o</sup> 11. I am ready to admit, that fome of the reafons adduced to maintain this doctrine cannot be fupported; but it does not follow that a doctrine is erroneous, becaufe out of a number of arguments in its favour, fome of them are not unanfwerable. But the principal grounds, which the Editor relies upon, are the following, *viz.* that the rule laid down by the learned Judge is part of a confiftent and certain fyftem, by which we can immediately difcover the heir to any inheritance; if we deviate from it, we are foon bewildered in uncertainty and confufion; when the law of defcents is not called in to make a provision for a man's family and his near relations, in which both our reafon and feelings, however we may wifh to divide the inheritance into different portions, correpond with the law, it is then entirely *juris pofitivi*, and its only object is certainty, by which anxiety and litigation among a number of claimants of an inteflate's eftate may be fuppreffed. But the law of defcents is eftablifhed beyond all poffibility of controversy, till we fearch for an heir among great uncles, and fecond and third coufins. And between thefe, and ftill more remote relations, it is of infinitely greater concern to the public to fix a rule, which can  
instantly

instantly inform us who is the heir, than to attend to any petty considerations of propriety, who ought to be the heir. It is fully settled, in the case of Clere and Brooke, *Plowd.* 450, that the brother of a paternal grandmother, or his representative, shall be preferred in the descent of a newly-purchased estate to a brother of a mother, or his representative, and this is a law which is certainly contrary to our natural wishes and sentiments; but it does little violence to our feelings to postpone the brother of a grandmother to the brother of a great-grandmother, and so in succession. If the grandmother is more worthy than the mother, because related by one male blood, and the mother by none, the great-grandmother, as is well observed by the editor of *Plowden*, ought to be still more worthy, being related by two male bloods. And that principle, which operates so powerfully as to carry the estate past the mother to the grandmother, ought to preserve its consistency, and to carry it also from the grandmother to the great-grandmother, provided they are immediately united to the male ascending branch. If we have no other rule among heirs through females beyond the mother than proximity; what have we to assist and guide us, when there are descendants of a number of female ancestors, or of ancestors through females of equal proximity? For if 10 is not to be preferred to 11, what principle can we find to determine between 10, 12, and 13? They have all an equal claim by proximity. The supporters of proximity will not be so bold as to say that they shall be coparceners, or that they shall run a race, and one shall gain the estate by occupancy. If we go a step higher, we shall find the descendants of the brothers of Anne Godfrey, William Smith, Jane King, Thomas Kemp, Sarah Browne, Charles Holland, and Mary Wilson, have all the same pretensions; and we may easily suppose also 15, 31, or any other number of claimants, without any clue whatever to determine the priority of their proximity. But, according to the rule laid down by the learned Judge, no two cases can possibly be produced, but we can determine instantly which has the prior right by descent. Moreover a *feudum novum* is considered as a *feudum antiquum*, or a feud of indefinite antiquity; and if it had actually descended, which we may suppose, from Walter or George Stiles, then the heirs by their wives, and the wives of their descendants, would all have been entirely cut off; and therefore it is not unreasonable, or, at least, inconsistent with that supposition, that an heir on the part  
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of a wife of a more remote ancestor of the Stiles's should be preferred to the heir on the part of a wife of a nearer ancestor.

If then the plan of descents laid down by the learned Judge be established, it may be explained by the scheme subjoined, which will determine the heir at law in all cases that can possibly be put or devised.

In tracing the heir downwards, in the descending line, no difficulty can ever occur. But in the scheme annexed, I suppose the propositus to die without issue, and without brothers or sisters, seized of an estate by purchase; and I suppose A, B, C, D, &c. to Z, to be his father, grandfather, &c. his lineal ancestors of the same name; and a, b, c, d,—z, to be their wives respectively, who are not necessarily related to each other. To find then the heir of the propositus, we must inquire for the lineal heir or representative of the eldest brother of A the father; then for the representative of the second, third, &c., but if A had no brothers, then for his sisters and their representatives; if none can be found, we must in like manner have recourse to B, and so on to C; and if we find a representative of III, the eldest brother of C, he is the heir at law to the intestate, and will inherit before the representatives of the brothers of D, E, F, &c. And thus we are to go back through the lineal male ancestors of the intestate; but if in going up to Z, or to any indefinite distance, we can find no heir issuing from the male ancestors, we must then have recourse to the females; but in this research we must begin at the other end, and pursue a different direction. We must inquire first, whether z, the wife of one of the remotest male ancestors of the propositus, had a brother or sister leaving a representative; for if so, he will be the heir of the propositus; if we suppose 24, 6, 3, to be the respective brothers of the wives, then the descendants of 24 will inherit before those of 6; and for the same reason those of 6 before those of 3. If z had no brother or sister leaving issue, but has collateral relations descending from her ancestors, one of those must be preferred to any heir on the part of f, e, d, &c., and to discover such an heir of z, we must put z in the place of the propositus, and inquire for the representative of the brothers and sisters of her male ancestors, and then of their wives as before, and such an heir of z will inherit before the heir of d, e, b, and a; and for the same reason their heirs respectively will have a preference as we come down to a. This table, the Editor conceives, is not difficult to be comprehended, and will determine immediately

ately the priority of relations ever so remote, if their pedigrees can be traced.

It must be remembered, that if it is known that the estate has descended from E to the propositus, then none of the heirs of e, d, c, b, a, can ever be admitted; and if it has descended from one of the wives, *viz.* f, then, as before, the heirs of e, d, c, b, a, are excluded, and also the collaterals of the male ancestors above E; and if no collateral of E, D, &c. f's descendants can be found, then to find her heir, she must be put in the place of the propositus in the table. The student must also observe, that if an estate of which the propositus is the purchaser, should descend to a representative of a brother of C from the propositus, upon failure of that branch, it may afterwards pass to a representative of a brother of F, and so upwards in the male line; but being once in the line of VI, the female branches, f, e, d, &c. are cut off, for they are not related by blood to F; but, upon failure of that line, it is still transmissible to the lines of the females above; for their collaterals would be related by blood, or will have a common ancestor with F; and this is another strong argument in support of the doctrine, that the remoter females should be preferred to the nearer; for this may be presumed to have been the progress of the estate in its descent from the propositus. When also it passes from the male into any female line, it cannot afterwards pass into any other female line, for they are not related to each other by blood. See n. 9. p. 220.

The preceding part of this note is nearly the same as it stood in a former edition, and, since it appeared, a pamphlet has been published by the author of the Remarks on the Laws of Descent, entitled "Remarks on the Inconsistency of the Table of Descents" projected by Mr. Professor Christian, with the doctrine laid down by Sir William Blackstone, and by every other writer on "the Law of Descent." My endeavour in the former part of this note has been to point out to the student the general principles upon which this subject ought to be considered, and by which, if any question upon it were brought before the courts, it would probably be determined. The authorities upon the subject are almost all referred to in the case of Clere and Brooke by the editor of the English edition of *Plowden*, p. 450. It is very remarkable that, though all the writers agree that the *next* and *worthiest* of blood shall be the heir, or the *next* of the *worthiest*, yet they have not given us any plan by which in the ascending lines

lines we are to ascertain the worthiest, or told us, whether, when we have ascertained the worthiest, the remotest of the worthiest in all cases shall be preferred to those, who are nearer of the less worthy of blood. It is agreed by all that the remotest relation collateral to the male ascending line shall be preferred to the nearest kinsman being collateral to a female line. And if the blood of a more remote female is more worthy than that of a nearer female united to the male ascending line, it is because it is derived through a greater number of males. If an estate has descended in the male line of the Howards for 24 generations, the relations introduced by females within so many generations can never possibly inherit, but the relations of females allied to more ancient generations may still be heirs to it; it is not therefore absurd to consider them of more worthy blood, even when the propositus is himself the purchaser. And in the year-book M. 12 Ed. IV. *cestuy, que doit inheriter al pere, doit inheriter al fits*, is cited by the court as a general legal maxim.

Sir William Blackstone's table goes back but a very short way, and a few generations more would necessarily make it diverge over an immense space. He takes it for granted that all the names in the top of the table have no collateral relations, for if they had, all his figures above 9 must necessarily have been placed differently.

The author of the Remarks on the Inconsistency, &c. contends that my plan of descents is inconsistent with Sir William Blackstone's; but, to the student who seriously attends to the learned Judge's reasons, I need not say more than that his preference of the great-grandmother to the grandmother united to the ascending line must necessarily have made him prefer Anne Godfrey the great great-grandmother before Christian Smith the great grandmother; and if he had supposed that Anne Godfrey had had a brother or sister leaving descendants, n<sup>o</sup> 10 must have been placed collaterally to her name. And I still think that the reason given by Mr. Justice Manwoode for his preference of n<sup>o</sup> 11 to n<sup>o</sup> 10 must produce uncertainty and confusion; viz. "For such heirs come from the blood of the female sex, from which the purchaser's father issued: and where they are all equally worthy, the next of blood shall always be preferred as heir." *Plowd.* 448.

If proximity refers to the ancestor or person from whom the claimant derives his title, then we may have many claimants equally near and equally worthy. To obviate this objection, the author  
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of the Remarks on the Inconsistency, &c. wishes to give a sense to proximity, which I do not find it will bear in any of the authorities relative to this subject, *viz.* that proximity is not to be referred to the collateral ancestor introduced by any female, but to the female as connected with the male branch.

In p. 23, he says, ‘Sir Edward Coke, in his commentary upon the word *prochein* in the text of Littleton, gives us the legal interpretation of proximity:—

“Here is understood a division of next, *viz.* next *jure representationis* and next *jure propinquitatis*, that is, by right of representation and right of propinquity; and Littleton meaneth of the right of representation; for legally, in course of descents, he is the next of blood inheritable.” *Co. Litt.* 10.

‘The principle is still farther explained by Sir Matthew Hale; Through all the degrees of succession by the right of representation, the right of proximity is transferred from the root to the branches, and gives them the same preference as the next and worthiest of blood.’ *Hist. Com. Law.* 237.

‘This authority, we trust, will solve all difficulties.’

I am sorry to differ from this learned writer in thinking that the difficulty is not in any degree solved by this authority, for in the passages above cited lord Coke and lord Hale are considering proximity *jure representationis* in the descending lines only, as that a grandson of the older brother shall be preferred to the son of the younger, or to the younger himself, as being the next and worthiest of blood.

But I have never found any intimation that the whole of the blood of b the grandmother shall inherit before any of the blood of c the great-grandmother. Lord Hale says that the most part of his rules may be collected out of the case in *Plowden*; but the question between 10 and 11 was not then decided judicially by the court, though I am ready to confess that in favour of n<sup>o</sup> 11 there is a greater number of high legal opinions.

If it should be admitted that the remotest of the blood of the grandmother b shall inherit before the nearest relation of the great-grandmother c, my objection to the uncertainty from proximity, in the sense in which it seems hitherto to have been used, is removed. And I cannot think that any court can ever determine that the brother of the grandmother b shall take before the brother of the great-grandmother c, but they must also determine that the whole of the blood of b shall fail, before any of the blood of c can be heir to the propositus. Upon that supposition I conceive the

table

table I have propofed will be found to be equally ufeful, for after the failure of all the male blood, if we are to have recourfe to the blood of the father's mother b, then to find the heir on the part of b, we muft fubftitute b in the place of the propofitus, as I before defcribed in finding the heir of z.

In difcuffing this fubject, my wifh has been to produce from authority and principles an univerfal plan of defcents, that when the pedigrees of any two relations whatever can be eftablifhed, the priority of their claims to the inheritance may be infantly and uncontrovertibly decided. I have no predilection for any particular fyftem, and I fhall be glad to confefs my errors, and to cancel all I have written upon the fubject, when a more correct plan is fanc-tioned by legal authority, or the general voice of the profeflion.

TABLE of DESCENTS.

Brothers or Sifters.	Male line.	Their Wives.	Brothers or Sifters.
	Z	z	24
	.	.	
	.	.	
	.	.	
VI	F		6
	E	e	
	D	d	
III	C	c	3
	B	b	
	A	a	
	Propofitus and Firft Purchafer.		

## CHAPTER THE FIFTEENTH.

OF TITLE BY PURCHASE, AND FIRST  
BY ESCHEAT.

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

**PURCHASE**, indeed, in it's 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 <sup>c</sup>, 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 take by purchase <sup>d</sup> (1).

<sup>a</sup> § 12.<sup>b</sup> Co. Litt. 18.<sup>c</sup> Co. Litt. 18.<sup>d</sup> Lord Raym. 728.

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(1) A man having two daughters his heirs, devises lands to them and their heirs, and dies. They shall take by purchase as joint-

But if a man, seised in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent<sup>e</sup>, even though it be charged with incumbrances<sup>f</sup>; this being for the benefit of creditors, and others, who have demands on the estate of the ancestor. If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasers<sup>g</sup>. 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 antient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent*<sup>h</sup>. And if A dies before entry, still his heirs 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<sup>i</sup>. The ancestor, during his life, beareth in himself all his heirs<sup>k</sup>; 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 (2). 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 feudal tenure, the lord would have been

<sup>e</sup> 1 Roll. Abr. 626.

<sup>h</sup> 1 Rep. 104. 2 Lev. 60. Raym. 334.

<sup>f</sup> Salk. 241. Lord Raym. 728.

<sup>i</sup> 1 Rep. 98.

<sup>g</sup> 1 Roll. Abr. 627.

<sup>k</sup> Co. Litt. 22.

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joint-tenants: for the estate of joint-tenants, and tenants in common, is different in it's nature and quality from that of coparceners. *Cro. Eliz.* 431.

(2) See *ante*, p. 172. n. 3.

defrauded by such a limitation of the fruits of his signiory arising from a descent to the heir.

[ 243 ] WHAT we call *purchase*, *perquisitio*, the feudists called *conquest*, *conquæstus*, or *conquisitio*<sup>1</sup>: both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland<sup>m</sup>: as it was among the Norman jurists, who styled the first purchaser (that is, he who brought the estate into the family who at present owns it) the conqueror or *conquereur*<sup>n</sup>. Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquæstus*, and himself *conquæstor* or *conquisitor*<sup>o</sup>; signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feudal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition*: a title which, however just with regard to the *crown*, the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had<sup>p</sup>.

THE difference, in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut 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,

<sup>1</sup> Craig. *l. i. t. 10. § 18.*

<sup>m</sup> Dalrymple of feuds, 210.

<sup>n</sup> *Gr. Custom, Gloss. c. 25. pag. 40.*

<sup>o</sup> Speim. *Gloss. 145.*

<sup>p</sup> See Book I. ch. 3.



first of the paternal, and then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him <sup>1</sup>) 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 <sup>2</sup>) that ancestor, sufficient to answer the charge <sup>3</sup>; whether he remains in possession, or hath alienated it before action [ 244 ] brought <sup>4</sup>; which sufficient estate is in the law called *assets*; from the French word, *assez*, enough <sup>5</sup>. Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent <sup>6</sup>.

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

I. ESCHEAT, we may remember <sup>7</sup>, was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman <sup>8</sup>, 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 reverts back, by a kind of reversion, to the original grantor or lord of the fee <sup>9</sup>.

<sup>1</sup> Stat. 29 Car. II. c. 3. § 10.

<sup>5</sup> Finch. Rep. 86.

<sup>2</sup> *Ibid.* § 12.

<sup>6</sup> See pag. 72.

<sup>3</sup> 1 P. Wms. 777.

<sup>8</sup> *Efchet* or *êchet*, formed from the

<sup>4</sup> Stat. 3 & 4 W. & M. c. 14.

verb *eschoir* or *êchoir*, to happen.

<sup>5</sup> Finch, law, 119.

<sup>9</sup> 1 Feud. 86. Co. Litt. 13.

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 escheated shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the other<sup>z</sup>;) 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 [ 245 ] own act or agreement,) than under the present, by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat*<sup>a</sup>: 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<sup>b</sup>. It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed this may also be said of descents themselves, in which an entry or other seisin is 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<sup>c</sup>, 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.

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

<sup>z</sup> Co. Litt. 13.

<sup>a</sup> Bro. Abr. tit. escheat. 26.

<sup>b</sup> Bro. Abr. tit. acceptance, 25. Co. Litt. 268.

<sup>c</sup> 1 Inst. 215.

confanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum*; and must revert back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

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<sup>d</sup>. But both these species may well be comprehended under the first denomination only; for he that is attainted [ 246 ] suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta<sup>e</sup>, “*dominus capitalis feodi loco haereditis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.*”

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

1, 2, 3. THE first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors: secondly, when he dies without any relations on the part of those ancestors from whom his estate descended: thirdly, when he dies without any relations of the whole blood. In two of these cases the blood of the first purchaser is certainly, in the other it is probably, at an end; and therefore in all of them the law directs, that the land shall escheat to the lord of the fee; for the lord would be manifestly prejudiced, if, contrary to the inherent condition

<sup>d</sup> Co. Litt. 13. 92.

<sup>e</sup> l. 6. c. 1.

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 (3).

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 it's body, yet if it [ 247 ] hath human shape it may be heir<sup>f</sup>. This is a very antient rule in the law of England<sup>g</sup>; and it's reason is too obvious, and too shocking, to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions<sup>h</sup>: yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby<sup>i</sup>: (as the *jus trium liberorum*, and the like) esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be such an issue, as shall entitle the husband to be tenant by the curtesy<sup>k</sup>; because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

<sup>f</sup> Co. Litt. 7, 8.

*liberos connumerari; et, si membra sint*

<sup>g</sup> *Qui contra formam humani generis inutilia aut tortuosa, non tamen est converso more procreantur, ut si mulier partus monstruosus. Braët. l. 1. c. 6. & monstruosum vel prodigiosum enixa sit, l. 5. tr. 5. c. 30.*

*inter liberos non computentur. Partus* <sup>h</sup> *Ff. 1. 5. 14.*

*tamen, cui natura aliquantulum addiderit vel diminuerit, ut si sex vel tantum* <sup>i</sup> *Ff. 50. 16. 135. Paul. 4. sent. 9. § 63.*

*quatuor digitos habuerit, bene debet inter* <sup>k</sup> *Co. Litt. 29.*

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(3) In the great case of *Burgefs v. Wheate*, lord chancellor Northington determined, contrary to the learned opinions of lord Mansfield and of sir Thomas Clarke, master of the rolls, whose assistance he had requested, that where a *cestuy que trust* dies without heirs, the trust does not escheat to the crown, so that the lands may be recovered in a court of equity by the king, but that the trustee shall hold them for his own benefit. 1 *Bl. Rep.* 123.

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 it's determination<sup>l</sup>. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur*<sup>m</sup>. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord<sup>n</sup>. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after it's birth the mother was married to the father<sup>o</sup>: and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance<sup>p</sup>: and a bastard was likewise capable of succeeding to the whole of his mother's estate, [ 248 ] although she was never married; the mother being sufficiently certain, though the father is not<sup>q</sup>. But our law, in favour of marriage, is much less indulgent to bastards.

THERE is, indeed, one instance, in which our law has shewn them some little regard; and that is usually termed the case of *bastard eigné* and *mulier puisné*. 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<sup>r</sup> 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 eigné*; and the younger son is legitimate, or *mulier puisné*. If then the father dies, and the *bastard eigné* enters upon his land, and enjoys it to his death, and dies seized thereof, whereby the inheritance descends to his issue; in this case the *mulier puisné*, and all other heirs, (though minors, feme-coverts, or under any incapacity whatsoever,)

<sup>l</sup> See Book I. ch. 16.<sup>m</sup> Co. Litt. 8.<sup>n</sup> Finch, law, 117.<sup>o</sup> Nov. 89. c. 8.<sup>p</sup> *Ibid.* c. 12.<sup>q</sup> *Cod.* 6. 57. 5.<sup>r</sup> l. 7. c. 1.

are totally barred of their right <sup>s</sup>. 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 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 <sup>t</sup>.

[ 249 ] 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 <sup>u</sup>.

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

<sup>s</sup> Litt. § 399. Co. Litt. 244.

<sup>v</sup> See Book I. ch. 10.

<sup>t</sup> Litt. § 400.

<sup>w</sup> Co. Litt. 8.

<sup>u</sup> Braçt. l. 2. c. 7. Co. Litt. 244.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase<sup>x</sup>, 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<sup>y</sup>, because they have not in them any inheritable blood.

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 by denization it acquires [ 250 ] 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<sup>z</sup>.

SIR Edward Coke<sup>a</sup> 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 common stock of their consanguinity, is the father; and as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the antient law: not only from the rule before cited<sup>b</sup>, that *cestuy, que doit inheriter al pere, doit inheriter al fits*: but also because we have seen that the only feodal foundation, upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that

<sup>x</sup> Co. Litt. 2.

<sup>y</sup> *Ibid.* 1 Lev. 59.

<sup>z</sup> Co. Litt. 129.

<sup>a</sup> 1 Inst. 8.

<sup>b</sup> See pag. 223. and 239.

it descended from some one of his ancestors; but in this case, as the intermediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum strictè novum*; that is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion hath been since over-ruled<sup>c</sup>: 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<sup>d</sup>. And reasonably enough upon the whole; for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent.

[ 251 ] IT is also enacted, by the statute 11 & 12 W. III. c. 6. that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors lineal or collateral; although their father or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last 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 is provided, by the statute 25 Geo. II. c. 39. that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised:—with an exception however

<sup>c</sup> 1 Ventr. 413. 1 Lev. 59. 1 Sid. 193.

<sup>d</sup> See pag. 226.



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<sup>d</sup> of descents by the common law.

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

GREAT care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law<sup>e</sup>, as a part of punishment for the offence; [ 252 ] and does not at all relate to the feudal system, nor is the consequence of any signiory or lordship paramount<sup>f</sup>: but, being a prerogative vested in 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 antient and superior law of forfeiture.

THE doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprized<sup>g</sup>;) 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 feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable

<sup>d</sup> See pag. 208 and 214:

<sup>e</sup> 3 Inst. 15. Stat. 25 Edw. III. c. 2.

<sup>c</sup> LL. Aelfred. c. 4. LL. Canut. c. 54. § 12.

<sup>f</sup> 2 Inst. 64. Salk. 85.

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 antient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert 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<sup>h</sup>, 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<sup>i</sup>.

[ 253 ] As a consequence of this doctrine of escheat, all lands of inheritance immediately vesting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. VI. c. 12. enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the antient law of forfeiture operates, for it is expressly provided by the statute 5 & 6 Edw. VI. c. 11. that the wife of one attaint of high treason shall not be endowed at all.

HITHERTO we have only spoken of estates vested in the offender, at the time of his 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

<sup>h</sup> 2 Inst. 36.

<sup>i</sup> Somner. 53. Wright, Ten. 118.

dies: here the lands 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 <sup>k</sup>. 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 <sup>l</sup>.

THERE is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the person attainted shall not only be incapable himself of inheriting, [ 254 ] or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a refinement upon the antient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony <sup>m</sup>. But, by the law of England, a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor to any other ancestors <sup>n</sup>, at least on the part of their attainted father.

THIS corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone con-

<sup>k</sup> Co Litt. 13.

<sup>l</sup> 3 Inst. 47.

<sup>m</sup> Van Leeuwen in 2 Feud. 31.

<sup>n</sup> Co. Litt. 391.

cerned ; but he cannot wipe away the corruption of blood ; for therein a third person hath an interest, the lord who claims by escheat. If therefore a man hath a son, and is attainted, and afterwards pardoned by the king ; this son can never inherit to his father, or father's ancestors ; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so : but if the son had been born after the pardon, he might inherit ; because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children<sup>o</sup>.

HEREIN there is however a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice : and therefore we have [ 255 ] seen, that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise : for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies ; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir ; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir : and therefore the younger brother shall not inherit, but the land shall escheat to the lord : though had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood<sup>p</sup>. So if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son : for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord<sup>q</sup>. Sir Edward Coke in this case allows<sup>r</sup>, that if the ancestor be attainted, his sons born before the attainder may be heirs to each other ; and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable

<sup>o</sup> Co. Litt. 392.

<sup>p</sup> *Ibid.* 3.

<sup>q</sup> Dyer, 48.

<sup>r</sup> Co. Litt. 8.

when

when imparted to them from the father; but he makes a doubt (upon the principles before mentioned, which are now over-ruled<sup>s</sup>) whether sons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

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

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

<sup>s</sup> 1 Hal. P. C. 357.

ship above complained of; which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor.

BEFORE I conclude this head of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and 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<sup>t</sup>, doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant [ 257 ] 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 vassal 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.

THERE is one more incapacity of taking by descent, which, not being productive of any escheat, is not strictly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute 11 & 12 Will. III. c. 4. (3).

<sup>t</sup> Co. Litt. 13.

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(3) This act was repealed by the 18 Geo. III. c. 6. so far as to permit such Roman catholics to inherit real property, as would take the oath of allegiance prescribed in the statute; which is the same oath that is directed to be taken by the 31 Geo. III. c. 32; which has repealed all the other odious restrictions upon those who profess the Roman catholic religion.

that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking, by descent as well as purchase, any real estates whatsoever; and his next of kin, being a protestant, shall hold them to his own use till such time as he complies with the terms imposed by the act. This incapacity is merely personal; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descents to others of his kindred. In like manner as, even in the times of popery, one who entered into religion, and became a monk professed, was incapable of inheriting lands, both in our own<sup>u</sup> and the feudal law; *eo quod desit esse miles seculi qui factus est miles Christi: nec beneficium pertinet ad eum qui non debet gerere officium*<sup>w</sup>. But yet he was accounted only *civiliter mortuus*; he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.

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

<sup>u</sup> Co. Litt. 132.

<sup>w</sup> 2 Feud. 21.

## CHAPTER THE SIXTEENTH.

## OF TITLE BY OCCUPANCY.

OCCUPANCY is the taking possession of those things which before belonged to nobody. This, as we have seen <sup>a</sup>, is the true ground and foundation of all property, or of holding those things in fealty, which by the law of nature, unqualified by that of society, were common to all mankind. But when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome <sup>b</sup>, *quod nullius est, id ratione naturali occupanti conceditur*.

THIS right of occupancy, so far as it concerns real property, (for of personal chattels I am not in this place to speak,) 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 <sup>c</sup>.

<sup>a</sup> See pag. 3 & 8.

<sup>b</sup> *Ff.* 41. 1. 3.

<sup>c</sup> *Co. Litt.* 41.



THIS seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though it formerly<sup>d</sup> was supposed so to do; for he had parted with all his interest, so long as *cestuy que vie* lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it: much less of so minute a remnant as this: it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the *haereditas jacens* of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands: for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king therefore there could be no prior occupant, because *nullum tempus occurrit regi*<sup>e</sup>. And, even in the case of a subject, had the estate *pur auter vie* been granted to a man *and his heirs* during the life of *cestuy que vie*, there the heir might, and still may, enter and hold possession, and is called in law a *special occupant*: as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *haereditas jacens*, during the residue of the estate granted: though some have thought him so called with no very great propriety<sup>f</sup>; and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes: the one 29 Car. II. c. 3. which enacts (according to the antient rule of law<sup>g</sup>) that

<sup>d</sup> Braçt. l. 2. c. 9. l. 4. tr. 3. c. 9. § 4.

<sup>f</sup> Vaugh. 201.

Flet. l. 3. c. 12. § 6. l. 5. c. 5. § 15.

<sup>e</sup> Braçt. *ibid.* Flet. *ibid.*

<sup>g</sup> Co. Litt. 41.

where there is no special occupant (1), 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 [ 260 ] their hand for payment of debts: 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 go in a course of distribution like a chattel-interest.

By these two statutes the title of *common* occupancy is utterly extinct and abolished; though that of *special* occupancy by the heir at law continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. But, as before the statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like<sup>g</sup>, (because, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore by the death of the grantee *pur auter vie* a grant of such hereditaments was entirely determined,) so now, I apprehend, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes must not be construed so as to create any new estate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and

<sup>g</sup> Co. Litt. 41. Vaugh. 201.

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(1) The meaning of the statute seems to be this, that every estate *pur auter vie*, whether there is a special occupant or not, may be devised like other estates in land, by a will attested by three witnesses.

If not devised, and there is a special occupant, then it is assets by descent in the hands of the heir; if there is no special occupant, then it passes like personal property to executors and administrators, and shall be assets in their hands,

which

which therefore was left open to the first occupant (2). When there is a residue left, the statutes give it to the executors and administrators, instead of the first occupant; but they will not *create* a residue, on purpose to give it to either<sup>h</sup>. They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner of lands which before were nobody's; and thereby to supply this *casus omissus*, and render the disposition of law in all respects entirely uniform; this being the only instance wherein a title to a real estate could ever be acquired by occupancy.

THIS, I say, was the only instance; for I think there can [ 261 ] 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

<sup>h</sup> But see now the statute 5 Geo. III. or other incorporeal hereditaments, c. 17. which makes leases for one, two, as good and effectual to all intents and or three lives, by ecclesiastical persons or purposes as leases of corporeal possessions. any eleemosynary corporation, of tithes

(2) Lord-keeper Harcourt has declared, there is no difference since the 29 Car. II. c. 3. between a grant of corporeal and incorporeal hereditaments *pur auter vie*; for by that statute every estate *pur auter vie* is made devisable, and if not devised, it shall be assets in the hands of the heir, if limited to the heir; if not limited to the heir, it shall go to the executors or administrators of the grantee, and be assets in their hands; and the statute, in the case of rents and other incorporeal hereditaments, does not enlarge, but only preserve the estate of the grantee. 3 P. Wms. 264. In p. 113. ante, it is said, that an estate *pur auter vie* cannot be entailed; yet if such an estate be limited to A in tail, with remainder to B, these limitations are designations of the persons who shall take as special occupants; but any alienation of the *quasi* tenant in tail will bar the interest of him in remainder. See 3 Cox, P. Wms. 266. and 6 T. R. 293. where it appears to have been the opinion of lord Northington and lord Kenyon that the tenant in tail of an estate *pur auter vie* may bar the remainders over by his will alone.

appointed, yet there is a *legal, potential* ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner. For Bracton tells us<sup>i</sup>, 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<sup>k</sup>. 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<sup>l</sup>, there it seems just (and so is the constant practice) that the eyotts or little islands, 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<sup>m</sup>, yet ours gives it to the king<sup>n</sup>. 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 water-mark; 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

<sup>i</sup> l. 2. c. 2.

<sup>m</sup> Inst. 2. 1. 18.

<sup>k</sup> Inst. 2. 1. 22.

<sup>n</sup> Bract. l. 2. c. 2. Callis of sewers,

<sup>l</sup> Salk. 637. See pag. 39.

22.

land adjoining<sup>o</sup>. 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<sup>p</sup>. 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 recompence for this sudden loss<sup>q</sup>. And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law<sup>r</sup>; from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before mentioned, as upon this other general ground of prerogative, which was formerly remarked<sup>s</sup>, that whatever hath no other owner is vested by law in the king.

<sup>o</sup> 2 Roll. Abr. 170. Dyer, 326.

<sup>p</sup> Callis, 24. 28.

<sup>q</sup> *Ibid.* 28.

<sup>r</sup> *Infl.* 2. 1. 20, 21, 22, 23, 24.

<sup>s</sup> See Vol. I. pag. 298.

## CHAPTER THE SEVENTEENTH.

## OF 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, have immemorially used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at large in the preceding part of these commentaries<sup>a</sup>. At present therefore I shall only, first, distinguish between *custom*, strictly taken, and *prescription*; and then shew what sort of things may be prescribed for.

AND, first, the distinction between custom and prescription is this; that custom is properly a *local* usage, and not annexed to a *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 time out of mind to have such an advantage or privilege<sup>b</sup>. 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<sup>c</sup> 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

<sup>a</sup> See Vol. I. pag. 75, &c.<sup>b</sup> Co. Litt. 113.<sup>c</sup> 1 Lev. 176.

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 time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath<sup>d</sup>: 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<sup>e</sup> 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<sup>f</sup>.

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<sup>g</sup>. For a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title; a title by corporal 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 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 immemorial usage. 2. A prescription must always be

<sup>d</sup> 4 Rep. 32.

<sup>e</sup> Co. Litt. 113.

<sup>f</sup> 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*.

<sup>g</sup> Dr. & St. dial. 1. c. 8. Finch, 132.

laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates<sup>h</sup>. For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for any thing, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus 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<sup>i</sup>. 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 decodands, 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 an 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<sup>k</sup>. 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,)

<sup>h</sup> 4 Rep. 31, 32.<sup>i</sup> 1 Vent. 387.<sup>k</sup> Co. Litt. 114.

nothing



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<sup>1</sup>. 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 *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 it's principal.

<sup>1</sup> Litt. § 183. Finch, L. 104.

## CHAPTER THE EIGHTEENTH.

## OF TITLE BY FORFEITURE.

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

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-representation to a benefice, when the forfeiture is denominated a *lapse*. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

I. THE foundation and justice of forfeitures for *crimes and misdemeanors*, and the several degrees of those forfeitures proportioned to the several offences, have been hinted at in the preceding volume<sup>a</sup>; but it will be more properly considered, and more at large, in the fourth book of these commentaries. At present I shall only observe in general, that the offences which induce a forfeiture of lands and tenements to the crown are principally the following six: 1. Treason. 2. Felony. 3. Misprision of treason. 4. *Praemunire*. 5. Drawing a weapon on a judge, or striking any one in the presence of

<sup>a</sup> Vol. I. pag. 299.

the king's principal courts of justice. 6. Popish recusancy, or non-observance of certain laws enacted in restraint of papists. But at what time they severally commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future inquiries.

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

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

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away. Yet in consequence of these it was always, and is still, necessary<sup>c</sup>, 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, un-

<sup>b</sup> See Vol. I. pag. 479.

<sup>c</sup> F. N. B. 121.

less by his own consent, to lose his privilege of escheats, and other feudal profits, by the vesting of lands in tenants that can never be attainted or die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest<sup>d</sup>. But, besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also, (upon the same feudal principles,) for the alienation of the specific land. And if no such licence was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. The necessity of this licence from the crown was acknowledged by the constitutions of Clarendon<sup>e</sup>, in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations<sup>f</sup>. 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 feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of

<sup>d</sup> Selden, Jan. Angl. l. 2. § 45.

*assensu et consensione ipsius, c. 2. A. D.*

<sup>e</sup> *Ecclesiae de feudo domini regis*

1164.

*non possunt in perpetuum dari, absque*

<sup>f</sup> See Vol. I. p. 384.

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 charter<sup>e</sup>, 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<sup>h</sup>.

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<sup>i</sup>, 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 *bonâ 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

<sup>e</sup> *A. D. 1217. cap. 43. edit. Oxon.*

<sup>h</sup> *Non licet alicui de caetero dare terram suam alicui domui religiosae, ita quod illam resumat tenendam de eadem domo; nec liceat alicui domui religiosae terram alicujus sic accipere, quod tradat illum ei a quo ipsam recepit tenendam:*

*si quis autem de caetero terram suam domui religiosae sic dederit, ut super hoc convincatur, donum suum penitus cassetur, ut terra illa domino suo illius feodi incuratur. Mag. Cart. 9 Hen. III. c. 36.*

<sup>i</sup> 2 Inst. 75.

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 are since become the great assurance of the kingdom, under the name of *common recoveries*. But upon this the statute of Westminster the second, 13 Edw. I. c. 32. enacted, that in such cases a jury shall 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. And the like provision was made by the succeeding chapter <sup>k</sup>, in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers,) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. 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 <sup>l</sup>, a proviso was inserted <sup>m</sup> 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. ft. 2., it was farther provided by statute 34 Edw. I. ft. 3. that no such licence should be effectual, without the consent of the mesne or intermediate lords.

YET still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the land remained in the

<sup>k</sup> cap. 33.<sup>l</sup> 2 Inst. 501.<sup>m</sup> cap. 3.

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, or else be sold to private persons; and that, for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtle imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery, lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute 23 Hen. VIII. c. 10. declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

BUT, during all this time, it was in the power of the crown, by granting a licence 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 licence was valid<sup>n</sup>, since the kings had no power to dispense with the statutes of mortmain by a clause

<sup>n</sup> 2 Hawk. P. C. 397.

of *non obstante* °, 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 it's own discretion may grant licences to aliene or take in mortmain, of whomsoever the tenements may be holden.

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 licence 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 licence of mortmain in either case; and the like provision hath been since made, in favour of the governors of queen Anne's bounty 9. It hath also been held †, 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 ends of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c. 36. that no lands or tenements, or money to be laid out thereon, shall be given for or charged with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar

° Stat. 1 W. & M. st. 2. c. 2.

† Co. Litt. 99.

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

Rep. 24.



months before the death of the donor, and enrolled in the court of chancery within six months after it's execution, (except stocks in the public funds, which may be transferred within six months previous to the donor's death,) and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void (1). The two universities, their colleges, and the scholars upon

(1) Lord Hardwicke has declared, since this last mortmain act, that "there is no restriction whatsoever upon any one, from leaving a sum of money by will, or any other personal estate, to charitable uses; provided it be to be continued as a personalty, and the executors or trustees are not obliged, or under a necessity of laying it out in land, by virtue of any direction of the testator for that purpose." 2 *Burn. Ec. L.* 509. *tit.* Mortm.

Money left to repair parsonage houses, or to build upon land already in mortmain, is held not to be within the statute. 1 *Bro.* 444. But a legacy to the corporation of queen Anne's bounty is void: as by the rules of the corporation it must be laid out in land. 1 *Bro.* 13.

By the 43 Geo. III. c. 107. the operation of the mortmain act upon the 2 & 3 Ann. c. 11. s. 4. is removed, and the powers given by that section are restored, so that every person is at liberty to give by deed enrolled, or by will, any real or personal property for the augmentation of queen Anne's bounty. That statute enables the governors to exchange all the lands of an augmented living or cure, and also to apply money in their hands to the procuring of a suitable residence for the minister.

And by the 43 Geo. III. c. 108. in like manner any person may give by deed enrolled, or will, executed three months before his death, five acres of land, or personal property to the amount of 500*l.* for the building or repair of any church or parsonage house.

If more is given, it may be reduced to that limit by the chancellor.

But a glebe of 50 acres can be augmented by one acre only.

The bequest of personalty to establish a school has been held to be good; as it was not necessary to purchase lands to give effect to the testator's design, for the master might teach in his own house or in the church. 4 *T. R.* 526.

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 (2), upon the respective foundations.

2. SECONDLY, alienation *to an alien* is also a cause of forfeiture to the crown of the land so alienated; not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land<sup>s</sup>, but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property; as was observed in the preceding volume<sup>t</sup>.

3. LASTLY, alienations *by particular tenants*, when they are greater than the law entitles them to make, and devert the remainder or reversion<sup>v</sup>, are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life alienes by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion<sup>u</sup>. For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feudal connexion and dependence; it implies a refusal to perform the due renders and services to the lord of [ 275 ] the fee, of which fealty is constantly one: and it tends in it's consequence to defeat and devert the remainder or reversion

<sup>s</sup> See pag. 249, 250.

<sup>t</sup> Book I. pag. 372.

<sup>v</sup> Co. Litt. 251.

<sup>u</sup> Litt. § 415.

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(2) That is, of one moiety of the students in those colleges, in which there are no persons styled fellows. The advowsons annexed to headships are not to be computed. S. 5.

By the 45 Geo. III. c. 101. this part of the statute is repealed, so that these colleges may now hold any number of advowsons.

expectant :

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 shewn 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 on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. The same law, which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere *discontinuance* (as it is called<sup>w</sup>) of the estate tail, which the issue may afterwards avoid by due course of law<sup>x</sup>: 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<sup>y</sup>. For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself has created.

EQUIVALENT, both in it's nature and it's 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<sup>z</sup>, upon reasons most apparently feodal. And so likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted [ 276 ]

<sup>w</sup> See book III. ch. 10.

<sup>y</sup> Co. Litt. 233.

<sup>x</sup> Litt. § 595, 6, 7.

<sup>z</sup> Finch, 270, 271.

him at the first infeodation, or takes upon himself those rights which belong only to tenant of a superior class <sup>a</sup>; if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like <sup>b</sup>; such behaviour amounts to a forfeiture of his particular estate.

III. LAPSE is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For it being for the interest of religion, and the good of the public, that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron; who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority <sup>c</sup>) of the council of Lateran <sup>d</sup>, which was in the reign of our Henry the second, when the bishops first began to exercise universally the right of institution to churches <sup>e</sup>. And therefore, where there is no right of institution, there is no right of lapse: so that no donative can lapse to the ordinary <sup>f</sup>, unless it hath been augmented by the queen's bounty <sup>g</sup>. But no right of lapse can accrue, when the original presentation is in the crown <sup>h</sup> (3).

THE term, in which the title to present by lapse accrues from the one to the other successively is six *calendar months*<sup>i</sup>,

<sup>a</sup> Co. Litt. 252.

<sup>b</sup> *Ibid.* 253.

<sup>c</sup> 2 Roll. Abr. 336. pl. 10.

<sup>d</sup> Bracton, l. 4. tr. 2. c. 3.

<sup>e</sup> See page 23.

<sup>f</sup> Bro. Abr. tit. *Quere Imped.* 3 Cro.

Jac. 518.

<sup>g</sup> St. 1 Geo. I. ft. 2. c. 10.

<sup>h</sup> Stat. 17. Edw. II. c. 8. 2 Inst. 273.

<sup>i</sup> 6 Rep. 62. Regist. 42.

(3) If a right of lapse accrues to the bishop and he dies, or is translated before he avails himself of it, the right of presentation to the lapsed benefice does not pass to the king, like the vacant patronage of the fee, but to the guardian of the spiritualities. *Gibf.* 770.

(follow-

(following in this case the computation of the church, and not the usual one of the common law,) and this exclusive of [ 277 ] the day of the avoidance<sup>k</sup>. But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in<sup>l</sup>; for the forfeiture accrues by law, whenever the negligence has continued six months in 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 elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk<sup>m</sup>. 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<sup>n</sup>. 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*<sup>o</sup>. 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,

<sup>k</sup> 2 Inst. 361.

<sup>l</sup> Gibf. Cod. 769.

<sup>m</sup> 2 Inst. 273.

<sup>n</sup> 2 Roll. Abr. 368.

<sup>o</sup> Dr. & St. d. 2. c. 36. Cro. Car. 355.

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 <sup>p</sup>.

[ 278 ] IN case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is 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 <sup>q</sup> (4). Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the archbishop or 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* <sup>r</sup>. 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 <sup>s</sup>. 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 <sup>t</sup>.

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 re-

<sup>p</sup> 7 Rep. 28. Cro. Eliz. 44.

<sup>s</sup> 2 Roll. Abr. 369.

<sup>q</sup> 4 Rep. 75. 2 Inst. 632.

<sup>t</sup> Co. Litt. 344.

<sup>r</sup> Co. Litt. 344, 345.

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(4) See 1 Vol. p. 392. notes 33 and 37.

semblance

semblance 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 <sup>u</sup>, 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 <sup>w</sup>; it being thought sufficient to leave [ 279 ] the clerk to ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, with regard to spiritual preferments, calls aloud to be put in execution. I shall briefly consider them in this place, because they devert the corrupt patron of the right of presentation, and vest a new right in the crown.

By the statute 31 Eliz. c. 6. it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift or promise (5), 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 <sup>x</sup>. But if the presentee dies, without being convicted of such simony in his lifetime, it is enacted by stat. 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

<sup>u</sup> 3 Inst. 156.

<sup>w</sup> Moor. 564.

<sup>x</sup> For other penalties inflicted by this statute see book IV. ch. 4.

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(5) The words of the statute are, “for any sum of money, reward, gift, profit, or benefit; or for any promise, agreement, grant, bond, covenant of or for any sum of money, reward, gift, profit, or benefit.”

presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subject to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

UPON these statutes many questions have arisen, with regard to what is, and what is not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony<sup>y</sup>: this being expressly in the face of the statute (6). 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<sup>z</sup> (7): and now, by that statute, to purchase, either in his own name or another's, the next presentation, and be thereupon presented at any future time to the living, is direct and palpable simony. [ 280 ] 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<sup>a</sup>. 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<sup>b</sup>. 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living,

<sup>y</sup> Cro. Eliz. 778. Moor. 914.

<sup>a</sup> Cro. Eliz. 686. Moor. 916.

<sup>z</sup> Hob. 165.

<sup>b</sup> 3 Inst. 154. Cro. Jac. 385.

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(6) Lord Hardwicke was of opinion, that the sale of an advowson during a vacancy, is not within the statute of simony, as the sale of the next presentation is; but it is void by the common law. *Amb.* 268. See p. 22. *ante*, n. 1.

(7) It has been determined, that the purchase of an advowson in fee, when the incumbent was upon his death-bed, without any privity of the clerk who was afterwards presented, was not simoniacal, and would not vacate the next presentation. 2 *Bl. Rep.* 1052.



are not simoniacal<sup>c</sup>, provided the patron or his relations be not benefited thereby<sup>d</sup>; 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<sup>e</sup>; there being no corrupt consideration herein, but such only as is for the good of the public. So also bonds to resign, when the patron's son comes to canonical age, are legal; upon the reason being given, that the father is bound to provide for his son<sup>f</sup>. 7. Lastly, general bonds to resign at the patron's request are held to be legal<sup>g</sup>: for they may possibly be given for one of the legal considerations before mentioned; and where there is a possibility that a transaction may be fair, the law will not suppose it iniquitous without proof(8). But, if the party can prove the contract to have

<sup>c</sup> Noy, 142.<sup>f</sup> Cro. Jac. 248. 274.<sup>d</sup> Stra. 534.<sup>g</sup> Cro. Car. 180. Stra. 227.<sup>e</sup> Cro. Car. 180.

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(8) In the great case of the bishop of London *v.* Ffytche, it was determined by the house of lords, that a general bond of resignation is simoniacal and illegal. The circumstances of that case were briefly these: Mr. Ffytche the patron presented Mr. Eyre, his clerk, to the bishop of London, for institution. The bishop refused to admit the presentation, because Mr. Eyre had given a general bond of resignation; upon this, Mr. Ffytche brought a *quare impedit* against the bishop, to which the bishop pleaded, that the presentation was simoniacal and void, by reason of the bond of resignation; and to this plea Mr. Ffytche demurred. From a series of judicial decisions, the court of common pleas thought themselves bound to determine in his favour; and that judgment was affirmed by the court of king's bench; but these judgments were afterwards reversed by the house of lords. The principal question was this, *viz.* whether such a bond was a *reward*, *gift*, *profit*, or *benefit*, to the patron under the 31 Eliz. c. 6.: if it were so, the statute had declared the presentation to be simoniacal and void. Such a bond is so manifestly intended by the parties to be a *benefit* to the patron, that it is surprising that it should ever have been argued and decided that it was not a *benefit* within the meaning of the statute. Yet many learned men are dissatisfied

been a corrupt one, such proof will be admitted, in order to shew the bond simoniacal, and therefore void. Neither will the patron be suffered to make an ill use of such a general bond of resignation; as, by extorting a composition for tithes, procuring an annuity for his relation, or by demanding a

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with this determination of the lords, and are of opinion, that their judgment would be different, if the question were brought before them a second time. But it is generally understood that the lords, from a regard to their dignity, and to preserve a consistency in their judgments, will never permit a question which they have once decided, to be again debated in their house. See 1 *Bro.* 286. With respect to the influence which the judgments of the inferior courts ought to have upon the house of lords, the Editor conceives a distinction may be suggested between cases arising merely upon the common law, and cases which depend upon the construction of a statute. A series of decisions in the courts are the best evidence we can have of the common law; and the lords cannot find any adequate authority to oppose to these decisions, or which would justify their reversal: but upon the construction of a statute, where we have no reason to suspect any variation of the original, they seem as fully competent to determine a question, after any number of decisions upon it in the courts below, as after the first; and the length of the series can operate no farther than as an object of general convenience.

In this view of the subject, it is not inconsistent to approve of the judgment of the lords in the case of resignation bonds; and at the same time to condemn their judgment in the case of *Reeve v. Long*, (see p. 169. *ante*, n. 1.) where their humanity led them to relax the severity of the law. The case of the bishop of London *v.* Ffytche is reported at length in *Cunningham's Law of Simony*, p. 52.

But in a late case, where a bond was given to resign a rectory when the patron's son came of age, and before that time, to reside, and to keep the chancel and rectory house in repair; as this case differed from the former, and it was understood that it was intended to carry it up to the house of lords, it was decided by the court of king's bench, in favour of the bond, without an argument. 4 *T. R.* 359. and 78. It has been decided, though with a difference of opinion, that a bond to resign a school or freehold office, at the request of the patron, is valid. 1 *East*, 391.

resign-

resignation wantonly or without good cause, such as is approved by the law; as, for the benefit of his own son, or on account of non-residence, plurality of livings, or gross immorality in the incumbent <sup>h</sup> (9).

V. THE next kind of forfeitures are those by *breach* or [ 281 ] non-performance 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 consider at large in a former chapter <sup>i</sup>.

VI. I THEREFORE now proceed to another species of forfeiture, *viz.* by *waste*. Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail <sup>k</sup>.

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 <sup>l</sup>. Therefore removing waincot, floors, or other things once fixed to the freehold of a house, is waste <sup>m</sup> (10). If a house be destroyed

<sup>h</sup> 1 Vern. 411. 1 Equ. Caf. Abr. 86,      <sup>k</sup> Co. Litt. 53.  
 87. Stra. 534.      <sup>l</sup> Heutl. 35.  
<sup>i</sup> See ch. 10. page 152.      <sup>m</sup> 4 Rep. 64.

(9) In an action by the incumbent for the use and occupation of his glebe, the defendant cannot give in evidence the simoniacal presentation of the plaintiff. 5 T. R. 4. But it may be given in evidence by a defendant who is sued for the tithes. *Hob.* 168.

(10) Between the heir and executor there has not been any relaxation of the ancient law with regard to fixtures, for there is no reason why the one should be more favoured than the other, or the courts would be disposed to assist the heir, and to prevent the inheritance from being dismembered and disfigured. 1 *Hen. Bl.* 258.

But

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. no action will lie against a tenant for an accident of this kind (11). 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

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But the courts are more favourable to an executor of a tenant for life against a person in remainder, and therefore they have held that his executor shall have the benefit of a fire-engine erected by a tenant for life. 3 Atk. 13.

With regard to a tenant for years, what fixtures erected by himself he may afterwards remove before the expiration of his lease, is a question of great importance. It is fully established he may take down useful and necessary erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage.

It has been so held in the case of cyder-mills. A tenant for years may also carry away ornamental marble chimney-pieces, wainscot fixed only by screws, and such like. But erections for the purposes of farming and agriculture do not come under the exception with respect to trade, and cannot be taken down again. See *Elwes v. Maw*, 3 East, 52, where all the cases upon the subject are fully examined.

Where a tenant for years has a right to remove erections and fixtures during his lease, and omits doing it, he is a trespasser afterwards for going upon the land, but not a trespasser *de bonis asportatis*. 2 East, 88.

(11) But if a lessee covenants to pay rent, and to repair, with an express exception of casualties by fire, he may be obliged to pay rent during the whole term, though the premises are burnt down by accident, and never rebuilt by the lessor. 1 T. R. 310. Nor can he be relieved by a court of equity, *Anst.* 687, unless perhaps the landlord has received the value of his premises by insuring. *Amb.* 621. And if he covenants to repair generally without any express exceptions, and the premises are burnt down, he is bound to rebuild them. 6 T. R. 650.

inheritance.

inheritance<sup>n</sup>. Timber also is part of the inheritance<sup>o</sup> (12). Such are oak, ash, and elm in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are 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<sup>p</sup>. But underwood the tenant may cut down at any seasonable time [ 282 ] that he pleases<sup>q</sup>; and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions<sup>r</sup>. 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<sup>s</sup>. For, as sir Edward Coke observes<sup>t</sup>, 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<sup>u</sup>. To open the land to search for mines of metal, coal, &c. is waste; for that is a detriment to the inheritance<sup>v</sup>: but if the pits or mines were open be-

<sup>n</sup> Co. Litt. 53.<sup>o</sup> 4 Rep. 62.<sup>p</sup> Co. Litt. 53.<sup>q</sup> 2 Roll. Abr. 817.<sup>r</sup> Co. Litt. 41.<sup>s</sup> Hob. 296.<sup>t</sup> 1 Inst. 53.<sup>u</sup> 1 Lev. 309.<sup>v</sup> 5 Rep. 12.

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(12) If during the estate of a mere tenant for life, timber is severed either by accident or by wrong, it belongs to the first person who has a vested estate of inheritance. But where there are intermediate contingent estates of inheritance, and the timber is cut down by a combination between the tenant for life and the person who has the next vested estate of inheritance; or if the tenant for life has himself such estate and sells timber; in these cases the chancellor will order it to be preserved for him who has the first contingent estate of inheritance under the settlement. 3 Cox's P. Wms. 267. 3 Woodd. 400.

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fore, it is no waste for the tenant to continue digging them for his own use<sup>w</sup>; 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.

LET us next see, who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories; “*si vassallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*”<sup>x</sup> But in our ancient common law the rule was by no means so large; for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons; guardian [ 283 ] in chivalry, tenant in dower, and tenant by the curtesy<sup>y</sup>; and not in tenant for life or years<sup>z</sup>. And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But, in favour of the owners of the inheritance, the statutes of Marlbridge 52 Hen. III. c. 23. and of Gloucester 6 Edw. I. c. 5., provided that the writ of waste shall not only lie against tenants by the law of England, (or curtesy,) and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for above five hundred years past, all tenants merely for life, or for any less estate, have been 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,

<sup>w</sup> Hob. 295.

<sup>x</sup> Wright, 44.

<sup>y</sup> It was however a doubt whether waste was punishable at the common law

in tenant by the curtesy. Regist, 72.

Bro. Abr. tit. waste, 88. 2 Inst. 301.

<sup>z</sup> 2 Inst. 299.

*absque impetitione vasti*; that is, with a provision or protection that no man shall *impetere*, or sue him for waste, committed (13). But 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 <sup>a</sup> (14). 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 <sup>b</sup>: 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 <sup>c</sup>.

THE punishment for waste committed was, by common law and the statute of Marlbridge, only single damages <sup>d</sup>; except in the case of a guardian, who also forfeited his ward-

<sup>a</sup> Co. Litt. 27. 2 Roll. Abr 826. 828.

<sup>c</sup> F. N. B. 58.

<sup>b</sup> Co. Litt. 54.

<sup>d</sup> 2 Inst. 146.

(13) A tenant for life without impeachment of waste has as full power of cutting down timber, and of opening new mines for his own use, as if he had an estate of inheritance; and is in the same manner entitled to the timber, if severed by others. 1 *T. R.* 56. *Harg. Co. Litt.* 220. But although such a tenant for life may commit waste for his own benefit, yet he may be restrained by an injunction out of the court of chancery from making *spoil and destruction* upon the estate. This distinction was first introduced in the case of lord Barnard, who was tenant for life without impeachment of waste, with remainder to his eldest son in tail; and having conceived a displeasure against his son, from motives of spleen, began to pull down the family mansion, Raby Castle; but he was restrained by the chancellor, and ordered to repair it. 2 *Vern.* 738. Since that case, such a tenant has been restrained from cutting down avenues and ornamental timber in pleasure grounds, and also young trees not fit for timber; and also trees upon a common two miles distant from the mansion house, which had been planted as an ornament to the estate. 1 *Bro.* 166. 3 *Bro.* 549. 6 *Ves. jun.* 107. See also 3 *Woodd.* 399. *et seq.* where this subject is fully and learnedly treated.

(14) See page 125. n. 3. *ante.*

ship<sup>e</sup> by the provisions of the great charter<sup>f</sup>: but the statute of Gloucester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance. The expression of the statute is, “he shall forfeit “the *thing* which he hath wasted;” and it hath been determined that under these words the *place* is also included<sup>g</sup>. And if waste be done *sparſim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several [ 284 ] rooms of a house, the whole house shall be forfeited<sup>h</sup>; because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood, (or perhaps in one room of a house, if that can be conveniently separated from the rest,) that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner<sup>i</sup>.

VII. A SEVENTH species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste: whereupon the lord may seize them without any presentment by the homage<sup>k</sup>; 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 vassals, the marks of feudal dominion continue much the strongest upon this mode of property. Most of the offences, which occasioned a resumption of the fief by the feudal law, and were denominated *feloniae, per quas vassallus amitteret feudum*<sup>l</sup>, still continue to be causes of forfeiture in many of our modern copy-

<sup>e</sup> 2 Inst. 300.

<sup>f</sup> 9 Hen. III. c. 4.

<sup>g</sup> 2 Inst. 303.

<sup>h</sup> Co. Lit., 54.

<sup>i</sup> 2 Inst. 304.

<sup>k</sup> 2 Ventr. 38. Cro. Eliz. 439.

<sup>l</sup> Feud. l. 2. t. 26. in c. 16.



holds. As, by subtraction of fuit and service<sup>m</sup>; *si dominum deservire noluerit*<sup>n</sup>: by disclaiming to hold of the lord, or swearing himself not his copyholder<sup>o</sup>; *si dominum ejuravit, i. e. negavit se a domino feudum habere*<sup>p</sup>: by neglect to be admitted tenant within a year and a day<sup>q</sup>; *si per annum et diem cessaverit in petenda investitura*<sup>r</sup>: by contumacy in not appearing in court after three proclamations<sup>s</sup>; *si a domino ter citatus non comparuerit*<sup>t</sup>: or by refusing, when sworn of the homage, to present the truth according to his oath<sup>u</sup>: *si pares veritatem noverint, et dicant se nescire, cum sciant*<sup>w</sup>. In these and a [ 285 ] variety of other cases, which it is impossible here to enumerate, the forfeiture does not accrue to the lord till after the offences are presented by the homage, or jury of the lord's court baron<sup>x</sup>: *per laudamentum parium suorum*<sup>y</sup>; or, as it is more fully expressed in another place<sup>z</sup>, *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa, quae sit laudanda*<sup>a</sup> *per judicium parium suorum*.

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, will be better considered in a subsequent chapter; when we shall endeavour more fully to explain it's nature, as it most immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and

<sup>m</sup> 3 Leon. 108. Dyer. 211.

<sup>n</sup> Feud. l. 1. t. 21.

<sup>o</sup> Co. Copyh. § 57.

<sup>p</sup> Feud. l. 2. t. 34. & t. 26. § 3.

<sup>q</sup> Plowd. 372.

<sup>r</sup> Feud. l. 2. t. 24.

<sup>s</sup> 8 Rep. 99. Co. Copyh. § 57.

<sup>t</sup> Feud. l. 2. t. 22.

<sup>u</sup> Co. Copyh. § 57.

<sup>w</sup> Feud. l. 2. t. 58.

<sup>x</sup> Co. Copyh. § 58.

<sup>y</sup> Feud. l. 1. t. 21.

<sup>z</sup> Ibid. t. 22.

<sup>a</sup> i. e. *arbitranda, definienda.* Du Fresne, IV. 79.

tenements is transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission of bankrupt is awarded and issued against him.

By statute 13 Eliz. c. 7. the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tenements which were purchased by him jointly with his wife or children to his own use, (or such interest therein as he [ 286 ] may lawfully part with,) or purchased with any other person upon secret trust for his own use; and to cause them to be appraised to their full value, and to sell the same by deed indented and inrolled, or divide them proportionably among the creditors. This statute expressly included not only free, but customary and copyhold, lands; but did not extend to estates-tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. I. c. 19. enacts, that the commissioners shall be empowered to sell or convey, by deed indented and inrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issues in tail, remainder-men, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same as the bankrupt himself might have done, and after redemption to sell them. And also by this and a former act<sup>b</sup>, all fraudulent conveyances to defeat the intent of these statutes are declared void; but that no purchaser *bona fide*, for a good or valuable consideration, shall be affected by the

<sup>b</sup> 1 Jac. I. c. 15.

bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed (15).

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

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(15) If the wife of a bankrupt has lands before marriage, unless they are settled upon her for her separate use, the husband's interest in them shall be sold, so that the wife can have no farther enjoyment of them until she survives her husband.

By 46 Geo. III. c. 135. it is enacted, that all conveyances by any bankrupt made two calendar months before the date of the commission shall be valid, notwithstanding a prior act of bankruptcy, provided the person dealing with the bankrupt had not any notice, at the time of the conveyance, of such prior act of bankruptcy of the bankrupt, or that he was insolvent, or had stopped payment.

## CHAPTER THE NINETEENTH.

## OF TITLE BY ALIENATION.

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

THIS means of taking estates by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law<sup>a</sup>, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord ; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts ; for if he might, the feudal restraint of alienation would have been easily frustrated and evaded<sup>b</sup>. And, as he could not aliene it in his lifetime, so neither could he by will defeat the succession, by devising his feud to another family ; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent, or presumptive heir<sup>c</sup>. And therefore it was very usual in antient feoffments to express that

<sup>a</sup> See page 37.

<sup>b</sup> *Feud. l. i. t. 27.*

<sup>c</sup> *Co. Litt. 94. Wright, 168.*

the alienation was made by consent of the heirs of the feoffor: or sometimes for the heir apparent himself to join with the feoffor in the grant <sup>d</sup>. And, on the other hand, as the feodal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his signiory without the consent of his vafal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seifing of his cattle by the lord of a neighbouring clan <sup>e</sup>. This consent of the vafal was expressed by what was called *attorning* <sup>f</sup>, or professing to become the tenant of the new lord: which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser, and to become his tenant, the grant or contract was in most cases void, or at least incomplete <sup>g</sup>: which was also an additional clog upon alienations.

BUT by degrees this feodal severity is worn off; and experience hath shewn, that property best answers the purposes of civil life, especially in commercial countries, when it's transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of king Henry the first, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power than over what had been transmitted to him in a course of descent from his ancestors <sup>h</sup>:

<sup>d</sup> Madox, *Formul. Angl.* N<sup>o</sup> 216. 319. 427.

<sup>e</sup> Gilb. Ten. 75.

<sup>f</sup> The same doctrine and the same denomination prevailed in Bretagne—*possiones in jurisdictionalibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vassallus, ejurato prioris domini obsequio*

*et fide, novo se sacramento novo item domino acquirenti obstringebat, idque jussu auctoris.* D'Argentre *Antiq. Consuet. Brit. apud Dufresne*, i. 819, 820.

<sup>g</sup> Litt. § 551.

<sup>h</sup> *Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognitionem suam, LL. Hen. I. c. 70.*

a doctrine which is countenanced by the feudal constitutions themselves<sup>i</sup>: but he was not allowed to sell the whole of his own acquisitions, so as totally to disinherit his children, any more than he was at liberty to alienate his paternal estate<sup>k</sup>. Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his assigns by name; but, if his assigns were not specified in the purchase deed, he was not empowered to alienate<sup>l</sup>: and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir<sup>m</sup>. By the great charter of Henry III.<sup>n</sup>, no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land<sup>o</sup>. But these restrictions were in general removed, by the statute of *quia emptores*<sup>p</sup>, whereby all persons, except the king's tenants *in capite*, were left at liberty to alienate all or any part of their lands at their own discretion<sup>q</sup>. And even these tenants *in capite* were by the statute 1 Edw. III. c. 12. permitted to alienate, on paying a fine to the king<sup>r</sup>. By the temporary statutes 7 Hen. VII. c. 3. and 3 Hen. VIII. c. 4. all persons attending the king in his wars were allowed to alienate their lands without licence, and were relieved from other feudal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of charging lands with the debts of the owner, this was introduced so early as stat. Westm. 2. which<sup>s</sup> subjected a moiety of the tenant's lands to executions, for debts recovered by law: as the whole of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*,

<sup>i</sup> Feud. l. 2. l. 39.

<sup>k</sup> *Si questum tantum habuerit is, qui partem terrae suae donare voluerit, tunc quidem hoc ei licet: sed non totum questum, quia non potest filium suum haeridem exhaereditare.* Glanvil. l. 7. c. 1.

<sup>l</sup> Mirr. c. 1. § 3. This is also borrowed from the feudal law. Feud. l. 2. l. 48.

<sup>m</sup> Mirr. *ibid.*

<sup>n</sup> 9 Hen. III. c. 32.

<sup>o</sup> Dalrymple of feuds, 95.

<sup>p</sup> 18 Edw. I. c. 1.

<sup>q</sup> See pag. 72. 91.

<sup>r</sup> 2 Inst. 67.

<sup>s</sup> 13 Ed. I. c. 18.

made the same year, and in a statute staple by statute 27 Edw. III. c. 9. and in other similar recognizances by statute 23 Hen. VIII. c. 6. [ 290 ] And now, the whole of them is not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold* for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of *devising* lands by will, except in some places by particular custom, lasted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last they were made no longer necessary to complete the grant or conveyance, by statute 4 & 5 Ann. c. 16.; nor shall, by statute 11 Geo. II. c. 19, the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice.

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.

I. WHO may aliene, and to whom: or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties: for all persons in *possession* are *prima facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. But, if a man has only in him the *right* of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed<sup>s</sup>. 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

<sup>s</sup> Co. Litt. 214.

assigned to a stranger, unless coupled with some present interest † (1).

[ 291 ] PERSONS attainted of treason, felony, and *praemunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows<sup>u</sup>: 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<sup>w</sup>. 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.

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<sup>x</sup>. But it hath been said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own infanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edward I., *non compos* was a sufficient plea to avoid a man's own bond<sup>y</sup>: and there is a writ in the register<sup>z</sup> for the alienor himself to recover

† Sheppard's touchstone, 238, 239.

× Co. Litt. 247.

322. 11 Mod. 152. 1 P. Wms. 574.

ʏ Britton, c. 28. fol. 66.

Stra. 132.

z fol. 228. See also *Memorand. Scaccb.* 22 Edw. I. (prefixed to Maynard's year-book, Edw. II.) fol. 23.

<sup>u</sup> Co. Litt. 42.

<sup>w</sup> *Ibid.* 2.

(1) A covenant for a valuable consideration to settle or convey a possibility, when it arises, will be enforced in equity. *Fonbl. Tr. of Eq.* 202.

lands



lands aliened by him during his infanity; *dum fuit non compos mentis suae, ut dicit, &c.* But under Edward III. a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own infanity<sup>a</sup>: and, afterwards, a defendant in assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assise; doubting, whether as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it<sup>a</sup>. Under Henry VI. this way of reasoning (that a man shall not be allowed to disable himself, [ 292 ] by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument<sup>b</sup>; upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason<sup>c</sup>, the maxim that a man shall not stultify himself hath been handed down as settled law<sup>d</sup>: though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it<sup>e</sup> (2). And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant<sup>f</sup>. And so too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to

<sup>a</sup> 5 *Edw. III.* 70.

<sup>a</sup> 35 *Affis. pl.* 10.

<sup>b</sup> 39 *Hen. VI.* 42.

<sup>c</sup> F. N. B. 202.

<sup>d</sup> Litt. § 405. Cro. Eliz. 398.

4 Rep. 123. Jenk. 40.

<sup>e</sup> Com. 469. 3 Mod. 310, 311.

1 Equ. cas. abr. 279.

<sup>f</sup> Perkins, § 21.

(2) In Cro. Eliz. 398. the opinion of Fitzherbert is denied to be law, and *de non sane memory* held to be a bad plea to an action of debt upon an obligation. See much learning respecting lunatics, collected in Mr. Fonblanque's edition of the Treatise of Equity, p. 40. & seq.

the

the purchase, his heir may either waive or accept the estate at his option<sup>g</sup>. 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<sup>h</sup>. Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased<sup>i</sup>. For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases. Yet the guardians or committees of a lunatic, by the statute of 11 Geo. III. c. 20. are empowered to renew in his right, under the directions of the court of chancery, any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatic, his heirs or executors.

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

THE case of an alien born is also peculiar. For he may purchase any thing; but after purchase he can hold nothing except a lease for years of a house for convenience of mer-

<sup>g</sup> Co. Litt. 2.

<sup>h</sup> *Ibid.*

<sup>i</sup> 2 Inst. 483. 5 Rep. 119.

<sup>k</sup> Co. Litt. 3.

<sup>l</sup> *Ibid.*

<sup>m</sup> Perkins, § 154. 1 Sid. 120.

chandize (3), in case he be an alien friend; all other purchases (when found by an inquest of office) being immediately forfeited to the king<sup>n</sup>.

PAPISTS, lastly, and persons professing the popish religion, and neglecting to take the oath prescribed by statute 18 Geo. III. c. 60. within the time limited for that purpose, are by statute 11 & 12 W. III. c. 4. disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void<sup>o</sup>.

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

IN consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; [ 294 ] which, we have more than once observed, was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose therefore of continuing the possession, the municipal law has established *descents* and *alienations*: the former to continue the possession in the heirs of the 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, should chuse to relinquish it in his lifetime. A translation, or transfer, of property being

<sup>n</sup> Co. Litt. 2.

<sup>o</sup> 1 P. Wms. 354.

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(3) It seems that he has not even this exception in his favour.  
*Harg. Co. Litt. 2.*

thus admitted by law, it became necessary that this transfer should be properly evidenced : in order to prevent disputes, either about the fact, as whether there was any transfer at all ; or concerning the persons, by whom and to whom it was transferred ; or with regard to the subject-matter, as what the thing transferred consisted of ; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common assurances* of the kingdom ; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

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

## CHAPTER THE TWENTIETH.

## OF ALIENATION BY DEED.

**I**N 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.

I. **FIRST**, then, a deed is a writing sealed and delivered by the parties <sup>a</sup>. 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' ἐξοχην, 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 *stopped* 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 <sup>b</sup>. 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 strait or

<sup>a</sup> Co. Litt. 171.<sup>b</sup> Plowd. 434.

indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists<sup>c</sup>; and with us *chirographa*, or hand-writings<sup>d</sup>; the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture: and this custom is still preserved in making out the indentures of a fine, whereof hereafter. But at length indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose, than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*: though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but *poll*ed or shaved quite even; and therefore called a *deed-poll*, or a single deed<sup>e</sup>.

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<sup>f</sup>. So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

SECONDLY, the deed must be founded upon good and sufficient *consideration*. Not upon an usurious contract<sup>g</sup>; nor upon fraud or collusion, either to deceive purchasers *bona fide*<sup>h</sup>, or just and lawful creditors<sup>i</sup>; any of which bad considerations will vacate the deed, and subject such persons, as put the same in ure, to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration,

<sup>c</sup> Lyndew. l. 1. t. 10. c. 1.

<sup>d</sup> Mirror. c. 2. § 27.

<sup>e</sup> *Ibid.* Litt. § 371, 372.

<sup>f</sup> Co. Litt. 35.

<sup>g</sup> Stat. 13 Eliz. c. 8.

<sup>h</sup> Stat. 27 Eliz. c. 4.

<sup>i</sup> Stat. 13 Eliz. c. 5.

is, as it were, of no effect: for it is construed to enure, or to be effectual, only to the use of the grantor himself<sup>k</sup> (1). The consideration may be either a *good* or a *valuable* one. A good [ 297 ] 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<sup>l</sup>: 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.

<sup>k</sup> Perk. § 533.

<sup>l</sup> 3 Rep. 83.

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(1) This I conceive is only true of a bargain and sale; for “ herein it is said to differ from a gift, that this may be without any consideration or cause at all; and that hath always some meritorious cause moving it, and cannot be without it.” *Shep. Touch.* 221. But otherwise a voluntary conveyance is good both in law and equity. *Tr. of Eq. b. 1. c. 5. f. 2.* It used to be thought, if a person made a voluntary grant of lands, although he could not resume them himself, yet if he afterwards made another conveyance of them for a valuable consideration, that the first grant would be void with regard to this purchaser under the 27 Eliz. c. 4. But it was determined by lord Mansfield and the court, that there must be some circumstance of fraud to vacate the first conveyance, the want of consideration alone not being sufficient. *Cowp.* 705.

But it has since been decided, that a voluntary settlement of lands made in consideration of natural love and affection, even as a provision for the nearest relations, parents, or children, is void as against a subsequent purchaser for a valuable consideration, although such purchaser had notice of the prior settlement. *9 East,* 59.

If a person is indebted at the time of making a voluntary grant, or becomes so soon afterwards, it will be considered fraudulent and void with respect to creditors, under the 13 Eliz. c. 5.

And if a person makes a voluntary grant, and afterwards becomes bankrupt, whether he was indebted or not at the time, it will be void by 1 Jac. c. 15.; and the estate granted may be conveyed by the commissioners to the assignees for the benefit of the creditors.

<sup>1</sup> *Atk.* 93.

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<sup>m</sup>. 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 be valid: unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

FOURTHLY; the matter written must be *legally* and *orderly* set forth: that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must be left to the courts of law to determine<sup>n</sup>. 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<sup>o</sup> order.

<sup>m</sup> Co. Litt. 227, F.N.B. 122.    <sup>n</sup> Co. Litt. 225.    <sup>o</sup> *Ibid.* 6.



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 <sup>p</sup>.

2, 3. NEXT come the *habendum* and *tenendum*<sup>q</sup>. 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<sup>r</sup>. But, had it been in the premises “to him and his heirs,” *habendum* “to him “for life,” the *habendum* would be utterly void<sup>s</sup>; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it. The *tenendum*, “and to hold,” is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted [ 299 ] 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. Before the statute of *quia emptores*, 18 Ed. I., it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus do-*

<sup>p</sup> See Appendix, N<sup>o</sup> II, § 1. pag. v.

<sup>r</sup> Co. Litt. 21. 2 Roll. Rep. 19. 23.

<sup>q</sup> *Ibid.*

Cro. Jac. 476.

<sup>s</sup> 2 Rep. 23. 3 Rep. 56.

*minis feodi*<sup>t</sup>; but as this expreffed nothing more than the ftatute had already provided for, it gradually grew out of ufe.

4. NEXT follow the terms of ftipulation, if any, upon which the grant is made: the firft of which is the *reddendum* or refervation, whereby the grantor doth create or referve fome new thing to himfelf out of what he had before granted, as “ rendering therefore yearly the fum of ten fhillings, or “ a pepper-corn, or two days’ ploughing, or the like.” Under the pure feodal fyftem, this render, *reditus*, return or rent, confifted in chivalry principally of military fervices; in villeinage, of the moft flavifh offices; and in focage, it ufually confifts of money, though it may ftill confift of fervices, or of any other certain profit<sup>w</sup>. To make a *reddendum* good, if it be of any thing newly created by the deed, the refervation muft be to the grantors, or fome, or one of them, and not to any ft ranger to the deed<sup>x</sup>. But if it be of antient fervices or the like, annexed to the land, then the refervation may be to the lord of the fee<sup>y</sup>.

5. ANOTHER of the terms upon which a grant may be made is a *condition*; which is a claufe of contingency, on the happening of which the eftate granted may be defeated; as  
 [ 300 ] “ gagee 500*l.* upon fuch a day, the whole eftate granted “ fhall determine; and the like<sup>z</sup>.

6. NEXT may follow the claufe of *warranty*; whereby the grantor doth, for himfelf and his heirs, warrant and fecurity to the grantee the eftate fo granted<sup>a</sup>. By the feodal conftitution, if the vafal’s title to enjoy the feud was difputed, he might vouch, or call the lord or donor to warrant or infure his gift; which if he failed to do, and the vafal was evicted, the lord was bound to give him another feud of equal value in recompence<sup>b</sup>. And fo, by our antient law, if before the ftatute of *quia emptores* a man enfeoffed another in

<sup>t</sup> Appendix, N<sup>o</sup> I. Madox. *Formul.* <sup>y</sup> Appendix, N<sup>o</sup> I. pag. i. *passim.*

<sup>z</sup> Appendix, N<sup>o</sup> II. § 2. pag. viii.

<sup>u</sup> Appendix, N<sup>o</sup> II. § 1. pag. iii.

<sup>a</sup> *Ibid.* N<sup>o</sup> I. pag. i.

<sup>w</sup> See pag. 41.

<sup>b</sup> *Feud. l. 2. t. 8 & 25.*

<sup>x</sup> Plowd. 13. 8 Rep. 71.

fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered<sup>c</sup>. Or if a man and his ancestors had immemorially holden land of another and his ancestors by the service of homage, (which was called *homage auncestrel*), this also bound the lord to warranty<sup>d</sup>; the homage being an evidence of such a feudal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty<sup>e</sup>, because they enjoy the equivalent. And so, even at this day, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) are bound to warrant the title<sup>f</sup>. But in a feoffment in fee, by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs<sup>g</sup>; because it is a mere personal contract on the part of the feoffor, the tenure (and of course the antient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, no warranty whatsoever is implied<sup>h</sup>; they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant*<sup>i</sup>. [ 301 ]

THESE express warranties were introduced, even prior to the statute of *quia emptores*, in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet if a clause of warranty was added to the

<sup>c</sup> Co. Litt. 384.<sup>d</sup> Litt. § 143.<sup>e</sup> Co. Litt. 174.<sup>f</sup> *Ibid.* 384.<sup>g</sup> Co. Litt. 384.<sup>h</sup> *Ibid.* 102.<sup>i</sup> Litt. § 733.

ancestor's grant, this covenant descending upon the heir injured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompence in lands of equal value: the law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood<sup>k</sup>; and therefore presuming that he had received a valuable consideration, either in land or in money, which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee-simple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir: and this, whether that warranty was *lineal* or *collateral* to the title of the land. *Lineal* warranty was, where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty: as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son<sup>l</sup>. *Collateral* warranty was where the heir's title to the land neither was, nor could have been derived from [ 302 ] the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother<sup>m</sup>. But where the very conveyance to which the warranty was annexed immediately followed a disseisin, or operated itself as such, (as, where a father tenant for years, with remainder to his son in fee, aliened in fee-simple with warranty,) this, being in it's original manifestly founded on the *tort* or wrong of the warrantor himself, was called a warranty *commencing by disseisin*; and, being too palpably injurious to be supported, was not binding upon any heir for such tortious warrantor<sup>n</sup>.

<sup>k</sup> Co. Litt. 373.

<sup>l</sup> Litt. § 703, 706, 707.

<sup>m</sup> Litt. § 705, 707.

<sup>n</sup> Ibid. § 698, 702.

IN both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting ancestor<sup>o</sup>. But though without assets, he was not bound to insure the title of *another*, yet in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land *himself*; for if he could succeed in such claim, he would then gain assets by descent, (if he had them not before,) and must fulfil the warranty of his ancestor: and the same rule<sup>p</sup> was with less justice adopted also in respect of collateral warranties, which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to aliene their lands with warranty; which collateral warranty of the father descending upon the son (who was the heir of both his parents) barred him from claiming his maternal inheritance; to remedy which the statute of Gloucester, 6 Edw. I. c. 3. declared, that such warranty should be no bar to the son, unless assets descended from the father. It was afterwards attempted in 50 Edw. III. to make the same provision universal, by enacting, that no collateral [ 303 ] warranty should be a bar, unless where assets descended from the same ancestor<sup>q</sup>; but it then proceeded not to effect. However, by the statute 11 Hen. VII. c. 20., notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife. And by statute 4 & 5 Ann. c. 16. all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession, shall be void against his heir. By the wording of which last

<sup>o</sup> Co. Litt. 102.<sup>p</sup> Litt. § 711, 712.<sup>q</sup> Co. Litt. 373.

statute it should seem that the legislature meant to allow, that the collateral warranty of tenant in tail in possession, descending (though without assets) upon a remainder-man or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute *de donis*, held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar<sup>r</sup>: which was therefore formerly mentioned<sup>6</sup> as one of the ways whereby an estate-tail might be destroyed; it being indeed nothing more in effect than exchanging the lands entailed for others of equal value. They also held, that collateral warranty was not within the statute *de donis*; as that act was principally intended to prevent the tenant in tail from disinheriting his own issue; and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon<sup>t</sup>. And so it still continues to be, notwithstanding the statute of queen Anne, if made by tenant in tail in possession: who therefore may now, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion.

[ 304 ] 7. AFTER warranty usually follow *covenants*, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he 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.<sup>u</sup> If the covenantor covenants for himself and his *heirs*, it is then a covenant real, and

<sup>r</sup> Litt. § 712. 2 Inst. 293.

<sup>t</sup> Pag. 116.

<sup>6</sup> Co. Litt. 374. 2 Inst. 335.

<sup>u</sup> Appendix, N<sup>o</sup> II. § 2. pag. viii.

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 (2). 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 and his ancestors, whereas a general *warranty* extends to all mankind. For which reasons the covenant has in modern practice totally superseded the other.

8. LASTLY, comes the *conclusion*, which mentions the execution and date of deed, or the time of it's being given or executed, either expressly, or by reference to some day and year before mentioned<sup>w</sup>. 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 it's being dated or given, that is delivered, can be proved<sup>x</sup> (3).

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

<sup>w</sup> Appendix, No. II. § 2. pag. xii.

<sup>x</sup> Co. Litt. 46. Dyer, 28.

(2) The executors and administrators are bound by every covenant without being named, unless it is such a covenant as is to be performed personally by the covenantor, and there has been no breach before his death. *Cro. Eliz.* 553.

(3) In antient times the date of the deed was generally omitted, and the reason was this, *viz.* that the time of prescription frequently changed, and a deed dated before the time of prescription was not pleadable, but a deed without date might be alleged to be made within the time of prescription. Dates began to be added in the reigns of *Ed. II.* and *Ed. III.*

. himself:

himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited: unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party<sup>y</sup>.

[ 305 ] 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 use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely antient. We read of it among the Jews and Persians in the earliest and most sacred records of history<sup>z</sup>. And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase<sup>a</sup>. In the civil law also<sup>b</sup>, seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England. For though sir Edward Coke<sup>c</sup> relies on an instance of king Edwin's making use of a seal about an hundred years before the conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumstance, of being sealed; since we are assured by all our antient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and whether they could write or not, to affix the sign of the cross; which custom our illiterate vulgar do, for the most part, to this day keep up; by signing a cross for their mark, when unable to write their names. And

<sup>y</sup> 2 Rep. 3. 9. 11 Rep. 27.

<sup>z</sup> 1 Kings, c. 21. Daniel, c. 6. Esther, c. 8.

<sup>a</sup> " And I bought the field of Hana-neel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed

him the money in the balances. And

" I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open." c. 32.

<sup>b</sup> *Inst.* 2. 10. 2 & 3.

<sup>c</sup> 1 *Inst.* 7.



indeed this inability to write, and therefore making a cross in it's stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters <sup>d</sup>. In like manner, and for the same unfurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made it's way among them, though the reason for doing it had ceased; and hence the charter of Edward the confessor to Westminster-abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England <sup>e</sup>. At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross <sup>f</sup>. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals <sup>g</sup>. The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the first, who brought them from the croifade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

THIS neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to au-

<sup>d</sup> "*Propria manu pro ignorantia literarum signum sanctae crucis expressi et subscripsi.*" Seld. *Jan. Angl.* l. i. § 42. And this, (according to Procopius) the emperor Jullin in the east, and Theodore king of the Goths in Italy, had before authorized by their example, on account of their inability to write.

<sup>e</sup> Lamb. *Archeion.* 51.

<sup>f</sup> "*Normanni chirographorum consuetudinem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in caeram impressam mutant, modumque scribendi Anglicum rejiciunt.*" Ingulph.

<sup>g</sup> Stat. Exon. l. i; Ed. I.

authenticate a deed: and so the common form of attesting deeds, — “*sealed and delivered,*” continues to this day; notwithstanding the statute 29 Car. II. c. 3. before mentioned revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds: in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other<sup>h</sup>.

[ 307 ] A SEVENTH requisite to a good deed is, that it be *delivered* by the party himself or his certain attorney, which therefore is also expressed in the attestation; “*sealed and delivered.*” A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing<sup>i</sup>, and by a parity of reason the signing also, and makes them both his own (4). 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<sup>j</sup>.

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 con-

<sup>h</sup> 3 Lev. 1. Stra. 764.

<sup>i</sup> Perk. § 130.

<sup>j</sup> Co. Litt. 36.

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(4) By 29 Car. 2. c. 3. referred to above in the text, all leases and agreements, which are required to be in writing, must be signed by the party, or an agent lawfully authorized.

With respect to leases and agreements specified in the first section, the agent must be authorized *by writing*, but in the fourth and 17th sections the words *by writing* are omitted, and a parol authority to the agent will be sufficient with respect to the contracts therein enumerated.

stituting

stituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers<sup>k</sup>, which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only become the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names, (that not being always in their power,) but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum; thus: “*hijz testibus Jobanne Moore, Jacobo Smith, et aliis, ad hanc rem convocatis*”<sup>l</sup>. This, like all other solemn transactions, was originally done only *coram paribus*<sup>m</sup>, and frequently when assembled in the court-baron, hundred, or county-court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.*<sup>n</sup> Afterwards the attestation of other witnesses was allowed, the trial in case of a dispute being still reserved to the *pares*; with whom the witnesses (if more than one) were associated and joined in the verdict<sup>o</sup>; till that also was abrogated by the statute of York, 12 Edw. II. ft. 1. c. 2. And in this manner, with some such clause of *hijz testibus*, are all old deeds and charters, particularly *magna carta*, witnessed. And in the time of sir Edward Coke, creations of nobility were still witnessed in the same manner<sup>p</sup>. But in the king's common charters, writs, or letters patent, the style is now altered: for at present the king is his own witness, and attests his letters patent thus: “*Teste meipso, witness ourself at Westminster, &c.*” a form which was introduced by Richard the first<sup>q</sup>, but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijz testibus* entirely discontinued till the reign of Henry the eighth<sup>r</sup>: which was also the æra of discontinuing it in the deeds of subjects, learning being then revived, and the

<sup>k</sup> *Feud. l. 1. t. 4.*

<sup>l</sup> *Co. Litt. 7.*

<sup>m</sup> *Feud. l. 2. t. 32.*

<sup>n</sup> *Spelm. Gloss. 228. Madox. Formul. N<sup>o</sup> 21. 322. 660.*

<sup>o</sup> *Co. Litt. 6.*

<sup>p</sup> 2 *Inst. 77.*

<sup>q</sup> *Madox Formul. N<sup>o</sup> 515.*

<sup>r</sup> *Ibid. Dissert. fol. 32.*

faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestations, either at the bottom, or on the back of the deed<sup>s</sup> (4).

III. WE are next to consider, how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before mentioned; either, 1. Proper parties, and a proper subject-matter: 2. A good and sufficient consideration: 3. Writing on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing, and, by the statute, in most cases signing also: or, 7. Delivery; it is a void deed *ab initio*. 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<sup>t</sup> (5). 2. By

<sup>s</sup> 2 Inst. 78. See pag. 378.

<sup>t</sup> 11 Rep. 27.

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(4) From the few laconic deeds of antiquity, being mostly feoffments, which I have had an opportunity of seeing, I have observed that in the reign of Edw. IV. and before that time, they were neither subscribed by the parties nor witnesses. But they conclude, *In cujus rei testimonium huic chartæ (vel scripto) nostra sigilla apposuimus. Hiis testibus, &c.* But after that time the parties began to write their names over or near the seal. And in the reign of Hen. VIII. in general they are signed by the parties, but not by the witnesses; but in the next reign the practice commenced, that the witnesses, who the parties intended should afterwards prove the execution of the instrument, should also subscribe their names.

(5) Such an alteration will also render void a bill of exchange or promissory note. 4 T. R. 320. 1 Anst. 225.

A bill may be altered in the terms of it at the time of making, or so soon afterwards that the alteration and the making may be construed as one act. But after it has been some time in the hands of the payee, it is void, though altered by the consent of all parties; a fresh stamp becomes necessary. But words written on a bill, which do not affect the responsibility of the acceptor or party against whom the action is brought, do not vitiate a bill or note. *Camp. p. 79.*

breaking

breaking off, or defacing the seal<sup>u</sup>. 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 antiently the province of the court of star-chamber, and now of the chancery: when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery<sup>w</sup>. 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. [ 309 ]

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 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

<sup>u</sup> 5 Rep. 23.

<sup>w</sup> Toth. *numo.* 24. 1 Vern. 348.

estate originally created, is enlarged, restrained, transferred, or extinguished.

[ 310 ] 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.

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*<sup>x</sup>. It is the most antient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the *feoffor*; and the person enfeoffed is denominated the *feoffee*.

THIS is plainly derived from, or is indeed itself the very mode of, the antient feudal donation; for though it may be performed by the word, “*enfeoff*” or “*grant*,” yet the aptest word of feoffment is, “*do* or *dedi*.” And it is still directed and governed by the same feudal rules; inasmuch that the principal rule relating to the extent and effect of the feudal 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*.” And therefore, as in pure feudal donations the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, “*ne quis plus donasse praesumatur quam in donatione expresserit*”<sup>a</sup>; 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<sup>b</sup>. For as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the

<sup>x</sup> Co. Litt. 9.

<sup>y</sup> *Ibid.*

<sup>z</sup> Wright, 21.

<sup>a</sup> pag. 108.

<sup>b</sup> Co. Litt. 42.

feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, 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<sup>c</sup>, 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<sup>d</sup>. [ 311 ]

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<sup>e</sup>. This livery of seisin is no other than the pure feudal investiture, or delivery of corporeal possession of the land or tenement; which was held absolutely necessary to complete the donation. “*Nam feudum sine investitura nullo modo constitui potuit<sup>f</sup>:*” and an estate was then only perfect, when, as the author of Fleta expresses it in our law, “*fit juris et seisinæ conjunctio<sup>g</sup>.*”

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

<sup>c</sup> See Appendix, N<sup>o</sup> I.

<sup>d</sup> Co. Litt. 9.

<sup>e</sup> Litt. § 66.

<sup>f</sup> Wright, 37.

<sup>g</sup> 1. 3. c. 15. § 5.

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

YET, the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases antiently allowed; by transferring something near at

<sup>h</sup> *Nam apifimur possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire. (Ff. 41.*

2, 3.) And again: *traditionibus dominia rerum, nonnudis pactis, transferuntur. (Cod. 2, 3. 20.)*

<sup>i</sup> Decretal, l. 3. t. 4. c. 40.

<sup>k</sup> See pag. 209. 227, 228.

<sup>l</sup> Flet. l. 6. c. 2. § 2.

hand,



hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. [ 313 ] Among the Jews we find the evidence of a purchase thus defined in the book of Ruth<sup>m</sup>: “now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things: a man plucked off his shoe and gave it to his neighbour; and this was a testimony in Israel.” Among the antient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses<sup>n</sup>. With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands<sup>o</sup>. And to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser by re-delivery of the same, in the presence of a jury of 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 encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the

<sup>m</sup> ch. 4. v. 7.

<sup>o</sup> Hicke, *Differt. Epistol.* 85.

<sup>n</sup> Stiernhook, *de jure Sueon.* l. 2. c. 4.

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 [ 314 ] was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet still, for a very long series of years, they were never made use of, but in company with the more antient and notorious method of transfer, by delivery of corporal possession.

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 indeed an actual *entry* is necessary, to vest the estate in the lessee: for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*: and when he enters in pursuance of that right, he is then, and not before, in possession of his term, and complete tenant for years<sup>p</sup>. 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 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<sup>q</sup>.

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<sup>r</sup>. But if such a remainder be created

<sup>p</sup> Co. Litt. 46.

<sup>q</sup> See pag. 165.

<sup>r</sup> pag. 167.

afterwards,

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*”<sup>s</sup>; but it must be made to the remainderman himself, by consent of the lessee for years; for without [ 315 ] his consent no livery of the possession can be given<sup>t</sup>; partly because such forcible livery would be an ejectionment of the tenant from his term, and partly for the reasons before given<sup>v</sup> for introducing the doctrine of attornments.

LIVERY of feisin 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,) come to the land, or to the house; and there in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: “I deliver these to you in the name of feisin of all the lands and tenements contained in this deed.” But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others<sup>w</sup>. If the conveyance or feoffment be of divers lauds, lying scattered in one and the same county, then in the feoffor’s possession, livery of feisin of any parcel, in the name of the rest, sufficeth for all<sup>x</sup>; 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 antiently this feisin was obliged to be delivered *coram paribus de vicineto*, before the peers or free-

<sup>s</sup> Co. Litt. 49.<sup>w</sup> Co. Litt. 48. West. Symb. 251.<sup>t</sup> *Ibid.* 48.<sup>x</sup> Litt. § 414.<sup>v</sup> pag. 288.

holders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law<sup>y</sup>, *pares debent interesse investituræ feudi, et non alii*: for which this reason is expressly given: because [ 316 ] 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<sup>z</sup>;) was still reserved to the *pares* or jury of the county<sup>a</sup>. Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case but by the consent of the particular tenant; and the consent of one will not bind the rest<sup>b</sup>. 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<sup>c</sup>. And thus much for livery in deed.

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

2. THE conveyance by *gift, donatio*, is properly applied to the creation of an estate-tail, as feoffment is to that of an

<sup>y</sup> *Feud. l. 2. t. 58.*

<sup>z</sup> See pag. 307.

<sup>a</sup> *Gilb. 10. 35.*

<sup>b</sup> *Dyer, 18.*

<sup>c</sup> See Appendix, N<sup>o</sup> I.

<sup>d</sup> *Litt. § 421, &c.*

<sup>e</sup> *Co. Litt. 42.*

<sup>f</sup> *Ibid. 52.*

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 an estate passing by it: for the operative words of conveyance in this case are *do* or *dedi*<sup>g</sup>; and gifts in tail are equally imperfect without livery or seisin, as feoffments in fee-simple<sup>h</sup>. And this is the only distinction that Littleton seems to take, [ 317 ] when he says<sup>i</sup>, “it is to be understood that there is feoffor “ and feoffee, donor and donee, lessor and lessee;” *viz.* feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life, or for years, or at will. In common acceptance gifts are frequently confounded with the next species of deeds: which are,

3. GRANTS, *concessionēs*; the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had<sup>k</sup>. For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery*; and the others, as advowsons, commons, rents, reversions, &c. to lie *in grant*<sup>l</sup>. And the reason is given by Bracton<sup>m</sup>: “*traditio*, or livery, *nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporeales, quae sunt ipsum jus rei vel corpori inhaerens, 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 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. A LEASE is properly a conveyance of any lands or tenements, (usually in consideration of rent or other annual

<sup>g</sup> West. Symbol. 256.

<sup>h</sup> Litt. § 59.

<sup>i</sup> § 57.

<sup>k</sup> Co. Litt. 9.

<sup>l</sup> *Ibid.* 172.

<sup>m</sup> *l. 2. c.* 18.

recompence,) 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, “ de-  
 [ 318 ] “ mife, grant, and to farm let: *dimisi, concessi, et ad firmam tradidi.*” *Farm*, or *feorme*, is an old Saxon word signifying provision<sup>n</sup>: and it came to be used instead of rent or render, because antiently 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, *firarius*, 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.

WHATEVER restriction, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons 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, 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 ordi-

<sup>n</sup> Spelm. *Gl.* 229.

nary °. So also bishops, and deans, and such other sole ecclesiastical corporations as are seized of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or controul. And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, [ 319 ] 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.

AND, first, the *enabling* statute, 32 Hen. VIII. c. 28., empowers three manner of persons to make leases, to endure for three lives or one-and-twenty years; which could not do so before. As first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seized in right of his wife, in fee-simple or fee-tail, provided the wife joins in such lease, may bind her and her heirs thereby. Lastly, all persons seized of an estate of fee-simple in right of their churches, 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 <sup>p</sup>. 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 (6). 3. If there be any

° Co. Litt. 44.

<sup>p</sup> *Ibid.*

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(6) By various acts of parliament, and also frequently by private settlements, a power is granted of making leases in possession, but not in reversion, for a certain term; the object being that the estate may

old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years, *or* three lives, and not for both. 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must be of corporeal hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distress.<sup>9</sup>

[ 320 ] 7. It must be of lands and tenements most commonly letten for twenty years past; so that if they had been let for above half the time (or eleven years out of the twenty) either for life, or 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.

<sup>9</sup> 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, 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.

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may not be incumbered by the act of the party beyond a specific time. Yet persons, who had this limited power of making leases in possession only, had frequently demised the premises to hold *from the day of the date*; and the courts in several instances had determined that the words *from the day of the date* excluded the day of making the deed; and that of consequence these were leases in reversion, and void. But this question having been brought again before lord Mansfield and the Court of king's bench, that learned lord proved, with his usual ability, that *from the day* might either be inclusive or exclusive of the day; and therefore that it ought to be construed so as to effectuate these important deeds, and not to destroy them. *Pugh v. Duke of Leeds, Cowp. 714.*

NEXT



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<sup>r</sup>. 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 again to her favourites, whom she thus gratified without any expense to herself. To prevent which<sup>s</sup> 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.

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. 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

[ 321 ]

<sup>r</sup> Co. Litt. 45.<sup>s</sup> 11 Rep. 71.

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 recompence. 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<sup>t</sup>. 6. All bonds and covenants tending to frustrate the provisions of the statutes of 13 & 18 Eliz. shall be void.

CONCERNING these restrictive statutes there are two observations to be made ; first, that they do not by any construction enable any persons to make such leases as they were by common law disabled to make. Therefore a parson, or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even *with* the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor *without* obtaining such consent<sup>u</sup>. 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<sup>w</sup>.

[ 322 ] THERE is yet another restriction with regard to college leases, by statute 18 Eliz. c. 6. which directs, that one-third of the old rent, then paid, should for 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<sup>x</sup> to have been an inven-

<sup>t</sup> Co. Litt. 45.

<sup>u</sup> *Ibid.* 44.

<sup>w</sup> Co. Litt. 45.

<sup>x</sup> Strype's Annals of Eliz.

tion 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 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. (7)

THE leases of beneficed clergymen are farther restrained, in case of their non-residence, by statutes 13 Eliz. c. 20., 14 Eliz. c. 11., and 18 Eliz. c. 11., and 43 Eliz. c. 9., which direct, that if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish; but that all leases made by him, of the profits of such benefice, and all covenants and

(7) The price of a quarter of wheat being at present near 50s. and the colleges receiving a quarter of wheat, or its value, for every 13s. 4d. which they are paid in money, it follows that the corn rent will be in proportion to the money rent nearly as four to one.

But both these rents united are very far from the present value. Colleges therefore, in order to obtain the full value of the term, take a fine upon the renewal of their leases. It was a great object to colleges to restrain those in possession from making long leases, and impoverishing their successors by receiving the whole value of the lease by a fine at the commencement of the term.

The corn rent has made the old rent approach in some degree nearer to its present value; otherwise it should seem the principal advantage of a corn rent is to secure the lessor from the effect of a sudden scarcity of corn.

agreements of like nature, shall cease and be void (8): except in the case of licensed pluralists, who are allowed to demise the living, on which they are non-resident, to their curates only; provided such curates do not absent themselves [ 323 ] above forty days in any one year. And thus much for leases, with their several enlargements and restrictions <sup>y</sup>.

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 <sup>z</sup>. The estates exchanged must be equal in quantity <sup>a</sup>; not of *value*, for that is immaterial, but of *interest*; as fee-simple for fee-simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery <sup>b</sup>. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance <sup>c</sup>: 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. But entry must be made on both sides; for, if

<sup>y</sup> For the other learning relating to leases, which is very curious and diffuse, I must refer the student to 3 Bac. abridg. 295. (title, *leases and terms for years*;) where the subject is treated in a perspicuous and masterly manner; be-

ing supposed to be extracted from a manuscript of sir Geoffrey Gilbert.

<sup>z</sup> Co. Litt. 50, 51.

<sup>a</sup> Litt. 64, 65.

<sup>b</sup> Co. Litt. § 51.

<sup>c</sup> Litt. § 62.

(8) In a late case it was determined, where an incumbent had leased his rectory, and had afterwards been absent for more than eighty days in a year, that his tenant could not maintain an ejection against a stranger who had got into possession without any right or title whatever. 2 *T. R.* 749.

But where the lease is void by non-residence, the tenant in possession may maintain an action of trespass against a wrong-doer. 1 *East*, 244.

A rector or vicar cannot render void a composition for tithes by non-residence. *Anst.* 67.

But by the 43 Geo. III. c. 84. all these statutes which vacate leases by non-residence are repealed.

either

either party die before entry, the exchange is void, for want of sufficient notoriety<sup>d</sup>. 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<sup>e</sup>. For if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges<sup>f</sup>.

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 [ 324 ] part. Here, as in some instances there is a unity of interest and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates which they are to take and enjoy separately. By the common law coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed: and in both cases the conveyance must have been perfected by livery of seisin<sup>g</sup>. And the statutes of 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. made no alteration in this point. But the statute of frauds, 20 Car. II. c. 2. hath now abolished this distinction, and made a deed in all cases necessary.

THESE are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary*, or *derivative* sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. RELEASES; which are a discharge or conveyance of a man's right in lands or tenements, to another that hath some

<sup>d</sup> Co. Litt. 50.

<sup>e</sup> Perk. § 288.

<sup>f</sup> pag. 300.

<sup>g</sup> Litt. § 250. Co. Litt. 169.

former estate in possession. The words generally used therein are “remised, released, and for ever quit-claimed<sup>h</sup>.” 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<sup>i</sup>. But in this case the releassee must be in *possession* of some estate, for the release to work upon; for if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the releassee<sup>k</sup>. 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<sup>l</sup>. And in both these cases there must be a privity of estate between the releasor and releassee<sup>m</sup>; 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<sup>n</sup>. 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<sup>o</sup>. 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<sup>p</sup>. 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

<sup>h</sup> Litt. § 445.<sup>i</sup> *Ibid.* § 465.<sup>k</sup> *Ibid.* § 465.<sup>l</sup> Co. Litt. 273.<sup>m</sup> Co. Litt. 272, 273.<sup>n</sup> Litt. § 466.<sup>o</sup> *Ibid.* § 47c.<sup>p</sup> Co. Litt. 278.

a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the releassee is a matter of sufficient notoriety already.

8. A CONFIRMATION is of a nature nearly allied to a release. Sir Edward Coke defines it<sup>q</sup> to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, “have given, granted, ratified, approved, and confirmed<sup>r</sup>.” An instance of the first branch of the definition is, if tenant for life lease 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, before [ 326 ] the death of tenant for life, it is no longer voidable but sure<sup>s</sup>. The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release, which operates by way of enlargement.

9. A SURRENDER, *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<sup>t</sup> 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 done by these words, “hath surrendered, granted, and yielded up.” The surrenderor must be in possession<sup>u</sup>; and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore tenant for life cannot surrender to him in remainder for years<sup>w</sup>.

<sup>q</sup> 1 Inst. 295.

<sup>r</sup> Litt. § 515. 531.

<sup>s</sup> *Ibid.* § 516.

<sup>t</sup> Co. Litt. 387.

<sup>u</sup> *Ibid.* 338.

<sup>w</sup> Perk. § 589.

In a surrender there is no occasion for livery of seisin<sup>x</sup>; for there is a privity of estate between the surrendoror 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 lessor, or confirmor, and the particular estate of the lessee, or confirmer, 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<sup>y</sup>.

[ 327 ] 10. AN *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor(10).

<sup>x</sup> Co. Litt. 50.

<sup>y</sup> Litt. § 460.

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(10) This is far from being universally true; for there is a great variety of distinctions when the assignee is bound by the covenants of the assignor, and when he is not. The general rule is, that he is bound by all covenants which run with the land; but not by collateral covenants which do not run with the land. As if a lessee covenants for himself, executors, and administrators, concerning a thing not in existence, as to build a wall upon the premises, the assignee will not be bound; but in that case the assignee will be bound, if the lessee has covenanted for himself and assigns. Where the lessee covenants for himself, his executors and administrators, to reside upon the premises, this covenant binds his assignee, for it runs with, or is appurtenant to, the thing demised. 2 Hen. Bl. 133. The assignee in no case is bound by the covenant of the lessee, to build a house for the lessor any where off the premises, or to



II. A DEFEAZANCE is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*<sup>2</sup> or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the antient law<sup>a</sup>; and, therefore only, indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent, (as rents, of which no seisin could be had till the time of payment;) and so also annuities, conditions, warranties, and the like, were always liable to be recalled by defeazances made subsequent to the time of their creation<sup>b</sup>.

II. THERE yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the *statute of uses*.

<sup>2</sup> From the French verb *defaire*, *in-ferre* *glum reddere*.

<sup>a</sup> Co. Litt. 236.

<sup>b</sup> *Ibid.* 237.

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to pay money to a stranger. Spencer's case, 5 Co. 16. The assignee is not bound by a covenant broken before assignment. 3 Burr. 1271. See *Com. Dig. Covenant*. But if an underlease is made even for a day less than the whole term, the underlessee is not liable for rent or covenants to the original lessee, like an assignee of the whole term. *Doug.* 174.

An assignee is liable for rent only whilst he continues in possession under the assignment. And he is held not to be guilty of a fraud, if he assigns even to a beggar, or to a person leaving the kingdom, provided the assignment be executed before his departure. 1 B. & P. 21.

USES and *trusts* are in their original of a nature very similar, or rather exactly the same: 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 <sup>c</sup>. But the *fidei-commissum*, which usually was created by will, was [ 328 ] the disposal of an inheritance to one, in confidence that he should convey it or dispose of the profits at the will of another. And it was the business of a particular magistrate, the *praetor fidei commissarius*, instituted by Augustus, to enforce the observance of this confidence <sup>d</sup>. So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice: which occasioned that known division of rights by the Roman law into *jus legitimum*, a legal right, which was remedied by the ordinary course of law; *jus fiduciarium*, a right in trust, for which there was a remedy in conscience; and *jus precarium*, a right in courtesy, for which the remedy was only by entreaty or request <sup>e</sup>. In our law, a use might be ranked under the rights of the second kind; being a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestuy que use*, or him to whose use it was granted, and suffer him to take the profits <sup>f</sup>. As, if a feoffment was made to A. and his heirs, to the use of (or in trust for) B. and his heirs; here at the common law A. the *terre-tenant* had the legal property and possession of the land, but B. the *cestuy que use* was in conscience and equity to have the profits and disposal of it.

THIS notion was transplanted into England from the civil law, about the close of the reign of Edward III. <sup>g</sup>, by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to

<sup>c</sup> *Ff.* 7. 1. 1.

<sup>f</sup> *Plowd.* 352.

<sup>d</sup> *Inst.* 2. tit. 23.

<sup>g</sup> *Stat.* 50 *Edw.* III. c. 6. 1 *Ric.* II.

<sup>e</sup> *Ff.* 43. 26. 1. *Bacon on Uses*, 8vo. c. 9. 1 *Rep.* 139.

their religious houses directly, but to *the use of* the religious houses<sup>h</sup>: which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction which Augustus had vested in his *praetor*, of compelling the execution of such trusts in the court of chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet if a testator had enfeoffed another to his own use, and so was possessed of the use only, such use was devisable by [ 329 ] will. But we have seen<sup>i</sup> how this evasion was crushed in it's infancy, by statute 15 Ric. II. c. 5., with respect to religious houses.

YET, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes: particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make 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 attained the other. Wherefore, about the reign of Edw. IV. (before whose time, lord Bacon remarks<sup>k</sup>, there are not six cases to be found relating to the doctrine of uses,) the courts of equity began to reduce them to something of a regular system.

ORIGINALLY it was held that the chancery could give no relief, but against the very person himself intrusted for *cestuy*

<sup>h</sup> See page 271.

<sup>k</sup> On Uses, 313.

<sup>i</sup> pag. 272.

*que use*, and not against his heir or alienee. This was altered in the reign of Henry VI. with respect to the heir<sup>1</sup>; 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<sup>m</sup>. 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 nor queen, on [ 330 ] account of their dignity royal<sup>n</sup>, nor any corporation aggregate, on account of its limited capacity<sup>o</sup>, could be seized to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use<sup>p</sup>: because they were not parties to the trust, but came in by act of law; though doubtless their title in reason was no better than that of the heir.

ON the other hand the use itself, or interest of *cestuy que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, and authorities, *quae ipso usu consumuntur*<sup>q</sup>: or whereof the seisin could not be instantly given<sup>r</sup>. 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<sup>s</sup>, unless he expressly declares it to be to the use of another, and then nothing shall be

<sup>1</sup> Keilw. 42. Year-book, 22 Edw. IV. 6.

<sup>m</sup> Keilw. 46. Bacon on Uses, 312.

<sup>n</sup> Cro. Abr. tit. Feoffm. at uses, 31. Bacon of Uses, 346, 347.

<sup>o</sup> Bro. Abr. tit. Feoffm. at uses, 40. Bacon, 347.

<sup>p</sup> 1 Rep. 122.

<sup>q</sup> 1 Jon. 127.

<sup>r</sup> Cro. Eliz. 401.

<sup>s</sup> See page 296.

presumed contrary to his own expressions <sup>t</sup>. But if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration <sup>u</sup>.

3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession <sup>w</sup>; 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 <sup>x</sup>, or be devised by last will and testament <sup>y</sup>; 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 the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But

*cestuy que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee <sup>z</sup>; to whom he was accounted by law to be only tenant at sufferance <sup>a</sup>.

5. Uses were not liable to any of the feudal 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 <sup>b</sup>.

6. No wife could be endowed, or husband have his curtesy, of a use <sup>c</sup>: 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 <sup>d</sup>.

7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestuy que use* <sup>e</sup>.

<sup>t</sup> 1 And. 37.

<sup>u</sup> Moor. 684.

<sup>w</sup> 2 Roll. Abr. 780.

<sup>x</sup> Bacon of Uses, 312.

<sup>y</sup> *Ibid.* 308.

<sup>z</sup> Stat. 1 Ric. III. c. 1.

<sup>a</sup> Bro. Abr. *ibid.* 23.

<sup>b</sup> Jenk. 190.

<sup>c</sup> 4 Rep. 1. 2 And. 75.

<sup>d</sup> See pag. 137.

<sup>e</sup> Bro. Abr. *tit. executions*, 907

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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 subtle disquisitions) deduced from this child of the imagination; when once a departure was permitted from the plain simple rules of property established by the antient law. These principal outlines will be fully sufficient to shew the ground of lord Bacon's complaint <sup>f</sup>, that this course of proceeding "was turned to  
 [ 332 ] "deceive many of their just and reasonable rights. A man, "that had cause to sue for land, knew not against whom to  
 "bring his action, or who was the owner of it. The wife  
 "was defrauded of her thirds; the husband of his curtesy;  
 "the lord of his wardship, relief, heriot, and escheat; the  
 "creditor of his extent for debt; and the poor tenant of his  
 "lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestuy que use* <sup>g</sup>, allowed actions for the freehold to be brought against him if in the actual pernancy or enjoyment of the profits <sup>h</sup>; made him liable to actions of waste <sup>i</sup>; established his conveyances and leases made without the concurrence of his feoffees <sup>k</sup>; and gave the lord the wardship of his heir, with certain other feudal perquisites <sup>l</sup>.

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*.

<sup>f</sup> Use of the law, 153.

<sup>i</sup> Stat. 11 Hen. VI. c. 5.

<sup>g</sup> Stat. 50 Edw. III. c. 6. 2 Ric. II. sess. 2. c. 3. 19 Hen. VII. c. 15.

<sup>k</sup> Stat. 1 Ric. III. c. 1.

<sup>l</sup> Stat. 4 Hen. VII. c. 17. 19 Hen.

<sup>h</sup> Stat. 1 Ric. II. c. 9. 4 Hen. IV. VII. c. 15.

c. 7. c. 15. 11 Hen. VI. c. 3. 1 Hen. VII. c. 1.

The hint seems to have been derived from what was done at the accession of king Richard III.; who, having, when duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But to obviate so notorious an injustice, an act of parliament was immediately passed <sup>m</sup>, which ordained, that where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestuy que use* in like manner as he had the use. And so the stat. of Henry VIII., 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 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 *seised* 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.

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THE statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestuy que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before esta-

<sup>m</sup> 1 Ric. III, c. 5.

blished 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 feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestuy que use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestuy que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

[ 334 ] 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 meanwhile the antient 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<sup>n</sup>, 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<sup>o</sup>. Which doctrine, when devises by will were again introduced, and considered as equivalent in point of constructions to declarations of uses, was also adopted in favour of *executory devises*.<sup>p</sup> But herein these,

<sup>n</sup> 2 Roll. Abr. 791. Cro. Eliz. 493.

<sup>p</sup> See pag. 173.

<sup>o</sup> Bro. Abr. tit. *Feoffm. al uses*, 30.

which



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 feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever<sup>a</sup>: 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<sup>r</sup>; 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*<sup>s</sup>; as, if A. makes a feoffment [ 335 ] 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<sup>t</sup>. 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<sup>u</sup>. It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow, was a deed of defeazance coeval with the grant itself, and therefore esteemed

<sup>a</sup> 1 Rep. 134. 138. Cro. Eliz. 439.

<sup>t</sup> Bacon of Uses, 351.

<sup>r</sup> Pollexf. 78. 10 Mod. 423.

<sup>u</sup> *Ibid.* 350. 1 Rep. 120.

<sup>s</sup> Bro. *Abr. tit. Feoffm. al uses*, 30.

a part of it, upon events specially mentioned<sup>w</sup>. 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<sup>x</sup>. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who (as lord Bacon observes<sup>y</sup>) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

By this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that “no use could be limited on a use<sup>z</sup>,” 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 [ 336 ] void<sup>a</sup>. And therefore on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not advertent, 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* (11). Again; as the statute mentions only such persons as were

<sup>w</sup> See pag. 327.

<sup>x</sup> Co. Litt. 237.

<sup>y</sup> On Uses, 316.

<sup>z</sup> Dyer, 155.

<sup>a</sup> 1 And. 37. 136.

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(11) It is the practice to introduce only the names of the trustee and the *cestui que trust*; the estate being conveyed to A. and his heirs, to the use of A. and his heirs, in trust for B. and his heirs; and thus this important statute has been effectually repealed by the repetition of half a dozen words.

*seised*

*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*<sup>b</sup>; and therefore, if a term of one thousand years be limited to A., to the use of (or in trust for) B., the statute does not execute this use, but leaves it as at common law<sup>c</sup>. 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<sup>d</sup> (12).

OF the two more antient 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

<sup>b</sup> Bacon law of Uses, 335. Jenk. 244.

<sup>d</sup> 1 Eq. Caf. Abr. 383, 384.

<sup>c</sup> Poph. 76. Dyer, 369.

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(12) I should be inclined to think that the case as expressed by the learned judge would be construed an use executed by the statute. In the authority referred to in 1 *Eq. Ca. Abr.* 383. the trustees were first to pay legacies and annuities, and then to pay over the surplus to a married woman for her separate use. To prevent a trust from being executed by the statute in cases of this kind, it seems necessary that the trustees should have some control and discretion in the application of the profits of the estate, as to make repairs, or to provide for the maintenance of the *cestui que trust*. 1 *Bro.* 75. 2 *T. R.* 444. Where there is no such special circumstance in the grant, it appears to be equivalent to a direction to the trustees to permit the *cestui que trust* to take the profits of the estate, which is fully established to be an use executed. 1 *Eq. Ca. Abr.* 383.

But if it is to permit a married woman to take the rents and profits for her separate use, the legal estate will be vested in the trustees in order to prevent the husband from receiving them subject to no control. 7 *T. R.* 652.

these

these were not *uses* which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed <sup>e</sup>. To this the reason of mankind assented, and the doctrine of *uses* was revived, under the denomination of *trusts*; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance <sup>f</sup>.

[ 337 ] HOWEVER, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made *uses* intolerable. 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 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 consideration to a purchaser without notice <sup>g</sup>; 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,

<sup>e</sup> 1 Hal. P. C. 248.

<sup>f</sup> Vaugh. 50. Atk. 591.

<sup>g</sup> 2 Freem. 43.

even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents<sup>h</sup>, than from any well-grounded principle (13). It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs<sup>i</sup>: because the trust could never be intended for his benefit. But let us now return to the statute of uses.

THE only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only antient conveyance of corporal freeholds; the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. But this now has given way to

12. A TWELFTH species of conveyance, called a *covenant to stand seised to uses*: by which a man, seised of lands, cove-

<sup>h</sup> 1 Chanc. Rep. 254. 2 P. Wms. 640.

<sup>i</sup> Hard. 494. Burgefs and Wheat, Hil. 32 Geo. II. in Canc.

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(13) It has been decided, that when the legal and equitable estates meet in the same person, the trust or equitable estate is merged in the legal estate; as if a wife should have the legal estate and the husband the equitable; and if they have an only child, to whom these estates descend, and who dies intestate without issue, the two estates having united, the descent will follow the legal estate, and the estate will go to an heir on the part of a mother: and thus, which appears strange, the beneficial interest will pass out of one family into another, between whom there is no connexion by blood. *Doug.* 741.

Before the statute of uses there was neither dower nor tenancy by the curtesy of an use, p. 331. It is therefore an unaccountable inconsistency, that, since the statute, the husband should have curtesy of a trust estate, and that the wife should out of a similar estate be deprived of dower. See *ante*, p. 132. n. 11,

nants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intending to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land <sup>k</sup>, 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.

13. A THIRTEENTH species of conveyance, introduced by this statute, is that of a *bargain and sale* of lands; which is a kind of real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee; and becomes by such a bargain a trustee for, or seised to the use of, the bargainee: and then the statute of uses completes the purchase<sup>l</sup>; or, as it hath been well expressed<sup>m</sup>, the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of parliament by statute 27 Hen. VIII. c. 16, that such bargains and sales should not 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. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before<sup>n</sup>; 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.

[ 339 ] But how impossible it is to foresee, and provide against, all the consequences of innovations! This omission has given rise to

<sup>k</sup> Bacon, Use of the law, 151.

<sup>l</sup> *Ibid.* 150.

<sup>m</sup> Cro. Jac. 696.

<sup>n</sup> See pag. 142.

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<sup>o</sup>. 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, being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before<sup>p</sup>, must be made to a tenant in possession: and, accordingly, the next day, a release is granted to him<sup>q</sup>. 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<sup>r</sup>.

15. To these may be added deeds to *lead* or *declare the uses* of other more direct conveyances, as feoffments, fines, and recoveries; of which we shall speak in the next chapter: and

16. DEEDS of *revocation of uses*, hinted at in a former page<sup>s</sup>, and founded in a previous power, reserved at the raising of the uses<sup>t</sup>, to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation<sup>u</sup>. And this may suffice for a specimen of conveyances founded upon the statute of uses: and will finish our observations upon such deeds as serve to *transfer* real property.

BEFORE we conclude, it will not be improper to subjoin [ 340 ] a few remarks upon such deeds as are used not to *convey*, but

<sup>o</sup> 2 Mod. 252.

<sup>p</sup> pag. 324.

<sup>q</sup> See Appendix, N<sup>o</sup> II. § 1, 2.

<sup>r</sup> Co. Litt. 270. Cro. Jac. 604.

<sup>s</sup> pag. 335.

<sup>t</sup> See Appendix, N<sup>o</sup> II. pag. xi.

<sup>u</sup> Co. Litt. 237.

to *charge* or *incumber*, lands, and to *discharge* them again : of which nature are, *obligations* or *bonds*, *recognizances*, and *defeazances* upon them both.

1. AN *obligation*, or *bond*, is a deed † whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio* : but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force : as payment of rent ; performance of covenants in a deed ; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor, while living ; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompence. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands (14). How it affects the personal property of the obligor will be more properly considered hereafter.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law

† See Appendix, N<sup>o</sup> III. pag. xiii.

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(14) If in a bond the obligor *binds himself*, without adding his *heirs, executors, and administrators*, the executors and administrators are bound, but not the heir. *Shep. Touch.* 369. A bond does not seem properly to be called an incumbrance upon land ; for it does not follow the land like a recognizance and a judgment ; and even if the heir at law alienes the land, the obligee in the bond, by which the heir is bound, can have his remedy only against the person of the heir to the amount of the value of the land ; but he cannot follow it when it is in the possession of a *bonâ fide* purchaser. *Bull. N. P.* 175.



that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction (15). 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 <sup>w</sup>. On the forfeiture of a bond, or it's 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

<sup>w</sup> Co. Litt. 206.

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(15) And if the bond be simply conditioned for the payment of money, yet if it was in fact given upon a *turpis contractus*, a contract either illegal or immoral, it has been determined, that the turpitude of the transaction may be pleaded in bar to an action upon the bond in a court of law. 2 *Wilf.* 347. But it is the common practice to apply to a court of equity for an injunction to such actions. Where bonds have been given in consideration of seduction and incontinence, a distinction has been made between bonds given for future cohabitation, which, being for a clear immoral consideration, are void (3 *Burr.* 1568.), and those which are given as a compensation (the *premium pudoris*) for the injury done to a woman by her seducer, which, in general, are good. 2 *P. Wms.* 432. 2. *Wilf.* 339. Yet in one case, where a young woman had been seduced by a married man, and had occasioned a separation between him and his wife, lord Hardwicke held that she was too criminal to derive any benefit from such a bond. 2 *Ves.* 160. *Fonbl. Tr. of Eq.* 216.

But bonds and annuities given even to a prostitute are held to be valid, unless it appears upon the face of the instrument, or can be clearly proved, that they were a stipulation for future intercourse, or that the consideration was a continuation of the connexion. 5 *Ves. jun.* 286.

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 <sup>x</sup>, 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 (16).

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorized <sup>y</sup>, with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record; the form whereof is, “that A. B. doth acknowledge to owe to our lord the king, to the plaintiff, to C. D. or the like, the sum of ten pounds,” which condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C. D. &c. is called the recognizee, “*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 court, is witnessed only by the record of that

<sup>x</sup> 2 Keb. 553. 555. Salk. 596, 597. <sup>y</sup> Bro. Abr. tit. *recognizance*, 24. 6 Mod. 11. 60. 101.

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(16) Interest beyond the penalty of a bond may be recovered in a court of law in the shape of damages. 2 T. R. 388. But it cannot be allowed beyond the penalty in a court of equity. 3 Bro. 489. 2 Ves. jun. 718.

But the court would not relieve a plaintiff, the obligor, if the amount of the interest beyond the penalty of the bond was occasioned by his own delay. 6 Ves. jun. 92.

court,

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 common obligation ; being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrolment on record<sup>z</sup>. There are also other recognizances, of a private kind, *in nature of a statute staple*, by [ 342 ] virtue of the statute 23 Hen. VIII. c. 6. which have been already explained<sup>a</sup>, and shewn to be a charge upon real property.

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<sup>b</sup>. 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 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 antient feudal 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

<sup>z</sup> Stat. 29 Car. II. c. 3. See pag. 161.

<sup>b</sup> Co. Litt. 237. 2 Saund. 47.

<sup>a</sup> See pag. 160.

them in the chartulary or leger-book of some adjacent monastery<sup>c</sup>; and the failure of the general register established by king Richard the first, for the stars or mortgages made [ 343 ] to Jews, in the *capitula de Judæis*, of which Hoveden has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deserves to be well considered. In Scotland every act and event, regarding the transmission of property, is regularly entered on record<sup>d</sup>. And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature<sup>e</sup> to erect such register 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 (17).

<sup>c</sup> Hickes *Dissertat. epistolæ*. 9.

<sup>e</sup> Stat. 2 & 3 Ann. c. 4. 6 Ann. c. 35.

<sup>d</sup> Dalrymple on feudal property, 262. 7 Ann. c. 20. 8 Geo. II. c. 6.

&c.

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(17) By the register-acts, a registered deed shall be preferred to a prior unregistered deed; yet it has been decreed by lord Hardwicke, if the subsequent purchaser by the registered deed had previous notice of the unregistered one, he shall not avail himself of his deed, but the first purchaser shall be preferred. 1 *Ves.* 64.

## CHAPTER THE TWENTY-FIRST.

OF ALIENATION BY MATTER OF  
RECORD.

ASSURANCES by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves: but the function of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another; or of its establishment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. PRIVATE *acts of parliament* are, especially of 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 [ 345 ]

in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give it's tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the restoration; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it<sup>a</sup>, every man had raised an equity in his own imagination, that he thought was entitled 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<sup>b</sup>, 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 estate, shall be too easily unsettled when they are dead, by the power of parliament.

Acts of this kind are however at present carried on, in both houses, with great deliberation and caution; particularly in the house of lords they are usually referred to two judges to examine and report the facts alleged, and to settle all technical forms. Nothing also is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter: unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever; except those whose consent 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<sup>c</sup>.

<sup>a</sup> Lord Clar. Centin. 162.

<sup>b</sup> *Ibid.* 163.

<sup>c</sup> Co. 138. Godb. 171.

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 allowed 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<sup>c</sup>; it hath been holden to be void, if contrary to law and reason<sup>d</sup>; and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains however enrolled among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established.

II. THE *king's grants* are also matter of public record. For as St. Germyn says<sup>e</sup>, 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 pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close*, *literae clausae*, and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.

<sup>c</sup> Richardson v. Hamilton. *Canc.* 8.

<sup>d</sup> 4 Rep. 12.

Jan. 1733. M<sup>c</sup>Kenzie v. Stuart. *Dom.*

<sup>e</sup> Dr. & Stud. b. I. d. 8.

*Proc.* 13 Mar. 1754.

[ 347 ] 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 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<sup>d</sup>." 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<sup>e</sup>." But there are some grants which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual*, without the confirmation of either the *signet*, the *great*, or the *privy seal*.

THE *manner* of granting by the king does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the king, *at the suit of the grantee*, shall be taken most beneficially *for* the king, and *against* the party: whereas the grant of a subject is construed most strongly *against* the grantor. Wherefore it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero motu regis*;" and then they have a more liberal construction<sup>f</sup>. 2. A subject's grant shall be construed to include many things, beside 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<sup>g</sup>: and if a feoffment of land was made by a lord to his villein, this operated as a manumission<sup>h</sup>; for he was otherwise unable

<sup>d</sup> 9 Rep. 18.<sup>e</sup> Co. Litt. 56.<sup>e</sup> *Ibid.* 2 Inst. 555.<sup>f</sup> Litt. § 206.<sup>g</sup> Finch. L. 100. 10 Rep. 112.



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 [ 348 ] so he may be capable of taking by grant<sup>i</sup>. 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<sup>k</sup>. 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 grant it would be; because it may reasonably be supposed, that the king meant to give no more than an estate-tail<sup>l</sup>: the grantee is therefore (if any thing) nothing more than tenant at will<sup>m</sup>. And to prevent deceits of the king, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV. c. 6. that no grant of his shall be good, unless, in the grantee's petition for them, express mention be made of the real value of the lands.

III. WE are next to consider a very usual species of assurance, which is also of record; *viz.* a *fine* of lands and tenements. In which it will be necessary to explain, 1. The nature of a fine; 2. It's several *kinds*; and 3. It's *force* and *effect*.

I. A FINE is sometimes said to be a feoffment of record<sup>n</sup>: though it might with more accuracy be called an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a

<sup>i</sup> Bro. Abr. tit. Patent, 62. Finch. L. 110.

<sup>m</sup> Bro. Abr. tit. Estates, 34. tit. Patents, 104. Dyer, 270. Dav. 45.

<sup>k</sup> Freem. 172.

<sup>n</sup> Co. Litt. 50.

<sup>l</sup> Finch, 101, 102.

[ 349 ] 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 is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices: whereby the lands in question become, or are acknowledged to be, the right of one of the parties °. In it's 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, and continue to be, every day commenced, for the sake of obtaining the same security.

A FINE is so called because it puts *an end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an ancient record of parliament <sup>p</sup>, 18 Edw. I. “ *Non in regno Angliæ providetur, vel est, aliqua securitas major vel sollemnior, per quam aliquis statum certiozem habere possit, neque ad statum suum verificandum aliquod sollemnius testimonium producere, quam finem in curia domini regis levatum: qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet, et hac de causâ providebatur.*” Fines indeed are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil <sup>q</sup> and Bracton <sup>r</sup> in the reigns of Hen. II. and Hen. III. as things then well known and long established; and instances have been produced of them even prior to the Norman invasion <sup>s</sup>. So that the statute 18 Edw. I. called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they should be levied or carried on. And that is as follows:

° Co. Litt. 120.

<sup>p</sup> 2 Roll. Abr. 13.

<sup>q</sup> l. 8. c. 1.

<sup>r</sup> l. 5. t. 5. c. 28.

<sup>s</sup> Plowd. 369.

1. THE party to whom the land is to be conveyed or assured, commences an action or suit at law against the other, generally an action of covenant<sup>t</sup>, by suing out a writ of *praecipe*, called a writ of covenant<sup>v</sup>: the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by ancient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one-tenth of the annual value<sup>u</sup>. The suit being thus commenced, then follows,

2. THE *licentia concordandi*, or leave to agree the suit<sup>w</sup>. For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace, and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative, which is an ancient revenue of the crown, and is called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before mentioned. And it is as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, three-twentieths of the supposed annual value<sup>x</sup>.

3. NEXT comes the *concord*, or agreement itself<sup>y</sup>, after leave obtained from the court: which is usually an acknowledgment from the deforciant (or those who keep the other

<sup>t</sup> A fine may also be levied on a writ of *mesne*, of *warrantia chartae*, or *de consuetudinibus et servitiis*. (Finch. L. 278.)

<sup>v</sup> See Appendix, No. IV. § 1.

<sup>u</sup> 2 Inst. 511.

<sup>w</sup> Appendix, No. IV. § 2. In the times of strict feudal jurisdiction, if a

vassal had commenced a suit in the lord's court, he could not abandon it without leave; lest the lord should be deprived of his perquisites for deciding the cause. (Robertson, Cha. V. i. 31.)

<sup>x</sup> 5 Rep. 39. 2 Inst. 511. Stat. 32 Geo. II. c. 14.

<sup>y</sup> Appendix, No. IV. § 3.

out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine is called the [ 351 ] *cognizor*, and he to whom it is levied the *cognizee*. This acknowledgment must be made either openly in the court of common pleas, or before 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 are bound by statute 18 Edw. I. ft. 4. to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme-covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

By these acts all the essential parts of a fine are completed: and, if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable<sup>a</sup>, still the fine shall be carried on in all it's remaining parts: of which the next is,

4. THE *note* of the fine<sup>a</sup>; which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This must be enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14.

5. THE fifth part is the *foot* of the fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied<sup>b</sup>. Of this there are indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*haec est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

<sup>a</sup> Comb. 71.

<sup>a</sup> Appendix, No. IV. § 4.

<sup>b</sup> *Ibid.* § 5.

By several statutes still more solemnities are superadded; in order to render the fine more universally public, and less liable to be levied by fraud or covin. And, first, by 27 Edw. I. c. 1., the note of the fine shall be openly read in the court of common pleas, at two several days in one week, and during such reading all pleas shall cease. [ 352 ] By 5 Hen. IV. c. 14. and 23 Eliz. c. 3. all the proceedings on fines, either at the time of acknowledgment, or previous or subsequent thereto, shall be enrolled of record in the court of common pleas. By 1 Ric. III. c. 7. confirmed and enforced by 4 Hen. VII. c. 24. the fine, after engrossment, shall be openly read and proclaimed in court (during which all pleas shall cease) sixteen times; viz. four times in the term in which it is made, and four times in each of the three succeeding terms; which is reduced to once in each term by 31 Eliz. c. 2., and these proclamations are indorsed on the back of the record<sup>c</sup>. It is also enacted by 23 Eliz. c. 3., that the chirographer of fines shall every term write out a table of the fines levied in each county in that term, and shall affix them in some open part of the court of common pleas all the next term: and shall also deliver the contents of such table to the sheriff of every county, who shall at the next assizes fix the same in some open place in the court, for the more public notoriety of the fine.

2. FINES, thus levied, are of four kinds. 1. What in our law French is called a fine “*sur cognizance de droit, come ceo que il ad de son done* ;” or, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor<sup>d</sup>. This is the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment 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;

<sup>c</sup> Appendix, No. IV. § 6.

<sup>d</sup> This is that sort, of which an example is given in the Appendix, No. IV.

the livery, thus acknowledged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant or cognizor acknowledges, *cognoscit*, the right to be in the plaintiff, or cognizee, as that which he 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 is commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third person<sup>e</sup>. 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<sup>f</sup>.” 3. A fine “*sur concessit*” is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like; for it operates as a new grant<sup>g</sup>. 4. A fine “*sur done, grant, et render*,” is a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.* and the fine *sur concessit*: and may be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo, &c.* conveys nothing but an absolute estate, either of inheritance or at least of freehold<sup>h</sup>. In this last species of fine, the cognizee, after the right is acknowledged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine, *sur cognizance de droit come ceo, &c.* is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

<sup>e</sup> Moor. 629.<sup>g</sup> West. p. 2. § 66.<sup>f</sup> West. Symb. p. 2. § 95.<sup>h</sup> Salk. 340.

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 antient common law, with respect to this point, [ 354 ] 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<sup>h</sup> 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<sup>i</sup>; whereby, as sir Edward Coke observes<sup>k</sup>, 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<sup>l</sup>, 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 made 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, reco-

<sup>h</sup> *Sur la pie* as it is in the Cotton MS. and not *pur le pai.*, as printed by Berthelet, and in 2 Inst. 511. There were then four methods of claiming, so as to avoid being concluded by a fine: 1. By action. 2. By entering such claim on the record at the *foot* of the fine.

3. By entry on the lands. 4. By continual claim, 2 Inst. 518. The second is not now in force under the statute of Henry VII.

<sup>i</sup> Litt. § 441.

<sup>k</sup> 2 Inst. 518.

<sup>l</sup> 4 Hen. VII. c. 24. See page 118.

vering their liberty, returning into England, or being restored to their right mind (1).

[ 355 ] IT seems to have been the intention of that politic prince, king Henry VII., to have covertly by this statute extended fines to have been a bar of estates-tail, in order to unfetter the more easily the estates of his powerful nobility, and lay them more open to alienations; being well aware that power will always accompany property. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar, (which they were expressly declared *not* to be by the statute *de donis*,) the statute 32 Hen. VIII. c. 36. was thereupon made; which removes all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestors, assigned to her in tail for her jointure<sup>m</sup>; or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

FROM this view of the common law, regulated by these 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*.

THE *parties* are either the cognizors, or cognizees, and these are immediately concluded by the fine, and barred of

<sup>m</sup> See statute 11 Hen. VII. c. 20.

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(1) This is the chief use and excellence of a fine, that it confirms and secures a suspicious title, and puts an end to all litigation after five years. Other conveyances and assurances admit an entry to be made upon the estate within twenty years, and in some instances, the right to be disputed in a real action for sixty years afterwards. *Harg. Co. Litt.* 121 a. n. 1.



any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme-covert*, or married woman, is permitted by law to do, (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband,) it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate (2).

PRIVIES to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood or other right of representation. Such as are the heirs general of the cognizor, the issue in tail since the statute of Henry the eighth, the vendee, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied<sup>n</sup>.

STRANGERS to a fine are all other persons in the world, [ 356 ] 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,

<sup>n</sup> 3 Rep. 87.

(2) A wife may join her husband in either a fine or recovery to convey her own estate and inheritance, or an estate settled upon her by her husband as her jointure, or to convey the husband's estates discharged of dower. 1 *Cru.* 99. 2 *Cru.* 143. *Pig.* 123. But if a jointress, after her husband's death, levies a fine or suffers a recovery without the consent of the heir, or the next person entitled to an estate of inheritance, the fine or recovery is void, and is also a forfeiture of her estate. 11 *Hen. VII. c.* 20. *Pig.* 75.

have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues °. And if within that time they neglect to claim, or (by the statute 4 Ann. c. 16.) if they do not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim.

BUT, in order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might without any risque defraud the owners by levying fines of their lands; for if the attempt be discovered, they can be no sufferers, but must only remain *in statu quo*: whereas if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner <sup>p</sup>, if claimed in proper time. It is not therefore to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire <sup>q</sup>, the estate is for ever barred by it. Yet where a stranger, whose presumption cannot be thus punished, officiously interferes in an estate which in nowise belongs to him, his fine is of no effect; and may at any time be set aside [ 357 ] (unless by such as are parties or privies thereunto <sup>r</sup>) by pleading that "*partes finis nihil habuerunt.*" And, even if a tenant for years, who hath only a chattel interest, and no freehold in the land, levies a fine, it operates nothing, but is liable to be defeated by the same plea <sup>s</sup>. Wherefore when a lessee for years is disposed to levy a fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner <sup>t</sup>, and create a new freehold by disseisin. And thus much

° Co. Litt. 372.

<sup>p</sup> *Ibid.* 251.

<sup>q</sup> 2 Lev. 52.

<sup>r</sup> Hob. 334.

<sup>s</sup> 5 Rep. 123. Hardr. 401.

<sup>t</sup> Hardr. 402. 2 Lev. 52.

for the conveyance or assurance by fine : which not only, like other conveyances, binds the grantor himself, and his heirs ; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law (3).

IV. THE fourth species of assurance, by matter of record, is a *common recovery*. Concerning the original of which it was formerly observed<sup>u</sup>, that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain ; and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now therefore only to consider, first, the *nature* of a common recovery ; and, secondly, its *force* and *effect*.

I. AND, first, the *nature* of it ; or what a common recovery is. A common recovery is so far like a fine, that it is a

<sup>u</sup> pag. 117. 271.

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(3) It is not necessary to be in possession of the freehold in order to levy a fine ; but if any one entitled to the inheritance, or to a remainder in tail, levies a fine, it will bar his issue and all heirs who derive their title through him. *Hob.* 333. A fine by tenant in tail does not affect subsequent remainders, but it creates a base or qualified fee, determinable upon the failure of the issue of the person to whom the estate was granted in tail ; upon which event the remainder-man may enter. If tenant in tail, with an immediate reversion in fee, levies a fine, the base fee merges in the reversion, which will become liable to all the incumbrances of the ancestors, from whom the estate-tail descended ; as judgments, recognizances, and such leases as are void with respect to the issue in tail. 5 *T. R.* 108. 1 *Cru.* 274. A recovery suffered by any tenant in tail lets in all the incumbrances created by himself, which were defeasible by the issue in tail, and after the recovery they will follow the lands in the hands of a *bonâ fide* purchaser. *Pig.* 120. 2 *Cru.* 287.

fuit or action, either actual or fictitious : and in it the lands are *recovered* against the tenant of the freehold ; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. A recovery therefore being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that it's form and method will not be easily understood by the student who is not yet acquainted with the course of judicial proceedings ; which cannot be thoroughly explained, till treated of at large in the third book of these commentaries. However I shall endeavour to state it's nature and progress, as clearly and concisely as I can ; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

LET us, in the first place, suppose David Edwards<sup>w</sup> to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands ; and he accordingly sues out a writ, called a *praecipe quod reddat*, because those were it's initial or most operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges that the defendant Edwards (here called the tenant) has no legal title to the land ; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it<sup>x</sup>. The subsequent proceedings are made up into a record or recovery roll<sup>y</sup>, in which the writ and complaint of the demandant are first recited : whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase, to have warranted the title to the tenant ; and thereupon he prays, that the said Jacob Morland may be called in to defend the title which he so war-

<sup>w</sup> See Appendix, No. V.

<sup>x</sup> § 1.

<sup>y</sup> § 2.

ranted.

ranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding the demandant desires leave of the court to *imparl*, or confer with the vouchee in private; which is (as usual) allowed him. And soon afterwards the demandant, Golding, returns to court, but Morland the vouchee disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question against the tenant, Edwards, who is now the recoveree: and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter<sup>z</sup>. This is called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the cryer of the court, (who, from being frequently thus vouched, is called the *common vouchee*,) it is plain that Edwards has only a nominal recompense for the land 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 operates merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding the purchaser. [ 359 ]

THE recovery, here described, is with a single voucher only; but sometimes it is with *double*, *treble*, or farther voucher, as the exigency of the case may require. And indeed it is now usual always to have a recovery with double voucher at the least: by first conveying an estate of freehold to any indifferent person, against whom the *praecipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee<sup>a</sup>. For, if a recovery be

<sup>z</sup> pag. 301.

<sup>a</sup> See Appendix, pag. xviii.

had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised; whereas if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered<sup>b</sup>. If Edwards therefore be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards doth first vouch Barker, and then Barker vouches Jacob Morland the common vouchee; who is always the last person vouched, and always makes default: whereby the demandant Golding recovers the land against the tenant Edwards, and Edwards recovers a recompense of equal value against Barker the first vouchee; who recovers the like against Mórland the common vouchee, against whom such ideal recovery in value is always ultimately awarded.

[ 360 ] THIS supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. For if the recoveree should obtain a recompense in lands from the common vouchee, (which there is a possibility in contemplation of law, though a very improbable one, of his doing,) these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail<sup>c</sup>. This reason will also hold with equal force, as to *most* remainder-men and reversioners; to whom the possibility will remain and revert, as a full recompense for the reality, which they were otherwise entitled to: but it will not *always* hold: and therefore, as Pigot says<sup>d</sup>, the judges have been even *astuti*, in inventing other reasons to maintain the authority of recoveries. And, in particular, it hath been said, that, though the estate-tail is gone from the recoveree, yet it is not *destroyed*, but *only transferred*; and still subsists, and will ever continue to subsist (by construction of law) in the recoveror, his heirs and assigns: and, as the estate-tail so continues to subsist for ever, the

<sup>b</sup> Bro. *Abt. tit. Taille*, 82. Plewd. 8.

<sup>d</sup> Of com. recov. 13. 14.

<sup>c</sup> Dr. & St. b. I. dial. 26.

remainders or reversions expectant on the determination of such an estate-tail can never take place (4).

To such awkward shifts, such subtle refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *de donis*. The design for which these contrivances were set on foot, was certainly laudable; the unrivetting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Our modern courts of justice have indeed adopted a more manly way of treating the subject; by considering common recoveries in no other light than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands. But, since the ill consequences of fettered inheritances are now generally seen and allowed, and of course the utility and expedience of setting them at liberty are apparent; it hath often been wished, that the process of this conveyance was [ 361 ] shortened, and rendered less subject to niceties, by either totally repealing the statute *de donis*; which, perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or by vesting in every tenant in tail of full age the same absolute fee-simple at once, which

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(4) Fines and recoveries are now considered as mere forms of conveyances or common assurances, the theory and original principles of them being little regarded. Chief justice Willes has declared that “ Mr. Pigot has confounded himself and every body else who reads his book, by endeavouring to give reasons for and explain common recoveries. I only say this,” he adds, “ to shew that when men attempt to give reasons for common recoveries, they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense. They have been in use some hundreds of years, have gained ground by time, and we must now take them, as they really are, common assurances.”  
1 *Wilf.* 73.

now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though this might possibly bear hard upon those in remainder or reversion by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time, and enrolled in some court of record: which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, and the decisions of our own courts of justice, which allow a tenant in tail (without fine or recovery) to appoint his estate to any *charitable use*<sup>e</sup>, but also by the precedent of the statute<sup>f</sup> 21 Jac. I. c. 19., which, in case of the bankrupt tenant in tail, empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And if, in so national a concern, the emoluments of the officers concerned in passing recoveries, are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrolment.

2. THE *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But by statute 34 & 35 Hen. VIII. c. 20., no recovery had against tenant in tail, of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate-tail, or the remainder or reversion of the crown. And by the statute 11 Hen. VII. c. 20. no woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband, or

<sup>e</sup> See pag. 376.

<sup>f</sup> See pag. 286.



fettled on her husband and her by any of his ancestors. And by statute 14 Eliz. c. 8. no tenant for life, of any sort, can suffer a recovery, so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid recovery; either he, or the tenant to the *praecipe* by him made, must *vouch* the remainder-man in tail, otherwise the recovery is void: but if he does vouch such remainder-man, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears, and suffers the recovery to be had against the tenant to the *praecipe*, it is as effectual to bar the estate-tail as if he himself were the recoveree <sup>f</sup>(5).

IN all recoveries it is necessary that the recoveree, or tenant to the *praecipe*, as he is usually called, be actually seised of the freehold, else the recovery is void <sup>g</sup>. For all actions, to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. And though these recoveries are in themselves fabulous and fictitious, yet it is necessary that

<sup>f</sup> Salk. 571.

<sup>g</sup> Pigot, 28.

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(5) If a tenant in tail, to whom the estate has descended *ex parte materna*, suffers a recovery, and declares the uses to himself in fee, the estate will descend to an heir on the part of the mother, even if he had the reversion in fee from his father, and *vice versa*; but if he took the estate-tail by purchase, the new fee will descend to the heirs general. 5 T. R. 104. If then a person, who has inherited an estate-tail from his mother, wishes to cut off the entail, and to make the estate descendible to his heirs on the part of the father, after the recovery he ought to make a common conveyance to trustees, and to have the estate reconveyed back by them, by which means he will take the estate by purchase, which will then descend to his heirs general.

there

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*, is removed by the provisions of the statute 14 Geo. II. c. 20. which enacts, with a retrospect and conformity to the antient rule of law<sup>h</sup>, that, though the legal freehold be vested in lessees, yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the *praecipe*; — that, though the deed or fine which creates such tenant be subsequent to the judgment of recovery, yet, if it be in the same term, the recovery shall be valid in law; — and that, though the recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the *praecipe*, and declare the uses of the recovery, shall after a possession of twenty years be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurances by matter of record.

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BEFORE I conclude this head, I must add a word concerning deeds to *lead*, or to *declare*, the *use* of fines, and of recoveries. For if they be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who levies or suffers them<sup>i</sup>. And if a consideration appears, yet as the most usual fine, “*sur cognizance de droit come ceo, &c.*” conveys an absolute estate, without any limitations, to the cognizee; and as common recoveries do the same to the recoveror; these assurances could not be made to answer the purpose of family settlements, (wherein a variety of uses and designations is very often expedient,) unless their force and effect were subjected to the direction of other more complicated deeds, wherein parti-

<sup>h</sup> Pigot, 41, &c. 4 Burr. l. 115.

<sup>i</sup> Dyer, 18.

cular uses can be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements in the vast and intricate machine of a voluminous family settlement. And if these deeds are made previous to the fine or recovery, they are called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As if A tenant in tail, with reversion to himself in fee, would settle his estate on B for life, remainder to C in tail, remainder to D in fee; that is what by law he has no power of doing effectually, while his own estate-tail is in being. He therefore usually, after making the settlement proposed, covenants to levy a fine (or if there be any intermediate remainders, to suffer a recovery) to E, and directs that the same shall enure to the uses in such settlement mentioned. This is now a deed to *lead* the uses of the fine or recovery; and the fine when levied, or recovery when suffered, shall enure to the uses so specified, and no other. For though E, the cognizee or recoveror, hath a fee-simple vested in himself by the fine or recovery; yet, by the operation of this deed, he becomes a mere instrument or conduit-pipe, seized only *to the use* of B, C, and D, in successive order: which use is executed immediately, by force of the statute of uses<sup>k</sup>. Or, if a fine or recovery be had without any

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<sup>k</sup> This doctrine may perhaps be more clearly illustrated by example. In the deed or marriage settlement in the Appendix, N<sup>o</sup> II. § 2. we may suppose the lands to have been originally settled on Abraham and Cecilia Barker for life, remainder to John Barker in tail, with divers other remainders over, reversion to Cecilia Barker in fee; and now intended to be settled to the several uses therein expressed, *viz.* to Abraham and Cecilia Barker till the marriage of John Barker with Katherine Edwards, and then to John Barker for life; remainder to trustees to preserve the contingent remainders; remainder to his wife Katherine for life, for her jointure; remainder to other trustees, for a term

of five hundred years; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to John Barker in tail; remainder to Cecilia Barker in fee. Now it is necessary, in order to bar the estate-tail of John Barker, and the remainders expectant thereon, that a recovery be suffered of the premises; and it is thought proper (for though usual it is by no means necessary: see Forrester, 167.) that in order to make a good tenant of the freehold or tenant to the *præcipe*, during the coverture, a fine should be levied by Abraham, Cecilia, and John Barker; and that the recovery itself be suffered against this tenant to the *præcipe*, who shall

previous settlement, and a deed be *afterwards* made between the parties, *declaring* the uses to which the same shall be applied, this will be equally good, as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For 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, shall be good and effectual in law, and the fine and recovery shall 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 (6).

shall vouch John Barker, and thereby venant to do these several acts (see  
 bar his estate-tail, and become tenant pag. viii.); and in consequence thereof  
 to the fee-simple by virtue of such re- the fine and recovery are had and suf-  
 covery; the uses of which estate so- fered (N<sup>o</sup> IV. and N<sup>o</sup> V.) of which  
 acquired are to be those expressed in this conveyance is a deed to *lead* the  
 this deed. Accordingly the parties co- uses.

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(6) The preamble to 39 & 40 Geo. III. c. 56. states, that it was the practice of courts of equity, in cases in which money, under the control of such courts, was subject to be laid out in the purchase of lands to be limited to uses capable of being barred by a fine, to direct the money to be paid to the person who could bar the uses by levying a fine, without requiring the actual investment of the money in the purchase of lands; but in cases where a fine would not bar the uses, and it was necessary to suffer a recovery to bar the interests in remainder, it was the practice to require an actual investment of the money in lands, which practice was attended with great expense and inconvenience, and did not materially promote the interests of the parties in remainder: it therefore enacts, that upon the petition of such persons who could, by a recovery or any other mode, bar the estates-tail, and all the interests in remainder, if the money were invested in freehold or copyhold hereditaments, the petitioners being adult, and if *femes-covert* being duly examined and consenting, a court of equity may order the money to be paid, and applied in such manner as the petitioners shall appoint, and the court approve.

Lord chancellor Loughborough consulted the chief justices and the master of the rolls, how this act ought to be executed; and

and they agreed that it would be proper not to order the money to be paid out of the court, until such time as the tenant in tail might actually have suffered a common recovery of the land; and in consequence a direction is added to the order in such cases, that it shall have no effect unless the tenant in tail shall be living on the second day of the next term. 5 *Vef. jun.* 12. 6 *Ibid.* 116.

But the court will make no order, unless the right of the petitioners is clear and indisputable. 6 *Vef. jun.* 156.

## CHAPTER THE TWENTY-SECOND.

OF ALIENATION BY SPECIAL  
CUSTOM.

WE are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property. This therefore is a very narrow title; being confined to copyhold lands, and such customary estates as are holden in antient 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 feigniory, it is therefore a forfeiture of a copyhold<sup>a</sup>. Nor are they transferable by matter of record, even in the king's courts, but only in the court baron of the lord. The method of doing this is generally by *surrender*; though in some manors, by special custom, recoveries may be suffered of copyholds<sup>b</sup>: but these differing in nothing material from recoveries of free land, save only that they are not suffered in the king's courts, but in the court baron of the manor, I shall confine myself to conveyances by surrender, and their consequences.

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

<sup>a</sup> Litt. § 74.<sup>b</sup> Moor. 637.

tenant comes to the steward, either in court, (or if the custom permits, out of court,) or else to two customary tenants of the same manor, provided 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 antient 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.

IN this brief abstract of the manner of transferring copyhold estates we may plainly trace the visible footsteps of the feudal institutions. The fief, being of a base nature and tenure, is unalienable without the knowledge and consent of the lord. For this purpose it is resigned up, or surrendered into his hands. Custom, and the indulgence of the law, which favours liberty, has now given the tenant a right to name his successor; but formerly it was far otherwife. And I am apt to suspect that this right is of much the same antiquity with the introduction of uses with respect to freehold lands; for the alienee of a copyhold had merely *jus fiduciarium*, for which

there was no remedy at law, but only by *sub-pœna* in chancery<sup>c</sup>. When therefore the lord had accepted a surrender of his tenant's interest, upon confidence to re-grant the estate to another person, either then expressly named or to be afterwards named in the tenant's will, the chancery enforced this trust as a matter of conscience; which jurisdiction, though seemingly new in the time of Edward IV.<sup>d</sup>, was generally acquiesced in, as it opened the way for the alienation of copyholds, as well as of freehold estates, and as it rendered the *use* of them both equally devisable by testament. Yet, even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowledgment for the licence of alienation. Add to this the plain feudal investiture, by delivering the symbol of feisin in presence of the other tenants in open court; "*quando hasta vel aliud corporeum quidlibet porrigitur a domino se investituram facere dicente; quae saltem coram duobus vassallis solemniter fieri debet*"<sup>e</sup>: and, to crown the whole, the oath of fealty is annexed, the very bond of feudal subjection. From all which we may fairly conclude, that had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestably prove the very universal reception which this northern system of property for a long time obtained in this island; and which communicated itself, or at least its similitude, even to our very villeins and bondmen.

THIS method of conveyance is so essential to the nature of a copyhold estate, that it cannot 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 surrender it to the use of my last will and testament; and in my will I must declare my in-

<sup>c</sup> Cro. Jac. 568.

<sup>e</sup> Feud. l. 2. t. 2.

<sup>d</sup> Bro. Abr. tit. *Tenant per copie*, 10.



tentions, and name a devisee, who will then be entitled to admission <sup>f</sup> (1). A fine or recovery had of copyhold lands in the king's court may, indeed, if not duly reversed, alter the tenure of the lands, and convert them into frank fee <sup>g</sup>, which is defined in the old book of tenures <sup>h</sup> to be "land pleadable " at the common law ;" but upon an action on the case, in the nature of a writ of *deceit*, brought by the lord in the king's court, such fine or recovery will be reversed, the lord will recover his jurisdiction, and the lands will be restored to their former state of copyhold <sup>i</sup>.

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.

<sup>f</sup> Co. Copyh. § 36.

<sup>h</sup> *t. tenir en franke fee.*

<sup>g</sup> *Old Nat. Brev. t. brieve de recto*  
*clauso.* F. N. B. 13.

<sup>i</sup> See Vol. III. pag. 166.\*

(1) Unless a surrender is made by the testator some time before his death to the use of his last will and testament, the devise of a copyhold is in general absolutely void, and the estate descends to the heir at law : but in three instances a court of equity will interfere, and will supply the defect of a surrender, *viz.* when copyholds are devised for the payment of debts, and in favour of a wife or younger children. Yet a wife or younger children will not be relieved in equity, if the heir is disinherited or unprovided for. 1 *Atk.* 387. 3 *Bro.* 229. 1 *Cox's P. Wms.* 60. But a wife will be relieved against an heir, who is not the child of the testator, or one who has an equal claim to his protection and bounty as his wife, though such heir be unprovided for, for the wife will be preferred, where there is not an equal moral obligation violated by giving her relief. 3 *Bro.* 229. If both freehold and copyhold estates are devised for the payment of debts, the chancellor will not supply the defect of the surrender of the copyhold, unless the freehold is insufficient. 1 *Bro.* 273. 2 *Bro.* 325.

Equity will not assist a brother, grandchildren, or a natural child. 3 *Atk.* 189. 2 *Ves.* 582.

Lord Somer's decree in favour of a grandson was reversed by the House of Lords. 6 *Ves.* jun. 544.

I. 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 surrendor 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 admittance. If he enters, he is a trespasser, and punishable in an action of trespass (2): 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 [ 369 ] make an act good, which was *ab initio* void. Yet, 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 effects 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*<sup>k</sup>: and the sur-

<sup>k</sup> 2 Roll. Rep. 107.

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(2) The surrenderee would not now be considered a trespasser; for it has been determined that he may recover in an ejectment against the surrendor, upon a demise laid after the surrender, where there was an admittance of the nominee before trial: but as the surrendor after the surrender is considered merely a trustee for the nominee, it should seem that the decision would have been the same even if the subsequent admittance had not been proved.  
1 T. R. 600.

renderor 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<sup>1</sup>.

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<sup>m</sup> : the surrender, as being 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, that is sufficient<sup>n</sup>. 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 both the lord, and them that took the surrender, in chancery, and shall there find relief<sup>o</sup>. [ 370 ]

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

<sup>1</sup> Co. Copyh. § 39.

<sup>n</sup> Co. Litt. 62.

<sup>m</sup> *Ibid.* §

<sup>o</sup> Co. Copyh. § 40.

admittance upon surrender by the former tenant ; and, thirdly, an admittance upon a descent from the ancestor.

IN admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For though it is in his power to keep the lands in his own hands ; or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein ; and quite to change their nature from copyhold to socage tenure, so that he may well be reputed their absolute owner and lord ; yet if he will still continue to dispose of them as copyhold, he is bound to observe the 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 enfranchise the land, yet if he grants it out again by copy, he can neither add to nor diminish the antient rent, nor make any the minutest variation in other respects <sup>p</sup> : nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord <sup>q</sup>. (3)

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

<sup>p</sup> Co. Copyh. § 41.

<sup>q</sup> 8 Rep. 63.

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(3) Where a copyhold has been granted for lives, upon the death of one or more of the lives, the heir of the grantee cannot claim by custom a renewal of the grant for fresh lives upon the payment of a reasonable fine, *i. e.* a fine of two years' value, as in the case of a copyhold of inheritance. No custom to renew a copyhold for lives is legal, unless the fine has been certain and unvaried ; for copyholds grantable for lives only, if the fine is not certain, are like leases of freehold lands for lives, and renewable only upon the best terms the party can make. *Warton v. King, Anstr. 659.*

incumbrances of the lord; for his claim to the estate is solely under him that made the surrender<sup>r</sup>.

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<sup>s</sup>. [ 371 ]

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<sup>t</sup>; nay, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases (4). For which reasons we

<sup>r</sup> 4 Rep. 27. Co. Litt. 59.    <sup>s</sup> 4 Rep. 27. 1 Rep. 140.    <sup>t</sup> 4 Rep. 23.

(4) The heir having as complete a title without admittance as with it, against all the world but the lord, the court of king's bench will not grant a mandamus to compel the lord to admit him. 2 T. R. 197.

may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine, and not so much necessary for the strengthening and completing the heir's title. Hence indeed an observation might arise, that if the benefit, which the heir is to receive by the admittance, is not equal to the charges of the fine, he will never come in and be admitted to his copyhold in court; and so the lord may be defrauded of his fine. But to this we may reply in [ 372 ] the words of sir Edward Coke <sup>u</sup>, " 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 admit-  
 " tance; but the custom of 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." (5)

<sup>u</sup> Copyh. § 41.

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(5) Copyholds are not within the statute *de donis*, and cannot be entailed without a special custom within the manor; and where such a custom exists, there may also be a custom to bar the estate-tail, by a recovery suffered in the lord's court; but if no such custom appears of barring by recovery, the entail may be barred by surrender, or otherwise it would amount to a perpetuity. 2 *Vef.* 601. Yet in some manors the custom of barring by one mode, is co-existent with the custom of barring by the other. 2 *Bl. Rep.* 944.

## CHAPTER THE TWENTY-THIRD.

## 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 at present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the original and antiquity of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

It seems sufficiently clear, that, before the conquest, lands were devisable by will<sup>a</sup>. But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord<sup>b</sup>. And some have questioned whether this restraint (which we may trace even from the antient Germans<sup>c</sup>) was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours; since it rarely happens,

<sup>a</sup> Wright of tenures, 172.

<sup>c</sup> Tacit. de mor. Germ. c. 21.

<sup>b</sup> See pag. 57.

that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the antient law of the Athenians directed that the estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go to the collateral relations: which had an admirable effect in keeping up equality, and preventing the accumulation of estates. But when Solon<sup>d</sup> made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others: which, by a natural progression, first produced popular tumults and dissensions; and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses, (which are the natural consequence of free agency, when coupled with human infirmity,) to debar the owner of lands from distributing them after his death as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property: which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

HOWEVER this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament<sup>e</sup>; except only in Kent, and in some antient burghs, and a few particular manors, where their Saxon immunities by special indulgence

<sup>d</sup> Plutarch, *in vita Solon.*

<sup>e</sup> 2 Inst. 7.



subsisted<sup>f</sup>. And though the feudal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after: from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious<sup>g</sup>. 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.

BUT when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised very frequently<sup>h</sup>, and the devisee of the use could in chancery compel it's execution. For it is observed by Gilbert<sup>i</sup>, that, as the popish clergy then generally sat in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses<sup>j</sup> had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, *viz.* 32 Hen. VIII. c. 1. explained by 34 Hen. VIII. c. 5. which enacted, that all persons being seized in fee-simple (except feme-coverts (1), infants, idiots,

<sup>f</sup> Litt. § 167. 1 Inst. 111.

<sup>i</sup> On devises, 7.

<sup>g</sup> Glanv. l. 7. c. 1.

<sup>j</sup> 27 Hen. VIII. c. 10. See Dyer. 143.

<sup>h</sup> Plowd. 414.

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(1) Where lands are conveyed to trustees, a married woman may have the power of appointing the disposition of them after her death, which appointment must be executed like the will of a *feme sole*, and will be subject to the same rules of construction. 2 *Ves.* 610. 1 *Bro.* 99. And though the contrary has been held, yet it has been determined by the house of lords, that the appointment of a married woman is effectual against the heir at law; though it depends

and persons of non-sane 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 focage: which now, through the alteration of tenures by the statute of Charles the second, amounts to the whole of their landed property, except their copyhold tenements.

CORPORATIONS were excepted in these statutes, to prevent the extension of gifts in mortmain; but now, by construction [ 376 ] 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 carried them great lengths in supporting such charitable uses<sup>k</sup>; it being held that the statute of Elizabeth, which favours appointments to charities, supercedes and repeals all former statutes<sup>l</sup>, and supplies all defects of assurances<sup>m</sup>: and therefore not only a devise to a corporation, but a devise by a copyhold tenant without surrendering to the use of his will<sup>n</sup>, and a devise (nay even a settlement) by tenant in tail without either fine or recovery, if made to a charitable use, are good by way of appointment<sup>o</sup>.

WITH regard to devises in general, experience soon shewed how difficult and hazardous a thing it is, even in matters of

<sup>k</sup> Ch. Prec. 272.

<sup>n</sup> Moor. 890.

<sup>l</sup> Gilb. Rep. 45. 1 P. Wms. 248.

<sup>o</sup> 2 Vern. 453. Ch. Prec. 16.

<sup>m</sup> Duke's charit. uses, 84.

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depends only upon an agreement of her husband before marriage, without any conveyance of the estate to trustees. 6 Bro. P. C. 156.

Where there is a power to charge lands for the payment of debts, or for a provision for a wife or younger children, a court of equity will decree a will, though not executed according to the statute, a good execution of the power. *Scho. & Lefr.* 60. 1 *Dick.* 165.

public

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<sup>p</sup>. 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. (2) And a solemnity nearly similar is requisite for revoking a devise by writing; though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent (3): as likewise *im-*

<sup>p</sup> Dyer, 72. Cro. Eliz. 100.

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(2) Copyholds and terms for years are not within the statute, but will pass by any will which is sufficient to bequeath personalty. 2 *Atk.* 37. 2 *Bro.* 58. But the testator must surrender his copyhold to the use of his will. See p. 368. *ante*, n. 1.

Where the testator is a trustee for the benefit of others, he may devise those lands, or the legal estate by his will; but the trust estates will not pass by general words, as all my lands or estates: to pass a trust estate, the intention of the testator must be expressly shewn. 6 *Vef. jun.* 577.

(3) It has been determined, that one will cannot be revoked by another will, though it should contain a clause declaring all former wills to be revoked, unless the second is valid and effectual as a will. 1 *P. Wms.* 343. Yet a will may be revoked by an instrument written merely for the purpose of revocation; but it must be attested by three witnesses, and the testator must sign it in *their presence*, which is not necessary in the execution of a will. The reason of this difference, if it was designed, is not obvious. 29 *Car. II. c. 3. s. 6.*

*pliedly,*

*pliedly*, 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 <sup>a</sup> (4).

IN the construction of this last statute, it has been adjudged that the testator's name, written with his own hand,

<sup>a</sup> Christopher v. Christopher, *Schaccb.* Cockpit, 27 Mar. 1773, by Wilmot, de 6 Jul. 1771. Spragge v. Stone, at the Grey and Parker. See pag. 502.

(4) Marriage and the birth of a posthumous child amount to a revocation. 5 *T. R.* 49.

In a case where a testator had devised his real estate to a woman with whom he cohabited, and to her children, he afterwards married her and had children by her, it was held these circumstances did not amount to a revocation of the will. Lord Ellenborough in his judgment says, "The doctrine of implied or presumptive revocations seems to stand upon a better foundation of reason, as it is put by lord Kenyon, in *Doe v. Lancashire*, 5 *T. R.* 58. namely, as being 'a tacit condition annexed to the will when made, that it should not take effect, if there should be a total change in the situation of the testator's family,' than on the ground of any presumed alteration of intention; which alteration of intention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon. But, upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply only in cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This, however, cannot be said to be the case, where the same persons, who, after the making of the will, stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character and denomination." 2 *East*, 530.

By the Roman law, if the child born after the will died before the testator, the testament was restored to its force and effect, 2 *Domat.* 40.

at the beginning of his will, as, "I, John Mills, do make  
 "this my last will and testament;" is a sufficient signing, [ 377 ]  
 without any name at the bottom<sup>a</sup>; though the other is the  
 safer way (5). It has also been determined, that though  
 the witnesses must all see the testator sign, or at least ac-  
 knowledge the signing, yet they may do it at different times<sup>r</sup>.  
 But they must all subscribe their names as witnesses *in his*  
*presence*, lest by any possibility they should mistake the in-  
 strument<sup>s</sup> (6). And, in one case determined by the court  
 of king's bench<sup>t</sup>, the judges were extremely strict in regard  
 to the credibility, or rather the competency, of the wit-  
 nesses: for they would not allow any legatee, nor by con-  
 sequence 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,

<sup>a</sup> 3 Lev. 1.<sup>s</sup> 1 P. Wms. 740.<sup>r</sup> Freem. 486. 2 Ch. Caf. 109. Pr.  
ch. 185.<sup>t</sup> Stra. 1253.

(5) I conceive that writing the name at the beginning would  
 never be considered a signing according to the statute, unless the  
 whole will was written by the testator himself: for whatever is  
 written by a stranger after the name of the testator, affords no  
 evidence of the testator's assent to it, if the subscription of his name  
 in his own hand is not subjoined.

(6) It has been determined to be in his presence, if he is ap-  
 prised at the time of the attestation of the witnesses, and was in a  
 situation from which he might have seen the witnesses subscribe  
 their names. As in a case where the testator's carriage was drawn  
 opposite the windows of an attorney's office, in which the witnesses  
 attested the will, this was clearly determined to be in the testator's  
 presence. 1 Bro. 99. The object of this requisition in the statute  
 is to prevent the testator and the witnesses from being imposed  
 upon by the substitution of another instrument or a fabricated will.  
 Hence the attestation of a will is void, if at the time the testator  
 is in a state of insensibility. Doug. 229.

whereas

whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues, (and these are the persons most likely to be present in the testator's last illness,) and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6. which restored both the competency and the credit of such *legatees*, by declaring void all legacies (7) 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 [ 378 ] jury before whom such will shall be contested. And in a much later case<sup>u</sup> 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 was said to be insufficient. (8)

<sup>u</sup> M. 31 Geo. II. 4 Bur. 1. 430.

(7) This extends to devises of lands, and every interest given to the witnesses.

(8) The subscribing witnesses may afterwards be admitted to prove the testator was insane when he executed his will. But in a case where the three witnesses and twelve servants swore to the testator's insanity, they were contradicted by the whole neighbourhood, and the subscribing witnesses were afterwards convicted of perjury. *Low v. Joliffe*, 1 *Bl. Rep.* 365.

. 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. hath provided, that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void: and that such creditors may maintain their actions jointly against both the heir and the devisee (9).

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 <sup>w</sup>, though it

<sup>w</sup> See pag. 307, 308.

(9) A devise to raise a portion for younger children according to an agreement before marriage, and a devise for the payment of debts, are exceptions in the statute, *sect.* 4. But it has been held, that the payment of the debt must be provided for effectually in order to bring it within the exception. 1 *Bro.* 311. 2 *Bro.* 614.

Lord Eldon has declared that it is an uniform rule, that a provision by will, effectual in law or equity for payment of creditors, is not fraudulent within the statute, but is equitable assets. 7 *Ves.* 323.

The execution of a will in a court of law is proved by calling one of the subscribing witnesses, who proves that the testator executed his will by signing and sealing in his presence, and in the presence of the other two subscribing witnesses. But if a bill is filed to establish a will, all the subscribing witnesses living must be examined, unless they are abroad; then their hand-writing must be proved, as if they were dead. 5 *Ves.* jun. 411.

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 it's 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 \* (10). Where-

\* 1 P. Wms. 575. 11 Mod. 148.

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(10) Lord Mansfield has declared, that this does not turn upon the construction of the statute 32 Henry VIII. c. 1. (as some have supposed) which says, that any person *having* lands, &c. may devise: for the same rule held before the statute, where lands were devisable by custom. *Cowp.* 90. It has been determined, that where a testator has devised all his lands, or all the lands which he shall have at the time of his death; if he purchases copyholds after the execution of the will, and surrenders them to the uses *declared* by his will, they will pass by the will. *Cowp.* 130. Or if the testator, after making such a devise, purchases freehold lands, and then makes a codicil duly executed according to the statute, though no notice is taken of the after-purchased lands; yet if the codicil is annexed to, or confirms the will, or, as it seems, has a reference to it, this amounts to a republication of the will, and the after-purchased lands will pass under the general devise. *Cowp.* 158. *Com.* 383. 4 *Bro.* 2. 7 *Ves.* jun. 98. But if the codicil refers expressly to the lands only devised by the will, then the after-purchased lands will not pass under the general devise of the will. 7 *T. R.* 482.

This also is a general rule, that if a man is seised of an estate in fee, and disposes of it by will, and afterwards makes a conveyance of the fee-simple, and takes back a new estate, this new estate will not pass by the will, for it is not the estate which the testator had at the time of publishing his will.

Some cases have lately produced much discussion both in the courts of law and equity. They were cases where articles had been



fore no after-purchased lands will pass under such devise<sup>y</sup>, unless, subsequent to the purchase or contract<sup>z</sup>, the devisor republishes his will<sup>a</sup> (11).

<sup>y</sup> Moor. 255. 11 Mod. 127.

<sup>a</sup> Salk. 238.

<sup>z</sup> 1 Ch. Caf. 39. 2 Ch. Caf. 144.

been entered into before marriage, by a man possessed of estates in fee, in order to make certain settlements upon his wife and children, in which he reserved to himself the reversion in fee, which reversion he afterwards disposed of by his will; and after the making of his will, he executed proper conveyances for the performance of the marriage-articles, in which, after the limitations to his wife and children, he took back the reversion in fee; this was held to be a revocation of the will by lord Loughborough, and his decision was afterwards confirmed by the house of lords in the case of *Brydges v. Duchefs of Chandos*. 2 *Vef. jun.* 417.

A similar decision was also made in the courts of common pleas and king's bench, in the case of *Goodtitle v. Otway*, 7 *T. R.* 399. In that case lord Kenyon lays down generally, "that it is now indisputably fixed, that where the whole estate is conveyed to uses, though the ultimate reversion comes back to the grantor by the same instrument, it operates as a revocation of a prior will." 7 *T. R.* 419.

Equity admits no revocation which would not upon legal grounds be a revocation at law. There are three cases which are exceptions to this general rule, *viz.* mortgages, which are revocations *pro tanto* only, a conveyance for payment of debts, or a conveyance merely for the purpose of a partition of an estate. In the two first a court of equity decrees the redemption, or the surplus, to that person who would have been entitled if such mortgage or conveyance had not existed, *i. e.* the devisee. 2 *Vef. jun.* 428.

(11) If an estate is given to A and his heirs, or to A and the heirs of his body, or any interest whatever to A, and A dies before the testator, the devise is lapsed and void, and the heirs of A can claim no benefit from the devise. A severe instance of this rule occurred not long ago in Ireland. A father devised his estate to his eldest son and the heirs of his body, and upon failure of his issue to his second son in like manner in tail; the eldest son died before the father, leaving several children; and the father, supposing that the eldest of them would take under the devise, made no alteration

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,

1. THAT the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law will admit <sup>b</sup>. For the maxims of law are, that “*verba intentioni debent inferuire;*” and “*benigne interpretamur chartas propter simplicitatem laicorum.*” And therefore the construction must also be *reasonable*, and agreeable to common understanding <sup>c</sup>.

2. THAT *quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est* <sup>d</sup>: 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* <sup>e</sup>. And another maxim of law is, that “*mala grammatica non vitiat chartam;*” neither false English nor bad Latin will destroy a deed <sup>f</sup>. Which perhaps a classical critic may think to be no unnecessary caution.

<sup>b</sup> And. 60.

<sup>c</sup> Hob. 27.

<sup>d</sup> 1 Bulltr. 175. Hob. 304.

<sup>e</sup> 10 Rep. 133.

Co. Litt. 223.

<sup>f</sup> 2 Saund. 157.

2 Show. 334.

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in his will: the consequence was, that the devise was lapsed and void, and the second son was entitled by the will to an estate-tail, in exclusion of the children of the eldest brother, the first objects of the father's bounty and regard.

The court of king's bench in Ireland decided in favour of the grandson; but that decision was reversed by the king's bench and house of lords here, the question being too clear to admit a doubt. *White v. White*, 6 T. R. 518. 1 Bro. 219. *Doug.* 330.

3. THAT

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* <sup>g</sup>.” 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 <sup>h</sup>. “*Nam verba debent intelligi cum effectu, ut res magis valeat quem pereat* <sup>i</sup>.” [ 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 <sup>j</sup>. 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 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 <sup>k</sup>. 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 <sup>l</sup>.

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 <sup>m</sup>. As if tenant in tail lets

<sup>g</sup> 1 Bullfr. 101.

<sup>h</sup> 1 P. Wms. 457.

<sup>i</sup> Plowd. 156.

<sup>j</sup> Co. Litt. 42.

<sup>k</sup> Co. Litt. 134.

<sup>l</sup> Bacon's Elem. c. 3.

<sup>m</sup> Co. Litt. 42.

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. 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<sup>n</sup>; wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand<sup>o</sup>. 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 (12). Yet in both cases we should rather attempt to reconcile them<sup>p</sup>.

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<sup>q</sup>; and an estate-tail without words of procreation<sup>r</sup> (13). By a will also an estate may pass by mere

<sup>n</sup> Hardr. 94.

<sup>q</sup> See pag. 108.

<sup>o</sup> Co. Litt. 112.

<sup>r</sup> See pag. 115.

<sup>p</sup> Cro. Eliz. 420. 1 Vern. 30.

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(12) Such was held to be the law in the time of lord Coke; but now where the same estate is given by the testator to two persons in different parts of the will, they are construed to take the estate as joint tenants, or tenants in common, according to the limitations of the estates and interests devised. 3 *Atk.* 493. *Harg. Co. Litt.* 112. *b.*

(13) In the celebrated case of *Perrin v. Blake*, the question was this, *viz.* whether the manifest intention of the testator to give to the first taker an estate for life only ought to prevail, or that he should have an estate-tail from the construction which would have clearly been put upon the same words if they had been used in a deed.

implication, without any exprefs words to direct it's courfe. As, where a man devifes lands to his heir at law, after the

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a deed. The devife in fubftance was as follows: the teftator declared, it is my intent and meaning, that none of my children fhould fell or difpofe of my eftate for longer term than his own life; and *to that intent* I give my fon John Williams my eftate during his natural life, remainder to my brother-in-law during the life of my fon John Williams (the defign of that being to fupport the contingent remainder); remainder to the heirs of the body of John Williams. Lord Mansfield and two other judges of the court of king's bench determined, that John Williams took an eftate for life only; but upon a writ of error to the exchequer-chamber, the decifion was reverfed, and fix out of eight of the other judges held, that John Williams took an eftate-tail, which of confequence gave him an abfolute power of *selling or difpofing of* the eftate as he pleafed. The difcuffion of this fubject called forth a fplendid difplay of legal learning and ingenuity. Yet it has fince been obferved by a learned judge, that as one of the judges held that John Williams took an eftate-tail, becaufe he was of opinion that fuch might be prefumed to be the teftator's intention, no argument in future can be drawn from this cafe; becaufe one half of the judges relied upon the ground of intention alone. And the Editor entirely concurs with that learned judge, that it is the firft and great rule in the expofition of wills, and to which all other rules muft bend, that the intention of the teftator, expreffed in his will, fhall prevail, provided it be *confiftent with the rules of law*; that is, provided it can be effectuated confiftently with the limits and bounds which the law prefcribes. Mr. J. Buller, *Doug.* 322. To argue that the intention fhall be frufterated by a *rule of conftruction of certain words*, is to fay that the intention fhall be defeated by the ufe of the very words which the teftator has adopted as the beft to communicate his intention, and of which the fenfe is intelligible to all mankind.

Where technical phrafes and terms of art are ufed alone by a teftator, it is fair to prefume that he knew their artificial import and fignification, and that fuch was his will and intention; but where he happens to introduce them, and at the fame time in effect declares that I do not intend what conveyancers underftand by thefe words, but my intention is to difpofe of my eilate directly contrary

death of his wife : here, though no estate is given to the wife in exprefs terms, yet ſhe ſhall have an eſtate for life by implication<sup>3</sup> ; for the intent of the teſtator is clearly to poſtpon the heir till after her death ; and, if ſhe does not take it, nobody elſe can (14). 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 *crofs remainders* by implication, and on the failure of either's iſſue, the other on his iſſue ſhall take the whole ; and C's remainder over ſhall be poſtponed till the iſſue of both ſhall fail<sup>4</sup>. But, to avoid confuſion, no ſuch croſs remainders are allowed between more than two deviſees<sup>5</sup> (15) :

<sup>3</sup> H. 13 Hen. VII. 17. 1 Ventr. 376.

<sup>4</sup> Cro. Jac. 655. 1 Ventr. 224.

<sup>5</sup> Freem. 484.

<sup>2</sup> Show. 139.

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to the conſtruction generally put upon them ; ſurely courts of juſtice are, or ought to be, as much at liberty, or rather under an obligation, to effectuate that intention as far as the law will admit, as if he had expreſſed it in the moſt apt and appropriate language. 1 Bl. Rep. 672. 4 Burr. 2579. Doug. 329. Fearn, 113. Harg. Tracts, 351. 490.

(14) But it has been thought, that if it is given to a ſtranger after the wife's death, the deviſe raiſes no implication in favour of the wife, for it may deſcend to the heir during the life of the wife, which poſſibly may have been the teſtator's intention. Cro. Jac. 75.

(15) The contrary has for ſome time been fully eſtabliſhed ; and this has been laid down by lord Mansfield, as a general rule, viz. wherever croſs remainders are to be raiſed between two and no more, the favourable preſumption is in ſupport of croſs remainders : where between more than two, the preſumption is againſt them ; but the intention of the teſtator may defeat the preſumption in either caſe.

And the Editor conceives that croſs remainders would be raiſed in every caſe in which it appears to be the teſtator's intention that the ſubſequent deviſee ſhall take nothing till the iſſue of all the firſt deviſees are extinct. Cowp. 777. 797. 4 T. R. 710.

In a caſe, where croſs remainders were created by a deed, lord Kenyon declared, that “ no technical precise form of words is  
“ neceſſary

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<sup>w</sup>. 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<sup>x</sup>, is construed in each with equal favour and benignity, and expounded rather on it's own particular circumstances, than by any general rules of positive law.

AND thus we have taken a transient view, in this and the [ 382 ] three preceding chapters, of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the *title* to things real, or the means by which they may be reciprocally lost and acquired. We have before considered the *estates* which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connexions of the persons entitled to hold them: we have examined the *tenures*, both antient and modern, whereby those estates have been, and are now, holden: and have distinguished the object of all these inquiries, namely, things real into the corporeal or substantial, and in corporeal or ideal *kind*; and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws, that differs much from every other system, except those

<sup>w</sup> Vaugh. 262.

<sup>x</sup> Fitzg. 236. 11 Mod. 153.

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“ necessary to create cross remainders, though in the verbosity  
 “ of conveyancers an abundance of words is generally introduced  
 “ in deeds for this purpose.” 5 *T. R.* 431. But cross remainders  
 cannot be created in a deed, as in a will, by implication, not even  
 where the ultimate limitation is given “ in default of all such  
 “ issue,” which words would probably create cross remainders  
 amongst any number in a will. 5 *T. R.* 521. 1 *East*, 416.

In a will there may be cross remainders amongst any number  
 by implication, where it is the manifest intention of the testator,  
 though he has given the estates to the *respective* heirs of their  
 bodies. 2 *East*, 36.

of the same feodal origin, in its notions and regulations of lauded estates; and which therefore could in this particular be very seldom compared with any other.

THE subject, which has thus employed our attention, is of very extensive use, and of as extensive variety. And yet, I am afraid, it has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or [ 383 ] method; and the multiplicity of acts of parliament which have amended, or sometimes only altered, the common law: these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. It hath been my endeavour principally to select such parts of it as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers, as were before strangers even to the very terms of art, which I have been obliged to make use of; though, whenever those have first occurred, I have generally attempted a short explication of their meaning. These are indeed the more numerous, on account of the different languages, which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our inquiries with the words of sir Edward Coke<sup>y</sup>: “ Albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself, but proceed: for on some other day, in some other place,” (or perhaps upon a second perusal of the same,) “ his doubts will be probably removed.”

<sup>y</sup> Proemio to 1 Inst.



## CHAPTER THE TWENTY-FOURTH.

## OF THINGS PERSONAL.

UNDER the name of things *personal* are included all sorts of things *moveable*, which may attend a man's person wherever he goes; and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immoveable*, as land and houses, and the profits issuing thereout. These being constantly within the reach, and under the protection of the law, were the principal favourites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it indeed was comparatively very trifling, during the scarcity of money and the ignorance of luxurious refinements which prevailed in the feudal ages. Hence it was, that a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence likewise may be derived the frequent forfeitures inflicted by the common law,

law, of *all* a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to deserve so severe a punishment. Our antient law-books, which are founded upon the feudal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the mirroir, that can fairly be referred to this head; and the little that is to be found in Glanvil, Braſton, and Fleta, seems principally borrowed from the civilians. But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented it's quantity and of course it's value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to antient usages, and a certain feudal tincture, which is still to be found in some branches of personal property.

BUT things personal, by our law, do not only include things *moveable*, but also something more: the whole of which is comprehended under the general name of *chattels*, which, fir Edward Coke says <sup>a</sup>, is a French word signifying goods. The appellation is in truth derived from the technical Latin word, *catalla*: which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all moveables in general <sup>b</sup>. In the *grand coutumier* of Normandy <sup>c</sup> a *chattel* is described as a mere moveable, but at the same time it is set in opposition to a fief or feud: so that not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more extended, negative sense, that our law adopts it; the idea of

<sup>a</sup> 1 Inst. 113.

<sup>b</sup> Dufresne, II. 407.

<sup>c</sup> l. 67.

goods, or moveables only, being not sufficiently comprehensive to take in every thing that the law considers as a chattel interest. For since, as the commentator on the *coutumier*<sup>d</sup> observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief; or, according to us, is not a *real* estate: the consequence of which in both laws is, that it must be a personal estate, or chattel.

CHATTELS therefore are distributed by the law into two kinds; chattels *real*, and chattels *personal* e.

I. CHATTELS *real*, saith sir Edward Coke<sup>f</sup>, are such as concern, or favour of, the realty; as terms for years of land, wardships in chivalry, (while the military tenures subsisted,) the next presentation to a church, estates by a statute-merchant, statute staple, *elegit*, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estates: of which they have one quality, *viz.* immobility, which denominates them *real*; but want the other, *viz.* a sufficient, legal, indeterminate duration; and this want it is, that constitutes them *chattels*. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life: their tenants were considered upon feudal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII.<sup>g</sup> A freehold, which alone is a real estate, and seems (as has been said) to answer to the

<sup>d</sup> *Il conviendrait quil fust non mouuable et de duree a tou siours, fol. 107. a.*

<sup>e</sup> So too in the Norman law, *Cateux sont meubles et immubles: si comme vrais meubles sont qui transporter se peuvent, et ensuivre le corps; immubles sont choses*

*qui ne peuvent en suivre le corps, nestre transportees, et tout ce qui n'est point en heritage. LL. Will. Nothi, 4. apud*

*Dufresne, II. 409.*

<sup>f</sup> 1 Inst. 118.

<sup>g</sup> See page 142.

[ 387 ] fief in Normandy, is conveyed by corporal investiture and livery of seisin; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act, of voluntary transfer or of forfeiture; or else by the happening of some future contingency, as in estates *per auter vie*, and the determinable freeholds mentioned in a former chapter<sup>h</sup>. And even these, being of an uncertain duration, may by possibility last for the owner's life; for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life-estate, and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it will certainly expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianships in chivalry expired of course the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that its duration is limited to a time certain, beyond which it cannot subsist.

2. CHATTELS *personal* are, properly and strictly speaking, things *moveable*; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels

<sup>h</sup> Page 120.

real, and their incidents, in the former chapters, which were employed upon real estates: that kind of property being of [ 388 ] a mongrel amphibious nature, originally endowed with one only of the characteristics of each species of things; the immobility of things real, and the precarious duration of things personal.

CHATTEL interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that *property*, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the *title* to that property, or how it may be lost and acquired. Of each of these in it's order.

## CHAPTER THE TWENTY-FIFTH.

## OF PROPERTY IN THINGS PERSONAL.

PROPERTY in chattels personal may be either in *possession*: which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property.

I. FIRST, then, of property in *possession absolute*; which is where a man hath, solely and exclusively, the right, and also the occupation, of any moveable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: such also may be all *vegetable* productions, as the fruit or other parts of a plant, when severed from the body of it; or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these therefore there remains little to be said.

BUT with regard to *animals* which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to their  
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several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are *domitae*, and such as are *ferae naturae*: some being of a *tame* and others of a *wild* disposition. In such as are of a nature tame and domestic, (as horses, kine, sheep, poultry, and the like,) a man may have as absolute a property as in any inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property<sup>a</sup>: in which our law agrees with the laws of France and Holland<sup>b</sup>. The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man; or else for the uses of husbandry<sup>c</sup>. But in animals *ferae naturae* a man can have no absolute property.

OF all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England<sup>d</sup>, as well as Rome<sup>e</sup>, "*si equam meam equus tuus praegnantem fecerit, non est tuum sed meum quod natum est.*" And, for this Puffendorf<sup>f</sup> gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with great expence and care: wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets; which belong equally to the owner of the cock and hen, and shall be divided between them<sup>g</sup>. But here the reasons of the general rule cease, [ 391 ] and "*cessante ratione cessat et ipsa lex:*" for the male is well

<sup>a</sup> 2 Mod. 319.

<sup>b</sup> *Vin. in. Inst. l. 2. tit. 1. § 15.*

<sup>c</sup> 1 Hal. P. C. 511, 512.

<sup>d</sup> *Bro. Abr. tit. proprietie, 29.*

<sup>e</sup> *Eff. 6. 1. 5.*

<sup>f</sup> *L. of N. l. 4. c. 7.*

<sup>g</sup> 7 Rep. 17

known, by his constant association with the female ; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

II. OTHER animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified, limited, or special* property ; which is such as is not in it's nature permanent, but may sometimes subsist, and at other times not subsist. In discussing which subject, I shall in the first place shew, how this species of property may subsist in such animals as are *ferae naturae*, or of a wild nature ; and then how it may subsist in any other things, when under particular circumstances.

FIRST then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *ferae naturae*, either *per industriam*, *propter impotentiam*, or *propter privilegium*.

I. A QUALIFIED property may subsist in animals *ferae naturae per industriam hominis* : by a man's reclaiming and making them tame by art, industry, and education ; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom : as horses, swine, and other cattle ; which if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity : and are therefore, say they, called *mansueta, quasi manui affueta*. But however, well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitae naturae* : and such creatures as are usually found at liberty, which



which are therefore supposed to be more emphatically *ferae naturae*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*, which is only to be known by their usual custom of returning<sup>h</sup>. A maxim which is borrowed from the civil law<sup>i</sup>; “*revertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint.*” The law therefore extends this possession farther than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animum revertendi*. So are my pigeons, that are flying at a distance from their home, (especially of the carrier kind,) and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them<sup>k</sup>. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken, and marked and turned loose in the river, the owner’s property in him still continues, and it is not lawful for any one else to take him<sup>l</sup>: but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *ferae naturae*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law<sup>m</sup>. And to the same purpose, not to say in the same words, with the civil law, speaks [ 393 ]

<sup>h</sup> Bracton, l. 2. c. 1. 7 Rep. 17.

<sup>i</sup> Crompt. of courts, 167. 7 Rep. 16.

<sup>j</sup> Inst. 2. 1. 15.

<sup>m</sup> Puff. l. 4. c. 6. § 5. Inst. 2. 1. 14.

<sup>k</sup> Finch. L. 177.

Bracton<sup>n</sup>: occupation, that is, hiving or including them; gives the property in bees; for though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests thereon; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them. But it hath been also said<sup>o</sup>, that with us the only ownership in bees is *ratione soli*; and the charter of the forest<sup>p</sup>, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

IN all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property, that may be destroyed if they resume their antient wildness and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferae naturae* again; and are free and open to the first occupant that hath ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food (1), as it is to steal tame animals<sup>q</sup>: but not so, if they

<sup>n</sup> *l. 2. c. 1. § 3.*

<sup>p</sup> 9 Hen. III. c. 13.

<sup>o</sup> Bro. *Abr. tit. proprietie*, 37. cites

<sup>q</sup> 1 Hal. P. C. 512.

43 Edw. III. 24.

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(1) But it is not felony to steal such animals of a wild nature, unless they are so confined that the owner can take them whenever he pleases; or, if they are not confined, unless they are reduced to tameness, and known by the thief to be so. 1 *Hawk. b. 1. c. 33. f. 26.*

are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing-birds<sup>r</sup>; because their value is not intrinsic, but depending only on the caprice of the owner<sup>s</sup>: though it is such an invasion of property as may [ 394 ] amount to a civil injury, and be redressed by a civil action<sup>t</sup>. Yet to steal a reclaimed hawk is felony both by common law and statute<sup>u</sup>; which seems to be a relic of the tyranny of our antient sportsmen. And, among our elder ancestors the antient Britons, another species of reclaimed animals, *viz.* cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture<sup>v</sup>. And thus much of qualified property in wild animals, reclaimed *per industriam*.

2. A QUALIFIED property may also subsist with relation to animals *ferae naturae, ratione impotentiae*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coney or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires<sup>x</sup>: but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away<sup>y</sup>. For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined; for these cannot through weak-

<sup>r</sup> Lamb. Eiren. 275.

<sup>s</sup> 7 Rep. 18. 3 Inst. 109.

<sup>t</sup> Bro. Abr. tit. trespass, 407.

<sup>u</sup> 1 Hal. P. C. 512. 1 Hawk. P. C. c. 33.

<sup>v</sup> " Si quis felem, horrei regii custodem, occiderit vel furto abstulerit, felis summa cauda suspendatur, capite aream attingente, et in eam grana tritici

" effundantur, usquedum summitas caudae tritico co-operiatur." Wotton.

LL. Wall. l. 3. c. 5. § 5. An amercement similar to which, sir Edward Coke tells us, (7 Rep. 18.) there antiently was for stealing swans; only suspending them by the beak, instead of the tail.

<sup>x</sup> Cartadi de forest. 9 Hen. III. c. 13.

<sup>y</sup> 7 Rep. 17. Lamb. Eiren. 274.

ness, any more than the others through restraint, use their natural liberty and forfake him.

[ 395 ] 3. A MAN may, lastly, have a qualified property in animals *ferae naturae*, *propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty<sup>z</sup>; and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner, in which this privilege is acquired, will be shewn in a subsequent chapter.

THE qualified property which we have hitherto considered extends only to animals *ferae naturae*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's antient windows<sup>a</sup>, corrupts the air of his house or gardens<sup>b</sup>, fouls his water<sup>c</sup>, or unpens and lets it out, or if he diverts an antient watercourse that used to run to the other's mill or meadow<sup>d</sup>; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession; for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

<sup>z</sup> Cro. Car. 554. Mar. 48. 5 Mod. 376. 12 Mod. 144.

<sup>a</sup> 9 Rep. 58.

<sup>b</sup> 9 Rep. 59. Lut. 92.

<sup>c</sup> 9 Rep. 59.

<sup>d</sup> 1 Leon. 273. Skin. 389.

THESE kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. [ 396 ] As in case of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, immediately, his possession also <sup>e</sup>. So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, &c.; and so too is that of the pledgee, which depends upon it's non-performance <sup>f</sup>. The same may be said of goods distrained for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distreinor, or party distreined upon; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession either absolute or qualified, but only a mere charge or oversight <sup>g</sup>.

HAVING thus considered the several divisions of property in *possession*, which subsists there only, where a man hath both the right and also the occupation of the thing; we

<sup>e</sup> 1 Roll. Abr. 607.

<sup>f</sup> Cro. Jac. 245.

<sup>g</sup> 3 Inst. 108.

will proceed next to take a short view of the nature of property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law; from whence the thing so recoverable is called [ 397 ] a thing, or *chose in action*<sup>h</sup>. Thus money due on a bond is a *chose in action*; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompence for this damage is a *chose in action*; for though a right to some recompence vests in me at the time of the damage done, yet what and how large such recompence shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe, that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a *chose in action*, and of the nature of which we shall discourse at large in a subsequent chapter.

At present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to

<sup>h</sup> The same idea, and the same denomination, of property prevailed in the civil law. "*Rem in bonis nostris habere intelligimur, quotiens ad recuperandum eam actionem habeamus.*" (Ff. 41. 1. 52.) And again, "*aeque bonis adnumerabitur etiam, si quid est in actionibus, petitionibus, persecutionibus. Nam et haec in bonis esse videtur.*" (Ff. 50, 16, 49.)

render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather in *potentia* than in *esse*: though the owner may have as absolute a property in, and be as well entitled to, such things in action, as to things in possession. [ 398 ]

AND, having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*: in conformity to the method before observed in treating of the property of things real.

FIRST, as to the *time* of *enjoyment*. By the rules of the antient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted<sup>i</sup>: though originally that indulgence was only shewn, when merely the use of the goods, and not the goods themselves, was given to the first legatee<sup>k</sup>; the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded<sup>l</sup>: and therefore if a man either by deed or will limits his books or furniture to A. for life, with remainder over to B., this remainder is good. But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation<sup>m</sup>. For this, if allowed, would tend to a perpe-

<sup>i</sup> 1 Equ. Caf. abr. 360.

<sup>l</sup> 2 Freem. 206.

<sup>k</sup> Mar. 106.

<sup>m</sup> 1 P. Wms. 290.

tuity, as the devisee or grantee in tail of a chattel has no method of barring the entail : and therefore the law vests in him at once the entire dominion of goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

[ 399 ] NEXT, as to the *number of owners*. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in coparcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements<sup>n</sup>. And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship<sup>o</sup>. So also, if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common; as we have formerly seen<sup>q</sup>, the same words would have done in regard to real estates (2). But for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein<sup>r</sup>.

<sup>n</sup> Litt. § 282. 1 Vern. 482.

<sup>q</sup> pag. 193.

<sup>o</sup> Litt. § 321.

<sup>r</sup> 1 Vern. 217. Co. Litt. 182.

<sup>p</sup> 1 Equ. Caf. abr. 292.

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(2) Residuary legatees and executors are joint tenants, unless the testator uses some expression which converts their interest into a tenancy in common; and if one dies before a division or severance of the surplus, the whole that is undivided will pass to the survivor or survivors. 2 *P. Wms.* 529. 3 *Bro.* 455. See p. 193. *ante*.



## CHAPTER THE TWENTY-SIXTH.

OF TITLE TO THINGS PERSONAL  
BY OCCUPANCY.

WE are next to consider the *title* to things personal, or the various means of *acquiring*, and of *losing*, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: — 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

AND, first, a property in goods and chattels may be acquired by *occupancy*: which, we have more than once remarked <sup>a</sup>, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations, have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which

<sup>a</sup> See pag. 3. 8. 258.

has once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

I. THUS, in the first place, it hath been said, that any body may seize to his own use such goods as belong to an alien enemy<sup>b</sup>. For such enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to seize upon their chattels, without being compelled as in other cases to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority or the state, residing in the crown<sup>c</sup>; and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And therefore it hath been holden<sup>d</sup>, that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. It hath also been adjudged, that if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker; unless they were retaken the same day, and the owner before sun-set puts in his claim of property<sup>e</sup>. Which is agreeable to the law of nations, as understood in the time of Grotius<sup>f</sup>, even with regard to captures made at sea; which were held to be the property of the captors after a possession of twenty-four hours; though the modern authorities<sup>g</sup> require, that before the property can

<sup>b</sup> Finch. L. 178.

<sup>c</sup> Freem. 40.

<sup>d</sup> Bro. *Abr. tit. proprietie*, 38. *forfeiture*, 57.

<sup>e</sup> *Ibid.*

<sup>f</sup> *de j. b. & p. l. 3. c. 6. § 3.*

<sup>g</sup> Bynkerth. *quaest. jur. publ. l. 4. Rocc. de Assetur, not. 66.*

be changed, the goods must have been brought into port, and have continued a night *intra presidia*, in a place of safe custody, so that all hope of recovering them was lost.

AND, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war<sup>h</sup>; at least till his ransom be paid<sup>i</sup>. And this doctrine seems to have been extended to negro-servants<sup>j</sup>, who are purchased, when captives, of the nations with whom they are at war, and are therefore supposed to continue in some degree the property of the masters who buy them: though, accurately speaking, that property (if it indeed continues,) consists rather in the perpetual *service*, than in the *body* or *person* of the captives<sup>k</sup>.

2. THUS again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs or estrays, or wreck, or hidden treasure; for these, we have formerly seen<sup>l</sup>, are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. THUS too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an antient window overlooking my neighbour's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it,

<sup>h</sup> Bro. *Abr. tit. proprietie*, 18.

<sup>i</sup> We meet with a curious writ of trespass in the register (102.) for breaking a man's house, and setting such his prisoner at large. "*Quare domum ipsius A. apud W. (in qua idem A. quendam H. Scotum per ipsum A. de guerra captum tanquam prisonem suum, quousque sibi de centum libris, per quas*

"*idem H. redemptionem suam cum pacto A. pro vita sua salvanda fecerat satisfaciendum foret, detinuit) fregit, et ipsum H. cepit et abduxit, vel quo voluit abire permisit, &c.*"

<sup>l</sup> 2 I. ev. 201.

<sup>k</sup> Carth. 396. Ld. Raym. 147. Salk. 667.

<sup>l</sup> Book I. ch. 8.

I cannot compel him to demolish his wall ; for there the first occupancy is rather in him, than in me. If my neighbour makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy ; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water ; yet not so as to injure my neighbour's prior mill, or his meadow : for he hath by the first occupancy acquired a property in the current. (1)

4. WITH regard likewise to animals *ferae naturae*, all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field : and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or if dead, are *absolutely* his own : so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offence, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such

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(1) Since the immense extension of the woollen and cotton manufactures, by machinery, a stream of water in many situations is become of great value to the owners of the grounds through which it flows. But though actions respecting injuries to mills, and the right to dam or divert the water in a stream, are now extremely frequent in the country, yet the whole law upon the subject seems to be comprized in the sentence in the text.

It seems now to be settled, that persons possessing lands on the banks of rivers have a right to the flow of the water in it's natural stream, unless there exists before a right in others to enjoy or divert any part of it to their own use. And that an enjoyment or diversion of it for 20 years establishes a right, or, in the words of lord Ellenborough, it affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of parliament. *6 East. 208.*

terrestrial,

terrestrial, ærial, or aquatic animals as go under the denomination of *game*; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege (2). But those animals which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.

5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblems*, by any *possessor* of the land who hath sown or planted it, whether he be owner of the inheritance, or of a less estate: which emblems are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels (3). They were devisable by testaments before the statute of wills<sup>m</sup>, and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action<sup>n</sup>: and by the statute 11 Geo. II. c. 19. though not by the common law<sup>o</sup>, they may be distrained for rent arrears. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given<sup>p</sup>; and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblems are assets in the hands of the executor, are forfeitable upon out-

[ 404 ]

<sup>m</sup> Perk. § 512.<sup>o</sup> 1 Roll. Abr. 666.<sup>n</sup> Bro. Abr. tit. *emblems*, 21.<sup>p</sup> page 122. 146.

5 Rep. 116.

(2) See this controverted by the Editor in page 419, note (10).

(3) The right to emblems does not seem to be aptly referred to the principle of occupancy; for they are the continuation of an inchoate, and not the acquisition of an original, right,

lawry, and distreinable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny before they are severed from the ground <sup>q</sup>.

6. THE doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such it's state of improvement <sup>r</sup> (4): but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted <sup>s</sup>. And these doctrines are implicitly copied and adopted by our Bracton <sup>t</sup>, and have since been confirmed [ 405 ] by many resolutions of the courts <sup>u</sup>. It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman <sup>w</sup>.

7. BUT in the case of *confusion* of goods, where those of two persons are so intermixed that the several portions can

<sup>q</sup> 3 Inst. 109.

<sup>u</sup> Bro. Abr. tit. *propertie*, 23. Moor.

<sup>r</sup> Inst. 2. 1. 25, 26. 31. ff. 6. 1. 5. 20. Poph. 38.

<sup>s</sup> Inst. 2. 1. 25. 34.

<sup>w</sup> Moor. 214.

<sup>t</sup> l. 2. c. 2 & 3.

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(4) This also has long been the law of England; for it is laid down in the Year-books, that whatever alteration of form any property has undergone, the owner may seize it in it's new shape, if he can prove the identity of the original materials; as if leather be made into shoes, cloth into a coat, or if a tree be squared into timber, or silver melted or beat into a different figure. 5 Hen. VII. fo. 15. 12 Hen. VIII. fo. 10.

be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares<sup>x</sup>. But if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost<sup>y</sup>. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain without his own consent<sup>z</sup>.

8. THERE is still another species of property, which (if it subsists by the common law) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke<sup>a</sup>, and many others<sup>b</sup>, to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary composition: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of [ 406 ] that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which

<sup>x</sup> *Inst.* 2. 1. 27, 28. 1 Vern. 217. P. C. 513. 2 Vern. 516.

<sup>y</sup> *Inst.* 2. 1. 28.

<sup>a</sup> on Gov. part 2. ch. 5.

<sup>z</sup> Poph. 38. 2 Buldr. 325. 1 Hal.

<sup>b</sup> See pag. 8.

is so exhibited ; and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership ; it being then a present to the public, like building a church or bridge, or laying out a new highway ; but, in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert ; and that, in the other, the whole property, with all it's exclusive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or published ; yet, from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates ; as being a right of too subtle and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

THE Roman law adjudged, that if one man wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials<sup>c</sup>: meaning thereby [ 407 ] the mechanical operation of writing, for which it directed the scribe to receive a satisfaction ; for in works of genius and invention, as in painting on another man's canvas, the same law<sup>d</sup> gave the canvas to the painter. As to any other property in the works of the understanding, the law is silent ; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as antient as the times of Te-

<sup>c</sup> *Si in chartis membranisque tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris. Inst. 2. 1. 33.*  
See pag. 404.

<sup>d</sup> *Ibid.* § 34.



rence<sup>c</sup>, Martial<sup>f</sup>, and Statius<sup>g</sup>. Neither with us in England hath there been (till very lately) any final<sup>h</sup> determination upon the right of authors at the common law (5).

<sup>c</sup> *Prol. in Eunuch.* 20.

<sup>f</sup> *Epigr.* i. 67. iv. 72. xiii. 3. xiv. 194.

<sup>g</sup> *Juv.* vii. 83.

<sup>h</sup> Since this was first written, it was determined in the case of *Miller v. Taylor*, in *B. R. Pasch.* 9 Geo. III. 1769, that an exclusive and permanent copyright in authors subsisted

by the common law. But afterwards, in the case of *Donaldson v. Becket*, before the house of lords, 22 Febr. 1774, it was held that no copyright now subsists in authors, after the expiration of the several terms created by the statute of queen Anne.

(5) Whether the productions of the mind could communicate a right of property or of exclusive enjoyment in reason and nature; and if such a moral right existed, whether it was recognized and supported by the common law of England; and whether the common law was intended to be restrained by the statute of queen Anne; are questions upon which the learning and talents of the highest legal characters in this kingdom have been powerfully and zealously exerted.

These questions were finally so determined, that an author has no right at present beyond the limits fixed by the statute. But as that determination was contrary to the opinion of lord Mansfield, the learned Commentator, and several other judges, every person may still be permitted to indulge his own opinion upon the propriety of it, without incurring the imputation of arrogance. Nothing is more erroneous than the common practice of referring the origin of moral rights, and the system of natural equity, to that savage state which is supposed to have preceded civilized establishments; in which literary composition, and of consequence the right to it, could have no existence. But the true mode of ascertaining a moral right I conceive is to inquire, whether it is such as the reason, the cultivated reason, of mankind must necessarily assent to.

No proposition seems more conformable to that criterion, than that every one should enjoy the reward of his labour, the harvest where he has sown, or the fruit of the tree which he has planted.

And if any private right ought to be preserved more sacred and inviolable than another, it is that where the most extensive benefit flows to mankind from the labour by which it is acquired. Literary property, it must be admitted, is very different in its nature from a property in substantial and corporeal objects, and this difference has led some to deny it's existence as property; but whether

BUT whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Ann. c. 19. (amended by stat. 15 Geo. III. c. 53.) hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years,

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it is *sui generis*, or under whatever denomination of rights it may more properly be classed, it seems founded upon the same principle of general utility to society, which is the basis of all other moral rights and obligations.

Thus considered, an author's copyright ought to be esteemed an inviolable right, established in sound reason and abstract morality.

No less than eight of the twelve judges were of opinion that this was a right allowed by the common law of England; but six held that, if it so existed by the common law, the enjoyment of it was abridged by the statute of queen Anne, and that all remedy for the violation of it was taken away after the expiration of the terms specified in the act; and agreeable to that opinion was the final judgment of the lords.

See the arguments at length of the judges of the king's bench, and the opinions of the rest, in 4 *Burr.* 2303.

Before the union of Great Britain and Ireland, in 1801, no statute existed to protect copyright in Ireland. But now, by the stat. 41 Geo. III. (U. K.) c. 107. provisions similar to those in the stat. of Anne are re-enacted, and extended to the whole of the united kingdom: these provisions are also enforced by additional remedies and increased penalties, and an action on the case for damages is specifically given to the party injured. Previous to this act, men of genius and learning in Ireland were stimulated only by the incentive which lord Camden splendidly described in the conclusion of his argument against literary property: "Glory is the reward of science, and those who deserve it scorn all meaner views. I speak not of the scribblers for bread, who tease the prefs with their wretched productions. Fourteen years are too long a privilege for their perishable trash. It was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world. When the bookseller offered Milton five pounds for his *Paradise Lost*, he did not reject it and commit his poem to flames; nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it."

and no longer<sup>i</sup>; and hath also protected that property by additional penalties and forfeitures: directing farther, that if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration (6):— and a similar privilege is extended to the inventors

<sup>i</sup> By statute 15 Geo. III. c. 53. some granted to the universities, and certain additional privileges in this respect are other learned societies.

(6) Where an author transfers all his right or interest in publication, upon his surviving the first fourteen years, the second term will result to his assignee, and not to himself. 2 Bro. 80. Musical compositions have been held to be within the meaning and protection of the statute. Cowp. 623. A representation of a dramatic performance upon the stage is not a publication for which the author can maintain an action as for an invasion of his right. 5 T. R. 245. Yet no one has a right to take down a play in shorthand, and to print it before it is published by the author. Amb. 694. A fair and *bonâ fide* abridgment of any book is considered a new work; and however it may injure the sale of the original, yet it is not deemed in law to be a piracy, or a violation of the author's copyright. 1 Bro. 451. 2 Atk. 141.

No one but the author, or his assignee, has a right to print or publish notes or additions to an old work, as an injunction was granted to restrain the printing of Milton's Paradise Lost with Dr. Newton's notes, although any person had the liberty of publishing the original work without the notes.

So an action has been maintained for publishing, without the leave of the author, improvements made to an old work, Paterfon's Book of Roads.

In such productions as history, chronology, dictionaries, &c. it must be left to a jury to determine whether the publication complained of is a servile copy and imitation, or an original work upon the same subject. 1 East, 358.

No one can be prosecuted for the penalties introduced by the statutes, viz. a forfeiture of one penny (and in some cases three-pence) for every sheet, and the sheets being defaced, unless the work is duly entered at stationers' hall in London, according to the directions of the several statutes now in force. But an action may be brought, or an injunction obtained in a court of equity, though the publication be not entered in the register of the stationers' company, or though the author do not prefix his name to it. 1 Bl. Rep. 330. 7 T. R. 620.

of prints and engravings, for the term of eight-and-twenty years, by the statutes 8 Geo. II. c. 13. and 7 Geo. III. c. 38. besides an action for damages, with double costs, by statute 17 Geo. III. c. 57. (7) All which parliamentary protec-

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The author of a libellous publication can have no remedy either at law or in equity for the republication and sale of it by others; for courts of justice will enforce no claim founded in a public breach of the law. 7 *Vef.* jun. 1.

Upon the termination of the impeachment of lord Melville, the house of lords made an order, as usual, that the lord chancellor should give orders for the publication of the trial, and that no other person should presume to publish the same, and the chancellor appointed Mr. Gurney, who filed a bill and moved for an injunction against Longman, who had also published the trial.

After hearing the subject fully argued with respect to the authority of the lords to make such an order, the chancellor granted an injunction till the hearing of the cause, but without pledging his future judgment upon the subject. It was afterwards compromised. 13 *Vef.* 403.

By § 7. of 41 Geo. III. (U. K.) c. 107. (founded on 12 Geo. II. c. 36. and 34 Geo. III. c. 20. § 57.) if any book be originally written and published in this country, and be afterwards reprinted abroad, and be imported and exposed to sale here, the importer and seller shall forfeit all such books, to be cancelled; and for every offence shall forfeit also ten pounds, and double the value of the books, to be recovered with costs. This provision extends to the whole of the united kingdom. Every sale of one book, or a parcel, is a distinct offence, by which a new penalty is incurred. 3 *T. R.* 509. Under these statutes it seems immaterial whether the author's copyright is extinct or not, if the book has been reprinted in England within twenty years.

The statutes were intended for the encouragement of printing in this country.

(7) The principal differences in these three statutes concerning prints seem to be these: the 8 Geo. II. gives an exclusive privilege of publishing to those who invent or design any print, for fourteen years only; the 7 Geo. III. extends the term to twenty-eight years absolutely, to all who either invent the design, or make a print from another's design or picture; and those who copy such prints within that time forfeit all their copies, to be destroyed, and

tions appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I. c. 3. which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee <sup>k</sup> (8).

<sup>k</sup> 1 Vern. 62.

5s. for each copy; the 17 Geo. III. gives the proprietor an action to recover damages and double costs for the injury he has sustained by the violation of his right.

(8) The patent is granted upon condition that the invention is new, or new in this country; and that the patentee shall deliver a specification of his invention, containing such a description, plan, or model of the machine or article, as to be intelligible to every artist conversant in the same trade or manufactory.

Or the invention must be so described that the public may at the end of fourteen years have the use of it in as cheap and beneficial a manner as the patentee himself uses it. Hence, if the specification be in any part materially false, defective, obscure, or give directions which tend to mislead the public, the patent is against law, and cannot be supported. The specifications are preserved in an office for public inspection. Some patents, in very valuable manufactures, have been declared void, on account of the designed obscurity of the specification. *Bull. N. P.* 76. 1 *T. R.* 602.

## CHAPTER THE TWENTY-SEVENTH.

## OF TITLE BY PREROGATIVE AND FORFEITURE.

A SECOND method of acquiring property in personal chattels is by the *king's prerogative*: whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown, as by the king's grant, or by prescription, which supposes an antient grant.

SUCH in the first place are all *tributes, taxes, and customs*, whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *cenfus regalis* or antient royal revenue, or whether they be occasionally created by authority of parliament; of both which species of revenue we treated largely in the former volume. In these the king acquires and the subject loses a property, the instant they become due: if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither also may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his antient prerogative, or by particular modern statutes: which revenues created by statute do always assimilate, or take the same nature, with the antient revenues; and may therefore be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

IN

IN these several methods of acquiring property by prerogative there is also this peculiar quality, that the king cannot have a *joint* property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person<sup>a</sup>; but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel<sup>b</sup>; and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt<sup>c</sup>. For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but where they interfere, his is always preferred to that of another person<sup>d</sup>; from which two principles it is a necessary consequence, that the innocent though unfortunate partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances (1).

<sup>a</sup> See pag. 184.

<sup>c</sup> Cro. Eliz. 263. Plowd. 323. Finch.

<sup>b</sup> Fitzh. *Abr. t. dette*, 38. Plowd. Law. 178. 10 Mod. 245.

<sup>d</sup> Co. Litt. 30.

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(1) If a joint-tenant of any chattel interest commits suicide, the right to the whole chattel becomes vested in the king. This was decided after much solemn and subtle argument in 3 Eliz. The case is reported by Plowd. 262. Eng. ed. Sir James Hales, a judge of the common pleas, and his wife were joint-tenants of a term for years; sir James drowned himself, and was found *felo de se*; and it was held that the term did not survive to the wife, but that sir James's interest was forfeited to the king by the felony, and that it consequently drew the wife's interest along with it. The argument

THIS doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the like; which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being *bona vacantia*, and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

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ment of lord chief justice Dyer is remarkably curious: “The felony (says he) is attributed to the act; which act is always done by a living man, and in his lifetime, as my brother Brown said; for he said sir James Hales was dead; and how came he to his death? It may be answered, by drowning; and who drowned him? sir James Hales; and when did he drown him? in his lifetime. So that Sir James Hales being alive, caused sir James Hales to die; and the act of the living man was the death of the dead man. And then for this offence it is reasonable to punish the living man who committed the offence, and not the dead man. But how can he be said to be punished alive, when the punishment comes after his death? Sir, this can be done no other way but by divesting out of him, from the time of the act done in his lifetime, which was the cause of his death, the title and property of those things which he had in his lifetime.”

This must have been a case of notoriety in the time of Shakspeare; and it is not improbable that he intended to ridicule this legal logic by the reasoning of the grave-digger in Hamlet upon the drowning of Ophelia. See sir J. Hawkins's note in Stephens's edition.

THERE



THERE is also a kind of prerogative *copyright* subsisting in certain books, which is held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulgating to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all *acts of parliament, proclamations, and orders of council.* 2. As supreme head of the church, he hath a right to the publication of all *liturgies* and books of *divine service.* 3. He is also said to have a right by purchase to the copies of such *law-books, grammars, and other compositions, as were compiled or translated at the expence of the crown.* And upon these two last principles, combined, the exclusive right of printing the translation of the *Bible* is founded.

THERE still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals *ferae naturae*, as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to [ 411 ] such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. This may lead us into an inquiry concerning the original of these franchises, or royalties, on which we touched a little in a former chapter<sup>f</sup>: the right itself being an incorporeal hereditament, though the fruits and profits of it are of a personal nature.

IN the first place then we have already shewn, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore the property of nobody, but liable to be seized by the first occupant. And so it was held by the imperial law, even so late as Justinian's time: "*Ferae igitur bestiae, et volucres, et omnia animalia quae mari, caelo, et terra nascuntur, simul atque ab aliquo capta fuerint, jure*

<sup>f</sup> pp. 38, 39.

" *gentium*

“ *gentium statim illius esse incipiunt. Quod enim nullius est, id naturali ratione occupanti conceditur* <sup>g</sup>.” But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the *place* in which this right may or may not be exercised; with respect to the *animals* that are the subject of this right; or with respect to the *persons* allowed or forbidden to exercise it. And, in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man’s grounds, for any cause, without the owner’s leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorize <sup>h</sup>. Many reasons have concurred for making these constitutions: as, 1. For the encouragement of agriculture and improvement of lands, by giving every [ 412 ] man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by general liberty. 3. For prevention of idleness and dissipation in husbandmen, artificers, and others of lower rank; which would be the unavoidable consequence of universal licence. 4. For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people <sup>i</sup>; which last is a reason oftener meant than avowed by the makers of forest or game laws (2). Nor,

<sup>g</sup> *Infl.* 2. 1. 12.

<sup>i</sup> Warburton’s Alliance, 324.

<sup>h</sup> Puff. L. N. l. 4. c. 6. § 5.

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(2) I am inclined to think that this reason did not operate upon the minds of those who framed the game laws of this country; for in several antient statutes the avowed object is to encourage the use of the long-bow, the most effective armour then in use; and even since the modern practice of killing game with a gun has prevailed,

certainly, in these prohibitions is there any *natural* injustice, as some have weakly enough supposed; since, as Puffendorff observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him. (3)

YET, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowledge that, in their present shape, they owe their immediate original to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to *persons* or *animals*, so far regarded the article of *place*, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut aucupandi gratiâ, potest a domino probiberi ne ingrediatur*"<sup>k</sup>. For if there can, by the law of nature, be any inchoate imperfect

<sup>k</sup> *Instit.* 2. 1. § 12.

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prevailed, every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game.

(3) I can by no means accede even to the combined authority of Puffendorf and the learned Judge, that there is not any natural injustice in abridging a person of the means of acquiring a future property. The right of acquiring future property may be more valuable than the right of retaining the present possession of property. A right of common, like all other rights, must bear a certain value; and it certainly is as great injustice to deprive any one of the right of hunting, fishing, or of digging in a public mine, as it is to take from him the value of that right in money or any other species of private property.

property

property supposed in wild animals before they are taken, it seems most reasonable to fix it in him upon whose land they are found. And as to the other restriction, which relates to persons and not to place, the pontifical or canon law<sup>1</sup> interdicts “*venationes, et sylvaticas vagationes cum canibus et accipitribus,*” to all *clergymen* without distinction; grounded [ 413 ] on a saying of St. Jerome<sup>m</sup> (4), that it never is recorded that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of king Edgar<sup>n</sup>, concur in the same prohibition: though our secular laws, at least after the conquest, did, even in the times of popery, dispense with this canonical impediment; and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof we may observe, that it is to this day a branch of the king’s prerogative, at the death of every bishop, to have his kennel of hounds, or a composition in lieu thereof<sup>o</sup> (5).

BUT, with regard to the rise and original of our present civil prohibitions, it will be found that all forest and game

<sup>1</sup> *Decretal. l. 5. tit. 24. c. 2.*

<sup>n</sup> *cap. 64.*

<sup>m</sup> *Decret. part. 1. dist. 34. l. 1.*

<sup>o</sup> 4 Inst. 309.

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(4) viz. *Venatorem nunquam legimus sanctum.* <sup>see kc</sup> ! ! ! ! !

(5) When archbishop Abbot by an unfortunate accident had killed a park-keeper in shooting at a deer with a cross-bow, though it was allowed no blame could be imputed to the archbishop but from the nature of the diversion, yet it was thought to bring such scandal upon the church, that an apology was published upon the occasion, which was warmly and learnedly answered by sir Henry Spelman, who maintained that the archbishop was in the exercise of an act prohibited by the canons and ordinances of the church, and that he was even disqualified from exercising his spiritual functions. The king referred the consideration of the subject to the lord keeper and several of the judges and bishops, who recommended it to his majesty to grant his grace a dispensation *in majorem cautelam, si qua forte sit irregularitas*; which was done accordingly. See *Reliquiæ Spelm.* 107.

laws were introduced into Europe at the same time, and by the same policy as gave birth to the feudal system; when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present kingdoms of Europe on the ruins of the western empire. For when a conquering general came to settle the economy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations; it behoved him, in order to secure his new acquisitions, to keep the *rustici*, or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting: and therefore it was the policy of the conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories or greater barons. And accordingly we find, in the feudal constitutions<sup>p</sup>, one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game. This exclusive privilege well suited the martial genius of [ 414 ] the conquering troops, who delighted in a sport which, in its pursuit and slaughter, bore some resemblance to war. *Vita omnis* (says Caesar, speaking of the antient Germans) *in venationibus atque in studiis rei militaris consistit*<sup>r</sup>. And Tacitus in like manner observes, that *quoties bella non incunt, multum venatibus, plus per otium transigunt*<sup>s</sup>. And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; despising all arts as effeminate, and having no other learning, than was couched in such rude ditties as were sung at the solemn carousals which succeeded these antient huntings. And it is remarkable that, in those nations where the feudal policy remains the most un-

<sup>p</sup> *Feud. l. 2. tit. 27. § 5.*

<sup>q</sup> In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, published *A. D.* 1205. there is one which prohibits the killing of all game from March to October;

that the court and soldiery might find plenty enough in the winter, during their recesses from war. (*Mod. Univ. Hist. iv. 468.*)

<sup>r</sup> *De Bell. Gall. l. 6. c. 20.*

<sup>s</sup> *c. 15.*

corrupted, the forest or game laws continue in their highest rigor. In France all game is properly the king's; and in some parts of Germany it is death for a peasant to be found hunting in the woods of the nobility †.

WITH us in England also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without enclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed in common. But when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and enclosed, the beasts naturally fled into the woody and desert tracts; which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which our royal sportsmen reserved for their own diversion, on pain of a pecuniary forfeiture for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests: as is fully expressed in the laws of Canute †, and of Edward the Confessor †: “*Sit quilibet homo dignus venatione sua, in sylva, et in agris, sibi propriis, et in dominio suo: et abstineat omnis homo a venariis regis, ubicunque pacem eis habere voluerit.*” which indeed was the antient law of the Scandinavian continent, from whence Canute probably derived it. “*Cuique enim in proprio fundo quamlibet feram quoquo modo venari permiffum.*”

HOWEVER, upon the Norman conquest, a new doctrine took place; and the right of pursuing and taking all beasts of chase or *venary*, and such other animals as were accounted *game*, was then held to belong to the king, or to such only as were authorized under him. And this, as well upon the

† *Mattheus de Crimin.* c. 3. tit. 1.  
Carpzov. *Prædic. Saxonis.* p. 2. c. 84.

‡ c. 36.

‣ *Stiernhook de jure Sueon.* l. 2. c. 8.

‡ c. 77.

principles of the feudal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee ; and that therefore he has the right of the universal foil, to enter thereon, and to chase and take such creatures at his pleasure : as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are *bona vacantia*, and, having no other owner, belong to the king by his prerogative (6). As therefore the former reason was held to vest in the king a *right* to pursue and take them any where ; the latter was supposed to give the king, and such as he should authorize, a *sole* and *exclusive* right.

THIS right, thus newly vested in the crown, was exerted with the utmost rigour, at and after the time of the Norman establishment ; not only in the antient forests, but in the new ones which the conqueror made, by laying together vast tracts of country depopulated for that purpose, and reserved solely for the king's royal diversion ; in which were [ 416 ] exercised the most horrid tyrannies and oppressions, under colour of forest law, for the sake of preserving the beasts of chase : to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance of the same principle, king John laid a total interdict upon the *winged* as well as the *four-footed* creation : “ *capturam avium per totam Angliam interdixit* \*.” The cruel and insupportable hardships, which those forest laws created to the subject, occasioned our ancestors to be as jealous for their reformation, as for the relaxation of the feudal rigors and the other exactions introduced by the Norman family, and accordingly we find the immunities of *carta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of *magna carta* itself. By this charter, confirmed in parliament<sup>y</sup>, many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained ; particularly<sup>z</sup> kill-

\* M. Paris, 303.

y 9 Hen. III.

z cap. 10.

(6) See p. 419. note 10. *post*.

ing the king's deer was made no longer a capital offence, but only punished by a fine, imprisonment, or abjuration of the realm. And by a variety of subsequent statutes, together with the long acquiescence of the crown without exerting the forest laws, this prerogative is now become no longer a grievance to the subject.

BUT, as the king reserved to himself the *forests* for his own exclusive diversion, so he granted out from time to time other tracts of lands to his subjects under the names of *chases* or *parks*<sup>a</sup>, or gave them licence to make such in their own grounds; which indeed are smaller forests, in the hands of a subject, but not governed by the forest laws: and by the common law no person is at liberty to take or kill any beasts of chase, but such as hath an antient chase or park; unless they be also beasts of prey.

[ 417 ] As to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise of royalty, derived likewise from the crown, and called *free warren*; a word which signifies preservation or custody: as the exclusive liberty of taking and killing fish in a public stream or river is called a *free fishery*: of which, however, no new franchise can at present be granted, by the express provision of *magna carta*, c. 16.<sup>b</sup> The principal intention of granting to any one these franchises or liberties was in order to protect the game, by giving the grantee a sole and exclusive power of killing it himself, provided he prevented other persons. And no man, but he who has a chase or free warren, by grant from the crown, or prescription, which supposes one, can justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all.

HOWEVER novel this doctrine may seem, to such as call themselves *qualified* sportsmen, it is a regular consequence from what has been before delivered; that the sole right

<sup>a</sup> See pag. 38.

<sup>b</sup> *Mirr.* c. 5. § 2. See pag. 40.



of taking and destroying game belongs exclusively to the king (7). This appears, as well from the historical deduction here made, as because he may grant to his subjects an exclusive right of taking them; which he could not do, unless such a right was first inherent in himself. And hence it will follow, that no person whatever, but he who has such derivative right from the crown, is by common law entitled to take or kill any beasts of chase, or other game whatsoever. It is true, that, by the acquiescence of the crown, the frequent grants of free warren in antient times, and the introduction of new penalties of late by certain statutes for preserving the game, this exclusive prerogative of the king is little known or considered; every man that is exempted from these modern penalties, looking upon himself as at liberty to do what he pleases with the game: whereas the contrary is strictly true, that no man, however well *qualified* he may vulgarly be esteemed, has a right to encroach on the [ 418 ] royal prerogative by the killing of game, unless he can shew a particular grant of free warren; or a prescription, which presumes a grant; or some authority under an act of parliament. As for the latter, I recollect but two instances wherein an express permission to kill game was ever given by statute; the one by 1 Jac. I. cap. 27. altered by 7 Jac. I. cap. 11. and virtually repealed by 22 & 23 Car. II. c. 25. which gave authority, so long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40*l.* *per annum* in lands of inheritance, or 80*l.* for life or lives, or 400*l.* personal estate, (and their servants,) to take partridges and pheasants upon their own, or their master's, free warren, inheritance, or freehold (8): the

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(7) See this controverted in p. 419. n. 10.

(8) The Editor apprehends that what the learned Judge has here stated respecting the first permission, has arisen from a misconception of the subject. The first qualification act is the 13 R. II. c. 13. the title of which is, "None shall hunt but they who have a sufficient living." The preamble states, that "divers artificers, labourers, servants, and grooms keep greyhounds

other by 5 Ann. c. 14. which empowers lords and ladies of manors to appoint gamekeepers to kill game for the use of such lord or lady : which with some alteration still subsists, and plainly supposes such power not to have been in them before (9). The truth of the matter is, that these game laws

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“ and dogs, and on the holydays, when good christian people be  
 “ at church hearing divine service, they go a hunting in parks,  
 “ and warrens, and connigrees of lords and others, to the very  
 “ great destruction of the same, and sometime under such colour  
 “ they make their assemblies, conferences, and conspiracies for to  
 “ rise and disobey their allegiance ; it is therefore ordained, that  
 “ no artificer, labourer, or other layman, which hath not lands or  
 “ tenements to the value of 40s. by the year, nor any priest to the  
 “ value of 10l. shall keep any dogs, nets, nor engines to destroy  
 “ deer, hares, nor conies, nor other *gentlemen's* game upon pain of  
 “ one year's imprisonment.”

This statute clearly admits and restrains their former right : the 1 Jac. I. c. 27. which seems intended for the encouragement of hawking, the most honourable mode of killing game at that time, begins with a general prohibition to all persons whatever to kill game with guns, bows, setting-dogs, and nets ; but there is afterwards a proviso in the act, that it shall and may be lawful for persons of a certain description and estate to take pheasants and partridges upon their own lands, in the day-time, with nets. This proviso clearly refers to the preceding prohibition introduced by the statute, and by no means gives a new permission to the persons thus qualified, which they did not possess antecedently to that statute.

The Editor trusts that those who will take the trouble to examine the statute, will be convinced of the truth of this remark ; and that the correction of this error alone will contribute in some degree to the refutation of the doctrine which the learned Judge has advanced in this chapter and other parts of the Commentaries, *viz.* that all the game in the kingdom is the property of the king or his grantees, being usually the lords of manors, p. 15. *ante* ; game is royal property, 4 vol. 174. ; and the new constitutions vested the sole property of all the game in England in the king alone. *Ib.* 415.

(9) Gamekeepers were first introduced by the present qualification act, 22 & 23 Car. II. c. 25. and various regulations have been

(of which we shall have occasion to speak again in the fourth book of these Commentaries) do indeed *qualify* nobody, ex-

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been made respecting them by subsequent statutes. As all these statutes seem to be in force in some degree at present, and as it is a subject interesting to sportsmen, I shall subjoin a short abstract of them, according to their chronology.

The 22 & 23 Car. II. c. 25. authorizes lords of manors of the degree of an esquire to appoint under their hands and seals gamekeepers, who shall have power within the manor to seize guns, dogs, nets, and engines kept by unqualified persons to destroy game; and by a warrant from a justice of peace, to search in the day-time the houses of unqualified persons, upon good ground of suspicion, and to seize for the use of the lord, or to destroy, guns, dogs, nets, &c. kept for the destruction of the game. This statute does not limit the number of those to whom such power and authority may still be given. The 4 & 5 W. & M. c. 23. f. 4. gives to these gamekeepers the same protection in resisting offenders in the night-time, as the law affords to the keepers of antient parks. The 5 Ann. c. 14. f. 4. permits any lord or lady of a manor to empower gamekeepers to kill game within the manor.

The 9 Ann. c. 25. f. 1. enacts, that no lord or lady of a manor shall appoint more than one gamekeeper, within one manor, with the power of killing game; and his name shall be entered with the clerk of the peace. And by 3 Geo. I. c. 11. the gamekeeper, who shall have the power to kill game within the manor, shall either be a qualified person, a domestic servant, or a person employed to kill for the sole use of the lord or lady of the manor. The only use of appointing a qualified person a gamekeeper was, to give him the power as before described of seizing the dogs, guns, and other engines of unqualified persons within the manor.

But by the 43 Geo. III. c. 93. the 3 Geo. I. c. 11. is repealed, and the gamekeeper, who has authority to kill game, may be any person whatever, qualified or unqualified, and who may kill for his own use, or the use of any other person specified in his deputation.

And by the 48 Geo. III. c. 55., if such person is a servant, duly charged as such, then he shall pay a duty as gamekeeper the annual sum of 1*l.* 1*s.*, but every other gamekeeper, and every other person who shall use any dog, gun, or net for the purpose of killing

cept in the instance of a gamekeeper, to kill game; but only, to save the trouble and formal process of an action by the per-

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any game, or any woodcock, snipe, quail, land-rail, or any conies, shall pay an annual duty of 3*l.* 3*s.*

But woodcocks and snipes may be taken with nets and springes, and rabbits may be taken in warrens, or in any inclosed grounds, by the occupier or his servants without a certificate. The duty must be paid to the collector of the assessed taxes, and the clerk of the commissioners shall grant a certificate in the manner described by the statute.

And if any person shall use a dog, gun, net, or other engine for the purpose of killing game, or the animals specified, without such a certificate, he shall be liable to the duty of 3*l.* 3*s.*, and the penalty of 20*l.* besides. Or if any person be found using any dog, gun, or net, for the aforefaid purposes, and shall refuse to shew his certificate, or to declare his name and place of residence, when required by any assessor or collector, or by any commissioner for the assessed taxes, or by any lord or lady of the manor, or gamekeeper, or by any inspector or surveyor, or by any person who has taken out his certificate, or by the owner or occupier of the ground, within their respective districts, he shall forfeit 20*l.*

But this statute does not in any degree affect the game laws. Any number of persons may be appointed gamekeepers, with authority to preserve the game, but they must be assessed as other servants.

By the 5 Ann. c. 14. s. 4. any justice of peace may within his county take either game, or dogs, and instruments kept for the destruction of game, from unqualified persons, and retain them for his own use. But it has been decided, that though gamekeepers are liable to the same penalties as unqualified persons for killing game out of their respective manors, yet no one is justified in taking from them their dogs and guns, when they are out of the limits of their lord's manor, even in pursuit of game. 2 *Wilf.* 387. *Rogers v. Carter.*

No lord of a manor can grant to another person the power of appointing a gamekeeper, without a conveyance also of the manor. A right to a manor cannot be tried in a penal action under the game laws 5 *T. R.* 19. This power of appointing a gamekeeper has,

son injured, who perhaps too might remit the offence, these statutes inflict *additional* penalties, to be recovered either in a regular or summary way, by any of the king's subjects from certain persons of inferior rank who may be found offending in this particular. But it does not follow that persons, excused from these additional penalties, are therefore *authorized* to kill game. The circumstance of having 100*l. per annum*, and the rest, are not properly qualifications, but exemptions. And these persons, so exempted from the penalties of the game statutes, are not only liable to actions of trespass by the owners of the land; but also, if they kill game within the limits of any royal franchise, they are liable to the actions of such who may have the right of chase or free warren therein.

UPON the whole it appears, that the king, by his prerogative, and such persons as have, under his authority, the royal franchises of chase, park, free warren, or free fishery, are the *only* persons who may acquire any property, however fugitive and transitory, in these animals *ferae naturae*, while [ 419 ]

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has, no doubt, introduced the very erroneous notion, that a lord of a manor has a peculiar right to the game, superior to that of any other land-owner within the manor, although his estate be a sufficient qualification to entitle him to follow the amusements of a sportsman.

Gamekeepers, we have seen, were first created by 22 & 23 Car. II. c. 25.; by the preceding qualification act, 7 Jac. I. c. 11., their power was given to the constable and headborough; and I apprehend it was transferred to the persons appointed by lords of manors, for no other reason than because it was probable they were the most interested in the preservation of the game, by having in general the most extensive range to pursue it in, *viz.* upon their own estates and wastes. And I conceive the 22 & 23 Car. II. c. 25. is the first instance either in our statutes, reports, or law treatises, in which lords of manors are distinguished from other land-owners with regard to the game.

living; which is said to be vested in them, as was observed in a former chapter, *propter privilegium* (10). And it must also

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(10) The learned Judge has frequently, and even zealously, inculcated the position that the common law has *vested the sole property of all the game in England in the king alone*, and of consequence that no man, let his rank and fortune be what they may, is qualified to kill game, or is exempt from the original penalties, unless he possesses some peculiar privilege derived from the king. This doctrine, enforced by so celebrated an author, apparently the result of mature deliberation, and which has been so long acquiesced in, the Editor should have questioned with diffidence, if he had not been fully persuaded that it was unsupported by any prior authority, and that the authorities to the contrary were numerous and irresistible.

The learned Judge himself admits, that this is a novel doctrine to such as call themselves qualified sportsmen; yet he has referred to no preceding authority whatever in any part of the Commentaries; but in p. 415. he has deduced this doctrine from two general principles. The first is, *that the king is the ultimate proprietor of all the lands in the kingdom, and therefore he has the right of the universal foil, to enter thereon, and to chase and take such creatures at his pleasure*. From the king's right to the universal foil, it is not evident why he should have a better right to take such creatures than to take any other production of that foil.

And even if the king should have a right to enter in person all the lands in the kingdom in pursuit of game, this affords no inference that the land-owner may not enjoy this right concurrently with the king. But although no complaint can perhaps be made against the king for entering the lands of his subjects, it has been determined that this power cannot be given to his foresters and servants in a case in Keilway, which in the sequel of this note I shall have occasion to take notice of.

The other general principle relied upon by the learned Commentator is, *another maxim of the common law, which he says he has frequently cited and illustrated, that these animals are bona vacantia, and, having no other owner, belong to the king by his prerogative*. It has been determined, that fish, if not confined as in a trunk, cannot be called *bona et catalla*; and so game, till it is taken, is every where  
said

be remembered, that such persons as may thus lawfully hunt, fish, or fowl, *ratione privilegii*, have (as has been said) only

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said to be *nullius in bonis*. But I am inclined to think that the very reverse of the maxim is true, and that *bona vacantia* belong to the first occupant or fortunate finder, except in those instances particularly specified by the law, and in which they are expressly given to the king. See 1 vol. 299. n. 12. A person might have acquired by occupancy, even in the last century, an estate in real property. See p. 258. *ante*. If a pearl should be found in an oyster, no lawyer I think would say, that it was the property of the king. If all wild animals had belonged to the crown, it would have been superfluous to have specified whales, sturgeons, and swans. Lord Coke tells us, that “a swan is a royal fowl; and “all those the property whereof is not known, do belong to the “king by his prerogative: and so whales and sturgeons are royal “fish, and belong to the king by his prerogative:” Case of swans, 7 Co. 16. “And the king may grant wild swans unmarked.” *Ib.* 18. But these are the only animals which our law has conferred this honour upon.

It is true that our kings, prior to the *carta de foresta*, claimed and exercised the prerogative of making forests wherever they pleased over the grounds of their subjects: within the limits of these forests certain wild animals were preserved, by severe laws, for the recreation of the sovereign. A district thus bounded at the king's pleasure might have been granted by the king to any of his subjects who enjoyed the exclusive privilege either of a forest, chase, park, or free-warren, according to the extent of the jurisdiction and powers conferred by the royal grant; p. 38. *ante*, n. 17. But beyond the boundaries of these privileged places, neither the king nor any of his grantees claimed a property in the game: for, according to the law of king Canute, *quilibet homo dignus venatione sua, in sylva, et in agris sibi propriis, et in dominio suo*; which law Manwood declares was confirmed by many succeeding kings. *Tit. For. pl. 3*. If this were so, it cannot be correct, what the learned Commentator has advanced, that upon the Norman conquest a new doctrine took place. By the *carta de foresta* all the new-made forests were disafforested and thrown open again; but besides the creation of new forests by the Norman kings, they had also made great encroachments and additions to the antient Saxon forests; these en-

a qualified property in these animals; it not being absolute or permanent, but lasting only so long as the creatures re-

croachments were called *purlieus*, and as these were the same grievance to the owners of the land as the new forests, they also were disafforested, but with this distinction, that as the grievance extended only to the land owner, he was allowed to enjoy his lands in as full a manner as he had done before the encroachment; but they still continued with respect to the rest of the world under the forest-law jurisdiction. Hence it followed as a consequence, that the owner of a purlieu might hunt and kill game within the limits of the purlieu, as any other man might have done in his own grounds: and the authorities of lord Coke and Manwood concur, if deer come out of the forest into the purlieu, the purlieu-man may hunt and kill them, provided he does it fairly and without *forestalling*. And this distinction is made; if a stag can recover the *filum forestæ*, the border of the forest, before the purlieu-man's dogs fasten upon him, he then belongs to the king or to the owner of the forest, and the purlieu-man must call his dogs back; but if they fasten upon him before he gains the forest, and he drags them into it, he belongs to the owner of the purlieu, who may enter the forest and carry him away. 4 *Insl.* 303. *Manw. Purlieu*. This alone is decisive, but there are various authorities to the same effect. In the year-book 12 Hen. VIII. fo. 10. it is held, if a man drive a stag out of a forest and kill him, he shall gain no property in him, because he shall derive no advantage from his own wrongful act; yet if the stag comes of himself beyond the limits of the forest, then any one (if qualified) may kill and take him, for they are animals *feræ naturæ, et nullius in bonis*; and the maxim, as the judges declared, was, *capiat qui capere potest*, i. e. catch that catch can.

That the king has no property in deer or other game when they are out of a forest, was determined also in a case reported by Keilway, 30. and copied by Manwood, 202. In that case an action of trespass was brought for entering the plaintiff's close; the defendant pleaded, that the place in which the trespass was supposed to be committed was adjoining to the king's forest, and that the plaintiff was bound to impale the said forest, and that for want of paling four deer escaped out of the forest into the plaintiff's land, and that he the defendant entered by the command of the forester to drive them



main within the limits of such respective franchise or liberty, and ceasing the instant they voluntarily pass out of it. It

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them back to the forest. The court held that this plea was not good; "for though the plaintiff was in fault for not paling, yet "it was not law for the forester or any person to drive the deer "out of the ground, or to take them; and the reason was, *because* "the king had no property in them; and this was different from the "case of tame cattle, where the property still remains in the owner "though they are out of his ground, for which reason he may re- "take them wherever he finds them; but it is not so when the "beasts are wild."

The learned Judge frequently intimates that no person is exempt from the original penalties; but I am inclined to think that no authority whatever can be found that any penalties were ever inflicted for killing game out of privileged grounds, except those which have been introduced by modern game laws, or the qualification acts. Lord Coke reports that the court held in the case of monopolies, 11 Co. 87. that, "it is true that none can make a "park, chase, or warren without the king's licence, for that is "quodam modo to appropriate those creatures, which are *feræ* "naturæ et nullius in bonis, to himself, and to restrain them of "their natural liberty, which he cannot do without the king's "licence; but for hunting, hawking, &c. which are matters of "pastime, pleasure, and recreation, there needs no licence, but "every one may in his own land use them at his pleasure *without* "any restraint to be made unless by parliament, as appears by the "statutes of 11 Hen. VII. c. 17., 23 Eliz. c. 10., and 3 Jac. I. "c. 13."

These authorities are also recognized and confirmed in *Bro. Abr. tit. Propertie*, and in Hale's Commentary on F. N. B. 197.

The following may serve as a specimen of the authorities collected by Brooke: *quant beastes savages le roye aler hors del forrest, le property est hors del roy; and again, silz sount hors del parke capienti conceditur.*

In a great case which was brought in 1791 from the courts of Scotland before the house of lords, the question was, whether by the law of Scotland the proprietor of an estate has a right to monopolize the game upon that estate, for the use of himself, and particular friends, authorized by his licence, and to exclude all gentlemen,

is held indeed, that if a man starts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himself<sup>c</sup>. And this is grounded on reason and natural justice<sup>d</sup>: for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase or warren; this property arising from privilege<sup>e</sup>, and not being changed by the act of a mere stranger. Or if a man starts game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there<sup>f</sup>; the property arising *ratione soli*. Whereas, if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because

<sup>c</sup> 11 Mod. 75.

<sup>d</sup> Puff. L. N. l. 4. c. 6.

<sup>e</sup> Lord Raym. 251.

<sup>f</sup> *Ibid.*

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men, legally qualified, from following that amusement over his waste and other grounds, not specially protected by any particular statute? The printed cases of the appellant and respondent contain much curious learning upon the Scotch game laws; but no idea was suggested that the game in Scotland belonged to the king. For the appellant, who insisted that he had a right to enter as a sportsman upon the respondent's estate, the authority of president Balfour in his *Præctics* was chiefly relied upon; *viz.* "It is leifome and permitted to all men to chase hares, foxes, and all other beistis, beand without forrestis, warrenis, parkis, or wardis." But the judgment of the lords being for the respondent, this permission of courts must be confined to a man's own estate. *Livingstone, esq. appellant, v. lord Breadalbane, respondent.* This is precisely the same as the law of England; for neither a lord of a manor, nor his gamekeeper, can go into any part of the manor, which is not the lord's own estate or waste, without being a trespasser like any other person.

it was not started in his soil; but it vests in the person who started and killed it<sup>g</sup>, though guilty of a trespass against both the owners (11).

III. I PROCEED NOW to a third method, whereby a title [ 420 ] to goods and chattels may be acquired and lost, *viz.* by *forfeiture*; as a punishment for some crime or misdemeanour in the party forfeiting, and as a compensation for the offence and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby *real* property might be lost and acquired, we treated in a former chapter<sup>h</sup>. It remains therefore in this place only to mention by what means, or for what offences, goods and chattels become liable to forfeiture.

IN the variety of penal laws with which the subject is at present encumbered, it were a tedious and impracticable task to reckon up the various forfeitures, inflicted by special statutes, for particular crimes and misdemeanours; some of which are *mala in se*, or offences, against the divine law, either natural or revealed; but by far the greatest part are *mala prohibita*, or such as derive their guilt merely from their prohibition by the laws of the land: such as is the forfeiture of 40s. per month by the statute 5 Eliz. c. 4. for exercising a trade without having served seven years as an apprentice thereto; and the forfeiture of 10*l.* by 9 Ann. c. 23. for

<sup>g</sup> Farr. 18. Lord Raym. 251.

<sup>h</sup> See pag. 267.

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(11) These distinctions never could have existed, if the doctrine had been true that all the game was the property of the king: for in that case the maxim, *in equali jure potior est conditio possidentis*, must have prevailed.

These distinctions I have heard recognized by lord Kenyon, who, in an action of trover, directed a verdict for the plaintiff; the defendant having carried away a hare, killed by the plaintiff's greyhounds upon the defendant's ground, but which had not been started there.

printing an almanack without a stamp. I shall therefore confine myself to those offences only, by which *all* the goods and chattels of the offender are forfeited: referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their several proper heads, under which very many of them have been or will be mentioned; or else to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or sometimes to other persons; and as one total forfeiture, namely, that by a bankrupt who is guilty of felony [ 421 ] by concealing his effects, accrues entirely to his creditors, I have therefore made it a distinct head of transferring property.

GOODS and chattels then are totally forfeited by conviction of *high treason* or *misprision* of treason; of *petit treason*; of *felony* in general, and particularly of *felony de se*, and of *manslaughter*; nay even by conviction of *excusable homicide*<sup>1</sup>; by *outlawry* for treason or felony, by conviction of *petit larceny*; by *flight*, in treason or felony, even though the party be acquitted of the fact; by *standing mute*, when arraigned of *felony*; by *drawing a weapon on a judge*, or *striking any one in the presence of the king's courts*; by *praemunire*; by *pretended prophecies*, upon a second conviction; by *owling*; by the *residing abroad* of artificers; and by *challenging to fight* on account of money won at gaming. All these offences, as will more fully appear in the fourth book of these Commentaries, induce a total forfeiture of goods and chattels.

AND this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of

<sup>1</sup> Co. Litt. 391. 2 Inst. 316. 3 Inst. 320.

real property. For chattels are of so vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the case of landed estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5.

## CHAPTER THE TWENTY-EIGHTH.

## OF TITLE BY CUSTOM.

A FOURTH method of acquiring property in things personal, or chattels, is by *custom*: whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless should I attempt to enumerate all the several kinds of special customs, which may entitle a man to a chattel interest in different parts of the kingdom; I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; viz. *heriots*, *mortuaries*, and *heir-looms*.

I. HERIOTS, which were slightly touched upon in a former chapter<sup>a</sup>, are usually divided into two sorts, *heriot-service*, and *heriot-custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent<sup>b</sup>: the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom<sup>c</sup>. Of these therefore we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

<sup>a</sup> Pag. 97.<sup>b</sup> 2 Saund. 166.<sup>c</sup> Co. Cop. § 24.

THE first establishment, if not introduction, of compulsory heriots into England, was by the Danes: and we find in the laws of king Canute<sup>d</sup> the several *heregeates* or heriots specified which were then exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest *eorle* down to the most inferior *thegne* or landholder. These, for the most part, consisted in arms, horses, and habiliments of war; which the word itself, according to sir Henry Spelman<sup>e</sup>, signifies. These were delivered up to the sovereign on the death of the vassal, who could no longer use them, to be put into other hands for the service and defence of the country. And upon the plan of this Danish establishment did William the Conqueror fashion his law of relief, as was formerly observed<sup>f</sup>; when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to the feudal custom and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money<sup>g</sup>.

THE Danish compulsive heriots being thus transmuted into reliefs, underwent the same several vicissitudes as the feudal tenures, and in socage estates do frequently remain to this day in the shape of a double rent payable at the death of the tenant: the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary<sup>h</sup>. These are now for the most part confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy; and perhaps are the only instance where custom has favoured the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowledgment of his having been raised a degree above villenage, when all his goods and chattels were quite at the mercy of the lord; and custom, which has on the one hand confirmed the tenant's interest in exclusion of the [ 424 ]

<sup>d</sup> c. 69.<sup>e</sup> *LL. Gull. Conq. c. 22, 23, 24.*<sup>c</sup> of feuds, c. 18.<sup>h</sup> Lambard. Peramb. of Kent, 492.<sup>f</sup> pag. 65.

lord's will, has on the other hand established this discretionary piece of gratitude into a permanent duty. An heriot may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom. Braçton<sup>i</sup> speaks of heriots as frequently due on the death of both species of tenants: "*est quidem alia praeſtatio quae nominatur herietum; ubi tenens, liber vel ſervus, in morte ſua, dominum ſuum, de quo tenuerit, reſpicit de meliori averio ſuo, vel de ſecundo meliori, ſecundum diverſam locorum conſuetudinem.*" And this he adds, "*magis fit de gratia quam de jure;*" in which Fleta<sup>k</sup> and Britton<sup>l</sup> agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant; though now the immemorial uſage has established it as of right in the lord.

THIS heriot is ſometimes the beſt live beaſt, or *averium*, which the tenant dies poſſeſſed of (which is particularly denominated the villein's relief in the twenty-ninth law of king William the Conqueror), ſometimes the beſt inanimate good, under which a jewel or piece of plate may be included: but it is always a *perſonal* chattel, which, immediately on the death of the tenant who was the owner of it, being aſcertained by the option of the lord<sup>m</sup>, becomes veſted in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant muſt be the owner of it, elſe it cannot be due; and therefore on the death of a feme-covert no heriot can be taken; for ſhe can have no ownershipt in things perſonal<sup>n</sup>. In ſome places there is a customary compoſition in money, as ten or twenty ſhillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indiſputably antient custom; but a new compoſition of this ſort will not bind the repreſentatives of either party; for that amounts to the creation of a new custom, which is now impoſſible<sup>o</sup>.

<sup>i</sup> l. 2. c. 36. § 56

<sup>k</sup> l. 3. c. 18.

<sup>l</sup> c. 69.

<sup>m</sup> Hob. 60.

<sup>n</sup> Keilw. 84. 4 Leon. 239.

<sup>o</sup> Co. Cop. § 31.



2. MORTUARIES are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us from a constitution of archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, *after*<sup>p</sup> the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary: "*si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesiae suae sine dolo, fraude, seu contradictione qualibet, pro recompensatione subtractionis decimarum personalium, necnon et oblationum, secundum melius animal referretur, post obitum, pro salute animae suae.*" And therefore in the laws of king Canute<sup>r</sup> this mortuary is called soul-scot (*raplyceat*) or *symbolum animae*. And, in pursuance of the same principle, by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death out of his merchandize, jewels, and other moveables<sup>s</sup>. So also, by a similar policy, in France, every man that died without bequeathing a part of his estate to the church, which was called *dying without confession*, was formerly deprived of christian burial: or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in case he had made a will. But the parliament, in 1409, redressed this grievance<sup>t</sup>.

It was antiently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence<sup>u</sup> it is sometimes called a *corse-present*: a term which bespeaks it to have been once a voluntary donation. However in Bracton's time, so early as Henry III. we [ 426 ]

<sup>p</sup> Co. Litt. 185.

<sup>q</sup> *Provinc. l. 1. tit. 3.*

<sup>r</sup> c. 13.

<sup>s</sup> Panormitan. *ad Decretal. l. 3. t. 20. c. 32.*

<sup>t</sup> Sp. I. b. 28. c. 41.

<sup>u</sup> Selden, *Hist. of tithes*, c. 10.

find it rivetted into an established custom : infomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. “ *Imprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere ; et postea ecclesiam de alia meliori* : the lord must have the best good left him as an heriot, and the church the second best as a mortuary. But yet this custom was different in different places : “ *in quibusdam locis habet ecclesia melius animal de consuetudine ; in quibusdam secundum, vel tertium melius ; et in quibusdam nihil : et ideo consideranda est consuetudo loci*”<sup>w</sup>. This custom still varies in different places, not only as the mortuary to be paid, but the person to whom it is payable. In Wales a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese ; till abolished, upon a recompence given to the bishop, by the stat. 12 Ann. ft. 2. c. 6. And in the archdeaconry of Chester a custom also prevailed, that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring<sup>x</sup>. But by statute 28 Geo. II. c. 6. this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in its room. The king’s claim to many goods, on the death of all prelates in England, seems to be of the same nature : though sir Edward Coke<sup>y</sup> apprehends, that this is *a duty due upon death* and not a *mortuary* : a distinction which seems to be without a difference. For not only the king’s ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by sir Edward Coke, is entitled to six things : the bishop’s best horse or palfrey, with his furniture ; his cloak, [ 427 ] or gown, and tippet ; his cup and cover ; his bafon and ewer ;

<sup>w</sup> Bracton, l. 2. c. 26. Flet. l. 2. c. 57.

<sup>y</sup> 2 Inst. 491.

<sup>x</sup> Cro. Car. 237.

his gold ring; and, lastly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter<sup>2</sup>.

THIS variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper by statute 21 Hen. VIII. c. 6. to reduce them to some kind of certainty. For this purpose it is enacted, that all mortuaries or corse-presents to parsons of any parish, shall be taken in the following manner; unless where by custom less or none at all is due: *viz.* for every person who does not leave goods to the value of ten marks, nothing: for every person who leaves goods to the value of ten marks and under thirty pounds, 3*s.* 4*d.*; if above thirty pounds and under forty pounds, 6*s.* 8*d.*: if above forty pounds, of what value soever they may be, 10*s.* and no more. And no mortuary shall throughout the kingdom be paid for the death of any feme-covert; nor for any child; nor for any one of full age, that is not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

3. HEIR-LOOMS are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, *loom*, is of Saxon original; in which language it signifies a limb or member<sup>a</sup>; so that an heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor<sup>b</sup> (1). But deer in a real authorized park, fishes in a

<sup>2</sup> pag. 413.

<sup>a</sup> Spelm. *Gloss.* 277.

<sup>b</sup> Co. Litt. 388.

(1) Or if any chattel be given to a man and the heirs of his body, he takes the entire and absolute interest in it. There have

pond, doves in a dove-house, &c. though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase <sup>c</sup>. For this reason also I apprehend it is, that the ancient jewels of the crown are held to be heir-looms <sup>d</sup>; for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. Charters likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor <sup>e</sup>. By special custom also, in some places, carriages, utensils, and other household implements, may be heir-looms <sup>f</sup>; but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, “*quod ab aedibus non facile revellitur* <sup>g</sup>,” is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like <sup>h</sup> (2). A very similar notion to which prevails in the duchy of Brabant; where they rank certain things moveable among those of the immoveable

<sup>c</sup> Co. Litt. 8.

<sup>d</sup> *Ibid.* 18.

<sup>e</sup> Bro. Abr. tit. *chattelles*, 18.

<sup>f</sup> Co. Litt. 18. 185.

<sup>g</sup> Spelm. *Gloss.* 277.

<sup>h</sup> 12 Mod. 520.

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been many fruitless attempts to make pictures, plate, books, and household furniture, descend to the heir with a family mansion. Where they are left to be enjoyed as heir-looms by the persons who shall respectively be in possession of a certain house, or to descend as heir-looms as far as courts of law and equity will admit, the absolute interest of them, subject to the life-interests of those who have life-estates in the real property, will vest in that person who is entitled to the first estate-tail or estate of inheritance, and upon his death that interest will pass to his personal representative.

1 Bro. 274. 3 Bro. 101.

(2) See p. 281. n. 10. *ante*.

kind,

kind, calling them by a very particular appellation, *praedia volantia*, or volatile estates; such as beds, tables, and other heavy implements of furniture, which (as an author of their own observes) “*dignitatem istam nacta sunt, ut villis, sylvis, et aedibus, aliisque praediis, comparentur; quod solidiora mobilia ipsis aedibus ex destinatione patrisfamilias cohaerere videantur, et pro parte ipsarum aedium aestimentur*”<sup>1</sup>.

OTHER personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of honour, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir<sup>k</sup>. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir<sup>l</sup> (3). But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can

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<sup>1</sup> Stockman's *de jure devolutionis*, c. 3. § 16.

<sup>k</sup> 12 Rep. 105. Co. Litt. 18.

<sup>l</sup> 3 Inst. 202. 12 Rep. 105.

(3) The right to sit in a particular pew in a church arises either from prescription as appurtenant to a messuage, or from a faculty or grant from the ordinary, for he has the disposition of all pews which are not claimed by prescription. *Gibf. Cod.* 221.

In an action upon the case for a disturbance of the enjoyment of a pew, if the plaintiff claims it by prescription, he must state it in the declaration as appurtenant to a messuage in the parish. This prescription may be supported by an enjoyment for thirty-six years, and perhaps any time above twenty years. 1 *T. R.* 428. But where a pew was claimed as appurtenant to an antient messuage, and it was proved that it had been so annexed for thirty years, but that it had no existence before that time, it was held this modern commencement defeated the prescriptive claim. 5 *T. R.* 296. In an action against the ordinary, the plaintiff must allege and prove repairs of the pew. 1 *Wilf.* 326.

he bring any civil action against such as indecently at least, if not impiously violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one in taking up a dead body steals the shroud or other apparel, it will be felony<sup>m</sup>; for the property thereof remains in the executor, or whoever was at the charge of the funeral. (4)

BUT to return to heir-looms; these, though they be mere chattels, yet cannot be devised away from the heir by will; but such a devise is void<sup>n</sup>, even by a tenant in fee-simple. For though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since as the inheritance was his own, he might mangle or dismember it as he pleased; yet they being at his death instantly vested in the heir, the devise (which is subsequent and not to take effect till *after* his death) shall be postponed to the custom, whereby they have already descended.

<sup>m</sup> 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515.

<sup>n</sup> 1 Co. Litt. 185.

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(4) It has been determined, that stealing dead bodies, though for the improvement of the science of anatomy, is an indictable offence as a misdemeanor; it being a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind. 2 T. R. 733.

Though a philosopher may be regardless of his own body after death, yet he must be destitute of the feelings of humanity, if he could bear without concern that the body of a beloved wife, daughter, or sister, had been exposed to public view, and mangled by the dissector's knife.

The principle is well described by Cicero; *de humatione uuum tenendum est, contemnendam in nobis, non negligendam in nostris; ita tamen mortuorum corpora nihil sentire intelligamus. Quantum autem consuetudini famæque dandum sit, id curent vivi.* Cic. 1 Tusc. n. 108.

## CHAPTER THE TWENTY-NINTH.

## OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

IN the present chapter we shall take into consideration three other species of title to goods and chattels.

V. THE fifth method therefore of gaining a property in chattels, either personal or real, is by *succession*: which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies: and therefore the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate<sup>a</sup>. Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists<sup>b</sup>. And thus a lease for years, an obligation, a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members to whom it was originally given.

<sup>a</sup> 4 Rep. 65.

<sup>b</sup> Bro. Abr. *t. estates*, 90. Cro. Eliz. 464.

BUT,

BUT, with regard to sole corporations, a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some antient cathedral, who stands in the place of and represents, in his corporate capacity, the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And therefore a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative<sup>c</sup>. Whereas in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession: and therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it<sup>d</sup>. For the word *successors*, when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural; and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors; so if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, the property thereof must be in abeyance from the [ 432 ] death of the present owner until the successor be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner<sup>e</sup>; but a man's right therein, when once suspended, is gone for ever. This

<sup>c</sup> Dyer, 48. Cro. Eliz. 464.<sup>d</sup> Co. Litt. 46.<sup>e</sup> Brownl. 132.



is not the case in corporations aggregate, where the right is never in suspense; nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right: the chattel interest therefore, in such a case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go to or be acquired by them in right of succession<sup>f</sup>.

YET to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors<sup>g</sup>. The other exception is, where, by a *particular* custom, some *particular* corporations sole have acquired a power of taking *particular* chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interests than such immemorial usage will strictly warrant. Thus the chamberlain of London, who is a corporation sole, may by the custom of London take *bonds* and *recognizances* to himself and his successors, for the benefit of the orphan's fund<sup>h</sup>: but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule; that such right of succession to chattels is universally inherent by the common law in all aggregate [ 433 ] corporations, in the king, and in such single corporations as represent a number of persons; and may, by special custom,

<sup>f</sup> Co. Litt. 46.

<sup>h</sup> 4 Rep. 65. Cro. Eliz. 682.

<sup>g</sup> *Ibid.* 90.

belong to certain other sole corporations for some particular purposes; although generally, in sole corporations, no such right can exist.

VI. A SIXTH method of acquiring property in goods and chattels is by *marriage*; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property and with the same powers, as the wife, when sole, had over them.

THIS depends entirely on the notion of an unity of person between the husband and wife: it being held that they are one person in law<sup>1</sup>, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for, unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined. (1)

<sup>1</sup> See book I. c. 15.

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(1) If he assigns her choses in action for a valuable consideration in her lifetime, and she survives, she is bound only to the amount of the consideration, and the residue survives to her. 1 *Atk.* 207. *Cox's P. Wms.* 380. But if the husband before marriage makes a settlement upon the wife in consideration of the wife's fortune, the representative of the husband will be entitled to all her things in action: (3 *P. Wms.* 199.) but if it is in consideration of part of the estate only, the residue not reduced into possession will survive

THERE is therefore a very considerable difference in the acquisition of this species of property by the husband, accord-

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to the wife ; and where there is a settlement made equivalent to the wife's fortune, though no mention be made of her personal estate, the husband's representative will be entitled to the whole. See *Mr. Butler's note to Co. Litt.* 352. where these distinctions are clearly and fully collected. If the husband cannot recover the things in action of his wife but by the assistance of a court of equity, the court, upon the principle that he who seeks equity must do equity, will not assist him in recovering the property, unless he either has made a previous provision for her, or agrees to do it out of the estate prayed for : or unless the wife appears personally in court, and consents to the property being given to him. *2 Ves.* 669. But the court will not direct the fortune in all cases to be paid to the husband, though the wife appears to consent, where no previous provision whatever is made upon her. *2 Ves.* 579. Lord Thurlow has declared that he did not find it any where decided, that if the husband makes an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned ; but that a court of equity has much greater consideration for the assignment actually made by contract, than for an assignment by mere operation of law ; for, as to the latter, his lordship declared it to be his opinion, that when the equitable interest of the wife was transferred to the creditor of the husband by mere operation of law, (as in the case of an assignee under a commission of bankrupt,) he stood exactly in the place of the husband, and was subject precisely to the same equity in respect of the wife. *1 Cox's P. Wms.* 459. And it is determined, the wife shall have the same relief, under a general assignment by the husband of his estate for the benefit of his creditors. *4 Bro.* 139. An assignee of a bankrupt in such cases generally allows the wife one half. *3 Ves. jun.* 620.

The courts of equity at present are not inclined to make any distinction between an assignee by contract and an assignee by operation of law, but I should think they would compel the former to make the same provision for the wife as the latter. *4 Bro.* 326. *2 Ves. jun.* 680.

But if the wife's fortune is paid to the husband, or he can receive it without applying to a court of equity, then it can give no relief to the wife. *2 Atk.* 420. *But. Co. Litt.* 351. *1 Fonb. Tr. Eq.* 304.  
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[ 434 ] ing to the subject-matter ; viz. whether it be a chattel *real* or a chattel *personal* ; and, of chattels *personal*, whether it be in *possession*, or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture<sup>k</sup> : if he be outlawed or attainted, it shall be forfeited to the king<sup>l</sup> : it is liable to execution for his debts<sup>m</sup> : and, if he survives his wife, it is to all intents and purposes his own<sup>n</sup>. Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will<sup>o</sup> : for, the husband having made no alteration in the property during his life, it never was transferred from the wife ; but after his death she shall remain in her antient possession, and it shall not go to his executors. So it is also of chattels *personal* (or *choses*) in *action* : as debts upon bond, contracts, and the like : these the husband may have if he pleases ; that is, if he reduces them into possession by receiving or recovering them at law. And, upon such receipt or recovery they are absolutely and entirely his own ; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revert in the wife. But if he dies before he has recovered or reduced them into possession, so that at his death they still continue *choses in action*, they shall survive to the wife ; for the husband never exerted the power he had of obtaining an exclusive property in them<sup>p</sup>. And so, if an estray comes into the wife's franchise, and the husband seizes it, it is absolutely his property, but if he dies without seizing it, his executors are not now at liberty to seize it, but the wife or her heirs<sup>q</sup> ; for the husband never exerted the right he had, which right determined with the coverture. Thus, in both these species of property the law is the same, in case the wife survives the husband ; but, in case the husband survives the wife, the law is very different with

<sup>k</sup> Co. Litt. 46.

<sup>l</sup> Plowd. 262.

<sup>m</sup> Co. Litt. 351.

<sup>n</sup> *Ibid.* 300.

<sup>o</sup> Poph. 5. Co. Litt. 351.

<sup>p</sup> Co. Litt. 351.

<sup>q</sup> *Ibid.*

respect to *chattels real* and *chofes in action* : for he shall have the *chattel real* by survivorship, but not the *chofe in action*<sup>r</sup> ; [ 435 ] except in the case of arrears for rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this : that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint tenancy with his wife ; wherefore the law will not wrest it out of his hands, and give it to her representatives ; though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a *chofe in action* shall not survive to him, because he never was in possession of it at all, during the coverture ; and the only method he had to gain possession of it, was by suing in his wife's right ; but as, after her death he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator ; and may, in that capacity, recover such things in action as became due to her before or during the coverture (2).

THUS, and upon these reasons, stands the law between husband and wife, with regard to *chattels real* and *chofes in action* : but, as to *chattels personal*, (or *chofes*) *in possession*, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the

<sup>r</sup> 3 Mod. 186.

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(2) By 29 Car. II. c. 3. s. 25. the husband shall have administration of all his wife's personal estate, which he did not reduce into his possession before her death, and shall retain it to his own use : and if he dies before administration is granted to him, or he has recovered his wife's property, the right to it passes to his personal representative, and not to the wife's next of kin. 1 P. Wms. 378. But. Co. Lit. 351.

marriage, not only potentially but in fact, which never can again revert in the wife or her representatives<sup>s</sup>.

AND, as the husband may thus generally acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death and not go to his executors. These are called her *paraphernalia*; which is a term borrowed from the civil law<sup>t</sup>, and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; and therefore even the jewels of a peeress usually worn by her, have been held to be *paraphernalia*<sup>u</sup>. These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives<sup>w</sup>. Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away<sup>x</sup>. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets<sup>y</sup>. And her necessary apparel is protected even against the claim of creditors<sup>z</sup> (3).

<sup>s</sup> Co. Litt. 351.

<sup>t</sup> *Ff.* 23. 3. 9. § 3.

<sup>u</sup> Moor. 213.

<sup>w</sup> Cro. Car. 343. 1 Roll. Abr. 911.

<sup>2</sup> Leon. 166.

<sup>x</sup> Noy's Max. c. 49. *Grahme v. Ld.*

*Londonderry*, 24 Nov. 1746. Canc.

<sup>y</sup> 1 P. Wms. 730.

<sup>z</sup> Noy's Max. c. 49.

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(3) The husband may dispose absolutely of his wife's jewels or other paraphernalia in his lifetime. 3 *Atk.* 394. And although after his death they are liable to his debts, if his personal estate is exhausted, yet the widow may recover from the heir the amount of what she is obliged to pay in consequence of her husband's specialty creditors out of her paraphernalia. 1 P. Wms. 730.

BUT

VII. A JUDGMENT, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and *chofes in action*; as if a man gives bond for 20*l.*, or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract or agreement made; and the law only gives him a remedy to recover the possession of that right, which already [ 437 ] in justice belongs to him. But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time: and, where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. SUCH penalties as are given by particular statutes, to be recovered on an action *popular*; or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of 500*l.*, which those persons are by several acts of parliament made liable to forfeit, that being in particular offices or situations in life, neglect to take the oaths to the government: which penalty is given to him or them

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But she is not entitled to them after his death, if she has barred herself by an agreement before marriage of every thing she could claim out of his personal estate either by the common law or custom. 2 *Atk.* 642.

that will sue for the same. Now here it is clear that no particular person, A or B, has any right, claim, or demand, in or upon this penal sum, till after action brought <sup>a</sup>; for he that brings his action, and can *bonâ fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit: but it is not consummated till judgment; for, if any collusion appears, he loses the priority he had gained <sup>b</sup>. But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty <sup>c</sup>. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where a suit and judgment at law are [ 438 ] not only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed, as it were, in a state of nature, accessible by all the king's subjects, but the acquired right of none of them; open therefore to the first occupant, who declares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

2. ANOTHER species of property, that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly

<sup>a</sup> 2 Lev. 141. Stra. 1169. Combe v. Pitt, B. R. Tr. 3 Geo. III.

<sup>b</sup> Stat. 4 Hen. VII. c. 20.

<sup>c</sup> Cro. Eliz. 138. 11 Rep. 65.

acquires,



acquires, and the defendant loses at the same time, a right to that specific sum. It is true, that this is not an acquisition so perfectly original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right. But, however, though strictly speaking, the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

3. HITHER also may be referred, upon the same principle, all title to costs and expences of suit; which are often arbitrary, and rest entirely on the determination of the court, upon weighing all circumstances, both as to the *quantum*, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs, therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law. [ 439 ]

## CHAPTER THE THIRTIETH.

## OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

VIII. GIFTS then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent; and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a pepper corn: any of which considerations will, in the eye of the law, convert the gifts if executed, into a grant; if not executed, into a contract.

GRANTS or gifts, of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein: which may be done either in writing, or by word of mouth<sup>a</sup>, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII. c. 4. all deeds of gift of goods, made in trust to the use of the donor, shall be void: because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5. every grant or gift of chattels, as well as lands, with an intent to defraud creditors, or others<sup>b</sup>, shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual; and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year.

A TRUE and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately: as if A gives to B 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompence<sup>c</sup>: unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, dures, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprize. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot

<sup>a</sup> Perk. § 57.<sup>b</sup> See 3 Rep. 82.<sup>c</sup> Jenk. 109.

be compelled to perform, but upon good and sufficient consideration; as we shall see under our next division (1).

IX. A CONTRACT, which usually conveys an interest merely in action, is thus defined: "an agreement upon sufficient consideration, to do or not to do a particular thing." From which definition there arise three points to be contemplated in all contracts; 1. The *agreement*; 2. The *consideration*; and 3. The *thing* to be done or omitted, or the different species of contracts.

FIRST then it is an *agreement*, a mutual bargain or convention; and therefore there must at least be two contracting parties, of sufficient ability to make a contract; as where A contracts with B to pay him 100*l.* and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the antient common law; for no *chose* in action could be assigned or granted over<sup>d</sup>, because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the antient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptance a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being

<sup>d</sup> Co. Litt. 214.

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(1) If a man sells goods and still continues in possession as visible owner, the sale is fraudulent, and void against creditors. 2 *T. R.* 596. But the sale or mortgage of a ship at sea is valid, if the grand bill of sale be delivered to the vendee or mortgagee, and he take possession the first opportunity after the ship arrives in port. 1 *T. R.* 462.

rather an attorney than an assignee. But the king is an exception to this general rule, for he might always either grant or receive a *chose* in action by assignment<sup>e</sup>: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action, as much as the law will that of a *chose* in possession<sup>f</sup>.

THIS contract or agreement may be either express or implied. [ 443 ] *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, *viz.* that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts, of one kind or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quasi ex contractu*<sup>g</sup>.

A CONTRACT may also be either *executed*, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here

<sup>e</sup> Dyer, 30. Bro. Abr. tit. *chose* in action, 1 & 4.

<sup>f</sup> 3 P. Wms. 199.

<sup>g</sup> Inst. 3. 14. 2.

the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract *executed* (which differs nothing from a grant) conveys a *chose in possession*; a contract *executory* conveys only a *chose in action*.

[ 444 ] HAVING thus shewn the general nature of a contract, we are, secondly, to proceed to the *consideration* upon which it is founded; or the reason which moves the contracting party to enter into the contract. "It is an agreement, upon *sufficient* "*consideration.*" The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal<sup>h</sup>. This thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen<sup>i</sup>, is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another<sup>j</sup>. This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors, or other third persons, of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity; for the person contracted with has then given an equivalent to recompense, and is therefore as much an owner, or a creditor, as any other person.

THESE valuable considerations are divided by the civilians<sup>k</sup> into four species. 1. *Do, ut des*: as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much

<sup>h</sup> *In omnibus contractibus, siue nominatis, siue innominatis, permutatio continetur.* Gravin. l. 2. § 12.

<sup>i</sup> pag. 297.

<sup>j</sup> 3 Rep. 83.

<sup>k</sup> *Ef.* 19. 5. 5.

for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias*; as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side on consideration of something done on the other; as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. [ 445 ] 3. The third species of consideration is, *facio, ut des*: when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4 The fourth species is, *do, ut facias*: which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages upon his performing such work: which, we see, is nothing else but the last species inverted: for *servus facit, ut herus det*, and *herus dat, ut servus faciat*.

A CONSIDERATION of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it <sup>1</sup> (2). As if one man pro-

<sup>1</sup> Dr. & St. d. 2. c. 24.

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(2) See a very learned dissertation upon this passage, and the learned Judge's observation and reference upon a *nudum pactum* in the preceding page, by Mr. Fonblanque in his edition of the Treatise of Equity, 1 vol. p. 326. That learned gentleman abundantly proves that a consideration was not necessary to constitute a binding contract in the civil law; and he concludes, that "from a  
"view

mises to give another 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however, a man may or may not be bound to perform it, in honour or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted<sup>m</sup> the maxim of the civil law<sup>n</sup>, that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation, (as a promise to pay a just debt, though barred by the statute of limitations,) it is no longer *nudum pactum* (3). And as this rule was principally esta-

<sup>m</sup> Bro. *Abr. tit. dette.* 79. Salk. 129.    <sup>n</sup> *Cod.* 2. 3. 10. & 5. 14. 1.

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“ view of the different modes by which an obligation could be  
 “ created by the civil law, it appears that, without any consider-  
 “ ation, a verbal agreement or promise might, in respect of cer-  
 “ tain prescribed solemnities, acquire a binding force and legal  
 “ validity; and further, that for want of consideration, a writ-  
 “ ten acknowledgment of a debt might be avoided; and that  
 “ though a consideration was alleged in writing, it might be de-  
 “ nied. If then it be asked, what was a *nudum pactum* by the civil  
 “ law? I should submit that, from the above observations, it ap-  
 “ pears to have been an undertaking to give or to do some parti-  
 “ cular thing or act, which *neque verbis præscriptis solemnibus vestitum*  
 “ *fit, neque factio aut datione rei transit in contractum innominatum.*”

(3) Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promise to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt, in affluent circumstances after his certificate, promise to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds.

In such and many other instances, though the promise gives a compulsory remedy where there was none before, either in law or equity,



blished, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned<sup>o</sup>, it therefore does not hold in some cases, where [ 446 ] such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment : for every bond from the solemnity of the instrument<sup>p</sup>, and every note from the subscription of the drawer<sup>q</sup> (4), carries with it an internal evi-

<sup>o</sup> Plowd. 308, 309.

<sup>q</sup> Ld. Raym. 760.

<sup>p</sup> Hardr. 200. 1 Ch. R. 157.

equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration. *Ld. Mansfield, 1 Cowp. 290*. These are the words of Lord Mansfield, but perhaps the promise would only be obligatory in the three first instances.

How far moral obligation is a legal consideration, see a learned note to the reports by Messrs. Bofanquet and Puller, 3 vol. p. 249.

But if a bankrupt, after obtaining his certificate, promise to pay a prior debt when he is able, it has been held that this is a conditional promise, and that the plaintiff must prove the defendant's ability to pay. 2 *Hen. Bl.* 116.

(4) Mr. Fonblanque, in his discussion of the subject of consideration, referred to in the last note but one, has taken notice of this inaccuracy : he says, what certainly is fully established, " that the  
 " want of consideration cannot be averred by the maker of a note,  
 " if the action be brought by an indorsee ; but if the action be  
 " brought by the payee, the want of consideration is a bar to the  
 " plaintiff's recovering upon it." 1 *Str.* 674. *Bull. N. P.* 274.  
 An indorsee, who has given full value for a bill of exchange, may maintain an action both against him who drew it, and who accepted it, without any consideration. The most important authority respecting the consideration of written contracts is the case of *Rann v. Hughes* before the house of lords, in which lord chief baron *Skynner* delivered the unanimous opinion of the judges, that an administratrix was not bound by a written promise to pay the debt of her intestate out of her own property. See it reported in 7 *T. R.* 350. In that case, the chief baron advanced, that " all  
 " contracts

dence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

WE are next to consider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing.*" The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale or exchange*. 2. That of *bailment*. 3. That of *hiring and borrowing*. 4. That of *debt*.

1. SALE, or *exchange*, is a transmutation of property from one man to another, in consideration of some price or recompence in value: for there is no sale without a recompence: there must be *quid pro quo*<sup>r</sup>. If it be a commutation of goods for goods, it is more properly an *exchange*; but if it be a transferring of goods for money, it is called a *sale*; which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be

<sup>r</sup> Noy's Max. c. 42.

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"contracts are by the laws of *England* distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved. He observed that the words of the statute of frauds were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing, and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable."

So a promise to pay the debt of another in writing is void, unless a legal consideration is stated in the written agreement. 5 *East*, 10.

exchanged

exchanged for all sorts of other property ; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted therefore very early the use of money ; for we find Abraham giving “ four hundred shekels of silver, “ current money with the merchant,” for the field of Macpelah<sup>s</sup> ; though the practice of exchange still subsists among several of the savage nations. But with regard to the *law* of sales and exchanges, there is no difference. I shall therefore [ 447 ] treat of them both under the denomination of sales only ; and shall consider their force and effect, in the first place where the vendor *hath* in himself, and secondly where he *hath not* the property of the thing sold.

WHERE the vendor *hath* in himself the property of the goods sold, he hath the liberty of disposing of them to whom-ever he pleases, at any time, and in any manner ; unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the statute of frauds<sup>t</sup>, the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing of the writ<sup>v</sup>, and any subsequent sale was fraudulent ; but the law was thus altered in favour of *purchasers*, though it still remains the same between the *parties* ; and therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors.<sup>u</sup> (5)

<sup>s</sup> Gen. c. 23. v. 16.

<sup>v</sup> 8 Rep. 171. 1 Mod. 188.

<sup>t</sup> 29 Car. II. c. 3.

<sup>u</sup> Comb. 33. 12 Mod. 5. 7 Mod. 95.

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(5) If two writs are delivered to the sheriff on the same day, he is bound to execute the first which he receives ; but if he levies and sells under the second, the sale to a vendee, without notice of the first, is irrevocable, and the sheriff makes himself answerable to both parties. 1 *Salk.* 320. 1 *T. R.* 729.

IF a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases<sup>u</sup>. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest*, (which the civil law calls *arrha*, and interprets to be “*emptiois-venditionis* [ 448 ] “*contractae argumentum*”<sup>w</sup>;) the property of the goods is absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them<sup>x</sup> (6). And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute, 29 Car. II. c. 3., no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; unless he gives part of

<sup>u</sup> Hob. 41. Noy's Max. c. 42.

<sup>x</sup> Noy, *ibid.*

<sup>w</sup> *Infl.* 3. tit. 24.

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(6) The property does not seem to be *absolutely bound* by the earnest; for lord Holt has laid down the following rules, *viz.* “That notwithstanding the earnest, the money must be paid upon fetching away the goods, because no other time for payment is appointed; that earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money is void; that after earnest given the vendor cannot sell the goods to another, without a default in the vendee; and therefore if the vendee does not come and pay, and take the goods, the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person.” 1 *Salk.* 113.

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the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith (7). Antiently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale*, “*venditio per mutuam manuum complexionem*”;<sup>y</sup> till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on<sup>z</sup>. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B

<sup>y</sup> Stiernhook *de jure Goth.* l. 2. c. 5.

<sup>z</sup> Hob. 41.

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(7) It seems to be established that contracts for goods which cannot be delivered immediately are not within the statute, and are binding without a writing; as an agreement to take a carriage when it is built, or corn when it is threshed, and the like. 4 *Burr.* 2101. And this is binding, though in fact the carriage is not delivered within the year; but if the original agreement was, that it should not at any event be delivered till after a year, then the contract will not be valid unless it is reduced into writing. But if the article exists at the time in a state fit for delivery, if the agreement is for more than 10*l.* it must be in writing, notwithstanding the delivery is to be postponed to a future day. *Cooper v. Elston*, 7 *T. R.* 14.

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for 10*l.* and B pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendor's custody, still he is entitled to the money, because, by the contract, [ 449 ] the property was in the vendee<sup>a</sup>. Thus may property in goods be transferred by sale, where the vendor *hath* such property in himself.

BUT property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is<sup>b</sup>, that all sales and contracts of any thing vendible, in fairs or markets *overt*, (that is, open,) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the mirror informs us<sup>c</sup>, were tolls established in markets, *viz.* to testify the making of contracts; for every private contract was discountenanced by law: insomuch that our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses<sup>d</sup>. Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day<sup>e</sup>. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt<sup>f</sup>; but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in<sup>g</sup>. But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them. And it is expressly provided by statute 1 Jac. I. c. 21., that the sale of any goods wrongfully taken,

<sup>a</sup> Noy, c. 42.<sup>e</sup> Cro. Jac. 68.<sup>b</sup> 2 Inst. 713.<sup>c</sup> c. 1. § 3.<sup>f</sup> Godb. 131.<sup>d</sup> LL. Etbel. 10. 12. LL. Fadg.<sup>g</sup> 5 Rep. 83. 12 Mod. 521.

to any pawnbroker in London, or within two miles thereof, shall not alter the property: for this, being usually a clandestine trade, is therefore made an exception to the general rule. And even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) will in no case bind him; though it binds infants, feme coverts, [ 450 ] idiots, and lunatics, and men beyond sea or in prison: or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods<sup>h</sup> (8). So likewise, if the buyer knoweth the property not to be in the feller; or there be any other fraud in the transaction; if he knoweth the feller to be an infant, or feme covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby<sup>i</sup>. If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price: unless the property had been previously altered by a former sale<sup>k</sup>. And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice<sup>l</sup>. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being devided, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, shall not be afterwards put to difficulties by reason of the previous knavery of the feller.

<sup>h</sup> Bacon's use of the law, 158.

<sup>k</sup> Perk. § 93.

<sup>i</sup> 2 Inst. 713, 714.

<sup>l</sup> 2 Inst. 713.

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(8) The owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from any one who has purchased them and sold them again, even with notice of the theft, before the conviction. 2 T. R. 750.

BUT there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses<sup>m</sup>. For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statutes 2 P. & M. c. 7. and 31 Eliz. c. 12. By which it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sun-set, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such fair or market; that toll be paid, if any [ 451 ] be due; and if not, one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bona fide* paid for him in market overt. But in case any one of the points before-mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

By the civil law<sup>n</sup> an implied warranty was annexed to every sale, in respect to the title of the vendor; and so too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose<sup>o</sup>. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer: unless he expressly warrants them to be found and good<sup>p</sup>, or unless he knew them to be otherwise and hath used any art to disguise

<sup>m</sup> 2 Inst. 719.

<sup>n</sup> ff. 21. 2. 1.

<sup>o</sup> Cro. Jac. 474. 1 Roll, Abr. 90.

<sup>p</sup> F. N. B. 94.

them,



them<sup>9</sup>, or unless they turn out to be different from what he represented them to the buyer. (9)

2. BAILMENT, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered, or (in our legal dialect) bailed, to a taylor to make a suit of cloaths, he has it upon an implied contract to render it again when made, and that in a workmanly manner<sup>r</sup>. If money or goods be delivered to a common carrier, to convey from Oxford to

<sup>9</sup> 2 Roll. Rep. 5.

<sup>r</sup> 1 Vern. 268.

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(9) The following distinctions seem peculiarly referable to the sale of horses. If the purchaser gives what is called a *found* price, that is, such as from the appearance and nature of the horse would be a fair and full price for it, if it were in fact free from blemish and vice, and he afterwards discovers it to be unsound or vicious, and returns it in a reasonable time, he may recover back the price he has paid in an action against the feller for so much money had and received to his use, provided he can prove the feller knew of the unsoundness or vice at the time of the sale; for the concealment of such a material circumstance is a fraud, which vacates the contract.

But if a horse is sold, with an express warranty by the feller that it is found and free from vice, the buyer may maintain an action upon this warranty or special contract without returning the horse to the feller, or without even giving him notice of the unsoundness or viciousness of the horse; yet it will raise a prejudice against the buyer's evidence, if he does not give notice within a reasonable time that he had reason to be dissatisfied with his bargain. *H. Bl.* 17.

The warranty cannot be tried in a general action of assumpsit to recover back the price of the horse. *Cowp.* 819. In a warranty it is not necessary to shew that the feller knew of the horse's imperfections at the time of the sale.

In sales of horses it has been considered, that, without a warranty of soundness by the feller, or fraud on his part, the buyer must stand to all losses arising from latent defects; the same was held in the sale of hops. 2 *East*, 314.

London, he is under a contract in law to pay, or carry them, to the person appointed<sup>s</sup>. If a horse, or other goods, be delivered to an inkeeper or his servants, he is bound to keep [ 452 ] them safely, and restore them when his guest leaves the house<sup>t</sup>. If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner<sup>u</sup>. If a pawnbroker receives plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time<sup>w</sup>: for the due execution of which contract many useful regulations are made by statute 30 Geo. II. c. 24. (10) And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainers, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expences, before the time of sale; or, when sold, to render back the overplus. If a friend delivers any thing to his friend to keep for him, the receiver is bound to restore it on demand; and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise<sup>x</sup>; unless he expressly undertook<sup>y</sup> to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled<sup>z</sup>, that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud: but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them, as a prudent man would take of his own<sup>a</sup>.

<sup>s</sup> 12 Mod. 482.

<sup>t</sup> Cro. Eliz. 622.

<sup>u</sup> Cro. Car. 271.

<sup>w</sup> Cro. Jac. 245. Yelv. 178.

<sup>x</sup> Co. Litt. 89.

<sup>y</sup> 4 Rep. 84.

<sup>z</sup> Lord Raym. 909. 12 Mod. 487.

<sup>a</sup> By the laws of Sweden the depository or bailee of goods is not bound to restitution, in case of accident by fire or theft: provided his own goods perished in the same manner; "*jura enim nostra,*" says Stiernhook, "*delum præsumunt, si una non pereant.*" (*De jure Sueon. l. 2. c. 5.*)

(10) And further regulated by the statute 29 Geo. III. c. 57.

IN all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract. [ 453 ] And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The taylor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distreinor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person<sup>b</sup>. For, being responsible to the bailor, or if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor (11).

<sup>b</sup> 13 Rep. 69.

(11) The learned Judge has classed indiscriminately together a number of bailments, which are very dissimilar in their nature and legal consequences. This subject forms a very important branch of the law of England. In order to acquire a knowledge of the numerous and nice distinctions which the law of bailments comprehend, it is necessary that the student should peruse with attention lord Holt's judgment in the report of *Coggs v. Bernard*, in *Lord Raym.* 909. ; and afterwards *Sir William Jones's Essay on the Law of Bailments*, where these distinctions are examined and discussed, as I conceive, with not less learning and ingenuity than sound judgment and just conclusions.

Sir William Jones has reduced the law of bailments as it were to a scale, by which he limits the degree of neglect which every bailee is answerable for.

He divides neglect into three kinds, which he thus defines :

“ Ordinary neglect is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns.

3. **HIRING** and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or bor-

“Gross neglect is the want of that care, which every man of common sense, how inattentive soever, takes of his own property.

“Slight neglect is the omission of that diligence, which very circumspect and thoughtful persons use in securing their own goods and chattels.”

A carrier is liable even without any degree of neglect; for from principles of public policy he is answerable if he is robbed of the goods: and for every other loss, which does not happen by the act of God, (that is, without human agency,) or by the king's enemies. See 3 vol. p. 165. n. 7.

An innkeeper, for the same reasons, is also liable for a theft or robbery of his guest's goods committed in his house. See 1 vol. p. 430. n. 11.

But the agisting farmer, the taylor, and the pawnee, are answerable only for ordinary neglect; so if a horse be sent to agist, and it be stolen, the owner cannot recover the value from the farmer as from a carrier and innkeeper, unless he was stolen by the negligence of the farmer, as by leaving the gate of the field open; or unless the farmer expressly has undertaken to be answerable for such a loss. *Law of Bailm.* 92.

A friendly depository is responsible only for gross neglect; and not even for that, if his character is known to the depositor, and he takes no better care of his own goods, and they also at the same time are spoiled or destroyed. *Ib.* 120.

Wherever a debt accrues to the bailee from the bailor, in consequence of the bailment, as where a horse is delivered to an innkeeper to take care of, or to a farmer to agist, or to a farrier to shoe; or where cloth is given to a taylor to make into a coat, or to a dyer to dye; or corn to a miller to grind: in all such cases the bailee has, what is called, a *lien* upon the thing bailed; that is, he may detain it till the debt incurred by the bailment is discharged by the bailor.

But he has only a lien upon the article bailed for the debt, which accrues upon the last bailment of it, and he cannot retain it till the bailor has paid him a demand which arose upon former bailments, where he restored the thing bailed without availing himself of his lien. 4 *Burr.* 2214.

But

rower : in which there is only this difference, that hiring is always for a price, or stipend, or additional recompense ; borrowing is merely gratuitous. But the law in both cases is the same (12). They are both contracts, whereby the possession and a transient property is transferred for a particular

But if a person gives notice to his employer that he will not take in goods without having a lien upon them for his general balance, and goods are sent after such notice, then the bailee can retain the bailments until he is paid all that is due to him. And it is lawful for persons in particular trades, as dyers, bleachers, &c. to join in such a resolution ; and their customers, who have had notice of it, will be bound by it. 6 T. R. 14. *Kirkman v. Shawcross*.

Any person may be a pawnee ; that is, may take a pledge or pawn as a security for money lent, provided he takes no more than legal interest, 29 Geo. III. c. 57. s. 23. But if plate, or any chattel, is given to one person for life, and after his death to another, if he who has the life-interest pawns the article for a valuable consideration, the pawnbroker or pawnee has no lien upon it against the person who is entitled to the interest in remainder, although the settlement was concealed from the pawnee, and he was imposed upon by the person who pawned the article. 2 T. R. 376.

Where a person purchases an estate in land without paying for it, he is a trustee for the feller, and the purchase money is a lien upon the land, even if the feller gives a receipt for it, and takes a security as a note or bond for the money unpaid, unless the purchaser can shew the vendor agreed to rely on that security alone, and to discharge the land. *Scho. & Lef.* 132.

An attorney has a lien for his costs out of a sum awarded to be paid by a defendant to the attorney's client, and the court will compel the defendant to pay the plaintiff's attorney his costs by an order of the court. 1 *East.* 465.

An innkeeper has a lien upon the horses and goods of his guests delivered to him. *Salk.* 387.

(12) The learned Commentator has here followed lord Holt, who has treated a *commodatum* and a *locatio* without distinction. *Lord Raym.* 916. But this seems to be properly corrected by *Sir W. Jones*, 85.; who concludes, that the hirer of a thing is answerable only for ordinary neglect ; but that a gratuitous borrower is responsible even for slight negligence. *Ib.* 120.

time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation, and not to abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled also to the price for which the horse was hired <sup>c</sup>.

[ 454 ] THERE is one species of this price or reward, the most usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiae*. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which generally is called *interest* by those who think it lawful, and *usury* by those who do not so. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle <sup>d</sup>, that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of it's institution, which was only to serve the purposes of exchange and not of increase. Hence the school divines have branded the practice of taking interest, as being contrary to the divine law both natural and revealed; and the canon law <sup>e</sup> has

<sup>c</sup> Yelv. 172. Cro. Jac. 236.

been suspected to be spurious.

<sup>d</sup> *Polit. l. 1. c. 10.* This passage hath

<sup>e</sup> *Decretal. l. 5. tit. 19.*

proscribed

proscribed the taking any, the least, increase for the loan of money as a mortal sin.

BUT, in answer to this, it hath been observed, that the Mosaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger<sup>f</sup>: which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se*; since it was allowed where any but an Israelite was concerned. And as to the reason supposed to be given by Aristotle, and deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to hire. And though money was originally used only for the purposes of exchange, yet the laws of any state may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end [ 455 ] for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on; and if no premium were allowed for the hire of money, few persons would care to lend it; or at least the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit: and again introduced with itself its inseparable companion, the doctrine of loans upon interest. And, as to any scruples

<sup>f</sup> Deut. xxiii. 20.

of confcience, fince all other conveniences of life may either be bought or hired, but money can only be hired, there feems to be no greater oppreffion in taking a recompense or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to confcience, for the loan of a horfe, or the loan of a fum of money: but a reasonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his lofing it entirely, is not more immoral in one cafe than it is in the other. Indeed the absolute prohibition of lending upon any, even moderate intereft, introduces the very inconvenience which it feems meant to remedy. The neceffity of individuals will make borrowing unavoidable. Without fome profit allowed by law, there will be but few lenders; and thofe principally bad men, who will break through the law, and take a profit; and then will endeavour to indemnify themfelves from the danger of the penalty, by making that profit exorbitant. A capital dif-  
 [ 456 ] tinction muft therefore be made between a moderate and exorbitant profit; to the former of which we ufually give the name of intereft, to the latter the truly odious appellation of ufury: the former is neceffary in every civil ftate, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated fociety. For, as the whole of this matter is well fummed up by Grotius<sup>s</sup>, “ if the compenfation allowed by law “ does not exceed the proportion of the hazard run, or the “ want felt, by the loan, it’s allowance is neither repugnant “ to the revealed nor the natural law: but if it exceeds thofe “ bounds, it is then oppreffive ufury; and though the municipal laws may give it impunity, they can never make it juft.”

WE fee that the exorbitance or moderation of intereft, for money lent, depends upon two circumftances; the inconvenience of parting with it for the prefent, and the hazard of lofing it entirely. The inconvenience to individual lenders can never be eftimated by laws; the rate therefore of general in-

<sup>s</sup> *de j. b. l. 2. c. 12. § 22.*



terest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom; for the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be; but where there is not enough circulating cash, or barely enough, to answer the ordinary uses of the public, interest will be proportionably high: for lenders will be but few, as few can submit to the inconvenience of lending.

So also the hazard of an entire loss has its weight in the regulation of interest: hence the better the security, the lower will the interest be; the rate of interest being generally in a compound *ratio*, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to *three per cent.*: a man that has money by him will perhaps lend it upon a good personal security at *five per cent.*, allowing two for the hazard run; he will lend it upon landed security or mortgage at *four per cent.*, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at *three per cent.*, the hazard being none at all.

BUT sometimes the hazard may be greater, than the rate of interest allowed by law will compensate. And this gives rise

rife to the practice of, 1. Bottomry, or *respondentia*. 2. Policies of infurance. 3. Annuities upon lives.

AND first, *bottomry* (which originally arofe from permitting the mafter of a fhip, in a foreign country, to hypothecate the fhip in order to raife money to refit) is in the nature of a mortgage of a fhip; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the fhip (*partem pro toto*) as a fecurity for the repayment. In which cafe it is underftood, that if the fhip be loft, the lender lofes alfo his whole money; but, if it returns in fafety, then he fhall receive back his principal, and alfo the premium or intereft agreed upon, however it may exceed the legal rate of intereft. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reafon of the extraordinary hazard run by the lender<sup>b</sup>.

[ 458 ] And in this cafe the fhip and tackle, if brought home, are anfwerable (as well as the perfon of the borrower) for the money lent. But if the loan is not upon the veffel, but upon the goods and merchandize, which muft neceffarily be fold or exchanged in the courfe of the voyage, then only the borrower, perfonally, is bound to anfwer the contract; who therefore in this cafe is faid to take up money at *respondentia*. Thefe terms are alfo applied to contracts for the repayment of money borrowed, not on the fhip and goods only, but on the mere hazard of the voyage itfelf; when a man lends a merchant 1000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary intereft, in cafe fuch a voyage be fafely performed<sup>c</sup>: which kind of agreement is fometimes called *foenus nauticum*, and fometimes *ufura maritima*<sup>d</sup>. But as this gave an opening for ufurious and gaming contracts, efpecially upon long voyages, it was enacted by the ftatute 19 Geo. II. c. 37. that all monies lent on bottomry or at *respondentia*, on veffels bound to or from the Eaft Indies, fhall be exprefsly lent only upon the fhip or upon the mer-

<sup>b</sup> Moll. *de jur. mar.* 361. Malyne, *jur. privat. l.* 3. c. 16.  
*lex mercat. b. I. c.* 31. Bacon's effays,

<sup>c</sup> 1 Sid. 27.

c. 41. Cro. Jac. 208. Bynkerfh. *quaest.*

<sup>d</sup> Molloy, *ibid.* Malyne, *ibid.*

chandize;

chandize; that the lender shall have the benefit of salvage<sup>k</sup>; and that if the borrower hath not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandize be totally lost. (13)

SECONDLY, a policy of *insurance* is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I insure a ship to the Levant, and back again, at *five per cent.*; here I calculate the chance that she performs her voyage to be twenty to one against her being lost: and, if she be lost, I lose 100*l.* and

<sup>k</sup> See Vol. I. page 294.

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(13) It is an established rule, that no contract is within the statute of usury, although more than *five per cent.* is to be paid upon money advanced, if the principal is actually put in hazard, and may be totally lost to the lender. 4*T. R.* 353. The general nature of a respondentia bond is this, the borrower binds himself in a large penal sum, upon condition that the obligation shall be void, if he pay the lender the sum borrowed and so much a month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage. The respondentia interest is frequently at the rate of forty or fifty *per cent.* or in proportion to the risk and profit of the voyage; for the respondentia lender may be considered as a material partner in the loss and gain of the adventure; and therefore he may insure his interest in the success of the voyage, but it must be expressly specified in the policy to be respondentia interest, 3*Burr.* 1391; unless there is a particular usage to the contrary, *Park. Inf.* 11. A lender upon respondentia is not obliged to pay salvage or average losses, but he is entitled to receive the whole sum advanced, provided the ship and cargo arrive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship. *Ib.* 421.

[ 459 ] get 5*l.* Now this is much the same as if I lend the merchant, whose whole fortunes are embarked in this vessel, 100*l.* at the rate of *eight per cent.* For by a loan I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to *three per cent.* : if therefore I had actually lent him 100*l.*, I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* But, as upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus, too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of repayment ; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year ; the inconvenience and general hazard of this loan, we have seen, are equivalent to 5*l.*, which is therefore the legal interest ; but there is also a special hazard in this case ; for, if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten : it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reasonable rate of interest in this case would be *fifteen per cent.* But this the law, to avoid abuses, will not permit to be taken ; Sempronius therefore gives Titius the lender only 5*l.*, the legal interest ; but applies to Gaius an insurer, and gives him the other 10*l.* to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach ; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time (14).

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(14) Insurance is in effect nothing more than a wager, for the underwriter, who insures at *five per cent.*, receives five pounds to return one hundred upon the contingency of a certain event ; and

But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted by statute 14 Geo. III. c. 48., that no insurance shall be made on lives, or on any other event, wherein the party insured hath no interest; that in all policies the name of such interested party shall be inserted; and nothing more shall be recovered [ 460 ] thereon than the amount of the interest of the insured.

THIS does not however extend to marine insurances, which were provided for by a prior law of their own. The learning relating to these insurances hath of late years been greatly improved by a series of judicial decisions; which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence: but, being founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes. Thus much however may be said; that being con-

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it is precisely the same in its consequences as if he had betted a wager of 95*l.* to five, or nineteen to one, that the ship arrives safe, or that a certain event does not happen. So where a life is insured for a year at ten *per cent.*; that is, where ten pounds are received to pay one hundred if a certain person dies within a year; this insurance is in effect precisely the same as a wager of nine to one, that the person whose life is insured lives a year. It is not surprising then that insurance should have become so prevalent and pernicious a mode of gaming, that the legislature was obliged to repress it, and to confine it within those limits within which it is beneficial or absolutely necessary to the security of commerce. The writers of mercantile law, with that natural partiality which authors feel for their subjects, have amused themselves by endeavouring to discover what country could first claim the honour of the invention of insurance. But it is a contract far too simple, and too obvious to the understandings of mankind, however uncultivated, to be dignified by the name of invention. Yet its progress and refinements would be a necessary consequence of the extension of commerce, and the gradual improvement in the science of law.

tracts,

tracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment; and on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament (15). But as a practice had obtained of insuring large sums without having any property on board, which were called insurances, *interest or no interest*, and also of insuring the same goods several times over; both of which were a species of gaming without any advantage to commerce, and were denominated *wagering policies*: it is therefore enacted by the stat. 19 Geo. II. c. 37., that all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, (all of which had the same pernicious tendency,) shall be totally null and void, except upon privateers, or upon ships or merchandize from the Spanish and Portuguese dominions, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead: and lastly, that, in the East India trade, the lender of money on bottomry, or at *respondentia*, shall alone have a right to be insured for the money lent, and the borrower shall (in case of

[ 461 ] a loss) recover no more upon any insurance than the surplus of his property, above the value of his bottomry, or *respondentia* bond. (16)

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(15) The contract of insurance is founded upon the purest principles of morality and abstract justice. Hence it is necessary that the contracting parties should have perfectly equal knowledge or ignorance of every material circumstance respecting the thing insured. If on either side there is any misrepresentation or *allegatio falsi*, or concealment or *suppressio veri*, which would in any degree affect the premium, or the terms of the engagement, the contract is fraudulent and absolutely void. See various instances in *Park's Inf. c. x.*

(16) This statute does not extend to foreign ships, upon which, as before the statute, there may still be insurances, *interest or no interest*.

THIRDLY, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same

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*terest.* These were not included in the act, on account of the difficulty of bringing witnesses from abroad to prove the interest. *Doug.* 302. But where there is an interest on board, the owner by a *valued* policy, in which the value of the goods is agreed upon and fixed between the parties, may insure far beyond the extent of the real value. For the excess of the insurance is held not to be within the statute, unless it should appear that the interest is so small as to be a mere evasion of the act, and a pretence for gaming. In an open policy, where no value is fixed, the prime cost of the goods must be proved. *2 Burr.* 1170.

A re-assurance is the contract which an insurer, who wishes to be indemnified against the risk he has taken upon himself, makes with another person, by giving him a premium to re-assure to him the same event, which he himself has insured. Re-assurances are prohibited by the statute 19 Geo. II. c. 37. both upon foreign and English ships, unless the assurer is insolvent, a bankrupt, or dead; in which cases he, his assignee, or personal representative, may make a re-assurance, which must be expressly mentioned as a re-assurance in the policy. *2 T. R.* 161. The object of prohibiting re-assurance, was to prevent idle gaming speculations, by persons endeavouring to obtain a high premium for insurance, and then to secure themselves by getting the same risk insured at a lower rate. The learned judge seems to have mistaken a double insurance for a re-assurance; a double insurance is where the owner insures his goods twice or *several times over*, with different underwriters, which he may lawfully do. By which means he increases his security, and though he cannot recover more than a single satisfaction for his loss, yet he may bring his action against any one of the underwriters, and compel him to pay the whole extent of the interest insured. And this underwriter may afterwards recover from each of the rest a rateable satisfaction or apportionment of the sum which he has been obliged to pay to the assured. *Park, Inf.* 280.

Insurance is merely a contract of indemnification against loss, and cannot be made a mode of gaining a prize, where no loss has been sustained.

A person to whom Mr. Pitt was indebted insured his life to the amount of his debt; after Mr. Pitt's death, he was paid by his

sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bonâ fide* (and not colourably<sup>1</sup>) put in jeopardy, no inequality of price will make it an usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity. To throw however some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute 17 Geo. III. c. 26. has directed, that upon the sale of any life annuity of more than the value of ten pounds *per annum* (unless on a sufficient pledge of lands in fee-simple (17) or stock in the public funds) the true consideration, which shall be in money only, shall be set forth and described in the security itself (18); and a memorial of the

<sup>1</sup> Carth. 67.

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executors, and in an action against the insurers, the court of king's bench held that he could not recover, and that no action can be brought for indemnity, where, upon the whole event, no damage has been sustained. 9 *EqB*, 72.

(17) In fee-simple or fee-tail, in possession, of an annual value equal to the annuity.

(18) The consideration may either be in money or notes, if they are paid when they become due, but they must be particularly specified in the memorial. 3 *T. R.* 298. 6 *T. R.* 690. Bank notes are



date of the security, of the names of the parties, *cestuy que trusts*, *cestuy que vies*, and witnesses, and of the consideration money, shall within twenty days after its execution be enrolled in the court of chancery; else the security shall be null and void: and, in case of collusive practices respecting the consideration, the court, in which any action is brought or judgment obtained upon such collusive security, may order the same to be cancelled, and the judgment (if any) to be vacated: and also all contracts for the purchase of annuities from infants shall remain utterly void, and be incapable of confirmation after such infants arrive to the age of maturity. But to return to the doctrine of common interest on loans: [ 462 ]

UPON the two principles of inconvenience and hazard, compared together, different nations have, at different times, established different rates of interest. The Romans at one time allowed *centesimae*, one per cent. monthly, or *twelve per cent. per annum*, to be taken for common loans; but Justinian<sup>m</sup> reduced it to *trientes*, or one

<sup>m</sup> *Cod.* 4. 32. 26. *Nov.* 33, 34, terms, and of the division of the Roman *as*, will be useful to the student, not

are considered in this case as money. *Ib.* 554. But the dates and times of payment of country bank-notes must be stated in the memorial. 1 *Bof.* 208. The grant of the annuity will be void if the consideration is partly money, and partly a debt for the sale of goods; for one great abuse intended to be corrected by the statute was a pretended advance of money by a fraudulent sale of goods. 1 *T. R.* 732.

A debt for money lent, or advanced for the use of the grantor, is a sufficient consideration for the grant of an annuity. 7 *T. R.* 551. Annuities granted without a pecuniary consideration, as in consideration of the grantee's resigning his business in favour of the grantor, are excepted in the statute, and need not be registered. 4 *T. R.* 790. The deed must express by whom the consideration was paid, or it will be absolutely void. 7 *T. R.* 390. If there be a clause of redemption in the deed, it must be inserted also in the memorial. 7 *T. R.* 205.

third of the *as* or *centesima*, that is, *four per cent.*; but allowed higher interest to be taken of merchants, because there the hazard was greater. So too Grotius in [ 463 ] forms us<sup>n</sup>, that in Holland the rate of interest was then eight *per cent.* in common loans, but twelve to merchants. And lord Bacon was desirous of introducing a similar policy in England<sup>o</sup>: but our law establishes one standard for all alike,

not only for understanding the civilians, perpetually refer to this distribution. but also the more classical writers, who Thus Horace, *ad Pisones*, 325.

*Romani pueri longis rationibus affem*

*Discunt in partes centum diducere. Dicat*

*Filius Albini, si de quincunce remota est*

*Uncia, quid superet? poterat dixisse, triens; eu,*

*Rem poteris servare tuam! redit uncia, quid fit?*

*Semis. ———*

It is therefore to be observed, that in calculating the rate of interest, the Romans divided the principal sum into an hundred parts, one of which they allowed to be taken monthly; and this, which was the highest rate of interest permitted, they called *usurae centesimae*, amounting yearly to twelve *per cent.* Now as the *as*, or Roman pound, was commonly used to express any integral sum, and was divisible into twelve parts or *unciae*, therefore these twelve monthly payments or *unciae* were held to amount annually to one pound, or *as usurarius*; and so the *usurae asses* were synonymous to the *usurae centesimae*. And all lower rates of interest were denominated

according to the relation they bore to this centesimal usury, or *usurae asses*: for the several multiples of the *unciae*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *sextans*, *quadrans*, *triens*, *quincunx*, *semis*, *septunx*, *bes dodrans*, *dextans*, *deunx*, containing respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, *unciae*, or duodecimal parts of an *as*. [*Ff.* 28. 5. 50. § 2. *Gravin. orig. jur. civ. l. 2. § 47.*] This being premised, the following table will clearly exhibit at once the subdivisions of the *as*, and the denominations of the rate of interest.

USURAE.	PARTES ASSIS.	PER ANNUM.
<i>Asses, sive centesimae</i> ———	<i>integer</i> ———	12 <i>per cent.</i>
<i>Decunces</i> ———	$\frac{11}{12}$ ———	11
<i>Dextantes, vel decunces</i> ———	$\frac{10}{12}$ ———	10
<i>Dodrans</i> ———	$\frac{9}{12}$ ———	9
<i>Besses</i> ———	$\frac{8}{12}$ ———	8
<i>Septunces</i> ———	$\frac{7}{12}$ ———	7
<i>Semisses</i> ———	$\frac{6}{12}$ ———	6
<i>Quincunces</i> ———	$\frac{5}{12}$ ———	5
<i>Trientes</i> ———	$\frac{4}{12}$ ———	4
<i>Quadrantes</i> ———	$\frac{3}{12}$ ———	3
<i>Sextantes</i> ———	$\frac{2}{12}$ ———	2
<i>Unciae</i> ———	$\frac{1}{12}$ ———	1

<sup>n</sup> *De jur. b. c.* p. 2. 12. 22.

<sup>o</sup> *Essays*, c. 41.

where

where the pledge of security itself is not put in jeopardy; left, under the general pretence of vague and indeterminate hazards, a door should be opened to fraud and usury: leaving specific hazards to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia*, or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9. confined interest to ten *per cent.*, and so did the statute 13 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so under her successor the statute 21 Jac. I. c. 17. reduced it to eight *per cent.*; as did the statute 12 Car. II. c. 13. to six: and lastly by the statute 12 Ann. st. 2. c. 16. it was brought down to five *per cent.* yearly, which is now the extremity of legal interest that can be taken (19). But yet, if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made<sup>p</sup>. Thus Irish, American, [ 464 ] Turkish, and Indian interest, have been allowed in our courts to the amount of even twelve *per cent.*: for the moderation or exorbitance of interest depends upon local cir-

<sup>p</sup> 1 Equ. Caf. Abr. 289. 1 P. Wms. 395.

(19) This statute not only makes the lender liable to a penalty of treble the amount of the sum lent, but it declares all usurious bonds, contracts, and assurances, absolutely void. If therefore a bill of exchange, or note, is given in consequence of an usurious contract, it is absolutely void in the hands of an innocent person, who has taken it in the regular and fair course of business, without any notice of the usury; and evidence of the usury will be a good defence, in an action brought upon such a bill or note, against the drawer, acceptor, or any indorser. This is a very hard case; and the law is the same if a bill or note be given for a gaming debt, or for money lent to game with. *Doug.* 708. See further upon usury in the 4th vol. p. 156.

cumstances; and the refusal to enforce such contracts would put a stop to all foreign trade (20). And, by statute 14 Geo. III. c. 79. all mortgages and other securities upon estates or other property in Ireland or the plantations, bearing interest not exceeding *six per cent.* shall be legal; though executed in the kingdom of Great Britain; unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home under colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed.

4. THE last general species of contracts, which I have to mention, is that of *debt*; whereby a *chose* in action, or right to a certain sum of money, is mutually acquired and lost<sup>9</sup>. This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that

<sup>9</sup> F. N. B. 119.

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(20) By the 13 Geo. III. c. 63. s. 30. no subject of his majesty in the East Indies shall take more than *12 per cent.* for the loan of any money or merchandize for a year, and every contract for more is declared void; and he who receives more shall forfeit treble the value of the money or merchandize lent, with costs, one moiety to the East-India company, and the other moiety to him who sues in the courts in India. If no such prosecution within three years, the party aggrieved may recover what he has paid above *12 per cent.*

If the informer shall compound the suit before the defendant's answer, or afterwards without leave of the court, he shall be liable upon conviction to be fined and imprisoned at the discretion of the court. Sec. 21.

he should execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract in short whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisition; being usually divided into debts of *record*, debts by [ 465 ] *special*, and debts by *simple* contract.

A DEBT of *record* is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature. Debts upon recognizance are also a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like: and these, together with statutes merchant and statutes staple, &c. if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, *viz.* debts of record; since the contract, on which they are founded, is witnessed by the highest kind of evidence, *viz.* by matter of record.

DEBTS by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation; which last we took occasion to explain in the twentieth chapter of the present book; and then shewed that it is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition there-

unto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

DEBTS by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at: and the rest, to avoid repetition, must be referred to those particular heads in the third book of these Commentaries, where the breach of such contracts will be considered. I shall only observe at present, that by the statute 29 Car. II. c. 3. no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement or some memorandum thereof be in writing, and signed by the party himself, or by his authority. (21)

BUT there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

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(21) See 3 vol. page 159.

A *BILL of exchange* is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account ; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in England, 1000*l.*, now if C. be going from England to Jamaica, he may pay B. this 1000*l.* and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C. ; who carries over his money in paper credit, without danger of robbery or loss. This [ 467 ] method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices ; in order the more easily to draw their effects out of France and England into those countries in which they had chosen to reside. But the invention of it was a little earlier ; for the Jews were banished out of Guienne in 1287, and out of England in 1290<sup>r</sup> ; and in 1236 the use of paper credit was introduced into the Mogul empire in China<sup>s</sup>. In common speech such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person, however, who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee* ; and the third person, or negotiator, to whom it is payable (whether especially named, or the *bearer* generally) is called the *payee*.

THESE bills are either *foreign*, or *inland* ; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa* ; and *inland*, when both the drawer and the drawee reside within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the

<sup>r</sup> 2 Carte. Hist. Eng. 203. 206.

<sup>s</sup> Mod. Un. Hist. iv. 499.

law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 W. III. c. 17. the other 3 & 4 Ann. c. 9. inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such<sup>t</sup>, being by those statutes expressly enacted with regard to the other. So that now there is not in law any manner of difference between them. (21)

PROMISSORY notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also, by the same statute 3 & 4 Ann. c. 9. are made assignable and indorsable in like manner as bills of exchange. But, by statute 15 Geo. III. c. 51. all promissory or other notes, [ 468 ] bills of exchange, drafts, and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared to be null and void; and it is made penal to utter or publish any such; they being deemed prejudicial to trade and public credit. And by 17 Geo. III. c. 30. all such notes, bills, drafts, and undertakings, to the amount of twenty shillings, and less than five

<sup>t</sup> Roll. Abr. 6.

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(21) One very important distinction between foreign and inland bills of exchange still remains unaltered by the statutes; *viz.* in a foreign bill, in order to recover against the drawer or indorsers, it is necessary that the bill should be protested for non-acceptance or non-payment, 5 *T. R.* 239. ; but a protest is not necessary upon an inland bill, to enable the holder to recover the amount of it against the drawer or indorsers; and the only advantage of a protest upon an inland bill is to give the holder a right to recover interest and expenses incurred by the non-acceptance or non-payment. *Ld. Raym.* 993. No inland bill, payable at or after sight, can be protested; or which is not drawn payable at some time after date. 4 *T. R.* 170.

pounds,



pounds, are subjected to many other regulations and formalities; the omission of any one of which vacates the security, and is penal to him that utters it. (22)

THE payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, *viz.* that, provided the drawee does not pay the bill, the drawer will : for which reason it is usual in bills of exchange to express that the *value* thereof hath been *received* by the drawer <sup>u</sup> ; in order to shew the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man ; contrary to the general rule of the common law, that no *chose* in action is assignable : which assignment is the life of paper credit. It may therefore be of some use to mention a few of the principal incidents attending this transfer or

<sup>u</sup> Stra. 1212.

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(22) Every note or bill of that value shall specify the name and place of abode of the payee ; it shall not be antedated, and shall be made payable within twenty-one days after date ; and every indorsement shall be made within that time, and shall be dated when and where made, and shall contain the name and place of abode of the indorsee. The penalty for not complying with the statute is from 5*l.* to 20*l.* at the discretion of a magistrate.

But by the 37 Geo. III. c. 32. these two statutes with respect to promissory notes and drafts, payable on demand to bearer, are suspended. And by 37 Geo. III. c. 61. if any person shall issue such notes or drafts for less than five pounds, and shall fail to discharge them within seven days after payment is demanded by the holder, then a complaint may be made to a justice of peace, who may order what is due to be paid with costs, and, upon failure of compliance with his order, he may by his warrant cause the same to be levied by distress of the party's goods.

The bank of England was enabled to issue small notes by the 37 Geo. III. c. 28.

assignment,

assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

IN the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by indorsement, or writing his name in *dorso*, or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to [ 469 ] another, and so on *in infinitum*. And a promissory note, payable to A. or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it<sup>v</sup>. But, in case of a bill of exchange, the payee, or the indorsee, (whether it be a general or particular indorsement,) is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill (23). If the drawee accepts the bill, either verbally or in writing<sup>w</sup>, he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20l. or upwards, and expressed to be for value received, the payee or indorsee may protest it for *non-acceptance*; which protest

<sup>v</sup> 2 Show. 235.—Grant *v.* Vaughan. T. 4 Geo. III. B. R.

<sup>w</sup> Stra. 1000.

(23) It is fully settled, that a verbal acceptance will bind the drawee. *Str.* 1000. Yet it appears from the statutes, which are very far from being so intelligible as the importance of the subject demanded, that if the drawee refuses to accept in writing, the bill may be protested for non-acceptance. 3 & 4 Ann. c. 9. f. 4. But if a verbal acceptance is received by the holder, the bill cannot afterwards be protested for non-payment, so as to charge the drawer with costs, damages, and interest, in consequence of the protest. f. 5.

But a promise to accept a bill before it is drawn does not amount to an acceptance of it when it is drawn. 1 *Easf.* 98.

must

must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after (24), be given to the drawer.

BUT, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (25), (which three days are called days of grace,) the payee or indorsee is then to get it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of

(24) See note 26.

(25) A bill or note is not now considered due or demandable till the last day of the three days' grace; as if a bill or note is dated on the 12th of any month, and made payable ten days, one week, or one month after date, payment must be demanded on the 25th, the 22d of the same, and on the 15th of the next month respectively. But if the third day of grace falls on a Sunday, the bill or note is payable and due on the Saturday preceding; and by 39 & 40 Geo. III. c. 42. if payable on Good Friday, they are due the day before, as they are when they become due on a Sunday or on a Christmas day. Days of grace are allowed upon promissory notes, in like manner as upon bills of exchange. 4 T. R. 148.

A promissory note made payable to A. without adding *or to his order, or to bearer*, though not negotiable, is a note within the statute, and the three days of grace must be allowed upon it. 6 T. R. 123.

A bill or note must be drawn upon a proper stamp, and if it be drawn upon a greater stamp than the statutes require, it cannot be received in evidence; but the plaintiff may recover as for so much money lent or advanced, if he can prove the defendant's promise to pay, or the consideration received by him from the plaintiff, independently of the imperfect note. 1 East, 55.

non-acceptance, or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills, (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law<sup>x</sup>) but also interest and all charges, to be computed from the time of making such protest. But if no protest be made [ 470 ] or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be : for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid : since it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time : when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee<sup>y</sup> (26).

<sup>x</sup> Lord Raym. 993.

<sup>y</sup> Salk. 127.

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(26) It is probable, when the statute 9 & 10 W. III. c. 17. was passed, which requires notice of a protest to be sent within fourteen days, that such time was thought a reasonable notice of the bill's being dishonoured : but it is now fully settled, that if the holder of a bill intends to have his remedy against the drawer or indorser, he must give him notice without delay of the non-acceptance or non-payment, and that he expects payment from him. It used to be held, that the reasonableness of the notice was a question of fact for the jury to determine ; but it is now so far a question of law, that the courts will grant new trials, till the jury adopt the rule which they have established : which seems to be this, *viz.* that notice must be given to the drawer or indorser by the first or next post, if the time will permit, after the dishonour of the bill. 1 *T. R.* 168. *Doug.* 497. It might perhaps be more convenient to extend the rule till the post goes out on the next day, as this would cut off all questions and litigation upon the possibility of giving notice on the same day. But if notice is not given by the first post,

IF the bill be an indorfed bill, and the indorfee cannot get the drawee to difcharge it, he may call upon either the drawer or the indorfer, or if the bill has been negotiated through many hands, upon any of the indorfers; for each indorfer is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorfer, as of the drawer. And if fuch indorfer, fo called upon, has the names of one or more indorfers prior to his own, to each of whom he is properly an indorfee, he is alfo at liberty to call upon any of them to make him fatisfaction; and fo upwards. But the firft indorfer has nobody to refort to, but the drawer only (27).

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poft, it muft at the fartheft be fent by the poft of the fucceeding day. 6 *Eaft*, 3. The drawer and indorfers are difcharged, without fuch due notice, from all aétions brought upon the bill; with this exception, if the holder can prove that the drawer had no effects in the hands of the drawee when the bill was difhonoured, he may ftill recover againft the drawer, though he omitted to give him notice. For the intent of the notice is to give him the earlieft opportunity of regaining his property out of the hands of the drawee; and he can fuftain no poffible injury by the want of notice, when he has no property in the drawee's poffeffion. 1 *T. R.* 712. But this reafon does not extend to an indorfer; and therefore the circumftance of the drawee's having no effects is immaterial in an aétion againft him. *Ib.*

So if a bill of exchange is difhonoured by non-acceptance or non-payment, if the holder intends to proceed againft a prior indorfer, he muft give him immediate notice. But if the payee in a promiffory note has given no value for it, then in an aétion againft him by the holder, it is not neceffary to prove that payment was demanded of the drawer at the time it was due, or that notice was given him of the drawer's refufal to pay.

For from the omiffion of thefe circumftances fuch a payee can fuftain no lofs. 2 *Hen. Bl.* 336. Proof that a letter was put into the poft-office in due time directed to the party, containing an account of the difhonour of a note or bill, is fufficient evidence of notice. 2 *Hen. Bl.* 509. But the holder muft remember that this cannot be proved by his own teftimony.

(27) The holder of the bill may bring aétions againft the acceptor,

WHAT has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another ; only that, in this case, as there is no drawee, there can be no protest for non-acceptance ; or rather the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsers.

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ceptor, drawer, and all the indorsers at the same time ; but though he may obtain judgments in all the actions, yet he can recover but one satisfaction for the value of the bill ; but he may sue out execution against all the rest for the costs of their respective actions. *Bayley, 43.*

## CHAPTER THE THIRTY-FIRST.

## OF TITLE BY BANKRUPTCY.

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. BANKRUPTCY ; a title which we before lightly touched upon <sup>a</sup>, so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us therefore first of all consider, 1. *Who* may become a bankrupt : 2. What *acts* make a bankrupt : 3. The *proceedings* on a commission of bankrupt : and 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.

1. WHO may become a bankrupt. A bankrupt was before <sup>b</sup> defined to be “ a trader, who secretes himself, or does “ certain other acts, tending to defraud his creditors.” He was formerly considered merely in the light of a criminal or offender <sup>c</sup> (1) ; and in this spirit we are told by Sir Edward

<sup>a</sup> See page 285.

<sup>c</sup> Stat. 1 Jac. I. c. 15. § 17.

<sup>b</sup> *Ibid.*

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(1) Throughout the three first statutes the bankrupt is uniformly called an offender, and the original design of the bankrupt

Coke<sup>d</sup>, that we have fetched as well the name, as the wicked-  
 [ 472 ] nefs, of bankrupts from foreign nations<sup>e</sup>. But at present  
 the laws of bankruptcy are confidered as laws calculated  
 for the benefit of trade, and founded on the principles of  
 humanity as well as justice: and to that end they confer  
 fome privileges, not only on the creditors, but alfo on the  
 bankrupt or debtor himfelf. On the creditors, by compelling  
 the bankrupt to give up all his effects to their ufe, with-  
 out any fraudulent concealment: on the debtor, by exempt-  
 ing him from the rigor of the general law, whereby his  
 perfon might be confined at the difcretion of his creditor,  
 though in reality he has nothing to fatisfy the debt: whereas  
 the law of bankrupts, taking into confideration the fudden  
 and unavoidable accidents to which men in trade are liable,  
 has given them the liberty of their perfons, and fome pecu-

<sup>d</sup> 4 Infl. 277.

<sup>e</sup> The word itfelf is derived from the  
 word *bancus* or *banque*, which fignifies  
 the table or counter of a tradesman,  
 (Dufrefne, I. 969.) and *ruptus*, broken;  
 denoting thereby one whole fhop or  
 place of trade is broken and gone;  
 though others rather choofe to adopt  
 the word *route*, which in French fignifies

a trace or track, and tells us that a bank-  
 rupt is one who hath removed his  
 banque, leaving but a trace behind.  
 (4 Infl. 277.) And it is obfervable that  
 the title of the firft Englifh ftatute con-  
 cerning this offence, 34 Hen. VIII. c. 4.,  
 “ againft fuch perfons as do make bank-  
 rupt,” is a literal tranflation of the  
 French idiom, *qui font banque route*.

laws appears to have been to prevent and defeat the frauds of cri-  
 minal debtors; for the 34 & 35 Hen. VIII. c. 4., the firft bankrupt  
 ftatute, begins with this preamble: — “ Whereas divers and fundry  
 “ perfons, craftily obtaining into their hands great fubftance of other  
 “ men’s goods, do fuddenly flee to parts unknown, or keep their  
 “ houfes, not minding to pay or reftore to any their creditors their  
 “ debts and duties, but at their own wills and pleafures confume  
 “ the fubftance obtained by credit of other men, for their own  
 “ pleafure and delicate living, againft all reafon, equity, and good  
 “ confcience.” The bankrupt being deemed an offender, and being  
 completely divested of the difpofition of his property, thefe ftatutes  
 at the firft would naturally be confidered penal ftatutes; for this  
 reafon I prefume the 21 Jac. I. c. 19. begins by declaring that  
 “ the aforefaid ftatute fhall be largely and beneficially conftrued  
 “ and expounded for the aid and relief of the creditors.”



niary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

IN this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body in pieces, and each of them take his proportionable share: if indeed that law, *de debitore in partes secando*, is to be understood in so very butcherly a light; which many learned men have with reason doubted<sup>f</sup>. Nor do I mean those less inhuman laws (if they may be called so, as *their* meaning is indisputably certain) of imprisoning the debtor's person in chains; subjecting him to stripes and hard labour, at the mercy of his rigid creditors; and sometimes selling him, his wife and children, to perpetual foreign slavery, *trans Tiberim*<sup>g</sup>: an oppression which produced so many popular insurrections, and secessions to the *mons sacer*. But [ 473 ] I mean the law of *cession*, introduced by the christian emperors; whereby if a debtor *ceded*, or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciatu semoto*"<sup>h</sup>. For, as the emperor justly observes<sup>i</sup>, "*inhumanum erat spoliatum fortunæ suis in solidum damnari*." Thus far was just and reasonable: but, as the departing from one extreme is apt to produce it's opposite, we find it afterwards enacted<sup>k</sup>, that if the debtor by any unforeseen accident was reduced to low circumstances, and would *swear* that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law, which under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

<sup>f</sup> Taylor, *Comment. in L. decemviral.* Bynkerth. *Observ. Jur. I.* 1. Heinecc. *Antiq. III.* 30. 4.

<sup>g</sup> In Pegu and the adjacent countries in East India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children; insomuch that he may even violate with impunity

the chastity of the debtor's wife, but then, by so doing, the debt is understood to be discharged. (Mod. Un. Hist. vii. 128.)

<sup>h</sup> *Cod.* 7. 71. *per tot.*

<sup>i</sup> *Infl.* 4. 6. 40.

<sup>k</sup> *Nov.* 135. c. 1.

THE laws of England, more wisely, have steered in the middle between both extremes : providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up ; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors ; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders* ; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes : for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one [ 474 ] in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor : and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides : the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortunes therefore of debtors, the law has given a compassionate remedy, but denied it to their faults : since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared that no one shall

shall be capable of being made a bankrupt, but only a *trader*; nor capable of receiving the full benefit of the statutes, but only an *industrious* trader.

THE first statute made concerning any English bankrupts, was 34 Hen. VIII. c. 4., when trade began first to be properly cultivated in England (2): which has been almost totally altered by statute 13 Eliz. c. 7., whereby bankruptcy is confined to such persons only as have *used the trade of merchandize*, in gross or by retail, by way of bargaining, exchange, rechange, bartering, chevifance<sup>1</sup>, or otherwise; or have *sought their living by buying and selling*. And by statute 21 Jac. I. c. 19., persons using the trade or profession of a *scrivener*, receiving other men's monies and estates into their trust and custody, are also made liable to the statutes of bankruptcy: and the benefits as well as the penal parts of the law, are extended as well to *aliens* and *denizens* as to [ 475 ] natural-born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives (3). By many subsequent statutes, but

<sup>1</sup> That is, making contracts. (Dufresne, II. 569.)

(2) But that statute extended to persons of every denomination who came under the description of the preamble, which see in the preceding note (1). By that statute the chief officers of state, the chief justices, the privy council, or three of them at the least, had the authority which is now given to the commissioners of bankrupt, to distribute the bankrupt's property among his creditors. It is something remarkable, that, although the subsequent statutes describe what traders shall be bankrupts, and the conduct which renders them subject to the bankrupt laws, and give commissioners appointed by the chancellor authority over *such persons*, yet I have no where found any negative words, or words to repeal this stat. of Henry VIII. The authority in that statute is left to the discretion of the high persons therein named; and as the object was supposed, as I conceive, to have been sufficiently answered by the subsequent statutes, it fell into entire disuse.

(3) Any person, whether native, denizen, or alien, who trades to England, although he never resides here as a trader, may be a

lastly by statute 5 Geo. II. c. 30.<sup>m</sup>, *bankers, brokers, and factors*, are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I., *viz.* for the relief of their creditors; whom they have otherwise more opportunities of defrauding than any other set of dealers, and they are properly to be looked upon as traders, since they make merchandize of money, in the same manner as other merchants do of goods and other moveable chattels. But by the same act<sup>n</sup>, no *farmer, grazier, or drover*, shall (as such) be liable to be deemed a bankrupt (4): for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral object: their chief concern being to manure and till the ground, and make the best advantage of its produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others, for the payment of their reserved rents; wherefore also, upon a similar reason, a *receiver of the king's taxes* is not capable<sup>o</sup>, as such, of being a bank-

<sup>m</sup> § 39.<sup>n</sup> § 40.<sup>o</sup> § *ead.*

bankrupt, if he should come to England and commit an act of bankruptcy whilst he is here. *Cocop.* 398.

(4) Although a farmer, grazier, and drover, cannot from their respective occupations alone be bankrupts, yet if they buy and sell, or are dealers, independently of these characters, they become, like other traders, subject to the bankrupt laws: as, one farmer was declared a bankrupt, who bought large quantities of potatoes, not for planting or consuming upon his farm, but for selling again for profit, 1 *Str.* 513.: and another, who occasionally bought horses, not for the use of his farm, but to make a profit of by reselling. 1 *T. R.* 517. A farmer, who makes upon his farm bricks for sale, from earth not taken from the farm, may be a bankrupt. 1 *Bro.* 173. But where a man rented a farm, wherein there was a brick-ground, upon which he dug the clay and manufactured bricks for sale, the court of common pleas decided he could not be a bankrupt; but this judgment was afterwards

rupt; lest the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative. By the same statute <sup>p</sup>, no person shall have a commission of bankrupt awarded against him, unless at the petition of some *one* creditor, to whom he owes 100*l.*; or of *two*, to whom he is indebted 150*l.*; or of *more*, to whom altogether he is indebted 200*l.* For the law does not look upon persons, whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statute themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects.

IN the interpretation of these several statutes, it hath been [ 476 ] held, that buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelihood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or in one general word, a *chapman*, who is one that buys and sells any thing. But no handicraft occupation (where nothing is bought and sold, and where therefore an extensive credit, for the stock in trade, is not necessary to be had) will make a man a regular bankrupt; as that of a husbandman, a gardener, and the like, who are paid for their work and labour <sup>q</sup>. Also an innkeeper cannot, as such, be a bankrupt <sup>r</sup> (5): for his gain or livelihood does not arise from buy-

<sup>p</sup> § 23.

<sup>r</sup> Cro. Car. 549. Skinn. 291.

<sup>q</sup> Cro. Car. 31.

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afterwards reversed by the court of king's bench. 1 *T. R.* 32. *Cooke*, 52. 3d edit.

(5) An innkeeper may be a bankrupt, if he sell liquor out of his house to all persons who send for it, however inconsiderable the quantity, or small his profit. 1 *T. R.* 517. And by this species of dealing, it is probable that all innkeepers are now traders, and liable to be made bankrupts.

In other cases, however small the dealing of a trader may be, if he has a general intention to carry on the business to an extent

ing and felling in the way of merchandize, but greatly from the use of his rooms and furniture, his attendance and the like; and though he may buy corn and victuals, to sell again at a profit, yet that no more makes him a trader, than a schoolmaster or other person is, that keeps a boarding-house, and makes considerable gains by buying and selling what he spends in the house; and such a one is clearly not within the statutes<sup>s</sup>. But where persons buy goods, and make them up into saleable commodities, as shoemakers, smiths, and the like; here, though part of the gain is by bodily labour, and not by buying and selling, yet they are within the statutes of bankrupts<sup>t</sup>: for the labour is only in melioration of the commodity, and rendering it more fit for sale.

ONE single act of buying and selling will not make a man a trader; but a repeated practice, and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt, they not being goods, wares, or merchandize, within the intent of the statute, by which a profit may be fairly made<sup>u</sup>. Neither will buying and selling under particular restraints, or for particular purposes; as if [ 477 ] a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not thereby made a trader within the statutes<sup>w</sup>. An infant, though a trader, cannot be made a bankrupt; for an infant can owe nothing but for necessaries; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts, which he is not liable at law to pay<sup>x</sup>. But a feme-covert in London, being a sole

<sup>s</sup> Skinn. 292. 3 Mod. 330.

<sup>w</sup> Salk. 110. Skinn. 292.

<sup>t</sup> Cro. Car. 31. Skinn. 292.

<sup>x</sup> Lord Raym. 443.

<sup>u</sup> 2 P. Wms. 308.

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proportionate to his means, it seems a sufficient trading to support a commission of bankrupt.

trader

trader according to the custom, is liable to a commission of bankrupt<sup>y</sup> (6).

2. HAVING thus considered who may, and who may not, be made a bankrupt, we are to inquire, secondly, by what *acts* a man may become a bankrupt. “A bankrupt is a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.” We have hitherto been employed in explaining the former part of this description, “a trader;” let us now attend to the latter, “who secretes himself, or does certain other acts tending to defraud his creditors.” And, in general, whenever such a trader, as is before described, hath endeavoured to avoid his creditors, or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. For in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon. [ 478 ] Among these may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors<sup>z</sup> (7). 2. Departing from his own house, with intent

<sup>y</sup> *La Vie v. Philips*, M. 6 Geo. III. B. R.

<sup>z</sup> Stat. 13 Eliz. c. 7.

(6) But if a single woman carries on a trade, and commits an act of bankruptcy, she cannot after marriage be made a bankrupt. *Cooke*, 40. 2 *Bro.* 266.

(7) The statute 1 Jac. I. c. 15. declares, that departing from the realm, departing from the dwelling-house, keeping-house, &c.  
“to

to secrete himself, and avoid his creditors<sup>a</sup>. 3. Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause; which is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law<sup>b</sup> (8). 4. Pro-

<sup>a</sup> *Ibid.* 1 Jac. I. c. 15.

<sup>b</sup> Stat. 13 Eliz. c. 7.

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“to the intent *or whereby* his creditors may be defeated or “laid” payment of their debts, are acts of bankruptcy. The court of king’s bench have lately construed *or whereby* to signify *and whereby*. So to constitute an act of bankruptcy the trader must *depart from, or keep, his house* with an intent to delay payment, and during his absence a creditor must be delayed. *Fowler v. Paget*, 7 T. R. 510. 5 T. R. 575. The former construction, *viz.* that, if a creditor was denied payment whilst a merchant had left his house, though with no intent to delay payment, the merchant became a bankrupt, could never be the intention of the legislature.

But in *Robertson v. Liddel*, 9 East, 487., all the preceding cases were fully considered, and the court of king’s bench decided that the words *or whereby*, have the same meaning as the words *to the intent*, and that the acts done with intent of delaying creditors are sufficient, although no creditor calls for payment.

(8) A denial that the trader is at home, when in fact he is, by his order or approbation, to a creditor or his servant, who comes to demand payment of a debt, is *prima facie*, and is generally admitted evidence of this act of bankruptcy; yet if the denial were made not to delay payment, but for some other cause, as sickness, company, business, or the unreasonableness of the hour, it does not amount to an act of bankruptcy. All the acts of bankruptcy being voluntary acts in the bankrupt, except lying in prison for two months, or neglecting to make satisfaction within the same time after service of legal process, where the trader has privilege of parliament, which acts of bankruptcy may be compulsory and unavoidable; the consequence is, that most bankruptcies are previously concerted by the trader and some of his creditors; yet it is held, if any creditor, who has concerted the bankruptcy with the trader, comes or sends for payment, and a denial is made, this is not an act of bankruptcy; for the trader cannot be said to keep



curing or suffering himself willingly to be arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise deemed an attempt to defraud his creditors<sup>c</sup>.

5. Procuring his money, goods, chattels, and effects to be attached or sequestered by any legal process; which is another plain and direct endeavour to disappoint his creditors of their security<sup>d</sup> (9). 6. Making any fraudulent conveyance to a friend, or secret trustee, of his lands, tenements, goods, or chattels: which is an act of the same suspicious nature with the last<sup>e</sup> (10). 7. Procuring any protection,

<sup>c</sup> *Ibid.* 1 Jac. I. c. 15.

<sup>e</sup> Stat. 1 Jac. I. c. 15.

<sup>d</sup> Stat. 1 Jac. I. c. 15.

keep house to delay a creditor, who sends not for payment, but for refusal of payment. But if any other creditor, who is not privy to this agreement and design, sends for payment, and a denial is made, this is a complete act of bankruptcy. *Cooke*, 93.

(9) A fraudulent judgment and execution, though void against creditors, do not constitute an act of bankruptcy; the words in the statute 1 Jac. I. c. 15. signify the peculiar manner of carrying on suits in London and some other places. *Cowp.* 427.

(10) A fraudulent conveyance or sale of goods by a trader, is not an act of bankruptcy, unless it is by deed. 4 *Burr.* 2478. A grant or assignment of all a trader's property is an act of bankruptcy. *Doug.* 282. And even an assignment by a trader of all his property in trust for his creditors, is an act of bankruptcy, unless they all concur, being contrary to the policy of the bankrupt laws. But the creditors who are parties, or assenting to such an assignment, cannot avail themselves of it, and establish it as an act of bankruptcy. *Cooke*, 108. 2 *T. R.* 594. A conveyance by deed of part of the effects, if made in contemplation of bankruptcy, is also an act of bankruptcy. *Doug.* 86. But where there is a conveyance without deed, or a payment of money, or any preference is given, although to a *bonâ fide* and meritorious creditor, upon the eve and expectation of bankruptcy, this is a fraud against the bankrupt laws, and may after bankruptcy be avoided by the assignees, for the benefit of the creditors in general. *Cowp.* 127. 629.

Yet if such a preference to a particular creditor be not given voluntarily, but from an apprehension of legal process, it is not fraudulent, and cannot afterwards be vacated. 1 *T. R.* 155.

not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavour to elude the justice of the law<sup>f</sup>. 8. Endeavouring or desiring, by any petition to the king, or bill exhibited in any of the king's courts against any creditors, to compel them to take less than their just debts; or to procrastinate the time of payment originally contracted for; which are an acknowledgment of either his poverty or his knavery<sup>g</sup>. 9. Lying in prison for two months, or more, upon arrest or other detention for debt, without finding bail, in order to obtain his liberty<sup>h</sup> (11). For the inability to procure bail, argues a strong deficiency in his credit, owing either to his suspected poverty, or ill character; and his neglect to do it, if able, can arise only from a fraudulent intention; in either of which cases it is high time for his creditors to look [ 479 ] to themselves, and compel a distribution of his effects. 10. Escaping from prison after an arrest for a just debt of 100*l.* or upwards<sup>i</sup>. For no man would break prison that was able and desirous to procure bail; which brings it within the reason of the last case. 11. Neglecting to make satisfaction for any just debt to the amount of 100*l.* within two months after service of legal process, for such debt, upon any trader having privilege of parliament<sup>k</sup> (12).

<sup>f</sup> Stat. 21 Jac. I. c. 19.

<sup>g</sup> *Ibid.*

<sup>h</sup> *Ibid.*

<sup>i</sup> Stat. 21 Jac. I. c. 19.

<sup>k</sup> Stat. 4 Geo. III. c. 35.

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(11) In this case the act of bankruptcy relates back to the day upon which the arrest is made. 2 *T. R.* 143. But if a trader, upon being arrested, puts in bail, and afterwards surrenders himself in discharge of his bail, and lies two months in prison, the act of bankruptcy is committed on the day of the surrender. *Bull. N. P.* 38. The commission cannot issue before the end of the two months, as the petitioning creditor makes an affidavit that he believes the debtor has committed an act of bankruptcy. 8 *T. R.* 507.

(12) A member of either house of parliament, who engages in trade, is subject to the bankrupt laws, if he commits any act of bankruptcy;

THESE are the several acts of bankruptcy, expressly defined by the statutes relating to this title: which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction, or implication (13). And therefore sir John Holt held<sup>1</sup>, that a man's removing his goods privately to prevent their being seized in execution, was no act of bankruptcy. For the statutes mention only fraudulent gifts

<sup>1</sup> Lord Raym. 725.

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bankruptcy; but as the act of bankruptcy by an arrest is the only one which other traders can be compelled to commit, in order therefore to compel merchants, having privilege of parliament, either to discharge their debts, or to yield up their property to be equally distributed amongst their creditors, the 4 Geo. III. c. 33. enacts, that if any creditor or creditors, whose debt or debts would enable them to be petitioning creditors, shall serve any such merchant with process sued out as described by the statute, he shall be declared a bankrupt, unless within two months he compounds or pays the debt, or enters into a bond with two sureties, to be approved of by a judge of the court, to pay the sum recovered in the action with costs.

The statute 45 Geo. III. c. 124. provides still farther, that such merchant shall be adjudged a bankrupt unless he shall also, within two months after being served with the process, enter a common appearance in the court in which the action is brought. Such merchant may also be declared a bankrupt, if he does not obey an order of the court of chancery, or court of exchequer, to pay money, such order being made as directed by the statute.

(13) There is one act of bankruptcy besides those enumerated above by the learned Commentator, viz. If any bankrupt shall give or secure to the person who has sued out a commission, more in the pound than other creditors can receive, that commission shall be superseded, and this alone shall be an act of bankruptcy to support another commission. 5 Geo. II. c. 30. s. 24. And if a trader gives a satisfaction to a petitioning creditor, who has sued out a commission, which induces him not to prosecute it; this is held to be an act of bankruptcy which will support a second commission. *Cooke*, 120.

to third persons, and procuring them to be seized by sham process in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of those cases, cannot be adjudged an act of bankruptcy. So also it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy; for it is not within the description of any of the statutes, and there may be good reasons for his so doing, as suspicion of forgery, and the like: and if, in consequence of such refusal, he is arrested, and puts in bail, still it is no act of bankruptcy<sup>m</sup>: but if he goes to prison, and lies there two months, then, and not before, he is become a bankrupt (14).

WE have seen *who* may be a bankrupt, and what *acts* will make him so: let us next consider,

3. THE *proceedings* on a commission of bankrupt: so far as they affect the bankrupt himself. And these depend entirely on the several statutes of bankruptcy; all which I shall endeavour to blend together, and digest into a concise methodical order.

AND, first, there must be a *petition* to the lord chancellor by one creditor to the amount of 100*l.* or by two to the amount of 150*l.* or by three or more to the amount of 200*l.*; which debts must be proved by *affidavit*<sup>n</sup> (15):

<sup>m</sup> 7 Mod. 139.

<sup>n</sup> Stat. 5 Geo. II. c. 30.

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(14) Bankruptcy and insolvency, though frequently confounded in common discourse, yet are very different in the consideration of law. Bankruptcy can happen to no one who is not a trader, and every trader, by committing any of the acts already enumerated may be a bankrupt, though he may be worth one hundred thousand pounds after the payment of all his debts; and if a trader or merchant openly appears in his shop or counting-house, and tells his creditors, I cannot pay you, or I will not pay you, no commission can be sued out against him till he has done some act which the law denominates an act of bankruptcy.

(15) The petitioning creditor's debt must be a legal, not an equitable demand, and consequently the assignee of a bond cannot take

upon which he grants a *commission* to such discreet persons as to him shall seem good, who are then stiled commissioners

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take out a commission. If a debt is due from a partnership, it will be sufficient to support a separate commission against one partner only. The petitioning creditor's debt must be contracted, either before the bankrupt began, or before he left off, trade. If a note or bill is drawn before the act of bankruptcy, but indorsed without fraud afterwards, the indorsee has the same right to petition for and to prove it under the commission as the original payee. The holders of bonds, bills, notes, and other securities for the payment of money, or in consideration of goods sold upon credit, may petition for a commission, before such securities are due, by the 5 *Geo. II. c. 30. s. 22.* Lord Kenyon is of opinion that the statute extends to all agreements to pay at a fixed future day. See *Cull. 74.* But the court of king's bench have decided that the power of petitioning for a commission of bankrupt is confined to such creditors, where the debts are due at a day to come, as have *written securities* payable at a future day. 9 *Easf, 505.* It is necessary to support a commission and the proceedings under it, that the petitioning creditor's debt should have existed prior to any act of bankruptcy proved. See *Cooke, ch. ii.*

But if the petitioning creditor has a debt due to him less than 100*l.* at the time of the act of bankruptcy, and has a note indorsed to him afterwards, but due before the suing out the commission of bankrupt, making up more than 100*l.* this will be sufficient. 7 *T. R. 498.*

A debt by simple contract of more than six years' standing is sufficient to support a commission of bankruptcy. 5 *Burr. 2630.* An infant cannot be a petitioning creditor, because his bond to the great seal would be voidable. 3 *Vef. jun. 554.*

If a creditor takes his debtor in execution, he cannot afterwards sue out a commission against him for the same debt, for the execution is a *legal* satisfaction of that debt. 8 *T. R. 123.*

But if any other creditor has the bankrupt in execution before the suing out of the commission, if he is discharged by his certificate, or the creditor discharges him, the creditor may prove his debt under the commission; but if the creditor, after the suing out of the commission, takes the bankrupt in execution, he cannot afterwards resort to the commission, but he is bound by his election. *Cooke, 160.*

of bankrupt<sup>o</sup>. The petitioners, to prevent malicious applications, must be bound in a security of 200*l.* to make the party amends in case they do not prove him a bankrupt (16). And if, on the other hand, they receive any money or effects from the bankrupt, as a recompence for suing out the commission, so as to receive more than their rateable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commission is awarded and issued, the commissioners are to meet, at their own expence, and to take an oath for the due execution of their commission, and to be allowed a sum not

<sup>o</sup> 3 Stat. 13 Eliz. c. 7.

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(16) When a creditor intends to take out a commission, he must make an affidavit of his debt, and execute a bond to the great seal (this is called *striking a docket*); and if he does not get the commission sealed within four days, exclusive of the day upon which the docket is struck, any other creditor may sue out the commission. *Cooke, ch. i.* By an order of lord chancellor Loughborough, if the commission is to be executed in London, it shall be superfedable for want of prosecution at the expiration of fourteen days after the date thereof; and if it is to be executed in the country, at the expiration of twenty-eight days after the date thereof; and the first application by any solicitor on the day after the time limited for a superfedas and a new commission, shall be preferred to that of the solicitor who sued out the superfedable commission. 4 *Bro.* 432.

If a commission of bankrupt is sued out against any person maliciously or without just cause, he may afterwards petition the chancellor, and upon a representation of the circumstances of the injury, the chancellor may order a specific sum to be paid to him as a compensation by the petitioning creditor, and to enable him to recover it, may assign the bond to him; and the chancellor's assignment is conclusive evidence of the fraud and malice in an action at law brought upon the bond. 7 *T. R.* 300.

exceeding

exceeding 20s. *per diem* each at every sitting (17). And no commission of bankrupt shall abate, or be void, upon any demise of the crown<sup>p</sup>.

WHEN the commissioners have received their commission, they are first to receive proof of the person's being a trader, and having committed some act of bankruptcy (18); and

<sup>p</sup> Stat. 5 Geo. II. c. 30.

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(17) The three commissioners who attend the execution of a commission are allowed 20s. each for every meeting in that commission; and by a late order of the chancellor, they cannot adjourn the meeting to another hour on the same day, so as to entitle themselves to a fresh fee. They are allowed also 20s. each for every assignment and bargain and sale they execute, and the same for signing a certificate for a superfeetas, and the certificate of the bankrupt's conformity.

The statute only allows 20s. for each meeting, but as the commissioners used formerly to meet merely to examine a deed, or the proceedings upon which they granted a certificate, they are now allowed to take distinct fees for them, although they sign them at a meeting held for the proof of debts, choice of assignees, or any other purpose. These, with half a guinea if a commissioner acknowledges the bargain and sale in the court in which it is enrolled, are all the fees which the commissioners, either in London or the country, are justified in taking.

The reason of taking that fee for executing these instruments is this, *viz.* originally the three commissioners had a meeting to examine the deed or instrument.

(18) The first inquiry is the amount and nature of the petitioning creditor's debt. The petitioning creditor must attend in person before the commissioners, and must specify the time when the debt was contracted, and the particulars of it. The time ought to be specified in the deposition of the witness who proves the act of bankruptcy; for, upon the death of the witness after the proceedings are recorded, the deposition will be evidence in any court of justice. *Doug.* 244. The declarations of the party are evidence, but they are not alone sufficient to prove an act of bankruptcy; yet if his absconding or keeping house is proved by other evidence, his declarations at the time will be admitted to shew his reasons for it, and will thus complete the evidence of

then to declare him a bankrupt, if proved so; and to give notice thereof in the gazette, and at the same time to appoint three meetings. At one of these meetings an election must be made of assignees, or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; which assignees are to be [ 481 ] chosen by the major part, in value, of the creditors who shall then have proved their debts; but may be originally appointed by the commissioners, and afterwards approved or rejected by the creditors: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10*l*. And at the third meeting, at farthest, which must be on the forty-second day after the advertisement in the gazette (unless the time be enlarged by the lord chancellor (19),) the bankrupt, upon notice also personally served upon him, or left at his usual place of abode, must surrender himself personally to the

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the act of bankruptcy. The act of bankruptcy may be committed after the party has discontinued his trading. *Cooke*, 91, 92. Neither the trading nor act of bankruptcy can be proved by a creditor.

The petitioning creditor's debt must still be prior to the act of bankruptcy proved; but by the 46 Geo. III. c. 135. the commission shall not be avoided in consequence of an act of bankruptcy prior to the debt of the petitioning creditor, but unknown to him.

(19) The chancellor may order the time to be enlarged fifty days, to be computed from the day fixed for the meeting; but the order must be made six days before that day. The order is generally made upon a petition in the name of the bankrupt, and upon condition that he surrenders himself on the day appointed between the hours of ten and one in the morning. This order is never denied, where it is thought necessary to be at the expence of making the application.

If the bankrupt surrenders within the forty-two days, then the commissioners have the power to enlarge the time for his last examination as long as they shall think convenient, and within that enlarged time the bankrupt is protected from arrests. 8 *T. R.* 475. The bankrupt is privileged from arrest the whole of the forty-second day. 7 *Vef.* 317.



commissioners ; which surrender (if voluntary) protects him from all arrests till his final examination is past : and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy ; or, in default of either surrender or conformity, shall be guilty of felony without benefit of clergy, ~~and shall suffer death~~, and his goods and estate shall be distributed among his creditors <sup>q</sup>.

IN case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol, in order to be forthcoming to the commissioners ; who are also empowered immediately to grant a warrant for seizing his goods and papers <sup>r</sup>.

WHEN the bankrupt appears, the commissioners are to examine him touching all matters relating to his trade and effects. They may also summon before them, and examine, the bankrupt's wife <sup>s</sup>, and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them shall refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they submit themselves, and make and sign a full answer ; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler, permitting such person to escape, or go out of prison, shall forfeit 500*l.* to the creditors <sup>t</sup>.

THE bankrupt, upon this examination, is bound upon [ 482 ] pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same ; together with all books and writings relating thereto : and is to deliver up all in his own power to the commissioners (except the necessary apparel of him-

<sup>q</sup> Stat. 5 Geo. II. c. 30.

<sup>r</sup> *Ibid.*

<sup>s</sup> Stat. 21 Jac. I. c. 19.

<sup>t</sup> Stat. 5 Geo. II. c. 30.

self, his wife, and his children); or, in case he conceals or embezzles any effects to the amount of 20*l.*, or withholds any books or writings with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estates shall be divided among his creditors <sup>u</sup>. And unless it shall appear, that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment of such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off <sup>v</sup> (20).

AFTER the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent.* out of the effects so discovered, and such farther reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two-and-forty days, shall forfeit 100*l.* and double the value of the estate concealed, to the creditors <sup>w</sup>.

HITHERTO every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigour and severity. For if the bankrupt hath made an ingenuous discovery (of the truth and sufficiency of which there remains no reason to doubt), and hath conformed in all points to the directions of the law; and if, in

<sup>u</sup> Stat. 5 Geo. II. c. 30. By the laws of Naples, all fraudulent bankrupts, particularly such as do not surrender themselves within four days, are punished with death; also all who conceal the effects of a bankrupt, or set up a pretended debt to defraud his creditors. (Mod. Un. Hist. xxviii. 320.)  
<sup>v</sup> Stat. 21 Jac. I. c. 19.  
<sup>w</sup> Stat. 5 Geo. II. c. 30.

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(20) There are instances of convictions and executions of bankrupts for not surrendering, and for concealment of their effects; *Green*, 208.; but I never read of any prosecution for this offence.

consequence thereof, the creditors, or four parts in five of them in number and value, (but none of them creditors for less than 20*l.*) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals (21), and to transmit it to the lord chancellor, and he, or two of the judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same, or disallow it, upon cause shewn by any of the creditors of the bankrupt <sup>[ 483 ]</sup> <sup>x</sup>.

IF no cause be shewn to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one-half

<sup>x</sup> Stat. 5 Geo. II. c. 30.

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(21) The commissioners may, at their discretion, as well as the creditors, refuse to sign the certificate; but after it is signed by the commissioners, notice is to be given in the gazette that it will be allowed by the chancellor, unless cause is shewn to the contrary within twenty-one days. And if within that time any petition is presented by a creditor to the chancellor for that purpose, the allowance is stayed till the bankrupt can answer the allegations, and the chancellor has an opportunity of considering the validity of the objection. If the number of creditors is less than five, all must sign, as four-fifths of four are three and one-fifth of another; and wherever there is a fraction, of necessity a whole creditor must sign. And this is true of every other number not exactly divisible by five; as if the number of creditors is nineteen, they must all sign but three.

If any of the creditors is prevailed upon by the payment of a sum of money to sign the certificate, though unknown to the bankrupt, the certificate is void. 1 *Bof.* 95.

of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent.*; but if they pay ten shillings in the pound, he is to be allowed *five per cent.*; if twelve shillings and sixpence, then *seven and a half per cent.*: and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.*: provided that such allowance do not in the first case exceed 200*l.*, in the second 250*l.*, and in the third 300*l.*<sup>y</sup>

[ 484 ] BESIDES this allowance, he has also an indemnity granted him, of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts; and, for that among other purposes, all proceedings on commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate properly allowed shall be sufficient evidence of all previous proceedings<sup>z</sup> (22). Thus the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth: which is the rather to be expected, as he cannot be entitled to these benefits, unless his failures have been ow-

<sup>y</sup> Stat. 5 Geo. II. c. 30. By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. (*Ff.* 42, 3, 4.) But this did not extend to such allowance as was left to him on the score of compassion for the

maintenance of himself and family. *Si quid misericordiae causa ei fuerit relictum, puta menstruum vel annum, alimentorum nomine, non oportet propter hoc bona ejus iterato venundari: nec enim fraudandus est alimentis cottidianis.* (*Ibid.* l. 6.)

<sup>z</sup> Stat. 5 Geo. II. c. 30.

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(22) That is, in an action brought against the bankrupt for a debt due before the bankruptcy, unless the plaintiff can prove a concealment by the bankrupt to the amount of 10*l.*, or that the certificate was obtained by fraud. 5 *Geo. II. c. 30. s. 8.*

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ing to misfortunes, rather than to misconduct and extravagance (23).

FOR no allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed, as before

(23) The bankrupt is discharged by his certificate from all debts which could have been proved under the commission, but he is still liable to make a reparation in damages for all torts or injuries done by him before the bankruptcy; for these could not be proved, as the extent of the damages must be ascertained by a jury. Hence also he is not discharged from any breach of covenant; and even where he covenants for payment of rent, although the lease and premises are disposed of by the assignees for the benefit of the creditors, the bankrupt still remains liable to be sued by the landlord upon his covenant. 4 *T. R.* 94. This is a hard case, for the landlord has his remedy also against the tenant in possession. The bankrupt is not discharged from any contingent debts where the contingency happens after the bankruptcy; these are debts which originate from something done previous to the bankruptcy, but which become absolutely debts at some period subsequent to it. As when one man is surety for another, the principal is not indebted to the surety till his surety is obliged to pay the debt for him. Therefore, if this does not happen till after the bankruptcy, the surety cannot prove his debt under the commission; and of consequence, the bankrupt is not discharged by the certificate. But it is determined that, if the principal gives the surety an absolute unconditional bond as an indemnity, he may prove it under the commission, though he has never been called upon to pay the debt of the principal. 2 *T. R.* 640. Yet in such a case it must be presumed that the surety would be restrained from receiving under the dividend more than he had actually been compelled to pay, or from receiving any thing at all till he was actually damnified. In analogy to the contingent debts of sureties, I conceive two cases have been determined, one in the common pleas upon a bill of exchange, *H. Bl. Rep.* 640.; the other in the king's bench upon a promissory note, 4 *T. R.* 714. In each case the payee was obliged to take back the bill or note, and to pay the value of it after the bankruptcy of the drawer; against whom he

mentioned ; and also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all

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afterwards brought an action, who pleaded his bankruptcy and certificate in bar ; but the courts held in the respective cases, that the bankrupt was not discharged by the certificate. But in both these cases it may be collected from the reports, that they were merely accommodation bills, that the payees had given no value before the bankruptcy, that they had lent their names merely as sureties, and of consequence, that the bankrupt was not indebted to them till they had been obliged to pay the amount of these bills. But a holder of a bill, who has given full value for it before the bankruptcy of the drawer or acceptor, and is obliged to take it back after his bankruptcy, may prove it under the commission ; a debt is due to him before the bankruptcy, which is not affected or disturbed by the subsequent assignment and re-assignment of the bill. It has been determined that the assignment relates to the original debt, and the assignee stands in his place. *Cooke*, 25. Hence an indorsee without notice, after the issuing of the commission, ought to be admitted to prove, and have relief under the commission.

It has been decided that the certificate is no bar to an action for a debt which accrued before the issuing of the commission, if it were subsequent to any act of bankruptcy that can be proved ; for if debts arising after an act of bankruptcy are proved under the commission, the chancellor upon petition must order them to be expunged. It is universally true, that debts provable under the commission, and debts discharged by the certificate, are convertible terms. *Bamford v. Burrell*, 2 *Bof.* 1.

It is the practice of the commissioners to receive the proof of all debts due at the time of suing out the commission, without inquiring when they were contracted ; but if an objection is made by any creditor, the proof of no debt ought to be admitted which arose subsequently to the act of bankruptcy.

The law upon this subject is so extremely unreasonable and absurd, that it is astonishing that it is not corrected by some act of the legislature.

But since this observation was made in the last edition, sir Samuel Romilly brought in an act to amend the laws relating to bankrupts,

title to these advantages <sup>a</sup>. Neither can he claim them, if he has given with any of his children above 100*l.* for a marriage portion, unless he had at that time sufficient left to pay all his debts; or if he has lost at any one time 5*l.* or in the whole 100*l.* within a twelvemonth before he became bankrupt, by any manner of gaming or wagering whatsoever; or within the same time has lost to the value of 100*l.* by stock-jobbing. Also, to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency: which is an occasional act, frequently passed by the legislature; whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or, not being in a mercantile state of life, are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, at the sessions or assizes; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death. Persons who have been once cleared by any of these methods, and afterwards be-

<sup>a</sup> Stat. 24 Geo. II. c. 57.

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bankrupts, by which it is provided, that all debts contracted before the date of the commission may be proved under it, provided the creditor had not notice of an act of bankruptcy committed by the bankrupt, at the time the debt was contracted.

And where there has been mutual credit between the bankrupt and any other person, the debts may be set off or balanced, provided the credit was given to the bankrupt two calendar months before the date of the commission, and provided the person claiming the benefit of the set-off, had not, at the time of giving credit to the bankrupt, notice of any prior act of bankruptcy, or that he was insolvent, or had stopped payment.

Striking a docket, though the commission shall not be issued, shall be deemed notice of an act of bankruptcy, if at that time one had actually been committed. 46 Geo. III. c. 135.

come bankrupts again, unless they pay full fifteen shillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades<sup>b</sup> (24).

THUS much for the proceedings on a commission of bankrupt, so far as they affect the bankrupt himself personally. Let us next consider,

4. How such proceedings affect or transfer the *estate* and *property* of the bankrupt. The method whereby a *real* estate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was shewn under its proper head in a former chapter<sup>c</sup>. At present therefore we are only to consider the transfer of things *personal* by this operation of law.

By virtue of the statutes before mentioned<sup>d</sup> all the personal estate and effects of the bankrupt are considered as vested, by the act of bankruptcy, in the future assignees of his commissioners, whether they be goods in actual *possession*, or debts, contracts, and other choses in *action*; and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broken open, in order to enter upon and seize the same. And when the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it<sup>e</sup> (25).

<sup>b</sup> Stat. 5 Geo. II. c. 30.

<sup>d</sup> Stat. 1 Jac. I. c. 15. 21 Jac. I. c. 19.

<sup>c</sup> pag. 285.

<sup>e</sup> 12 Mod. 324.

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(24) If they do not pay fifteen shillings in the pound under the second commission, the second certificate is no bar to an action or execution against their future effects. 5 T. R. 287.

(25) And it has been decided, after much serious argument, that the assignment of the commissioners conveys the bankrupt's personal



THE property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. Therefore it is usually said, that once a bankrupt, and always a bankrupt; by which is meant, that a plain direct act of bankruptcy once committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may<sup>f</sup> be (26); but that, if a commission is afterwards awarded, the commission and the property of the assignees shall have a relation, or reference, back to the first and original act of bankruptcy<sup>g</sup>. Infomuch that all transactions of the bankrupt are from that time absolutely null and void, either with

<sup>f</sup> Salk. 110.<sup>g</sup> 4 Burr. 32.

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personal property and interests which are out of the kingdom at the time of bankruptcy and assignment. 4 *T. R.* 182.

By the assignment the property is so completely vested in the assignees, that the bankrupt is not entitled to receive from his estate even the necessary subsistence of himself and family, but by the favour and indulgence of the assignees and creditors. 1 *T. R.* 157.

(26) The court of king's bench have gone so far in holding that a clear unequivocal act of bankruptcy cannot be wiped away by any subsequent conduct, as to decide, that if a merchant is denied in a morning, when a holder of a bill comes for payment, it is an irrevocable act of bankruptcy, even though he should pay the bill in the course of that day, before it could be protested, or he could be sued upon it. 2 *T. R.* 59. This is a severe case; and it has rather the appearance of a *petitio principii* to pronounce it an unequivocal act of bankruptcy. A denial is not of itself an act of bankruptcy, but only evidence of one; *viz.* a beginning to keep house with *intent* to defraud and hinder creditors; and where a debtor prevents his creditor from being hindered for a moment, after he has a right to demand payment, ought we not in candour and justice to presume that he never had that intent? Indeed, in such a case it is not improbable that the denial was merely for the purpose of procuring the means of discharging the debt.

regard

regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not served and executed on the bankrupt's effects, till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts<sup>h</sup>; for if, after the act of bankruptcy committed and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby<sup>i</sup> (27). In France this doctrine of relation is carried to a very great length; for there every act of a merchant, for ten days *precedent* to the act of bankruptcy, is presumed to be fraudulent, and is therefore void<sup>k</sup>. But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by statute 19 Geo. II. c. 32. that no money paid by a bankrupt to a

<sup>h</sup> 1 Atk. 262.

<sup>k</sup> Sp. L. b. 29. c. 16.

<sup>i</sup> Viner, Abr. t. creditor and bankr. 104.

(27) The king not being expressly named in the bankrupt statutes, is held not to be bound by them, 2 *Str.* 982.; and therefore an extent will bind the property of the bankrupt, if it is issued before the actual assignment of the commissioners; which assignment, by changing the property, defeats the subsequent process of the crown. When therefore it is apprehended the bankrupt is indebted to the crown, the commissioners execute immediately a provisional assignment, by which means the crown will be entitled to no more than an equal share with the other creditors. If the extent and assignment bear date on the same day, the extent shall be preferred. *Park. Rep.* 126. *Green.* 126.

The crown is not barred by the certificate of the bankrupt; and therefore the practice is for the officers of the crown not to prove the debt under the commission, but to rely upon the future effects of the bankrupt.

*bonâ fide* or real creditor in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded (28). Nor, by statute 1 Jac. I. c. 15. shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again (29). The intention

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(28) This statute extends it's protection to the creditor of the bankrupt in two instances only, *viz.* when he has received payment, without notice of the bankruptcy, either for goods sold, or for a bill of exchange, which in the usual course of trade the bankrupt is liable to pay. And it has been determined that a creditor was compellable to refund, who had given further time to the bankrupt when a bill became due, at his request, and upon a promise to pay interest, and who afterwards received the amount of it with interest, without any notice that the debtor had committed an act of bankruptcy; for the court held this to be the payment of a loan, and not of a bill. 2 *T. R.* 648. So also a creditor has been obliged to refund money paid by a trader, after a secret act of bankruptcy, for the carriage of goods. 5 *T. R.* 197. 2 *Hen. Bl.* 334.

(29) If a debtor pays the debt to a trader, with the knowledge of an act of bankruptcy committed by him, if afterwards a commission issues, he may be compelled to pay it over again to the assignees; as where a banker pays a trader's drafts, after knowledge of an act of bankruptcy. 2 *T. R.* 113. So also if a debtor pays money to a trader in prison, who continues there two months, he may be compelled to pay it over again to his assignees. This is a hard case; but the act of bankruptcy relates back to the first day; and the debtor is held to have sufficient notice of the probable consequence of the trader's situation. 2 *T. R.* 141.

But he will not be liable to repay it, if he pays it after a judgment obtained without fraud. 2 *T. R.* 482.

If a debtor gives his acceptance, or promissory note, in discharge of his debt, after a secret act of bankruptcy, he is protected, though he pays it afterwards with notice of the bankruptcy. An acceptance or note is deemed payment, if paid when due. 7 *T. R.* 711.

By the 46 Geo. III. c. 135. it is provided generally that all conveyances, all payments by and to, and all contracts and dealings by and with, any bankrupt, made more than two calendar months

of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

THE assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority : but cannot commence a suit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value (30), at a meeting to be held in pursuance of notice in the gazette<sup>1</sup>.

[ 487 ] WHEN they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after four, and within twelve months after the commission issued, give one and twenty days' notice to the creditors of a meeting for a dividend or distribution (31); at which time they must produce their accounts, and verify them upon oath if required (32). And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove,

<sup>1</sup> Stat. 5 Geo. II. c. 30.

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months before the date of the commission, shall be valid, notwithstanding any prior act of bankruptcy, provided the person so dealing had not at the time notice of a prior act of bankruptcy, or that the bankrupt was insolvent, or had stopped payment.

(30) In all meetings of creditors under the statute, the determination is to be made by the major part in value ; number seems never to be regarded but in signing the certificate. The assignees may bring actions at law, without consulting the creditors.

(31) The notice is to be given by an advertisement in the London Gazette.

(32) At a meeting for the first dividend, the assignees are seldom required by the commissioners or creditors to verify their accounts upon oath, but the dividend is ordered upon their *admission* that they have recovered property to a certain amount ; but upon making a final dividend, the oath of the assignees cannot be dispensed with.

their

their debts. This dividend must be made equally, and in a rateable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption<sup>m</sup>. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment or has taken the debtor's lands or goods in execution (33).

<sup>m</sup> Finch, Rep. 466.

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(33) When a creditor proves his debt, he states in his deposition either that he has received no security, or what the security is.

If he has a security, and wishes to prove and receive a dividend, he must deliver up the security for the benefit of the creditors, unless it is a joint security from the bankrupt and another person, and then he may receive a dividend upon the whole due at the time of the deposition, and may have recourse to the co-security besides; provided he does not receive more than 20s. in the pound for the whole debt. But every security which the creditor has in his possession, must be exhibited to the commissioners when he proves his debt.

If a creditor proves an aggregate debt, and states more than one security; for instance, two or more bills or notes; if he receives the value of any one of them in full, so much at the time of the dividend must be deducted from the amount of the debt proved. *Cooke*, 195. Where a creditor has a mortgage or pledge, which he thinks insufficient to satisfy the whole of his debt, he may apply to the commissioners, and if they see no objection to the title of the mortgage, they may order it to be sold, and that the produce shall be applied in discharge of the expences of the sale, and of the mortgagee's debt; and if there be a deficiency, the mortgagee shall be permitted to prove it under the commission. Order, *March* 8th, 1794.

By the 5 *Geo. II. c. 30. f. 29.* if any person shall falsely swear that a sum of money is due to him from the bankrupt, either where nothing is due, or where the sum is more than is really due he shall suffer the penalties of perjury, and shall also forfeit double the

And, upon the equity of the statute 8 Ann. c. 14. (which directs, that upon all executions of goods being on any premises demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord,) it hath also been held, that under a commission of bankrupt, which is in the nature of a statute-execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors (34), even though he hath neglected to distrain, while the goods remained on the premises: which he is otherwise entitled to do for his entire rent, be the *quantum* [ 488 ] what it may<sup>u</sup>. But, otherwise, judgments and recognizances, (both which are debts of record, and therefore at other times have a priority,) and also bonds and obligations by deed or special instrument, (which are called debts by specialty, and are usually the next in order,) these are all put on a level with debts by mere simple contract, and all paid *pari passu*<sup>o</sup>. Nay, so far is this matter carried, that by the express provision of the statutes<sup>p</sup>, debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid

<sup>u</sup> 1 Atk. 103, 104.

<sup>p</sup> Stat. 7 Geo. I. c. 31.

<sup>o</sup> Stat. 21 Jac. I. c. 19.

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the sum so sworn to be due, to be recovered for the benefit of the creditors under the commission. And lately, for this offence, one Walsh was sentenced to two years imprisonment, and to stand in the pillory upon the conviction for the perjury, and afterwards the assignees under the commission recovered from him by an action 2,283*l.* for the benefit of the creditors. See the proceedings, 7 *T. R.* 458.

(34) Lord Bathurst, chancellor, declared expressly, that this proposition in the Commentaries was erroneous, and decreed that a landlord, if he has not availed himself of his right to distrain, has no privilege under the bankrupt statutes, but must come *in pari passu* with other creditors for every part of the rent due to him. *Cooke*, 222.

Yet a landlord may distrain for all the rent due, even after a provisional or absolute assignment, while the goods continue upon the premises. 1 *Atk.* 103.

equally

equally with the rest <sup>a</sup>, allowing a discount or drawback in proportion (35). And insurances, and obligations upon bottomry or *respondentia*, *bonâ fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy <sup>r</sup> (36).

WITHIN eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first <sup>s</sup> (37). And if any surplus remains, after selling his estates and paying every creditor his full debt, it shall be restored to the bankrupt <sup>t</sup>. This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence;

<sup>a</sup> Lord Raym. 1549. Stra. 1211.

<sup>s</sup> Stat. 6 Geo. II. c. 30.

<sup>r</sup> Stat. 19 G. II. c. 32.

<sup>t</sup> Stat. 13 Eliz. c. 7.

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(35) The whole of such a debt must be proved, and if it is not payable when a dividend is declared, the discount for the time which is then to run must be deducted from the whole sum, and the creditor shall be allowed a dividend upon the remainder.

(36) Where an obligor in a bottomry or respondentia bond, or an underwriter, becomes a bankrupt, the obligee and the assured shall be permitted to claim; and after the contingency happens upon which the bond is due, or upon the loss of the ship, or other event against which the insurance is made, they shall be admitted to prove, as if these events had happened before the bankruptcy. 19 Geo. II. c. 32.

(37) If a creditor has not proved before a second dividend, it is now the practice of the commissioners to receive the proof of his debt, without an order from the chancellor, and to admit him to be paid equally with the rest of the creditors, if there is sufficient property left in the hands of the assignees,

except that, upon satisfaction made to all the creditors, the commission may be *superfeded* <sup>u</sup>. This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice, which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt <sup>w</sup>, or his representatives (38).

<sup>u</sup> 2 Ch. Caf. 144.

<sup>w</sup> 1 Atk. 244.

and then to direct an equal distribution of the residue. *Cooke*, 589.

(38) Bills and notes, in which interest is not named, carry interest only between the protest and the date of the commission.

In case of a surplus the chancellor will not order it to be returned to the bankrupt till he has discharged the interest up to the time of all debts bearing interest, and satisfied all other equitable claims upon the fund. 2 *Ves. jun.* 303.



## CHAPTER THE THIRTY-SECOND.

OF TITLE BY TESTAMENT AND  
ADMINISTRATION.

THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, *viz.* by *testament* and *administration*. And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

XI. XII. IN the pursuit, then, of this joint subject, I shall, first, inquire into the original and antiquity of testaments and administrations; shall, secondly, shew who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, shew what an executor and administrator are, and how they are to be appointed; and lastly, shall select some few of the general heads of the office and duty of executors and administrators.

FIRST, as to the *original* of testaments and administrations. We have more than once observed, that when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations,

gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons <sup>a</sup>. The former method of acquiring personal property, according to the express directions of the deceased, we call a *testament*: the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law <sup>b</sup>, we call in England an *administration*; being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

TESTAMENTS are of very high antiquity. We find them in use among the ancient Hebrews; though I hardly think the example usually given <sup>c</sup>, of Abraham's complaining <sup>d</sup> that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to shew that he had made him so by *will*. And indeed a learned writer <sup>e</sup> has adduced this very passage to prove, that in the patriarchal age, on failure of children, or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law <sup>f</sup>. But, (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world <sup>g</sup>;) I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings <sup>h</sup>, wherein Jacob bequeaths to his son Joseph a por-

<sup>a</sup> Puff. L. of N. b. 4. c. 10.

<sup>e</sup> Taylor's elem. civ. law, 517.

<sup>b</sup> *Ibid.* b. 4. c. 11.

<sup>f</sup> See pag. 12.

<sup>c</sup> Barbeyr. Puff. 4. 10. 4. Godolph.

<sup>g</sup> Selden. *de succ. Ebr.* c. 24.

Orph. Leg. 1. 1.

<sup>h</sup> Gen. c. 48.

<sup>d</sup> Gen. c. 15.

tion of his inheritance double to that of his brethren : which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them ; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens<sup>i</sup> ; but in many other parts of Greece they were totally discountenanced<sup>k</sup>. In Rome they were unknown, till the laws of the twelve tables were compiled, which first gave the right of bequeathing<sup>l</sup> : and, among the northern nations, particularly among the Germans<sup>m</sup>, testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state<sup>n</sup> ; which has permitted it in some countries, and denied it in others : and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven<sup>o</sup>.

WITH us in England this power of bequeathing is coeval with the first rudiments of the law : for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental ; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuria, sive morte repentina, fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (praeter eam quae jure debetur hereoti nomine) sibi assumito. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuuntur*"<sup>p</sup>. But we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us<sup>q</sup>, that by the common law,

<sup>i</sup> Plutarch. *in vita Solon.*<sup>k</sup> Pott. *Antiq.* l. 4. c. 15.<sup>l</sup> *Inst.* 2. 22. 1.<sup>m</sup> Tacit. *de mor. Germ.* 21.<sup>n</sup> See p. 13.<sup>o</sup> Sp. L. b. 27. c. 1. Vinnius *in Inst.*

l. 2. tit. 10.

<sup>p</sup> *LL. Canut.* c. 68.<sup>q</sup> l. 2. c. 5.

as it stood in the reign of Henry the second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal<sup>r</sup>. The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them<sup>s</sup>.

THIS continued to be the law of the land at the time of *magna carta*, which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased; and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; salvo uxori ipsius et pueris suis rationabilibus partibus suis*"<sup>t</sup>. In the reign of king Edward the third this right of the wife and children was still held to be the universal or common law<sup>u</sup>; though frequently pleaded as the local custom of Berks, Devon, and other counties<sup>w</sup>: and sir Henry Finch lays it down expressly<sup>x</sup>, in the reign of Charles the first, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration begun. Indeed sir Edward Coke<sup>y</sup> is of opinion, that this never was

<sup>r</sup> Bracton, *l. 2. c. 26.* Flet. *l. 2. c. 57.*

<sup>s</sup> F. N. B. 122.

<sup>t</sup> 9 Hen. III. c. 18.

<sup>u</sup> A widow brought an action of detinue against her husband's executors, *quod cum per consuetudinem totius regni Angliæ hæcenus usitatum et approbatum, uxores debent et solent a tempore, &c. habere suam rationabilem partem bonorum maritorum suorum: ita videlicet, quod si nullos habuerint liberos, tunc medietatem; et si habuerint, tunc tertiam partem, &c.* and that her husband died

worth 200,000 marks, without issue had between them; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied: but the rule of law, as stated in the writ, seems to have been universally allowed. (*M. 30 Edw. III. 25.*) And a similar case occurs in *H. 17 Edw. III. 9.*

<sup>w</sup> *Reg. Brev. 142. Co. Litt. 176.*

<sup>x</sup> *Law. 175.*

<sup>y</sup> 2 *Inft. 33.*

the general law, but only obtained in particular places by special custom: and to establish that doctrine, he relies on a passage in Bracton, which, in truth, when compared with the context, makes directly against his opinion. For Bracton<sup>z</sup> lays down the doctrine of the reasonable part to be the common law: but mentions that as a particular exception, which sir Edward Coke has hastily cited for the general rule. And Glanvil, *magna carta*, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which also continues to this day to be the general law of our sister kingdom of Scotland<sup>a</sup>. To which we may add, that, whatever may have been the custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the ancient method continued in use in the province of York, the principality of Wales, and in the city of London, till very modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided; the one 4 & 5 W. & M. c. 2. explained by 2 & 3 Ann. c. 5. for the province of York; another, 7 & 8 W. III. c. 38. for Wales; and a third, 11 Geo. I. c. 18. for London: whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of all their personal estates by will; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter<sup>b</sup>) to remember his lord and the church, by leaving them his two best chattels, which was the original of heriots and mortuaries; and afterwards he was left at his own liberty to bequeath the remainder as he pleased.

<sup>z</sup> l. 2. c. 26. § 2.

<sup>b</sup> pag. 426.

<sup>a</sup> Dalrymp. of feud. property, 145.

IN case a person made no disposition of such<sup>b</sup> his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ*, and general trustee of the kingdom<sup>c</sup>. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition<sup>d</sup>. Afterwards the crown, in favour of the church, invested the prelates with this branch of the prerogative: which was done, saith Perkins<sup>e</sup>, because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; and he might seize them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money *in pios usus*: and if he did otherwise, he broke the confidence which the law reposed in him<sup>f</sup>. So that properly the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious<sup>g</sup>. And, as he had thus the disposition of intestates' effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

<sup>c</sup> 9 Rep. 38.

<sup>d</sup> *Ibid.* 37.

<sup>e</sup> § 486.

<sup>f</sup> Finch. Law. 173, 174.

<sup>g</sup> Plowd. 277.

THE goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct<sup>h</sup>. But even in Fleta's time it was complained<sup>i</sup>, "*quod ordinarii, hujusmodi bona nomine ecclesiae occupantes, nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried most evidently appears from a gloss of pope Innocent IV.<sup>k</sup>, written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiae et pauperum dispensanda est.*" Thus the popish clergy took to themselves<sup>l</sup> (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two-thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the statute of Westm. 2.<sup>m</sup>, that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands; yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependants: and therefore the statute 31 Edw. III. c. 11.

<sup>h</sup> Plowd. 277.

<sup>i</sup> *l. 2. c. 57. § 10.*

<sup>k</sup> *in Decretal. l. 5. t. 3. c. 42.*

<sup>l</sup> The proportion given to the priest, and to other pious uses, was different in different countries. In the archdeaconry

of Richmond in Yorkshire, this proportion was settled by a papal bulle, A. D. 1254, (*Regist. honoris de Ricbm. 101.*) and was observed till abolished by the statute 26 Hen. VIII. c. 15.

<sup>m</sup> 13 Edw. I. c. 19.

provides,

provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted<sup>n</sup> to be the *next of blood* that is under no legal disabilities. The statute 21 Hen.VIII. c. 5. enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

UPON this footing stands the general law of administrations at this day. I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to shew the original and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

I PROCEED now, *secondly*, to inquire who may, or may not, make a testament; or what persons are absolutely obliged by law to die intestate. And this law<sup>o</sup> is entirely prohibitory; for, regularly, every person hath full power and liberty to make a will, that is not under some special prohibition by law or custom: which prohibitions are principally upon three accounts; for want of sufficient discretion; for want of

<sup>n</sup> 9 Rep. 39.

<sup>o</sup> Godolph. Orph. Leg. p. 1. c. 7.

sufficient



sufficient liberty and free will; and on account of their criminal conduct.

1. IN the first species are to be reckoned infants, under the age of fourteen, if males, and twelve, if females; which is the rule of the civil law<sup>p</sup>. For, though some of our common lawyers have held that an infant of any age (even four (1) years old) might make a testament<sup>q</sup>, and others have denied that under eighteen he is capable<sup>r</sup>, yet as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but if the testator was not of sufficient discretion, whether at the age of fourteen or four-and-twenty, that will overthrow his testament. Madmen, or otherwise *non compotes*, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses befuddled with drunkenness — all these are incapable, by reason of mental disability, to make any will so long as such disability lasts (2). To this class also may be referred such persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animus testandi*, and their testaments are therefore void.

2. SUCH persons, as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as

<sup>p</sup> Godolph. p. 1. c. 8. Went. 212.      <sup>q</sup> Perkins. § 503.  
<sup>2</sup> Vern. 104. 469.      Gilb. Rep. 74.      <sup>r</sup> Co. Litt. 89.

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(1) This has been thought an error of the press in Perkins, and that four by mistake was printed for fourteen. See this subject learnedly investigated by Mr. Hargrave, who concludes with the learned Judge, that a will of personal estate may be made by a male at the age of fourteen, and by a female at the age of twelve, and not sooner. *Harg. Co. Litt.* 99.

(2) But if a person of sound mind makes his will, this will is not revoked nor affected by his subsequent insanity. 4 *Co.* 61.

prisoners, captives, and the like<sup>o</sup>. But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi*. And, with regard to feme-coverts, our law differs still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole<sup>t</sup>. But with us a married woman is not only utterly incapable of devising lands (3), being excepted out of the statute of wills, 34 & 35 Hen. VIII. c. 5., but also she is incapable of making a testament of *chattels*, without the licence of her husband. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her; it would be therefore extremely inconsistent to give her a power of defeating that provision of the law, by bequeathing those chattels to another<sup>v</sup>. Yet by her husband's licence she may make a testament<sup>w</sup>; and the husband, upon marriage, frequently covenants with her friends to allow her that licence: but such licence is more properly his assent (4); for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will<sup>x</sup>. Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed<sup>y</sup>. So that in reality the woman makes no will at all, but only something like a will<sup>z</sup>; operating in the nature

<sup>o</sup> Godolph. p. 1. c. 9.

<sup>w</sup> Bro. *Abr. tit. devise.* 34. Stra. 891.

<sup>t</sup> *Ff.* 31. 1. 77.

<sup>x</sup> *The King v. Bettefworth.* T. 13 Geo.

<sup>v</sup> 4 Rep. 51.

II. B. R.

<sup>u</sup> Dr. & St. d. 1. c. 7.

<sup>y</sup> Cro. Car. 376. 1 Mod. 211.

(3) See page 375. note 1. *ante*.

(4) Where personal property is given to a married woman for her sole and separate use, she may dispose of it by will without the assent of her husband. 3 Bro. 8.

of an appointment, the execution of which the husband, by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law. For though a son who was *in potestate parentis* could not by any means make a formal and legal testament, even though his father permitted it<sup>z</sup>, yet he might, with the like permission of his father, make what was called a *donatio mortis causa*<sup>a</sup>. The queen consort is an exception to this general rule, for she may dispose of her chattels by will without the consent of her lord<sup>b</sup>: and any feme-covert may make her will of goods, which are in her possession *in auter droit*, as executrix or administratrix; for these can never be the property of the husband<sup>c</sup>: and if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by testament, without the control of her husband<sup>d</sup>. But, [ 499 ] if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will<sup>e</sup> (5).

3. PERSONS incapable of making testaments, on account of their criminal conduct, are, in the first place, all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture<sup>f</sup>. Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time<sup>g</sup>. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from

<sup>z</sup> *Ff.* 28. 1. 6.

<sup>a</sup> *Ff.* 39. 6. 25.

<sup>b</sup> *Co. Litt.* 133.

<sup>c</sup> *Godolph.* 1. 10.

<sup>d</sup> *Prec. Chan.* 44.

<sup>e</sup> 4 *Rep.* 60. 2 *P. Wms.* 624.

<sup>f</sup> *Plowd.* 261.

<sup>g</sup> *Fitz. Abr. t. descent.* 16.

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(5) And it cannot be revived by the subsequent death of her husband. 2 *T. R.* 695.

making

making testaments, (as usurers, libellers, and others of a worse stamp,) by the common law their testaments may be good<sup>h</sup>. And in general the rule is, and has been so at least ever since Glanvil's time<sup>i</sup>, *quod libera sit cujuscunque ultima voluntas*.

LET us next, *thirdly*, consider what this last will and testament is, which almost every one is thus at liberty to make; or what are the nature and incidents of a testament. Testaments, both Justinian<sup>j</sup> and sir Edward Coke<sup>k</sup> agree to be so called, because they are *testatio mentis*: an etymon which seems to favour too much of the conceit; it being plainly a substantive derived from the verb *testari*, in like manner as *juramentum*, *incrementum*, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis nostrae justa sententia de eo, quod quis post mortem suam fieri velit*"<sup>l</sup>: which may be thus rendered into English, "the legal declaration of a man's intentions, which he wills to be performed after his death." It is called [ 500 ] *sententia*, to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostrae sententia*, because it's efficacy depends on it's declaring the testator's intention, whence in England it is emphatically styled his *will*: it is *justa sententia*; that is, drawn, attested, and published, with all due solemnities and forms of law; it is *de eo, quod quis post mortem suam fieri velit*, because a testament is of no force till after the death of the testator.

THESE testaments are divided into two sorts; *written*, and *verbal* or *nuncupative*; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing, is a supplement to a will; or an addition made by the testator, and annexed to, and to

<sup>h</sup> Godolph. p. 1. c. 12.

<sup>i</sup> l. 7. c. 5.

<sup>j</sup> Inst. 2. 10.

<sup>k</sup> 1 Inst. 111. 322.

<sup>l</sup> Ff. 28. 1. 1.

be taken as part of, a testament : being for it's explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator <sup>m</sup>. This may also be either written or nuncupative.

BUT, as nuncupative wills and codicils (which were formerly more in use than at present, when the art of writing is become more universal) are liable to great impositions and may occasion many perjuries, the statute of frauds, 29 Car. 2. c. 3. hath laid them under many restrictions ; except when made by mariners at sea, and foldiers in actual service. As to all other persons, it enacts ; 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and approved ; and unless the same be proved to have been so done by the oaths of three witnesses at the least ; who, by statute 4 & 5 Ann. c. 16., must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in any wise be good, where the estate bequeathed exceeds 30*l*. unless proved by three such witnesses, present at the making thereof, (the Roman law requiring seven <sup>n</sup>;) and unless they or some of them were specially required to bear witness thereto by the testator [ 501 ] himself ; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprized with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow, or next of kin, to contest it, if they think proper. Thus hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse, and is hardly ever heard of, but in the only instance

<sup>m</sup> Godolph. p. 1. c. 1. § 3.

<sup>n</sup> *Infl.* 2. 10. 4.

where favour ought to be shewn to it, when the testator is surprized by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must require the by-standers to bear witness of such his intention; the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from strangers: it must be in his *last* sickness; for if he recovers, he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or surprized.

As to *written* wills, they need not any witness of their publication. I speak not here of devises of lands, which are quite of a different nature; being conveyances by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good; provided sufficient proof can be had that it is his hand-writing<sup>o</sup>. And though written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate<sup>p</sup>. Yet it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses: which last was always required in the time of Bracton<sup>q</sup>; or, rather, he in this respect has implicitly copied the rule of the civil law.

[ 502 ]

No testament is of any effect till after the death of the testator. “*Nam omne testamentum morte consummatum est: et voluntas testatoris est ambulatoria usque ad mortem*”<sup>r</sup>. And

<sup>o</sup> Godolph. p. 1. c. 21. Gilb. Rep. 260.

<sup>q</sup> l. 2. c. 26.

<sup>r</sup> Co. Litt. 112.

<sup>p</sup> Comyns, 452, 3, 4.

therefore

therefore, if there be many testaments, the last overthrows all the former <sup>s</sup>: but the republication of a former will revokes one of a later date, and establishes the first again <sup>t</sup>.

HENCE it follows, that testaments may be avoided three ways: 1. If made by a person labouring under any of the incapacities before mentioned: 2. By making another testament of a later date: and, 3. by cancelling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words cannot alter the disposition of law, so as to make that irrevocable which is in it's own nature revocable <sup>u</sup>. For this, saith lord Bacon <sup>w</sup>, would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is alteration or repentance. It hath also been held, that, without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy <sup>x</sup> (6). The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by, (without assigning a true and sufficient reason <sup>y</sup>) any of the children of the testator <sup>z</sup>. But [ 503 ] if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause: and in such case no *querela inofficiosa testamenti* was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling (7) or some other express legacy, in

<sup>s</sup> Litt. § 168. Perk. 478.

<sup>x</sup> Lord Raym. 441. 1 P.Wms. 204.

<sup>t</sup> Perk. 479.

<sup>y</sup> See book I. ch. 16.

<sup>u</sup> 8 Rep. 82.

<sup>z</sup> *Inff.* 2. 18. 1.

<sup>w</sup> Elem. c. 19.

(6) Marriage, and the birth of a posthumous child, amount to a revocation of a will made previous to the marriage. 5 T. R. 49. See p. 376. n. 4. *ante*.

(7) This, I conceive, seldom proceeds from ignorance, but in general is the last effusion of an unforgiving spirit, desirous of

order to disinherit him effectually : whereas the law of England makes no such constrained suppositions of forgetfulness or insanity ; and therefore though the heir or next of kin be totally omitted, it admits no *querela inofficiosa*, to set aside such a testament.

WE are next to consider, *fourthly*, what is an executor, and what an administrator, and how they are both to be appointed.

AN executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides ; as feme-coverts, and infants : nay, even infants unborn, or *in ventre sa mere*, may be made executors<sup>a</sup>. But no infant can act as such till the age of seventeen years ; till which time administration must be granted to some other, *durante minore aetate*<sup>b</sup>. In like manner as it may be granted *durante absentia*, or *pendente lite* ; when the executor is out of the realm<sup>c</sup>, or when a suit is commenced in the ecclesiastical court touching the validity of the will<sup>d</sup>. This appointment of an executor is essential to the making of a will<sup>e</sup> ; and it may be performed either by express words, or such as strongly imply the same. But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act ; in any of these cases, the ordinary must grant administration *cum testamento annexo*<sup>f</sup> to some other person ; and then the duty of the administrator, as also when he is constituted only *durante minore aetate*, &c. of another, is very little different from that of an executor. And this was law so early as the reign of Henry II. ; when<sup>g</sup> Glanvil

[ 504 ]

<sup>a</sup> West. Symb. p. 1. § 635.

<sup>b</sup> Went. Off. Ex. c. 18.

<sup>c</sup> 1 Lutw. 342.

<sup>d</sup> 2 P.Wms. 589, 590.

<sup>e</sup> Went. c. 1. Flowd. 281.

<sup>f</sup> 1 Roll. Abr. 907. Comb. 20.

<sup>g</sup> l. 7. c. 6.

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leaving an insult upon record, after it has ceased to produce either injury or disappointment.

informs



informs us, that “ *testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit; si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere.*”

BUT if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the third and Henry the eighth, before-mentioned, direct. In consequence of which we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband or his representatives<sup>h</sup>: and of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his discretion<sup>i</sup>. 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases<sup>k</sup>. 3. That this *nearness* or propinquity of degree shall be reckoned according to the computation of the civilians<sup>l</sup>; and not of the canonists, which the law of England adopts in the descent of real estates<sup>m</sup> (8): because in the civil computation the intestate himself is the *terminus a quo* the several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration; both which are indeed in the first degree; but with us<sup>n</sup> the children are allowed the preference<sup>o</sup>. Then

<sup>h</sup> Cro. Car. 106. Stat. 29 Car. II. c. 3. 1 P. Wms. 381.

<sup>i</sup> Salk. 36. Stra. 532.

<sup>k</sup> See page 496.

<sup>l</sup> Prec. Chanc. 593.

<sup>m</sup> See page 203. 207. 224.

<sup>n</sup> Godolph. p. 2. c. 34. § 1. 2 Vern. 125.

<sup>o</sup> In Germany there was a long dispute whether a man's children should inherit his effects during the life of their grandfather; which depends (as

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(8) See page 224. note 12. where the Editor endeavours to shew that the canon law computation is of no avail whatever in the descent of real estates.

follow brothers *p*, grandfathers *q*, uncles or nephews *r*, (and the females of each class respectively,) and lastly, cousins. 4. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritances of land upon feudal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood *s*; and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion *t*. 5. If none of the kindred will take out administration, a creditor may, by custom, do it *u*. 6. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin *w*. 7. And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done *x* before the statute of Edward III.) to such discreet person as he approves of: or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody *y*, and to do other acts for the benefit of such as are entitled to the property of the deceased *z*. If a bastard, who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate, and without wife or child, it formerly hath been held *a* that the ordinary might seize his goods, and dispose of them *in pios usus*. But the usual course now is for some one to procure letters patent or other authority from the king; and then the ordi-

(as we shall see hereafter) on the same principles as the granting of administrations. At last it was agreed at the diet of Arensberg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory, and so the law was established in their favour, that the issue of a person deceased shall be entitled to his goods and chattels in

preference to his parents. (Mod. Un. Hist. xxix. 28.)

*p* Harris in *Nov.* 118. c. 2.

*q* Prec. Chan. 527. 1 P. Wms. 41.

*r* Atk. 455.

*s* 1 Ventr. 425.

*t* Aley. 36. Styl. 74.

*u* Salk. 38.

*w* 1 Sid. 281. 1 Ventr. 219.

*x* Plowd. 278.

*y* Wentw. ch. 14.

*z* 2 Inst. 398.

*a* Salk. 37.

nary of course grants administration to such appointee of the crown <sup>b</sup>. (9)

THE interest, vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor : so that the executor of A's executor is to all intents and purposes the executor and representative of A himself <sup>c</sup> ; but the executor of A's administrator, or the administrator of A's executor, is not the representative of A <sup>d</sup>. For the power of an executor is founded upon the special confidence and actual appointment of the deceased ; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence : but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all : and therefore on the death of that officer, it reverts back to the ordinary to appoint another. And with regard to the administrator of A's executor, he has clearly no privity or relation to A ; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property <sup>e</sup>. But he may, as well as an original

<sup>b</sup> 3 P. Wms. 33.

<sup>d</sup> Bro. Abr. tit. administrator. 7.

<sup>c</sup> Stat. 25 Edw. III. ft. 5. c. 5.

<sup>e</sup> Styl. 225.

I Leon. 275.

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(9) Where a bastard dies intestate without wife or issue, the king is entitled to his personal property as administrator ; but it is usual for the crown to grant the administration of it to some relation of the bastard's father or mother, reserving one-tenth or other small proportion of it. 1 Wood. 398.

adminiftrator, have only a *limited* or *ſpecial* adminiftration committed to his care, *viz.* of certain ſpecific effects, ſuch as a term of years and the like; the reſt being committed to others <sup>f</sup>.

[ 507 ] HAVING thus ſhewn what is, and who may be, an executor or adminiftrator, I proceed now, *ſiftly* and laſtly, to inquire into ſome few of the principal points of their office and duty. Theſe in general are very much the ſame in both executors and adminiftrators; excepting, firſt, that the executor is bound to perform a will, which an adminiftrator is not, unleſs where a teſtament is annexed to his adminiftration, and then he differs ſtill leſs from an executor: and ſecondly, that an executor may do many acts before he proves the will <sup>g</sup> (10), but an adminiftrator may do nothing till letters of adminiftration are iſſued; for the former derives his power from the will and not from the probate <sup>h</sup>, the latter owes his entirely to the appointment of the ordinary. If a ſtranger takes upon him to act as executor, without any juſt authority (as by intermeddling with the goods of the deceased <sup>i</sup>, and many other tranſactions ) he is called in law an executor of his own wrong, *de ſon tort*, and is liable to all the trouble of an executorſhip, without any of the profits or advantages; but merely doing acts of neceſſity or humanity, as locking up the goods, or burying the corſe of the deceased, will not amount to ſuch an intermeddling as will charge a man as executor of his own wrong <sup>l</sup>. Such a one cannot bring an

<sup>f</sup> 1 Rol. Abr. 908. Godolph. p. 2.  
c. 30. Salk. 36.

<sup>g</sup> Wentw. ch. 3.

<sup>h</sup> Comyns. 151.

<sup>i</sup> 5 Rep. 33, 34,

<sup>k</sup> Wentw. ch. 14. Stat. 43 Eliz. c. 8.

<sup>l</sup> Dyer. 166.

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(10) He may commence an action, but he cannot declare in the action, before probate; for when he declares, he muſt produce in court the letters teſtamentary. And he may releaſe or pay a debt, may aſſent to a legacy, and be ſued, before probate; and do other acts, which ſeem to be fully enumerated in 1 Salk. 299. and *Com. Dig. Admin. B. 9.*

action himself in right of the deceased <sup>m</sup>, but actions may be brought against him. And, in all actions by creditors against such an officious intruder, he shall be named an executor, generally <sup>n</sup>; for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof <sup>o</sup>. He is chargeable with the debts of the deceased, so far as assets come to his hands <sup>p</sup>; and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree <sup>q</sup>, himself only excepted <sup>r</sup>. And though, as against the right- [ 508 ]  
ful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages <sup>s</sup>; unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt <sup>t</sup>. (11)  
But let us now see what are the power and duty of a right-ful executor or administrator.

1. HE must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expences are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased <sup>u</sup>.

<sup>m</sup> Bro. *Abr tit. administrator.* 8.

<sup>r</sup> 5 Rep. 30. Moor. 527.

<sup>n</sup> 5 Rep. 31.

<sup>o</sup> 12 Mod. 441. 471.

<sup>o</sup> 12 Mod. 471.

<sup>t</sup> Wentw. ch. 14.

<sup>p</sup> Dyer. 166.

<sup>u</sup> Salk. 196. Godolph. p. 2. c. 26.

<sup>q</sup> 1 Chan. Caf. 33.

§ 2.

(11) It is held, that the least intermeddling with the effects of the intestate, even milking cows, or taking a dog, will constitute an executor *de son tort*. Dy. 166. An executor of his own wrong will be liable to an action, unless he has delivered over the goods of the intestate to the rightful administrator before the action is brought against him. And he cannot retain the intestate's property in discharge of his own debt, although it is a debt of a superior degree. 3 T. R. 590. 2 T. R. 100.

2. THE executor, or the administrator *durante minore aetate*, or *durante absentia*, or *cum testamento annexo*, must prove the will of the deceased: which is done either in *common form*, which is only upon his own oath before the ordinary, or his surrogate; or *per testes*, in more solemn form of law, in case the validity of the will be disputed<sup>w</sup>. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of it's having been proved before him; all which together is usually stiled the *probate*. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II. c. 10., enter into a bond, with sureties faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia*, or chattels to the value of a *hundred shillings*, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative<sup>x</sup>; whence the courts where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to archbishop Chichele, interprets these hundred shillings to signify *solidos legales*; of which he tells us seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles, or 1*l.* 13*s.* 4*d.* He therefore computes<sup>y</sup> that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* 0 $\frac{1}{4}$ *d.* This will account for

<sup>w</sup> Godolph. p. 1. c. 20. § 4.

<sup>x</sup> 4 Inst. 335.

<sup>y</sup> *Provinc. l. 3. t. 13. c. item. v. centum.*  
*Ec. statutum v. laicis.*

what is said in our antient books, that *bona notabilia* in the dioceſe of London<sup>z</sup>, and indeed every where elſe<sup>a</sup>, were of the value of ten pounds by *composition*; for if we purſue the calculations of Lyndewode to their full extent, and conſider that a pound of gold is now almoſt equal in value to an hundred and fifty nobles, we ſhall extend the preſent amount of *bona notabilia* to nearly 70*l.* But the makers of the canons of 1603 underſtood this antient rule to be meant of the ſhillings current in the reign of James I., and have therefore directed<sup>b</sup> that *five pounds* ſhall for the future be the ſtandard of *bona notabilia*, ſo as to make the probate fall within the archiepiſcopal prerogative. Which prerogative (properly underſtood) is grounded upon this reaſonable foundation: that as the biſhops were themſelves originally the adminiſtrators to all inteſtates in their own dioceſe, and as the preſent adminiſtrators are in effect no other than their officers or ſubſtitutes, it was impoſſible for the biſhops, or thoſe who acted under them, to collect any goods of the deceaſed other than ſuch as lay within their own dioceſes, beyond [ 510 ] which their epiſcopal authority extends not. But it would be extremely troubleſome, if as many adminiſtrations were to be granted, as there are dioceſes within which the deceaſed had *bona notabilia*; beſides the uncertainty which creditors and legatees would be at, in caſe different adminiſtrators were appointed, to aſcertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently veſted in the metropolitan of each province, to make in ſuch caſes one adminiſtration ſerve for all. This accounts very ſatisfaſtorily for the reaſon of taking out adminiſtration to inteſtates, that have large and diffuſive property, in the prerogative court: and the probate of wills naturally follows, as was before obſerved, the power of granting adminiſtrations; in order to ſatiſfy the ordinary that the deceaſed has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of adminiſtering the effects.

<sup>z</sup> 4 Inſt. 335. Gedolph. p. 2. c. 22.

<sup>b</sup> can. 92.

<sup>a</sup> Plowd. 281.

3. THE executor or administrator is to make an *inventory*<sup>c</sup> of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. HE is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased<sup>d</sup>, and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest<sup>e</sup>; but in case of administrators it is otherwise<sup>f</sup>. Whatever is so recovered, that is of a saleable nature, and may be converted into ready money, is called *assets* in the hands of the executor or administrator<sup>g</sup>; that is, sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend.

[ 511 ] Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him (12): which is the next thing to be considered; for,

5. THE executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority: otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he must pay all funeral charges, and the expence of proving the will, and the like. Secondly, debts due to the king on record or specialty<sup>h</sup>. Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in

<sup>c</sup> Stat. 21 Hen. VIII. c. 5.

<sup>f</sup> 1 Atk. 460.

<sup>d</sup> Co. Litt. 209.

<sup>g</sup> See page 244.

<sup>e</sup> Dyer. 23.

<sup>h</sup> 1 And. 129.

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(12) The goods of a testator, in the possession of the executor, cannot be taken in execution of a judgment in an action brought against the executor in his own right. 4 T. R. 621.

woollen,



woollen<sup>i</sup>, money due upon poor-rates<sup>k</sup>, for letters to the post-office<sup>l</sup>, and some others. Fourthly, debts of record; as judgments, (docquetted according to the statute 4 & 5 W. & M. c. 20.) statutes and recognizances<sup>m</sup>. (13) Fifthly, debts due on special contracts: as for rent, (for which the lessor has often a better remedy in his own hands, by distressing,) or upon bonds, covenants, and the like, under seal<sup>n</sup>. (14) Lastly, debts on simple contracts, viz. upon notes unsealed, and verbal promises. Among these simple contracts, servants' wages are by some<sup>o</sup> with reason preferred to any other: and so stood the antient law, according to Bracton<sup>p</sup> and Fleta<sup>q</sup>, who reckon among the first debts to be paid *servitia servientium et stipendia famulorum*. Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to. But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law<sup>r</sup>. If a creditor constitutes his debtor his executor, this is a release [ 512 ] or discharge of the debt, whether the executor acts or not<sup>t</sup>; provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all

<sup>i</sup> Stat. 30 Car. II. c. 3.<sup>p</sup> l. 2. c. 26.<sup>k</sup> Stat. 17 Geo. II. c. 38.<sup>q</sup> l. 2. c. 56. § 10.<sup>l</sup> Stat. 9 Ann. c. 10.<sup>r</sup> 10 Mod. 496. See vol. III. p. 18.<sup>m</sup> 4 Rep. 60. Cro. Car. 363.<sup>s</sup> 5 Rep. 30.<sup>n</sup> Wentw. ch. 12.<sup>t</sup> Plowd. 124. Salk. 299.<sup>o</sup> 1 Roll. Abr. 927.

(13) To this class of debts must be added a decree of a court of equity. 3 P. Wms. 401.

(14) A court of equity will order voluntary bonds or other special contracts, without consideration, to be postponed to simple contract debts; upon the principle that a man ought to be just before he is generous, or that he ought not to make gifts before he has paid his debts. 3 P. Wms. 222.

legacies,

legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary <sup>u</sup>. Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest; for, without a suit commenced, the executor has no legal notice of the debt <sup>w</sup>. (15)

<sup>u</sup> Salk. 303. 1 Roll. Abr. 921.

<sup>w</sup> Dyer. 32. 2 Leon. 60.

(15) After a suit is commenced, the executor or administrator may still give a preference to other creditors of the same degree, by confessing a judgment to them for the real amount of their debts. 1 *P. Wms.* 295. But after a bill is filed by a creditor for a discovery of assets and payment of his debt, the executor or administrator may pay another creditor of equal degree without confessing a judgment. 3 *P. Wms.* 401. Sir James Mansfield said, he wished it were more generally known, (for he believed, that lawyers in the courts of law were not aware of it,) that through the medium of a court of equity, the creditors of a deceased insolvent may always be compelled to take an equal distribution of the assets. It was only necessary for a friendly bill to be filed against the executor or administrator, to account; after which the chancellor would injoin any of the creditors from proceeding at law. *Campbell, N. P.* 148.

The course of administration, or payment of the debts according to their priority, applies only to legal assets; but as natural equity requires that all the creditors of the testator should be paid equally, when therefore the testator leaves his real estate to trustees or to executors, who thus become trustees, for the payment of his debts, these are called equitable assets, because a court of equity will order all the creditors to be paid *pari passu*, or an equal share, out of this fund. 1 *Bro.* 138. 2 *Atk.* 50.

And even where specialty creditors have received part of their debts out of the personal estate, a court of equity will restrain them from receiving any part of the equitable fund, till all the other creditors are paid an equal proportion of their debts. 3 *P. Wms.* 322.

The personal estate is said to be the natural fund for the payment of debts, yet it will be exonerated if the testator leaves by his will sufficient real property for the payment of his debts, provided it is the manifest intention that the personal estate shall be exonerated

6. WHEN the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far

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exonerated, and that the real estate shall be alone applied to that purpose. 1 *Bro.* 462. 2 *Bro.* 60. 6 *Vef. Jun.* 567.

If lands descend to the heir charged by the testator with his debts, there it shall be liable to all his debts, although it shall be considered as legal assets, and they shall be paid according to their priority. 2 *Atk.* 290. 1 *P. Wms.* 430. The equity of redemption of lands, mortgaged in fee, is equitable assets, for the creditors can have no relief from it but in a court of equity. 2 *Atk.* 290.

All specialty creditors, where the testator has bound himself and his heirs, have their election, whether they will resort to the heir, who has lands by descent, or to the executor, for payment of their debts; and although a court of equity will not interpose its authority, and compel the specialty creditors to apply to the heir, yet if they exhaust the personal fund, or leave insufficient for the discharge of the simple contract creditors, it will enable these to stand in the place of the specialty creditors, and to recover from the heir at law the amount of what they have drawn out of the personal fund. 1 *Vef.* 312. This is called marshalling the assets.

A court of equity will marshal the assets, or throw the amount of the specialty debts upon the real estate, against the heir in favour of legatees, but not against a devisee; as he is equally an object of the testator's favour. In that case, if there is a deficiency in the personal assets, the legatees must abate in proportion. 1 *P. Wms.* 678. 5 *Vef.* 359.

If a person mortgages an estate and dies, the heir at law shall have the estate exonerated, or the mortgage discharged by the personal representative out of the personal estate, provided it does not interfere with other debts and legacies, for the personal estate had been augmented to that extent in consequence of the mortgage; and therefore the heir at law shall not have the benefit of the personal estate to discharge a mortgage, which was not brought upon the estate by the testator or intestate. 2 *Cox's P. Wms.* 664. 2 *Bro.* 101.

If a testator, having mortgaged an estate, devises it by will, and permits other lands to descend to his heir, the devisee shall have the estate devised to him exonerated out of the personal estate, and if that is insufficient, by the heir at law. 2 *Atk.* 430.

as his assets will extend; but he may not give himself the preference herein, as in the case of debts.\*

A LEGACY is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is styled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor: for if I have a *general* or *pecuniary* legacy of 100*l.* or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor<sup>y</sup>. (16) For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our antient law<sup>z</sup>, “*de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis*” “*et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis.*” And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts; [ 513 ] but a *specific* legacy (of a piece of plate, a horse, or the like,)

\* 2 Vern. 434. 2 P. Wms. 25.

<sup>z</sup> 1. 2. c. 26.

<sup>y</sup> Co. Litt. 111. Aleyn. 39.

(16) In *Decks v. Strutt*, 5 T. R. 690. it was determined that no action can be maintained in a court of law to recover a legacy, though it had before been decided that an action of assumpsit might have been brought against an executor in his own right, if in consideration of assets in his possession he had promised to pay the legatee the legacy. *Corup.* 284. 289.

But if the executor assents, an action at law may be maintained for a specific legacy, as for a lease or any other chattel. 3 *East*, 120.

If an executor takes upon him to act, and receives money of the testator, and pays it to a co-executor, who misapplies it; he who received it is answerable to a creditor in an action at law. 7 *East*. 246.

is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it<sup>a</sup>. Upon the same principle, if the legatees had been paid their legacies, they are afterwards bound to refund a rateable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid<sup>b</sup>. And this law is as old as Bracton and Fleta, who tell us<sup>c</sup>, “*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficient, fiat ubique defalcatio, excepto regis privilegio.*”

If the legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*. And if a *contingent* legacy be left to any one; as *when* he attains, or *if* he attains, the age of twenty-one; and he dies before that time: it is a lapsed legacy<sup>d</sup>. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy, an interest which commences *in presenti*, although it be *solvendum in futuro* (17): and if the legatee dies before that age, his representatives shall receive it out of the testator's

<sup>a</sup> 2 Vern. 111.

<sup>c</sup> Bract. l. 2. c. 26. Flet. l. 2. c. 57. § 11.

<sup>b</sup> *Ibid.* 205.

<sup>d</sup> Dyer. 59. 1 Equ. Caf. abr. 295.

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(17) If the legacy is given when, or if the legatee attains a certain age, or to him *at* that age, the time is said to be annexed to the substance of the legacy, and it is not vested or transmissible to his representatives if the legatee dies before that age; but if it is payable *at* that age, or *when*, or *if* he attains it, the time is said to be annexed to the payment only, and the legacy is vested and transmissible though he should die without ever arriving at that age. 2 *Atk.* 128. This is a trifling distinction, and understood or attended to by few testators who make their own wills. If the testator gives a legacy without referring the time to the payment, it will notwithstanding be vested, if he gives the interest until that time. 2 *Bro.* 3. But this rule will not extend to a maintenance less than the interest. 3 *Bro.* 416. But if lands are devised, *when* the devisee attains a certain age, the interest in the estate will be vested, and upon the death of the devisee before that age, will descend to his heir. 3 *T. R.* 41.

personal estate, at the same time that it would have become payable in case the legatee had lived. (18). This distinction is borrowed from the civil law<sup>e</sup>; and its adoption in our courts is not so much owing to it's intrinsic equity, as to it's having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued<sup>f</sup>. But if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir<sup>g</sup>; for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction. (19). And in case of a vested legacy, due im-

<sup>e</sup> *Ff.* 35. l. 1 & 2.

<sup>f</sup> 1 *Eq. Cas.* Abr. 295.

<sup>g</sup> 2 *P. Wms.* 601.

(18) But where a legacy is given to another, in case the first legatee dies under twenty-one or a certain age, the legacy must be paid upon the death of the infant. And where it is not given over to another, if it bears interest, his representative shall be entitled to it immediately; but if the interest allowed by the testator is less than the interest allowed by a court of equity, the executor of the testator shall be entitled to the difference until the first legatee would have arrived at the age prescribed by the testator. 2 *P. Wms.* 478. 1 *Bro.* 105.

A bequest of a residue or fund to all the children of A, to be paid when they shall attain the age of twenty-one, must be divided among those only who are in existence when the eldest attains that age. 3 *Bro.* 404.

Where a legacy was given to the eldest child of A upon the death of B, A had at the death of B only illegitimate children, but had afterwards a legitimate child, it was held that neither could take, the first not legally answering the description, and the second not existing when the legacy was to vest. 6 *Ves.* jun. 43.

The rule of the court of chancery now is to let in all children, until there is a distributive share to be given to one. 6 *Ves.* 348.

(19) It is generally true, that both portions created by deed or will, and legacies which are to be raised out of real property and

mediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable [ 514 ] thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator <sup>h</sup> (20).

BESIDES these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a donation *causa mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered to another, the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker,) to keep in case of his decease (21). This gift, if the donor dies, needs not the assent of his executor: yet it

<sup>h</sup> 2 P. Wms. 26, 27.

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to be paid upon a future day, shall never be raised if the person to whom they are given dies before the day of payment. But legacies and portions in a will shall be raised, if the time of payment is postponed on account of the circumstances of the testator's estate, and not on account of the circumstances of the legatee; or where it is the apparent intention of the testator, notwithstanding the death of the legatee prior to the time specified. If the portions are to be raised out of land, and no time is limited, although the cases upon the subject are contradictory, it seems they shall sink into the estate, if the children die before they are wanted. See the cases upon this subject fully collected in 2 *Cox's P. Wms.* 612. and *Harg. Co. Litt.* 237.

(20) A pecuniary legacy, given by a parent to a legitimate child, shall carry interest from the death of the testator; otherwise the child might perish within the year for want of maintenance. 1 *Ves.* 310.

(21) There may be a *donatio causa mortis* of bonds, bank-notes, and bills payable to bearer, but not of other promissory notes or bills of exchange, these being choses in action which cannot pass by a delivery; 3 *P. Wms.* 357. and 2 *Ves.* 431. where this subject is largely discussed by lord Hardwicke.

shall not prevail against creditors; and is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa*<sup>i</sup>. This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession<sup>k</sup>; and so far differs from a testamentary disposition; but seems to have been handed to us from the civil lawyers<sup>l</sup>, who themselves borrowed it from the Greeks<sup>m</sup>.

7. WHEN all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use by virtue of his executorship<sup>n</sup>. But whatever ground there might have been formerly for this opinion, it seems now to be understood<sup>o</sup> with this restriction; that although where the executor has no legacy at all, the *residuum* shall in general be his own; yet wherever there is sufficient [ 515 ] on the face of a will, (by means of a competent legacy or otherwise,) to imply that the testator intended his executor should *not* have the residue, the undivided surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator (22): concern-

<sup>i</sup> Prec. Chanc. 269. 1 P. Wms. 406. Piræus; and another by Hercules, in the *Alcestes* of Euripides, v. 1020.  
441. 3 P. Wms. 357.

<sup>k</sup> Law of forfeit. 16.

<sup>n</sup> Perkins, 525.

<sup>l</sup> *Inft.* 2. 7. 1. *Ff. l.* 39. 1. 6.

<sup>o</sup> Prec. Chanc. 323. 1 P. Wms. 7.

<sup>m</sup> There is a very complete *donatio mortis causa*, in the *Odyffey*, b. 17. v. 544. 2 P. Wms. 338. 3 P. Wms. 43. 194. *Str.* 559. *Lawfon v. Lawfon*, 78. made by Telemachus to his friend *Dom. Proc.* 28 Apr. 1777.

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(22) Courts of equity now construe executors to be trustees for the next of kin in all cases where a fair inference can be collected from the expressions and circumstances of the will, that such was the testator's intention. When a legacy is given to a sole executor, it affords a reasonable conclusion, that the testator intended to give him this alone as a satisfaction and recompense for his



ing whom indeed there formerly was much debate<sup>p</sup>, whether or no he could be compelled to make any distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the ad-

<sup>p</sup> Godolph. p. 2. c. 32.

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his trouble; for it would be absurd to give him expressly a part, if it were intended that he should have the whole, or, according to a quaint phrase, he cannot take all and some. And this inference is not repelled where a wife is the executrix, or the next of kin has also a legacy. But an exception out of a legacy in favour of an executor, does not raise such an implication as to exclude him from the benefit of the residue; as where the use of a service of plate is given to the executor for his life, and after his death it is bequeathed to another, for such an exception is perfectly consistent with the bequest of the residue, and the executor could not have had the benefit of the exception without a special description of it. So also where a legacy is given to one of two or more co-executors, or where unequal legacies are given to co-executors, or where some have legacies and not all, they shall take the residue, for this might be done by the testator, not in favour of his next of kin, but with an intent to shew a preference to one above the others. See these distinctions, and the authorities, fully and clearly collected and stated in 1 *Cox's P. Wms.* 550. 7 *Ves.* jun. 225.

The cases were all examined and the law confirmed, as stated by lord Chancellor Erskine. 12 *Ves.* 298.

If the testator gives the *residuum* to a person who dies in his lifetime, in consequence of which this bequest is lapsed, the executor, though he has no legacy, shall be a trustee for the next of kin, because the testator has expressed a manifest intention not to give it to his executor. 3 *Bro.* 28.

And it is probable that now the same would be held of every lapsed legacy and interest.

Where an executor has a specific legacy given him, still parol evidence may be admitted, to shew that it was the testator's intention, at the time of making his will, to give him the residue. *Clenell v. Leathwait*, 2 *Ves.* jun. 465.

ministrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law<sup>q</sup>. And the right of the husband not only to administer, but also to enjoy exclusively the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only, that the statute of distributions does not extend to this case. But now these controversies are quite at an end; for by the statute 22 & 23 Car. II. c. 10. explained by 29 Car. II. c. 30. it is enacted, that the surplusage of intestate's estates, (except of *femes covert*, which are left as at common law<sup>r</sup>;) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner. One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters<sup>s</sup>. The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have [ 516 ] sufficiently spoken<sup>t</sup>. And therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sister of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17. if the father be dead, and any of the children die intestate without wife or issue, in the life-time of the mother,

<sup>q</sup> 1 Lev. 233. Cart. 125. 2 P. Wms. 447.

<sup>s</sup> Raym. 496. Lord Raym. 571.

<sup>t</sup> Pag. 504.

<sup>r</sup> Stat. 29 Car. II. c. 3. § 25.

she and each of the remaining children, or other representatives, shall divide his effects in equal portions (23).

It is obvious to observe, how near a resemblance this statute of distribution bears to our ancient English law,

(23) The next of kin, who are to have the benefit of the statute of distribution, must be ascertained according to the computation of the civil law, including the relations both on the paternal and maternal sides.

And when relations are thus found who are distant from the intestate by an equal number of degrees, they will share the personal property equally, although they are relations to the intestate of very different denominations, and perhaps not relations to each other. As if the next of kin of the intestate are great uncles or aunts, first cousins, and great nephews or nieces, these being all related to the intestate in the fourth degree, will all be admitted to an equal distributive share of his personal property. There is only one exception to this rule, *viz.* where the nearest relations are a grandfather or grandmother, and brothers or sisters; although all these are related in the second degree, yet the former shall not participate with the latter; for which singular exception it does not appear that any good reason can be given. 3 *Atk.* 762. No difference is made between the whole and half blood in the distribution of intestate personal property.

A curious question was agitated some time ago respecting the right to the administration. General Stanwix and an only daughter were lost together at sea, and it was contended that it was a rule of the civil law, that when a parent and child perish together, and the priority of their deaths is unknown, it shall be presumed that the child survives the parent. And by this rule the right to the personal estate of the general would have vested in the daughter, and by her death in her next of kin, who on the part of the mother was a different person from the next of kin to her father.

But this being only an application for the administration, and not for the interest under the statute of distribution, the court declined giving a judgment upon that question. 1 *Bl. R.* 640. And it does not appear that that point was ever determined in

*de rationabili parte bonorum*, spoken of at the beginning of this chapter<sup>u</sup>; and which sir Edward Coke<sup>w</sup> himself, though he doubted the generality of it's restraint on the power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato*<sup>x</sup>; which, and because the act was also penned by an eminent civilian<sup>y</sup>, has occasioned a notion that the parliament of England copied it from the Roman praetor: though indeed it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So likewise there is another part of the statute of distributions, where directions are given

<sup>u</sup> Pag. 492.

<sup>w</sup> 2 Inst. 33. See 1 P. Wms. 8.

<sup>x</sup> The general rule of such successions was this: 1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood, or, if the parents were dead, all the brethren and

sisters, together with the representatives of a brother or sister deceased.

3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. *Ff.* 38. 15. 1. *Nov.* 118. c. 1, 2, 3. 127. c. 1.

<sup>y</sup> Sir Walter Walker. Lord Raym. 574.

the spiritual courts. But I should be inclined to think that our courts would require more than presumptive evidence to support a claim of this nature. And in 6 *East*, 82. it is said that lord Mansfield required the jury to find whether the general or his daughter survived; but it is not stated upon what occasion. Some curious cases *de commorientibus* may be seen in *Causés Celebres*, 3 tom. 412. *et seq.* In one of which, where a father and son were slain together in a battle, and on the same day the daughter became a professed nun, it was determined that her civil death was prior to the death of her father and brother, and that the brother having arrived at the age of puberty, should be presumed to have survived his father.

that no child of the intestate (except his heir at law) on whom he settled in his life-time any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplufage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the *collatio bonorum* of the imperial law<sup>z</sup>: which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that with regard to goods and chattels, this is part of the antient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England, under the name of *botchpot*<sup>a</sup>.

BEFORE I quit this subject, I must however acknowledge, that the doctrine and limits of representation, laid down in the statute of distribution, seem to have been principally borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the common law knows no other rule of succession but that *per stirpes* only<sup>b</sup>. They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis*, in the right of another person. As if the next of kin be the intestate's three brothers, A, B, and C; here his effects are divided into three equal portions, and distributed *per capita*, one to each: but if one of these brothers, A, had been dead, leaving three children, and another B, leaving two; then the distribution must have been *per stirpes*; viz. one third to A's three children, another third to B's two children; and

<sup>z</sup> *Ef.* 37. 6. 1.

<sup>b</sup> See ch. 14. pag. 217.

<sup>a</sup> See ch. 12. pag. 191.

the remaining third to C, the surviving brother: yet if C had also been dead, without issue, then A's and B's five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz. each of them one fifth part <sup>c</sup> (24).

[ 518 ] THE statute of distributions expressly excepts and reserves the custom of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects. So that, though in those places the restraint of devising is removed by the statutes formerly mentioned <sup>d</sup>, their antient customs remain in full force, with respect to the estates of intestates. I shall therefore conclude this chapter, and with it, the present book, with a few remarks on those customs.

IN the first place, we may observe that in the city of London <sup>e</sup>, and province of York <sup>f</sup>, as well as in the kingdom of

<sup>c</sup> Prec. Chanc. 54.

<sup>e</sup> Lord Raym. 1329.

<sup>d</sup> Pag. 493.

<sup>f</sup> 2 Burn. Eccl. Law. 746.

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(24) There is no representation or distribution *per stirpes* but among the immediate descendants of the intestate, and the children of his brothers and sisters; for the statute has expressly declared that no representation shall be admitted among collaterals, after brother's and sister's children. *f.* 7. If therefore A, the brother of the intestate, be dead, leaving only grandchildren, and B be dead, leaving children, and C still be living, the grandchildren of A shall have no share, but one half will be given to the children of B, and the other half to C. 1 *P. Wms.* 25. If the intestate has a mother living, and brother's or sister's children, they shall take *per stirpes* with the mother, who shall have in such case the same share as a brother or sister. 1 *Atk.* 458.

An aunt's child, or a cousin, cannot take by representation with an uncle, for as a nephew's child cannot take by representation, so a collateral equally remote shall not be admitted to take by representation with a nearer kinsman. 1 *P. Wms.* 594.

Scotland<sup>g</sup>, and probably also in Wales, (concerning which there is little to be gathered, but from the statute 7 & 8 W. III. c. 38.) the effects of the intestate, after payment of his debts, are in general divided according to the antient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children, his substance (deducting for the widow's apparel and the furniture of her bed-chamber, which in London is called the *widow's chamber*) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator: if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other<sup>h</sup>; if neither widow nor child, the administrator shall have the whole<sup>i</sup>. And this portion, or *dead man's part*, the administrator was wont to apply to his own use<sup>k</sup>, till the statute 1 Jac. II. c. 17. declared that the same should be subject to the statute of distribution. So that if a man dies worth 1800*l.* personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom and two by the statute; and each of the children five, three by the custom and two by the statute: if he leaves a widow and one child, she shall still have eight parts as before; and the child shall have ten, six by the custom and four by the statute: if he leaves a widow and no child, the widow shall have three-fourths of the whole, two by the custom and one by the statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity, with regard to the custom only<sup>l</sup>; but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement<sup>m</sup>. And if any of the children are advanced by the

[ 519 ]

<sup>g</sup> Burn. Eccl. Law. 782.

<sup>h</sup> 1 P. Wms. 341. Salk. 246.

<sup>i</sup> 2 Show. 175.

<sup>k</sup> 2 Freem. 85. 1 Vern. 133.

<sup>l</sup> 2 Vern. 665. 3 P. Wms. 16.

<sup>m</sup> 1 Vern. 15. 2 Chanc. Rep. 252.

father

father in his life-time with any sum of money (not amounting to their full proportionable part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom<sup>n</sup>: but, if they are fully advanced, the custom entitles them to no further dividend<sup>o</sup>.

THUS far in the main the customs of London and of York agree; but, besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament<sup>p</sup>: and, if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one, it is free from any orphanage custom, and in case of intestacy, shall fall under the statute of distributions<sup>q</sup>. The other, that in the province of York, the heir at common law, who inherits any land either in fee or in tail, is excluded from any filial portion or reasonable part<sup>r</sup>. But, notwithstanding these provincial variations, the customs appear to be substantially one and the same. And as a similar policy formerly prevailed in every part of the island, we may fairly conclude the whole to be of British original; or, if derived from [ 520 ] the Roman law of successions, to have been drawn from that fountain much earlier than the time of Justinian, from whose constitutions in many points (particularly in the advantages given to the widow) it very considerably differs; though it is not improbable that the resemblances which yet remain may be owing to the Roman usages; introduced in the time of Claudius Cæsar, who established a colony in Britain to instruct the natives in legal know-

<sup>n</sup> 2 Freem. 279. 1 Equ. Caf. Abr. 155. 2 P. Wms. 526.

<sup>o</sup> 2 P. Wms. 527.

<sup>p</sup> 2 Vern. 558.

<sup>q</sup> Prec. Chan. 537.

<sup>r</sup> 2 Burn. 754.



ledge<sup>s</sup>; inculcated and diffused by Papinian, who presided at York as *praefectus praetorio* under the emperors Severus and Caracalla<sup>t</sup>; and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

<sup>s</sup> Tacit. *Annal.* l. 12. c. 32.

<sup>t</sup> Selden. in *Fletam. cop.* 4. § 3.

THE END OF THE SECOND BOOK.



# APPENDIX.

N° I.

## *Vetus Carta FEOFFAMENTI.*

**S**CIANT presentes et futuri, quod ego Willielmus Premises. filius Willielmi de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere: *Habendam et Tenendam* totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: *Habendum, and Tenendum.* *Reddendum.* *Warranty.* *Reddendo* et faciendo annuatim eidem dominis capitalibus servitia inde debita et consueta; Et ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. *Conclusion.* In cujus rei testimonium huic presenti carte sigillum meum apposui; Hiis testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, & aliis. Data apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI sexto.

(L. S.)

Memorandum, quod die et anno infrascriptis plena et pacifica seisin acre infrascriptate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford Johannis de Seybroke, et aliorum.

Livery of seisin entered.

N° II.

N<sup>o</sup> II.

N<sup>o</sup> II. *A modern Conveyance by LEASE and RELEASE.*

§ I. LEASE, or BARGAIN and SALE, for a year.

Premises. **T**HIS Indenture, made the third day of September, in the twenty-first year of the reign of our sovereign lord GEORGE the second by the grace of God king of Great Britain, France and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven, between Abraham Barker of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards of Lincoln's Inn in the county of Middlesex, esquire, and Francis Golding of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Cecilia his wife, in consideration of five shillings of lawful money of Great Britain to them in hand paid by the said David Edwards and Francis Golding at or before the enfealing and delivery of these presents, (the receipt whereof is hereby acknowledged,) and for other good causes and considerations them the said Abraham Barker and Cecilia his wife hereunto specially moving, have bargained and sold, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, **A**ll that the capital messuage, called Dale Hall in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof: **T**o have and to hold the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein-before mentioned or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances,

Parties.

Consideration.

Bargain and sale.

Parcels.

*Habendum.*

tenances, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next ensuing and fully to be completed and ended: *Yielding and paying* therefore unto the said Abraham Barker and Cecilia his wife, and their heirs and assigns, the yearly rent of one peppercorn at the expiration of the said term, if the same shall be lawfully demanded: *To the intent* and purpose that, by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs and assigns; to the uses and upon the trusts, thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. *In witness* whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

N<sup>o</sup> II.*Reddendum.**Intent.**Conclusion.*

Sealed, and delivered, being first duly stamped, in the presence of  
George Carter.  
William Browne.

Abraham Barker. (L. S.)  
Cecilia Barker. (L. S.)  
David Edwards. (L. S.)  
Francis Golding. (L. S.)

### § 2. Deed of RELEASE.

This Indenture of five parts, made the fourth day of September in the twenty-first year of the reign of our sovereign lord GEORGE the second by the grace of God King of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven, between Abraham Barker of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife of the first part; David Edwards of Lincoln's Inn in the county of Middlesex, esquire, executor of the last will and testament of Lewis Edwards of Cowbridge in the County of Glamorgan, gentleman, his late father, deceased, and Francis Golding of the city of Norwich, clerk, of the second part; Charles Browne of Enstone, in the county of Oxford, gentleman, and Richard Moore of the city of Bristol, merchant, of the third part; John Barker, esquire, son and heir apparent of the said Abraham Barker, of the fourth part; and Katharine Edwards, spinster, one of the sisters of the said David Edwards, of the fifth part. *Whereas* a marriage is intended, by the permission of God, to be

Premises.

Parties.

be

N<sup>o</sup> II. be shortly had and solemnized between the said John Barker and Katharine Edwards: *Now this Indenture witnesseth*, that in consideration of the said intended marriage, and of the sum of five thousand pounds, of good and lawful money of Great Britain, to the said Abraham Barker, (by and with the consent and agreement of the said John Barker and Katharine Edwards, testified by their being parties to, and their sealing and delivery of, these presents,) by the said David Edwards in hand paid at or before the enfealing and delivery hereof, being the marriage portion of the said Katharine Edwards, bequeathed to her by the last will and testament of the said Lewis Edwards, her late father, deceased; the receipt and payment whereof the said Abraham Barker doth hereby acknowledge, and thereof, and of every part and parcel thereof, they the said Abraham Barker, John Barker, and Katharine Edwards, do, and each of them doth release, acquit, and discharge the said David Edwards, his executors and administrators, for ever by these presents: and for providing a competent jointure and provision of maintenance for the said Katharine Edwards, in case she shall, after the said intended marriage had, survive and overlive the said John Barker her intended husband: and for settling and assuring the capital messuage, lands, tenements, and hereditaments, herein-after mentioned, and to such uses, and upon such trusts as are hereinafter expressed and declared: and for and in consideration of the sum of five shillings of lawful money of Great Britain to the said Abraham Barker and Cecilia his wife in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard Moore, at or before the enfealing and delivery hereof, (the several receipts whereof are hereby respectively acknowledged), they the said Abraham Barker and Cecilia his wife, *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 David Edwards and Francis Golding, their heirs and assigns, *All* that the capital messuage called Dale Hall, in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's Farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, water-courses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof,

or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made by the said Abraham Barker and Cecilia his wife for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession;) and the reversion and reversions, remainder and remainders, yearly and other rents, issue and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker, and Cecilia his wife, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises: *To have and to hold* the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein-before mentioned to be hereby granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns to such uses, upon such trusts, and to and for such intents and purposes as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker and Cecilia his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behoof of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but nevertheless to permit and suffer the said John Barker, and his assigns, during his life to receive and take the rents and profits thereof, and of every part thereof to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can, or may have or claim, of, in, to, or out of, all and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seized of any estate of freehold or inherit-

N<sup>o</sup> II.

Mention of bargain and sale.

*Habendum.*

To the use of the grantors till marriage:

Then of the husband for life, *sans waste*:

Remainder to trustees to preserve contingent remainders:

Remainder to the wife for life, for her jointure, in bar of dower:

N<sup>o</sup> II. ance: and from and after the decease of the said Katherine Edwards, or other sooner determination of the said estate, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during, and unto the full end and term of, five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of waste: upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisos and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same: and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, and of the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: and for default of such issue, then to the use and behoof of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, to be equally divided between them, (if more than one,) share and share alike, as tenants in common, and not as joint-tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing: and for default of such issue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully issuing: and for default of such heirs, then to the use and behoof of the said Cecilia the wife of the said Abraham Barker, and of her heirs and assigns for ever. And as to, for, and concerning the term of five hundred years herein-before limited to the said Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisos and agreements hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, in case there shall be an eldest or only son, and one or more other child or children of the said John Barker

Remainder to other trustees for a term, upon trusts after mentioned:

Remainder to the first and other sons of the marriage in tail:

Remainder to the daughters,

as tenants in common, in tail;

Remainder to the husband in tail; Remainder to the husband's mother in fee. The trust of the term declared;



ker on the body of the said Katherine his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child or children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the meantime and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions, after the rate of four pounds in the hundred yearly. *Provided* always, that in case any of the same children shall happen to die before his, her, or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid. *Provided* also, that in case there shall be no such child or children of the said John Barker, on the body of the said Katherine his intended wife begotten, besides an eldest or only son; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Brown and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf aforesaid; or in case the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unfold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and

N<sup>o</sup> II.

to raise portions for younger children.

Payable at certain times,

with maintenance at the rate of 4 per cent.

and benefit of survivorship.

If no such child,

or if all die,

or if the portions be raised,

or paid,

or secured by the person next in remainder; the residue of the term to cease.

N<sup>o</sup> II. and purposes, any thing herein contained to the contrary thereof  
 in any wise notwithstanding. **PROVIDED** also, and it is hereby  
 Condition, further declared and agreed by and between all the said parties  
 that the uses, and estates to these presents, that in case the said Abraham Barker or  
 hereby granted shall be void, and Francis Golding, or the survivor of them, or the exe-  
 on settling other lands of equal value in recompense. cutors and administrators of such survivor shall settle, convey,  
 and assure other lands and tenements of an estate of inheritance  
 in fee-simple, in possession in some convenient place or places  
 within the realm of England, of equal or better value than the  
 said capital messuage, lands, tenements, hereditaments, and pre-  
 mises, hereby granted and released, and in lieu and recompense  
 thereof, unto and for such and the like uses, intents, and pur-  
 poses, and upon such and the like trusts, as the said capital mes-  
 suage, lands, tenements, hereditaments, and premises are hereby  
 settled and assured unto and upon, then and in such case, and  
 at all times from thenceforth, all and every the use and uses,  
 trust and trusts, estate and estates herein-before limited, ex-  
 pressed and declared of or concerning the same, shall cease,  
 determine, and be utterly void to all intents and purposes; and  
 the same capital messuage, lands, tenements, hereditaments,  
 and premises, shall from thenceforth remain and be to and for  
 the only proper use and behoof of the said Abraham Barker or  
 Cecilia his wife, or the survivor of them, so settling, conveying,  
 and assuring such other lands and tenements as aforesaid, and of  
 his or her heirs and assigns for ever; and to and for no other  
 use, intent, or purpose whatsoever; any thing herein contained  
 to the contrary thereof in any wise notwithstanding. **And**, for  
 the considerations aforesaid, and for barring all estates-tail, and  
 all remainders or reversions thereupon expectant or depending,  
 if any be now subsisting and unbarred or otherwise undeter-  
 mined, of and in the said capital messuage, lands, tenements,  
 hereditaments, and premises, hereby granted and released, or  
 mentioned to be hereby granted and released, or any of them,  
 or any part thereof, the said Abraham Barker for himself and  
 the said Cecilia his wife, his and her heirs, executors, and ad-  
 ministrators, and the said John Barker for himself, his heirs,  
 executors, and administrators, do, and each of them doth, re-  
 spectively covenant, promise, and grant to and with the said  
 David Edwards and Francis Golding, their heirs, executors, and  
 administrators, by these presents, that they the said Abraham  
 Barker and Cecilia his wife, and John Barker, shall and will,  
 at the costs and charges of the said Abraham Barker, before  
 the end of Michaelmas term next ensuing the date hereof, ac-  
 knowledge and levy, before his majesty's justices of the court of  
 common pleas at Westminster, one or more fine or fines, *sur cog-  
 nizance de droit, come ceo, &c.* with proclamations according to  
 the

Covenant  
 to levy a  
 fine,

the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities, qualities, number of acres, and other descriptions to ascertain the same, as shall be thought meet; which said fine or fines, so as aforesaid, or in any other manner levied and acknowledged, or to be levied or acknowledged, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and are hereby declared by all the said parties to these presents to be and enure, to the use and behoof of the said David Edwards, and his heirs and assigns; to the intent and purpose that the said David Edwards may by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the said capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his majesty's high court of chancery one or more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's justices of the court of common pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs, of entry he the said David Edwards shall appear *gratis*, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the said Abraham Barker and Cecilia his wife, and John Barker; who shall also *gratis* appear in their proper person, or by their attorney or attorneys, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default: so as judgment shall and may be thereupon had and given for the said Francis Golding to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said Abraham Barker and Cecilia his wife, and John Barker, and for them to recover in value against the said common vouchee, and that execution shall and may be thereupon awarded, and had accordingly, and all and every other act and thing be done and executed, needful

N<sup>o</sup> II.

}

in order to  
make a ten-  
nant to the  
*praecepta*, that  
a recovery  
may be suf-  
fered;

N<sup>o</sup> II. and requisite for the suffering and perfecting of such common  
 recovery or recoveries, with vouchers as aforesaid. And it is  
 hereby further declared and agreed by and between all the said  
 parties to these presents, that immediately from and after the  
 suffering and perfecting of the said recovery or recoveries, so as  
 aforesaid, or in any other manner, or at any other time or  
 times, suffered or to be suffered, as well these presents and the  
 assurance hereby made, and the said fine or fines, so covenanted  
 to be levied as aforesaid, as also the said recovery and recoveries,  
 and also all and every other fine or fines, recovery and reco-  
 veries, conveyances, and assurances in the law whatsoever here-  
 tofore had, made, levied, suffered, or executed, or hereafter  
 to be had, made, levied, suffered or executed, of the said ca-  
 pital messuage, lands, tenements, hereditaments, and premises,  
 or any of them, or any part thereof, by and between the said  
 parties to these presents or any of them, or whereunto they or any  
 of them are or shall be parties or privies, shall be and enure,  
 and shall be judged, deemed, construed, and taken, and so  
 are and were meant and intended, to be and enure, and the re-  
 coveror or recoverors in the said recovery or recoveries named  
 or to be named, and his or their heirs, shall stand and be seised of  
 the said capital messuage, lands, tenements, hereditaments,  
 and premises, and of every part and parcel thereof, to the uses,  
 upon the trusts, and to and for the intents and purposes, and  
 under and subject to the provisos, limitations, and agreements  
 hereinbefore mentioned, expressed, and declared, of and con-  
 cerning the same. And the said Abraham Barker, party here-  
 unto, doth hereby for himself, his heirs, executors, and admi-  
 nistrators, further covenant, promise, grant, and agree, to and  
 with the said David Edwards and Francis Golding, their heirs,  
 executors, and administrators, in manner and form following;  
 that is to say, that the said capital messuage, lands, tenements,  
 hereditaments, and premises, shall and may at all times hereafter  
 remain, continue, and be, to and for the uses and purposes,  
 upon the trusts, and under and subject to the provisos, limita-  
 tions, and agreements, herein-before mentioned, expressed, and  
 declared of and concerning the same; and shall and may be  
 peaceably and quietly had, held, and enjoyed accordingly,  
 without any lawful let or interruption of or by the said Abraham  
 Barker or Cecilia his wife, parties hereunto, his or her heirs or  
 assigns, or of or by any other person or persons lawfully claim-  
 ing or to claim from, by, or under, or in trust for him, her,  
 them, or any of them; or from, by, or under, his or her ances-  
 tors, or any of them; and shall so remain, continue, and be,  
 free and clear, and freely and clearly acquitted, exonerated, and  
 discharged, or otherwise, by the said Abraham Barker or Cecilia  
 his wife, parties hereunto, his or her heirs, executors, or admi-  
 nistrators, well and sufficiently saved, defended, kept harmless,  
 and

to enure

to the pre-  
ceding uses  
in this deed.Other co-  
venants;for quiet  
enjoyment,free from  
incum-  
brances.

and indemnified of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their act, means, assent, consent or procurement; **And moreover** that he the said Abraham Barker and Cecilia his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors, or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisos, limitations, and agreements, herein-before mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law, shall be reasonably advised, devised, or required; so as such further assurances contain in them no further or other warranty or covenant than against the person or persons, his her, or their heirs, who shall make or do the same; and so as the party or parties, who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. **Provided lastly** and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals, and attested by two or more credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby

N<sup>o</sup> II.

and for further assurance.

Power of revocation.

N<sup>o</sup> II. before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, any thing herein contained to the contrary thereof in anywise notwithstanding.

Conclusion. In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed, and delivered, being first duly stamped, in the presence of  
 George Carter.  
 William Browne.

Abraham Barker. (L. S.)  
 Cecilia Barker. (L. S.)  
 David Edwards. (L. S.)  
 Francis Golding. (L. S.)  
 Charles Browne. (L. S.)  
 Richard Moore. (L. S.)  
 John Barker. (L. S.)  
 Katherine Edwards. (L. S.)

N<sup>o</sup> III.*An OBLIGATION, or BOND, with CONDITION for  
the Payment of Money.*

**KNOW** all men by these presents, that I David Edwards of Lincoln's Inn in the county of Middlefex, esquire, am held and firmly bound to Abraham Barker of Dale Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord GEORGE the second, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven.

The condition of this obligation is such, that if the above-bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above-named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed, and delivered, being  
first duly stamped, in the  
presence of  
George Carter.  
William Brown.

David Edwards. (L.S.)

N<sup>o</sup> IV.

N<sup>o</sup> IV.

*A FINE of Lands fur Cognizance de Droit,  
come ceo, &c.*

§ 1. *Writ of covenant ; or PRAECIPE.*

**G**EORGE the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. Command Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale ; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices at Westminster, from the day of saint Michael in one month, to shew wherefore they have not done it : and have you there the summoners, and this writ. Witness ourself at Westminster the ninth day of October, in the twenty-first year of our reign.

Sheriff's  
return.

Pledges of prosecution	} John Doe. Richard Roe.	Summoners of the within named A- braham, Cecilia, and John.	} John Den. Richard Fen.
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§ 2. *The Licence to agree.*

Norfolk, } David Edwards, esquire, gives to the lord the  
to wit. } king ten marks, for licence to agree with Abra-  
ham Barker, esquire, of a plea of covenant of two messuages, two  
gardens, three hundred acres of land, one hundred acres of mea-  
dow, two hundred acres of pasture, and fifty acres of wood, with  
the appurtenances in Dale.

§ 3. *The Concord.*

And the agreement is such, to wit, that the aforefaid Abra-  
ham, Cecilia, and John have acknowledged the aforefaid tene-  
ments,



ments, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforefaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforefaid David and his heirs for ever. And further the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforefaid David and his heirs, the aforefaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling. N<sup>o</sup> IV.

§ 4. *The Note, or Abstract.*

Norfolk, } Between David Edwards, esquire, complainant,  
to wit. } and Abraham Barker, esquire, and Cecilia his wife,  
and John Barker, esquire, deforciant, of two messuages, two  
gardens, three hundred acres of land, one hundred acres of meadow,  
two hundred acres of pasture, and fifty acres of wood, with  
the appurtenances, in Dale, whereupon a plea of covenant was  
summoned between them: to wit, that the said Abraham, Cecilia,  
and John have acknowledged the aforefaid tenements, with  
the appurtenances, to be the right of him the said David, as  
those which the said David hath of the gift of the aforefaid  
Abraham, Cecilia, and John; and those they have remised and  
quitted claim, from them and their heirs, to the aforefaid David  
and his heirs for ever. And further, the same Abraham, Cecilia,  
and John, have granted for themselves, and their heirs, that they  
will warrant to the aforefaid David, and his heirs, the aforefaid  
tenements, with the appurtenances, against all men for ever.  
And for this recognition, remise, quit-claim, warranty, fine, and  
agreement, the said David hath given to the said Abraham, Cecilia,  
and John, two hundred pounds sterling.

§ 5. *The Foot, Chirograph, or Indentures of the FINE.*

Norfolk, } This is the final agreement, made in the court  
to wit. } of the lord the king at Westminster, from the day  
of saint Michael in one month, in the twenty-first year of the  
reign of the lord GEORGE the second, by the grace of God of  
Great Britain, France, and Ireland king, defender of the faith,  
and so forth, before John Willes, Thomas Abney, Thomas Burnet,  
and Thomas Birch, justices, and other faithful subjects of  
the lord the king then there present, between David Edwards,  
esquire, complainant, and Abraham Barker, esquire, and Cecilia  
his wife, and John Barker, esquire, deforciant, of two messuages,  
two gardens, three hundred acres of land, one hundred acres of  
meadow,

N<sup>o</sup> IV. meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the said court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David, and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§ 6. *Proclamations, endorsed upon the FINE, according to the Statutes.*

The first proclamation was made the sixteenth day of November, in the term of saint Michael, in the twenty-first year of the king withinwritten.

The second proclamation was made the fourth day of February, in the term of saint Hilary, in the twenty-first year of the king withinwritten.

The third proclamation was made the thirteenth day of May, in the term of Easter, in the twenty-first year of the king withinwritten.

The fourth proclamation was made the twenty-eighth day of June, in the term of the holy Trinity, in the twenty-second year of the king withinwritten.

N<sup>o</sup> V.*A common RECOVERY of Lands with double \* Voucher.*§ 1. *Writ of Entry sur Disseisin in the Post ; or PRAECIPE.*

**G**ODFRE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. Command David Edwards, esquire, that justly and without delay he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the foresaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the foresaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of saint Martin, to shew wherefore he hath not done it; and have you there the summoners, and this writ. Witness ourself at Westminster the twenty-ninth day of October, in the twenty-first year of our reign.

Pledges of	}	John Doe.	Summoners of the	}	John Den.	Sheriff's
prosecution		Richard Roe.	within named David.		Richard Fen.	

*Exemplification of the RECOVERY Roll.*

**G**ODFRE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to all to whom these our present letters shall come, greeting. Know ye, that among the pleas of land enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of Saint Michael in the twenty-first year of our reign, upon the fifty-second roll it is thus contained. Entry returnable on the octave of Saint Martin. Norfolk, to wit; Francis Golding, clerk, in his proper

\* Note, that if the recovery be had with single voucher, the parts marked "thus" in § 2. are omitted.

N<sup>o</sup> V. person demandeth against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [\* of six shillings and eight pence, and more, in rents, corn, and grafs:] and into which [the said David hath not entry, unless as aforesaid:] and thereupon he bringeth suit [and good proof]. And the said David in his proper person comes and defendeth his right, when [and where it shall behove him,] and thereupon voucheth to warranty

Demand against the tenant.

Count.

Esples.

Defence of the tenant.

Voucher.

“War-  
“ranty.

“Demand  
“against the  
“vouchee.

“Count.

“Defence  
“of the  
“vouchee.  
“Second  
“voucher.”

Warranty.

Demand against the common vouchee.

Count.

Defence of the common vouchee.

Plea, nul disseisin.

“ John Barker, esquire; who is present here in court in his proper person, and the tenements aforesaid with the appurtenances to him freely warranted [and prays that the said Francis may count against him]. And hereupon the said Francis demandeth against the said John, tenant by his own warranty, the tenements aforesaid with the appurtenances, in form aforesaid, &c. And whereupon he saith, that he himself was seised of the tenements aforesaid with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c. And the aforesaid John, tenant by his own warranty, defends his right, when, &c. and thereupon he further voucheth to warranty” Jacob Morland; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warranteth, &c. And hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c. And the aforesaid Jacob, tenant by his own warranty, defends his right, when, &c. And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth suppose: and of this he puts himself upon the country. And the

\* The clauses, between hooks, are no otherwise expressed in the record than by an &c.

aforesaid Francis thereupon craveth leave to imparl; and he hath it. And afterwards the aforesaid Francis cometh again here into court in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. **Therefore it is considered,** that the aforesaid Francis do recover his feisin against the aforesaid David of the tenements aforesaid, with the appurtenances: and that the said David have of the land of the aforesaid "John, to the value [of the tenements aforesaid;]" and further, that the said John have of the land the said Jacob to the value [of the tenements aforesaid.] And the said Jacob in mercy. And hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full feisin of the tenements aforesaid with the appurtenances: and it is granted unto him, returnable here without delay. Afterwards, that is to say, the twenty-eighth day of November in this same term, here cometh the said Francis in his proper person; and the sheriff, namely Sir Charles Thomson, knight, now sendeth, that he by virtue of the writ aforesaid, to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full feisin of the tenements aforesaid with the appurtenances, as he was commanded. All and singular which premises, at the request of the said Francis, by the tenor of these presents we have held to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the bench aforesaid, to be affixed to these presents. *Witness* Sir John Willes, knight, at Westminster, the twenty-eighth day of November, in the twenty-first year of our reign.

Cooke.

THE END OF THE SECOND VOLUME.











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