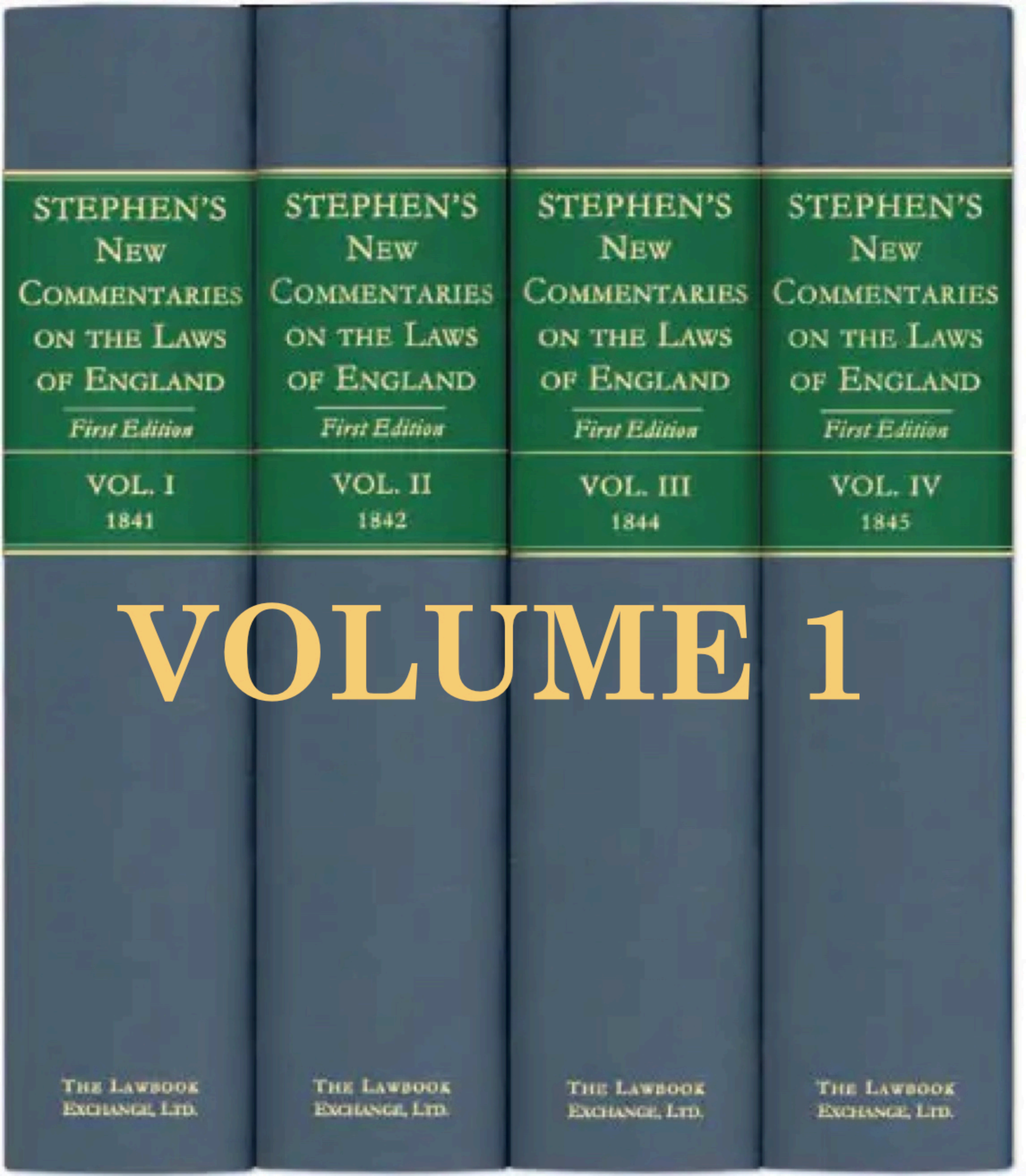
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NEW

COMMENTARIES

ON

THE LAWS OF ENGLAND.

(PARTLY FOUNDED ON BLACKSTONE.)

BY

HENRY JOHN STEPHEN,

SERJEANT AT LAW.

"For hoping well to deliver myself from mistaking, by the order and perspicuous expressing "of that I do propound, I am otherwise zealous and affectionate to recede as little from "antiquity, either in terms or opinions, as may stand with truth, and the proficience of know-"ledge."—Lord Bac. Adv. of Learning.

Fourth Edition.

PREPARED FOR THE PRESS BY

JAMES STEPHEN, LL.D.,

OF THE MIDDLE TEMPLE, BARRISTER AT LAW,

AND PROFESSOR OF ENGLISH LAW AND JURISPRUDENCE
AT KING'S COLLEGE, LONDON.

IN FOUR VOLUMES.

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TO

THE QUEEN.

MADAM,

THE eminent person upon whose Commentaries on the Laws of England this Work is partly founded, had the honour to obtain for his labours the patronage of a Queen Consort; but the present Writer has to congratulate himself upon the yet more distinguished fortune of being permitted thus to dedicate his pages to a reigning Queen,—under whose gracious and beneficent sceptre the administration of the law

has been such as to command universal respect, and the law itself has been carried forward in a steady and temperate course of reform, nearer and nearer towards perfection.

I remain, Madam,

with profound respect,

Your Majesty's

loyal Subject and Servant,

THE AUTHOR.

PREFACE TO THE FIRST EDITION

OF THE

FIRST VOLUME(*a*).

It is now many years ago that I first conceived, and communicated to my friends in private society, the design of composing a work on the Laws of England, to which the text of Blackstone should be in a great measure contributory; and in 1836 I announced that design to the public. Since this period, several works have issued from the press, purporting to be treatises either on the English Law in general, or on detached portions of it, and containing republications of Blackstone's text, in forms more or less entire, with the intermixture of new matter by the respective editors. While this circumstance affords some testimony to the value of the original conception (*b*), there is, at the same time, no collision between any of these works and my own. With the exception of the general resemblance above pointed out, they will be found to pursue methods entirely remote from that which I have adopted.

(*a*) This work was originally published volume by volume.

(*b*) I do not mean by this expression to suggest that the works in question are indebted to me for the design on which they are founded. With respect, indeed, to that which first made its appearance, I became apprised, very shortly after my advertisement, that it was in contemplation, and that one of the volumes was far advanced towards completion.

Of the plan and principle of my own work, and of the views on which it was undertaken, it may be right here to give some farther explanation. Though the celebrated Treatise of Blackstone still remains without a rival, as an introductory and popular work on the Laws of England, the positions which it contains have been nevertheless so trenched upon by recent alterations in the law itself, that if the student were to rely upon its text, as containing an accurate account of our present system of jurisprudence, he would be led continually astray. The later editions have consequently comprised a copious accompaniment of corrective and supplementary notes at the bottom of the page: but it is not in the nature of such a method (with whatever ability pursued) to give entire satisfaction, because it obliges the reader to transfer his attention incessantly, from the text to the commentary, and augments also, to a considerable degree, the bulk and consequent expense of the volumes. These considerations led me to conceive that a work might prove acceptable, which should be framed upon the plan of introducing the necessary alterations into the text itself; but the question then arose whether it would be better to confine my effort to the reparation of those defects which new legislation and new decisions had occasioned, or to take a bolder course, and, discarding all solicitude about the measure of my adherence to the original work, to interweave my own composition with it, as freely as the purpose of ge-

neral improvement might seem to require. It was upon the latter plan that I fixed, though with some hesitation, my choice.

It may be thought, perhaps, that the confidence which carried me thus far, might naturally have tempted me farther, and taught me to aspire to the construction of an entirely new treatise. But if I had been conscious of faculties adequate to such an enterprise, I should still have declined it, as founded, in my judgment, on a wrong principle. The unimpaired portion of Blackstone's Commentaries comprise many passages, which (free in other respects from objection) are so far valuable at least, that they bear the stamp of his authority, and many others whose merit is of the highest order, being distinguished by all the grace and spirit of diction, the justness of thought, and the affluence of various learning, to which he owes his fame. These relics, which are in considerable danger of perishing by their incorporation in a work now falling into decay, may be lawfully converted, by any new Commentator on the Laws, to his own purposes; and it is manifestly not less his duty than his interest, to make the appropriation. He cannot reasonably hope to rival their excellence; and to attempt to displace them for original matter of his own, is consequently an injury to the public, and to the science of which he treats.

All passages, then, which appeared to me to fall under either of the descriptions above given, I have made it my principle to retain; but my deviations from the original work have, nevertheless, been frequent and extensive. Independently of certain objections to its arrangement (to which I shall presently revert), its exposition of particular subjects appeared to me to be often deficient in depth, in fulness, or in precision, and in some instances to be even chargeable with positive inaccuracy; so that, as I had prescribed to myself the rule of departing from Blackstone wherever I felt dissatisfied with his performance as well as where any change in the law had made a departure indispensable, it is seldom that I have been able to pursue the text for several pages in succession, without the introduction (more or less extensively) of matter from my own pen. Large portions, indeed, of original composition will be found frequently to occur in a continuous form; and even where the text of my predecessor is pursued with shorter interruption, yet it will be often apparent that fundamental alterations have been made in the manner of treating the particular subject under discussion. There is no part of the present volume, perhaps, in which the innovation is so important, as in that which regards the law of Descent, where I have endeavoured to lay down new Rules of Inheritance, in lieu of the well-known Canons of Blackstone, now superseded by the effect of a recent Act of Parliament—a severe

task—from which I should have been tempted to recoil, if, consistently with the general plan of my work, it had been possible to leave it unattempted.

But it is in that which regards the general arrangement, that the strongest claim of the present work to originality will be found. The order adopted by Blackstone is, in all its principal lineaments, derived from the Analysis of Hale; but though rendered venerable by the combined authority of names like these, I have not felt myself able to accede to it without alteration. The main division, indeed, by which the body of municipal law is severed into *Rights* and *Wrongs*, I have deemed it expedient to retain; for (though liable to the great disadvantage of precluding the entire or continuous discussion of some particular subjects, by making it necessary to recur to them under the aspect of Wrongs, after they have already once engaged our attention under that of Rights) it is founded nevertheless on a natural and just distinction, and is interwoven besides with the whole fabric of our law, and rooted in the minds of our lawyers. The division also of Wrongs into those of a *civil*, and those of a *criminal* nature, I have, for similar reasons, thought it clearly essential to preserve. But as to the division of *Rights*, the case is widely different. These are distributed by Blackstone into *Rights of Persons* and *Rights of Things;* an arrangement which has been justly considered

contrary both to grammatical and logical propriety. For the rights of things can only be understood as signifying the rights *relating* to things—a sense not correctly conveyed by the form of expression; and are placed, besides, in false antithesis to the rights of persons; by which is evidently intended the rights *belonging* to persons. The meaning would have been better expressed by a division into the rights relating to persons, and the rights relating to things. This fault, indeed, is the more remarkable, because it might have been avoided by a closer adherence to the language of Justinian's Institutes, which apparently served in this instance as the model: *Omne jus quo utimur* (according to this authority) *vel ad personas pertinet, vel ad res, vel ad actiones* (*c*).

The arrangement in question, however, is not open merely to this kind of criticism, but to other objections of a much weightier description. In the first place, it determines that the law relating to *persons* shall be fully discussed before that relating to *property* has been examined,—and yet the subject of property ought, in reason, to take the precedence of that part of the law of persons, at least, which treats of relative rights; for it is in the nature of the relative rights, viz. those which grow out of the social relations of parent and child, husband and wife, magistrates and people, and the like, to *pre-*

(*c*) Instit. lib. i. tit. 2.

suppose the absolute ones of life, liberty, personal security, and property (*d*). With respect to absolute rights of the three first descriptions, this is obvious, and the precedence therefore is properly assigned to them in Blackstone's work; but it is equally true with regard to property also—for property, like the rest, unquestionably constitutes one of the circumstances to which the social relations are adjusted, and to which they must be supposed to refer. To this right, therefore, the next place ought, in point of correct arrangement, to have been allotted; but the Commentator's plan of division makes this impossible, and compels him, after a short notice of property, to pass on, and to postpone its further examination, until all relative rights (whether private or public) have been exhausted. This inversion of the natural order is not only inartificial, but often embarrasses the discussion of rights of the relative kind. Thus in the chapter on Husband and Wife, every reader must perceive the disadvantage of the total omission to notice the effects of marriage in regard to the property of the parties; and yet until

(*d*) This did not escape the discernment of Hale: "Having done with "the rights of persons, I now come to the rights of things. And though "according to the usual method of civilians, and our antient common law "tractates, this comes in the second place, after the *jura personarum*, and "therefore I have herein pursued the same course, yet that must not be the "method of a young student of the common law, but he must begin his "study here, at the *jura rerum*; for the former part contains matter proper "for the study of one that is well acquainted with those *jura rerum*."—Hale's Anal. sect. 23. This passage had not attracted my attention until my principle of division had been fixed upon; and its subsequent discovery was of course calculated to give me increased confidence in the propriety of my choice.

the subject of property in general had been examined, any disquisition on the proprietary rights attending that particular relation, would have been obviously premature.

Another, and a still more important objection to the method which considers *Rights* as consisting either of *Rights of Persons* or *Rights of Things*, is that it fails to embrace the whole compass of rights. There is a branch of law which belongs (properly speaking) to neither of these divisions, but of great and growing importance in our municipal system, that, namely, which concerns the social, as distinguished from the political, ecclesiastical, and judicial, institutions of the country, and which comprises (among many other subjects) the laws relating to the poor, to highways, to public charities, and the like. For topics such as these, the analysis of Blackstone affords no proper place, and, when they are of too much importance to be neglected, expedients of an awkward kind are often devised to make room for them. Thus the law of highways and turnpikes is made incidental to the office of parish surveyor, and the large and interesting subject of the poor laws is dealt with, by way of digression from the office of overseer.

Dissatisfied for these reasons with Blackstone's arrangement of rights, and conceiving that it had not, like the other portions of his general method,

become so inveterate among us, as to render its retention unavoidable, I have consequently ventured to lay it aside, and to adopt, so far as this subject is concerned, a different plan of distribution. This plan is entirely of my own conception. It might have been supposed, indeed, that, in a field so highly cultivated as that of Rights, I could be at no loss for a satisfactory precedent; but my search for one, though prosecuted with some diligence, was not attended with success. No writer on English or American law, who has deserted the order of Blackstone, had any pretension to be considered as a model—the repositories of the Roman jurisprudence (which, with the exception of the Institutes, are notoriously defective or confused in their arrangement) supplied nothing to the purpose—the Institutes themselves (from which the division into the rights of persons and of things was originally taken) could of course afford no assistance;—and, with respect to the continental systems, they either conform (as in the Code Civil of France) to the Institutes, or when they depart (as in the treatise of Domat) from the beaten track, their course is not such as an English jurist could follow with advantage.

The general plan, which I have thus ventured, on my own responsibility to lay down, will be found in the first chapter of the first book. Its leading principle is—to make the distinction be-

tween *Persons* and *Things* the foundation not of a primary, but of a subordinate arrangement, and to consider *Persons*, as constituting in a primary sense, the only objects of the law's regard. But the persons, whom the law is supposed thus uniformly to contemplate, are presented, first, in the light of insulated individuals,—and in that capacity their *personal* (in other words their *bodily*) rights are examined; next, in their connection with the things around them,—which introduces the consideration of their rights of *property*; next, as members of families—which involves their *rights in private relations*; and lastly, as members of the community,—which leads to the discussion of their rights in public relations, or (as they may be termed more compendiously) *public rights.*

According to this order, the absolute right uniformly takes the precedence of the relative, and the law of property in general is investigated before the relations of men, in regard to property, arise for consideration. Upon this system, too, the division of *Public Rights* (when it shall come to be examined in its proper place) will allow of a subdivision conveniently adapted to the discussion of those mixed subjects to which we have before referred, and which, having no exclusive connection either with person or property, it is the tendency of Blackstone's method to exclude. I propose to subdivide the head of Public Rights into those

which concern a man in his relations to persons in authority, whether civil or ecclesiastical, and those which concern him in his relations to his fellow citizens at large—the first of which will fall under the heads of *The Civil Government*, and *The Church*; the second, under that of the *Social Economy of the Realm*; and it is under this latter head, that such mixed subjects as above referred to, will find a regular and appropriate place. The entire arrangement of the work, when fully developed, will consequently stand as follows:—

I. Of Personal Rights.

II. Of Rights of Property.
  1. As to things real.
  2. As to things personal.

III. Of Rights in Private Relations.
  1. Between master and servant.
  2. Between husband and wife.
  3. Between parent and child.
  4. Between guardian and ward.

IV. Of Public Rights.
  1. As to the civil government.
  2. As to the church.
  3. As to the social economy of the realm.

V. Of Civil Injuries.
  Including the modes of redress.

VI. Of Crimes.
  Including the modes of prosecution.

While the general method differs thus widely from that of the former Commentaries, yet the two

works are often in coincidence, so far as regards the interior or more specific divisions; and the chapters of the present volume in particular, will be found to correspond very frequently, both in title and order of succession, with those in the earlier portions of the second volume of Blackstone. Yet even in parallel chapters the reader will discover that the same subjects are not invariably embraced—several topics being detached from the place which Blackstone has assigned to them, and either actually inserted, or destined for future insertion, in other departments of the work. Thus in the seventeenth chapter, the remarks on leases comprise no notice of *Leases by tenants in tail*, or by *married women*, for which the nineteenth chapter was thought to afford a more convenient opportunity—nor of *Leases by ecclesiastical persons*, which will more naturally present themselves for discussion, in a subsequent volume, in connection with the general law relating to the Church. In like manner, the fourteenth chapter (on Forfeiture) passes by the subject of *Simony*, to which the Church seems again to have a preferable claim,—and that of *Waste*, reserved (as it is conceived) with more propriety for the division relative to Civil Injuries. To these deviations from Blackstone, in point of arrangement, it is also proper to add, that the present volume contains several chapters involving a complete departure from the method of that author, and altogether of new construction; among

which, the most important are the ninth (on Uses and Trusts), the eighteenth (on Conveyances under the Statute of Uses), and the nineteenth (on Conveyances by Tenants in Tail and Married Women).

In a production bearing the relation that has been described to the work of a former writer, I have deemed it indispensable to supply the reader with the means of readily and precisely distinguishing the portions due to either commentator, or, I should rather say, of distinguishing them with *more* readiness and precision than could be done by aid of the internal evidence resulting from the style or matter. Supposing a mistake to have occasionally arisen on this subject, the effect would have been either to divest an excerpted passage of the authority which of right belonged to it, or to obtain for some part that is new, a credit which it did not fairly deserve; and even if no greater inconvenience had occurred, than to leave the mind in mere uncertainty to which of the two authors a given passage was to be assigned, it would have materially detracted from the interest and value of the work. The sense of this has led to a method of notation by brackets, the nature of which will be explained in a Notice subjoined to this Preface. It has considerably increased both the labour and the expense of the publication, and by no means contributed to the beauty of its page. But the eye soon learns to ac-

commodate itself to the novelty, and it is believed that the reader will experience no embarrassment from its adoption. It has not been thought necessary, however, to extend it to the notes. Among these, there are many by the present commentator; but independently of the inferiority of their merit, the reference that they bear to his portions of the text, or other similar circumstances, will in general be found sufficiently to distinguish them from the annotations of Blackstone. The cases and authorities to which these last refer have throughout been carefully verified, with the exception only of some few instances, in which no ready access could be had to the works from which the citations were made.

Upon the whole, I submit this volume to the public, with a solicitude proportionate to the importance of the enterprise of which it is the first result. Conscious that I have devoted to it my best faculties, and a large portion of inestimable time, I naturally cherish the hope that the value of the product may prove to be in some degree adequate to the cost of the production: but when I recollect how much its progress has been embarrassed by the labours and anxieties always incident to a professional life, it appears scarcely reasonable to suppose that its plan will be found entirely free from defect, or its execution from inaccuracy.

January 1*st*, 1841.

NOTICE TO THE READER.

The portions of this work which lie between brackets [ ] are taken, without alteration, from the text of Blackstone. For the rest, the present author is responsible. To enable the reader to distinguish the former from the latter, upon merely opening the volume, and without being obliged to turn the leaves over backwards, the *continuation* of an extract is always marked by a new bracket at the top of the page.

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INTRODUCTION.

SECTION I.

OF THE STUDY OF THE LAW.

At the outset of a work like the present, in the course of which it is proposed (though with the aid, in part, of materials derived from a former writer) to bring under examination no less a subject than the entire body of the English law, the discouragement to which the writer is naturally inclined by the magnitude of the task before him, is counteracted by the recollection of its general interest and importance. The subject is one to which no class of readers in the realm can be indifferent; for it [is incumbent upon every man to be acquainted with those laws at least with which he is immediately concerned, lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under.] But it ought to have peculiar attractions for men of liberal education and respectable rank. [These advantages are given them, not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

Let us therefore begin with gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke (*a*)

(*a*) Education, Sec. 187.

[as a strange absurdity. It is their landed property, with its long and voluminous train of descents and conveyances, settlements, entails and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession: yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, for the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended

together.] And when juries are incapable of doing this with tolerable propriety, it tends proportionably to lower their authority and to throw more power [into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

But it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood: by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also, (under which must be included the knowledge,) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

Yet farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament; and those, who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons; that they may list under party banners; may grant or withhold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innova-

[tion; to propose, to adopt, and to cherish any solid and well-weighed improvement: bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

Indeed it is perfectly amazing that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only in the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself *born* a legislator. Yet Cicero was of a different opinion: "it is necessary," says he (*b*), "for a senator to be thoroughly acquainted with the constitution; and this," he declares, "is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection; without which no senator can possibly be fit for his office."

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged

(*b*) De Leg. 3, 18. "*Est senatori necessarium nosse rempublicam; idque late patet:—genus hoc omne scientiæ, diligentiæ, memoriæ est; sine quo paratus esse senator nullo pacto potest.*"

[for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice,) owe their original, not to the common law itself, but to innovations that have been made in it by acts of parliament, "overladen (as Sir Edward Coke expresses it)(*c*) with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if," he subjoins, "acts of parliament were, after the old fashion, penned by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisoes, as they now do."]

Again, [what is said of gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong, or still stronger, with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellers of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law: to examine and correct

(*c*) 2 Rep. pref.

[such errors as have escaped] the most experienced sages of the profession presiding in the courts from which the appeal to them is made. [Their sentence is final, decisive, irrevocable; no appeal, no correction, not even a review can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.]

It is true that in the exercise of this province they are entitled to demand the attendance and advice of the collective body of the judges of the superior courts of the common law, by whose learning they are guided through the technical difficulties of the case before them; but it is obviously important that the members of the noble assembly itself, in whose name and under the sanction of whose authority the judgment is to be ultimately pronounced, should be so far conversant with law as to be able to make a proper and intelligent use of the assistance thus afforded.

[The Roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scævola, the then oracle of the Roman law; but, for want of some knowledge in that science, could not so much as understand even the technical terms of which his friend was obliged to make use. Upon which Mutius Scævola could not forbear to upbraid him with this memorable reproof (*d*), "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law, wherein he arrived to that proficiency, that he left behind him about a hundred and four-score volumes of his own compiling upon the subject; and became, in the opinion

(*d*) Ff. 1, 2, s. 43. "*Turpe esse patricio, et nobili, et causas oranti, jus in quo versaretur ignorare.*"

[of Cicero (*e*), a much more complete lawyer than even Mutius Scævola himself.

It will be idle to recommend to our English nobility and gentry to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator: but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable in those who are entrusted by their country to maintain, to administer, and to amend them.]

Nor will some degree of legal knowledge [be found in the least superfluous to persons of inferior rank, especially those of the learned professions. The clergy, in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes, and other ecclesiastical dues; to marriages, and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension, which is no otherwise to be acquired than by use, and a familiar acquaintance with legal writers.]

To gentlemen of the faculty of physic the study of the law is attended with some importance, not only to complete their character for general and extensive knowledge, a character which their profession has always remarkably deserved, but also to enable them to give more satisfactory evidence in a variety of cases in which they are liable to be examined as witnesses. The frequent combination of medical with legal considerations, upon inquiries relative

(*e*) Brut. 41.

to suspected murder or doubtful sanity, and other points of the like nature, has given birth to a sort of mixed science, known by the name of *Forensic Medicine* or *Medical Jurisprudence,* which may be considered as common ground to the practitioners both of law and physic.

[But those gentlemen who intend to profess the civil and ecclesiastical laws, in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But, as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption. In which we are not singular in our notions: for even in Holland, where the imperial law has been much cultivated, and its decisions pretty generally followed, we are informed by Van Leeuwen (*f*), that it received its force from custom and the consent of the people, either tacitly or expressly given; "for otherwise," he adds, "we should no "more be bound by this law than by that of the Almains, "the Franks, the Saxon, the Goths, the Vandals, and other "of the antient nations." Wherefore, in all points in which the different systems depart from each other, the law of the land was to take place of the law of Rome, whether antient or modern, imperial or pontifical. And, in those of our English courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them, or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law in

(*f*) Dedicatio Corporis Juris Civilis. Edit. 1663.

[either instance both may, and frequently does, prohibit and annul their proceedings (*g*): and it will not be a sufficient excuse for them to tell the queen's courts at Westminster that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota or Imperial chamber. For which reason it becomes highly necessary for every civilian and canonist, that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together as to form certain supplemental parts of the common law of England, distinguished by the titles of the maritime, the military, and the ecclesiastical law.]

The general use and necessity of some acquaintance with the common law being thus apparent, it may naturally be supposed that some provision would antiently have been made for this, as for other branches of education, in the universities of Cambridge and Oxford. The reverse, however, is the fact—the study of the common law having until recent times been wholly neglected in those venerable seats of learning, and having been cultivated from the earliest period in a different region. How this has come to pass will appear from the following retrospect.

[Sir John Fortescue, in his panegyric on the laws of England, (which was written in the reign of Henry the sixth,) puts (*h*) a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning: "Why the laws of England, being so good, so fruitful, and so commodious, are not taught in the universities, as the civil and canon laws are?" In answer to which he gives (*i*) what seems, with due deference be it spoken, a very jejune and unsatisfactory reason;

(*g*) Hale, Hist. C. L. c. 2; Selden in Fletam; 5 Rep. Caudrey's case; 2 Inst. 599.

(*h*) C. 47.

(*i*) C. 48.

[being, in short, that "as the proceedings at common law "were in his time carried on in three different tongues, the "English, the Latin, and the French, that science must be "necessarily taught in those three several languages; but "that in the universities all sciences were taught in the "Latin tongue only;" and therefore he concludes, "that "they could not be conveniently taught or studied in "our universities." But without attempting to examine seriously the validity of this reason, (the very shadow of which, by the effect of late constitutions, is entirely taken away,) we perhaps may find out a better, or at least a more plausible account, why the study of the municipal laws was so long banished from these seats of science, than what the learned chancellor thought it prudent to give to his royal pupil.

That antient collection of unwritten maxims and customs, which is called the common law, however compounded, or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest. This had endeared it to the people in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages: it was then taught, says Mr. Selden (*k*), in the monasteries, *in the universities*, and in the families of the principal nobility. The clergy, in particular, as they then engrossed almost every other branch of learning, so (like their predecessors, the British Druids) (*l*), they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmsbury (*m*). The judges therefore were usually created out of the

(*k*) In Fletam, 7, 7.
(*l*) Cæsar de Bello Gal. 6, 12.
(*m*) De Gest. Reg. l. 4.

[sacred order (*n*), as was likewise the case among the Normans (*o*); and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day.

But the common law of England, being not committed to writing, but only handed down by tradition, use and experience, was not so heartily relished by the foreign clergy, who came over hither in shoals during the reign of the conqueror and his two sons, and were utter strangers to our constitution as well as our language.] And it was nearly brought to ruin by the new impulse given in the 12th century to the study of Justinian's system of law, and its consequent reception over all the west of Europe, where before it had possessed, in general, no authority, and had fallen almost into oblivion (*p*). [This now became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science; and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law,] that is, the compilations of Justinian, [(being the best written system then extant,) as the basis of their several constitutions; blending and interweaving it among

(*n*) Dugdale, Orig. Jurid. c. 8.

(*o*) "*Les juges sont sages personnes et autentiques,—sicomme les archevesques, evesques, les chanoines des eglises cathedraulx, et les aultres personnes qui ont dignitez en saincte eglise; les abbez, les prieurs conventuaulx, et les gouverneurs des eglises, &c.*"—Grand Coustumier, ch. 2.

(*p*) Hallam's Middle Ages, 3d vol. p. 513; 1 Bla. Com. 18; 1 Reeves, Hist. Eng. Law, p. 66. It has been said (and the opinion is adopted by Blackstone) that this revival was owing to the accidental discovery of a copy of the Pandects at the capture of Amalfi by the Pisans, about the year 1130. But there appears to be no sufficient evidence that any such discovery took place. Vide Hallam, ubi sup.; et Histoire du Droit Romain au Moyen-Age, par M. De Savigny, ch. xviii. s. 35, et sequ., ch. xxii. ss. 164, 167.

[their own feodal customs, in some places with a more extensive, in others a more confined authority (*q*).

Nor was it long before the prevailing mode of the times reached England: for Theobald, a Norman abbot, being elected to the see of Canterbury (*r*), and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and, among the rest, Roger, surnamed Vacarius, whom he placed in the university of Oxford (*s*), to teach it to the people of this country. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and though the monkish clergy, devoted to the will of a foreign primate, received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately published a proclamation (*t*), forbidding the study of the laws, then newly imported from Italy, which was treated by the monks (*u*) as a piece of impiety; and though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.

From this time the nation seems to have been divided into two parties; the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the] civil law, and that of the Roman church (or canon law), [which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law, both of them reciprocally jealous of what they were unacquainted with,

(*q*) Domat's Treatise of Law, c. 13, § 9; Epistol. Innocent. IV. in M. Paris, A.D. 1254.

(*r*) A.D. 1138.

(*s*) Gervas. Dorobern. Act. Pontif. Cantuar. Col. 1665.

(*t*) Rog. Bacon, citat. per Selden in Fletam, 7, 6; in Fortesc. c. 33; and 8 Rep. Pref.

(*u*) Joan. Sarisburiens. Polycrat. 8, 22.

[and neither of them, perhaps, allowing the opposite system that real merit which is abundantly to be found in each. This appears, on the one hand, from the spleen with which the monastic writers (*x*) speak of our municipal laws upon all occasions; and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton, when the prelates endeavoured to procure an act to declare all bastards legitimate in case the parents intermarried at any time afterwards: alleging this only reason, because holy church (that is, the canon law,) declared such children legitimate; but "all the earls and barons (says the parliament-roll) (*y*) with one voice answered, that they would not change the laws of England, which had hitherto been used and approved." And we find the same jealousy prevailing above a century afterwards (*z*), when the nobility declared, with a kind of prophetic spirit, "that the realm of England hath never been unto this hour, neither by the consent of our lord the king, and the lords of parliament, shall it ever be, ruled or governed by the civil law (*a*)." And of this temper between the clergy and laity many more instances might be given.

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of King Henry the third, episcopal constitutions were published (*b*), forbidding all ecclesiastics to appear as advocates *in foro sæculari.* Nor did they long continue to act as judges there, not caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm (*c*), though they still kept possession of the high

(*x*) Idem, ibid. 5, 16; Polydor. Virgil, Hist. l. 9.

(*y*) Stat. Merton, 20 Hen. 3, c. 9. "*Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.*"

(*z*) 11 Rich. 2.

(*a*) Selden, Jan. Anglor. l. 2, § 43; in Fortesc. c. 33.

(*b*) Wilkins, Concil. vol. i. p. 574, 599.

(*c*) Selden in Fletam, 9, 3.

[office of chancellor,] and the court of chancery attached to it, a court then of little juridical power; [and afterwards, as its business increased by degrees, they modelled the process of the court at their own discretion.

But wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our universities, and from the high court of chancery before mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law; for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; Pope Innocent the fourth having forbidden (*d*) the very reading of it by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered that our universities began about that period to receive their present form of scholastic discipline; and that they were then, and continued to be till the time of the Reformation, entirely under the influence of the popish clergy; this will lead us to perceive the reason why the study of the Roman laws was in those days of bigotry (*e*) pursued with such alacrity in

(*d*) M. Paris, A.D. 1254.

(*e*) There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character, even of the blessed virgin, without making her a civilian and a canonist; which Albertus Magnus, the renowned Dominican doctor of the thirteenth century, thus proves in his Summa de Laudibus Christiferæ Virginis (divinum magis quam humanum opus), qu. 23, § 5. "*Item quod jura civilia, et leges, et decreta scivit in summo, probatur hoc modo: sapientia advocati manifestatur in tribus; unum, quod obtineat omnia contra judicem justum et sapientem; secundo, quod contra adversarium astutum et sagacem; tertio, quod, in causa desperata: sed beatissima virgo, contra judicem sapientissimum, Dominum; contra adversarium callidissimum, dyabolum; in causa nostra desperata;*

[these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

And after the Reformation, many causes conspired to prevent its becoming a part of academical education: as, first, long usage and established custom, which, as in everything else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth; and their total ignorance of the merit of the common law, though its equal at least, and perhaps an improvement on the other. But the principal reason of all, that hindered the introduction of this branch of learning, is, that the study of the common law being banished from hence in the times of popery, fell into a quite different channel, and was wholly cultivated in another place.

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen; who entertained upon their parts a most hearty aversion to the civil law (*f*), and made no scruple to profess their contempt, nay, even their ignorance (*g*) of it, in the most public manner. But still,

sententiam optatam obtinuit." To which an eminent Franciscan, two centuries afterwards, Bernardinus de Busti (Mariale, part 4, serm. 9,) very gravely subjoins this note. "*Nec videtur incongruum mulieres habere peritiam juris. Legitur enim de uxore Joannis Andreæ glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit.*"

(*f*) Fortesc. de Laud. LL. c. 25.

(*g*) This remarkably appeared in the case of the Abbot of Torum, M. 22 Edw. III. 24, who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory *contra inhibitionem novi operis;* by which words Mr. Selden (in Flet. 8, 5,) very justly understands to be meant the title *de novi operis nuntiatione* both in the civil and canon laws, (Ff. 39, 1, C. 8, 11, and Decretal. 5, 32,) whereby the erection of any new buildings in prejudice of more antient ones was prohibited. But Skipwith, the king's serjeant, and afterwards chief baron of the Exchequer, declares them to be flat nonsense; "*in ceux parolx,* contra inhibitionem novi operis, *ny ad pas entendment;*" and Justice Schardelow mends the matter but little by informing him that they

[as the balance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil, (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta,) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

The incident referred to was the fixing the Court of Common Pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held before the king's chief justiciary of England, in the *aula regis*, or such of his palaces wherein his royal person resided; and removed, with his household, from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of King John and that of King Henry the third (*h*), that, "Common Pleas should no longer follow the king's court, but be held in some certain place:" in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who (as Spelman (*i*) observes) addicted themselves wholly to the study of the laws of the land, and, no longer considering it as a mere subordinate science for the amusement of leisure hours,

signify a restitution *in their law*: for which reason he very sagely resolves to pay no sort of regard to them. "*Ceo n'est que un restitution en lour ley, pur que a ceo n'avomus regard, &c.*"

(*h*) C. 11.

(*i*) Glossar. 334.

[soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, King Edward the first.

In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of chancery) between the city of Westminster, the place of holding the king's courts, and the city of London; for advantage of ready access to the one, and plenty of provisions in the other (*p*). Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers, first styled apprentices (*q*), from *apprendre*, (to learn,) who answered to the bachelors of the universities; as the state and degree of a serjeant (*r*), *servientis ad legem*, did to that of a doctor.

The crown seems to have soon taken under its protec-

(*p*) Fortesc. c. 48.

(*q*) Apprentices or barristers seem to have been first appointed by an ordinance of King Edward the first, in parliament, in the 20th year of his reign. (Spelm. Gloss. 37; Dugdale, Orig. Jurid. 55.)

(*r*) The first mention perhaps in our law books of serjeants or countors, is in the statute of Westm. I. 3 Edw. I. c. 29, and in Horne's Mirror, c. 1, s. 10, c. 2, s. 5, c. 3, s. 1, in the same reign. But M. Paris, in his life of John II. Abbot of St. Alban's, which he wrote in 1255, 39 Hen. III. speaks of advocates at the common law, or countors, (*quos banci narratores vulgariter appellamus,*) as of an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, A.D. 1259, in the case of one William de Bussy; who, being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end "*voluit ligamenta coifæ suæ solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permissus.——Satelles vero eum arripiens, non per coifæ ligamina sed per guttur eum apprehendens, traxit ad carcerem.*" And hence Sir H. Spelman conjectures (Glossar. 335), that coifs were introduced to hide the tonsure of such renegade clerks as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon.

[tion this infant seminary of common law; and, the more effectually to foster and cherish it, King Henry the third, in the nineteenth year of his reign, issued out an order, directed to the Mayor and Sheriffs of London, commanding that no regent of any law schools *within* that city should, for the future, teach law therein (*s*). The word law, or *leges*, being a general term, may create some doubt, at this distance of time, whether the teaching of the civil law, or the common, or both, is hereby restrained. But in either case it tends to the same end. If the civil law only is prohibited, (which is Mr. Selden's (*t*) opinion,) it is then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law be also included in the restriction, (as Sir Edward Coke (*u*) understands it, and which the words seem to import,) then the intention is evidently this,—by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university which was newly instituted in the suburbs.

In this juridical university (for such it is insisted to have been by Sir Edward Coke (*x*)) there were two sorts of collegiate houses; one called inns of chancery, in which the younger students of the law were usually placed, "learning and studying (says Fortescue (*y*)) the originals, and, as it were, the elements of the law; who, profiting therein, as they grew to ripeness, so were they admitted into the greater inns of the same study, called the inns of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by its practice; and that in his time there were about two thousand stu-

(*s*) "*Ne aliquis scholas regens de legibus in eadem civitate de cætero ibidem leges doceat.*"

(*t*) In Flet. 8, 2.

(*u*) 2 Inst. proëm.

(*x*) 3 Rep. pref.

(*y*) C. 49.

[dents at these several inns, all of whom, he informs us, were *filii nobilium*, gentlemen born.

Hence, it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the sixth it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the laws. But by degrees this custom has fallen into disuse; which seems principally owing to these reasons; first, because in these societies all sorts of regimen and academical superintendence, either with regard to morals or studies, have been thought impracticable, and therefore entirely neglected: secondly, because persons of birth and fortune, after having finished their usual courses at the universities, have seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction.]

At the present day the inns of Chancery have accordingly sunk into insignificance, and an admission to them is no longer of any avail to the student in his progress to the bar. And even the resort to the inns of court is now very much confined to those to whom the knowledge of practice is absolutely necessary, that is, such as are intended for the profession (*z*).

The inns of court still enjoy, however, their antient and exclusive privilege of conferring the rank or degree of *barrister at law* (*a*); the possession of which (or of the higher degree of *serjeant*) constitutes an indispensable qualification for practising as an advocate or counsel in the supe-

(*z*) The inns of court are the Inner Temple, the Middle Temple, Lincoln's Inn and Gray's Inn. The inns of chancery are Clifford's Inn, Clement's Inn, Lyon's Inn, New Inn, Thavies' Inn, Staples' Inn and Barnard's Inn. Furnival's Inn (which formerly belonged to the latter class) has now ceased to exist as a law society. As to the constitution of the inns of court and chancery, see Rex *v.* Barnard's Inn, 6 Ad. & El. 17, and the cases there quoted; see also Dugd. Orig. Jur. pref. to 3rd Report.

(*a*) For further information as to barristers, vide post, b. v. c. iii.

rior courts (*b*). No other means of obtaining it exist but that of becoming enrolled as a student in one or the other of these inns, and applying, after a certain period, to its principal officers (or *benchers*) for a *call to the bar*. As a qualification for the call, the student must have kept commons for three years (i. e. twelve terms), by dining in the hall of the society, into which he has obtained admission, at least three times in each term; and by the present educational system (as lately established) no student shall be eligible to be called to the bar, who shall not either have attended during one whole year the lectures of two of the Readers, or have satisfactorily passed a public examination (*c*). And, accordingly, a public examination for all the inns collectively, periodically takes place, extending to all students who are desirous of submitting themselves to that test of proficiency (*d*). The business of legal education, however, in this country, is also in a great measure conducted (as it has always been) in private channels; the usual plan being to obtain admission into the chambers of a practising barrister, conveyancer, or special pleader, where, in addition to the opportunities of observing the course of practice, the pupil enjoys for some years the advantage of private tuition in the grounds and principles of the law. Even academical instruction, indeed, may be obtained in other schools than those of the inns of court; for lectures in law are now given in colleges

(*b*) In order to practise as an advocate in those courts in which the *civil* law obtains, the degree of doctor of laws must be first obtained at one of the English universities.

(*c*) Rules of the Inns of Court. See the Rules for the Public Examination of Students, Michaelmas Term, 1856. The lectures above referred to are given on Constitutional Law and Legal History; on Jurisprudence and the Civil Law; on Equity; on the Law of Real Property; and on the Common Law of England.

(*d*) As an inducement to students to propose themselves for examination, studentships, tenable for three years, of fifty guineas a year, have been recently founded by the Inns of Court; one of which is conferrible on the most distinguished student at each public examination. See the same Rules for the Public Examination of Students.

c V Hutchinson

of the University of London, viz., at King's College, and at University College; and though no provision for instruction in the municipal laws of England was antiently made, as we have seen, at Cambridge or at Oxford, the deficiency has been long since redressed by the munificence of private donors, who at each university have founded professorships, with appropriate endowments for that purpose.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

By the term Laws we here intend to denote the rules [of human action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free-will, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him on whom he depends as the rule of his conduct; not, indeed, in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will.

This will of his Maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty

[of reason to discover the purport of those laws. Such, among others, are these principles,—that we should live reputably, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law (*a*).]

The constitution and frame of humanity are in this respect, as in all others, so contrived as to afford a striking proof of the benevolence of the great Creator. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connexion of justice and human felicity, we ought to consider the law of nature not as made up of a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised, but as graciously reduced to [this one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law; for the several articles into which it is branched in our systems, amount to no more than demonstrating that this or that action tends to man's real happiness, and therefore concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.]

But though the real basis of the law of nature is a tendency to promote human happiness, and though to a certain extent this consideration affords a practical test, whether a given course of conduct be naturally right or not, yet the fallibility of human reason, and its inability to judge of the ultimate consequences of things, will in general preclude the application of such a test to parti-

(*a*) "*Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.*"—Inst. l. 1, 3. The word *honeste* in this passage has been rendered by Blackstone, vol. i. p. 40, *honestly*, which (as remarked by Christian) scarcely conveys the full meaning.

cular cases. It would seem not to have been the design of the all-wise disposer of the universe that man, even in his perfect state, should be left wholly to the guidance of his own understanding or conscience on the subject of moral duty; but it is at all events certain that since the fall his corrupt and clouded faculties have proved unequal to the task.

Ample light however is now afforded to him by [the benign interposition of divine Providence, which, in compassion to the frailty, the imperfection and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that until they were revealed, they were hid from the wisdom of ages. As, then, the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed be ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points

[in which both the divine law and the natural leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions, arises] the chief unlawfulness of this crime. Those human laws, by which it is also interdicted, add comparatively but little to its moral guilt, or to the duty *in foro conscientiæ* of abstaining from its perpetration. [Nay, if any human law should allow or injoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws,—such for instance, as the] importation of particular commodities from foreign countries,—[here the inferior legislature had scope and opportunity to interpose, and to make that action unlawful which before was not so.]

But we are farther to observe that [Man was formed for society; and, as is demonstrated by the writers on this subject (*b*), is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations," which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several commu-

(*b*) Puffendorf, l. 7, c. 1, compared with Barbeyrac's Commentary.

[nities; in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject; and therefore the civil law very justly observes, that *quod naturalis ratio inter homines constituit, vocatur jus gentium* (c).

Thus much it appeared necessary to premise concerning the law of nature, the revealed law, and the law of nations, before a more full exposition was given of the principal subject of this section, municipal (or civil) law; that is, the rule by which particular districts, communities, or nations, are governed. It is here called *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.]

The true meaning and force of the term (taken in this its ordinary sense) may be more fully developed thus: it is "a rule of civil conduct prescribed by the supreme power in a state (*d*)."

[Let us endeavour to explain its several properties, as they arise out of this definition. And, first, it is a *rule:* not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a rule. It is also called a rule, to distinguish it from advice or counsel, which we are at

(c) Ff. l. 1, 9.

(d) "*Jus civile est quod quisque sibi populus constituit.*" — Inst. l. 2, 1.

[liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

It is also called a rule, to distinguish it from a *compact* or *agreement;* for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be "*a rule.*"

Municipal law is also "a rule *of civil conduct.*" This distinguishes municipal law from the natural, or revealed; the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise "a rule *prescribed.*" Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law; it is requisite that this resolution be notified

[to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *vivâ voce*, by officers appointed for that purpose, as is done with regard to proclamations.] It may, lastly, [be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when, after an action (indifferent in itself) is committed, the legislator then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he might know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed *by the supreme power in a state.*" For legislature is the greatest act of superiority that can be exercised

[by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

This will naturally lead us into a short inquiry concerning the nature of society and civil government; and the natural inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society; and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again: sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness

[and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together; namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should] guarantee to each individual member the enjoyment of certain liberties and advantages or (as they are generally termed) *rights*, [and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled the Supreme Being; the three grand requisites, that is to say, of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community; goodness, to

[endeavour always to pursue that real interest; and strength or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not intended here to enter into any of them. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy—wisdom, goodness, and power—are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates: and all the

[other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knitted together, and united in the hand of the prince: but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the antients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero (*e*) declares himself of opinion "*esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure (*f*).

(*e*) In his fragments de Rep. l. 2.

(*f*) "*Cunctas nationes et urbes populus, aut primores, aut singuli regunt: delecta ex his et constituta reipublicæ forma laudari facilius quam evenire, vel, si evenit, haud diuturna esse potest.*"—Ann. l. 4, c. 33.

[But, happily for us of this island, the British constitution has long remained (and may it long continue!) a standing exception to the truth of this observation. For as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the sovereign; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and, thirdly, the House of Commons, freely chosen by the people from among themselves, which makes it a kind of democracy: as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing, there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity; that is, virtue, wisdom, and power. If it were lodged in any two of the branches—for instance, in the sovereign and House of Lords—our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the sovereign and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford; if

[the supreme rights of legislature were lodged in the two houses only, and the crown had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the royal office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. The legislature would be changed from that which (upon the supposition of an original contract, either actual or implied,) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected, is, according to Mr. Locke (*g*), (who perhaps carries his theory too far,) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, we are now to remark that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as

(*g*) On Government, part 2, § 212.

[political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any natural union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a political union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law*.

Thus far, as to the right of the supreme power to make laws; but farther, it is its duty likewise. For since the respective members are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will. But as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

Municipal law, in a general point of view, may be said to consist of several parts: one, *declaratory;* whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another, *directory;* whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs;

[a third, *remedial;* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added]—in case of a law by which any public wrong is prohibited, or public duty enjoined—a fourth, viz. the part which contains [the *sanction*], that is, the provision for enforcing or promoting its observance.

[With regard to the first of these, the *declaratory* part of municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication.] Those rights then [which God and nature have established, and may therefore be called natural rights, such as are life and liberty, need not the aid of human laws to be effectually invested in every man; neither do they receive any material increase of strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature can justifiably abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural duties (such as, for instance, the worship of God, the maintenance of children, and the like) receive a much stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract but little additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great Lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has very little force or operation with regard to actions that are naturally and intrinsically right or wrong.]

But, [with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according

[as the municipal legislator sees proper for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature, but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties,—obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide in what cases the seizing another's cattle shall amount to a trespass or a theft: and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the *declaratory* part of municipal law: and the *directory* stands much upon the same footing: for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean

[properly, when we speak of the protection of the law. When, for instance, the declaratory part of the law has said, that "the field or inheritance, which belonged to Titius's father, is vested by his death in Titius;" and the directory part has "forbidden any one to enter on another's property, without the leave of the owner:" if Gaius after this will presume to take possession of the land, the remedial part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.]

With regard to the *sanction* of laws [it is observed, that human legislators have for the most part chosen to make it rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards; because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty; and farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good (*h*). For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.]

Laws attended with a vindicatory sanction [are said to *compel* and *oblige*: not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense

(*h*) Locke on the Human Understanding, b. 2, c. 21.

[of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty; for rewards, in their nature, can only *persuade* and *allure;* nothing is *compulsory* but punishment.]

It is, however, held by the soundest ethical writers, that there is also an obligation in point of conscience to observe the laws. It is related of Socrates that he made a promise with himself to observe the laws of his country; and this is nothing more than what every man ought both to promise and perform; and he ought also to promise that he will exert all his power to compel others to obey them (*i*). It has been sometimes questioned, indeed, whether this principle is not to be understood with some restriction. "It holds," it has been said, "as to rights—and when the law "has determined the field to belong to Titius, it is matter "of conscience no longer to withhold or invade it. So also "in regard to natural duties, and such offences as are *mala* "*in se;* here we are bound in conscience, because we are "bound by superior laws, before those human laws were "in being, to perform the one and abstain from the other. "But in relation to those laws which enjoin only positive "duties, and forbid only such things as are not *mala in se,* "but *mala prohibita* merely, without any intermixture of "moral guilt, annexing a penalty to non-compliance: here "conscience is no farther concerned than by directing a "submission to the penalty in case of our breach of those "laws" (*k*). The distinction however will perhaps hardly bear the test of a close inquiry. To form a true judgment on the subject, it is necessary to take into consideration that the true principle both of moral and of positive laws

(*i*) Note by Christian to Blackstone's Com. p. 59.

(*k*) 1 Bl. Com. 58.

is in effect the same, viz. utility, or the general welfare, and that the disobedience of either sort of precept must be presumed to involve in it some kind of mischievous consequence. Supposing the existence of a law of the merely positive class, which happens to be considered by the public at large as useless or even detrimental to society, yet a conscientious man will feel himself bound to observe it, if for no other reason, yet for this, that his taking the contrary course might encourage others to violate laws of a more beneficial character, and lessen the general reverence for the institutions of his country.

SECTION III.

OF THE LAWS OF ENGLAND.

[THE "municipal law of England," or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten (or common) law; and the *lex scripta*, the written (or statute) law.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws* that are, by custom, observed only in certain courts and jurisdictions.

When these parts of our law are called *leges non scriptæ*, it is not to be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed, that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional; for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory (*a*); and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges solâ memoriâ et usu retinebant* (*b*). But with us, at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, pre-

(*a*) Cæs. de B. G. lib. 6, c. 13. (*b*) Spelm. Gl. 362.

[served and handed down to us from the times of highest antiquity. However, these parts of our law are therefore styled *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are; but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that which is "*tacito et illiterato hominum consensu et moribus expressum.*"

Our antient lawyers, and particularly Fortescue (*c*), insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some; but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another; though doubtless the Romans, the Picts, the Saxons, the Danes, and the Normans, must have insensibly introduced and incorporated many of their own customs with those that were before established: thereby, in all probability, improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries. Our laws, saith Lord Bacon (*d*), are mixed as our language; and as our language is so much the richer, the laws are the more complete.]

And indeed our early historians do positively assure us, that our body of laws is of this compounded nature. For they tell us, and their statement is adopted by Blackstone (*e*), that in the time of Alfred the local customs of the several provinces of the kingdom were grown so

(*c*) C. 17.
(*d*) See his proposals for a digest.
(*e*) 1 Bl. Com. 64.

various, that he found it expedient to compile a *Dom-boc* or *Liber Judicialis*, digesting them into one uniform code of laws for the general use of the whole kingdom: and this book is said by Blackstone to have been extant so late as the reign of king Edward the fourth, but to have been since lost: and it is thought by that commentator to have contained the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings (*f*).

It is farther the opinion of Blackstone that the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse, or at least to be mixed and debased with other laws of a coarser alloy; so that, about the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts (*g*): 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the antient Britons; and which Blackstone conceives therefore to have been very probably intermixed with the British or Druidical customs. 2. The *West-Saxon Lage*, or laws of the West Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire, which he supposes to have been much the same with the laws of Alfred above mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat

(*f*) In the opinion of Mr. Hallam (Midd. Ages, vol. ii. p. 402, 7th ed.) there is no sufficient proof that Alfred "compiled a *dom-boc*, or general code for the government of his kingdom." Turner (in his Hist. Ang. Sax. vol. ii. p. 149, 6th ed.) considers the DOM-BOC as the same with the laws of Alfred in the Leges Anglo-Sax. published by Wilkins. A document, called "*Alfred's Dooms*," was printed by the Record Commissioners in 1840, but Sir F. Palgrave remarks (Rise, &c. of the British Commonwealth, c. 11) that it is insufficient to support the assertions of Blackstone as to Alfred's achievements as a law compiler.

(*g*) For this Blackstone cites Sir M. Hale, Hist. C. L. c. 3.

of his peculiar residence. 3. The *Dane-Lage*, or Danish law, which was principally maintained in the rest of the midland counties, and also on the eastern coast, (the part most exposed to the visits of the Danes,) the very northern provinces being at that time under a distinct government.

Out of these three systems of laws, Blackstone states (upon the authority of Roger Hoveden (*h*) and Ranulphus Cestrensis (*i*), that king Edward the Confessor extracted one uniform law, or digest of laws, to be observed throughout the whole kingdom; though the work had also been projected and begun by his grandfather king Edgar. And he remarks in confirmation of this statement, that a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces governed by peculiar customs; as in Portugal, under king Edward, about the beginning of the fifteenth century (*k*); in Spain, under Alonzo the tenth, who, about the year 1250, executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *Las Partidas* (*l*); and in Sweden, about the same æra, when a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England (*m*). However, in his opinion, these undertakings of king Edgar and Edward the Confessor were probably no more than a new edition, or fresh promulgation, of Alfred's code or Dom-boc, with such additions and improvements as the experience of a century and a half had suggested; for Alfred, as he remarks, is generally styled by the same historians the *legum Anglicanarum conditor*, as Edward the Confessor is the *restitutor*.

But whatever may be thought of these points of legal

(*h*) In Hen. II.
(*i*) In Edw. Confessor.
(*k*) Mod. Un. Hist. xxii. 135.
(*l*) Mod. Un. Hist. xx. 211.
(*m*) *Ibid.* xxxiii. 21, 58.

history or tradition, there can be no doubt that, under the first princes of the Norman line, our ancestors were engaged in a frequent struggle to maintain certain institutions known by the appellation of the "laws of Edward the Confessor," and which would seem to have been a body of laws or customs observed (though not first established) in the reign of that monarch (*n*); and it is certain that the Norman princes made frequent engagements to restore and maintain these laws as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. Nor is it unreasonable to believe that these, or some other remains of the law established in this country before the conquest, gave rise (in part at least) to that collection of maxims and customs which is now known by the name of the common law (*o*); a name either given to it in contradistinction to other laws—as the statute law, the civil law, the law merchant, and the like—or more probably, as a law common to all the realm.

To assign however to the common law no other original than this, would be to take an imperfect and erroneous view of the subject. Our system of tenures was chiefly constructed, if not first founded, by the Norman conqueror (*p*); our judicial forms and pleadings, while they have nothing in common with the Anglo-Saxon style, are in striking conformity with the Norman (*q*); and it has

(*n*) The laws so called, contained in Lambard and Wilkins, are considered as spurious. Vide Hallam's Midd. Ages, vol. ii. p. 444, 7th edit.

(*o*) That much of our common law was in force in this island before the Conquest, is maintained both by Hale and Blackstone. And the historian of the Middle Ages, though inclined in general to ascribe our common law to a date not much antecedent to the publication of Glanville (temp. Hen. 2), yet admits that "some features of it may "be distinguishable in Saxon times." Hallam's Midd. Ages, vol. ii. pp. 466, 468, 7th edit. Mr. Spence, also, in his *History of the Equitable Jurisdiction of the Court of Chancery*, insists that the most important part of our common law was a legacy from the Romans.

(*p*) 2 Bl. Com. 48; Henry, Hist. of Eng. vol. vi. pp. 10, 18; Reeves's Hist. Eng. Law, vol. 1, p. 28, 3rd edit.; Hallam, ubi sup. p. 408.

(*q*) Some information on this subject may be found in Stephen on Pleading, 5th edit. Notes 2, 11, 13, 45, 47.

been remarked with great truth, that the general language of our jurisprudence and its terms of art are exclusively of French extraction (*r*). We cannot hesitate therefore to recognize in the antient law of Normandy another parent of the common law, and one from which it has inherited some of its most remarkable features (*s*).

But though these are the most likely foundation of this collection of maxims and customs, yet [the maxims and customs, so collected, are of higher antiquity than memory or history can reach (*t*): nothing being more difficult than to ascertain the precise beginning and first spring of an antient and long established custom. Whence it is that, in our law, the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, "time whereof the memory of man runneth not to the contrary,"] a phrase which refers, however (it is to be observed) in our law to a fixed era, and means that the custom must appear (for anything that can be proved to the contrary) to have been in use before the commencement of the reign of Richard the first (*u*). [This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta,* of this kingdom.

This unwritten, or common law, is properly distinguish-

(*r*) "*Omnia vocabula, quæ vocabula artis dicuntur, quibusque hodie in foro Angli utuntur, Gallica sunt; nihilque cum Saxonica lingua habent affine.*" —Crag. Jus Feud. lib. i. s. 7.

(*s*) The similarity of the English and Norman Laws is strongly illustrated by a comparison of the Grand Coustumier of Normandy (compiled as late as Ric. I. and probably later), with our Glanville, who wrote in the reign of Hen. II. This subject is discussed by Hale in Hist. C. L. c. 6, who, jealous for the originality of the English law, argues from the posteriority in date of the Grand Coustumier, that, in most of the particulars where the conformity is to be traced, the merit of the first introduction presumably belongs to England, though he admits the reasonableness of assigning it in others to Normandy. It does not however seem very material in which of the two countries they were first established. They have at all events no resemblance to the Anglo-Saxon institutions, and are evidently due to lawyers of the Norman school.

(*t*) Hale, Hist. C. L. c. 3.

(*u*) Vide preamble to stat. 2 & 3 W. 4, c. 71; Co. Lit. 115 a; Jenkins *v.* Harvey, 5 Tyrw. 326.

[able into three kinds: I. General customs; which are the universal rule of the whole kingdom, and form the "common law," in its stricter and more usual signification. II. Particular customs: which affect only the inhabitants of particular districts. III. Certain particular laws; which, by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. As to general customs, or the common law, properly so called; this is that law by which proceedings and determinations in the ordinary courts of justice are principally guided and directed; this, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligations of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires (*x*). Thus, for example, that there shall be four superior courts of record, the Chancery, the Queen's Bench, the Common Pleas, and the Exchequer;—that the eldest son alone is heir to his ancestor;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims; as, "that the king can do no wrong," "that no man shall be bound to accuse himself," and the like. But these appear to be one and

(*x*) Hale's Hist. C. L. c. 2.

[the same thing. For the authority of these maxims rests entirely upon general reception and usage: and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it.

But here a very natural, and very material, question arises: how are these general customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. The knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue mentions (*y*); and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a general custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose (*z*); and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the Conquest, we find the "*præteritorum memoria eventorum*," reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optime instituti* (*a*),"] while at the same time it has been uniformly considered to be the duty of those who administer the law, to conform to the precedents thus established. For the scale of justice is

(*y*) Cap. 8.

(*z*) As to records, vide Co. Lit. 260 a, and n. by Harg. By stat. 1 & 2 Vict. c. 94, the public records of the kingdom are now in general placed under the superintendence of the Master of the Rolls for the time being, and a public Record Office has been established.

(*a*) Seld. Review of Tith. c. 8.

not intended to [waver with every new judge's opinion (which would be productive of intolerable inconvenience),] but when in any case the law has been solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; [not delegated to pronounce a new law, but to maintain and expound the old one.] Yet a single determination is not sufficient to establish an inflexible rule—more particularly where it is opposed to reason or natural justice. [But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.] And here we may observe that our lawyers have been always copious in their encomiums on the reason of the common law; their doctrine being [that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law.] In accordance with which, a presumption always obtains in favour of an antient and established rule, the reason of which cannot at this distance of time be precisely assigned, that it is really founded on just and solid views. And in fact [it hath been an antient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.]

It is to be observed, however, that many specific questions are perpetually occurring, in which the rule of the

common law does not happen to be fixed by any known decision, and that these are disposed of by the judges in the manner that they think most conformable to the received rule in other analogous cases, or if there be no such analogy to guide them, then according to the natural reason of the thing; though (in deference to the principle already referred to, that the opinion of the judge is not to make the law, but only to ascertain it), their determination always purports to be declaratory of what the law *is*, and not of what it *ought* to be. It is obvious that, owing to the infinite variety of combinations in human affairs, questions of this novel description must frequently arise under every system of jurisprudence, with whatever prospective sagacity it may attempt to guard against them (for example, in cases which turn on the exposition of the meaning of particular clauses in deeds or wills), and it is remarked by Sir Matthew Hale (*b*) that they are much better dealt with by a judge, than they could be by a merely learned or wise man not belonging to the profession of the law, who might be incompetent to understand even the technical terms employed in the instrument to be expounded, and at all events would be unable to reason from analogy to other decided cases. To which it may be added, that even in such of those questions as depend on reason only, the habit of solving them has an obvious tendency to improve the faculty, and to give the judge a great advantage over any person possessed of the same natural abilities, but not accustomed to exercise them in the same manner.

The decisions of courts, being the best evidence of what the common law is, are [held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *Reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both

(*b*) Hist. C. L. c. 4.

[sides and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The Reports are extant in a regular series from the reign of King Edward the second to that of Henry the eighth inclusive; and were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually;* whence they are known under the denomination of the *Year Books.*] In the reign of the latter monarch, however, this series closed; and though afterwards King James the first, at the instance of Lord Bacon, appointed two reporters with a handsome stipend to perform the same duty (*c*), that institution was soon neglected (*d*); and from the reign of Henry the eighth to the present time the task of communicating to the public the decisions of the courts has been executed by private hands. [Some of the most valuable of the antient reports] which were thus executed [are those published by Lord Chief Justice Coke (*e*); a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name (*f*).]

(*c*) See Lord Bacon's proposition for amending the laws of England.

(*d*) 1 Bla. Com. p. 72. In James the second's time an order was issued to the Stationers' Company to the effect that all books concerning the common laws of the realm were to be *licensed* by the Lord Chancellor or the judges or one of them. See 1 Ld. Raym. 537; Burr. pref. But the judges afterwards came to a resolution to grant licences no longer.

(*e*) The first eleven parts only were published in his life time, at various periods between 1600 and 1615; the twelfth and thirteenth being posthumous.

(*f*) His reports, for instance, are styled, κατ' ἐξοχὴν, "the Reports," and, in quoting them, we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of Judge Croke are also cited in a peculiar manner, by the names of those princes, in whose reigns the cases reported in his three volumes were determined; *viz.* Queen Eliza-

He had been preceded as a reporter by Dyer and Plowden, both lawyers of the highest eminence; of his successors, (too numerous, especially in our own days, for distinct notice,) we will only mention the more antient and distinguished names of Hobart, Croke, Yelverton, Saunders (*g*), Vaughan, and Levinz.

[Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law.] Such are Glanville and Bracton, who in the reigns of Henry the second and Henry the third respectively wrote treatises on the Laws of England; the author of Fleta (*h*), who composed a work on the same subject in the time of Edward the first; the author of the Mirror, a work generally ascribed to the reign of Edward the second (*i*); Fortescue, who wrote De Laudibus Legum Angliæ in the reign of Henry the sixth; St. German, who composed the treatise on the grounds of the laws of Eng-

beth, King James, and King Charles the first; as well as by the number of each volume. For sometimes we call them 1, 2, and 3 Cro., but more commonly Cro. Eliz., Cro. Jac., and Cro. Car.

(*g*) The reports of Saunders were edited in 1799 by Mr. Serjeant Williams, a profound lawyer, who appended to them notes (or rather legal dissertations) of a very instructive character. His edition was afterwards republished by Sir John Patteson and Mr. Justice Williams (then both at the bar) as joint editors, and still more recently by Mr. Justice Williams alone (before his elevation to the bench); and these editors have added excellent annotations of their own to the former stock.

(*h*) The author is unknown; and the title of the work derived from its being written during his confinement in the Fleet prison. Reeves's Hist. Eng. Law, vol. ii. p. 280. The work of Reeves just referred to (a production of our own times) is itself of high character, but less read perhaps than it deserves. Though its method is somewhat dry, its research and accuracy are exemplary; and a continuation of it to the present day (if executed with equal ability) would be of great service to every student of law or constitutional history.

(*i*) The authorship and even the date of this treatise, "The Mirror of Justices," is uncertain. Some have pronounced it older than the conquest, but it bears internal evidence of at least having been adapted to the time of Edward the second. See Reeves's Hist. Eng. Law, vol. ii. p. 358. It is stated by Turner (Hist. Ang. Sax. b. i. c. 3) to have been written by Andrew Horne, temp. Edw. 2.

land called the Doctor and Student, in the reign of Henry the eighth; Staundforde, whose work on the criminal law was published about the time of Philip and Mary, and who was followed in that track by Hale and Hawkins early in the last century; the author of Sheppard's Touchstone (*k*), who wrote on conveyances in the reign of James the first; Fitzherbert, Brooke and Rolle, who published abridgments or digests of the different titles of the law in the reigns of Henry the eighth, Elizabeth, and Charles the second respectively, and whom Viner, Comyns and Bacon have since succeeded (*l*); and Gilbert, among whose valuable works (the productions of the last century), we shall only mention the treatises on tenures and on uses and trusts (*m*). These and many other methodical writers are of high and intrinsic authority in the courts of justice; but none of the class shines so conspicuously as the learned judge before mentioned, Sir Edward Coke, who in the year 1628 (*n*) [published four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the antient reports and year books, but greatly defective in method (*o*). The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of

(*k*) The work has been attributed to Doderidge, a judge of great eminence. See Pref. to Hilliard's edition.

(*l*) See Mr. Hargrave's eulogium on Viner's Abridgment, and Comyns' Digest, Co. Litt. 9 a, n. (3), 17 a, n. (1).

(*m*) Chief Baron Gilbert's treatises were all published after the author's death, and in an unfinished state; but they are of a most learned and useful character. As to his treatise on tenures, vide Butler's Pref. to Co. Litt.

(*n*) Butler's Preface to Co. Litt., where the reader will find some valuable observations on the celebrated commentary on Littleton, of which the First Institute consists, and also on the original work of Littleton.

(*o*) It is usually cited either by the name of Co. Litt. or as 1 Inst.

[the crown; and the fourth an account of the several species of courts (*p*).

And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice: which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

The Roman law, as practised in the times of its liberty, paid also a great regard to custom; but not so much as our law; it only then adopting it, when the written law was deficient, though the reasons alleged in the Digest (*q*) will fully justify our practice, in making it of equal authority with, when it is not contradicted by, the written law; "for since (says Julianus) the written law binds us for no "other reason but because it is approved by the judgment "of the people, therefore those laws which the people have "approved without writing ought also to bind every body. "For where is the difference, whether the people declare "their assent to a law by suffrage, or by a uniform course "of acting accordingly?"]

With us, indeed, it would seem that the statute law and the common law both flowed originally from the same fountain (*r*). A great portion at least of the latter must be referred to some positive enactment of the supreme power in the country, though not now to be found of record.

II. [The second branch of the unwritten laws of England are particular customs, or laws, which affect only the inhabitants of particular districts (*s*):] and these it is usual to designate by the word *customs* taken *per se*; which suf-

(*p*) These are cited as 2, 3, or 4 Inst. without any author's name; an honorary distinction, which, as we before observed, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

(*q*) Ff. 1, 3, 32.

(*r*) Per Wilmot, C. J., Collins *v.* Blantern, 2 Wils. 351; Hale's Hist. C. L. c. 4.

(*s*) Co. Litt. 110 b; vide sup. p.47.

ficiently distinguishes them from the general customs of which we spoke before.

These particular customs, or some of them, are probably the remains of a multitude of local customs, prevailing, some in one part and some in another, over the whole of England, while it was broken into distinct dominions, and out of which, after it became a single kingdom, one common law was collected and made applicable to the realm at large; each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of the same uniform and universal system of laws; but, for reasons now long forgotten, particular counties, cities, towns, manors, and lordships, were indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large, which privilege is confirmed to them by several acts of parliament (*t*).

[Such is the custom of *gavelkind* in Kent, and some other parts of the kingdom (*u*), (though perhaps it was also general until the Norman conquest,) which ordains, among other things, that not the eldest son only of the father succeeds to his inheritance, but all the sons alike; and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estates, without any escheat to the lord.—Such is the custom that prevails in divers antient boroughs, and therefore called *borough-English*, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas, at the common law, she shall be endowed of one third part only. Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors. Such, lastly, are many particular customs within the city of Lon-

(*t*) Mag. Cart. 9 Hen. 3, c. 9; 1 Edw. 3, st. 2, c. 9; 14 Edw. 3, st. 1, c. 1; 2 Hen. 4, c. 1.

(*u*) Co. Litt. 140 a.

[don, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament (*x*).]

To this head has sometimes been referred (*y*) that branch of the law which comprises certain rules relative to bills of exchange, partnership, and other mercantile matters, and which is generally denominated the *custom of merchants*. As its character, however, is not local, nor its obligation confined to a particular district, it cannot with propriety be considered as a custom in the technical sense to which we now refer (*z*). It is, in truth, only a part of the general law of England (*a*); and it is distinguished by a separate name only because it applies, to the particular subjects in question, principles different from those which the common law ordinarily recognizes, and because these principles were engrafted into our municipal system by gradual adoption from the *lex mercatoria* (*b*), or general body of European usages in matters relative to commerce.

Upon the same principle we must exclude from the technical idea of a custom the mere *usages of particular trades,* when not restrained to some particular limit in point of place, as opposed to the realm at large. If there be any such usage of immemorial observance, and authenticated by judicial decision, it will form, according to our definitions, part of the general law of England; if there be any sanctioned by act of parliament, it will constitute part of the statute law; but for the rest, the want of any pecu-

(*x*) See the City of London's case, 8 Rep. 126; The King *v.* Bagshaw, Cro. Car. 347; see also Pulling on the Laws and Customs of London, p. 2.

(*y*) 1 Bl. Com. 75.

(*z*) Co. Litt. 115 b.

(*a*) Per Holt, C. J., Hussey *v.* Jacob, Ld. Raym. 88: per Forster, J., Edie *v.* East India Company, 2 Burr. 1226; 1 Bl. Rep. 299, S. C.; 2 Inst. 58; Stone *v.* Rawlinson, Willes, 561.

(*b*) The *lex mercatoria*, or *law merchant*, is mentioned in some of our earlier statutes. (Vide 27 Edw. 3, st. 2, c. 8, 19, 20.)

liar locality determines them to be no customs, and they are consequently no rules of law at all. Yet as matters of *fact* they often fall under the notice of our courts of justice, and are very necessary to be considered; for as the prevalence of any certain course of dealing among men leads to the presumption that in particular instances they intend to conform to it, the existence of such usages as these may often bear materially or even conclusively upon the question, whether an implied contract to a given effect was entered into between certain parties, and also upon the question in what sense their express contract in certain cases was designed to be understood.

The rules relating to particular customs regard either the proof of their existence, or their allowance as good and legal, when proved. And first we will consider the rules of *proof*.

As to the modes of descent in gavelkind, and borough-English, the law takes particular notice of them (*c*); and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other customs must be particularly pleaded (*d*); and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged. [The trial in both cases (both to show the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male and never to the heirs female;" and also to show "that the lands in question are within that manor," is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court (*e*).

The customs of London differ from all others in point of trial; for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by a certificate from the lord mayor and aldermen by the mouth of their

(*c*) Co. Litt. 175; 36 Hen. 6, 20; 21; vide stat. 17 Edw. 2, st. 1, c. 16.

(*d*) Litt. s. 265.

(*e*) Dr. and St. 1, 10.

[recorder (*f*); unless it be such a custom as the corporation is itself interested in—as a right of taking toll—for then the law permits them not to certify on their own behalf (*g*).

When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for, if it is not a good custom it ought to be no longer used; "*Malus usus abolendus est*" is an established maxim of the law (*h*).]

As to the validity of a custom, the following rules are established: 1. [It must have been *used so long, that the memory of man runneth not to the contrary.*] Upon this subject, however, it is material to recollect what has been before laid down, that the time of memory as regards the validity of a custom, or (as it is sometimes expressed) the time of *legal* memory, has received a peculiar technical limitation, and refers to so remote a date as the commencement of the reign of king Richard the first (*i*). So that if an usage can be shown to have first commenced at any time since that era, it is void as a custom; though in the absence of such proof its observance for a long time, and as far back as the evidence reaches, will amount to presumptive proof of its having prevailed during the whole period of legal memory (*k*). It is important also to remark on the other hand, that this principle, by which a custom is required to be immemorial, is materially qualified in many cases by a recent statute, 2 & 3 Will. IV. c. 71; which, as to customary and prescriptive claims of rights to be exercised over the land of other persons, (such as the rights of common, or way, or the like,) provides that they shall be considered as sufficiently established by an uninterrupted enjoyment as of right, in some cases for thirty, in others for twenty years; and shall not be defeated (where

(*f*) See Appleton *v.* Sloughton, Cro. Car. 516; vide Plummer *v.* Bentham, 1 Burr. 248; Blacquiere *v.* Hawkins, Dougl. 378; Crosby *v.* Hetherington, 4 Man. & Gr. 933; Pulling on the Laws and Customs of London, 2nd edit. p. 4.

(*g*) Day *v.* Savadge, Hob. 85.

(*h*) Litt. § 212; 4 Inst. 274.

(*i*) Co. Litt. 115 a; et vide sup. p. 46.

(*k*) Rex *v.* Jolliffe, 2 Barn. & Cres. 54.

such enjoyment can be proved) by showing that they commenced within the time of legal memory (*l*).

2. [It must have been *continued*. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the *possession* only for ten or twenty years, will not destroy the custom (*m*). As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute (*n*).] For customs seem to derive their authority from their allowance at some remote period, by common consent (*o*): and where the practice or usage has been immemorially disputed, the evidence of this consent is wanting.

4. [Customs must be *reasonable* (*p*); or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says (*q*), to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the

(*l*) See farther, post, bk. ii. pt. 1, c. 23, as to the subject of *prescription*.

(*m*) Co. Litt. 114.

(*n*) Ibid.

(*o*) Vide sup. p. 54.

(*p*) See Year Book, 8 Edw. 4, 19; Litt. s. 212; Wilkes *v.* Broadbent, 1 Wils. 63; Bell *v.* Wardell, Willes, 202; Jones *v.* Waters, 5 Tyr. 361; Taylor *v.* Devey, 7 Ad. & El. 409.

(*q*) Co. Litt. 62.

[manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his, and then the tenants will lose all their profits (*r*).

5. Customs ought to be *certain* (*s*). A custom, that lands shall descend to the most worthy of the owner's boold, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good (*t*). A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest.*

6. Customs, though established by consent, must be (when established) *compulsory;* and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Customs must be also *consistent* with each other: one custom cannot be set up in opposition to another (*u*). For if both are really customs, then both are of equal antiquity, and both established by mutual consent; which to say of contradictory customs, is absurd.] Therefore if a man should allege that as a fisherman he is entitled, by the custom of a certain place, to dry his nets upon another's land (which in favour of fishing and navigation is a reasonable usage (*x*),) the latter could not allege in opposition to

(*r*) Co. Copyh. § 33.

(*s*) 1 Roll. Abr. 565; Selby *v.* Robinson, 2 T. R. 758; Steel *v.* Houghton, 1 Hen. Bl. 51.

(*t*) 1 Roll. Abr. 565.

(*u*) See Aldred's case, 9 Rep. 58 b; Kenchin *v.* Knight, 1 Wils. 253; 1 Bl. Rep. 49, S. C.; Parkin *v.* Radcliffe, 1 Bos. & Pul. 282.

(*x*) 1 Roll. Abr. 560; Hickman *v.* Thorne, 2 Mod. 104.

to this a right by custom to remove the nets when so placed; for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.

8. It is also a rule, [that customs, in derogation of the common law, must be construed strictly (*y*). Thus, by the custom of gavelkind, an infant of fifteen years may, by one species of conveyance, (called a deed of feoffment,) convey away his lands in fee simple, that is, for ever. Yet this custom does not empower him to use any other conveyance, for the custom must be strictly pursued.] However, if there is a custom in a manor that a man may convey his copyhold in fee simple, it will also enable him to convey for life, or any other estate; for the less is implied in the greater; and though customs must be strictly, yet they need not in every case be literally construed (*z*).

9. Lastly, it is to be understood that no custom can prevail against an express act of parliament (*a*). Therefore, where an act has directed that every pound throughout the kingdom shall contain sixteen ounces, a custom that every pound of butter sold in a certain market shall weigh eighteen ounces is void (*b*). And thus much for the second part of the *leges non scriptæ*, or those particular customs which affect particular persons or districts only.

III. [The third branch of the unwritten or common laws are those which by custom are adopted and used only in certain peculiar courts and jurisdictions (*c*).] And by these we are to understand the civil and canon laws (*d*).

[It may seem a little improper at first view to rank these laws under the head of *leges non scriptæ*, or unwritten laws, seeing they are set forth by authority] in pandects,

(*y*) Arthur *v.* Bokenham, 11 Mod. 161; Denn *v.* Spray, 1 T. R. 466.

(*z*) Co. Cop. § 33. This limitation of the rule is noticed by Mr. Justice Coleridge, vide Coleridge's Blackstone, 1 vol. p. 79; et vide Denn *v.* Spray, 1 T. R. 466.

(*a*) Co. Litt. 113 a; Noble *v.* Durell, 3 T. R. 271.

(*b*) Noble *v.* Durell, 3 T. R. 271.

(*c*) Vide sup. p. 47.

(*d*) Hist. C. L., c.

codes, and institutions; in councils, decrees, and decretals; and are enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. [But this is done after the example of Sir Matthew Hale (*e*); because it is most plain, that it is not on account of their being *written* laws that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority, which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors, were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here; for the legislature of England doth not, nor ever did, recognize any foreign power as superior or equal to it in this kingdom, or as having the right to give law to any, the meanest, of its subjects.] But all the strength that either the papal or imperial laws have obtained in this realm [is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptæ*, or customary laws: or else because they are in some other cases introduced by consent of parliament: and then they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII. c. 21, addressed to the king's royal majesty: "This your grace's realm, recognizing no superior under "God but only your grace, hath been and is free from "subjection to any man's laws, but only to such as have "been devised, made, and ordained *within* this realm, for "the wealth of the same; or to such other as, by suffer-"ance of your grace and your progenitors, the people of "this your realm have taken at their free liberty, by their "own consent, to be used among them; and have bound

(*e*) Hist. C. L., c. 2.

["themselves by long use and custom to the observance of "the same; not as to the observance of the laws of any "foreign prince, potentate, or prelate; but as to the *cus-* "*tomed* and antient laws of this realm, originally esta- "blished as laws of the same, by the said sufferance, "consents, and custom; and none otherwise."

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digests of the Emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account (*f*).

The Roman law—founded first upon the regal constitutions of their antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors,—had grown to so great a bulk, or, as Livy expresses it (*g*), "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed to be many camels' load, by an author who preceded Justinian (*h*). This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the Emperor Theodosius the younger, by whose orders a code was compiled A.D. 438, being a methodical collection of all the imperial constitutions then in force; which Theodosian code was the only book of civil law received as authentic in the western part of Eu-

(*f*) A more ample dissertation on this subject will be found in Kent's Com. (Lect. xxiii.), who refers the student in civil law to Vinnius on the Institutes, Voet. on the Pandects, Perezius on the Code, and generally to the works of Bynkershoeck, Heineccius, and Pothier. See also Histoire du Droit Romain au Moyen-Age, par M. de Savigny.

(*g*) L. 3, c. 34.

(*h*) See Taylor's Elements of Civil Law, 17.

[rope till many centuries after (*i*); and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms: for Justinian commanded only in the eastern remains of the empire; and it was under his auspices that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

This consists of, 1. The Institutes, which contain the elements or first principles of the Roman law, in four books. 2. The Digests, or Pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new Code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code of Theodosius imperfect. 4. The Novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which, however, fell soon into neglect and oblivion, till] the early part of the twelfth century (*k*), when the policy of the Roman ecclesiastics began to give new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

[The canon law (*l*) is a body of Roman ecclesiastical law,

(*i*) This is at least true of the western part of Europe generally, as the code of Justinian was not recognized there generally till the twelfth century. But that code seems to have been recognized by the Roman Church, at least, much earlier. See Hallam's Mid. Ag. vol. iii. p. 513; and "Histoire du Droit Romain au Moyen-Age, par M. de Savigny," ch. xxii. ss. 164, 167.

(*k*) Blackstone says till about the year 1130, viz. the date of the capture of Amalfi: vide sup. p. 11.

(*l*) A disquisition on this subject, including our national canon law, will be found in Reeves's Hist. Eng. Law, 4th vol. chapters xxiv., xxv.; et vide Robertson's Chas. V. vol. i. n. 24.

[relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the antient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see; all which lay in the same disorder and confusion as the Roman civil law, till, about the year 1151, one Gratian, an Italian monk, in imitation of Justinian's Pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia Discordantium Canonum*, but which are generally known by the name of *Decretum Gratiani* (*m*). These reached as low as the time of Pope Alexander the third. The subsequent papal decrees, to the pontificate of Gregory the ninth, were published in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni.* A sixth book was added by Boniface the eighth about the year 1298, which is called *Sextus Decretalium.* The Clementine constitutions, or decrees of Clement the fifth, were in like manner authenticated in 1317 by his successor John the twenty-second, who also published twenty constitutions of his own, called the *Extravagantes Joannis,* all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes:* and all these together, Gratian's Decree, Gregory's Decretals, the Sixth Decretal, the Clementine Constitutions, and the Extravagants of John and his successors form the *corpus juris canonici,* or body of the Roman canon law.

Besides these pontifical collections, which, during the times of popery, were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *pro-*

(*m*) It is said by Dr. Burn, in the Preface to his "Ecclesiastical Law," p. xx, that the "decrees" of the canon law, having first been collected by *Ivo* in the year 1114, were afterwards "polished and perfected by Gratian, a monk of Bononia, in the year 1149."

[*vincial* constitutions, and adapted only to the exigencies of this church and kingdom (*n*). The *legatine* constitutions (*o*) were ecclesiastical laws, enacted in national synods, held under the Cardinals Otho and Othobon, legates from Pope Gregory the ninth and Pope Clement the fourth, in the reign of king Henry the third, about the years 1220 and 1268. The *provincial* constitutions (*p*) are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry the third, to Henry Chichele, in the reign of Henry the fifth; and adopted also by the province of York (*q*) in the reign of Henry the sixth. At the dawn of the Reformation, in the reign of King Henry the eighth, it was enacted in parliament (*r*), that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed.] And, as no such review has yet been perfected (*s*), upon this enactment now depends the authority of the canon law in England, the limitations of which appear upon the whole to be as follows, that no canon contrary to the common or statute law, or the prerogative royal, is of any validity; that, subject to this condition, the canons made anterior to the parliamentary provision above mentioned, and adopted into our system (for there are some which have had no reception among us), are binding both

(*n*) See Reeves's Hist. Eng. Law, vol. ii. p. 78.

(*o*) On these constitutions Athon is the chief commentator. See Pref. to Burn's Ecclesiastical Law, p. xxii.

(*p*) On this subject Lyndwode's Provinciale is the chief work of authority: see the account of it in Reeves's Hist. Eng. Law, 4th vol. p. 117.

(*q*) Burn's Eccl. Law, pref. ubi sup.

(*r*) Stat. 25 Hen. 8, c. 19, (revived and confirmed by 1 Eliz. c. 1); 27 Hen. 8, c. 15; 35 Hen. 8, c. 16; and 3 & 4 Edw. 6, c. 11; (vide Middleton *v.* Croft, Stra. 1060; 2 Atk. 659, 669). The three last statutes however were temporary ones.

(*s*) Vide Watson's Cl. Law, ch. iii. p. 17, 3rd ed.; Burnet's Hist. Reform. vol. ii. p. 197; Adam's Relig. World, vol. i. p. 411.

on clergy and laity; but that canons made since that period, and having no sanction from the parliament, are, as regards the laity at least, of no force (*t*).

As for those canons in particular which were enacted by the clergy in convocation under James the first, in the year 1603, and which were never confirmed in parliament, but sanctioned by the king's charter only (*u*), [it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the antient canon law, but are introductory of new regulations, they do not bind the laity, whatever regard the clergy may be bound to pay them (*v*).]

There are four species of courts in which the civil and canon laws are permitted, under different restrictions, to be used: 1. [The courts of the archbishops and bishops, and their derivative officers, usually called, in our law,

(*t*) See 25 Hen. 8. c. 19, ss. 2, 7; Caudrey's case, 5 Rep. xxxii.; 12 Rep. 72; Co. Litt. 344a; Pref. to Burn's Ecc. Law; Wolferstan *v.* Bishop of Lincoln, 2 Wils. 174; Middleton *v.* Croft, Stra. 1056; 2 Atk. 669; Alston *v.* Atlay, 7 Ad. & El. 305.

(*u*) Middleton *v.* Croft, ubi sup. These are 141 in number, and are a collection out of the several preceding canons. They are intituled "Constitutions and Canons Ecclesiastical treated upon by the Bishop of London, President of the Convocation, &c., and agreed upon with the King's Majesty's licence, in their Synod begun at London, A.D. 1603, in the first year of King James." They constitute the present standard of the Church both of England and Ireland.

(*v*) See Middleton *v.* Croft, ubi sup., per Lord Hardwicke, More *v.* More, 2 Atk. 158; Bishop of St. David's *v.* Lucy, Carth. 485; Rex *v.* Bishop of Lichfield, 2 W. Bla. 968; Pref. to Burn's Ecc. Law. "Before the Reformation," says Mr. Christian, Bl. Com. vol. i. p. 392, *in notis*, "degrees were as frequent in the canon law as in the civil law. Many were graduates *in utroque jure*, or *utriusque juris*. J. U. D. or *juris utriusque doctor*, is still common in foreign universities. But Hen. 8, in the 27th year of his reign, when he had renounced the authority of the pope, issued a mandate to the university of Cambridge, '*ut nulla legatur palam publice lectio in jure canonico sive pontificio, nec aliquis cujuscunque conditionis homo gradum aliquem in studio illius juris pontificii suscipiat, aut in eodem in posterum promoveatur quovis modo.*' Stat. Acad. Cant. 137. It is probable that, at the same time, Oxford received a similar prohibition, and that degrees in canon law have ever since been discontinued in England."

[courts Christian, *curiæ Christianitatis*, or the ecclesiatical courts. 2. The military courts. 3. The courts of admiralty.] 4. The Chancellor's Court of the University of Cambridge (*w*). [In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom, corroborated in the last instance by act of parliament, ratifying those charters which confirm the customary law of the university. The more minute consideration of these will fall properly under that part of these Commentaries which treats of the jurisdiction of courts (*x*). It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.

1. And first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and, in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal (*y*).

2. The common law has reserved to itself] a paramount authority [in the exposition of all such acts of parliament as concern either the extent of these courts or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the superior courts at Westminster will grant prohibitions to restrain and control them (*z*).

(*w*) Cambridge University Commission Report, p. 5. As to this court see post, bk. v. c. 6. Blackstone enumerates among the courts where the civil and canon laws are permitted to be used, the courts of the two universities (meaning Cambridge and Oxford); but by 17 & 18 Vict. c. 81, s. 45, it is enacted, that in the court of the Vice-Chancellor of Oxford all matters of law shall, after the passing of that act, be governed by the common and statute law of the realm, and not by the rules of the civil law; vide post, ubi sup.

(*x*) As to courts ecclesiastical, military and maritime, vide post, bk. v. c. 5.

(*y*) 2 Inst. 623; Ex parte Jenkins, 1 Barn. & Cress. 655; vide Beaurain *v.* Sir W. Scott, 3 Camp. 388.

(*z*) Hall *v.* Maule, 7 Ad. & El. 721.

[3. An appeal lies from all these courts to the sovereign, in the last resort (*a*); which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own.

From these three strong marks and ensigns of superiority, it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege;* and that, thus admitted, restrained, altered, new modelled and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England;] their proper appellation being the ecclesiastical, the military, the maritime and the academical laws of this realm (*b*).

[Let us next proceed to the *leges scriptæ*, the written laws of the kingdom (*c*); which are statutes, acts, or edicts, made by the sovereign, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled (*d*). The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament in the ninth year of Henry the third (*e*); though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.]

(*a*) As to the appeal from the ecclesiastical and maritime courts, vide post, bk. v. c. 5.

(*b*) Hale, Hist. C. L. c. 2; 1 Bl. Com. 84. As to these several courts, vide 4 Inst. 123, 134, 321.

(*c*) Vide sup. p. 41.

(*d*) The Prince's case, 8 Rep. 20.

(*e*) The statutes from Magna Charta down to the end of Edw. 2, including also some which (because it is doubtful to which of the three reigns of Hen. 3, Edw. 1, or Edw. 2 to assign them) are termed *incerti temporis*, compose what have been called the *Vetera Statuta;* those from the beginning of the reign of Edw. 3 being contra-distinguished by the appellation of the *Nova Statuta*. Dwarris, on Statutes, 626. It may be observed, that, by 19 & 20 Vict. c. 64, a variety of acts not in use, together with all enactments (if any) confirming, continuing, or perpetuating the same, or any of them, are repealed.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliament (*f*). At present we will only take notice of the different kinds of statutes; and of the rules of law with regard to their effect and construction (*g*).

First, as to their several kinds. Statutes are either *public* or *private*. A public act is an universal rule that regards the whole community (*h*). Private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns: such as the Romans entitled *senatûs decreta*, in contradistinction to the *senatûs consulta*, which regarded the whole community (*i*). Thus—to show the distinction—the statute 13 Eliz. c. 10, which prevents the master and fellows of any college, the

(*f*) As to the constitution of parliament, vide post, bk. iv. pt. i. c. 1.

(*g*) The method of citing these acts of parliament is various. Many of our antient statutes are called after the name of the place where the parliament was held that made them;—as the statutes of Merton and Marleberge, of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject;—as the statutes of Wales and Ireland, the *articuli cleri* and the *prærogativa regis*. Some are distinguished by their initial words, a method of citing very antient; being used by the Jews in denominating the books of the Pentateuch; by the Christian Church in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulls; and in short by the whole body of antient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statute of *Quia emptores*, and that of *Circumspectè agatis*. But the most usual method of citing them, especially since the time of Edward 2, is by naming the year of the king's reign in which the statute was made, together with the chapter or particular act, according to its numeral order;—as, 9 Geo. 2, c. 4. For all the acts of one session of parliament taken together make properly but one statute; and therefore when two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the Bill of Rights is cited, as 1 W. & M. st. 2, c. 2, signifying that it is the second chapter or act, of the second statute, or the laws made in the second session of parliament, in the first year of King William and Queen Mary. See also 13 & 14 Vict. c. 21, s. 3, as to the method of citing, in an act of parliament, any former statute.

(*h*) Lord Cromwell's case, 4 Rep. 13 a; Holland's case, ibid. 76 a; Kirk *v.* Nowill, 1 T. R. 125; Samuel *v.* Evans, 2 T. R. 569.

(*i*) Gravin. Orig. 1, § 24.

dean and chapter of a cathedral, or any other person having a spiritual living, from making leases for longer terms than twenty-one years, or three lives, is a public act (*k*); it being a rule prescribed to spiritual persons in general: but an act to enable the Bishop of Chester to make a lease to A. B. for sixty years, which is otherwise, in general, beyond a bishop's power (*l*), concerns only the parties and the bishop's successors, and is therefore a private act. Of private acts some are *local*, as affecting particular places only; others *personal*, as confined to particular persons. Of the first kind, an inclosure act is an example; of the second, an act for a divorce or for a change of name. With respect to the distinction between public and private statutes, it is to be observed that, as the law till lately stood, the courts of law were bound to take notice judicially and *ex officio* of the former, but not of the latter; so that, in order to claim any advantage under a private act, it was necessary to plead and set it forth particularly. But now, by 13 & 14 Vict. c. 21, s. 7, every act made after the commencement of the then next session of parliament, is to be taken to be a public one, and judicially noticed as such, unless the contrary be expressly declared (*m*).

Statutes also are sometimes described as *declaratory*, or *penal*, or *remedial*, according to the different nature of their object or provisions. Declaratory statutes are where the old custom of the kingdom is almost fallen into disuse, or become disputable: in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus, the statute of treasons,

(*k*) Holland's case, ubi supra.

(*l*) See as to church leases, post, bk. iv. pt. ii. c. 3.

(*m*) See Hargreaves *v.* Lancaster and Preston Railway Company, 1 Railw. Cas. 416. For the convenience of reference, acts are also now divided, in our printed statute books, into *public general acts—local and personal acts declared public—private printed acts—and private acts not printed.* See 5 & 6 Vict. c. 97, s. 5; Cock *v.* Gent, 12 Mee. & W. 734; Richards *v.* Easto, 15 Mee. & W. 951; Barnett *v.* Cox, 9 Q. B. 623. See further as to private acts of parliament, post, bk. ii. pt. i. c. 21; bk. iv. pt. i. c. 1.

25 Edw. III. c. 2, makes not any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offence, which before were treason at the common law. Penal acts are those which merely impose penalties or punishments for an offence committed, as in the case of the statutes relative to game. Remedial acts are such as supply some defect in the existing law, and redress some abuse or inconvenience with which it is found to be attended, without introducing any provision of a penal character;—as in the case of the statute 3 & 4 Will. IV. c. 105, which introduces various improvements in the law relating to dower. But it is not every statute that falls within one or other of these divisions; for some combine more than one of these objects, and others have objects of a different description. There is also a distinction of acts of parliament, as being either *enlarging*, or *restraining*, *enabling* or *disabling* acts. Thus the 32 Hen. VIII. c. 28, which gave bishops and other sole ecclesiastical corporations (except parsons and vicars) a more ample power of making leases than they possessed before, is called an enabling statute: the 13 Eliz. c. 10, which afterwards imposed the limitations above noticed (*n*) as to the making of leases by ecclesiastical persons, is described as a restraining or disabling statute (*o*).

Secondly, as to their interpretation. In interpreting statutes (as well as in declaring the rule of the common law (*p*),) the courts are governed by former adjudications (*q*); or, in the absence of these, by analogy and general reasoning (*r*). But many specific rules are also laid down for their guidance; and principally these which follow.

1. A statute begins to operate from the time when it receives the royal assent, unless some other time be fixed by

(*n*) Vide sup. p. 70.
(*o*) Co. Litt. 44 b; 1 Bl. Com. 87.
(*p*) Vide sup. p. 48.
(*q*) Vide per Kenyon, Lacon *v.* Hooper, 6 T. R. 224; Rex *v.* Leek Wootton, 16 East, 122.
(*r*) Hob. 346.

the act itself for the purpose (*s*). The rule on this subject was formerly different; for at common law every act of parliament, which had no provision to the contrary, was considered, as soon as it passed, (that is, received the royal assent,) as having been in force retrospectively from the first day of the session of parliament in which it passed, though in fact it might not have received the royal assent, or even been introduced into parliament, until long after that day. Thus where a statute provided that every deed of annuity granted *after the passing of the act* should be inrolled within twenty days after execution, and the act received the royal assent in May, 1777, but the session had commenced in October, 1776, an annuity deed, executed in January, 1777, nearly four months before the royal assent was given, but after the commencement of the session, was adjudged to be void for non-compliance with the provision (*t*). This strange principle, however, though rigidly observed for centuries, no longer prevails; it being expressly provided by 33 Geo. III. c. 13, that where no other direction is given, every act shall be considered as commencing from the date indorsed upon it as the date of its receiving the royal assent—a manifest improvement, it must be owned, on the former law; though it has been doubted (*u*) (and with reason) whether even the new rule is placed upon the right basis, and whether some fixed and reasonable period ought not always to be interposed between the passing of an act and the time of its coming into operation, so as to give the subjects of the realm an opportunity of becoming acquainted with its provisions (*x*). The rule, it will be observed, is laid down

(*s*) 33 Geo. 3, c. 13; Nares *v.* Rowles, 14 East, 510. But where an act expires before a bill for continuing it, introduced in the same session, receives the royal assent, the latter act takes effect (unless otherwise provided, and except as to penalties,) from the expiration of the former; 48 Geo. 3, c. 106.

(*t*) Latless *v.* Holmes, 4 T. R. 660.

(*u*) Vide Kent's Comm. Lect. 20; Dwarris on Stats. 683.

(*x*) This is the principle of the modern French law; vide Code Civil, tit. Prelim.

with an exception of the case where the period of commencement is otherwise fixed by the statute itself; for by force of an express provision, or even by necessary construction from the nature of the enactment, the operation of a statute may be either postponed on the one hand, or have a retrospective relation on the other, so as to affect rights which had vested before it received the royal assent, or transactions which had before then taken place (*y*).

2. Statutes are to be construed not according to their mere letter, but the intent and object with which they were made (*z*). It occasionally happens therefore that the judges who expound them are obliged, in favour of the intention, to depart in some measure from the words. And this may be either by holding that a case within the words, is not within the meaning; or that a case not within the words, is within the meaning. Thus where a statute provides that all who shall commit a certain act shall be deemed felons, yet a madman who does the act shall not be deemed a felon; for that would be contrary to the presumable intention (*a*). And so, on the other hand, where an act of parliament gave the owners of inheritances a remedy by action against such tenants holding for life or *years* as should commit waste (i. e. spoil and destruction); the action was held maintainable against a tenant holding only for one year or less, for so the lawmakers presumably designed (*b*). In all instances where the strict letter of the law is thus corrected by reference to its intention, the construction is said to be by *equity* (*c*), a phrase not peculiar to the law of England, but used by

(*y*) Upon the subject of construing a statute retrospectively, see Freeman *v.* Moyes, 1 Ad. & El. 338; Burn *v.* Carvalho, ibid. 896; Hitchcock *v.* Way, 6 Ad. & El. 943.

(*z*) Bac. Ab. Statute (I) 5; Stradling *v.* Morgan, Plow. 205; Rex *v.* Everdon, 9 East, 101.

(*a*) Eyston *v.* Studd, Plow. 465.

(*b*) Ibid. 467.

(*c*) Ibid. 465, 467; Co. Litt. 24 b; 1 Bl. Com. 62. The term is of very early occurrence in our law; vide Bract. lib. 1, c. 4, p. 3 a; lib. 2, c. 7, p. 23 b.

foreign jurists in the same sense (*d*). Thus, in the first example, the case would be said to be out of the equity of the act: in the second, to be within its equity (*e*). It is to be observed, however, that this principle of equitable construction is not to be carried beyond certain bounds, and a judge is not at liberty, in favour of a supposed intention, to disregard the express letter of the statute, where, for anything that appears, the wording may correspond with the actual design of the legislature—the maxim in cases of this description being that *a verbis legis non recedendum est* (*f*). It is also important to remark, that the rule in question has been applied more freely to the antient statutes than it now is to those of more modern date, which are interpreted somewhat more strictly, and with closer adherence to the letter (*g*). For the style of framing acts of parliament has itself undergone a material change—those of a more antient era being comparatively short and general in their character, while the later acts are expanded into minute detail, and intended to reach every specific case; and, therefore, in adopting a construction not in strict conformity with the language of the legislature, there is more danger than there once was, of going beyond, or falling short of, its real intention.

3. Another maxim (and one that may often serve for our guidance in the application of the last,) is, that, in the interpretation of statutes in general, the following points are to be considered,—the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act, what the mischief was for which the common

(*d*) Grotius de Æquitate, s. 3; Puffendorf, Elem. Jur. Un. lib. 1, ss. 22, 23.

(*e*) 3 Bl. Com. 431. The latter expression is of more familiar occurrence, however, than the former.

(*f*) Edrich's case, 5 Rep. 118 b. Et vide Rex *v.* Great Bentley, 10 Barn. & Cress. 520; Jones *v.* Smart, 1 T. R. 53.

(*g*) Per Coleridge, J., Rex *v.* Gardner, 6 Ad. & El. 118. Et vide Brandling *v.* Barrington, 6 Barn. & Cress. 475; Rex *v.* Inhabitants of Barham, 8 Barn. & Cress. 104; Notley *v.* Buck, ib. 164; Adam *v.* Inhabitants of Bristol, 2 Ad. & El. 395, 399.

law did not provide, and what remedy the parliament hath provided to cure this mischief (*h*). And here an example may again be found in the restraining statute of 13 Eliz. c. 10. By the common law the master and fellows of a college, and such other corporations, might let as long leases as they thought proper; the mischief was that they let long and unreasonable leases, to the impoverishment of their successors; the remedy applied by the statute was by making void all leases made by them for longer terms than three lives, or twenty-one years. Now in the construction of this statute it is held, that leases, though for a longer term, made by the master and fellows of a college or a dean and chapter, are not void during the continuance of the master or the dean; for the act was made for the benefit and protection of the successor (*i*), and the mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but the leases, during the continuance of the grantors, not being within the mischief, are not within the remedy (*k*).

4. It is also an established rule, that remedial statutes are to be more liberally, and penal more strictly, construed (*l*). The statute of Elizabeth just mentioned may again serve as an example; for soon after it was made, the master and fellows of Magdalen College granted certain premises to the queen, her heirs and successors, on condition that she should convey the same to a certain person named: and it was contended that this conveyance was not restrained by the act; for that by the general rule of law the sovereign is not bound by a statute unless specially mentioned; which the court admitted to be in many cases true. But as this was a remedial act, and made to suppress wrong, it was adjudged that it should bind the queen (*m*). As to the

(*h*) Heydon's case, 3 Rep. 7; 1 Bl. Com. 87; 2 Inst. 110.

(*i*) Co. Litt. 45, n. (4), by Harg.; Bac. Ab. Leases (H); Magdalen College case, 11 Rep. 73 a.

(*k*) 1 Bl. Com. 87.

(*l*) Ibid. 88.

(*m*) Magdalen College case, 11 Rep. 72.

stricter manner in which a penal act must be interpreted, we may resort to an illustration of Lord Bacon's, that if for a certain offence it be enacted that a man shall lose his right hand, and some offender hath had his right hand before cut off in the wars; he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law shall be extended (*n*). This distinction applies, it will be observed, not only to remedial and penal statutes properly so called, but also to those of a mixed kind, which contain both remedial and penal provisions (*o*);—the former of which will be construed with more indulgence than the latter. To exemplify this we may refer to a decision which took place on the 9 Anne, c. 14, against gaming. That statute provided, that if any person shall lose at any time or sitting ten pounds, and shall pay it to the winner, he may recover it back by action within three months; and if the loser does not sue within that time, any other person may sue for it and treble the value besides. An action being brought to recover back a sum which had been won and paid, the question was, whether the money was to be considered as won *at any one sitting*, so as to fall within the prohibition of the act, there having been an interruption to the play during dinner. And the court held the affirmative, because the action was not brought by a common informer for the penalty, but by the loser to regain his money; and so far as his reimbursement was concerned, the statute was of a remedial character (*p*).

5. In the construction of a statute all other such statutes ought to be taken into consideration as have been made *in pari materia* (*q*). Thus by 7 Geo. II. c. 15, it was enacted, that ship-owners, carrying goods,

(*n*) Bac. Maxims, 12.

(*o*) Platt *v.* Sheriffs of London, Plowd. 36.

(*p*) Bones *v.* Booth, W. Bla. 1236. The penalties of 9 Ann. c. 14, have been recently repealed by 8 & 9 Vict. c. 109, s. 15; and the subject differently regulated, vide post, bk. vi. c. 12.

(*q*) Bac. Abr. Statute (1), 2, 3; Jones *v.* Smart, 1 T. R. 53; King, qui tam *v.* Smith, 4 T. R. 419; Duck *v.* Addington, 4 T. R. 447; Gale *v.* Laurie, 5 Barn. & Cress. 156.

are not to be responsible for losses to such goods, incurred (without their privity) by the misconduct of the master and mariners, to any greater extent than the value of the ship, *with all her appurtenances*, and the freight. By 26 Geo. III. c. 86, they were exempted from liability for loss incurred by robbery of any persons whatsoever, farther than the value of the ship, *with all her appurtenances*, and the freight. By 53 Geo. III. c. 159, s. 1, they were not to be answerable for losses arising from any act done without their fault or privity, beyond the value *of the ship* and freight. Upon the last act a question arose, whether the owner of a vessel was answerable for the value of certain fishing stores belonging to the ship, and lost by an accidental collision at sea: and the court held him answerable; and remarked, that in subsequent sections of the same act, and also in the two preceding acts, which were *in pari materia*, the words used were ship *and all her appurtenances;* so that the section in question was to be understood as if the words *with all her appurtenances* were used therein, supposing that those words would make any difference in the sense (*s*). This rule, it will be observed, applies whether the prior statutes are referred to in the statute on which the question arises, or not. They are considered, indeed, as all forming one continued enactment (*t*).

6. [A statute which treats of things or persons of an inferior rank, cannot by any general words be extended to those of a superior (*u*).] And therefore, inasmuch as the statute of 13 Eliz. c. 10, before referred to, applied its prohibition to "masters and fellows of colleges, deans and chapters of cathedrals, masters of hospitals, parsons and vicars, or any other having any spiritual or ecclesiastical

(*s*) Gale *v.* Laurie, 5 Barn. & Cress. 156. It may be remarked, that the substance of the provisions in favour of shipowners (as to which see 17 & 18 Vict. c. 125, s. 88), having been incorporated in the 9th part of the Merchant Shipping Act, 1854, the three acts mentioned in the text are repealed by the Merchant Shipping Repeal Act, 1854, s. 14.

(*t*) Earl of Aylesbury *v.* Pattison, 1 Doug. 30.

(*u*) 1 Bla. Com. 88.

living," a bishop was held not to be included within its provisions; for, though he has a spiritual living, he is of higher dignity than any of the persons enumerated (*x*).

7. Where the provision of a statute is general, every thing which is necessary to make such provision effectual is supplied by the common law (*y*). And therefore, when any thing is commanded or prohibited, though only in general terms, by an act of parliament, and no remedy is expressly given in the event of its provision being violated, yet is the party, who sustains an injury by such violation, entitled to bring an action for his private relief; and if the matter be of public concern, the offender shall besides be considered as guilty of a misdemeanor, and liable to indictment accordingly (*z*). The law in this case will be the same, even though the statute, after the prohibition, proceeds by a separate clause to annex a particular pecuniary penalty to the offence if committed; for that will not take away the other remedies (*a*): but where a statute merely inflicts a pecuniary penalty for an act not previously unlawful, and contains no direct prohibitory clause, no indictment can in this case be sustained;—the only remedy is to proceed for the penalty (*b*).

8. A subsequent statute may repeal a prior one, not only by express provision to that effect, but by necessary implication; and every statute is a repeal by implication of a preceding statute, so far as it is contrary thereto (*c*), for *leges posteriores priores abrogant;* consonant to which it was laid down by a law of the twelve tables at Rome, that

(*x*) Archbishop of Canterbury's case, 2 Rep. 46 b; 2 Hawk. c. 27, s. 124.

(*y*) Bac. Abr. Statute (B).

(*z*) 2 Inst. 131, 163. See the case of the Marshalsea, 10 Rep. 75 b; 2 Hale, P. C. 171; Rex *v.* Harris, 4 T. R. 205; Rex *v.* Leginham, 1 Mod. 71; Carden *v.* General Cemetery Company, 5 Bing. N. C. 253; R. *v.* Buchanan, 12 L. J. 227.

(*a*) Per Ashhurst, J., Rex *v.* Harris, ubi supra; Beckford *v.* Hood, 7 T. R. 620; Rex *v.* Wright, 1 Burr. 543.

(*b*) See Rex *v.* Buck, 2 Str. 679; Rex *v.* Wright, ubi supra; Rex *v.* Robinson, 2 Burr. 805.

(*c*) Bac. Abr. Statute (D). See Paget *v.* Foley, 2 Bing. N. C. 679; Rex *v.* Middlesex Justices, 2 B. & Adol. 818.

quod populus postremum jussit, id jus ratum esto. But this is to be understood only when the matter of the later statute is so clearly repugnant that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have an estate of twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks:—here the latter statute virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end (*d*). But if the acts are such that they may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. As if by a former law an offence be indictable at the quarter sessions, and a later law makes the same offence indictable at the assizes;—here the jurisdiction of the sessions is not taken away, but both have concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere* (*e*).

9. It was formerly the rule, that if a statute, repealing another, was itself repealed afterwards, the first statute was revived, without any formal words for that purpose (*f*). Thus when the statute of 5 & 6 Edw. VI. c. 12, providing that the matrimony of priests should be deemed true and lawful matrimony to all purposes, was repealed by a statute 1 Mary, st. 2, c. 2, and this latter statute was afterwards repealed by the act of 1 Jac. c. 25; it was held that there needed not any express words of revival in king James's statute (though such words are in fact contained), but that the act of Edward the sixth was impliedly and virtually revived (*g*). But the rule is now different, it being enacted by 13 & 14 Vict. c. 21, ss. 5, 6, that where any act repealing in whole or in part any former act is itself repealed, such last repeal shall not revive the act or provisions before re-

(*d*) Jenk. Cent. 2, 73.

(*e*) Dr. Foster's case, 11 Rep. 63.

(*f*) See the Bishop's case, 12 Rep. 7; 4 Inst. 325; Tattle *v.* Grimwood, 3 Bing. 493; Doe *v.* Gully, 9 Barn. & Cress. 344; Phillips *v.* Hopwood, 10 Barn. & Cress. 39.

(*g*) The Bishop's case, 12 Rep. 9.

pealed, unless words be added for that purpose; and that where any act shall be made repealing in whole or in part any former act, and substituting provisions instead of those repealed, such repealed provisions shall remain in force till those substituted shall come into operation by force of the last made act.

10. [Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason, but it will not restrain or clog any parliamentary attainder (*h*). Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority; it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislatures. "When you repeal the law itself," says he, "you "at the same time repeal the prohibitory clause, which "guards against such repeal (*i*)."]

These are the several grounds of the law of England in its proper and original extent. There is a species, however, of unwritten law to which no reference has yet been made, but which has long formed part of the general system, and (though here noticed in the last place) constitutes one of its principal divisions. This is *equity;* which is so termed by way of distinction from the original and proper law of England, or (as it is usually called in this case) the *common law.* For that phrase (we are to observe) is used in two senses—either to express the institutions which are not founded on any known statute, but on

(*h*) 4 Inst. 43.

(*i*) "*Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat.*"—L. 3, ep. 23.

custom only (*k*),—or those which are distinct from equity. Indeed the term serves in both cases to indicate that which is more antient, as opposed to that which is less so: the statute law being of modern creation when compared with that which is of immemorial antiquity; and equity being of considerable later birth than some of the earlier parts of the statute law. The origin of equity may be stated as follows. The antient structure of our national jurisprudence (whatever might be its merit in other particulars) was singularly defective in compass and enlargement of view. It took no account of several subjects for which it is the duty of civilized judicature to provide; and to others it applied maxims too strict and unbending to satisfy the notions of justice in an advanced state of society. Its judicial remedies were also in some cases of a cumbrous and inconvenient character. For these evils the progressive introduction of new remedial laws by act of the legislature would seem to have been the natural remedy. But the course of things was different. Owing perhaps to some peculiar averseness in the early genius of the country from change in its legal institutions, the law administered between subject and subject, in the antient courts of the realm, was allowed to remain for a long period of our history with very little alteration of a fundamental kind. But new courts were on the other hand gradually established with a collateral, and in some sense, an usurped jurisdiction, in which cognizance was taken of those subjects which the proper law of England had overlooked or insufficiently regulated, relief given from the consequences of some of its harsher doctrines, and the defects of its judicial methods in certain cases supplied. These courts having been at the outset chiefly resorted to for one of the particular purposes above enumerated, viz. the mitigation of the severity of the common law as applied to particular cases, the whole system of rules and principles there administered obtained (without much propriety, but in reference to the liberal principle of interpretation applied by jurists to the inter-

(*k*) Vide sup. pp. 40, 52.

pretation of positive laws (*l*),) the appellation of *equity*,—and soon began to hold that divided empire with the more antient, or common law, which it still retains. In the courts of equity is now administered a very large proportion of the whole forensic business of the country, (that is, in matters of property, for beyond this they have no jurisdiction); and the extensive subjects, in particular, of *trusts* and *partnerships*, fall almost exclusively under their management. They are also the proper and regular courts to which recourse is to be had, where the object is to compel a man to perform his contract, or abstain from the commission of an injury: and until a very recent period they were the only courts available for either of these purposes, the common law courts interfering only so far as to award *damages* where the breach of contract or wrong had been already committed. But the jurisdiction of the common law courts has been now extended so as to embrace the latter of these purposes, at least, as will be shown hereafter in its proper place (*m*). The forms of proceeding in the courts of equity are also peculiar to themselves; and comprise the method of requiring the defendant to put in, upon his oath, a written answer to the plaintiff's charge; a method unknown to the courts in which the common law is administered (*n*).

(*l*) Vide supra, pp. 74, 75. Redesdale, Plead. in Chan. p. 3.

(*m*) Vide post, bk. v. c. 7. By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 79—82), the courts of common law are now enabled, on the application of the plaintiff in an action, to issue a *writ of injunction* against the repetition or continuance of the breach of contract or other injury for which the action is brought.

(*n*) The defendant, however, may now be compelled in the common law courts to be examined *viva voce* as a witness against himself, though the case was formerly otherwise; it being enacted by the recent statute of 14 & 15 Vict. c. 99, that either party shall be competent and compellable to give evidence on behalf of either party. And by the Common Law Procedure Act, 1854, before mentioned, (ss. 51—57,) either party to an action may, by order of the court or a judge, deliver *interrogatories* in writing to the other, with a view to discover any such matters as the applicant for the order believes material to his action or defence.—Vide post, bk. v. c. 10. For further information as to the courts of equity, and the injuries cognizable therein, vide post, bk. v. c. XIV.

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

[THE kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland,] or Berwick-upon-Tweed (*a*), [or any other part of the Queen's dominions except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries;—of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

Wales (*b*) had continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for many centuries: even from the time of the hostile invasions of the Saxons, when the antient and Christian inhabitants of the island retired to those natural intrenchments, for protection against their pagan visitants. But when these invaders themselves were converted to Christianity, and settled into regular and potent governments, this retreat of the antient Britons grew every day narrower; they were over-run by little and little, gradually driven from one fastness to another, and by repeated losses abridged of

(*a*) Vide Rex *v.* Cowle, 2 Burr. 850. But England now *primâ facie* includes Wales and Berwick; vide post, p. 92.

(*b*) As to Wales, vide Vaugh. 395—420; Rex *v.* Cowle, ubi sup.; 4 Inst. 239; 2 Inst. 195; Buckley *v.* Thomas, Plowd. 121, 123, 126, 129.

[their wild independence. Very early in our history we find their princes doing homage to the crown of England; till at length in the reign of Edward the first, who may justly be styled the conqueror of Wales, the line of their antient princes was abolished (*c*), and the king of England's eldest son] was created (*d*) their titular prince; [the territory of Wales being then entirely re-annexed (by a kind of feodal resumption) to the dominion of the crown of England (*e*); or, as the statute of] Wales (*f*) [expresses it, "*terra Wal-*"*liæ cum incolis suis, prius regi jure feodali subjecta* (of "which homage was the sign), *jam in proprietatis dominium* "*totaliter et cum integritate conversa est, et coronæ regni* "*Angliæ tanquam pars corporis ejusdem annexa et unita.*" By the statute of Wales very material alterations were also made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings; but they still retained very much of their original polity, particularly their rule of inheritance, viz., that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still farther abridged; but the finishing stroke to their independency was given by the statute 27 Hen. VIII. c. 26, which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty, being insensibly put upon the same footing, and made fellow-citizens, with their conquerors.

It is enacted by this statute 27 Hen. VIII. c. 26, -- 1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have

(*c*) See Turner's Hist. Eng. p. 3, c. ii.; Hume's Hist. Eng. c. xiii.

(*d*) Blackstone says he became so "as a matter of course;" but, as Mr. Christian has remarked, the expression is not accurate, though it has been always usual to create the king's eldest son Prince of Wales.

(*e*) Vaugh. 400; Rex *v.* Cowle, 2 Burr. 851.

(*f*) 12 Edw. I. Blackstone refers erroneously in this place to the statute 10 Edw. I.

[the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no other, shall be used in Wales: besides many other regulations of the police of this principality. And the statute 34 & 35 Hen. VIII. c. 26, confirms the same, adds farther regulations, and divides it into twelve shires (*g*),] a division, it may be observed, exclusive of the county of Monmouth; which, though formerly part of Wales, had been made, by the 27 Hen. VIII. c. 26, just mentioned, one of the counties of the realm of England.

From this time the civil condition of the principality has differed but slightly from that of the kingdom at large. There were however, until a recent period, two particulars of distinction sufficiently important to deserve notice—first, that Wales possessed within itself superior courts called Courts of Great Session (*h*), independent of the process of Westminster Hall, and was not visited by the English judges of assize; secondly, that such of its counties and towns as were represented in parliament sent each one member only, the usual number in England being two. But by the act for the more effectual administration of justice, 1 Will. IV. c. 70, the jurisdiction of the Court of Great Sessions was abolished, and it was enacted that assizes should be held in the principality, for the trial of all matters criminal and civil, in like manner and form as had been usual for the counties in England. And by the act to amend the representation of the people, 2 Will. IV. c. 45, a new arrangement was made as to the return of members for Wales; by the effect of which three of its counties respectively send two knights of the shire to parliament, and each of the remaining counties one.

The kingdom of Scotland (*i*)—notwithstanding the union of the crowns on the accession of their king James the sixth

(*g*) By 8 & 9 Vict. c. 11, the manner of assigning *sheriffs* in Wales is regulated and assimilated to that in England.

(*h*) The proceedings in the courts of great session were partly regulated by 13 Geo. 3, c. 51.

(*i*) As to Scotland, vide 4 Inst. 345.

to that of England,—continued [an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done], as these kingdoms exhibited at the time of the project [a very great resemblance, though far from identity] in their institutions. And this is remarked by Sir E. Coke (*j*), who points out a conformity, in many things, [not only in the religion and language of the two nations, but also in their antient laws (*k*).] As to the latter particular, indeed, this resemblance did not exist at the time of the Norman Conquest, for the Scottish institutions were then, according to the best authorities, exclusively Celtic (*l*), and those of England, Anglo-Saxon; but it had become established as soon afterwards as the twelfth century (*m*), and not only continued to prevail at the time of the Union, but is even yet in some particulars distinctly perceptible. The diversities of practice, however, in two large and independent jurisdictions, and the acts of two distinct parliaments, have in process of time naturally tended to introduce great diversities; to which we may add, as a co-operative cause, the antient alliance and connection of Scotland with France, where the civil law chiefly prevailed. For to that law the Scottish jurisprudence ultimately became in many respects conformable; and particularly in all that regards contracts and commerce (*n*).

(*j*) 4 Inst. 345.

(*k*) Blackstone says that both kingdoms "were antiently under the same government," and cites 1 Jac. 1, c. 1, as declaring that "these two mighty, famous and antient kingdoms were formerly one." But when and how they became so, is not stated.

(*l*) See Hallam's Constitutional Hist. vol. iii. p. 404, 3rd ed.

(*m*) The most antient book of Scottish law, called *Regiam Majestatem* (the authenticity of which, though once a subject of dispute, seems on the whole to be sufficiently established,) is so similar to the treatise of Glanvil on English law in the reign of Hen. 2, that one of them is plainly copied from the other. There seems little reason, however, to doubt that Glanvil's is the original work. As to these treatises, vide 4 Inst. 345; Erskine's Instit. b. 1, t. 1, s. 32; Robertson's Chas. V. vol. i. n. (25); Reeves's Hist. Eng. Law, vol. i. p. 225.

(*n*) Vide Erskine's Instit. b. 1, t. 1, s. 41. By 19 & 20 Vict. c. 60, and c. 97, the laws of England and Scotland have recently been assimilated on several miscellaneous points affecting trade and commerce.

To recur however to the history of the Union:—it appeared to Sir Edward Coke, and the politicians of that time, to be attended (notwithstanding the similarity of the two systems of law) with great difficulties; but [these were at length overcome, and the great work was happily effected in the reign of Queen Anne (*o*); when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable being as follows;—that

1. On the first of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.*

16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdoms.

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England (*p*). But all the other laws of Scotland shall remain in force; though alterable by the parliament of Great Britain. Yet with this caution, that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

22. Sixteen peers are to be chosen to represent the peerage of Scotland in parliament (*q*), and forty-five mem-

(*o*) See the act of Union, 5 Ann. c. 8; et vide 6 Ann. cc. 6, 23.

(*p*) See Maxwell *v.* Mayre, 1 Bla. Rep. 271, 364.

(*q*) 6 Ann. c. 23. Et vide 2 & 3 Will. 4, c. 63; 14 & 15 Vict. c. 87; 15 & 16 Vict. c. 35.

[bers to sit in the house of commons;] which number of commoners has, however, by an act of parliament passed in the year 1832 (*r*), been raised to fifty-three.

23. [The sixteen representative peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers, except sitting in the house of lords and voting on the trial of a peer (*s*).

These are the principal of the twenty-five articles of union, which are ratified and confirmed by statute 5 Anne, c. 8: in which statute there are also two acts of parliament recited; the one of Scotland (*t*), whereby the church of Scotland, and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England (*u*), whereby the acts of uniformity of the thirteenth year of Elizabeth and the thirteenth year of Charles the second (except as the same had been altered by parliament at that time), and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed. And it is enacted, that these two acts "shall for ever be observed as fundamental and essential conditions of the union."

Upon these articles and acts of union, it is to be observed,—1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of

(*r*) 2 & 3 Will. 4, c. 65. The act to amend the representation of the people in Scotland.

(*s*) See Lord Mornington's case, Fort. Rep. 165; Duke of Queensberry's case, 1 Peere Wms. 582.

(*t*) An act for securing the Protestant religion and Presbyterian church government, 1 W. & M., act 5.

(*u*) 5 Ann. c. 5, an act for securing the church of England as by law established.

[either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union (*v*)." 2. That whatever else may be deemed "fundamental and essential conditions," the preservation of the two churches of England and Scotland in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given,) would be an infringement of these

(*v*) It may be justly doubted whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union; for the bare idea of a state without a power somewhere vested to alter every part of its laws is the height of political absurdity. The truth seems to be, that in such an *incorporate union* (which is well distinguished by a very learned prelate from a *fœderate alliance*, where such an infringement would certainly rescind the compact), the two contracting states are totally annihilated, without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's Alliance, 195.) But the wanton or imprudent exertion of this right would probably raise a very alarming ferment in the minds of individuals; and therefore it is hinted above that such an attempt might *endanger* (though by no means *destroy*) the union.

To illustrate this matter a little farther; an act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless in point of authority be sufficiently valid and binding; and notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps, by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals. So sacred, indeed, are the laws above mentioned (for protecting each church and the English liturgy) esteemed, that in the regency acts, both of 1751 and 1765, the regents are expressly disabled from assenting to the repeal or alteration of either these or the act of settlement.

[" fundamental and essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and, as the parliament has not yet thought proper, except in certain instances, to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal laws of England are, generally speaking, of no force or validity in Scotland;] nor, on the other hand, are those of Scotland of force or validity in England (*x*); [and of consequence, in the ensuing Commentaries, we shall have very little occasion to mention, any farther than sometimes by way of illustration, the municipal laws of the Scottish part of the united kingdom.] It is however to be observed, that acts of parliament, passed since the union, extend in general to Scotland, though that country be not expressly mentioned. If it be intended to except Scotland, there must be an express proviso to that effect, or the intention of the legislature to except it must be otherwise sufficiently indicated (*y*).

[The town of Berwick-upon-Tweed was originally part of the kingdom of Scotland; and, as such, was for a time reduced by King Edward the first into the possession of the crown of England; and during such its subjection, it received from that prince a charter, which (after its subsequent cession by Edward Balliol to be for ever united to the crown and realm of England,) was confirmed by King Edward the third, with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of King Alexander, that is, before its reduction by Edward the first. Its constitution was new-modelled, and put upon an English footing by a charter of King James the first: and all its liberties, franchises, and customs were confirmed in parliament by the statutes 22

(*x*) Our courts do not even take judicial notice of the state of the law in Scotland; but (as in the case of a foreign country) if any question upon it happens to arise, it is considered as a matter of *fact* to be ascertained by evidence. Woodham *v.* Edwardes, 5 Ad. & El. 771.

(*y*) Rex *v.* Cowle, 2 Burr. 853.

[Edw. IV. c. 8, and 2 Jac. I. c. 28. Though therefore it hath some local peculiarities, derived from the antient laws of Scotland, yet it is clearly part of the realm of England (z), being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was (perhaps superfluously) declared by statute 20 Geo. II. c. 42, s. 3, that where England only is mentioned in any act of parliament, the same notwithstanding hath and shall be "deemed to comprehend and include the dominion of Wales and town of Berwick-upon-Tweed."] Berwick, however, is no part of the county of Northumberland (a); but forms, in some sense, a county of itself; that is, a *county of a town corporate* (b): as to the effect of which, the reader is referred to the observations which we shall have occasion presently to make when we come to explain the nature of counties corporate (c).

As to Ireland (d), its inhabitants, at the time of the conquest of the island by Henry the second, were governed by what they call the Brehon law, so styled from the Irish name of judges, who were denominated Brehons (e). But on such conquest, the laws of England were received and sworn to by the Irish nation assembled at the council of Lismore (f). And afterwards [King John, in the twelfth year of his reign, went into Ireland and carried over with him many able sages of the law; and there by his letters-patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England (g): which letters-patent Sir

(z) See Hale, Hist. C. L. c. 9; Rex v. Cowle, 2 Burr. 853; Com. Dig. Scotland (B.); Mayor of Berwick v. Shanks, 3 Bing. 459.

(a) See Rex v. Cowle, 2 Burr. 860; Mayor of Berwick v. Shanks, ubi sup.

(b) See 5 & 6 Will. 4, c. 76, ss. 61, 109; 6 & 7 Will. 4, c. 103, s. 6.

(c) Vide post, 133.

(d) As to Ireland, vide 4 Inst. 349.

(e) 4 Inst. 358; Edm. Spenser's State of Ireland, p. 1513, edit. Hughes.

(f) Pryn. on 4 Inst. 249.

(g) See Craw v. Ramsay, Vaugh. 294; 2 Pryn. Rec. 85; Calvin's case, 7 Rep. 23; Campbell v. Hall, Cowp. 210.

[Edward Coke apprehends to have been there confirmed in parliament (*h*). But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the third (*i*) and Edward the first (*k*) were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III., under Lionel Duke of Clarence, the then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of Queen Elizabeth, the wild natives still kept and preserved their Brehon law; which is described (*l*) to have been "a rule of right un-" written, but delivered by tradition from one to another, " in which oftentimes there appeared great show of equity " in determining the right between party and party, but in " many things repugnant quite to both God's laws and " man's." The latter part of this character is alone ascribed to it, by the laws before cited of Edward the first and his grandson.]

Notwithstanding this settlement of Ireland, it was only entitled the dominion or lordship of Ireland (*m*), and the king's style was no other than *Dominus Hiberniæ*, lord of Ireland, till the thirty-third year of King Henry the eighth, when he assumed the title of king, which is recognized by act of parliament, 35 Hen. VIII. c. 3. But [as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed, that though the immemorial customs, or common law, of England were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of King John, extended into that kingdom; unless it were specially named, or included under general words, such as, "within any of the kings dominions." And

(*h*) Co. Litt. 141.

(*i*) A. R. 30; 1 Rym. Fœd. 442.

(*k*) A. R. 5.—"*Pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censeri non debeant, nobis et consilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.*"—Pryn. Rec. 1218.

(*l*) See Spenser's State of Ireland, p. 1513, edit. Hughes.

(*m*) Stat. Hiberniæ, 14 Hen. 3.

[this is particularly expressed, and the reason given, in the Year Books (*n*); where it is said, "a tax granted by the "parliament of England shall not bind those of Ireland, "because they are not summoned to our parliament;" and again, "Ireland hath a parliament of its own, and maketh "and altereth laws; and our statutes do not bind them (*o*), "because they do not send knights to our parliament; but "their persons are the king's subjects, like as the inhabitants "of Calais, Gascoigne, and Guienne, while they continued "under the king's subjection." The general run of laws, enacted by the superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries, which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But when the sovereign legislative power sees it necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt but then they are bound by its laws (*p*).

The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper (*q*). But an ill use being made of this liberty, particularly by Lord Gormanstown, deputy-lieutenant in the reign of Edward the fourth (*r*), a set of statutes were then enacted in the tenth year of Henry the seventh (Sir Edward Poynings being then lord deputy, whence they are called "Poynings' laws,") one of which (*s*), in order to restrain the power as well of the deputy as of the Irish parliament, provides,—1. That, before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king, under the great seal of

(*n*) 20 Hen. 6, 8; 2 Rich. 3, 12.

(*o*) Lord Coke, citing this in Calvin's case, 7 Rep. 22, inserts the following parenthesis, *viz.* "(which is to be understood *unless specially named*)."

(*p*) Year Book, 1 Hen. 7, 3; Calvin's case, 7 Rep. 22.

(*q*) Irish Stat. 11 Eliz. st. 3, c. 8.

(*r*) Ibid. 10 Hen. 7, c. 23.

(*s*) Cap. 4, expounded by 3 & 4 Ph. & M. c. 4.

[Ireland, the considerations and causes thereof, and the articles of the acts proposed to be passed therein; and 2. That after the king, in his council of England, shall have considered, approved or altered the said acts or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other, shall be proposed, received, or rejected (*t*). But as this precluded any laws from being proposed but such as were pre-conceived before the parliament was in being, which occasioned many inconveniences, and made frequent dissolutions necessary,] it was afterwards provided by the Irish statute of 3 & 4 Ph. & Mary, c. 4, [that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament.] Still, however, [there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering, any law.] But the usage afterwards was, that bills were often framed in either house, under the denomination of "heads for a bill or bills:" and in that shape they were offered to the consideration of the lord lieutenant and privy council: who, upon such parliamentary intimation, or otherwise upon the application of private persons, received and transmitted such heads, or rejected them without any transmission to England. With regard however to "Poynings' law" in particular, it could not be repealed or suspended unless the bill for that purpose, before it was certified to England, were approved by both houses (*u*).

[But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and the measure of justice in both kingdoms becoming no longer uniform, it was therefore enacted by another of

(*t*) 4 Inst. 353.

(*u*) Irish Stat. 11 Eliz. st. 3, c. 8.

["Poynings' laws" (*x*), that all acts of parliament, before made in England, should be of force within the realm of Ireland (*y*).] But by the same rule, that the people of Ireland were not bound by acts of the English parliament passed *before* this enactment, and not specially naming or referring to Ireland, so they were not bound by such acts of parliament passed *after* this enactment (*z*). And on the other hand it was equally clear that where Ireland was particularly named, or included under general words, they were bound by such acts of parliament. [For this follows from the very nature and constitution of a dependent state: dependence being very little else but an obligation to conform to the will or law of that superior person or state upon which the inferior depends. The original and true ground of this superiority, in the present case, was what we usually call, though somewhat improperly, the right of conquest: a right allowed by the law of nations, if not by that of nature; but which in reason and civil policy can mean nothing more than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered, that, if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies (*a*).

But this state of dependence being almost forgotten, and ready to be disputed by the Irish nation, it became necessary to declare how that matter really stood; and therefore by statute 6 Geo. I. c. 5, it was declared, that the kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial crown of Great Britain, as being inseparably

(*x*) Cap. 22.

(*y*) 4 Inst. 351.

(*z*) 12 Rep. 112. By the act, however, of the Irish Parliament, 21 & 22 Geo. 3, c. 48, (Yelverton's act,) it was enacted, that certain statutes then made in England or Great Britain, relating to the subjects therein enumerated, save so far as the same had been altered or repealed, should be accepted, used and executed in Ireland. A previous act of the same parliament (21 & 22 Geo. 3, c. 47, *Irish*,) would seem to repeal the provisions of 10 Hen. 7, c. 4, and 3 & 4 Ph. & M. c. 4.

(*a*) Puff. L. of N. viii. 6, 24.

[united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, had power to make laws to bind the people of Ireland.]

It was not only the parliamentary constitution of Ireland that was thus placed in a state of dependence; the same kind of inferiority attached to her courts of justice, from which there was an ultimate resort to the English courts, and a writ of error [(in the nature of an appeal) lay from the King's Bench in Ireland to the King's Bench in England (*b*), and an appeal from the chancery in Ireland immediately to the House of Lords here;—it being expressly declared, by the same statute, 6 Geo. I. c. 5, that the peers of Ireland have no jurisdiction to affirm or reverse any judgments or decrees whatsoever.] For it was maintained to be a proper and necessary constitution in all inferior dominions, that the appeal from their courts in the last resort should be to the courts of the superior state, and this for two reasons: 1. [Because otherwise the law appointed or permitted to such inferior dominion, might be insensibly changed within itself, without the assent of the superior. 2. Because otherwise judgments might be given to the disadvantage or diminution of the superiority; or to make the dependence to be only of the person of the king, and not of the crown of England (*c*).]

The time however at length arrived when Ireland, impatient of a subordinate position, was enabled to assert her rights as a free and independent state. The statute of 6 Geo. I., before mentioned, having been first repealed (*d*), it was by 23 Geo. III. c. 28, declared that the parliament and courts of Ireland had an exclusive right as to all matters of legislation and judicature in that country; and this emancipation was followed at no distant period by the

(*b*) This was law in the time of Hen. 8; as appears by the antient book intituled *Diversity of Courts, c. Bank le Roy.*

(*c*) Vaughan, 402; 1 Bl. Com. 104.

(*d*) By 22 Geo. 3, c. 53.

great measure which incorporated her (like Scotland) as an integral part of the British dominions.

Of the articles of the Act of Union with Ireland 39 & 40 Geo. III. c. 67, the most important parts are these:—

1. That the kingdoms of Great Britain and Ireland shall, on the 1st day of January, 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland.

2. That the succession to the imperial crown shall continue in the same manner as that to the crown of Great Britain and Ireland stood before limited.

3. That there shall be one parliament, styled the Parliament of the United Kingdom of Great Britain and Ireland.

4. That the Lords spiritual of Ireland by rotation of sessions, and twenty-eight Lords temporal of Ireland, elected for life by the peers of Ireland, shall sit in the House of Lords, and one hundred commoners (to whom five more have now been added by a late act of parliament (*e*)) shall be the number to sit in the House of Commons on the part of Ireland; that a peer of Ireland, not elected one of the twenty-eight, may sit in the House of Commons, but while so sitting shall not be entitled to privilege of peerage, or to be elected one of the twenty-eight, or to vote at such election; and that all the lords spiritual and temporal of Ireland (except those temporal peers who may be members of the House of Commons,) shall have all privilege of peerage as fully as those of Great Britain;—the right of sitting in the House of Lords (with its attendant privileges) only excepted.

5. That the churches of England and Ireland shall be united into one Protestant episcopal church, to be called the United Church of England and Ireland; that the doctrine, worship and discipline shall be the same, and that the continuance and preservation of the united church as

(*e*) An act to amend the representation of the people of Ireland, 2 & 3 Will. 4, c. 88, see s. 11.

the established church of England and Ireland shall be deemed an essential and fundamental part of the union; and that in like manner the church of Scotland shall remain the same as established by the acts of Union of England and Scotland.

6. That the subjects of Great Britain and Ireland shall be entitled to the same privileges with regard to trade and navigation (*f*), and also in respect of all treaties with foreign powers.

7. That the future expenditure of the united kingdom shall be defrayed in such proportion as parliament shall from time to time deem reasonable, according to certain rules prescribed for that purpose in the act.

8. That all the laws and courts of each kingdom shall remain the same as already established, subject to such alterations by the united parliament as circumstances may require; but that all writs of error and appeal which might then have been decided in the House of Lords of either kingdom, shall be decided by the House of Lords of the united kingdom.

Since the union all acts of parliament extend to Ireland, whether expressly mentioned or not, unless that portion of the united kingdom be expressly excepted, or the intention to except it be otherwise plainly shown.

[With regard to the other adjacent Islands, which are subject to the crown of Great Britain, some of them (as the Isle of Wight (*g*), of Portland, of Thanet, &c.) are comprised within some neighbouring county, and are therefore to be looked upon as annexed to the mother island, and part of the kingdom of England (*h*). But there are others which require a more particular consideration.

(*f*) See Attorney-General *v.* M'Kenzie, 11 Price, 284.

(*g*) The Isle of Wight, for the purpose of *parliamentary representation*, is a county of itself, separate from Hampshire, and returns one member; see 2 Will. 4, c. 45, s. 16.

(*h*) Com. Dig. Navigation, F. 5; 4 Inst. 287.

[And first, the Isle of Man (*i*) is a distinct territory from England, and is not governed by our laws; neither doth any act of parliament extend to it, unless it be particularly named therein, and then an act of parliament is binding there (*j*). It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to King John and Henry the third of England; afterwards to the kings of Scotland; and then again to the crown of England; and then at length we find King Henry the fourth claiming the island by right of conquest, and disposing of it to the Earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley by letters-patent 7 Hen. IV. (*k*). In his lineal descendants it continued for eight generations, till the death of Ferdinando, Earl of Derby, A.D. 1594; when a controversy arose concerning the inheritance thereof between his daughters and William, his surviving brother: upon which, and a doubt that was started concerning the validity of the original patent (*l*), the island was seized into the queen's hands, and afterwards various grants were made of it by King James the first; all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William Earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James, Earl of Derby, A.D. 1735, the male line of Earl William failing, the Duke of Atholl succeeded to the island as heir general by a female branch. In the meantime, though the title of king had long been disused, the Earls of Derby, as lords of Man, had maintained a sort of royal authority therein, by assenting or dissenting to laws

(*i*) Com. Dig. Navigation, F. 2; Co. Lit. 9 a; Calvin's case, 7 Rep. 21; 4 Inst. 283.

(*j*) 4 Inst. 284; 2 And. 116. By 18 & 19 Vict. c. 96, s. 24, it is made part of the United Kingdom for the purpose of any act relating to the customs, but with a saving as to any rights then enjoyed by the Isle.

(*k*) Selden, Tit. Hon. 1, 3.

(*l*) Camden, Eliz. A.D. 1594.

[and exercising an appellate jurisdiction. Yet, though no English writ, or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council (*m*). But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue (it affording a commodious asylum for debtors, outlaws and smugglers,) authority was given to the treasury by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors for the use of the crown; which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. cc. 26 and 39, whereby the whole island and all its dependencies so granted as aforesaid, (except the landed property and some other rights of the Atholl family,) are unalienably vested in the crown (*n*), and subjected to the regulations of the British excise (*o*) and customs (*p*).

The islands of Jersey, Guernsey, Sark, Alderney, and their appendages (*q*), were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an antient book of very great authority, intituled *Le Grand Coustumier* (*r*). The queen's writ or process from the courts of Westminster is] in ordinary cases (*s*) [of no force in these islands; but her commission is. They are not bound

(*m*) Christian *v.* Corren, 1 P. Wms. 329.

(*n*) An additional compensation for this cession was afterwards granted to the Duke of Atholl by 45 Geo. 3, c. 123. Et vide 6 Geo. 4, c. 34.

(*o*) See 7 & 8 Geo. 4, c. 53, s. 3.

(*p*) See 16 & 17 Vict. c. 107, ss. 9, 10, 346—355; 18 & 19 Vict. c. 96, ss. 12, 23, 24, c. 97.

(*q*) As to these, vide 4 Inst. 286; Calvin's case, 7 Rep. 20 b; Martin *v.* M'Culloch, 1 Moore, Priv. Counc. Rep. 308.

(*r*) See Hale, Hist. Com. Law, c. 6.

(*s*) 4 Inst. 286. It may be observed, however, that a writ of habeas corpus ad subjiciendum lies into the channel islands, under the provisions of 31 Car. 2, c. 2, and 56 Geo. 3, c. 100. See Carus Wilson's case, 7 Q. B. 984, et post, b. v. c. 12, s. 5.

[by common acts of the English parliament, unless particularly named. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but appeal lies from them to the sovereign in council in the last resort.]

From these adjacent islands we may now extend our view to the more distant possessions (or as they are usually termed *colonies*) of the British crown in various quarters of the globe. Colonies are no part of the mother country, but distinct (though dependent) dominions. In general, they are either gained from other states by conquest or treaty; or else they are acquired by right of occupancy only, that is, by finding them desert and uncultivated, and peopling them from the mother country.

[Both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies with respect to the laws by which they are bound.] For in conquered or ceded countries that have already laws of their own, these laws remain in force until changed by competent authority (*t*), and the common law of England, as such, has no allowance or authority there: while, on the other hand, [it hath been held (*u*), that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being—which are the birthright of every subject (*x*)—are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inherit-

(*t*) Campbell *v.* Hall, Cowp. 204; 2 P. Wms. 75; Rex *v.* Vaughan, 4 Burr. 2500. It has been said that the position laid down in the text is subject to the exception of such laws "as are contrary to the Christian religion or natural morality;" Calvin's case, 7 Rep. 17 b; but that doctrine is of questionable authority; vide Campbell *v.* Hall, ubi sup.

(*u*) Blankard *v.* Galdy, Salk. 411; S. C. 4 Mod. 215; Smith *v.* Brown, Salk. 666.

(*x*) See 2 P. Wms. 75.

[ance, and of protection from personal injuries; the artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.]

The sovereign exercises, as to colonies of every description, the right of appointing governors, and of issuing warrants for the appointment of all other officers, whether judicial or administrative (*y*). The right of legislation, too, is in some cases vested in the Crown; for all such colonies as have been acquired by conquest or cession are subject to such laws as the sovereign in council may himself impose (*z*), or to such as may be imposed by any legislative council established there under the royal authority. This does not extend, however, to colonies acquired by occupancy; for in these the Crown possesses no such legislative right. The sovereign may, nevertheless, in any colonies, however acquired, direct the governor to summon a representative assembly, from among the inhabitants themselves, for the purpose of interior legislation; and it is an established principle, that a conquered or ceded colony, to which the Crown has once thus granted a representative legislature, is no longer subject to legislation by the Crown (*a*). Such would seem, in a general point of view,

(*y*) As to the colonial *church establishment*, we may observe here, that, of late years, *bishops* have been appointed for the colonies; as to whom see 59 Geo. 3, c. 60; 3 & 4 Vict. c. 33; 5 & 6 Vict. c. 4, c. 119; 15 & 16 Vict. cc. 52, 53, 88; 16 & 17 Vict. c. 49; 19 & 20 Vict. c. 115, s. 4. The following are colonial dioceses:—Calcutta, Madras, Bombay, Colombo, Mauritius, Victoria (Hong Kong), Labuan, Cape Town, Sierra Leone, Natal, Graham's Town, Quebec, Montreal, Toronto, Nova Scotia, Fredericton, Newfoundland, Rupert's Land, Jamaica, Barbados, Antigua, Guiana, Sydney, Newcastle, Melbourne, Adelaide, Tasmania, New Zealand, Gibraltar, Jerusalem.

(*z*) Calvin's case, 7 Rep. 17 b; Campbell *v.* Hall, Cowp. 211.

(*a*) Campbell *v.* Hall, ubi sup.; Att-Gen. *v.* Stewart, 2 Meriv. 158.

to be the extent of the royal power in the colonies acquired either by conquest, cession, or occupancy; but in connection with this subject, it is proper also to notice the act of 6 & 7 Vict. c. 94, passed, as it would appear, chiefly to provide for places acquired by other means,—by which, —after reciting that, "by treaty, capitulation, grant, usage, "sufferance, and other lawful means, her majesty hath "power and jurisdiction within divers countries and places "out of her dominions, and that doubts had arisen how "far the exercise of such power and jurisdiction was con-"trolled by and dependent on the laws and customs of "this realm, and that it was expedient that such doubts "should be removed"—it was enacted, that it shall be lawful for her majesty to exercise any power or jurisdiction that she may have within any country or place out of her dominions, in the same and in as ample a manner as if such power or jurisdiction had been obtained by cession or conquest; and that everything done in pursuance of such power or jurisdiction, in any place out of her majesty's dominions, shall within her dominions, be deemed to be, to all intents and purposes, as valid as if done according to the local law then in force within such place; and further, that if in any proceedings civil or criminal, it shall become necessary, in the opinion of the presiding judge, to produce evidence of the existence of such power or jurisdiction, questions properly framed shall be transmitted to a principal secretary of state, and his answer shall be final and conclusive evidence of the matters therein contained, and required to be ascertained thereby (*b*).

Such being the nature of the authority of the Crown in our colonial possessions, it is almost superfluous to remark that they are all, under all circumstances and whatever may be their political constitution, subject to the legisla-

(*b*) 6 & 7 Vict. c. 94, s. 3. See 20 & 21 Vict. c. 75, to confirm an order in council concerning the exercise of jurisdiction in matters arising within the kingdom of Siam.

tive control of the British parliament. It was the exercise by parliament of this general right, for the particular purpose of raising a revenue by colonial taxation, that led to that famous dispute between the mother country and her North American provinces, which ultimately terminated in their independence (*c*). The existence of the right in this, as in other cases, was during the controversy asserted by an act of the 6 Geo. III. c. 12, which declares that all his majesty's colonies or plantations in America are, and of right ought to be, subordinate to, and dependent upon, the imperial crown and parliament of Great Britain, who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatever. It was however ultimately thought expedient to disclaim the exercise of the power of taxation as regarded America: it being declared by another act of the British legislature, 18 Geo. III. c. 12, that, from and after the passing thereof, the king and parliament of Great Britain will not impose any duty, tax, or assessment whatever payable in any of his majesty's colonies, provinces, or plantations in North America, or the West Indies, except only such duties as it may be expedient to impose for the regulation of commerce (*d*);—the net produce of such duties to be always paid and applied to and for the use of the colony, province or plantation in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts or general assemblies of such colonies, provinces, or plantations, are ordinarily paid and applied.

Though it is competent to parliament to legislate for the colonies, yet a colony is not considered as affected by acts of parliament passed after its acquisition, and while it is

(*c*) By 22 Geo. 3, c. 46, his majesty was empowered to conclude a truce or peace with these colonies, and by a definitive treaty signed at Paris, 3rd September, 1783, acknowledged the United States of America to be free, sovereign, and independent.

(*d*) See the recital on this subject in the 31 Geo. 3, c. 31, s. 46, relative to Canada.

subject to other legislative authority, (whether that of the sovereign in council, or of a local council or assembly,) unless it be mentioned in the Act, by name, or by general description, such as "the colonies," or "the West Indies (*e*);" or unless the Act be, in its nature, obviously intended to affect all our possessions. But in a colony, acquired by occupancy, Acts passed before its acquisition come into force immediately upon that event, as part of the general law of England, (as to all provisions at least not unsuitable to its social circumstances);—though it is otherwise in the case of a colony won by conquest or cession, which remains (as we have seen) subject to its own pre-existing laws, and is not in general affected by statutes of the united kingdom passed before its acquisition.

Such being the general principles of law applicable to colonies, we may next advert to the actual constitution of those which at present belong to the British Crown (*f*).

(*e*) See Blankard *v.* Galdy, 4 Mod. 215; 2 P. Wms. 75; Rex *v.* Vaughan, 4 Burr. 2500.

(*f*) An enumeration of these will be found in Clark's Summary of Colonial Law, p. 18; but to the list there given, must be now made some additions. We may also mention here the following statutes, containing regulations as to *particular* colonies:—

Africa (*Coast of*), 6 & 7 Vict. c. 13. *Australian Colonies*, 13 & 14 Vict. c. 59; 18 & 19 Vict. c. 56. *Australia* (*South*), 4 & 5 Will. 4, c. 95; 1 & 2 Vict. c. 60; 5 & 6 Vict. c. 61; 18 & 19 Vict. c. 56. *Australia* (*Western*), 10 Geo. 4, c. 22; 9 & 10 Vict. c. 35. *Canada*, 3 & 4 Vict. c. 35; 5 & 6 Vict. c. 118; 10 & 11 Vict. c. 71; 11 & 12 Vict. c. 56; 14 & 15 Vict. c. 63; 16 & 17 Vict. c. 21; 17 & 18 Vict. c. 118; 18 & 19 Vict. c. 56; 19 & 20 Vict. c. 23; 20 & 21 Vict. c. 34. *Falkland Islands*, 6 & 7 Vict. c. 13. *Ionian States*, 20 Vict. c. 4. *New Brunswick*, 20 & 21 Vict. c. 34. *Newfoundland*, 5 & 6 Vict. c. 120; 9 & 10 Vict. c. 3, c. 45; 10 & 11 Vict. c. 1, c. 44; 12 & 13 Vict. c. 21. *New South Wales* (*and Van Diemen's Land*), 9 Geo. 4, c 83 (Astley *v.* Fisher, 6 C. B. 572); 6 & 7 Will. 4, c. 46; 7 Will. 4 & 1 Vict. c. 42; 1 & 2 Vict. c. 50; 2 & 3 Vict. c. 70; 3 & 4 Vict. c. 62; 4 & 5 Vict. c. 44; 5 & 6 Vict. c. 76; 7 & 8 Vict. c. 74; 12 & 13 Vict. c. 22, c. 52; 18 & 19 Vict. c. 54, c. 55, s. 3, c. 56. *New Zealand Islands*, 3 & 4 Vict. c. 62; 9 & 10 Vict. c. 103; 10 & 11 Vict. c. 112; 11 & 12 Vict. c. 5; 12 & 13 Vict. c. 79; 13 & 14 Vict. c. 70; 14 & 15 Vict. cc. 84, 86; 15 & 16 Vict. c. 72; 20 & 21 Vict. cc. 51, 52, 53. *Norfolk Island*, 6 & 7 Vict. c. 35. *Prince of Wales Island, Singapore and Malacca*, 18 & 19 Vict. c. 93. *Quebec*, 15 & 16 Vict. c. 53. *Vancouver's Island*, 12 & 13 Vict. c. 48. *Van Diemen's Land* (now called "Tasmania"), 5 & 6 Vict. c. 13; 8 & 9

And here a great variety is observable. In every case they are subject to a local governor, the representative and deputy of the sovereign, who acts under the royal commission and the royal instructions, by which the commission is usually accompanied. In every case, too, the law is administered by local judges, deriving their authority from the crown: and an appeal is universally allowed from the decision of those judges to the sovereign in council, here in England (*g*). But in other particulars our present colonies differ widely from each other in their plan of government, some of them having received the gift of English laws, others remaining subject to the codes of foreigners, their former masters; some remaining under the legislative power of the crown itself, and others receiving their laws from a local legislative council, or from representative assemblies, established by authority of the crown or of parliament. With respect to those possessing assemblies of this description, (which are a numerous class,) it may be said that their whole interior polity is in general closely modelled upon that of the mother country. For having (as already observed) a governor (the representative of royalty), and royal courts of justice, they have also a local council, forming a sort of upper house, in addition to their general assembly, corresponding with our House of Commons (*h*); who, by their united authority, make laws suited to the emergencies of the colony. This how-

Vict. c. 95; 10 & 11 Vict. c. 57; 18 & 19 Vict. c. 56. *Victoria*, 13 & 14 Vict. c. 59; 18 & 19 Vict. cc. 55, 56. *Tobago and Trinidad*, 11 & 12 Vict. c. 22. Moreover with respect to the *West Indies*, we may notice the following acts: *For the relief of certain colonies and plantations therein*, 2 & 3 Will. 4, c. 125; 5 & 6 Will. 4, c. 51; 3 & 4 Vict. c. 40; 7 & 8 Vict. c. 17; 8 & 9 Vict. c. 50; 11 & 12 Vict. c. 38; 19 & 20 Vict. c. 35; *For the sale of incumbered estates therein*, 17 & 18 Vict. c. 117: *For regulating the prisons there*, 1 & 2 Vict. c. 67: *For increasing the number of bishoprics therein*, 5 & 6 Vict. c. 4: and *for establishing courts of appeal for certain of the West India Islands*, 13 & 14 Vict. c. 15.

(*g*) Vide post, b. iv. c. 5.

(*h*) As to the power of a House of Assembly to commit for contempt, see Beaumont *v.* Barrett, 1 Moore, Priv. Counc. Rep. 59.

ever is subject to such restriction as necessarily results from the subordination of these local establishments to the crown and the imperial parliament. For acts of assembly not only require the assent of the governor as representing the crown, before they can come even into temporary operation, but are liable to be afterwards annulled by a notification from this country of their having been *disallowed* by the sovereign in council (*i*). And it is particularly declared by statute 7 & 8 Will. III. c. 22, that all laws, bye-laws, usages and customs, which shall be in practice in any of the plantations, repugnant to any law made or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect (*k*).

Thus much as to our settlements in general (*l*). But there is a large class of them in the West Indies and elsewhere, which require our separate attention, on account of their connexion with the late system of colonial slavery. From the earliest period of their acquisition, their produce had been raised by the compulsory labour of the negro race, and notwithstanding the peculiar freedom of her own institutions, and the pure form of Christianity which she professes, the mother country had never hesitated to lend her sanction to that iniquitous method of cultivation (*m*).

(*i*) Clark's Colonial Law, 41. (See the provision as to laws of governor general in council in *India*, 16 & 17 Vict. c. 95, s. 26.)

(*k*) See Bank of Australasia *v.* Nias, 20 L. J. (Q. B.) 294. A similar declaration, in relation to our possessions in America, occurs in 16 & 17 Vict. c. 107, s. 190.

(*l*) We may notice here the following statutes, containing recent regulations applicable to our colonies in general. As to *the apprehension of offenders in the colonies escaping into the United Kingdom, and vice versâ*, 6 & 7 Vict. c. 34. As to *admission in certain cases of unsworn testimony in civil and criminal proceedings*, 6 & 7 Vict. c. 22. As to *letters-patent in the colonies*, 9 & 10 Vict. c. 91. As to the *jurisdiction of the admiralty* in the colonies, 12 & 13 Vict. c. 96. As to the *post-office* in the colonies, 12 & 13 Vict. c. 66. As to the *proof of colonial acts of state and legal proceedings*, 14 & 15 Vict. c. 49, s. 7. As to the *land and casual revenues of the crown* in the colonies, 15 & 16 Vict. c. 39. As to *colonial lighthouses*, 18 & 19 Vict. c. 91. As to *sale of crown waste lands in colonies, and emigration commissioners*, 18 & 19 Vict. c. 119.

(*m*) Several of our statutes gave

Yet among all the nations involved in the guilt of slavery, she alone has now passed a law for its abolition, and under circumstances which can leave no doubt that the measure is really due to the force of her moral principles. The conscience of the British public was first awakened to the atrocity of the traffic by which the plantations were continually supplied with new victims from the coast of Africa; and at a later period to the nature of the colonial bondage itself, which was shown to exceed even the servile system of Pagan Rome in severity, and to be without parallel in the history of human oppression (*n*). The trade, after a long and obstinate opposition from the parties interested, was abolished in 1807 (*o*)—and after another protracted interval, during which the duty of ameliorating the condition of the negroes in the colonies was confided (but in vain) to the local legislature, the imperial parliament at length resolved to put an end, from 1st August, 1834, to the system of slavery itself—which was carried into effect by an act passed in 1833 (*p*). To justify this measure, however, it was thought necessary to award to the slave proprietors the sum of twenty millions sterling, in compensation for the loss of service sustained,—and also to interpose a certain period of probation during which the slaves, instead of passing suddenly into absolute liberty, should be considered as apprentices, and held in that qualified species of subjection to their former masters. But in the result, the masters themselves found it expedient to abandon the system of apprenticeship before the pre-

sanction to this system, as already established by the local laws of the colonies (vide Forbes *v.* Lord Cochrane, 2 Barn. & Cress. 469); yet the condition of slavery has been long pronounced by our courts to be repugnant to the genius of the municipal law of England; see the case just cited, and the case of Somersett, 11 St. Tr. 340; Lofft. 1.

(*n*) Vide "Slavery of the British West India Colonies delineated," by the late James Stephen, Esq. 1824.

(*o*) 47 Geo. 3, st. 1, c. 36. The foreign slave trade, viz. the supply of foreign countries with slaves, was abolished in 1806, by stat. 46 Geo. 3, c. 52, and the supply of our own conquered colonies had been previously forbidden by the king in council in 1805.

(*p*) 3 & 4 Will. 4, c. 73.

scribed time had expired; and, by acts of their own legislature throughout the different colonies, admitted their apprentices into the state of pure freedom at a period somewhat earlier than they would otherwise have been entitled to its enjoyment (*q*).

Our possessions in India are also entitled, from their superior extent and importance, to specific notice. In 1708 two rival associations existed in England for the purposes of East India traffic; but in that year they were consolidated into one by act of parliament (*r*), with an exclusive privilege of trading to the East Indies and other specified places (*s*);—a privilege afterwards renewed by many successive grants. This body was originally incorporated by the name of "The United Company of Merchants of England trading to the East Indies," but convenience attached to them the shorter appellation of "The East India Company," which afterwards became by express provision (*t*) their proper legal style. In the progress of their well-known history, they drove from the Indian peninsula the rival settlers of Europe; and though first instituted for purposes merely commercial, their policy gradually led to the acquisition of immense territorial dominions, by which they became effectively (though subject to the undoubted supremacy of the British crown (*u*))

(*q*) Besides the acts above cited, vide 5 Geo. 4, c. 113, s. 9; 7 Will. 4 & 1 Vict. c. 91, *for making the slave trade piracy:* 5 Geo. 4, c. 113; 9 Geo. 4, c. 84; 11 Geo. 4 & 1 Will. 4, c. 55; 3 & 4 Will. 4, c. 72; 5 & 6 Will. 4, c. 60, c. 61; 6 & 7 Will. 4, c. 81; 7 Will. 4 & 1 Vict. c. 62; 1 & 2 Vict. c. 39, c. 40, c. 41, c. 47, c. 83, c. 84, c. 102; 2 & 3 Vict. c. 57, c. 73; 6 & 7 Vict. c. 50, c. 98; 7 & 8 Vict. c. 26; 16 & 17 Vict. c. 16, c. 17; 18 & 19 Vict. c. 85, *for farther provisions as to slave trade;* 5 & 6 Will. 4, c. 45; 6 & 7 Will. 4, c. 5, c. 16, c. 82; 1 & 2 Vict. c. 3, c. 19; 4 & 5 Vict. c. 18, *as to slave compensation and slavery;* 16 & 17 Vict. c. 86, *to remove doubts as to the rights of liberated Africans in Sierra Leone.* As to slave dealers, subjects of a country which has not abolished the slave trade, and their rights of property in the slaves they trade in, see Buron *v.* Denman, 2 Exch. 167.

(*r*) 6 Ann. c. 17, s. 13.

(*s*) 6 Ann. c. 17, and 9 & 10 Will. 3, c. 44, s. 81.

(*t*) 3 & 4 Will. 4, c. 85, s. 111.

(*u*) See preamble to 53 Geo. 3, c. 155.

the sovereigns of India (*x*). The unexampled grandeur of this company has long rendered the regulation of its affairs an object of the highest interest and importance to the British nation. In consequence of the prevalence of great abuses, its constitution was newly arranged in 1773 by an act of parliament (*y*), prescribing the manner in which its Directors should be chosen from among its members, and the qualification which should entitle a member to vote in its affairs (*z*). In 1784 its administration of the East was brought under the more effectual superintendence of the government at home, by the establishment of the Board of Commissioners for the Affairs of India, afterwards generally called the "Board of Control"(*a*). Still however its commercial monopoly remained entire; but in 1813 it was provided by the act (*b*) then passed for the temporary renewal of the company's charter, that the trade from all places except China, and in all commodities except tea, should be thrown open (under certain restrictions and limitations) to every subject of the realm. And this proved but the prelude to a still more important change, for the expediency being at length generally recognized of admitting the capital of our private merchants to a free participation in every branch of the Indian traffic, an arrangement was accordingly made with the company for that purpose in 1832. By the act which carried this into effect—3 & 4 Will. IV. c. 85—such exclusive rights of trading as the

(*x*) 7 Geo. 3, c. 57. See Gibson *v.* East India Company, 5 Bing. N.C. 272; Mayor of Lyons *v.* East India Company, 1 Moore, Priv. Counc. Rep. 374.

(*y*) 13 Geo. 3, c. 63, explained and amended by 21 Geo. 3, c. 70.

(*z*) 13 Geo. 3, c. 63, s. 5. These provisions are now snperseded by 16 & 17 Vict. c. 95, ss. 36—42.

(*a*) 24 Geo. 3, c. 25, explained and amended by 26 Geo. 3, c. 16. And see the acts for the better administration of justice in India, 37 Geo. 3, c. 142; 39 & 40 Geo. 3, c. 79; 4 Geo. 4, c. 71; 6 Geo. 4, c. 85; 7 Geo. 4, c. 37; 9 Geo. 4, c. 74; 2 & 3 Vict. c. 34; 18 & 19 Vict. c. 93, s. 5; and the provisions in 13 Geo. 3, c. 63, (as to which see Queen *v.* Douglas, 13 Q. B. 42,) against the acceptance of presents by councillors or judges, and for prosecution in England of offences committed in India.

(*b*) 53 Geo. 3, c. 155, s. 7.

company still retained were abolished, and they were debarred from engaging, for the future, in commercial transactions (*c*). And though the territories and other property in their possession, with the exception of St. Helena (which was by the same statute vested in the crown), were allowed to remain under the government of the company, this was declared to be "in trust" only "for his majesty, his heirs and successors, and for the service of the government of India (*d*)." And by the same act it was provided, that it should be lawful for his majesty to nominate "commissioners for the affairs of India," to whom all former enactments relative to the Board of Control should in general be applicable, and without whose sanction no orders or despatches whatever should be sent out by the board of Directors (*e*). As for the local government of India, it was committed to a governor-general and a board of councillors, who, under the style of "The Governor-General of India in Council" (*f*), were invested with a superintending authority over all the local governments called Presidencies, in all points relating to their civil and military administration (*g*); and with power to make laws for all persons, whether British or native, throughout the whole of the territories, and for all servants of the company within the dominions of allied states (*h*); subject however to a power in the Court of Directors (acting under the control in the act provided), to disallow any law so made (*i*); and also subject to the superintending and paramount authority

(*c*) 3 & 4 Will. 4, c. 85, s. 3. Certain sections of this act are repealed by 16 & 17 Vict. c. 95, s. 21.

(*d*) 3 & 4 Will. 4, c. 85, ss. 1, 2. By this act the territories were to continue under such government until 30th April, 1854. But before the arrival of that time it was provided by another act (16 & 17 Vict. c. 95), that *until Parliament should otherwise provide*, all territories then in the possession and under the government of the East India Company should so continue (subject to the former trusts), and that all the provisions of the 3 & 4 Will. 4, c. 85, then in force, should continue as if the term thereby limited had not expired.

(*e*) 3 & 4 Will. 4, c. 85, s. 30.

(*f*) Sect. 39.

(*g*) Sect. 65.

(*h*) Sect. 43.

(*i*) Sect. 44.

of the imperial parliament; in favour of which a "full, con-"plete and constantly existing right" was emphatically reserved "to control, supersede, or prevent all proceedings "and acts whatever of the governor-general in council, and "in all respects to legislate for the territories as if the act "had not been passed (*j*)." The right of nominating the governor-general and the governors of the Presidencies, was vested in the Court of Directors—the appointments, however, being subject to the approbation of the crown (*k*). The ecclesiastical establishment of India was also remodelled by the same act of 3 & 4 Will. IV. c. 85, and it made provision for founding two bishoprics—those of Madras and Bombay—in addition to the diocese of Calcutta, already established in accordance with the provisions of a former statute (*l*). The Bishop of Calcutta, however, was declared to be the metropolitan bishop in India, with such jurisdiction and functions as the sovereign by letters-patent should direct, subject nevertheless to the general superintendence and revision of the Archbishop of Canterbury (*m*). To this statute several others, introductory of additional provisions relating to India, have succeeded. By 3 & 4 Will. IV. c. 93 (amended by 3 & 4 Vict. c. 56, and 6 & 7 Vict. c. 80), the trade to China and India is now regulated; and its entire freedom, (subject as regards China to the superintendence of a commissioner, appointed by her majesty in council (*n*),) is definitively established (*o*);—and by 5 & 6 Will. IV. c. 52; 16 & 17 Vict. c. 95, and 17 & 18 Vict. c. 77, a variety of new enactments have been passed in reference particularly to the manner of appointment, qualification, and powers, of the Directors (*p*); the distribution and arrangements of the

(*j*) 3 & 4 Will. 4, c. 85, s. 81.

(*k*) Sects. 42, 58.

(*l*) 58 Geo. 3, c. 155.

(*m*) 3 & 4 Will. 4, c. 85, s. 94. See also the Acts referred to sup. p. 103, n. (*y*).

(*n*) By 6 & 7 Vict. c. 80, the office of Superintendent of Trade in China is at present combined with that of Governor of Hong Kong.

(*o*) See also the provisions of 16 & 17 Vict. c. 107, s. 329, as to the coasting trade of India.

(*p*) 16 & 17 Vict. c. 95, s. 2, &c.

different presidencies (*l*); the power and authority of the governor-general, and the constitution of his council (*m*); and the age, qualification, manner of appointment and training, of persons destined to the civil or military service of the company (*n*).

We have now noticed such several parts of the dominions of the crown of Great Britain as are not within the full and proper jurisdiction of the English laws.

[As to any foreign dominions which may] happen in the course of events to [belong to the person of the sovereign by hereditary descent, by purchase or other acquisition—as these do not in anywise appertain to the crown of these kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. The English legislature had wisely remarked the inconveniences that had formerly resulted from dominions on the continent of Europe; from the Norman territory which William the Conqueror brought with him, and held in conjunction with the English throne; and from Anjou, and its appendages, which fell to Henry the second by hereditary descent. They had seen the nation engaged, for near four hundred years together, in ruinous wars for defence of these foreign dominions, till, happily for this country, they were lost under the reign of Henry the sixth. They observed that, from that time, the maritime interests of England were better understood and more closely pursued; that in consequence of this attention, the nation, as soon as she had rested from her civil wars, began at this period to flourish all at once, and became much more considerable in Europe than when her princes were possessed of a larger territory, and her councils distracted by foreign interests. This experience and these considerations gave birth to a conditional clause in

(*l*) 16 & 17 Vict. c. 95, s. 15, &c.; and 17 & 18 Vict. c. 77, s. 3, &c.

(*m*) 16 & 17 Vict. c. 95, s. 20, &c.

(*n*) 16 & 17 Vict. c. 95, s. 36, &c. It may be worth while to notice here a recent provision, 18 & 19 Vict. c. 91, s. 22, placing such natives of the company's territories, as are found destitute in this country, under charge of the company.

[the Act (*o*) of settlement, which vested the crown in her present majesty's illustrious house, "that in case the "crown and imperial dignity of this realm shall hereafter "come to any person not being a native of this kingdom "of England, this nation shall not be obliged to engage in "any war for the defence of any dominions or territories "which do not belong to the crown of England, without "consent of parliament."

We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in the ensuing Commentaries. And this comprehends not only Wales and Berwick, of which enough has been already said (*p*), but also part of the sea. The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shown hereafter; but they are not subject to the common law (*q*). This main sea begins at the low-water-mark. But between the high-water-mark and the low-water-mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, an alternate jurisdiction: one upon the water, when it is full sea, the other upon the land, when it is an ebb (*r*).

The territory of England is liable to two divisions; the one ecclesiastical, the other civil (*s*).

1. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction (*t*). Each province contains divers dioceses (*u*), or sees of suf-

(*o*) Stat. 12 & 13 Will. 3, c. 2.

(*p*) Vide sup. pp. 84, 92.

(*q*) Co. Litt. 260.

(*r*) Finch, L. 78; Constable's case, 5 Rep. 107 a.

(*s*) As to the territorial divisions of England, some valuable information will be found in the preface to the Population Abstract of 1831, vol. i. p. xiv.

(*t*) See further as to archbishops and bishops, post, bk. IV. pt. II. c. I.

(*u*) "Bishoprics or dioceses are almost as antient as the introduction of Christianity. Of those now extant, all, (excepting seven,) were formed in Saxon or in British times. Of the excepted seven, five were created by Henry the eighth out of a portion of the confiscated property of the

[fragan (*x*) bishops;] the whole number of which, including the bishopric of the Isle of Man (*y*), is at present twenty-six (*z*). Every diocese [is divided into archdeaconries, each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural deans' jurisdiction, of whom hereafter (*a*);] and every rural deanery is divided into parishes (*b*).

[A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein (*c*). How antient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that, in the early ages of Christianity in this island, parishes were unknown (*d*),

suppressed religious houses."—Report on Religious Worship, p. xxxvii.

(*x*) As to the term *suffragan*, vide post, bk. IV. pt. II. c. I.

(*y*) The bishopric of Man or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but was annexed to that of York, by statute 33 Hen. 8, c. 31. See 4 Inst. p. 285.

(*z*) Two of these bishoprics (those of Ripon and Manchester,) have been created in pursuance of the Reports of "the Ecclesiastical Commissioners for England." And in pursuance of the recommendations of these commissioners, and of the statutes founded thereon, orders in council have been at various times issued regulating the episcopal incomes, and making new arrangements with respect to dioceses, archdeaconries and rural deaneries. (See as to the Ecclesiastical Commissioners, 6 & 7 Will. 4, c. 77; 3 & 4 Will. 4, c. 113; 4 & 5 Vict. c. 39; 6 & 7 Vict. cc. 37, 77; 7 & 8 Vict. c. 94; 13 & 14 Vict. cc. 41, 94; 14 & 15 Vict. c. 104; 16 & 17 Vict. cc. 35, 50; 19 & 20 Vict. cc. 55, 104; 20 & 21 Vict. c. 74; post, bk. IV. pt. II. c. IV.)

(*a*) Vide post, bk. IV. pt. II. c. I.

(*b*) Co. Litt. 94. The number of parishes and population of each diocese in 1831 are given in the Population Abstract of that year, vol. i. p. xix.

(*c*) "*Parochia est locus in quo degit populus alicujus ecclesiæ.*"—5 Rep. 67 a, Jeffrey's case. See Sharpley *v.* Overseers of Maplethorpe. 3 Ell. & Bl. 906. It is stated in the Population Abstract of 1831, vol. i. p. xviii. that the number of parishes and parochial chapelries at that period in England and Wales might, for any general purpose, be safely taken at 10,700.

(*d*) "Parochial divisions, as they "now exist, did not take place, at "least in some countries, till several "centuries after the establishment "of Christianity."—Hallam's Middle Ages, vol. ii. p. 205, 7th ed.—where it is farther observed, that though Muratori and Fleury have referred the origin of parishes to the fourth century, this must be limited

[or at least signified the same that a diocese does now (*e*). There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion (*f*).

Mr. Camden (*g*) says, England was divided into parishes by Archbishop Honorius, about the year 636. Sir Henry Hobart (*h*) lays it down, that parishes were first erected by the council of Lateran, which was held A.D. 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shown (*i*), that the clergy lived in common, without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran to which they are ascribed by Hobart.

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of King Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary;* that is, every man paid his own, (as was before observed,) to what church or parish he pleased. But this being liable to be attended with either fraud, or

to the most populous parts of the empire.

(*e*) "When the *dioichia*, or the "district over which the bishop ex-"ercised his spiritual functions, was "divided into lesser portions for "the superintendence of his clergy, "a word of similar import was "adopted, *paroichia*. And in an-"tient times, Mr. Selden thinks the "words were used indiscriminately." —Chitty's Blackstone, vol. i. p. 106, n.; et vide 3 Burn, Ec. L. 60, 7th ed.

(*f*) Seld. of Tith. 9, 4; 2 Inst. 646; Slade *v.* Drake, Hob. 296. As to the modern law of tithes, vide 6 & 7 Will. 4, c. 71, et post, bk. IV. pt. II. c. III.

(*g*) See Camden's Britannia, vol. I. p. ccxxviii.

(*h*) Slade *v.* Drake, ubi sup. And see Bishop of Winchester's case, 2 Rep. 44 b.

(*i*) Seld. of Tithes, c. 9.

[at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was now ordered by the law of King Edgar (*k*), that "*dentur omnes decimæ, primariæ ecclesiæ ad quam parochia pertinet.*" However, if any thane, or great lord, had a church, within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister; but if it had no cemetery, the thane must himself have maintained his chaplain by some other means: for in such case *all* his tithes were ordained to be paid to the *primaria ecclesia* or mother-church (*l*).

This proves that the kingdom was then generally divided into parishes, which division happened probably not all at once, but by degrees. And it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors; since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish,—which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly-erected church

(*k*) C. 1.

(*l*) C. 2. See also the Laws of King Canute, c. 11, about the year 1030.

[with the tithes of those disjointed lands, especially if no church was then built in any lordship adjoining to those outlying parcels.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day *extra-parochial;* and their tithes are now by immemorial custom payable to the king, instead of the bishop, in trust and confidence that he will distribute them for the general good of the Church (*m*).]

As a parish is an ecclesiastical division, so the persons who bear the chief authority in a parish, as such, viz. the rector, (or vicar, or perpetual curate,) and churchwardens, are also of an ecclesiastical character: and the nature of their offices and duties is a subject that consequently belongs not to the present place, but to that division of the work in which we shall have occasion to treat of the law of the Church (*n*). It is material, however, to observe, here, both as to parishes and parochial officers, that though primarily and properly they have relation to ecclesiastical purposes, yet there are some secular aspects in which they also require to be considered. For there has been a gradual tendency, more particularly in modern times, to treat a parish as a civil, not less than an ecclesiastical, division. Thus the collection of the poor-rate, or fund for relief of the poor, and in a general point of view its application also, is *parochial;* and the case is the same with respect to several other species of local taxation.

(*m*) 2 Inst. 647; Bishop of Winchester's case, 2 Rep. 44; Wright *v.* Wright, Cro. Eliz. 512. In the Population Abstract of 1831 more than two hundred extra-parochial places are mentioned, and it is stated that they are usually found to have been the site of royal palaces, religious houses or antient castles. Vol. i. p. xxii. See 20 Vict. c. 19, an Act to provide for the relief of the poor and other purposes in extra-parochial places.

(*n*) Vide post, bk. iv. pt. ii.

The affairs of a parish, as such, (whether civil or ecclesiastical,) are regulated in *vestry*, which is, properly speaking, an assembly of the minister, churchwardens, and parishioners, (viz. parishioners contributing to public burdens (*o*);) and which from being commonly held in the vestry adjoining or belonging to the church, takes its name from thence, as the place itself does from the priest's vestures, which are usually deposited there (*p*). The vestry is summoned, or called together, by the churchwardens, with consent of the minister (*q*), (who has been generally considered as entitled, when present, to preside at the meeting (*r*)); and its principal rights and duties are those of investigating and controlling the expenditure of the parochial funds, and electing certain of the parochial officers, though there are various other matters in which it possesses an authority (*s*). We here speak of its original character at common law; but its nature is liable to modification in particular places by force of special custom or enactment (*t*); and is regulated besides by the general vestry act, 58 Geo. III. c. 69, amended by 59 Geo. III. c. 85, and by 16 & 17 Vict. c. 65. By these statutes (which extend not however to the city of London or Southwark) a vestry is not to be summoned except on three days' notice (*u*); and when it meets, a chairman is to be ap-

(*o*) Steer's Par. L. 253.

(*p*) By 13 & 14 Vict. c. 57, the Poor Law Board may, upon application of the churchwardens, pursuant to a resolution of vestry in any parish where the population exceeds 2000 by the then last census, make an order that no meeting shall be held in the parish church except for divine worship or some ecclesiastical or charitable object or purpose approved by the bishop; nor in the vestry room attached to the church, except in cases of urgency, and with previous approval of the Poor Law Board; but that the same shall be held in such other room as shall be provided within the parish.

(*q*) Steer's Par. L. 252.

(*r*) Wilson *v.* M'Math, 3 B. & Ald. 241, n. (*b*); see Mawley *v.* Barbet, 2 Esp. 687.

(*s*) Steer's Par. L. 257; vide 1 & 2 Will. 4, c. 60, ss. 27, 39; 58 Geo. 3, c. 69, s. 6.

(*t*) Steer's Par. L. 260; Golding *v.* Fenn, 7 Barn. & Cress. 765; R. *v.* Brain, 3 B. & Adol. 614; R. *v.* St. Martin's in the Fields, ibid. 907; R. *v.* Clerkenwell, 1 Ad. & Ell. 317.

(*u*) By 7 Will. 4 & 1 Vict. c. 45, the notice for calling a vestry is to

pointed, unless the rector, vicar, or perpetual curate, is present; and the chairman shall have the casting vote, and sign the minutes of the proceedings. They also contain provisions as to the right of voting; which is adjusted upon a certain scale, having relation to the amount in which the voter is assessed to the relief of the poor (*x*). The constitution of vestries is moreover sometimes regulated by 1 & 2 Will. IV. c. 60, which provides for the election, by the rate payers, of a certain number of vestrymen and auditors, under whose management the parochial accounts are to be kept and audited (*y*). This statute has no application, however, to parishes not forming part of a city or town, and not having more than 800 rate payers: and the adoption of its arrangements is in no case compulsory: no parish being subject to them unless it voluntarily consents to place itself under the act. There is a statute also of 59 Geo. III. c. 12, which empowers parishes to establish vestries of a certain description for the management of the poor; and, as far as their relief is concerned, the bodies so appointed supersede the authority of the ordinary parish officers; though they are themselves, on the other hand, by a subsequent act, made subject to the control of the Poor Law Board (*z*).

On the subject of parishes it only remains to be observed, that, by certain Acts lately passed for extending church

be affixed on or near the church door, without any publication (as formerly) in the parish church.

(*x*) As to arrears of rates, see 16 & 17 Vict. c. 65. As to the manner of voting, vide Campbell *v.* Maund, 5 Ad. & El. 685; R. *v.* Rector of Birmingham, 7 Ad. & El. 254; R. *v.* St. Mary, Lambeth, 7 Ad. & El. 356.

(*y*) R. *v.* St. Pancras Trustees, 5 Nev. & M. 219; R. *v.* Vestry of St. Mary-le-bone, 5 Ad. & El. 268. By 18 & 19 Vict. c. 120, s. 1, the stat. 1 & 2 Will. 4, c. 60, is repealed as to *the metropolis;* and vestries of a new constitution created there.

(*z*) See 4 & 5 Will. 4, c. 76, ss. 21, 54; 10 & 11 Vict. c. 109, s. 10; Queen *v.* Green and others, 21 L. J. (M. C.) 137. See also 13 & 14 Vict. c. 57, enabling the Poor Law Board, upon application of the churchwardens, pursuant to a resolution of vestry, in any parish where the population exceeds 2000 by the then last census, to make an order for the appointment of a *paid vestry clerk*, whose duties the act defines.

accommodation, and making more effectual provision for the cure of souls (*c*), it is provided, that by such authorities and under such circumstances, and with such consents, as therein specified, any part or parts of any parish may be constituted a separate *district* (*d*), for spiritual purposes; and that any parish may also be divided into two or more distinct and separate parishes, for all ecclesiastical purposes whatsoever (*e*). In pursuance of which provisions many such new constitutions and divisions have, for purposes of that description, accordingly taken place (*f*). And thus much for the ecclesiastical division of this kingdom.

2. [The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns (*g*).] This division is of remote and undefined antiquity; and was not peculiar to England, [similar distributions having been in use among several nations of the continent (*h*). As to the tithings, they were

(*c*) The most important of these statutes are 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 6 & 7 Will. 4, c. 77; 3 & 4 Vict. c. 113; 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 19 & 20 Vict. cc. 55, 104. (See also as to division into separate *benefices*, 1 & 2 Vict. c. 106, s. 16; 2 & 3 Vict. c. 49, s. 6.) A further account of these statutes will be found post, bk. IV. pt. II. c. IV.

(*d*) See 6 & 7 Vict. c. 37, s. 10; 7 & 8 Vict. c. 56, s. 6, as to the registration of a map or plan of the boundaries of districts formed under these Acts.

(*e*) Some of the Acts also authorized the establishment, within these divisions, of a species of select vestry for ecclesiastical purposes, vide 59 Geo. 3, c. 134, s. 30; 3 Geo. 4, c. 72, s. 10. But the select vestries authorized by these Acts are abolished by 14 & 15 Vict. c. 97, s. 23.

(*f*) With respect to parishes, it may be proper also to notice the useful provisions of certain late statutes (see 2 & 3 Vict. c. 62, ss. 34—36; 3 & 4 Vict. c. 15, s. 28; 8 & 9 Vict. c. 118, s. 39; and 12 & 13 Vict. c. 83) for adjustiug (*prospectively*, see R. *v.* Madeley, 15 Q. B. 43) the antient boundaries between parishes and townships, or defining new boundaries; and to mention the stat. 5 & 6 Vict. c. 18, authorizing the sale of parish property and paying parish debts out of the poor rate; and 19 & 20 Vict. c. 50, enabling parishioners, &c. to sell advowsons held by or in trust for them.

(*g*) A general survey of Great Britain, .wick, and the Isle of Man was authorized by 4 & 5 Vict. c. 60, continued and amended by 9 & 10 Vict. c. 46; 14 & 15 Vict. c. 22; and 19 & 20 Vict. c. 61.

(*h*) Hallam's Middle Ages, vol. ii. p. 389, 7th edit. The division has been ascribed to Alfred, but Mr.

[so called, from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king, for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming (*i*). And therefore antiently no man was suffered to abide in England, above forty days, unless he were enrolled in some tithing or decennary (*k*). One of the principal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithingman, the headborough, (words which speak their own etymology,) and in some counties, the borsholder, or borough's-ealder (*l*), being supposed the discreetest man in the borough, town, or tithing.

Tithings, towns, or vills, are of the same signification in law; and are said to have had, each of them, originally a church and celebration of divine service, sacraments and burials (*m*): though that seems to be rather an ecclesiastical than a civil distinction. The word *town* (*n*) or *vill* is indeed, by the alteration of times and language, now become a generical term,] comprehending under it several species and varieties. Taken in this sense, towns are distinguished from each other as being either corporate or not corporate; the townsmen forming, in the first kind, a *corporation*, that

Hallam questions his claim to the distinction, and observes that counties are mentioned in the Laws of Ina. "It is not surprising," he afterwards remarks, "that the great "services of Alfred to his people in "peace and in war should have led "posterity to ascribe every institu-"tion, of which the beginning was "obscure, to his contrivance, till his "fame has become almost as fabu-"lous in legislation as that of Arthur "in arms."—Ibid. 402; et vide Co. Litt. by Harg. 168 a, n. (6).

(*i*) Flet. 1, 47. This in the Laws of King Edward the Confessor, c. 20, is very justly entitled "*summa et maxi-*"*ma securitas, per quam omnes statu* "*firmissimo sustinentur;—quæ hoc* "*modo fiebat, quod sub decennali fide-*"*jussione debebant esse universi, &c.*"

(*k*) Mirr. c. 1, s. 3.

(*l*) Jac. Dict. v. Headborough.

(*m*) Co. Litt. 115 b.

(*n*) As to the legal definition of "town," see Elliot *v.* South Devon Railway Company, 2 Exch. 729; Ex parte Incumbent, &c., of Brompton, 22 L. J., N. S. (Ch.) 281.

is, a society, with certain legal properties and capacities, on the nature of which we shall treat at large in a subsequent division of these Commentaries, and shall at the same time consider the provisions of the act for regulating municipal corporations, 5 & 6 Will. IV. c. 76, by the effect of which, all towns of this description are now placed under one uniform plan of internal government (*o*). There are also market-towns, that is, towns which are entitled to hold markets; and there are others which have not that franchise. And, lastly, towns are divided into cities, boroughs, and common towns. The cities of this kingdom are certain towns of principal note and importance, all of which either are or have been sees of bishops; yet there seems to be no necessary connexion between a city and a see (*p*); and it is certain, that [though the bishopric be dissolved, as at Westminster (*q*), yet still it remaineth a city (*r*).] A borough is a city or other town that sends burgesses to parliament (*s*), a privilege the nature of which we shall more fully explain hereafter, in that part of the work which relates to Parliament (*t*). According to Sir

(*o*) As to municipal corporations, vide post, bk. IV. pt. III. c. I.

(*p*) Vide 1 Woodd. 302; Jac. Dict. v. City.

(*q*) Westminster was one of the new bishoprics founded by Henry the eighth out of the revenues of the dissolved monasteries, and was made a city by express creation. It was dissolved as a see, and restored to the bishopric of London in the reign of Edward the sixth. Elizabeth, by authority of parliament, turned it into a collegiate church, subject to a dean.—Chitty's Blackstone, vol. i. p. 109 (n); 2 Burn, E. L. 542, 7th edit.; Co. Litt. by Harg. 109 b, n. (3).

(*r*) Co. Litt. 109 b.

(*s*) 1 Bl. Com. 114; Litt. s. 164; Co. Litt. 108 b. See also Parliamentary Reform Act, 2 Will. 4, c. 45, s. 79. The word however was originally used in a more extensive sense, vide Co. Litt. by Harg. 108 b, n. (4). In Jac. Dict. v. Borough, the term is taken to mean a town sending burgesses to parliament *and not being a city*. But see the authorities first cited; also Co. Litt. 109 a. In the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, "borough" is used in a sense peculiar to that statute; and expresses a corporate town, whether sending representatives to parliament, or not.

(*t*) As to the parliament, vide post, bk. IV. pt. I. c. I.

Edward Coke (*u*), there were in his time, in England and Wales, 8803 towns, or thereabouts. To several of them [there are small appendages belonging, called hamlets; which are taken notice of in the statute of Exeter (*x*), wherein frequent mention is made of "entire vills," "demi-vills," and "hamlets." Entire vills, Sir Henry Spelman (*y*) conjectures, to have consisted of ten freemen, or frank-pledges, demi-vills of five, and hamlets of less than five. These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, to some purpose in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings; and, sometimes, where there is but one parish there are two or more vills or tithings.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by a high constable or bailiff; and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse (*z*). In some of the more northern counties these hundreds are called wapentakes (*a*)] (*b*).

As to their origin, we may remark that hundreds [seem to have obtained in Denmark (*c*); and we find that in France a regulation of this sort was made above two hundred years before; set on foot by Clotharius and Chil-

(*u*) Co. Litt. 116 a.

(*x*) 14 Edw. 1.

(*y*) Gloss. 274.

(*z*) As to the hundred court, vide post, bk. v. c. IV.

(*a*) Seld. in Fortesc. c. 24.

(*b*) "*Et quod Angli vocant hun-*"*dredum, comitatus Yorkshire, Lin-*"*colnshire, Nottinghamshire, Leices-*"*tershire, et Northamptonshire, vocant* "*wapentachium.*"—(Wilk. Leg. Ang. Sax. Ll. Edw. c. 33.) And the passage proceeds to explain why they are so called, viz. because the people at a public meeting confirmed their union with the governor by touching his weapon or lance.—(Christian's Blackstone, vol. i. p. 115, *note;* et vide Cowell's Dict. v. Wapentake.)

(*c*) Seld. Tit. of Honour, 2, 5, 3.

[debert, with a view of obliging each district to answer for the robberies committed in its own division (*d*). These divisions were, in that country, as well military as civil, and each contained a hundred freemen, who were subject to an officer called the *centenarius;* a number of which *centenarii* were themselves subject to a superior officer called the count or *comes* (*e*). And indeed, something like this institution of hundreds may be traced back as far as the antient Germans, from whom were derived both the Franks who became masters of Gaul, and the Saxons who settled in England: for both the thing and the name, as a territorial assemblage of persons, from which afterwards the territory itself might probably receive its denomination, were well known to that warlike people, "*Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et quod* "*primo numerus fuit, jam nomen et honor est* (*f*)."

An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks: that is, the earl or alderman, (as the Saxons called him,) of a shire, to whom the government of it was intrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve or shire-reeve, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent and rapes in Sussex, each of them containing about three or four hundreds apiece (*g*). These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided

(*d*) Thus in this country (it may be observed), the hundred is, by 7 & 8 Geo. 4, c. 31, and 17 & 18 Vict. c. 104, s. 477, obliged to compensate persons damnified by the riotous and tumultuous demolition of churches and certain kinds of buildings and machinery, or by plunder of wreck.

(*e*) Montesq. Sp. L. 30, 17.

(*f*) Tacit. de Morib. German. 6.

(*g*) The rapes of Sussex are said to have been military governments in the time of the Conqueror; the lathes of Kent to have been civil

[into *three* of these intermediate jurisdictions, they are called trithings (*h*), which were antiently governed by a trithing-reeve. These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west riding (*i*). The number of counties in England and Wales have been different at different times; at present they are forty in England and twelve in Wales (*k*).]

It seems probable that the realm was originally divided into counties, with a view to the convenient administration of justice; the judicial business of the kingdom having in former times been chiefly dispatched in local courts, held in each different county, before the sheriff, as its principal officer (*l*). These antient tribunals, indeed, have long since fallen into great decay, and retain nothing of their former consequence, the important courts lately established under the name of County Courts, though similar in name, being in fact of a very different character and jurisdiction (*m*). Yet the distribution into counties is to this day materially connected, (though in a different manner,) with the course of judicial proceedings. For trials of disputed facts are still ordinarily conducted in the county where the cause

jurisdictions, and of earlier date.— Population Abstract, 1831, vol. i. p. xv.

(*h*) Wilk. Leg. Ang. Sax. Ll. Edw. c. 34.

(*i*) For some purposes connected with the business of the justices of the peace, counties are severed into *divisions* (as to which vide post, bk. IV. pt. I. c. x.) The number of places in England and Wales where petty sessions or divisional meetings are usually holden, lately amounted (according to the returns) to 609.— Population Abstract, 1831, vol. i. p. xv.

(*k*) A particular place, parcel of one county, is sometimes detached from it, and surrounded by another. By 7 & 8 Vict. c. 61, these detached parts are annexed, for all purposes, to the counties of which they form a part, for the purpose of parliamentary representation. As to the jurisdiction of magistrates therein, see 2 & 3 Vict. c. 82; and as to the union of liberties with counties, see 13 & 14 Vict. c. 105.

(*l*) Hickes, Thes. Diss. Epist.; Reeves's Hist. Eng. L. vol. i. pp. 6, 7.

(*m*) As to these modern County Courts, vide post, bk. v. c. IV.

of action arose, or the offence was committed (*n*), viz., before the judges of the superior courts at Westminster, who take periodical circuits throughout England and Wales for the trial both of civil and criminal cases; or before the county justices of the peace, who exercise a jurisdiction, in cases of the latter description, at their quarter sessions. Another important object connected with the distribution into counties, is that of parliamentary representation, inasmuch as not only the more important towns of the kingdom, but every county also, sends to the House of Commons its own members,—called knights of the shire,—who represent their respective counties, as the other members do their respective towns; though, by a new arrangement, the larger counties are now subdivided, each portion forming a separate county (so far as this purpose is concerned), and sending its separate representatives (*o*). For the object of local taxation, too, the division into counties is of practical effect and importance; for as each parish is subject to a rate for relief of the poor, so is every county to a county rate, which is levied on the occupiers of land under the authority of various acts of parliament (*p*), and applied to many miscellaneous purposes (*q*).

(*n*) By 4 & 5 Will. 4, c. 36, a new court was established, called the Central Criminal Court, for trial of offences committed in London and Middlesex, and certain parts of Essex, Kent and Surrey; and by 19 & 20 Vict. c. 16, persons charged with offences committed out of the jurisdiction of such court, may, nevertheless, be ordered by the Queen's Bench to be there tried, if it shall appear to the latter court, that it is "expedient to the ends of justice" that this course should be taken. And these provisions form a sort of exception to the principle stated in the text, so far as criminal cases are concerned.

(*o*) 2 Will. 4, c. 45, ss. 12, 13, 14.

(*p*) Vide 22 Hen. 8, c. 5; 12 Geo. 2, c. 29; 55 Geo. 3, c. 51. As to borrowing money on mortgage of county rate in Middlesex, 8 & 9 Vict. c. 32. As to the assessment and collection of the county rate generally, 7 & 8 Vict. c. 33; 15 & 16 Vict. c. 81. See also 5 & 6 Will. 4, c. 76, s. 92; 17 & 18 Vict. c. 71, as to borough rates in the nature of county rates.

(*q*) See Report of County Rate

[Three of these counties, Chester, Durham and Lancaster, are called counties palatine. The two former are such by prescription or immemorial custom; or at least as old as the Norman conquest (*r*); the latter was created by King Edward the third, in favour of Henry Plantagenet, first Earl and then Duke of Lancaster (*s*); whose heiress being married to John of Gaunt, the king's son, the franchise was greatly enlarged and confirmed in parliament (*t*) to honour John of Gaunt himself; whom, on the death of his father-in-law, the king had also created Duke of Lancaster (*u*). Counties palatine are so called *a palatio*, because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had in those counties *jura regalia* as fully as the king hath in his palace; *regalem potestatem in omnibus*, as Bracton expresses it (*x*). They might pardon treasons, murders and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis* (*y*). And indeed by the antient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried; in a court-leet, *contra pacem domini;* in the court of a corporation, *contra pacem ballivorum;* in the sheriff's court or tourn, *contra pacem vice-comitis* (*z*). These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the

Commissioners, 16 June, 1836 (printed by order of House of Commons), with the tables annexed to that Report, Appendix C. As to the charges on counties for police, vide post, bk. IV. pt. I.; for lunatic asylums, bk. IV. pt. III.; for gaols and maintenance of prisoners, ibid.; for bridges, ibid.

(*r*) Seld. Tit. Hon. 2, 5, 8.

(*s*) Pat. 25 Edw. 3, p. 1, m. 18; Seld. ibid.; Sandford's Gen. Hist. 112; 4 Inst. 204.

(*t*) Cart. 36 Edw. 3, n. 9.

(*u*) Pat. 51 Edw. 3, m. 33; Case of Duchy of Lancaster, Plowd. 215; 7 Rym. 138.

(*x*) L. 3, c. 8, s. 4.

(*y*) 4 Inst. 205.

(*z*) Seld. in Heng. Magn. c. 2.

[weak and infant state of the first feodal kingdoms in Europe (*a*)) were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland; in order that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to the enemy's incursions; and that the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire; the latter now united with Northumberland; but these were abolished by parliament, the former in the twenty-seventh year of Henry the eighth, the latter in the fourteenth year of Elizabeth. In the twenty-seventh year of Henry the eighth, likewise, the powers before mentioned of owners of counties palatine were abridged; the reason for their continuance having in a manner ceased (*b*).] And within a recent period many important alterations have taken place in regard to the administration of justice in the counties palatine, tending to assimilate them in that point to the rest of England. For by 11 Geo. IV. & 1 Will. IV. c. 70, the jurisdiction of the court of session of the county palatine of Chester was abolished, and the county subjected in all things to the jurisdiction of the superior courts at Westminster; by 4 & 5 Will. IV. c. 62, 13 & 14 Vict. c. 43, 15 & 16 Vict. c. 76, s. 229, 17 & 18 Vict. c. 82, c. 125, s. 100, and 18 & 19 Vict. c. 15, c. 45, c. 67, s. 8, the practice and proceedings in civil actions in the court of common pleas and in the court of chancery at Lancaster are regulated and made conformable in most particulars to that of the superior courts just mentioned; and by 2 Vict. c. 16, 15 & 16 Vict. c. 76, s. 229, 17 & 18 Vict. c. 125, s. 100, and 18 & 19 Vict. c. 15, c. 67, s. 8, similar provisions are made with respect to the court of pleas of Durham (*c*).

(*a*) Robertson, Cha. V. i. 60.

(*b*) 4 Inst. 205.

(*c*) See also 15 & 16 Vict. c. 76, ss. 230—234; 17 & 18 Vict. c. 125,

It is also to be remarked, that of the counties palatine none now remains in the hands of a subject. For [the earldom of Chester, as Camden testifies, was united to the crown by Henry the third, and has ever since given title to the king's eldest son,] and the palatine jurisdiction of Durham, which was vested until a recent period in the Bishop of Durham for the time being, is now taken from him by 6 & 7 Will. IV. c. 19, and vested as a separate franchise and royalty in the crown. As to the county palatine or duchy of Lancaster, it [was the property of Henry Bolingbroke, the son of John of Gaunt, at the time when he wrested the crown from King Richard the second, and assumed the title of King Henry the fourth. But he was too prudent to suffer this to be united to the crown; lest if he lost one, he should lose the other also. For as Plowden (*d*) and Sir Edward Coke (*e*) observe, "he "knew he had the duchy of Lancaster by sure and inde-"feasible title, but that his title to the crown was not so "assured: for that after the decease of Richard the second "the right of the crown was in the heir of Lionel Duke of "Clarence, *second* son of Edward the third; John of Gaunt, "father to this Henry the fourth, being but the *fourth* son." And therefore he procured an act of parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered and governed in like manner as if he never had attained the regal dignity: and thus they descended to his son and grandson, Henry the fifth and Henry the sixth: many new territories and privileges being annexed to the duchy by the former (*f*). Henry the sixth being attainted in the first year of Edward the fourth, this duchy was declared in

ss. 101—104, et post, bk. V. c. VI. As to attornies of the Palatinate Courts, vide 6 & 7 Vict. c. 73, s. 3.

(*d*) P. 215.

(*e*) 4 Inst. 205.

(*f*) Parl. 2 Hen. 5, n. 30; 3 Hen. 5, n. 15.

[parliament to have become forfeited to the crown (*g*), and at the same time an act was made to incorporate the duchy of Lancaster, to continue the county palatine (which might otherwise have determined by the attainder (*h*),) and to make the same parcel of the duchy: and, further, to vest the whole in King Edward the fourth and his heirs, *kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in the first year of Henry the seventh, another act was made to resume such part of the duchy lands as had been dismembered from it in the reign of Edward the fourth, and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form and condition, separate from the crown of England and possession of the same, as the three Henries and Edward the fourth, or any of them, had and held the same (*i*).]

The isle of Ely was never a county palatine, though sometimes erroneously called so. It was, however, a royal

(*g*) Fisher *v.* Batten, 1 Ventr. 155.

(*h*) 1 Ventr. 1157.

(*i*) Some have entertained an opinion (Plowd. 220, 1, 2; Lamb. Archeion, 233; 4 Inst. 206;) that by this act the right of the duchy vested only in the *natural* and not in the *political* person of King Henry the seventh, as formerly in that of Henry the fourth; and was descendible to his natural heirs, independent of the succession to the crown. And, if this notion were well founded, it might have become a very curious question at the time of the Revolution in 1688, in whom the right of the duchy remained after King James's abdication, and previous to the attainder of the pretended Prince of Wales. But it is observable, that in the same act the duchy of Cornwall is also vested in King Henry the seventh and his heirs, which could never be intended in any event to be separated from the inheritance of the crown. And indeed it seems to have been understood very early after the statute of Henry the seventh, that the duchy of Lancaster was by no means thereby made a separate inheritance from the rest of the royal patrimony, since it descended with the crown to the half-blood in the instances of Queen Mary and Queen Elizabeth, which it could not have done, as the estate of a mere Duke of Lancaster, in the common course of legal descent. The better opinion therefore seems to be that of those judges, who held (Plowd. 221), that, notwithstanding the statute of Henry the seventh (which was only an act

franchise; the Bishop of Ely having been formerly entitled, by grant of King Henry the first, to *jura regalia* within the district, whereby he exercised a jurisdiction over all causes as well criminal as civil (*k*). But by 6 & 7 Will. IV. c. 87, this secular authority of the bishop is taken away and vested in the crown.

[There are also counties *corporate*, which are certain cities and towns, some with more, some with less territory annexed to them; to which out of special grace and favour the kings of England have granted the privilege to be counties of themselves; and not to be comprised in any other county; but to be governed by their own sheriffs (*l*) and other magistrates, so that no officers of the county at large have any power to intermeddle therein (*m*).] As they constitute no part of the counties at large in which they are locally situate, so they had formerly, in general, no share in voting for the members to serve for those counties in parliament (*n*). But thirteen of the number are now expressly included within their respective counties, so far as regards the right of election for knights of the shire (*o*). To which we may add, that by 38 Geo. III. c. 52, all causes of action arising and offences committed in a county corporate may be tried in the next adjoining county at large (*p*); a regulation from which certain towns and cities indeed were at first excepted, but almost the whole of these

of resumption), the duchy still remained as established by the act of Edward the fourth, separate from the other possessions of the crown in order and government, but united in point of inheritance. We may notice here that by 18 & 19 Vict. c. 58, the chancellor and council of the Duchy of Lancaster are enabled to sell and purchase land on behalf of her Majesty, in right of the Duchy.

(*k*) 4 Inst. 220; Grant *v.* Bagge, 3 East, 128.

(*l*) As to the appointment of sheriffs of counties corporate, see 5 & 6 Will. 4, c. 76, s. 61.

(*m*) Their names are given in Russell's Reform Act, p. 5; and in the Population Abstract of 1831, vol. i. p. xiv. Et vide 3 Geo. 1, c. 15; 5 & 6 Will. 4, c. 76, ss. 61, 109.

(*n*) Russell's Reform Act, p. 5.

(*o*) 2 Will. 4, c. 45, s. 17.

(*p*) See also 14 & 15 Vict. c. 55, ss. 19, 21—24; and c. 100, s. 23.

exceptions have been since repealed by the act for regulating municipal corporations (*q*).

Thus much of the countries subject to the laws of England; the consideration of which involves, in a general point of view, that of the *persons* also, to whom these laws are applicable. For all persons found within these territories fall under the operation of these laws, though in different degrees: British subjects—that is, persons born within any part of the dominions of the crown, and in some cases their descendants also, though born in foreign parts, and persons naturalized by act of parliament—being in a full and absolute sense entitled to the rights conferred by these laws, and liable to the obligations they impose; but aliens (or those who are not British subjects) in a limited sense only; as we shall have occasion more particularly to explain hereafter (*r*).

(*q*) 5 & 6 Will. 4, c. 76, s. 109. Some farther provisions as to *counties corporate* are contained in 51 Geo. 3, c. 100; 60 Geo. 3 & 1 Geo. 4, c. 4, s. 6; c. 14, s. 3; 7 Geo. 4, c. 64, s. 25; 5 & 6 Will. 4, c. 76, s. 113; 2 & 3 Vict. c. 72.

(*r*) Vide post, bk. IV. pt. I. c. II. It may be remarked here, as to the population of Great Britain, that by the last census, taken on the 31st March, 1851 (see 13 & 14 Vict. c. 53), the number of persons then within Great Britain (including the islands of Jersey, Guernsey, and Man) was 20,936,468.

NEW COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK I.

OF PERSONAL RIGHTS.

In a disquisition of such extent and variety as that on which we are about to enter, it is obviously of the first importance to lay down a proper preliminary arrangement of the subject; and the plan of division which appears to be most suitable to a treatise of this description, is one founded on a consideration of the nature of municipal law in the abstract, and of the objects or purposes towards which it is directed. It will be necessary, therefore, to recur for a moment to the views taken of this subject in a preceding part of the work.

We have seen that municipal law is a rule of civil conduct prescribed by the supreme power in a state (*a*), whose authority to prescribe it has been referred to the contract implied in civil society, that its members should submit to certain restraints of their natural freedom, in order to secure to each the enjoyment of defined liberties and advantages: and these we have comprehended under the general name of *rights* (*b*). It results from these considerations, that, in every country, the true and proper objects of the law consist in the establishment and main-

(*a*) Vide sup. p. 26. (*b*) Vide sup. p. 30.

tenance of the rights, severally due to the different members of the community.

The idea of rights however naturally suggests the correlative one of *wrongs*; for every right is capable of being violated. A right to receive payment for goods sold (for example) implies a wrong on the part of him who owes, but withholds, the price; a right to live in personal security, a wrong on the part of him who commits personal violence. And, therefore, while in a general point of view the law is intended for the establishment and maintenance of rights, we find it on closer examination to be dealing both with rights and wrongs. It first fixes the character and definition of rights, and then, with a view to their effectual security, proceeds to define wrongs, and to devise the means by which the latter shall be prevented or redressed.

These considerations form the most convenient basis upon which to construct the principal division of the laws of England; and we shall therefore sever them (like former writers (*c*)) into two portions, one of which regards *Rights*, and the other *Wrongs*.

But, again, if rights be analyzed, they will be found to consist of several kinds. For first, they are such as regard a man's own person; secondly, such as regard his dominion over the external and sensible things by which he is surrounded; thirdly, such as regard his private relations, as a member of a family; fourthly, such as regard his social state or condition, as a member of the community; the first of which classes may be designated as *personal rights*, the second, as *rights of property*, the third, as *rights in private relations*, and the fourth, as *public rights*.

In these divisions of rights, it is to be observed, that we everywhere mean to include the converse or reciprocal consideration of *duties*. For whatever is due *to* one man

(*c*) Hale and Blackstone; vide the Preface to Hale's Analysis of the Laws of England, and Blackstone's Comm. vol. i. p. 122.

or set of men, is necessarily due *from* another. Thus the right of one man to receive from another the price of a commodity sold, casts upon the latter the duty of paying that price; and the general right of each individual to live in personal security, implies the converse duty on the part of others not to subject him to any violence. The party too, who possesses the right, is in general himself subject to some resulting duty. Thus the people have a right to live under the form of government established by law, and are under a corresponding duty of submission to that government. In the discussion of rights, therefore, it is often necessary to speak also of duties. Indeed, it is under the aspect of duties principally, that some rights require to be considered.

To avoid, however, any misapprehension from the use of the term "duties," we may remark that there are some duties which have no connection with rights in the sense which we have affixed to the latter expression; and of such duties our law consequently takes no cognizance. These are, such as the law of God or conscience prescribes, but the violation of which by the individual is attended with no direct mischief to others. Thus public sobriety is a duty recognized by the law, having regard to the right of each citizen to be protected from disgusting or contaminating exhibitions of vice; but private sobriety is not enforced by any legal sanction; because secret intoxication, though equally opposed, with open drunkenness, to conscience and the law of God, is no violation of any human right, nor its commission, if by any means detected, a fit subject for human punishment.

Wrongs also may be subdivided; but as regards these, we are necessarily led to adopt a different principle of distribution. For the leading distinction here depends not on the character of the right violated, but on the party who is supposed to sustain injury from its violation. According to the view which our law takes of this subject, the violation of a right may in some instances amount to an injury

to the particular individual only, but in others it may take the character of an injury to the public at large (*d*). When viewed in the first aspect, it is usually called a *civil injury*, when in the last, a *crime*. Thus the withholding of money due, is a wrong to the individual; and consequently a civil injury; but it is considered as not affecting the public; and therefore it is no crime. On the other hand to deprive a man of his money by theft or robbery, is held to be a wrong to the public, and therefore a crime; though it is also a civil injury, if considered in relation to the damage which the party individually sustains. The considerations which tend to determine whether a given species of wrong shall be treated as an injury to the individual, or to the public, or both, constitute a subject which it would be premature to enter upon in this place, and which belongs to a later portion of the treatise. It is sufficient at present to have thus stated the general nature of the distinction between civil injuries and crimes, and to remark that it is one of great practical importance; for the law deals very differently with the two kinds of wrong; the former being merely a subject for *redress*, the latter for *punishment*.

The extensive subject under consideration appearing thus naturally to resolve itself into the several divisions above indicated, we shall adopt them for the purpose of the present work; and our method, or order of discussion, will be as follows:—

Book I. Of Personal Rights.
II. Of Rights of Property.
III. Of Rights in Private Relations.
IV. Of Public Rights.
V. Of Civil Injuries; including also the modes of Redress which the law provides for them.
VI. Of Crimes; comprising also the modes of Criminal Prosecution.

(*d*) Vide 4 Bl. Com. pp. 5, 6.

We are now first to consider Personal Rights, or those which relate to a man's own person. As these are the most important, so are they also the most simple of all that are secured to men by the institutions of society; and the law has been much less frequently employed in fixing their definition and boundaries, than in devising redress or punishment in case of their violation. The discussion of these rights will consequently lie in a comparatively narrow compass. They consist of two principal or primary articles, the right of *Personal Security*, and the right of *Personal Liberty*.

I. [The right of Personal Security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise] designedly [killeth it in her womb; or if any one beat her,] with a like design, [whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter (*e*).] But by the modern law, the offence is, in neither case, considered in this light; though to procure a miscarriage is, in all cases, a heinous crime (*f*). If a potion, however, be used, or a battery inflicted, with intent to kill a child in the womb, and the child is born alive, and afterwards dies of the potion or battery; the case is very different, and amounts to murder (*g*).

(*e*) "*Si aliquis mulierem prægnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam, si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homicidium.*" —Bracton, l. 3, c. 4.

(*f*) See 7 Will. 4 & 1 Vict. c. 85, s. 6, by which it is now a felony to procure a miscarriage by poison or other noxious thing, or an instrument or other means. It was formerly a heinous misdemeanor only.

(*g*) 3 Inst. 50.

[An infant *in ventre sa mère*, or in the mother's womb, is supposed, in law, to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it (*h*); and it is enabled to] take by descent, and to [have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born (*i*). And in this point the civil law agrees with ours (*k*).] In the case of descent, however, the presumptive heir may enter and receive the profits for his own use till the birth of the child (*l*).

2. [A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to *mayhem* by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature.] To these, therefore, as to life itself, he may be said to have a natural inherent right.

[Both the life and limbs of a man are of such high value in the estimation of the law of England, that it pardons even homicide, if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance (*m*). And the same is also a sufficient excuse for the commission of many misde-

(*h*) Stat. 12 Car. 2, c. 24, s. 8.

(*i*) Vide Co. Litt. 390 a; 10 & 11 Will. 3, c. 16; Beale *v.* Beale, 1 P. Wms. 245; Doe *v.* Clarke, 2 H. Bl. 399; Wallis *v.* Hodson, 2 Atk. 117; Doe *v.* Lancashire, 5 T. R. 49.

(*k*) "*Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur.*" —Ff. l. 5, 26.

(*l*) Goodtitle *v.* Newman, 3 Wils. 526.

(*m*) 2 Inst. 483.

[meanors, as will appear in the course of these Commentaries (*n*). The constraint a man is under in these circumstances, is called in law *duress*, from the Latin *duritiæ*, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem or loss of limb. And this fear must be upon sufficient reason; "*non*," as Bracton expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum* (*o*)." A fear of battery or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages (*p*); but no suitable atonement can be made for the loss of life or limb. And the indulgence shown to a man under this, the principal, sort of duress, namely, the fear of losing his life or limbs, agrees also with that maxim of the civil law; "*ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit* (*q*)."

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community by means of the several statutes enacted for the relief of the poor, of which in their proper places (*r*). A humane provision; yet, though dictated by the principles of society, discountenanced by

(*n*) Vide post, bk. VI. c. II.

(*o*) Bract. l. 2, c. 5; Co. Litt. 162 a, 253 b; R. *v.* Southerton, 6 East, 144.

(*p*) 2 Inst. 483.

(*q*) Ff. 48, 21, 1.

(*r*) As to the laws relating to the poor, vide post, bk. IV. pt. III. c. II.

[the Roman laws. For the edicts of the Emperor Constantine, commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants—an institution founded on the same principle as our foundling hospitals, —though comprised in the Theodosian Code (*s*), were rejected in Justinian's Collection.

These rights of life and member can only be determined by the death of the person;] which is either a civil or a natural death (*t*). Civil death occurs where a man by act of parliament or judgment of law is attainted of treason or felony; for immediately upon such attainder he loses (subject indeed to some exceptions) his civil rights and capacities; and becomes, as it were, dead in law (*u*). It also took place formerly where any man [abjured the realm (*x*), by the process of the common law; or entered into religion, that is, went into a monastery, and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society; and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations (*y*). A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators

(*s*) L. xi. c. 27.

(*t*) Co. Litt. 132 a.

(*u*) 3 Inst. 213; 4 Bl. Com. 380.

(*x*) Co. Litt. 133 a; Newsome *v.* Bowyer, 3 P. Wms. 37, n. (B). Et vide post, bk. VII. c. XXI. *note*, where this subject is further explained.

(*y*) This was also a rule in the feudal law, l. ii. t. 21, "*desiit esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium.*"

[had the same power, and might bring the same actions for debts due *to* the religious, and were liable to the same actions for those due *from* him, as if he were naturally deceased (*z*). Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors; and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof: here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due (*a*). In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion; for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's *natural* life (*b*). But, even in the times of popery, the law of England took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts (*c*); and therefore, since the Reformation, this disability is held to be abolished (*d*):—as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I. c. 28 (*e*).

This natural life, being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.] Yet, nevertheless it may be lawfully taken away (as before observed) in the necessary defence of life or limb (*f*); and is also capable of being forfeited for a breach of those laws of society which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience and legality of which, we may hereafter more conveniently inquire in a subsequent

(*z*) Litt. s. 200.

(*a*) Co. Litt. 133 b.

(*b*) Archbishop of Canterbury's case, 2 Rep. 48 b; Co. Litt. 132 a.

(*c*) Co. Litt. 132 b.

(*d*) Rex *v.* Lady Portington, 1 Salk. 162.

(*e*) 1 Hale, P. C. 605.

(*f*) Vide sup. p. 140.

part of these Commentaries (*g*). At present it may suffice to observe, that it results from the very nature of the social compact, on which we have supposed all municipal law to be founded (*h*), that no privation or restraint ought in any case to be inflicted on the individual, unless it be indispensable to the protection of some public interest of adequate importance. All laws therefore savour of injustice and oppression, which authorize the destruction of life or member in order to secure a public object of comparatively trivial character; or even an object of the highest consequence to the public, but capable of being sufficiently secured by some more lenient method. We shall find accordingly, that, though the law of England in some cases affects the life of the delinquent, it is only for the prevention of crimes of the deepest dye—the severity by which our penal system was once unhappily distinguished having been progressively, and now at length effectually, softened by the milder spirit of modern legislation. To this, it may be proper to add, that our form of government, or constitution, is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. [" *Nullus liber homo*," says the great charter (*i*), "*aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terræ*." Which words, "*aliquo modo destruatur*," according to Sir Edward Coke (*k*), include a prohibition not only of *killing* and *maiming*, but also of *torturing* (to which our laws are strangers), and of every oppression by colour of an illegal authority. And it is enacted by a statute of 5 Edw. III. c. 9, that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Edw. III. c. 3, that no man shall be put to death without being brought to answer by due process of law.]

3. A man is also entitled, as to his whole body, to

(*g*) Vide post, bk. VI. c. I.
(*h*) Vide sup. p. 30.
(*i*) C. 29.
(*k*) 2 Inst. 48.

security from all corporal insults or injuries, whether by menaces, assaults, beating, wounding, or otherwise, though they may amount not to destruction of life or member.

4. To the preservation of his health from such practices as may prejudice or annoy it; and

5. To the security of his reputation or good name from slander.

But these three last articles, it will suffice to have barely mentioned among personal rights. It is to their infringement, rather than to the rights themselves, that the provisions of the laws have been in general directed; and a more convenient place for their further discussion, will consequently be found in that part of the work which relates to *wrongs* (*l*).

II. [Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding artic e; that it is a right strictly natural:] that the laws of England never abridge it without cogent reason; [and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter (*m*) is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes (*n*) expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the Petition of Right, 3 Car. I., it is

(*l*) As to *wrongs*, vide post, bk. V. and bk. VI.

(*m*) C. 29.

(*n*) 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3.

[enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of an illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of King's Bench or Common Pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the *Habeas Corpus Act*,] (amended and made more effectual by 56 Geo. III. c. 100,) [the methods of obtaining this writ are so plainly pointed out and enforced, that so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2, c. 2, that excessive bail ought not to be required;] though, on the other hand, to prevent such abuses as are naturally apt to occur in the resort to a writ of this description, it is a rule with the courts that they will not grant a *habeas corpus* as of course, and without probable cause shown (*o*).

[Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate, to imprison arbitrarily whomever he or his officers thought proper,] (as in France was once daily practised by the crown) (*p*), [there would soon

(*o*) Hobhouse's case, 3 Barn. & Ald. 420. Et vide 56 Geo. 3, c. 100, by the express provisions of which act, there must, in the cases to which it applies, be "an affidavit showing a probable and reasonable ground" for the complaint.

(*p*) It is stated by Blackstone that during the mild administration of Cardinal Fleury, above 54,000 *lettres de cachet* were issued, upon the single ground of the famous bull *Unigenitus*.

[be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient: for it is the parliament only or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *Habeas Corpus* Act for a short and limited time, to imprison suspected persons,] without the possibility of their obtaining their discharge, during that period, by any interference of the courts of law (*q*); [as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica detrimenti capiat,*" was called the *senatus consultum ultimæ necessitatis:* in like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever.

The confinement of the person in any wise, is an imprisonment. So that the keeping a man against his will in a

(*q*) Mr. Justice Coleridge refers to 57 Geo. 3, c. 3, and c. 55, as instances of suspending acts.—*Coleridge's Blackstone*, vol. i. p. 136.

[private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment (r). And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it (s).] To make a commitment to prison lawful, [it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner (t). For the law judges in this respect, saith Sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

A natural and regular consequence of this personal liberty, is, that every Englishman may claim a right to abide in his own country so long as he pleases, and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without licence (u). This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will; no, not even a criminal.]

(r) 2 Inst. 589.
(s) 2 Inst. 482.
(t) 2 Inst. 52, 53. See 1 Chitty, Crim. Law, 110, &c.
(u) F. N. B. 85.

For exile was never sanctioned by the common law, except in the case of abjuration above referred to (*x*); and though in modern times persons have been conveyed to parts beyond the seas, under sentence of "transportation," and may still be so conveyed under sentence of "penal servitude," they have been so dealt with either by their own choice to escape a capital punishment, or else by the express direction of some act of parliament (*y*). [To this purpose the Great Charter (*z*) declares that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *Habeas Corpus* Act, 31 Car. II. c. 2, (that second *Magna Charta*, and stable bulwark of our liberties,) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas; (where they cannot have the full benefit and protection of the common law): but that all such imprisonment shall be illegal: that the person who shall dare to commit another, contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and be incapable of receiving the king's pardon:] and the party wrongfully committed shall also have his private action against the person committing and all his aiders, advisers and abettors, and shall recover costs, and damages to the extent of at least five hundred pounds (*a*).

(*x*) Co. Litt. 133 a. Vide sup. p. 142.

(*y*) It is said that exile was first introduced as a punishment by the legislature in the thirty-ninth year of Eliz., when a statute enacted, that "such rogues as were dangerous to the inferior people should be banished the realm;" (39 Eliz. c. 4; see Bar. Ant. Stat. 269;) and that the first statute in which the word "transportation" is used is the 18 Car. 2, c. 3, which gives a power to the judges at their discretion either to execute, or transport to America for life, the Moss-troopers of Cumberland and Northumberland. (2 Woodd. 498.) As to the present regulations in reference to the sentence of penal servitude, see 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; et vide post, bk. VI. c. XXIII.

(*z*) C. 29.

(*a*) As to the writ of *habeas corpus*, see further, bk. V. c. XII.

[The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out* of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador (*b*). For this might, in reality, be no more than honourable exile.]

What has been hitherto said on the subject of personal liberty, refers, it will be observed, chiefly to its illegal restraint by the authority of government. When imprisonment is illegally inflicted by a private subject, relief may, in the same manner, be had by *habeas corpus:* and redress may also be obtained by action, or the offender may be punished upon indictment. But the consideration of these methods, and the further discussion of the mode of proceeding upon *habeas corpus*, more properly belong to our divisions of civil injuries and of crimes. They are glanced at, in this place, only in illustration of the importance attached by the law to the right of personal liberty.

In connection with the rights of personal liberty and security, which we have been considering in this Book, is the right of the subject to carry arms proper for his defence. [This is declared by the statute 1 W. & M. st. 2, c. 2; and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanction of society and laws are found insufficient to restrain the violence of oppression.] There is an antient enactment, however, against going armed, under such circumstances as may tend to terrify the people, or indicate an intention of disturbing the public

(*b*) 2 Inst. 46.

peace (*c*); and, by a modern statute (*d*), the training of persons, without lawful authority, to the use of arms is prohibited; and any justice of the peace is authorized to disperse such assemblies of persons as he may find engaged in that occupation, and to arrest any of the persons present.

(*c*) 2 Edw. 3, c. 3; vide Hawk. bk. 1, c. 63, ss. 9, 10.

(*d*) 60 Geo. 3 & 1 Geo. 4, c. 1.

BOOK II.

OF RIGHTS OF PROPERTY.

INTRODUCTION.

OF PROPERTY IN GENERAL.

THE rights of property consist in a man's free use, enjoyment, and disposal according to the laws of the community, of all his acquisitions in the external things around him. It may be desirable to premise a few observations on the nature and origin of these rights, before we proceed to distribute and consider their several objects.

The rights in question, though we speak of them in the plural, in regard to the different objects over which a man may have ownership, and the different modifications of that ownership, are yet capable of being reduced, and for the purpose of abstract discussion are usually reduced, to one general head—the right of property, or the principle by which one man claims and exercises a sole and despotic dominion over the external things of the world, in total exclusion of all other individuals in the universe. However generally recognized that right may be, there are very few that will give themselves the trouble to consider its origin and foundation. [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 (*a*). 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

(*a*) Bl. Com. vol. ii. p. 2.

[will and testament of the dying owner: not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field, or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, as 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 (*b*)."] Hence [the earth 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

(*b*) Genesis, i. 28.

[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 those times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset* (c)." Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to ought but the *substance* of the thing; nor could 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 (*d*); 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 said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is, for the time, his own (*e*).

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to indivi-

(*c*) Justin, l. 43, c. 1.

(*d*) Barbeyr. Puff. l. 4, c. 4.

(*e*) "*Quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occuparit.*"—De Fin. l. 3, c. 20.

[duals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious and agreeable; as habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural 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 homestall; which seem to have been originally mere temporary huts or moveable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use till improved and meliorated by

[the bodily labour of the occupant]; which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to strengthen, very materially, the title that mere occupancy gives 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 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 county of Abimelech, and exacting an oath for his security, "because he had digged that well (*f*)." And Isaac, about ninety years afterwards, reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace (*g*).

All this time 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

(*f*) Genesis, xxi. 30. (*g*) Genesis, xxvi. 15, 18, &c.

[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 (*h*). We have also a striking example of the same kind in the history of Abraham and his nephew Lot (*i*). 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 Jor-"dan, that it was well watered everywhere, even as the "garden of the Lord. Then Lot chose him all the plain "of Jordan, and journeyed east; and Abraham dwelt in "the land of Canaan."

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practised as well by the Phœnicians and

(*h*) "*Colunt discreti et diversi; ut fons, ut campus, ut nemus, placuit.*"—De Mor. Ger. 16.

(*i*) Genesis, c. xiii.

[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 its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage; but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and 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 and our happiness together) the result of this very necessity has been the ennobling of the human species, by

[giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Necessity begat property; and in order to ensure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, governments, 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 man an exclusive right to retain, in a permanent manner, that specific land, which before belonged generally to everybody, 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 a 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, 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 savours too much of nice and scholastic refinement. However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own

[convenience, provided he found them unoccupied by any one else.

Property, both in lands and moveables, being thus originally acquired by the first taker—which taking amounts to a declaration that he intends to appropriate the thing to his own use—it remains in him by the principles of universal law, till such times as he does some other act which shows 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.]

In this manner, then, both lands and moveables became everywhere permanently appropriated. [However, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such among others are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: and such also are the generality of those animals which are said to be *feræ naturæ*, 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 dis-

[turbance; but if once they escape from his custody,] (though without his voluntary abandonment,) it naturally follows that [they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.]

The doctrine of ownership once established, soon drew after it that of transfer. [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 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.]

If all property ceased upon death, it would follow that, [by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments, which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal

[law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion (*i*). 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* (*k*) 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.]

As to the right, however, of the children or nearest relations of the deceased to inherit, (which was allowed much earlier than that of devising by testament,) its origin is, perhaps, to be traced to a higher source than the mere institutions of civil society. There is a general and intuitive feeling that it has nature on its side; and there seems in truth good reason to refer it to the same natural title of occupancy on which the right of property itself is founded (*l*). No doubt its merits, as a civil institution, are such as might be sufficient in themselves to

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

(*k*) As to escheats, vide post, c. 12.

(*l*) Blackstone expresses an opinion that the right of inheritance is *not* a natural but a political right (Bl. Com. vol. ii. p. 11); observing that we often mistake for nature what is established by custom. Yet he proceeds to remark, "that the children are generally the first occupants," and the title by occupancy is, according to his own doctrine, a *natural* one.

have recommended it for the adoption of a wise legislature; for [the 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. A man's children or nearest relations are usually 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 (*m*)."

While property continued only for life, testaments were useless and unknown: and when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will: till at length it was found that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigencies 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 style his

(*m*) Gen. xv. 3.

[*will.* This was established in some countries much later than in others.] With us in England, as the law stood in the reign of Henry the second, [a man could only dispose of one-third of his moveables to the exclusion of his wife and children,] (a restriction, however, long since fallen out of use); and though lands were fully devisable before the Conquest, yet except by the special custom of particular places, [no will was permitted of lands] after the Conquest for any greater estate than a term of years, [till the reign of Henry the eighth; and then only of a certain portion: and it was not till after the Restoration that the power of devising real property became so universal as at present (*n*).]

Wills and testaments are obviously in their nature of date posterior to the formation of civil society, and must be considered as the mere creatures of the municipal law; by which also it is clear that the particular modifications of the law of inheritance and succession are alone regulated. Accordingly we find that [every distinct country has 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 general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.]

(*n*) This was in consequence of the conversion of tenure in chivalry into tenure in socage, by the st. 12 Car. 2, c. 24; vide post, bk. II. pt. I. c. 2 and c. 20.

Such is the origin that we are disposed to assign to property itself, and to the power of transferring or transmitting property, considered in the abstract. However, it is clear, that all proprietory rights, as we now find them established in any country, rest on the municipal law as their *immediate* basis—being indeed some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty; and, like those relative to life and limb, they have always been guarded by the laws of England with peculiar vigilance, and have been frequently recognized in distinct and emphatic terms by the legislature. Thus [the Great Charter (*o*) has declared, that no freeman shall be disseised or divested of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of antient statutes (*p*) it is enacted, that no man's lands or goods shall be seized into the king's hands against the Great Charter and the law of the land; and that no man shall be disinherited, nor put out of his franchise or freehold, unless he be duly brought to answer and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed and holden for none.]

Even for the general good of the whole community, no unnecessary violation of the rights of property is, in any instance, allowed by our law. If a new road, for example, is to be made through the grounds of a private person, in a case where it would be extensively beneficial to the public, the legislature never permits itself to do this without consent of the owner of the land, or at least without securing to him a complete indemnification. In vain may it be urged that the good of the individual ought to yield to that of the community. The true principle applicable to all such cases is one to which we have had occasion already to refer, and which is constantly borne in view

(*o*) C. 29.

(*p*) 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3.

by the English law, viz. that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance (*q*). [The public, therefore, is considered in all such transactions as an individual treating with an individual, for an exchange. All that the legislature does is to oblige the owner to alienate his possession for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform (*r*).]

Nor is this the only instance in which the law of the land has postponed the public interest to the sacred and inviolable rights of private property. [For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent or that of his representatives in parliament. By the statute 25 Edw. I. cc. 5 and 6, it is provided, that the king shall not take any aids or tasks but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4, c. 1, which (*s*) enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land; and again by 14 Edw. III. st. 2, c. 1, the prelates, earls, barons, and commons, citizens, burgesses, and merchants, shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by

(*q*) Vide sup. p. 144.

(*r*) See 8 & 9 Vict. c. 18 (called "The Lands Clauses Consolidation Act, 1845"), for consolidating into one act the provisions usual in acts authorizing the taking of lands for undertakings of a public nature.

(*s*) See the introduction to the Great Charter (edit. Oxon.), sub anno 1297; wherein it is shown that this statute, *De tallagio non concedendo*, supposed to have been made in 34 Edw. I, is in reality nothing more than a sort of translation into Latin of the *Confirmatio cartarum*, 25 Edw. I, which was originally published in the Norman language.

[compulsory loans, and benevolences extorted without a real and voluntary consent, it was made an article in the Petition of Right, 3 Car. I., that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 Will. & Mary, st. 2, c. 2, it is declared, that levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, or for longer time, or in other manner, than the same is or shall be granted, is illegal.]

PART I.

OF THINGS REAL.

THE subjects of dominion or property, in the law of England, are *things*, as contradistinguished from *persons;* and things are distributed into two kinds, things *real*, and things *personal*. Things real, (otherwise called realty,) consist of things substantial and immoveable, and of the rights and profits annexed to or issuing out of these.

Things personal, (otherwise called personalty,) consist of goods, money, and all other moveables, and of such rights and profits as relate to moveables (*a*).

The First Part of the present Book will consequently relate to things Real, and the Second to things Personal.

(*a*) Blackstone says, "*things real* "are such as are permanent, fixed "and immoveable, which cannot be "carried out of their place, as lands "or tenements—*things personal* are "goods, money and all other move-"ables which may attend the owner's "person wherever he thinks proper "to go." (2 Bl. Com. p. 16.) It has been thought expedient to deviate from these definitions, which, (among other objections to them,) appear to be too limited, as referring to things of a substantial or solid kind only, without embracing incorporeal rights. His definition of things personal, however, does not appear to be fairly open to the objection that has been made to it, of not being extensive enough to comprise *chattels real*. For it is more correct and convenient to keep separate the idea of the subjects in which property may be acquired, from the idea of the estate or interest that may be acquired in these subjects. A chattel real is, properly speaking, not a thing personal, but rather a particular kind of estate in a thing real. It is, however, for many purposes, properly designated as *personal estate*. This is a matter that we shall have occasion to notice more fully hereafter.

CHAPTER I.

OF THE DIVISIONS OF THINGS REAL.

THINGS real are usually said to consist in lands, tenements, or hereditaments. [Lands, says Sir Edward Coke (*a*), comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes and heath. It legally includeth also all castles, houses, and other buildings: for they consist, saith he, of two things: *land*, which is the foundation, and *structure* thereupon: so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem as 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 its capacity, as for so many cubical yards; or by superficial measure, for twenty acres of water; or by general description, as for a pond, a water-course, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water* (*b*).] And so if I grant a certain *water*, though the right of fishing passes, yet the soil does not (*c*). [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

(*a*) Co. Litt. 4 a; Ewer *v.* Hayden, Cro. Eliz. 476; Cooke *v.* Yates, 4 Bing. 90.

(*b*) Challoner *v.* Thomas, Brownl. 142.

(*c*) Co. Litt. 4 b.

[water runs out of my pond into another man's, I have no right to reclaim it (*d*). But the land which that water covers, is permanent, fixed and immoveable: and therefore in this I may have a certain substantial property, of which the law will take notice, and not of the other. Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum*, 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 in general to the owner of the surface. So that the word "land" includes not only the face of the earth, but everything under it or over it (*e*). And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them (*f*): but the capital distinction is this, that by the name of a 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 (*g*).]

The word [*tenement* is of still greater extent, and though in its vulgar acceptation it is only applied to houses and

(*d*) See Race *v.* Ward, 4 Ell. & Bl. 702.

(*e*) Shep. Touch. 90; Raine *v.* Alderson, 1 Arnold, 329.

(*f*) Blackstone here adds, "except in the instance of *water*." But it would seem that the case of water cannot properly be considered as an exception, because "water" is *not* the particular name, in contemplation of law, of the thing intended to be passed; vide sup. p. 169.

(*g*) Co. Litt. 4 a—6 b. This word *land* is used in a still larger sense in certain statutes, as in 3 & 4 Will. 4, c. 106, for regulating the law of inheritance; where it is provided, that, so far as the enactments of that statute are concerned, "land" shall comprise every interest, real or personal, capable of being inherited, and also money to be laid out in the purchase of land; see also c. 105, the act for regulating the law of dower.

[other buildings, yet in its original proper and legal sense, it signifies every thing that may be *holden*,] that is, be the subject of *tenure*, of which we shall speak at large in the following chapter. In ordinary legal intendment, it includes not only *land* (which is the primary subject of tenure) but rents, commons, and several other rights and interests issuing out of, or concerning land (*h*).

[But an *hereditament*, says Sir Edward Coke, is by much the largest and most comprehensive expression (*i*); for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal or mixed. Thus an heir-loom, or implement of furniture, which by custom descends to the heir together with the house, is neither land nor tenements, but a mere moveable: yet, being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also a hereditament (*k*).]

It is under the larger term of hereditaments, though it be not strictly confined to things real, that the subjects of real property have been usually arranged; and to this method it will therefore be most convenient to adhere. [Hereditaments, then, are of two kinds, *corporeal* and *incorporeal*. Corporeal consist of such as affect the senses, such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.] If we apply the word hereditaments to the realty only (which is its most ordinary use), "corporeal" hereditaments are in fact the same with *land*, of which enough has been said; "incorporeal" are the rights and profits annexed to or issuing out of land. It is to corporeal hereditaments, that our attention must be first di-

(*h*) Co. Litt. 6 a, 20 a, 78 a; R. *v.* Dersingham, 7 T. R. 671; Vin. Ab. Grants (T).

(*i*) Co. Litt. 6 a. As to *hereditaments*, see also Moore *v.* Denn, 2 Bos. & Pul. 251; Pocock *v.* Bishop of London, 3 Brod. & Bing. 33.

(*k*) Winchester's case, 3 Rep. 2 b.

rected; and whatever is said generally, hereafter, as to the law of real property, is to be understood as referring to its corporeal subjects only, until those of the incorporeal kind present themselves, in their turn, for separate consideration, in a distinct chapter (*l*).

(*l*) As to incorporeal hereditaments, vide post, bk. II. pt. I. c. 23.

CHAPTER II.

OF TENURES.

In proceeding to treat of corporeal hereditaments, we shall consider, in the first place, the tenures by which they may be holden; secondly, the estates which may be had in them (*a*); and lastly, the title to them, or the manner in which those estates may be acquired and lost (*b*). And, first, as to tenures.

These it will be impossible to understand with any degree of accuracy, unless we have some previous acquaintance with the nature of feuds, or the feudal law (*c*); a system established during the middle ages throughout the greater part of the European continent, and from thence derived to England, where its spirit still lives in several of her institutions. This chapter will therefore be dedicated, in the first instance, to an inquiry into the feudal system; after which we shall revert to our own municipal law, and particularly that branch of it which relates to the *Tenure* of real property, a doctrine that we shall find to be altogether founded upon feudal principles.

Feuds were introduced under the new dynasties founded by the barbarous tribes, who, during the fourth, fifth and sixth centuries, poured themselves from Germany and the neighbouring countries into the Roman empire (*d*). In

(*a*) Vide post, bk. II. pt. I. cc. 3—9.

(*b*) Vide post, bk. II. pt. I. cc. 10—22.

(*c*) "I do marvel many times," says Spelman, "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."—Spel. Orig. of Terms, c. viii.

(*d*) See Spelman on Feuds, and Wright on Tenures; Co. Litt. by Harg. 64 a, n. (1), 191 a, n. by Butler.

every province which they subjugated, large tracts of territory were divided by lot among the conquerors, some portion falling to the king or general of the invading tribe, and the rest to his soldiers, who received their shares as free and independent property, subject only to the condition of bearing arms, as occasion might require, in the defence of the community from hostile aggression. Of the lands assigned to the sovereign of the tribe, certain portions were afterwards usually distributed by him among his adherents, and chiefly among his courtiers or companions (*comites*) (*e*); but the interest they derived under these grants was not strictly in the nature of property; it was of a beneficial or usufructuary kind only, a mere stipendiary return for services (commonly services of a military description) which they were expected to render to their master, and subject at some future period to resumption; the *proprietas*, or actual ownership of the land, being considered as still residing in the sovereign himself.

This species of interest, which we find at first described as a *benefice* (*beneficium*) (*f*), was called, about the close of the tenth century (and, as there is reason to suppose, much earlier), a *feud* (*feudum*) (*g*), a term which signified in the German language a stipendiary estate, and stood in contradistinction to *allodium* (*h*), the phrase applied to

(*e*) Vide sup. p. 126.

(*f*) The portions of land thus distributed were at first revocable at the will of the lord, and were then, it is said, called *munera*. They were afterwards held for some limited time (usually one year), and called *beneficia*. In process of time they began to be granted in perpetuity, and were then called *feuda* according to Spelman, who cites Cujacius, Feud. lib. 3, p. 180. Vide Spelman on Feuds, 4, 6, 9; Cowell's Interpreter, *in verb.*

(*g*) *Feudum* is said to be compounded of *od*, possession or estate, and *feo*, wages, pay.—Robertson's Hist. Ch. V. vol. i. n. (8); citing Wachteri, Gloss. Germ. voc. *Feodum*.

(*h*) *Allodium* is stated by Robertson (ibid.) to be compounded of the German particle *an* and *lot*, and to signify land obtained by lot; and he cites the same glossary, voc. *Allodium*. Another derivation, however, and one perhaps more probable, is given by Blackstone, who considers it as compounded of *all* (*totum*), and *odh* (*proprietas*) in the Northern languages.—2 Bl. Com. p. 45, n.

that independent species of property, before described, which had originally become vested by allotment in the conquerors of the country. There began thus to arise two distinct modes of holding or possessing land. The stipendiary held *of* (that is, in relation to and dependence upon) a superior; the allodialist held of no one, but enjoyed his land as free and independent property; the first of these methods applying exclusively to royal domains granted out in the manner we have described, the other to such land as had been allotted to the troops on the original conquest, or to land never appropriated by the barbarians, but left in the possession of the antient owners; for the holding of this was of the same independent character, and received the same appellation of *allodium*.

The interest of the stipendiary or beneficiary tenant did not originally extend beyond his own life (if it was not even determinable at the royal pleasure); but in course of time it gradually improved in stability, and acquired an *hereditary* character, which led by a natural progress to the practice of *subinfeudation;* for the stipendiary, (or feudatory, as he should now rather be termed,) considering himself as substantially the owner, began to imitate the example of his sovereign, by carving out portions of the benefice or feud, to be held of himself by some other person, on terms and conditions similar to those of the original grant; and a continued chain of successive dependencies was thus established, connecting each stipendiary or *vassal* (*i*) (as he was termed) with his immediate superior or *lord*.

The beneficiary or feudal relation was well suited to those times of violence and insecurity, and was found by experience to be attended with great advantage both to the lord and the vassal: to the former, as it secured to him a band of military retainers, attached by duty and by

(*i*) From *gwas*, a Celtic word for a servant.—Hallam's Middle Ages, p. 155, 7th ed.

sentiment to his person; and to the latter, as it brought them into close connection with a powerful superior, under whom they found that shelter from oppression, which the law was then too weak to afford. The effect of this, as regarded the allodial species of property, was remarkable: the allodialist, though enjoying a nominal independence, found himself exposed to all the evils and dangers attendant on a state of civil confusion, and began to contemplate with envy the comparative security of the feudal vassal: he was therefore gradually induced to place himself under the same relation, by changing the nature of his property from allodial to feudal; in order to effect which, he gave up or surrendered his land to some powerful lord, and received it back again from him in the shape of a beneficium or feud, to be held upon some kind of service: or, instead of resorting to this formal transaction, he would in other cases merely *acknowledge* himself to hold as a vassal to some chosen lord, under specified services, as if by the effect of a former grant, which had, in truth, never taken place. In one or other of these methods, allodial lands were gradually changed into feudal, in every part of the continent where the feudal system had been introduced; and this conversion became, in some countries, almost universal; though, in others, there were many estates which always continued to be held allodially (*k*).

Such, according to the best informed and most discriminating writers on the subject (*l*), is the true history of the origin and establishment of the feudal system; by which we may perceive that it was not (according to the theory adopted by Blackstone) (*m*) an invention of government applied systematically by the barbarous tribes to the management of the conquered countries, with a view to

(*k*) Vide Co. Litt. by Harg. 65 a, n. (1).

(*l*) See particularly Robertson's Charles V. vol. i. n. (8); and Hallam's Middle Ages, vol. i. p. 142—323, 7th edit.

(*m*) 2 Bl. Com. pp. 45, 46.

security from foreign invasion or domestic insurrection, but rather a conventional arrangement of property, established by gradual usage among the new dynasties, and brought into general acceptance by its tendency to aggrandize powerful lords, and to protect persons of inferior rank from the inconveniences of civil disorder. It seems probable, however, that the principle of the *beneficium*, or of that contract by which the temporary use of land was bestowed on the one hand, as the stipend for military service to be performed on the other, had been known to the barbarians in their native countries, and before their invasion of the Roman provinces; and some authority for the supposition seems to be supplied, by the passage which Blackstone cites from Florus relative to the demand which the Cimbri and Teutones are recorded to have made of the Roman people, about a century before the Christian era:—"*Ut martius populus aliquid sibi terræ daret, quasi stipendium; cæterum, ut vellet, manibus atque armis suis uteretur*" (*n*).

The feud was conferred [by words of gratuitous and pure donation, *dedi et concessi*,] which would still be the operative words in a modern infeudation or deed of feoffment in the English law. [This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals; which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known, and therefore the evidence of property was reposed in the memory of the 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 vassal or tenant, upon investiture, did usually *homage* to

(*n*) 2 Bl. Com. p. 46.

[his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him, and there professing that he did become his *man*, from that day forth, of life and limb and earthly honour;" and then he received a kiss from his lord (*o*). Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo* (*p*).]

Besides the fealty and homage, the relation of lord and vassal was ordinarily attended with the following feudal incidents (*q*):—1. *Aid*, which was originally a mere benevolence granted by the vassal to his lord in time of difficulty and distress (*r*); but in process of time came to be considered as a matter of right. 2. *Relief*, which was a tribute paid to the lord for taking up the estate which was lapsed or fallen in by the death of the last tenant: for while the feuds were not properly hereditary, but granted by favour of the lord only to the children of the former possessor, the heir [used generally to pay a fine or acknowledgment to the lord, in horses, arms, money or the like, for such renewal of the feud; which was called a relief, because, in the words of the feudal writers, "*incertam et caducam hereditatem relevant.*"] And this relief was afterwards, when the feuds became absolutely hereditary, continued on the death of the tenant, though the original reason of it had ceased to apply. 3. *Fine on alienation*, being a sum of money paid to the lord by the

(*o*) Litt. s. 85.

(*p*) It was an observation of Dr. Arbuthnot that tradition is nowhere preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope, vi. 134, 8vo.) It will not, perhaps, be thought puerile to remark in confirmation of this observation, that in one of our antient 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.

(*q*) Hallam's Middle Ages, vol. i. p. 181, 7th ed.

(*r*) "*Auxilia fiunt de gratia et non de jure,—cum dependeant ex gratia tenentium et non ad voluntatem dominorum.*"—Bract. lib. ii. tr. 1, c. 16, s. 8.

tenant whenever he had occasion to make over his land to another. This depended on the nature of the feudal connection: [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,] without the lord's consent. [And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection in return for his own fealty and service, therefore the lord could no more transfer his seigniory or protection, without consent of his vassal, than the vassal could his feud without consent of his lord (*s*); 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.] 4. *Escheat* (*t*) and *forfeiture* (*u*), being two different modes by which the relation between the lord and vassal might be dissolved. The first was where the tenant in possession of a feud not granted for life only, but transmissible by hereditary descent, died without leaving any heir behind him upon whom, according to the terms of the original grant, the feud could any longer descend; in which case it reverted to the lord, that is, the gift, being determined, resulted back to the giver. The second case (that of forfeiture) occurred where the tenant committed some act in violation of his duty towards his lord, such as rendered him unfit to be longer trusted as a vassal; the effect of which was that his interest in the feud became forfeited, and returned to the lord, as for a breach of that condition of fidelity on which the grant was made (*x*).

Feuds, as we have seen, did not originally extend beyond the life of the first vassal, but in process of time they were universally extended [to his *sons*, or perhaps to

(*s*) Wright's Tenures, 30.

(*t*) As to escheat, see further post, bk. II. pt. I. c. XII.

(*u*) As to forfeiture, see further post, bk. II. pt. I. c. XIV.

(*x*) Wright's Tenures, 44.

[such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions; and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation (*y*). 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 feudal 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" (*z*). And the descent being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found, upon many accounts, inconvenient (particularly by dividing the services, and thereby weakening the strength of the feudal union), and *honorary* feuds (or titles of nobility) being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son (*a*); 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 (*b*).]

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

(*y*) Wright's Tenures, 17.
(*z*) Ibid. 183.
(*a*) Feud. ii. 55.
(*b*) Wright's Tenures, 32.

[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 to 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 are called in the Scots law "rere-fiefs") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords (*c*). 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 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 comprised all such as do not fall within the other description; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less 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 (*d*).]

The feudal polity of which we have here presented an outline [seems not to have been received in this part of our island, at least not universally, and as a part of the

(*c*) Wright's Tenures, 20. (*d*) Ibid. 36.

[national constitution, till the reign of William the Norman (*e*). 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 until the eleventh or twelfth century (*f*) [that feuds arrived to their full vigour and maturity, even on the continent of Europe.

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 Norman 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;] 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 attempt 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

(*e*) Spelm. Gloss. 218; Bract. l. 2, c. 16, s. 7.

(*f*) Hallam's Middle Ages, vol. i. p. 192, 7th ed. Blackstone considers the feudal system as having reached its maturity about the year 800, and cites Crag. l. 1, t. 4.

[are some circumstances that may lead us to a probable conjecture concerning it; for we learn from the Saxon Chronicle (*g*), that in the nineteenth year of King William's reign an invasion was apprehended from Denmark; and the military constitutions of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly 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 themselves 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 (*h*); 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 (*i*). This may possibly have been the era 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 (*k*), and couched in these remarkable words:—"*Statuimus, ut omnes liberi homines fœdere et sacramento affirment, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo,*

(*g*) A.D. 1085.

(*h*) "*Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hac terra; quo modo incoleretur, et a quibus hominibus.*"—Chron. Sax. ib.

(*i*) "*Omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta præstiterunt, se contra alios quoscunque illi fidos futuros.*"—Chron. Sax. A.D. 1086.

(*k*) Wilkins's Leg. Anglo-Sax. LL. Guil. Con. c. 52.

[*et contra inimicos et alienigenas defendere.*" The terms of this law, as Sir Martin Wright has observed (*l*), are plainly feudal; for, first, it requires the oath of fealty, which made, in the sense of the feudists, every man that took it a tenant or vassal; and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies, foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection (*m*), which exacts the performance of the military feudal services as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri 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 explendum 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.*"]

It is probable that by thus [consenting to the introduction of feudal tenures, our English ancestors 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 (*n*); as if the English had, in fact as well as theory,

(*l*) Tenures, 66.

(*m*) Wilkins's Leg. Anglo-Sax. LL. Guil. Con. c. 58.

(*n*) Spelm. of Feuds, c. 28.

[owed everything 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 (*o*). However, the Conqueror, and his son William Rufus, kept up with a high hand all the rigours of the feudal doctrines; but their successor, Henry the first, 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 (*p*), 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 King John, they became so intolerable, that they occasioned his barons or principal feudatories to rise up in arms against him, which at length produced the famous great charter at Running-mead, which, with some alterations, was confirmed by his son Henry the third (*q*). And, though its immunities (especially as altered on its last edition by his son (*r*)), are very greatly short of those granted by Henry the first, it was justly esteemed at the time a vast acquisition of English liberty. Indeed, by the further alteration of tenures that has since happened,] (and that principally took place, as we shall presently see, in

(*o*) Wright's Tenures, 81.

(*p*) Wilkins's Leges Anglo-Sax. LL. Hen. 1, c. 1.

(*q*) "It received confirmation, with some not inconsiderable variations, in the first, second, and ninth years of Henry's reign. The last of these is in our present statute book, and has never received any alterations. But Sir E. Coke reckons thirty-two instances wherein it has been solemnly ratified."—Hallam's Mid. Ages, vol. ii. p. 452, 7th ed.

(*r*) 9 Hen. 3.

the reign of Charles the second,) [many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted; but this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference: that the liberties of Englishmen are not 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 finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.]

This general introduction of strict feudal principles gave rise to that fundamental maxim which still prevails, that all land belonging to any subject in this realm is *holden* of some superior, and either mediately or immediately of the sovereign (*s*); for in the law of England, according to Sir E. Coke (*t*), we have not *allodium*, which, as we have seen (*u*), is the name by which the feudists abroad distinguished such estates of the subject as were not holden of any superior. And as all lands in England were holden, they were consequently called *tenements*, the possessors thereof *tenants*, and the manner of their possession a *tenure* (*x*). Where the tenure was of the sovereign immediately, it was said to be *in capite*, or in chief. This, however, was of two kinds, either *ut de honore* (where the land was held of the king as proprietor of some honour, castle, or manor), or *ut de coronâ* (where it was held of him in right of the crown itself); and it is to the latter kind that the term of tenure *in capite* was more especially applied (*y*). But the

(*s*) Co. Litt. 93 a, 1 a, 1 b, 65 a.

(*t*) Id.; et vide Co. Litt. by Harg. 64 a, n. (1).

(*u*) Vide sup. p. 174.

(*x*) Co. Litt. 1 b; 2 Bl. C. 59.

(*y*) It seems that when tenure *in capite* was mentioned generally, it was understood to apply to a tenure *ut de coronâ*, and not *ut de honore*; Co. Litt. 108 a; 2 Inst. 64; Mag. Char. c. 31; 1 Edw. 3, c. 13, st. 2; 1 Edw. 6, c. 4; F. N. B. 175; Bro. Alien. 11; Wright's Ten. 163. See however the remarks which are made on this subject in Co. Litt. by Harg. 108 a, n. (3).

holding might also be mediate, that is, in the way of sub-infeudation (z). [For such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king: and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord *paramount;* A. was both tenant and lord, or was a mesne lord; and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit of the land (*a*).]

This distinction of mediate or immediate tenancy ran through all the different sorts of tenure, which we shall here proceed severally to consider.

[There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced; the grand criteria of which were the natures of the several services or renders that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services 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 like. *Base* services were such as were fit only 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

(z) Vide sup. p. 175. (a) 2 Inst. 296.

[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 base, or villein service.]

The various combinations of these services gave rise to the various kinds of lay tenure. [Of these Bracton (who wrote under Henry the third) seems to give the clearest and most compendious account of any author antient or modern (*b*):] of which the following is the outline or abstract. "Tenements are of two kinds, frank-tenement and "villenage. And, of frank-tenements some are held freely, "in consideration of homage and *knight-service*; others in "*free-socage* with the service of fealty only, or with fealty "and homage according to some authorities" (*c*). And again (*d*), "Of villenages some are pure, others privileged. "*Pure villenage* is where a man holds upon terms of doing "whatsoever is commanded of him, nor knows in the "evening what is to be done in the morning, and is always "bound to an uncertain service. There is also another "kind of villenage holden of the king, from the time of "the Conquest, which is called *villein-socage*, and which is "villenage, but of a privileged sort. Such tenants of the "king's demesnes have the privilege that they cannot be "removed from the land while they do the service due; "and these villein-socmen are properly called *glebæ ascrip-*

(*b*) Bract. l. 4, c. 28.

(*c*) "*Tenementorum aliud liberum, aliud villenagium. Item liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libero socagio cum fidelitate tantum, vel cum fidelitate et homagio, secundum quosdam.*" § 1.

(*d*) "*Villenagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei præceptum fuerit, nec scire debeat sero quod facere debeat in crastino, et semper tenebitur ad incerta. Est etiam aliud genus villenagii quod tenetur de domino Rege, a conquestu Angliæ, quod dicitur socagium villanum, et quod est villenagium, sed tamen privilegiatum. Habent itaque tenentes de dominicis domini regis tale privilegium, quod a gleba amoveri non debent quamdiu velint et possint facere debitum servitium. Et hujusmodi villani sokmanni propriè dicuntur glebæ ascriptitii. Villana autem faciunt servitia, sed certa et determinata.*" § 5.

" *titii.* They perform villein services, but such as are cer-
" tain and determined." This account, illustrated as it is by other authorities, proves that there antiently existed (as before remarked) four principal kinds of lay tenure: and that they were as follows—*servitium militare* (the tenure in chivalry or knight-service), where the service was free, but uncertain; *liberum socagium* (or free socage), where it was not only free but certain; *purum villenagium* (pure villenage), where it was base in its nature, and uncertain; and lastly, *villenagium privilegiatum* (or villein socage), where it was base but certain, which seems principally to have prevailed among those who are above described as " tenants of the king's demesnes."

The four kinds of tenure above enumerated, however, in process of time were described as only three, viz. knight-service, free socage, and copyhold; which last comprises both the species of villenage to which Bracton refers. These three subsisted in England till the middle of the seventeenth century, and the two last subsist to this day.

1. [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 (*e*), which name is expressly given it by the Mirrour (*f*). 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, it was necessary that the tenement in point of quantity should amount to twelve ploughlands (*g*); which was called a knight's fee (*h*), *feodum militare;* and the value of which is stated in 1 Edw. II. at £20 per annum (*i*).

(*e*) Spelm. Gloss. 219.

(*f*) C. 2, § 27.

(*g*) 2 Inst. 596. A ploughland, *carucata terræ*, was as much as one plough could plough in a year; Co. Litt. 69 a.

(*h*) 2 Inst. 596.

(*i*) 2 Inst. 596; Co. Litt. 69 a.

[And he who held this proportion of land (*k*) (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; 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 (*l*). And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure of knight-service had all the marks of a strict and regular feud; it was granted by words of a pure donation, *dedi et concessi* (*m*); was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty (*n*).] It also drew after it the following consequences, some of which, as we have seen (*o*), were ordinary feudal incidents, and therefore in general observance, not in England only, but throughout a large portion of the continent (*p*).

1. In tenure by chivalry the land on the death of the tenant passed by *descent* to his heir (for the practice of

(*k*) "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. Tit. of "Hon. p. 2, c. 5, ss. 17 and 26."—*Christian's Blackstone*, vol. ii. p. 62 (n).

(*l*) Litt. § 95.

(*m*) Co. Litt. 9.

(*n*) As to homage and fealty, vide sup. p. 177; Co. Litt. 64 a, 67 b. Foreign jurists frequently blend homage and fealty together, but in England they were distinct. Co. Litt. by Harg. 68 a, n. (1).

(*o*) Vide sup. p. 178.

(*p*) The local extent of the feudal law is pointed out in Hallam's Mid. Ages, vol. i. pp. 200—203, 7th edit., where its regular machinery and systematic establishment are considered as chiefly applying "to the "dominions of Charlemagne and to "those countries which afterwards "derived it from thence." Denmark, Sweden, Bohemia and Hungary are particularly mentioned as countries not influenced by the feudal system.

granting feuds *jure hæreditario* has been in use amongst us ever since the Norman conquest (*q*)), and in this descent sons succeeded before daughters, an elder son before a younger (*r*).

2. If the heir in chivalry [was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry (*s*). 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] fourteen [in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female,] Sir E. Coke remarks, that she might at fourteen govern an household, and marry a husband, who might do knight's 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, the lord might not only keep her in ward till she attained that age, but if she remained unmarried, he might keep her land in his custody two years longer by virtue of the statute of Westm. I., 3 Edw. I. c. 22 (*t*).

[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

(*q*) Reeves's Hist. Eng. Law, vol. i. p. 36.

(*r*) Hale's Hist. C. L. c. 11.

(*s*) *Wardship* and *Marriage* were not ordinary feudal incidents, but nearly peculiar to England and Normandy.—Hallam, Mid. Ages, vol. ii. pp. 429, 215; vol. i. p. 190, 7th edit.

(*t*) Litt. s. 103; 2 Inst. 204; Blackstone states the guardianship of females to have lasted till sixteen. But see Coleridge's Blackstone, vol. ii. p. 67.

[the profits thereof provide a fit person to supply the infant's services, till he should be of age to perform them himself: and, if we consider the feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, 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 the first, 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* (*q*); 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 profits of the land; though this seems expressly contrary to *Magna Charta* (*r*). However, in consideration of their lands having been so long in ward, they were excused all] the reliefs, and the king's tenants all the primer seisins also to be hereafter mentioned (*s*). [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 (*t*),

(*q*) Co. Litt. 77 a.
(*r*) 9 Hen. 3, c. 3.
(*s*) Co. Litt. 77 a.
(*t*) Hoveden, sub Rich. 1.

[commonly called an *inquisitio post mortem;* 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 principal accusations against Empson and Dudley, the wicked engines of Henry the seventh, that by colour of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto (*u*). And afterwards a court of wards and liveries was erected (*x*), for conducting the same inquiries in a more solemn and legal manner.

When the heir thus came of full age (*y*) he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine. For, in these 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 is supposed to have been the original of the feudal knighthood (*z*). This prerogative of compelling the vassals to be knighted, or to pay a fine—as expressly recognized in parliament by

(*u*) 4 Inst. 198.

(*x*) St. 32 Hen. 8, c. 46; 33 Hen. 8, c. 22.

(*y*) Blackstone adds here, "provided he held a knight's fee *in capite* under the crown;" but Mr. Christian observes, that Lord Coke does not make that distinction in his Commentary on the Stat. de Milit. 2 Inst. 593, and that the power of the Commissioners in the commissions issued by Edward the sixth and Queen Elizabeth, was not limited to the king's tenants. Et vide 16 Car. 1, c. 20.

(*z*) "*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto frameaque juvenem ornant. Hæc apud illos toga, hic primus juventæ honos: ante hoc domus pars videntur; mox reipublicæ.*"—De Mor. Germ. c. 13.

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

3. But there was still another piece of authority which the guardian was at liberty to exercise over his infant wards; viz. the right of *marriage* (*a*), which signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward in matrimony. For, he might tender to his infant tenant, when of the age of fourteen, a suitable match without *disparagement*, or inequality; which the infant, if a male, could not refuse and marry elsewhere, without forfeiting to the lord double the value which the lord might have obtained for the alliance, *duplicem valorem maritagii;* nor could a female refuse, without entitling him to hold her lands by way of penalty, till she attained the age of twenty-one. And even without tender of a match, he was entitled in every case, on the ward's coming of age, to the single value which he might have obtained for the marriage (*b*). [This seems to have been one of the greatest hardships of our antient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *controul* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female wards intermarrying with the lord's enemy (*c*): but no tolerable pretence could be assigned why the lord

(*a*) Vide Co. Litt. 88, n. (11), by Harg.; Reeves's Hist. vol. i. p. 116.

(*b*) Lord Darcy's case, 6 Rep. 70 b; Palmer's case, 5 Rep. 126 b; Co. Litt. 82 a.

(*c*) Bract. l. 2, c. 37, s. 6.

[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 (*d*); 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 before-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 (*e*); or, as it was expressed in the first draught of that charter, "*ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua* (*f*)." But these provisions in behalf of the relations were omitted in the charter of Henry the third: wherein (*g*) the clause stands merely thus—"*hæredes maritentur absque disparagatione:*" meaning certainly, by *hæredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage (*h*) of heirs male; and as Glanvil (*i*) 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 fœmina*, as Bracton more than once expresses it (*k*): and also, as nothing but disparagement was restrained by *Magna Charta*, they thought themselves at liberty to make all other advantages

(*d*) Gr. Cust. 95.

(*e*) Cap. 6, edit. Oxon.

(*f*) Cap. 3, ib.

(*g*) Cap. 6.

(*h*) The words *maritare* and *maritagium* seem *ex vi termini* to denote the providing of an *husband*.

(*i*) L. 7, c. 9 and 12, and l. 9, c. 4.

(*k*) L. 2, c. 38, s. 1.

[that they could (*l*). 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 (*m*); which is the first direct mention of it perhaps to be met with, in our own or any other law.]

4. The tenant in chivalry was also liable to *aids*. These in England [were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vassal's power, was, by the strict rigour of the feudal law, an absolute forfeiture of his estate (*n*). 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 lord's heir was fifteen years old, or capable of bearing arms (*o*); the intention of it being to breed up the eldest son and heir apparent of the seigniory to deeds of arms and chivalry, for the better 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 (*p*). 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

(*l*) Wright's Tenures, 97.
(*m*) 20 Hen. 3, c. 6.
(*n*) Feud. l. 2, t. 24.
(*o*) 2 Inst. 233.
(*p*) Philip's Life of Pole, l. 223.

[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 patron's daughter: to pay his debts; and to redeem his person from captivity (*q*).

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* (*r*) ordained, that no aids be taken by the king of his tenants *in capite* without consent of parliament, nor in any wise by inferior lords, save only the three antient ones above mentioned. But this provision was omitted in Henry the third's charter, and the same oppressions were continued till the twenty-fifth year of Edward the first, 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.] These ordinances, however, related to the species of aids only; the quantity of each aid was provided for by other statutes. [King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable (*s*);] as well as that the aids taken by the king of his tenants *in capite* should be settled by parliament (*t*). But they were never completely adjusted till the statute Westm. I. 3 Edw. I. c. 36, and 25 Edw. III. c. 11, the former of 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

(*q*) "*Erat autem hæc inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent; in æris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent.*"—Paul. Manutius de Senatu Romano, c. 1.

(*r*) Cap. 12, 15.

(*s*) Ibid. 15.

(*t*) Ibid. 14.

son a knight, or marrying the eldest daughter: and the latter did the same with regard to the king's tenants *in capite*. [The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.]

5. The tenant in chivalry was liable besides to *relief*. [This was looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, it was 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 (*u*). The English ill-brooked this consequence of their new adopted policy; and therefore William the Conqueror by his laws (*v*) *ascertained* the relief by directing (in imitation of the Danish heriots) that a certain quantity of arms and habiliments of war should be paid by the earls, barons, and vavasours respectively; and if the latter had no arms, they should pay 100*s*. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws; thereby in effect obliging every heir to new purchase or *redeem* his land (*x*): but his brother, Henry the first, 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 (*y*). But afterwards, when, by an ordinance in the twenty-seventh year of Henry the second, 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 100*s*. for every knight's fee, as we find it ever after established (*z*). But it must be remembered (*a*), that this relief

(*u*) Wright's Tenures, 99.

(*v*) Wilkins's Leges Anglo-Sax. LL. Guil. Con. cc. 22, 23, 24.

(*x*) 2 Roll. Abr. 514.

(*y*) "*Hæres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eam.*"—Text. Roffens. cap. 34.

(*z*) Vide sup. p. 192.

(*a*) Glanv. l. 9, c. 4; Litt. § 112.

[was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.]

6. The tenant in chivalry was also liable to the payment of *primer seisin*, which was, however, a burthen [only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords (*b*). 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 (*c*). 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 (*d*). This practice, however, seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but, as to tenures *in capite*, the *prima seisina* was expressly declared, under Henry the third and Edward the second, to belong to the king by prerogative, in contradistinction to other lords (*e*). The king was entitled to enter and receive the whole profits of the land, till livery was sued; which suit being commonly made within a year and a day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king

(*b*) *Primer seisin* seems not to have been an ordinary feudal incident, though in France the lord might enter on the lands and possess them for a year if the heir could not pay the relief.—Hallam, Mid. Ages, vol. i. p. 183, 7th edit.

(*c*) Co. Litt. 77 a.

(*d*) Feud. l. 2, t. 24.

(*e*) Stat. Marlb. c. 16; 17 Edw. 2, c. 3.

[used to take, as an average, the *first fruits*, that is to say, one year's profits of the land (*f*). 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 *primitiæ*, or first fruits.]

7. The tenant in chivalry on arriving at the full age of twenty-one, had power of *aliening* his land; but such alienation was required to be to hold of the same lord as he himself held it of before (*g*); and he had no power of aliening it by a testamentary disposition.

8. The tenant in chivalry, exercising the power of alienation above mentioned, was liable, if he held *in capite*, to a *fine on alienation*, but these fines [only seem to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence;] and if they did, it became a question whether they did not incur an absolute forfeiture of the land (*h*). [But this severity was mitigated by the statute 1 Edward 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 such tenant presumed to aliene without a licence, a full year's value should be paid (*i*).]

9. The estate of the tenant in chivalry was liable to the incidents of *escheat and forfeiture*. These were feudal incidents attaching in full force to the tenure in chivalry, and were attended beside with this severity (which seems to have

(*f*) Staundf. Prerog. 12.

(*g*) This was by the statute of *Quia emptores*, 18 Edw. 1, c. 1. This statute applied both to tenants in chivalry and those in socage; 2 Inst. 501. Even anterior to its provisions the tenant might aliene, but only by way of sub-infeudation; that is, to hold as of himself; and in general only a part of his lands. Vide Wright's Tenures, p. 154; Co. Litt. by Harg. 43 a, n. (2).

(*h*) 2 Inst. 66.

(*i*) Id. 67.

been peculiar to England (*k*)), that by attainder of treason or felony the tenant not only forfeited his land, but his blood was held to be corrupted or stained; whereby every inheritable quality was entirely blotted out and abolished, so that no land could thereafter be transmitted from him or through him in a course of descent.

These [were the principal qualities, fruits, and consequences of the tenure by knight-service:] a tenure, by which a great part of the lands in this kingdom was held, [till the middle of the seventeenth century; and which was created, as Sir Edward Coke expressly testifies (*l*), 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 knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so called (though improperly), because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering, as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty* (*per magnum servitium*) (*m*), 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 (*n*). It was in most other respects like knight-service (*o*); only he was not bound to pay aid (*p*), or escuage (*q*); and, while 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 (*r*)]. And none could hold by grand serjeanty, but of the king only. [Tenure by *cornage*,

(*k*) Hallam, Mid. Ages, vol. i. p. 188, 7th ed.; 2 Bla. Com. 254; vide sup. p. 179.

(*l*) 4 Inst. 192.

(*m*) Co. Litt. by Harg. 108 a, n. (1).

(*n*) Litt. s. 153.

(*o*) Litt. s. 158.

(*p*) 2 Inst. 233.

(*q*) Litt. s. 158.

(*r*) Id. s. 154.

[—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),] when the tenure was immediately of the king (*y*), [a species of grand serjeanty (*z*).

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; first by sending others in their stead, and in process of time by 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* (*a*); *scutum* being then a well-known denomination for money: and in like manner it was called, in our Norman French, *escuage:* being indeed a pecuniary, instead of a military service. The first time this appears to have been taken, was in the fifth year of Henry the second, 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 Henry the second, 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 Charta*, that no scutage should be imposed without consent of parliament (*b*). But this clause was omitted in his son

(*y*) Co. Litt. 107 a.

(*z*) Litt. s. 156.

(*a*) Littleton, Coke, and Bracton, render it the "service of the shield," *i. e.* of arms, being a compensation for actual service; vide Co. Litt. by Harg. 68 b, 73 a, n. (2), 74 a, n. (1).

(*b*) "*Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri.*"—C. 112.

[Henry the third's charter; where we only find (*c*) that scutages or escuage should be taken as they were used to be taken in the time of Henry the second: that is, in a reasonable and moderate manner. Yet afterwards, by statute 25 Edward I. cc. 5 and 6, and many subsequent statutes (*d*), 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 escuage or scutage could not be levied but by consent of parliament (*e*); such scutages being indeed the groundwork of all succeeding subsidies, and the land tax of later times (*f*).

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 tending 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 burdens, which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages 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

(*c*) Cap. 37.
(*d*) Vide sup. p. 167.
(*e*) Old. Ten. tit. Escuage.
(*f*) As to the modern land-tax, vide post, bk. IV. pt. I. c. VII.

[of his estate during infancy. And then, as Sir Thomas Smith (*g*) 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 further, he was yet to pay half a year's profits as a fine for suing out *livery;* and also the price or value of his *marriage;*] or twice that value if he refused such wife as his lord and guardian tendered him without disparagement, and married elsewhere. [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 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 the first consented (*h*), in consideration of a proper equivalent, to abolish them all; though the plan proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution, for removing the feudal grievance of heritable jurisdictions in Scotland (*i*), which has since been pursued and effected by the statute 20 George II. c. 43 (*k*). 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

(*g*) Commonw. l. 3, c. 5.
(*h*) 4 Inst. 202.
(*i*) Dalrymp. of Feuds, 292.
(*k*) By another statute of the same year (20 Geo. 2, c. 50,) the tenure of *wardholding* (equivalent to the knight service of England) is for ever abolished in Scotland.

[the crown, and assured to the inferior lords, payable out of every knight's fee within their respective seigniories: an expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages, (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 seisins, and ousterlemains, values and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienations, 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* (*l*), be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage, save only tenures in frankalmoign, copyholds and the honorary services (without the slavish part) of grand serjeanty. A statute, which was a greater acquisition to the civil property of this kingdom than even *Magna Charta* 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.]

II. The second kind of tenure which we had to consider (*m*), and into which, by the statute just mentioned, all tenures by knight-service are now converted, is [*Free Socage*. Socage, in its most general and extensive signifi-

(*l*) Mr. Hargrave holds this mention of tenures *in capite* to have been a mistake in the framers of the act; vide Co. Litt. by Harg. 108, n. (5). There may be some doubt, however, as to the sense in which the term is used, as there were two kinds of tenure *in capite*; vide sup. p. 186. It is at all events certain that the act was not intended to prohibit persons from holding immediately under the crown. Indeed, it is in this manner that land in fee is now most usually held.

(*m*) Vide sup. p. 189.

[cation, 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 (*n*): 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 (*o*); "*ex donationibus, servitia militaria vel magnæ serjantiæ non continentibus, oritur nobis quoddam nomen generale, quod est socagium.*" Littleton also (*p*) 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. The service must therefore be certain, in order to denominate it socage: as to hold by fealty and 20*s*. rent; or by homage, fealty, and 20*s*. rent: or, by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the lord's land for three days; or by fealty only, without any other service: for all these are tenures in socage (*q*).]

(*n*) L. 2, c. 16, s. 9.

(*o*) L. 3, c. 14, s. 9.

(*p*) S. 117.

(*q*) Litt. ss. 117, 118, 119. As to the etymology of the term *socage*, it is derived by Littleton, Lord Coke, and others, from the French word *soc*, a ploughshare; its services being supposed to have consisted formerly of those of husbandry only, though changed in process of time to a pecuniary rent; vide Co. Litt. by Harg. 86 a, n. (1); Wright's Ten. 144. On the other hand this term is considered by Somner and Blackstone as originating in the Saxon *soc*, which signified a franchise or privilege, (though more especially one of jurisdiction); *socage* being distinguished from other tenures by the great privilege of fixed and ascertained services; vide 2 Bl. Com. p. 80. The opinion of Bracton, as one of the earliest authorities on the subject, would be entitled to great weight were it more decidedly expressed. "*Dici poterit socagium a socco, et inde tenentes socmanni, eo quod deputati sunt, ut videtur, tantummodo ad culturam, et quorum custodia et maritagia ad propinquiores parentes jure sanguinis pertinebant.*"—Bract. c. 35. This leans, though somewhat doubtfully, towards the derivation from the *plough;* but in another part of his work he speaks of the tenure called *socagium villanum* in a way that rather tends to assign to *socagium* the

But, as formerly shown on the authority of Bracton (*r*), [socage is of two sorts: *free*-socage, where the services are not only certain but honourable; and *villein*-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil (*s*), and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free socage. Of this tenure we are now to speak; and this, both in the nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any.] It was of a strongly feudal character indeed, being created by words of pure donation and livery of seisin, and invariably attended with the obligation of fealty at the least, (even where no other service was rendered,) and with all the incidents attaching to feuds in general. Yet it fell far short, upon the whole, of the severity of the tenure in chivalry; and this not only as being certain in its services, but also as being comparatively mild in some of its fruits and consequences. This will manifestly appear by the following enumeration of them.

1. The law of inheritance was the same in socage tenure as in tenure by knight-service (*t*).

2. Wardship [was also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, be-

meaning of *privileged* tenure. "*Est etiam genus villenagii, &c., quod dicitur* socagium villanum, *et quod est* villenagium *sed tamen* privilegiatum." (See the passage more fully cited, sup. p. 188.) As to *socmanni*, it may be remarked that they are frequently mentioned in Domesday Book; and in Hallam's Mid. Ages (vol. ii. pp. 386, 481, 7th edit.) they are supposed to have been derived from the superior class of Anglo-Saxon *ceorls*. It is stated, however, that they were perfectly exempt from all marks of villenage, both as to persons and estates; and they are considered as "the root of a noble "plant, the free socage tenants, or "English yeomanry."

(*r*) Vide sup. p. 188.

(*s*) Glanv. l. 7, c. 3.

(*t*) There was antiently however a time when socage lands descended to *all* the sons; Hale, Glanv. l. 7, c. 3; Hale, C. L. c. 11; sup. p. 180, post, p. 214.

[long to the lord of the fee; because, in this tenure, no military or other personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but his nearest relation (to whom the inheritance cannot descend (*u*)) was to be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. At fourteen this wardship in socage ceases: and the heir may oust the guardian, and call him to account for the rents and profits (*x*): for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular of wardship, as in also that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it: that young heirs, being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute, 12 Car. II. c. 24, enacted that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one (*y*). And if no such appointment be made, the Court of Chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin (*z*).

3. "Marriage," or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian but rather the reverse. For if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage (*a*). For the law made them account not only for

(*u*) Vide Co. Litt. by Harg. 88 b, n. (6).

(*x*) Litt. s. 123; Co. Litt. 89 a.

(*y*) Vide Co. Litt. by Harg. 88 b, n. (15).

(*z*) Ibid. n. (16). As to the law of guardian and ward, vide post, bk. III. c. IV.

(*a*) Litt. s. 123.

[what they *did*, but also for what they *might*, receive on the infant's behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but the statute of Charles 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 act for preventing clandestine marriages (*b*).]

4. [The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter (*c*): which were fixed by the statute of Westm. 1, c. 36, at 20*s*. for every 20*l*. 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. (*d*).]

5. Relief [is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l*., or one quarter of the supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small (*e*); and therefore Bracton (*f*) will not allow this to be properly a relief, but "*quædam præstatio loco relievii 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 socage they were due even though the heir was under age, because the lord has no wardship over him (*g*).

(*b*) 26 Geo. 2, c. 33. This act was repealed by 4 Geo. 4, c. 76, one of the present marriage acts, which substitute new provisions to prevent clandestine marriages.

(*c*) Co. Litt. 91 a.

(*d*) Vide sup. p. 205.

(*e*) Litt. s. 126.

(*f*) L. 2, c. 37, s. 8.

(*g*) Litt. s. 127.

[The statute of Charles the second reserves the reliefs incident to socage 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 (*h*).]

6. Primer seisin [was incident to the king's socage tenants *in capite*, as well as to those by knight-service (*i*). But primer seisins are, among the other feudal burthens, entirely abolished by the statute of Charles the second.]

7. The tenant in socage enjoyed the same right of aliening his lands as the tenant by knight-service (*k*).

8. Fines for alienation were, apparently, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service: for the statutes that relate to this point, and Sir Edward Coke's comment on them (*l*), speak generally of all tenants *in capite*, without making any distinction; but now all fines for alienation of lands holden *in capite* are demolished by the statute of Charles the second.

9. Escheat and forfeiture are equally incident to tenure in socage, as they were to tenure by knight-service. But by the effect of late statutes, which we shall have occasion to notice more particularly hereafter, the effect of the law of escheat for felony is now in every description of tenure materially mitigated (*m*).

Such was the tenure in free socage; being that under which the bulk of real property is holden at the present day; and which is now better known by its modern denomination of *freehold* (*n*). But this tenure, which we

(*h*) Freeman *v.* Booth, 3 Lev. 145; vide Co. Litt. by Harg. 93 a, n. (2).

(*i*) Co. Litt. 77 a.

(*k*) Vide sup. p. 200. But the tenant in socage might, by the custom of some particular places, also aliene by way of *testamentary disposition.* Co. Litt. by Harg. 111 b, n. (1).

(*l*) Co. Litt. 43 a; 2 Inst. 65, 66, 67.

(*m*) Vide 54 Geo. 3, c. 145; 3 & 4 Will. 4, c. 106, s. 10; 3 & 4 Will. 4, c. 23; vide post, bk. II. pt. I. c. XII.

(*n*) It may be worth while to remark, that the term *freehold* was formerly inadequate to express the particular kind of tenure; as it

have hitherto discussed only in its proper and ordinary shape, also comprised some particular varieties, viz. *petit serjeanty*, *tenure in burgage*, and *gavelkind*.

We may remember that *grand serjeanty* was a variety of the tenure in chivalry, involving honorary services to the king's person, such as carrying his sword or banner; and that these services are still reserved by the statute 12 Car. II. c. 24, though the tenure, in other respects, is converted into free socage (*o*). [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 render, both tending to some purpose relative to the king's person (*p*). Petit serjeanty, as defined by Littleton (*q*), 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.] The services being free and certain, it is in all respects free socage (*r*); though [being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty. And *Magna Charta* respected it in this light, when it enacted (*s*), 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 (*t*), and is expressly said by Littleton (*u*), 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 (*x*). It is indeed only a kind of town socage; as

was indifferently applicable both to knight-service and to free socage, and accordingly we find from Lord Coke that it was only used to express that the holding was not base; Co. Litt. 94 a; but as by the abolition of knight-service free socage has become the only free lay tenure, freehold is now taken as equivalent with free socage.

(*o*) Vide sup. pp. 201, 205.

(*p*) Co. Litt. 107 a, 108 b.

(*q*) S. 159.

(*r*) Wright's Tenures, 160.

(*s*) Cap. 27.

(*t*) Lib. 7, c. 3.

(*u*) S. 162.

(*x*) Litt. ss. 162, 163.

[common socage, by which other lands are holden, is usually of a rural nature.] Many of these tenements so held in antient burgage are subject to a great variety of customs: [the principal and most remarkable of which is that called *Borough-English*, so named in contradistinction (as it were) to the Norman customs, and which is taken notice of by Glanvil (*y*), and by Littleton (*z*); viz. that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father (*a*). For which Littleton (*b*) 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 (*c*) 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 it is not known that ever this custom prevailed in England, though it certainly did in Scotland (under the name of *mercheta* or *marcheta*), till abolished by Malcolm the third (*d*). 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

(*y*) Lib. 7, c. 3.

(*z*) S. 165.

(*a*) "The custom of Borough-English prevails in several cities and antient boroughs, and districts of smaller or larger extent adjoining to them, in different parts of the kingdom. The land is held in socage, but according to the custom it descends to the youngest son, in exclusion of all the other children of the person dying seised. In some places, this peculiar rule of descent is confined to the case of children, in others, the custom extends to brothers and other male collaterals."..... "The custom of Borough-English governs the descent of copyhold land in various manors."—Third Real Property Report, p. 8. Et vide as to Borough-English, Year-Book, 36 Hen. 6, 20; Co. Litt. by Harg. 10 a, n.(3), n (4).

(*b*) S. 211; et vide 8 Edw. 4, c. 18.

(*c*) 3 Mod. Rep. pref.

(*d*) Sel. Tit. of Hon. 2, 1, 47; Reg. Mag. l. 4, c. 31.

[nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle, and go to seek a new habitation. The youngest son, therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from the father, which one became his heir (*e*). So possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describes. Other special customs there are in different burgage tenures; as that in some the wife shall be endowed of *all* her husband's tenements (*f*), 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 (*g*), which in general was not permitted after the conquest, till the reign of Henry the eighth; though in the Saxon times it was allowable (*h*).]

Gavelkind (*i*) occurs as of common right in the county of Kent, almost the whole of which is subject to this tenure. It is universally known that the Kentish men obtained concessions from the Conqueror, by the effect of which they were permitted to retain their antient liberties. [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 (*k*),) we may fairly conclude

(*e*) "*Pater cunctos filios adultos a se pellebat, præter unum, quem hæredem sui juris relinquebat.*"—Walsing. Upodigm. Neust. c. 1.

(*f*) Litt. s. 166.

(*g*) S. 167.

(*h*) Wright's Tenures, 172.

(*i*) As to gavelkind, vide Year-Book, 36 Hen. 6, 20; st. 17 Edw. 2, st. 1, c. 16; 32 Hen. 8, c. 29; Co. Litt. 140 a; Robinson on Gavelkind.

(*k*) Stat. 32 Hen. 8, c. 29; Kitch. of Courts, 200; Co. Litt. 140 a. This custom prevails over almost the whole of the county of Kent, and in a qualified manner over copyhold lands in various parts of the kingdom.—Third Real Property Report, p. 8.

[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 (*l*). 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 (*m*). 2. The estate does not escheat in case of an attainder for felony, their maxim being "the father to the bough, the son to the plough (*n*)." 3. In most places the tenant had a power of devising lands by will, before the statute] authorizing the devise of lands (*o*), generally, [was made (*p*). 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together (*q*), which was indeed antiently the most usual course of descent all over England (*r*), 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 socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain (*s*). Wherefore by a charter of King John (*t*), Hubert, Archbishop of Canterbury, was authorized to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight-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.*]

(*l*) "*In toto regno, ante ducis adventum, frequens et usitata fuit: postea cæteris adempta, sed privatis quorundam locorum consuetudinibus alibi postea regerminans, Cantianis solum integra et inviolata remansit.*"—Analect. l. 2, c. 7.

(*m*) Lamb. Peramb. 614.

(*n*) Lamb. 634.

(*o*) The Statute of Wills, 32 Hen. 8, by which the power of devising lands in general was regulated, prior to the modern statute of 7 Will. 4 & 1 Vict. c. 26.

(*p*) F.N.B.198; Launder *v.* Brooks, Cro. Car. 561.

(*q*) Litt. s. 210.

(*r*) Glanvil, l. 7, c. 3; Hale, C. L. c. 11.

(*s*) Wright's Tenures, 211.

(*t*) Spelm. Cod. Vet. Leg. 355.

III. From the tenure of villenage (as described in its different branches by Bracton (*u*)) sprang our present *copyhold* tenure (*x*); [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 antient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day (*y*): just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest.] It is from the Normans, however, that we derive the particular form of manors with which we are conversant at present (*z*); and among this people, a manor (*manerium* (*a*)) seems to have been originally a district of ground held by a lord or great personage, who kept to himself such parts of it as were necessary for his own use, which were called *terræ dominicales*, or *demesne* lands (being those of the *dominus manerii*), and distributed the rest to freehold tenants, to be held of him in perpetuity (*b*). Of the demesne lands, again, part was retained in the actual occupation of the lord, for the purposes of his family; other portions were held in villenage (*c*), of which we shall presently speak more at large;

(*u*) Vide sup. p. 188.

(*x*) Vide sup. p. 189.

(*y*) Co. Cop. ss. 2, 10.

(*z*) Ibid. s. 10.

(*a*) Lord Coke (Cop. s. 31) suggests two derivations of this term: *à manendo*, because the owner of the manor usually resided there; and from *mesner*, in French, (to guide); the tenants being under the lord's guidance and direction. He gives the preference to the latter etymology.

(*b*) Lord Coke says, that a perfect manor cannot subsist without a perfect tenure, which he afterwards explains as a tenure between very lord and very tenant in *fee*. Co. Cop. s. 31; et vide per Lord Kenyon, Glover *v.* Lane, 3 T. R. 447; Attorney-General *v.* Parsons, 2 Tyrw. 223.

(*c*) "*Dominicum dicitur quod quis habet ad mensam suam—dicitur etiam dominicum, villenagium quod traditur villanis*," &c.—Bracton, as cited Co. Cop. s. 12. "*Est autem dominicum propriè terra ad mensam assignata, et villenagium quod traditur villanis ad excolendum.*"—Fleta, as cited, ib. And Lord Coke expresses his assent to this doctrine, that in strictness the demesne comprised the lands held in villenage, though popularly

and there was besides these, a portion which, [being uncultivated, was termed the lord's waste, and served for public roads and for common of pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships; and each lord or baron was empowered to hold a domestic court, called the court baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants.] If several of these manors were held (as was frequently the case) under one great baron, or lord paramount, his seigniory over them was termed an *honor* (*d*).

The villenage to which we have referred [was a species of tenure neither strictly feudal, Norman, or Saxon, but mixed and compounded of them all (*e*); and which also, on account of the *heriots* (*f*) that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks (*g*), a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the *folkland*, from which they were removeable 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 infe-

it signified only what he kept in his own hands, whether waste or cultivated.—Co. Cop. s. 14; et vide Attorney-General *v.* Parsons, 2 Tyrw. 223.

(*d*) 2 Bl. Com. 91; vide Co. Litt. by Harg. 108 a, n. (4). It is said that there are eighty honors in England, Com. Dig. Honor, where they are enumerated.

(*e*) Wright's Tenures, 215.

(*f*) Vide post, p. 222.

(*g*) Introd. Hist. Eng. 59.

[rior to every other condition (*h*). This they called villenage, and the tenants villeins, either from the word *vilis*, or else, as Sir Edward Coke tells us (*i*), *à villa;* because they lived chiefly in villages, and were employed in rustic works of the most sordid kind; resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another (*k*). They could not leave their lord without his permission; but if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held, indeed, small portions of land, by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes and any other the meanest offices (*l*): and their services were not only base, but uncertain both as to their time and quantity (*m*). A villein, in short, was in much the same state with us as Lord Molesworth describes to be that of the boors in Denmark, and which Stiernhook (*n*) 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 (*o*).

(*h*) Wright's Tenures, 217.
(*i*) Co. Litt. 116 a.
(*k*) Litt. s. 181.
(*l*) Litt. s. 172.
(*m*) Bracton, l. 4, tr. 1, c. 28.
(*n*) De Jure Sueonum, l. 2, c. 4.
(*o*) Litt. s. 177.

[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 (*p*); and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property (*q*). 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* (*r*). 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 villein; contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because by another maxim of our law, he is *nullius filius;* and as he could *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it (*s*). 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 (*t*)], without being subject to indictment at the king's suit (*u*).

[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 (*x*): 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 (*y*): 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

(*p*) Co. Litt. 140 a.
(*q*) Litt. s. 202.
(*r*) Ibid. s. 187.
(*s*) Ibid. ss. 187, 188.
(*t*) Ibid. ss. 189, 194. The additional matter which here follows in Blackstone, as to the villein's right of action against the lord, in the case of maihem, is not accurate. It is clear from Littleton that almost the only case, in which he could bring an action against the lord, was when he sued as executor; Litt. ss. 189, 192, 194.
(*u*) Co. Litt. 126 b.
(*x*) Co. Litt. s. 204.
(*y*) S. 204—6.

[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 againt his villein, this enfranchised him (z); 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 as himself, and therefore held it an implied manumission. But in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

Villeins, by 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 goodnature 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 were still said to hold their estates at the will of their lord, yet it is such a will as is agreeable to the custom of the manor; which customs were preserved and evidenced by the rolls of the several manor courts in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And as such tenants had nothing to show for their estates but these customs, and admissions in pursuance of them entered on those rolls, or the copies of such entries witnessed by the steward, they

(z) S. 208.

[now began to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold* (*a*).

Thus copyhold tenures, as Sir Edward Coke observes (*b*), 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 (*c*); who, by a long series of immemorial encroachments on the lord, at last established a customary right to those estates which before were held absolutely at the lord's will.] By the gradual progress of manumission also (either voluntary or constructive), the *personal* condition of villenage was at length everywhere commuted into freedom. At the period of the reformation in religion, this change had already become almost complete. [For Sir Thomas Smith testifies (*d*), that in all his time (and he was secretary to Edward the sixth) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery: for, he tells us, that "the holy "fathers, monks and friars had in their confessions, and "specially in their extreme and deadly sickness, convinced "the laity how dangerous a practice it was for one Christian "man to hold another in bondage, so that temporal men "by little and little, by reason of that terror in their con-"sciences, 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 con-"science to impoverish and despoil the church so much "as to manumit such as were bound to their churches, or

(*a*) F. N. B. 12.

(*b*) Cop. s. 32.

(*c*) In confirmation of this doctrine, see F. N. B. 12 C; Wright's Tenures, 214; 3 Reeves's Hist. Eng. Law, 158, 312. In Astle *v.* Grant, Doug. 725, a doubt is expressed by Lord Loughborough, whether the opinion that copyholders sprang from villiens be well founded; but it is an opinion that rests on the highest authority, and seems too firmly settled to be shaken.

(*d*) Commonwealth, b. 3, c. 10.

["to the manors which the church had gotten; and so kept "their villeins still."]

Even these remnants of the antient slavery, however, did not long survive, and the last traces of it have been entirely obliterated among us for at least two centuries; the last claim of villenage which we find recorded in our courts being in the fifteenth year of King James the first (*e*). But the abolition of the personal condition did **not** involve that of the copyhold tenure, to which it had given birth; and we may remember (*f*) that this tenure is one of those expressly reserved by the statute of Charles the second. In manors, therefore, we still find that species of tenants called copyholders; whose lands, though substantially their own property, are nominally part of the lord's demesnes, and are entered on the rolls of the customary court of the manor, as holden *at the will of the lord* according to the custom. And a manor (when in its proper and perfect state) also still comprises (according to its antient constitution (*g*)) some portion of freehold tenants holding of the manor in perpetuity (*h*), and a court baron, differing from the customary court of the copyholders (though usually held at the same time), and of which the freeholders are the judges (*i*).

No freehold, it is to be observed, can at the present day be converted into copyhold; of which the chief and most obvious reason is, that the essence of the latter tenure is immemorial custom, which can of course have no application where land is granted for the first time to be held according to that tenure (*k*). But, on the other hand, a copyhold is capable of being turned into freehold, by the lord's conveying to the copyholder the freehold of the

(*e*) Pigg *v.* Caley, Noy, 27; 11 Harg. St. Tr. 342.

(*f*) Vide sup. p. 205.

(*g*) Vide sup. p. 215.

(*h*) Glover *v.* Lane, 3 T. R. 447 a; Melwitch's case, 4 Rep. 26 b. Yet though there should be a failure of suitors to the court baron, and consequently in strictness of law an extinction of the manor, the jurisdiction of the customary court will not be affected; Coke's Tracts, 53.

(*i*) Co. Litt. 58 a; Co. Cop. s. 31.

(*k*) Revell *v.* Joddrell, 2 T. R. 424.

particular premises, or releasing to him the seignorial rights; which is called *enfranchisement* (*l*).

Copyhold, like the other tenures, involves the obligation of fealty. A copyhold tenement is *descendible* also, where the custom of the manor so permits, to the *heir*. As for the rule of descent it is the same (in the greatest number of manors) with the ordinary rule in free socage tenure; though in some it is according to the method in gavelkind, and in others according to that in borough-English (*m*). But an incident almost peculiar to copyholds (though it sometimes occurs in freehold lands) (*n*) is that of *heriots*. These, which are generally supposed to be a Danish custom (*o*) (and of which more will be said in a subsequent part of the work (*p*)), are a render of the best beast or other article (as the custom may be) to the lord, on the death of the tenant. If considered as a relic of villein tenure, there was 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; but it is now justly considered as one of the most oppressive circumstances which attend the modern law of tenures. The *wardship* in copyhold also resembles that in socage, for the lord is not guardian (except by special custom), but the guardianship belongs to the next of kin of the infant to whom the copyhold cannot descend (*q*); and he, like guardian in socage, is accountable to his ward for the profits. Copyhold tenure is, in some manors, subject also to *relief*, of the same nature with that in socage (*r*), and to *escheat*

(*l*) 1 Watk. Cop. 362. So if the copyholder convey to the lord, this (though no enfranchisement, as the land in the lord's hands was already free) is an *extinguishment* of the copyhold. As to the effect of the copyholder conveying to a stranger by force of an act of parliament, see Dimes *v.* Grand Junction Canal, 16 L. J. Rep. Q. B. 107.

(*m*) Third Real Property Rep. p. 14.

(*n*) Ibid. 16; Damerell *v.* Protheroe, 16 L. J. Rep. Q. B. 170.

(*o*) 2 Bl. C. 97.

(*p*) As to heriots, see further, bk. II. pt. I. c. XXII.

(*q*) 2 Watk. Cop. 101; Co. Litt. by Harg. 81 b, n. (13); vide 11 Geo. 4 & 1 Will. 4, c. 65, s. 3—10.

(*r*) See Doe *d.* Tarrant *v.* Hellier, 3 T. R. 164, 169.

and *forfeiture.* But a copyholder cannot *aliene* except through the medium of a surrender to the lord, and the copyhold passes not to the alienee, till the lord admits him. *Fines*, too, are in general payable to the lord on alienation, and there are other fines upon hereditary descent (*s*). [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 the copyholders, have tied them down to be *reasonable* in their extent; otherwise they might amount to a disherison of the estate. No fine therefore is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years' improved value of the estate (*t*). From this instance we may judge of the favourable disposition that the law of England (which is a law of liberty) hath always shown to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands, by declaring, that the will of the lord was to be interpreted by the custom of the manor; 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.]

The tenure that we have been describing, is copyhold *commonly so called*, or tenure *by copy of court roll, at the will of the lord according to the custom of the manor;* which, as we have seen, is lineally descended from the antient one of *pure* villenage. In the division, however, that we formerly made of lay tenures (*u*) the term *copyhold* is to be understood in a larger sense, and as importing (according to the view sanctioned by the highest authorities) (*v*) every

(*s*) 1 Watk. Cop. 286.

(*t*) Astle *v.* Grant, Doug. 724; Lord Verulam *v.* Howard, 7 Bing. 327.

(*u*) Vide sup. p. 189.

(*v*) The st. 12 Car. 2, c. 24, sanc-

customary tenure (that is, every tenure depending on the particular custom of a manor), as opposed to free socage or *freehold;* which may now (since the abolition of knight-service) be considered as the general or common law tenure of the country (*x*). And copyhold, in this wider application of the term, comprises, besides the principal and common kind that we have just been delineating, two varieties, viz., *antient demesne* and *customary freehold.*

The first of these seems to be the same tenure as described by Bracton under the name sometimes of *privileged* villenage, and sometimes of *villein-socage.* This, he tells us (*y*), is such as has been held of the kings of England from the Conquest downwards; and the tenants wherein "*villana faciunt servitia, sed certa et determinata.*" 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 its services, and the freedom of socage in their certainty,—he has therefore given a name compounded out of both, and calls it *villanum socagium.*]

Antient demesne is a tenure existing in certain manors, [which, though now perhaps granted out to private subjects, were actually in the hands of the crown at 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 (*z*). The tenants] in these manors of the crown [were not all of the same order or

tions no other lay tenures but "*free and common socage,*" and "*copyhold,*" (vide sup. p. 205). And Blackstone remarks that all lay tenures "are "now in effect reduced to two spe-"cies, free tenure in common so-"cage, and base tenure by copy of "court roll."—2 Bl. C. 101. Et vide Co. Cop. ss. 17, 32; Calthorpe, 51, 54; Doe *v.* Huntingdon, 4 East, 288; Doe *v.* Llewellyn, 5 Tyrw. 899; 1 Gale, 193; 2 C. M. & R. 503, S. C.

(*x*) Vide Wright's Ten. 138, 139; Anthony Lowe's case, 9 Rep. 123. As to the term *freehold,* vide sup. p. 210, n.

(*y*) L. 4, t. 1, c. 28, s. 5. Vide sup. p. 188.

(*z*) F. N. B. 14, 16; Crowther *v.* Oldfield, Salk. 364.

[degree. Some of them, as Britton testifies (*a*), 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 (*b*). 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 lands 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 (*c*); as to try the right of their property in a peculiar court of their own, (called a court of antient demesne (*d*)), by a peculiar process, denominated a writ of *right close* (*e*); not to pay toll or taxes; not to contribute to the expenses of knights of the shire; not to be put on juries; and the like (*f*).]

Manors of antient demesne accordingly comprise, to this day, both copyholders in the proper and common sense of the term, and also such privileged tenants as above described (*g*), who are alone properly called *tenants in antient demesne* (*h*). As to these, though their services, like those of pure villeins, were originally base, yet (as appears by the account of them just given) they were distinguished from the latter, [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

(*a*) C. 66.
(*b*) F. N. B. 228.
(*c*) 4 Inst. 269.
(*d*) Doe *v.* Roe, 2 Burr. 1046; Alden's case, 5 Rep. 105; 3 & 4 Will. 4, c. 74, ss. 4, 5, 6.
(*e*) F. N. B. 11.
(*f*) Ibid. 14.
(*g*) F. N. B. 11 M., 12 B; Co. Cop. s. 32.
(*h*) Third Real Property Rep. 13.

[*sokemanries;* which he describes (*i*) 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 demesne." And the same name is also given them in Fleta (*k*).] Tenants in antient demesne, like common copyholders, require admittance by the lord to perfect their title; and they hold according to the custom of the manor, though not *ad voluntatem domini* (*l*).

Customary freehold (the other variety to which we referred) exists in many parts of the kingdom. The evidences of title are to be found (as in pure or common copyhold) upon the court rolls; and the entries declare the holding to be according to the custom of the manor, but it is not said to be *at the will of the lord* (*m*). The customs of these manors are subject to great variety. But in general the incidents of customary freehold are similar to those of common copyhold (*n*).

[Mention has hitherto been made of *lay* tenures only; because there is still behind, one other species of tenure,

(*i*) C. 66.

(*k*) L. 1, c. 8.

(*l*) 2 Bl. C. 101; Semb. acc. Co. Cop. s. 32; sed vide Third Real Property Rep. p. 13.

(*m*) Co. Cop. s. 32; vide Third Real Property Rep. p. 20; Co. Litt. by Harg. 52 b. n. (1). There is also a kind of customary estate called *tenant right*, said to be peculiar to the north of England, and which falls, like other customary estates, under the general class of copyhold, though distinguished from the common kind by many of its incidents. Vide Doe *v.* Huntingdon, 4 East, 288; Burrell *v.* Dodd, 3 Bos. & Pul. 378; Graham *v.* Jackson, 6 Q. B. 835; Passingham, app. Pitty, resp. 17 C. B. 313.

(*n*) As to the state of the law with respect to the *devise* of customary freeholds before the late stat. 7 Will. 4 & 1 Vict. c. 26, vide Third Real Property Rep. p. 22; Doe *v.* Llewellen, 5 Tyrw. 899; Hodgson *v.* Merest, 9 Price, 556. But by the 3rd section of that statute the power of devising extends to all customary freehold. There has been much controversy upon the question whether the freehold, in this description of tenure, is vested in the tenant, or (as in the case of common copyhold) in the lord; see Blackst. Law Tracts, Cons. on Copyhold; 2 Scriven, 679, 3rd edit. and the cases there cited; Third Real Property Rep. 20. As to *antient demesne*, it is clear that the freehold is in the tenant; 2 Inst. 325; 2 Scriven, 678, (n.).

[reserved by the statute of Charles the second, which is of a *spiritual* nature, and called the tenure in frankalmoign.

IV. Tenure in *frankalmoign, in libera eleemosyna,* or free alms, is that, whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever (*o*). The service which they were bound to render for these lands was not certainly defined: but only, in general, to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other services but this) (*p*), because this divine service was of a higher and more exalted nature (*q*). 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 (*r*); the nature of the service being upon the Reformation altered and made conformable to the purer doctrines of the Church of England. It was an old Saxon tenure, and continued under the Norman revolution, through the great respect that was shown to religion and religious men

(*o*) Litt. s. 133.

(*p*) Ibid. 131.

(*q*) Ibid. 135.

(*r*) Vide Third Real Property Rep. p. 7. That Blackstone is correct in stating this as the tenure of the parochial clergy, is confirmed by the language of the *assisa utrum*, the antient remedy of the parson for recovering of his glebe, &c. in which the point of inquiry always was "*utrum tantum terræ sit libera eleemosyna pertinens ad ecclesiam ipsius, an laicum feodum.*" —Bract. l. 4, tr. 5, c. 1. It is true, indeed, that in the case of a parson the inheritance is said to be in *abeyance*, and the parson entitled for his *life* only (vide post, p. 237), and this at first sight appears inconsistent with the nature of frankalmoign, which always implies a gift in *perpetuity*: but the difficulty is removed by the remark of Bracton (ibid. c. 2), "*nihil clamare poterit nisi nomine ecclesiæ suæ, quia in ecclesiis parochialibus non fit donatio personæ sed ecclesiæ.*" The inheritance, according to this view, resides not in himself, but in his church. Et vide Litt. s. 646. The tenure of the parochial clergy, however, will be of this kind only where the grant was made in the antient form, to hold *ut in libera eleemosyna.* See Wats. C. L. 373; Plowd. 242; 1 Inst. 94 b.

[in antient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions (*s*): just as the Druids, among the antient Britons, had *omnium rerum immunitatem* (*t*). 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 (*u*). Wherein it materially differs from what was called *tenure by divine service:* in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor (*x*). All donations in frankalmoign are indeed now out of use; for, since the statute of *Quia emptores*, 18 Edward I., none but the king can give lands to be holden by this tenure (*y*). So they are only mentioned because *frankalmoign* is excepted by name in the statute of Charles the second, and therefore subsists in many instances at this day.]

Having made these observations with respect to tenures in general, it may be now proper to add, that in proceeding further to investigate the nature and properties of corporeal hereditaments, we shall for the present suppose them held by the ordinary tenure of free socage, or free-

(*s*) Seld. Jan. 1, 42.

(*t*) Cæsar de Bell. Gal. l. 6, c. 13.

(*u*) Litt. s. 136.

(*x*) Litt. s. 137.

(*y*) Litt. s. 140. By this statute no subject may grant lands in perpetuity to hold of himself; ibid. From which it follows, that none can grant in frankalmoign; for (as Littleton afterwards remarks) none may hold in frankalmoign, but of the grantor and his heirs, s. 141, and the estate in frankalmoign is always in perpetuity.—Co. Litt. 94 b.

hold; and the reader may dismiss the subject of copyhold from his consideration, till we arrive at a later part of the treatise, when we shall have occasion to devote a separate chapter to the more particular examination of property holden by that tenure (z).

(z) Vide post, bk. II. pt. I. c. XXII. It may be desirable to mention here, that as regards some matters of general interest, there is now no distinction between freehold and copyhold in point of practical effect; the two tenures being placed by modern statutes on the same footing, as far as these subjects are concerned. These are *the qualification to vote at elections of members of parliament for counties;*—and *the qualification to serve on juries.* See, as to the former, 31 Geo. 2, c. 14, and 2 Will. 4, c. 45, s. 19; as to the latter, 6 Geo. 4, c. 50, s. 1.

CHAPTER III.

OF FREEHOLD ESTATES OF INHERITANCE.

THE second point to be considered with regard to corporeal hereditaments (*a*) is the nature of the *estates* which may be had in such of them as are of free tenure, reserving for subsequent consideration (*b*) the subject of corporeal hereditaments held in base tenure. [An estate in land signifies such interest as the tenant hath therein; so that if a man grants all *his estate* in Dale to A. and his heirs, everything that he can possibly grant shall pass thereby (*c*). It is called in Latin *status:* it signifying the condition or circumstance in which the owner stands with regard to his property.]

And here it is material, in the first place, to remark that some kind of actual interest or ownership is implied in the term, for a bare *possibility*, (such, for example, as the expectation of the eldest son of succeeding, upon his father's decease, to the inheritance of his lands,) will not satisfy the legal idea of an estate (*d*). Nor will a mere *power* amount to an estate; as if a man by will orders his land to be sold by his executors: for they will in such case take neither right nor title in the land, but only a bare authority (*e*).

(*a*) Vide sup. p. 173.

(*b*) Vide post, bk. II. pt. I. c. XXII.

(*c*) Co. Litt. 345 a.

(*d*) Jones *v.* Roe, 3 T. R. 93; Doe *v.* Tomkinson, 2 Mau. & Sel. 170. There are two kinds of possibility in law:—one a bare possibility, such as referred to in the text; the other a possibility coupled with an interest.—Ibid. The latter may without impropriety be considered as an estate (though an estate in contingency), and may now, by the express provision of 8 & 9 Vict. c. 106, s. 6, be disposed of by deed.

(*e*) Co. Litt. 265 b; Co. Litt. 113 a, n. (2).

And the same may be said of a mere *revocable licence or permission* to make a certain use of land (*f*). But on the other hand, there are various descriptions of actual interest to which the term applies. The leading distinction to which estates are subject is that of *legal* and *equitable* estates; the first being properly cognizable in the courts of common law, though noticed also in the courts of equity; and the second being properly cognizable in the latter courts, and not even noticed, generally speaking, in the former (*g*).

It is of legal estate alone (which is the original and primary idea) that we shall have occasion at present to speak; and we purpose to consider it [in a threefold view: first, with regard to the *quantity of interest* which the tenant has in the tenement; secondly, with regard to the *time* at which that quantity of interest is to be enjoyed; and, thirdly, with regard to the *number* and *connection* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent.] Thus, either the ownership is to subsist in the tenant during his own life, or the life of another man: or it is vested in the tenant and 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 the tenant and his representatives for ever. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold.*]

A freehold estate—*liberum tenementum*, or frank tenement, as it was formerly called—is an estate either of inheritance, or for life, in lands or tenements of free tenure (*h*): and it

(*f*) See R. *v.* Mellor, 2 East, 189; Williams *v.* Morris, 8 Mee. & W. 493; Wood *v.* Leadbitter, 13 Mee. & W. 838; Perry *v.* Fitzhowe, 8 Q. B. 757; Adams *v.* Andrews, 15 Q. B. 284; Hewitt *v.* Isham, 7 Exch. 77; Roffey *v.* Henderson, 17 Q. B. 574; Taplin *v.* Florence, 10 C. B. 764.

(*g*) Sanders on Uses, 8. And see Alpass *v.* Watkins, 8 T. R. 516; Hardr. 469; 2 Fonb. 257; Bac. Uses, 77; Murley *v.* Sherren, 8 Ad. & El. 754.

(*h*) The tenure itself, we may recollect, is expressed by the same term of *freehold*: vide sup. p. 210, n. As

is material to our proper conception of it to remark, that at the common law, and prior to certain alterations in our system to be hereafter explained, an estate of this description in hereditaments corporeal could in general be created or transferred only by the ceremony called *livery of seisin* (*i*), attended with proper words of donation; which ceremony consisted, as its name imports, of a solemn delivery of possession; and is in fact the feudal investiture of which we spoke in the last chapter.

This method (which is still capable of being used) is called a *feoffment;* and the parties between whom it takes place are called the *feoffor* and the *feoffee.* By the common law, the donation with which the livery is accompanied might be merely oral; but now, by the Statute of Frauds, 20 Car. II. c. 3, it must be expressed by some instrument in writing, under the signature of the feoffor or of his agent by writing lawfully authorized.

It appears by our definition, that estates of freehold may be classed as being [either estates *of inheritance*, or estates *not of inheritance* (*k*)]; and these two kinds will each be considered in their order.

An estate of inheritance is where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law upon the persons who successively represent him *in perpetuum*, in right of blood (*l*), according to a certain established order of *descent*, which

to the definition here given of freehold estate, it is according to Co. Litt. 43 b, where it is laid down that "tenant in fee, tenant in tail, and "tenant for life, are said to have a "frank tenement, a freehold, so "called, because it doth distinguish "it from terms of years, chattels "upon uncertain interests, lands in "villenage, or customary or copy-"hold lands." Blackstone's definition of freehold is, that it is "such "an estate as is conveyed by livery "of seisin."—2 Bl. Com. 104; but he adds, that as estates of inheritance, or for life, and no other, are conveyed with this solemnity, therefore no others are properly freehold.

(*i*) Co. Litt. 49 a. As to the manner of making livery, vide Doe *v.* Taylor, 5 Barn. & Ad. 575.

(*k*) Edward Seymour's case, 10 Rep. 97 b.

(*l*) Co. Litt. 237 b.

we shall have occasion hereafter to explain (*m*). These persons are called his *heirs*, and himself their *ancestor*.

An estate of inheritance is otherwise called a *fee* (*n*).

[The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium* (*o*); which, as we have seen, is a man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree, and the owner thereof hath *absolutum et directum dominium*. 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. This allodial property no subject in England has, it being a received and now undeniable principle in the law, that all the lands in England are holden mediately or immediately of the crown. The sovereign therefore, only, hath *absolutum et directum dominium* (*p*); 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 were laid upon the first feudatory when it was originally granted.

This is the primary sense and acceptation of the word *fee*. But, as Sir Martin Wright very justly observes (*q*), the doctrine "that all lands are holden" having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the con-

(*m*) As to the law of descent, vide post, bk. II. pt. I. c. XI.

(*n*) "Fee simple" and "inheritance" are used as convertible terms, Litt. s. 9; Litt. s. 1; Flet. l. 5. c. 5, s. 27.

(*o*) As to allodial property, vide sup. p. 174.

(*p*) "*Prædium domini regis est directum dominium, cujus nullus est author nisi Deus.*"—Co. Litt. 1 b.

(*q*) Of Ten. 148.

[tinuance or quantity of estate. A *fee*, therefore, in general, signifies an estate of inheritance (*r*), being the highest and most extensive interest that a man can have in a feud. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man (*s*).]

Estates of inheritance are either estates in *fee simple* or estates in *fee tail* (*t*).

I. An estate in fee simple (*u*) is that which a man hath to hold to him and his heirs general (*x*), that is, his heirs both lineal and collateral, male and female; and this is often called an "estate in fee," without the addition of the word "simple" (*y*); though, as already explained, a "fee" more properly signifies any estate of inheritance. Where a man claims an estate in fee simple in possession in a corporeal (*z*) hereditament, the precise technical expression is as follows: that he is "seised in his demesne as of fee," (*in dominico suo ut de feodo*): the words *in dominico*, or "in his demesne," signifying that he is seised as owner of the land itself, and not merely of the seigniory or services (*a*);

(*r*) Litt. s. 1; Flet. l. 5, c. 5, s. 27.

(*s*) Co. Litt. 1 b.

(*t*) "An estate of inheritance is either fee simple or fee tail."—Edward Seymour's case, 10 Rep. 97 b. Et vide Litt. s. 13; Co. Litt. 1 b, 19 a, 27 b; Vaughan, 273. Blackstone divides inheritances into such as are *absolute* (which he considers as equivalent to fees simple) and such as are *limited*, of which he considers fees tail as forming a species. 2 Bl. Com. 104. But the authorities in favour of the division in the text (which is the more usual one) greatly preponderate.

(*u*) As to this estate, vide Co. Litt. 1 a—18 b.

(*x*) Wright's Tenures, 147; Co. Litt. 1 b. It is to be observed that we are treating at present of natural persons only. Artificial persons, or *corporations*, of whom we shall have occasion to speak hereafter, hold estates in fee simple, to them and their *successors*. Co. Litt. 8 b.

(*y*) Litt. s. 293.

(*z*) Where the subject is incorporeal, or the estate expectant on a precedent freehold, the words "*in his demesne*" are omitted. Com. Dig. Pleader (C. 35.)

(*a*) Blackstone considers these words "in his demesne," as signifying that it is "his property, as belonging to him and his heirs for ever."—2 Bl. Com. 105. But this assigns no meaning to them beyond what would belong to the other words with which they are con-

and the words "as of fee" importing that he is seised of an estate of inheritance in fee simple, and also (in reference to the original meaning of the term *fee*) that he is not the absolute or allodial owner, but holds (feudally) of a superior lord (*b*).

The quality of being always holden of a superior lord (the nature of which was fully explained in the Chapter on Tenures) is incident to every estate in fee simple belonging to a subject; but the tenure is no longer (as formerly) of the person from whose immediate grant the fee is derived, but of the person to whose seigniory it has of antient time belonged. This is by the effect of the statute of *Quia emptores* (18 Edw. I.) which was passed to put a stop to the practice of the subinfeudation (*c*) of the fee simple. For, according to that practice (which was antiently allowed), a new relation of lord and tenant was, upon each successive alienation of the fee, continually created between the alienor and alienee; and the latter consequently held of the former, and not of the chief lord under whom the alienor himself held. But this being found prejudi-

nected. Lord Coke understands the word *demesne*, when used in this particular connection, to signify *de main* or of the *hand*, because it is applied only to corporeal or tangible subjects of property. Co. Litt. 17 a. But the Latin term *dominicum* is opposed to this derivation; for it is evidently to be traced to *dominus*. On the other hand, there is abundant authority for holding that *dominicum* properly signifies the land which the feudal lord retained to his own use for sustentation of his household, as distinguished from what he granted out on services, and that the true sense of seisin in demesne is that given in the text. Thus it is laid down in Fleta, l. 5, c. 5, s. 18—"*Est dominicum propriè terra in mensam assignata, &c.*" And again, "*Poterit unus tenere in feodo quoad servitia, sicut dominus capitalis, et non in dominico—alius in feodo et dominico, et non in servitio, sicut liberè tenens alicujus,*" s. 26. And Bracton, in treating of the *assisa utrum*, says, "*refert qualiter fuit seisitus, utrum scilicet in dominico, vel servitio.*"—Bract. l. 4, tr. 5, c. 2, s. 2. As for the exclusive appropriation of the term to tangible possessions, that is referable merely to the circumstance, that what the lord applied to the use of his household naturally consisted of property of that description, and not of incorporeal and intangible subjects.

(*b*) 2 Bl. Com. 105.

(*c*) As to subinfeudation, vide sup. pp. 175, 187.

cial to the interests of the chief lords, by exposing them to the frequent loss of their escheats, wardships, and marriages, the statute in question was passed for their protection (*d*); directing that upon all sales or feoffments of land in fee simple (*e*), the feoffee shall hold the same, not of his immediate feoffor, but of the next lord paramount, of whom such feoffee himself held; and by the same services. Since this statute (*f*), therefore, the vendor or grantor of land in fee simple has no longer been able to convey it to be holden of himself, but the grantee must take it to hold of the same seigniory to which the fee immediately belonged when the statute passed (*g*),—unless something should have since occurred to alter the tenure. Where, from the lapse of time, no badges of tenure under any subject can now be traced, the land will be considered as holden immediately of the crown (*h*), and by the service of mere fealty; which is the least and lowest service the law can create (*i*), and which being now never exacted, has become a merely nominal obligation (*k*). But in many instances a private lord can still be shown to be entitled to the immediate seigniory; the ultimate one, as formerly remarked, being in all cases vested in the sovereign.

A fee simple is the most extensive estate of inheritance that a man can possess in land (*l*); it is the entire property therein (*m*): and to a fee simple (as indeed to most other

(*d*) 2 Inst. 66, 500.

(*e*) 2 Inst. 505.

(*f*) It is said that the stat. *Quia emptores* did not extend to the king's own tenants *in capite*, but that the like law was afterwards declared as to them by the statute *De Prerogativa Regis*, 17 Edw. 2, c. 6, and 34 Edw. 3, c. 15. Vide 2 Bl. Com. 91. It would seem, however, that the stat. *Quia emptores* did in effect apply to the tenants *in capite*, where they held *ut de honore*, and not *ut de corona*. Wright's Tenures, 163; Taylor *v.* Horde, Burr. 108. As to the distinction between these two tenures *in capite*, vide sup. p. 186.

(*g*) Bradshaw *v.* Lawson, 4 T. R. 443.

(*h*) Booth, 135.

(*i*) Co. Litt. 98 a.

(*k*) Co. Litt. by Harg. 68 b, n. (5).

(*l*) Litt. s. 11; Co. Litt. 18 a; Vaughan, 269.

(*m*) Butler's Fearne, p. 13 (note); Co. Litt. 18 a; 2 Saund. 388 b; Machell *v.* Clarke, Lord Ray. 779; 2 Inst. 336; Edward Seymour's case, 10 Rep. 97 b.

estates) is attached—as an inseparable incident—the right of alienation (*n*), at the mere pleasure of the tenant, to the full extent of the interest which is vested in the tenant himself, or for any smaller estate. If he alienes to the full extent of his interest, or, in other words, conveys away the fee simple, it follows of course that the alienee takes an estate to himself and his *own* heirs, answerable to that which the original tenant had to him and *his* heirs.

[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 the grantor 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. Yet sometimes the fee may be in *abeyance* (*o*),] that is, only in remembrance, intendment, and consideration of the law (*p*); there being no person *in esse*, in whom it can vest and abide; though the law considers it as always potentially existing. This may be exemplified in [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 (*q*). 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 abey-

(*n*) Litt. s. 360; Co. Litt. 223 a; 1 Cr. Dig. 20.

(*o*) As to the doctrine of *abeyance*, see Co. Litt. 341 a, 342 b; Litt. 646, 647; Butler's Fearne, p. 360, 9th ed.; 1 Prest. Est. 503; Camoys' Peerage Case, 5 Bing. N. C. 763; et vid. sup. 227, n.

(*p*) Blackstone considers abeyance as also importing "*expectation*," and Co. Litt. 342 b, is to the same effect. Yet Lord Coke himself afterwards remarks that the fee simple may be in *perpetual* abeyance (as in the case of a parson) "without any expectation to come *in esse*." Co. Litt. 343 a. Littleton's exposition, therefore, which is that followed in the text, seems to be the more correct; vide Litt. s. 646.

(*q*) Litt. s. 646. Lord Coke, however, holds that a parson has for some purposes a fee simple qualified; Co. Litt. 341 a.

[ance, until a successor be named, and then it vests in the successor (*r*).

The word "heirs" is necessary in the grant or donation, in order to make a fee or inheritance. For if the 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 (*s*). 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 it was required that the form of the donation should be punctually pursued; or that, as Craig (*t*) expresses it in the words of Baldus, "*donationes sint stricti juris, ne quis plus donasse præsumatur 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 has some exceptions—and particularly 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 has always been 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, even before the late act of 7 Will. IV. & 1 Vict. c. 26, was construed to have an estate of inheritance; for the intention of the devisor was sufficiently plain from the words of perpetuity annexed, though he had omitted the legal words of inheritance (*u*). But if the devise were

(*r*) Litt. s. 647; Co. Litt. 342 b.

(*s*) Litt. s. 1; Wright *v.* Dowley, 2 W. Bl. 1185.

(*t*) L. 1, t. 9, s. 17.

(*u*) Thus, too, a devise to A. (before the new Will Act above-mentioned), subjecting A. to a yearly payment to B., was, on the same principle, adjudged to give A. an estate in fee by implication. See Peppercorn *v.* Peacock, 3 Man. & G. 356; Doe *d.* Sams *v.* Garlick, 14 Mee. & W. 702.

to a man and his assigns, without annexing words of perpetuity, there the devisee was held to take only an estate for life; for it did not appear that the devisor intended any more. A new rule of construction, however, is now provided, by a positive law, for all such cases; for by the statute just mentioned (sect. 28), it is provided, that where any real estate shall be devised without words of limitation, it shall be construed to pass the whole interest which the testator had power to dispose of, unless the contrary intention should appear by the will.

Estates in fee simple are divided into three sorts:—1, *fee simple absolute* (that is, free from all qualification or condition); 2, *fee simple qualified or base;* 3, *fee simple conditional* (*x*),—a division which relates, it is to be observed, to the *quality*, not the *quantity*, of the estate; for it is laid down by Lord Coke that in the latter respect both fees qualified and fees conditional are equivalent to fees simple absolute (*y*).

1. The first (or fee simple absolute) requires no par-

(*x*) This division of fees simple is given by Lord Coke as the common one in his time (Co. Litt. 1 b); and is followed by Powell, J., in Idle *v.* Cooke, Lord Raym. 1148, and by the Court of K. B. in Martin *v.* Strachan, reported 5 T. R. 107, *in notis.* It is to be observed, however, that the two last classes of *qualified* (or *base*) and *conditional* are both referred by Lord Coke to a more general head of fees simple *determinable* (a term still in frequent use). See Edward Seymour's case, 10 Rep. 97 b, where estates of inheritance are distributed with great clearness and precision, as follows:—First, they are either *fee simple* or *fee tail.* Estates in fee simple are either *absolute* (i. e. indeterminable) or *determinable.* Those which are determinable are either *derived out of an estate in fee simple absolute*, or *derived out of an estate in fee tail.* The first of these are created either by way of *condition* (as upon mortgage), or by way of *limitation* (as if A. enfeoffs B. of the manor of D. to hold to him and his heirs so long as C. has heirs of his body); the first sort being called fees simple *conditional*, the second, fees simple *limited and qualified.* The fee simple derived out of an estate tail, Lord Coke exemplifies by the case where tenant in tail bargains and sells to W. H. and his heirs, who takes an estate in fee simple, as long as the tenant in tail has heirs of his body, derived out of the estate tail. See also Walsingham's case, Plowd. 557; Willion *v.* Berkley, ibid. 241.

(*y*) Co. Litt. 18 a.

ticular remark; the two others involve considerations of greater intricacy.

2. [A base (or qualified) fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end (*z*). As, in the case of a grant to A. and his heirs, *tenants of the manor of Dale;* in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So, when Henry the sixth granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle;—here John Talbot had a base or qualified fee in that dignity (*a*), and the instant he or his heirs quitted the seigniory of this manor, the dignity was at an end.] This estate is a fee simple, because it is limited to the heirs general, and may by possibility endure for ever; yet, as that duration depends upon the concurrence of collateral circumstances, which qualify the donation, it is therefore not an absolute, but a qualified or base (*b*) fee.

3. A conditional fee seems properly to comprise every fee simple granted upon condition (*c*), but the term is usually understood to refer to that particular species called a conditional fee at the common law.

[A conditional fee at the common law, was a fee restrained] in its form of donation [to some particular heirs,

(*z*) As to these fees vide Lord Cardigan *v.* Armitage, 2 Barn. & Cress. 202.

(*a*) Co Litt. 27 a.

(*b*) It is proper to observe, with respect to this term of *base* fee, that it has usually a more restricted application, viz., to that species of qualified fee which is created where tenant in tail conveys his estate by bargain and sale to another and his heirs, and which Lord Coke describes as a determinable fee derived out of an estate tail; vide sup. p. 239, note (*x*). And in the Act for Abolition of Fines and Recoveries, 3 & 4 Will. 4, c. 74, its meaning is by express provision confined (so far as that act is concerned) to the estate created by the alienation of the tenant in tail where the issue are barred, but those in remainder or reversion are not.

(*c*) Edward Seymour's case, 10 Rep. 97 b. Vide sup. note (*x*).

[exclusive of others: "*donatio stricta et coarctata* (*d*); *sicut certis hæredibus, 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 (*e*).] We say restrained in the *form of donation;* because, in point of legal *effect*, such a gift was construed by the judges of former days, as conferring not merely an estate descendible to particular heirs, but a fee simple, though a fee simple subject to condition (*f*). For they 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 (*g*).] They therefore called it a fee simple, on condition that he had issue. [So that as soon as the grantee had any issue *born*, his estate was supposed,] by the performance in some sense of the condition (*h*), to become absolute; 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 (*i*). 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 (*k*). 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his

(*d*) Flet. l. 3, c. 3, s. 5.

(*e*) Blackstone remarks here, that there are strong traces of such particular limitation in our earliest Saxon laws, from which he cites the following:—"*Si quis terram hæreditariam habeat, eam non vendat a cognatis hæredibus suis, si illi viro prohibitum sit, qui eam ab initio acquisivit, ut ita facere nequeat.*"—Ll. Ælfred. c. 37.

(*f*) Nevil's case, 7 Rep. 34 b.

(*g*) Stat. de donis, 13 Edw. 1, c. 1; Willion *v.* Berkley, Plowd. 241.

(*h*) It was performed, says Lord Coke, "to some intent;" Nevil's case, 7 Rep. 34 b.

(*i*) "The reason thereof," says Lord Coke, "was, because he having "a fee simple, and having issue, his "issue could not avoid the aliena-"tion, because he claimed fee sim-"ple, whereof his father might bar "him." Nevil's case, ubi sup.; Co. Litt. 19 a; 2 Inst. 333; et vide Doe *v.* Clark, 5 B. & Ald. 461.

(*k*) Co. Litt. 19 a; 2 Inst. 334.

[issue(*l*). 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 (*m*); for if the issue had afterwards died, and then the tenant or original grantee had died, without making any alienation, the land,] by force of the condition, [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 fees-simple took care to aliene as soon as they had performed the condition by having issue; and afterwards re-purchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general according to the course of the common law. And thus stood the old law with regard to conditional fees:] a subject of no great practical importance, this kind of gift having been long since construed (as we shall presently see) in a different manner. But, as Lord Coke observes (*n*), these things, [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 (*o*), and therefore remain as at the common law.]

II. The subject of conditional fees leads us, by a natural introduction, to our second general division of estates of inheritance (*p*)—namely, *estates in fee-tail*, or, as

(*l*) Co. Litt. 19 a.

(*m*) Nevil's case, 7 Rep. 34 b; Willion *v.* Berkley, Plowd. 247.

(*n*) Co. Litt. 19 a.

(*o*) As to the things capable of being entailed, vide Co. Litt. by Harg. 20 a, n. (3), n. (5); Moore *v.* Lord Plymouth, 7 Taunt. 614.

(*p*) Vide sup. p. 234.

they are more concisely termed, *estates tail.* An estate tail (*q*) is that which a man hath to hold to him and the heirs of his body, or to him and particular heirs of his body; being, as to the form of donation, the same kind of estate that we have just been considering under the name of fee simple conditional (*r*); for in that light (as we have seen (*s*)), it was at first contemplated. But by force of the statute to be presently mentioned, and of the judicial construction which that statute received (*t*), another character has been long attached to it in point of legal effect:—viz. that of an estate tail; the incidents or consequences of which are very different from those of a fee conditional. The history of the change is as follows:—

[The inconveniences which attended a limited and fettered inheritance were probably what induced the judges to give way to the subtle finesse of construction (for such it undoubtedly was,) by which the dispositions in question were construed as conditional estates in fee simple (*u*). 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 (*x*) (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 enacted that from thenceforth the will of the donor be observed *secundum formam in carta*

(*q*) As to this estate, vide Co. Litt. 18 b—28 b.

(*r*) Willion v. Berkley, Plowd. 237.

(*s*) Vide sup. p. 240.

(*t*) 2 Inst. 335.

(*u*) "The policy of the law," says Lord Coke, "was to give power, "after issue, to aliene for two causes "—1, that the estate of a purchaser "should not be avoided by a remote "possibility, viz. if the donee and "his issue also should die without "issue; 2, if he, having a fee simple, should not have power after "issue to aliene, it would be in a "manner a *perpetuity*, and a restraint of alienation for ever, which "the common law for many causes "will not suffer." Nevil's case, ubi sup.

(*x*) 13 Edw. 1, c. 1.

doni expressam; and that the tenements so given (to a man and the heirs of his body, or the heirs male of his body, or the like) should, notwithstanding any alienation by the donee, go to his issue, if there were any; or, if issue failed, should revert to the donor or his heirs.

[Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple; but they divided the estate into two parts (*y*), leaving in the donee a new kind of particular estate, which they denominated a *fee-tail* (*z*); and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue (*a*). And hence it is that Littleton tells us (*b*), that tenant in fee-tail is by virtue of the statute of Westminster the second.]

This expectant estate or reversion of the donor is considered as of a different nature from the right which belonged to the donor of a fee conditional: for his reverter was only in possibility (*c*), being dependent on the contingency of the estate's determining by force of the condition; but the reversion of the donor of an estate tail is the residue of the fee, and therefore a fixed or vested interest.

(*y*) 2 Inst. 335; Willion *v.* Berkley, Plowd. 241; Butler's Fearne, 382, (n), 9th edit. "When the "statute," says Dyer, C. J., "restrained the donee from aliening "the fee simple or from doing other "acts which he that has a fee simple "may do, it was presently taken "that the fee was not in him, for it "would be idle to adjudge it in him "when be could not do any thing "with it, and therefore it was taken "by collection and implication of "the act, that the fee simple continued in the donor; so that he "has one inheritance, viz. a fee "simple, and the donee has another "inheritance of an inferior degree, "viz. a fee tail." Willion v. Berkley, ubi sup.

(*z*) The expression *fee tail* or *feodum talliatum*, was borrowed from the feudists; see Craig, l. 1, t. 10, s. 24, 25; among whom it signified any mutilated or truncated inheritance; being derived from the barbarous verb *taliare*, to cut; from which the French *tailler* and the Italian *tagliare* are formed.—Spelm. Gloss. ad verb. Feodum.

(*a*) 2 Inst. 335.

(*b*) S. 13.

(*c*) 2 Inst. 335; Co. Litt. 22 a. See the remarks on this subject in Bac. Abr. tit. Remainder and Reversion.

By the express provision of the statute, the alienation of the tenant in tail was not to defeat the succession of the issue, or the reversion of the donor and his heirs. It was not, however, otherwise restrained; nor was the alienation of a tenant in tail a void act—for his leases, though liable to be defeated after his death by those claiming under the entail, were in other respects effectual; and if he conveyed his estate to another and his heirs, the alienee took a fee-simple to hold as long as the alienor lived or had heirs of his body, which is a *base fee* (*d*). But this estate was determinable on the death of the alienor and the failure of his issue; and even on his death might be avoided by the entry of the issue (*e*).

[Estates-tail are either *special* or *general.* 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* (*f*). Tenant in tail-special is where the gift is restrained to] the heirs of the donee's body by a particular person; [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] *of his body*, [this makes it a fee-tail; and the person being also limited on whom

(*d*) Vide sup. p. 240.

(*e*) Co. Litt. by Butler, 331 a, n. (1); Machell *v.* Clarke, Ld. Raym. 778; Salk. 618, S. C.; Seymour's case, 10 Rep. 97 b; Walsingham's case, Plowd. 557; Goodright *v.* Shilson, Burr. 1703. An alienation of the land, however, by tenant in tail in possession, if made by certain modes of conveyance, was a *discontinuance*, which took away the entry of the issue (Co. Litt. 328 a; 2 Inst. 335); as to which, vide post, bk. II. pt. I. c. XIX.

(*f*) Litt. ss. 14, 15.

[such heirs shall be begotten, (viz. *Mary his present wife*) this makes it a fee-tail special.

Estates in "general" and "special" tail are further diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or tail *female*. As if lands be given to a man and his *heirs male of his body* begotten, this is an estate in tail male general, but if to a man and the heirs *female of his body on his present wife* begotten, this is an estate in tail female special. And in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor *e converso*, the heirs male, in case of the gift in tail female (*g*). 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 (*h*). 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 (*i*).

As the word *heirs* is necessary to create a fee, so in further imitation of the strictness of the feudal donation, the word *body*, or some other words of procreation (*k*), are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If therefore either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail. As if the grant be to a man and the *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, for there are wanting the words of inheritance, "his heirs" (*l*). So, on the

(*g*) Litt. ss. 21, 22.
(*h*) Ibid. s. 24; Co. Litt. 25 b.
(*i*) Co. Litt. 25 b.
(*k*) Beresford's case, 7 Rep. 40.
(*l*) Co. Litt. 20; Frogmorton *v.* Wharrey, 2 W. Bla. 728; 3 Will. 125, 144, S. C.

[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 (*m*):] which is indispensable to an estate of the latter description; and every estate in fee, which is not in tail, must of necessity be fee-simple (*n*), as all fees consist either of one kind or the other (*o*). Upon such a gift too as last supposed, heirs both male and female shall inherit (*p*); for a descent in fee-simple is inconsistent (by our definition (*q*)) with a restriction to heirs of either sex. It is to be observed, however, that in last wills and testaments a greater indulgence is allowed as to the manner of expounding the donation; and in these instruments therefore [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 (*r*),] sufficient to indicate an intention to restrain the inheritance to the descendants of the devisee.

[There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio*, or *frankmarriage*. These are defined (*s*) to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frankmarriage*, does *ex vi termini* not only create an inheritance, like the word *frankalmoign*, but likewise limits that inheritance; supplying not only words of descent, but

(*m*) Litt. sect. 31; Co. Litt. 7 a; Abraham *v.* Twigg, Cro. Eliz. 478; Earl of Oxford's case, W. Jones, 105. But if the grant be by the Crown, such grant is void.—Ibid. Co. Litt. 27 a.

(*n*) Co. Litt. 27 b.

(*o*) Vide sup. p. 234.

(*p*) Co. Litt. 27 b.

(*q*) Vide sup. p. 234.

(*r*) Co. Litt. 9 b, 27 a; Nanfam *v.* Legh, 7 Taunt. 85; Mellish *v.* Mellish, 2 B. & Cr. 520; Doe *d.* Jearrad *v.* Bannister, 7 M. & W. 228.

(*s*) Litt. s. 17.

[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 (*t*).]

We have seen that lands cannot now be conveyed in fee-simple to be holden of the grantor; but that the tenure must be of him to whose seigniory the fee belongs (*u*). It is otherwise, however, with respect to a gift in tail. For if a tenant in fee-simple grants an estate tail out of it, (the reversion remaining in the donor,) the donee in tail shall hold of the donor, by fealty and such other services as may be reserved; or if none be reserved then by fealty and such other services as the donor himself renders to the next lord paramount (*x*). But the tenure thus created between the donor and donee in tail, differs from that between the tenant in fee-simple and the chief lord; the latter being described as a *perfect*, the former as an *imperfect* tenure (*y*).

[Thus much for the nature of estates tail; the establishment of which family law (as it is properly styled by Pigott (*z*)) occasioned infinite difficulties and disputes (*a*). 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

(*t*) Litt. ss. 19, 20. The reason given by Littleton is, that after the fourth degree the issues of the donor and donees were capable by the law of the church of intermarrying. As to the prohibited degrees in marriage, according to the different modes of computation in the civil and the canon law, vide post, bk. II. pt. II. c. VII.; bk. III. c. II.

(*u*) Vide sup. p. 235.

(*x*) Litt. s. 19; Co. Litt. 23 a, 93 a, 143 a, 68 b, n. (5), by Harg.; 2 Inst. 505; Willion *v.* Berkley, Plowd. 237; Bingham's case, 2 Rep. 92 b. Before the statute of *Quia emptores*, the rule was the same as to alienations in fee simple, 2 Inst. 501.

(*y*) Co. Cop. s. 31.

(*z*) Com. Recov. 5.

(*a*) Chudleigh's case, 1 Rep. 131 b.

[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 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 (*b*). But as the nobility were always fond of the statute *De donis*, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature; and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

About two hundred years intervened between the making of the statute *De donis* and the application of *common recoveries* to this intent, in the twelfth year of Edward the fourth, which were then openly declared by the judges to be a sufficient bar of an estate tail (*c*). For though the courts had, so long before as the reign of Edward the third, very frequently hinted their opinion that a bar might be effected upon these principles (*d*), yet it never was carried into execution, till Edward the fourth, observing (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had upon families, whose estates were protected by the sanctuary of entails,] contrived (*e*) that Taltarum's case should be brought before the court (*f*); [wherein, in consequence of the principles then laid down, it was in effect determined, that a common

(*b*) Co. Litt. 19 b; Hunt *v.* Gateley, Moor, 156; Mary Portington's case, 10 Rep. 38.

(*c*) Chudleigh's case, 1 Rep. 131; Mildmay's case, 6 Rep. 40.

(*d*) Mary Portington's case, 10 Rep. 37, 38.

(*e*) Pigott, 8. Blackstone says he *suffered* it to be brought, but the expression of Pigott is, that he "brought it on the stage."

(*f*) Year Book, 12 Edw. 4, 14, 19; Fitzh. Abr. tit. Faux Recov. 20; Bro. Abr. ibid. 30; tit. Recov. in Value, 19; tit. Taile, 36. See Reeves's Hist. Eng. Law, vol. iii. p. 328.

[recovery suffered by tenant in tail should] convert his estate into a fee simple absolute, and bar all persons whatever claiming the estate tail, or any estate ulterior thereto (*g*). [What common recoveries were, both in their nature and consequences, and why they were allowed to be a bar to the estate tail, must be reserved to a subsequent inquiry. At present it may suffice to say, that they were 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 introduced, afterwards became by long use and acquiescence a most common assurance of lands; and were looked upon as the legal mode of conveyance, by which tenant in tail might dispose of his lands and tenements, so that no court would suffer them to be shaken or reflected on (*h*).

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 forfeiture 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 resettled in a similar manner to suit the convenience of families, had address enough to procure a statute (26 Henry VIII. c. 13), 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.

(*g*) See Martin *v.* Strachan, 5 T. R. 107, (n.); Willes, 449; Taylor *v.* Horde, 1 Burr. 115; Smith *v.* Clifford, 1 T. R. 738; First Real Property Report, p. 22.

(*h*) As to these assurances vide 11 Hen. 7, c. 20; 7 Hen. 8, c. 4; 34 & 35 Hen. 8, c. 20; 14 Eliz. c. 8; 4 & 5 Anne, c. 16; 14 Geo. 2, c. 20; and see further, as to fines and recoveries, post, bk. II. pt. I. c. XIX.

[The next attack which they suffered in order of time was by the statute 32 Henry 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 (*i*). But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines, 4 Henry VII. c. 24, by the statute 32 Henry VIII. c. 36,] which declares that mode of conveyance called a *fine* (which is another species of fictitious proceeding), when duly levied by tenant in tail, to be a complete bar to him and his heirs claiming under such entail. [This was evidently agreeable to the intention of Henry the seventh, 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 should *not* be a bar to estates-tail. But the statute of Henry the eighth, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention.

By a statute of the succeeding year (*k*), 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 (*l*), they are also subjected to be sold for the

(*i*) Co. Litt. 45 b.

(*k*) 33 Hen. 8, c. 39, s. 75.

(*l*) The first provision for subjecting estates tail to sale in the case of bankruptcy, was by 21 Jac. 1, c. 19, s. 12, repealed by 6 Geo. 4, c. 16, s. 65, (as to the effect of which vide Jervis *v.* Tayleur, 3 Barn. & Ald, 557), and this latter provision is now repealed, and new enactments substituted by

[debts contracted by a bankrupt. And by the construction put on the statute 43 Elizabeth, c. 4, an appointment (*m*) by tenant in tail of the land entailed, *to a charitable use*, has been held to be good without fine or recovery.]

But the most extensive and effectual relaxation is that introduced by the late statute 3 & 4 Will. IV. c. 74, enabling the tenant in tail, by an ordinary deed of conveyance (if duly enrolled), and without resort to the indirect and operose expedient of a fine or recovery (which the statute wholly abolishes), to aliene in fee simple absolute, or for any less estate, the lands entailed, and thereby to bar himself and his issue and all persons having any ulterior estate therein (*n*). Yet this is subject to an important qualification, designed for the protection of family settlements. For in these, it is usual to settle a life estate (which is a freehold interest) on the parent, prior to the estate tail limited to the children; and the nature of a *recovery* (by which alone interests ulterior to the estate tail could formerly be barred) was such as to make the concurrence of the immediate tenant of the freehold indispensable to its validity. In order, therefore, to continue to the parent (or other prior taker), a control of the same general description, the act provides that where, under the same settlement which created the estate tail, a prior estate of freehold, or for years determinable with life, shall have been conferred; it shall not be competent for the tenant in tail to bar any estate taking effect upon the determination of the estate tail, without consent of the person to whom such prior estate was given: who receives for that reason the appellation of *protector of the settlement* (*o*). But the object not being to restrain the power of the tenant in tail over the

3 & 4 Will. 4, c. 74, s. 55—65; 12 & 13 Vict. c. 106, s. 208.

(*m*) Attorney-General *v.* Rye, 2 Vern. 453; Chan. Prec. 16.

(*n*) 3 & 4 Will. 4, c. 74, s. 15. This provision took effect from 31st December, 1833.

(*o*) S. 22. The estates however of dowresses, bare trustees, and some others do not qualify for the protectorship, ss. 26, 27.

estate tail itself, (which he could have barred before the statute, by *fine*, without any other person's concurrence,) his alienation (in the manner prescribed by the Act) is allowed to be effectual even without the consent of the protector, so far as regards the barring of such tenant in tail and his issue (*p*).

Even subsequently to the passing of this Act, however, one of the antient and justly obnoxious immunities of an estate tail still remained without disturbance; viz. its exemption from liability for ordinary debts, not contracted by a trader in the course of commerce. But this was at length removed by 1 & 2 Vict. c. 110, which provides that a judgment entered up against the debtor in any of the superior courts at Westminster (*q*), shall operate as a charge upon all lands, tenements, or hereditaments, of which he shall be seised or possessed for any estate or interest in law or equity, or over which he shall have any disposing power; and shall be binding as against him and the issue of his body, and all claimants whatever whom he was competent, without the assent of any other person, to have barred (*r*).

Finally, by the recent statute, 19 & 20 Vict. c. 120 (repealing the provisions of the statute 32 Hen. VIII. before mentioned, as to leases made by tenants in tail (*s*)), it is enacted (*t*) that any person entitled to the possession, or to the receipt of the rents and profits of any settled estates, (that is, any estates which are the subject of a settle-

(*p*) 3 & 4 Will. 4, c. 74, s. 34. See the provisions of this Act more fully stated, post, bk. II. pt. I. c. XIX.

(*q*) By 1 & 2 Vict. c. 110, s. 18, rules of the courts of common law and decrees and orders in equity for payment of money, are placed on the same footing as judgments.

(*r*) 1 & 2 Vict. c. 110, s. 13. To give the judgment creditor, however, any claim on the debtor's real estate, as against *purchasers*, *mortgagees*, or *other creditors*, the judgment must be duly registered in the Court of Common Pleas. See the same Act, s. 19; 2 & 3 Vict. c. 11, s. 4; 3 & 4 Vict. c. 38, s. 2; 18 & 19 Vict. c. 15, s. 5.

(*s*) 19 & 20 Vict. c. 120, s. 35.

(*t*) 19 & 20 Vict. c. 120, ss. 32, 33. The enactment, it is to be observed, extends only to the case of settlements made after the act came into force (s. 44); and it came into force 1st November, 1856 (s. 45).

ment (*u*)), for an estate for life, or for term of years determinable with his life, or for any greater estate, (which includes an estate tail,) either in his own right, or in right of his wife, may demise the same from time to time, (unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise,) for any term not exceeding twenty-one years, in such form as in the Act prescribed (*v*).

Estates tail have thus been gradually unfettered; and are now subject to even less restraint than attached to conditional fees at common law, after the condition was performed by the birth of issue. For, first, the tenant in tail (*w*) is now enabled, by any ordinary deed of conveyance enrolled, to alienе his lands and tenements in fee-simple absolute or otherwise, and thereby to bar his issue (born or unborn) and all ulterior claimants; subject only to the necessity, so far as the latter are concerned, of obtaining the consent of the protector where there is one. Secondly, he is liable to forfeit them for treason. Thirdly, he may charge them with reasonable leases. And lastly, they are subject to be sold for payment of his debts to the same extent to which he would himself have had power to dispose of them.

(*u*) The word "settlement," as used in this act, signifies "any act "of parliament, deed, agreement, "copy of court roll, will, or other "instrument, or any number of such "instruments, under or by virtue of "which any hereditaments of any "tenure, or any estates or interests "in any such hereditaments, stand "limited to, or in trust for any per-"sons by way of succession, includ-"ing any such instruments affecting "the estates of any one or more of "such persons exclusively." 19 & 20 Vict. c. 120, s. 1.

(*v*) The principal mansion house and demesnes and lands usually occupied therewith, cannot be included; —the twenty-one years must take effect in possession;—the demise must be by deed;—for the best rent, that can reasonably be obtained, without fine;—(such rent to be incident to the immediate reversion);—not without impeachment of waste; —with covenant for payment of rent;—with condition of re-entry on non-payment of rent for twenty-eight days, and on non-observance of any of the covenants and conditions:—and a counterpart must be executed by the lessee. 19 & 20 Vict. c. 120, s. 32.

(*w*) Some few species of estates tail are excepted from these provisions of the Act (3 & 4 Will. 4, c. 74) "for the Abolition of Fines and Recoveries." Vide post, p. 582.

CHAPTER IV.

OF FREEHOLD ESTATES NOT OF INHERITANCE.

[We are next to discourse of such estates of freehold as are not of inheritance, but *for life* only (*a*). 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 (*b*). 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* (*c*). These estates for life are like inheritances, of a feudal nature; and were for some time the highest estate that any man could have in a feud, which (as we have before seen (*d*)) was not in its original hereditary. They are given or conferred by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves are;] and as in estates of inheritance in possession, the tenant is said to be "seised in his demesne as of fee," or "of fee-tail" (*e*), so in estates for life in possession, he is "seised in his demesne as of freehold."

(*a*) Vide sup. p. 232.
(*b*) Wright's Tenures, 190.
(*c*) Litt. s. 56.
(*d*) Vide sup. p. 175.
(*e*) Vide sup. p. 234.

[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 (*f*). 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* (*g*), in case the grantor hath authority to make such a grant; for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor (*h*), unless in the case of grants by the crown.

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 (*i*). Yet, while they subsist, they are reckoned estates for life (*k*); 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 be attainted of treason or felony, [whereby he is dead in law: for which reason, in conveyances, the grant is

(*f*) Co. Litt. 42 a, 183 a.
(*g*) Ibid.
(*h*) Co. Litt. 36 a, 183 a.
(*i*) Co. Litt. 42 a; Boraston's case, 3 Rep. 19 a.
(*k*) Co. Litt. 42 a.

[usually made "for the term of a man's *natural* life;" which can only determine by his *natural death* (*l*).]

On the gift of an estate tail we may remember that the donee holds of the donor, by fealty and such other services as may be reserved between them; or if none be reserved, then by fealty, and the same services as are due from the donor, to the next superior lord (*m*). In like manner, upon a lease for life, a tenure (of the imperfect kind) is thereby created between the lessor and lessee; and the latter will hold of the former, by the nominal obligation of fealty, and such other services as may be reserved; but if no other be reserved, the lessee will hold not by those due from the lessor himself, but by fealty only (*n*).

[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* or *botes*,] that is, an allowance of wood for fuel, repairs, and the like; the term estovers being derived from the French word *estoffer*, to furnish; and *bote*, which is of Saxon derivation, being used by us as synonymous with estovers. And here we may remark, that when the allowance is for fuel, it is called house-bote, and sometimes fire-bote; when for making and repairing the instruments of husbandry, plough-bote and cart-bote; when for repairing hedges and fences, it is termed hay-bote or hedge-bote (*o*). The term *bote* and its compounds however, though technically proper, have in modern times somewhat fallen out of use.

While a tenant for life has this privilege of *botes*, he is at the same time answerable by law for *waste* (*p*), that is, any

(*l*) Vide sup. p. 143.

(*m*) Vide sup. p. 248.

(*n*) Co. Litt. 143 a, 23 a, 93 a, 68 b, n. (5), by Harg.; Litt. s. 132.

(*o*) See 2 Bl. Com. 35.

(*p*) As to waste, see further post, bk. v. c. VIII. See also 19 & 20 Vict. c. 120, ss. 2, 11, enabling the Court

spoil and destruction which he does, or allows to be done, to the premises during his tenancy, to the injury of the person entitled to the inheritance (*p*). And there are two kinds of waste, either *voluntary* or *permissive;* the first by the tenant's voluntary act, as where he pulls down a wall, or cuts down timber; the other by his default, as by suffering a wall to fall down for want of necessary repair (*q*). Estates for life or years are sometimes made, however, with an express clause, that the tenant shall hold the land without *impeachment of waste;* which has the effect of relieving him (generally) from this restraint (*r*).

2. A person entitled to the possession of any *settled* estate, as tenant for life, or for term of years determinable with his life, or for any greater estate, either in his own right, or in right of his wife, is now enabled by the provision of statute 19 & 20 Vict. c. 120, before mentioned (*s*), to make effectual leases of the same, or any part thereof, (unless the settlement contains an express declaration to the contrary,) and subject to such exceptions and provisions as in the statute contained, for a term not exceeding twenty-one years (*t*).

3. [Tenant for life, or his representatives, shall not be prejudiced by the determination of his estate,] where such

of Chancery in certain cases, and subject to certain conditions, to authorize leases of *settled* estates for any purpose, whether involving waste or not; or a sale of such estates or of any timber (not being ornamental timber) growing thereon.

(*p*) Co. Litt. 53; 2 Bl. Com. 281; 3 Bl. Com. 223.

(*q*) As to the liability of tenant for life for *permissive* waste, see Chitty's General Practice of the Law, vol. i. p. 386.

(*r*) See Herlakenden's case, 4 Rep. 63 a; Dowman's case, 9 Rep. 10 b; Pyne *v.* Dor, 1 T. R. 55; Ashton *v.* Ashton, 1 Ves. sen. 254; Burgess *v.* Lamb, 16 Ves. 174; Lushington *v.* Boldero, 6 Madd. 149; Morris *v.* Morris, 15 Sim. 505; 1 Fonb. Eq. 33, n.

(*s*) Sup. p. 253.

(*t*) 19 & 20 Vict. c. 120, s. 32. As to the meaning of the terms "settlement" and "settled estate" for the purposes of this Act, and the date of the settlements to which it applies, vide sup. p. 254, n. (*t*) and n. (*u*).

determination is sudden and unforeseen. [Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements* (*u*), or profits of the crop: for the estate was determined by the *act of God* (*v*). The representatives therefore of the tenant for life shall have the emblements, to compensate for the labour and expense of tilling, manuring, and sowing the lands,—and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore, by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole (*w*). And 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 *cestui que vie*, or he on whose life the land is held, dies after the corn sown;—the tenant *pur autre 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 (*x*). 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,

(*u*) As to emblements, vide Co. Litt. 55 a, 55 b; Graves *v.* Weld, 5 Barn. & Ad. 105; Davis *v.* Eyton, 7 Bing. 154.

(*v*) Blackstone notices here, by way of additional reason, the maxim that *actus Dei nemini facit injuriam.* 2 Bl. Com. p. 122.

(*w*) Feud. l. 2, t. 28.

(*x*) Oland's case, 5 Rep. 116.

[having thus determined the estate by their own acts, shall not be entitled to take the emblements (*y*). The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit: but it is otherwise of fruit trees, grass, and the like, which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth (*z*): for when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11. For all persons who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

4. A fourth incident to estates for life relates to the under-tenants or lessees. For] by the common law [they have the same, nay greater indulgences than their lessors, the original tenants for life. The same; for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place (*a*): 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 (*b*).] And as regards tenants at

(*y*) Knevett *v.* Pool, Cro. Eliz. 461; 1 Roll. Abr. 727.

(*z*) Co. Litt. 55 a, 55 b; 1 Roll. Abr. 728.

(*a*) Co. Litt. 55 b.

(*b*) Ibid.

rack rent (*c*), holding farms or lands under landlords entitled for life or other uncertain interest, the statute law has now provided a still more ample protection: it being enacted by 14 & 15 Vict. c. 25, s. 1, that where in such cases the lease or tenancy shall determine by the death or by cesser of the estate of the landlord, the tenant shall, instead of claims to emblements, continue to hold until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if his tenancy were determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding owner shall be entitled to recover, as the landlord could have done if his interest had continued, a fair proportion of the rent for the period elapsed from the termination of the landlord's interest to the time of quitting; and the succeeding owner and tenant respectively shall be entitled, as against each other, to all the benefits, and be subject to the terms, to which the landlord and tenant respectively would have been entitled or subject in case the tenancy had determined in manner aforesaid at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid. [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 (*d*). To remedy which it is enacted by 11 Geo. II. c. 19, s. 15 (*e*), 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

(*c*) As to the nature of tenancy at *rack rent*, vide post, bk. II. pt. I. c. XXIII.

(*d*) Clun's case, 10 Rep. 127.

(*e*) See Jenner *v.* Morgan, 1 P. Wms. 392; Ex parte Smith, 1 Swans. 337.

[death of such lessor;] and also by a later statute (*f*), that where any lease shall determine on the death of the person making the same (though he may not have been strictly tenant for life); or on the expiration of the life or lives for which he was entitled; a proportion of the rent shall in like manner be recoverable by his executors or administrators, or by himself, as the case may be (*g*).

II. [The next estate for life is of the legal kind, as contradistinguished from conventional: viz. that of tenant *in tail after the possibility of issue extinct* (*h*). 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 (*i*): in this case the man has an estate tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that would not have distinguished him from others; and besides he has no longer an estate of inheritance, or fee (*j*), for he can have

(*f*) 4 & 5 Will. 4, c. 22. See Lock *v.* De Burgh, 15 Jur. 961.

(*g*) As to tenants for life, or for years determinable on life, and some persons under particular disabilities, it is (for the particular purpose of facilitating improvements by way of *drainage*) provided by 8 & 9 Vict. c. 56 (repealing and re-enacting, with alterations, 3 & 4 Vict. c. 55), that they may, by petition to the Court of Chancery and consent of the occupier, obtain leave to effect such improvements, and have the expense thereof charged on the inheritance. See also 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 12 & 13 Vict. c. 100; 13 & 14 Vict. c. 31. Et vide 19 & 20 Vict. c. 120.

(*h*) As to the estate of tenant in tail after possibility of issue extinct, vide Lewis Bowles's case, 11 Rep. 79 b; Co. Litt. 27 b—28 b; Williams *v.* Williams, 12 East, 209; 15 Ves. 419; Platt *v.* Powles, 2 Mau. & Sel. 65.

(*i*) Litt. s. 32.

(*j*) Bowles *v.* Berrie, 1 Roll. Rep. 184: Lewis Bowles's case, 11 Rep. 80.

[no heirs capable of taking *per formam doni.* Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out as this of tenant *in tail after possibility of issue extinct*, which, (with a precision peculiar to our own law,) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone.

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

This estate is of an amphibious nature, partaking partly of an estate tail, and partly of an estate for life.] For besides the name of tenant in tail, the tenant is so far in the condition of a tenant in tail properly so called, as to be dispunishable, (that is, not answerable,) for waste (*m*); and he formerly possessed some other of the privileges of a tenant in tail, connected with branches of the law which have now become extinct (*n*). But, on the other hand, his estate in a general point of view, has always been considered as equivalent to an estate for life only (*o*); and

(*k*) Co. Litt. 28 a.

(*l*) Ibid.

(*m*) Co. Litt. 27 b; vide Whitfield *v.* Bewitt, 2 P. Wms. 240; Williams *v.* Williams, 12 East, 209.

(*n*) Co. Litt. 27 b; Lewis Bowles's case, 11 Rep. 80 a.

(*o*) By 19 & 20 Vict. c. 120, s. 1,

therefore the law permits a tenant in tail of this description and an ordinary tenant for life, to make mutual alienation of their estates, by that particular method of conveyance called an *exchange;* which can take place (as we shall see hereafter (*p*)) only in the case of estates that are equal in their nature.

III. An estate *by the curtesy of England* (*q*), is that to which a man is by law entitled, on the death of his wife, in the lands and tenements of which she was seised, during the marriage, in fee simple or fee tail; provided he had issue by her born alive during the marriage, and 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 (*r*). If the lands, however, be in gavelkind, the rule is so far different that he shall hold no more than a moiety, and that only while he lives unmarried; and, on the other hand, his title attaches whether he had issue born or not (*s*).

This estate is said, in the Mirrour (*t*), to have been introduced by King Henry the first; and, notwithstanding its appellation, was not peculiar to this realm (*u*): [for it

it is expressly provided, that a tenant in tail after possibility of issue extinct, shall be deemed a tenant for life for the purposes of that Act.

(*p*) As to an exchange, vide post, bk. II. pt. I. c. XVII.

(*q*) As to an estate by the curtesy, vide Co. Litt. 29 a—30 b; Menvill's case, 13 Rep. 23; 2 Saund. by Williams, 45, n. (5), 46, n. (q), 382 a, b; Buckworth *v.* Thirkell, 3 Bos. & Pul. 652, n.

(*r*) Ibid.

(*s*) Robins. Gavelk. bk. ii. c. 1; et vide acc. as to birth of issue, Co. Litt. 30 a.

(*t*) Cap. 1, s. 3.

(*u*) It is said by Blackstone (citing Crag. l. 2, t. 19, s. 4,) to have also obtained in Scotland, where it was called *Curialitas;* (see also Co. Litt. 30 a.) And Blackstone hence infers that probably our word *curtesy* signified an attendance by the husband on the lord's court, or *curia,* (in capacity of his vassal or tenant in respect of the wife's land). Tenant by curtesy is said, however, by Littleton, to be so called, "because this "is used in no other realm but in "England only;" Litt. s. 35. And the manner in which he is described in the old pleadings, "*Tenaunt per lei d'Engleterre,*" (Year-Book, Trin. 1 Edw. 2,) seems to confirm that etymology. See also Co. Litt. by Harg. 33 a, n. (5), and the Patent Roll of Hen. 3, there cited, which

[also appears to have obtained in Normandy (*x*); and was likewise used among the antient Almains or Germans (*y*). And yet it is not generally apprehended to have been a consequence of feodal tenure (*z*), though some substantial feodal reasons may be given 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; for which 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 (*a*). 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.] It may be proper to add that he was considered to hold not of the infant but of the next lord of the fee (*b*).

[There are four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue (*c*), and death of the wife (*d*):]—1. The marriage must be legal; so that if either void *ipso facto*, or avoided by a divorce *a vinculo matrimonii*, no estate by the curtesy can in either case be claimed (*e*). 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 pos-

speaks of this estate as the *consuetudo et lex Angliæ*. But though the term may have been derived from a notion that the estate was peculiar to the law of England, it is clear that the supposed peculiarity did not in fact exist.

(*x*) Grand Coustum. c. 119.

(*y*) Lindenbrog. LL. Alman. t. 92.

(*z*) Wright's Ten. 194.

(*a*) F. N. B. 143.

(*b*) 2 Inst. 301; Paine's case, 8 Rep. 36 (a).

(*c*) In *gavelkind* lands the husband has a right to his curtesy, whether there be issue or not; but on the other hand the curtesy extends only to a moiety of the wife's lands and ceases on the widower's marriage. Robins. Gavelk. bk. ii. c. 1.

(*d*) Co. Litt. 30 a.

(*e*) Vide Rennington *v.* Cole, Noy, 29.

[session, which is a seisin *in deed* (*f*). 3. The issue must be born alive. Some have had a notion that it must be heard to cry, but that is a mistake. Crying, indeed, is the strongest evidence of its being born alive; but it is not the only evidence (*g*). The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy; because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while yet in the mother's womb; and the estate being once so vested, shall not afterwards be taken from it (*h*).] The issue must also be such as is [capable of inheriting the mother's estate (*i*). 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 (*j*). The time when the issue was born is immaterial, provided it were during the coverture: for whether it were born before or after the wife's seisin of the lands, and 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 (*k*). The husband by the birth of the child becomes, as was before observed, tenant by the curtesy *initiate* (*l*), and may do many acts to charge the lands; but his estate is not *consummate* till, 4. The death of the wife, which is the last requisite to make a complete tenant by the curtesy (*m*).]

To complete our view of this species of interest, it must be added that by the statute 19 & 20 Vict. c. 120, so often referred to, which enables tenants for life, of *settled* estates, to make effectual leases for twenty-one years, subject to the exceptions and provisions in the act contained, a similar

(*f*) Co. Litt. 31 a, 29 a.

(*g*) Dyer, 25; Paine's case, 8 Rep. 34.

(*h*) Co. Litt. 29 b.

(*i*) Litt. s. 52.

(*j*) Co. Litt. 29 b.

(*k*) Ibid.

(*l*) Ibid. 30 a.

(*m*) Ibid. Vide sup. p. 265.

power is also conferred upon tenants by the curtesy, of *unsettled* estates (*n*).

IV. An estate *in dower* (*o*), at the common law, is the portion which a woman, on the death of her husband, is by that law entitled to claim in his lands and tenements (*p*). This portion amounts to the third part of them (in value); and it is to be assigned to her, to hold during the term of her natural life; except the lands be gavelkind, in which case she is entitled to a moiety; but subject, in this instance, to the condition of remaining chaste and unmarried (*q*).

[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 implied 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 anything in general more different than the regulation of landed property, according to the English and Roman laws. Some (*r*) have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system, (wherein it is called *triens, tertia* (*s*), and *dotalitium,*) by the Emperor Frederick the second (*t*), who was contemporary with our King Henry the third. 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

(*n*) 19 & 20 Vict. c. 120, s. 32. It is conferred also on tenants of unsettled estates, *in right of a wife seised in fee.* Ibid.

(*o*) As to dower, vide Co. Litt. 30 b—41 a; Rowe *v.* Bower, 2 N. R. 1; Slatter *v.* Slatter, 1 Scott, 82; Colleton *v.* Gareb, 6 Simon, 19; Stoughton *v.* Leigh, 1 Taunt. 402; Ray *v.* Pung, 5 B. & Ald. 561; Moody *v.* King, 2 Bing. 447; Rex *v.* Northweald Bassett, 4 Dow. & Ry. 276; Jones *v.* Jones, 2 Tyrw. 531.

(*p*) Co. Litt. ubi sup.

(*q*) 2 Bl. Com. 129; Robins. Gavelk. bk. ii. c. 2.

(*r*) Wright's Ten. 192.

(*s*) Crag. l. 2, t. 22, s. 9.

(*t*) Ibid.

[the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals (*u*). However this be, the reason which our law gives for adopting it is a very plain and sensible one: viz., for the sustenance of the wife, and the nurture and education of the younger children (*v*).

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 otherwise defeated.

1. [Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos* (*w*). But a divorce *a mensa et thoro* only, doth not destroy the dower (*x*); no, not even for adultery itself by the common law (*y*). Yet now by the statute of Westminster the second (*z*), 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 (*a*). It was formerly held that the wife of an idiot might be endowed (*b*): 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 (*c*), 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 (*d*) gives it another turn,

(*u*) Mod. Un. Hist. xxxii. 91.

(*v*) Bract. l. 2, c. 39, s. 1; Co. Litt. 30 b.

(*w*) Bract. l. 2, c. 39, s. 4. But she does not lose her dower merely because the marriage was *voidable*, if there be no actual divorce; Co. Litt. 33 a.

(*x*) Co. Litt. 33 a, 33 b.

(*y*) Sidney *v.* Sidney, 3 P. Wms. 276. Yet, among the antient Goths, an adulteress was punished by the loss *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. l. 3, c. 2.)

(*z*) 13 Edw. 1, c. 34.

(*a*) 2 Inst. 435; Hetherington *v.* Graham, 6 Bing. 135.

(*b*) Co. Litt. 31 a.

(*c*) P. C. b. 3, c. 33.

(*d*) C. 110.

[viz. that it is presumed the wife was privy to her husband's crime. However, the statute 1 Edw. IV. c. 12, abated the rigour of the common law in this particular, and allowed the wife her dower. But a subsequent statute (*e*) revived this severity against the widows of traitors, who are now barred of their dower, but not the widows of felons (*f*).] Finally, [the wife must be above nine years old at her husband's death, otherwise she shall not be endowed (*g*): though in Bracton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere* (*h*)."

2. We are next to inquire, of what a wife may be endowed.] And supposing her husband to have died, and no act to have been done to defeat or abridge her rights, [she is 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 (*i*). 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

(*e*) 5 & 6 Edw. 6, c. 11, s. 13.

(*f*) Until a recent period an alien woman, married without the royal licence to a British subject, could not be endowed: Co. Litt. by Harg. 31 b, n. (9); but see now 7 & 8 Vict. c. 66, s. 16. Et vide post, bk. IV. pt. I. c. II.

(*g*) A woman cannot consent to marriage, so as to render it a binding engagement, until she is twelve, nor a man until he is fourteen years of age. Co. Litt. 33 a. But even an inchoate and imperfect marriage, from which either of the parties at the age of consent may disagree, will be accounted in law, after the death of the husband, as a lawful marriage *quoad dotem;* that is, provided the wife was above nine years of age at the husband's death.—Ibid.

(*h*) L. 2, c. 39, s. 3.

(*i*) Litt. ss. 36, 53. As to dower in a *use*, and in a *trust*, vide post, pp. 374—377.

[the lands entailed; for no issue that she could have, could by any possibility inherit them (*k*). A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable (*l*); 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 (*m*).] As to the nature, however, of the lands and tenements of which she may be endowed, there are some few cases noticed in our books, where her title does not attach: among others, that of a castle maintained for the necessary defence of the realm; for that ought not to be divided, and the public must be preferred to the private interest (*n*).

3. [Next, as to the manner in which a woman is to be endowed.] There were formerly subsisting five species of dower: [Dower by the *common law*, or that which has been already described. Dower by particular *custom* (*o*); as that the wife should have half the husband's lands (*p*), or in some places the whole, and in some only a quarter.] Dower *de la plus belle*, of which no more needs be said than that it was a consequence of the military tenures, and that it was abolished with them (*q*). Dower *ad ostium ecclesiæ* (*r*), which was where tenant in fee simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made, and (Sir Edward Coke in his translation of Littleton adds) troth plighted between them, endowed his wife with the whole, or such quantity as he pleased, of his lands, at the same time specifying and ascertaining the same; on which the wife, after her husband's

(*k*) Litt. s. 53.

(*l*) Vide 3 & 4 Will. 4, c. 104, s. 3.

(*m*) Co. Litt. 31 a.

(*n*) Co. Litt. 31 b; vide Gerard *v.* Gerard, 3 Lev. 401.

(*o*) Litt. s. 37.

(*p*) As in *gavelkind*, see Robins. Gavelk. bk. ii. c. 2.

(*q*) See as to dower *de la plus belle*, Co. Litt. 38 a; 2 Bl. Com. 132.

(*r*) Litt. s. 39.

[death, might enter without further ceremony.] And lastly, dower *ex assensu patris* (*s*), [which was only a species of dower *ad ostium ecclesiæ*, made when the husband's father was alive, and the son by his consent, expressly given, endowed his wife with parcel of his father's lands.] But both the latter descriptions of dower (like that *de la plus belle*) have now disappeared from our system, having been abolished by a recent act of parliament (*t*). We need only consider, therefore, the method of proceeding to enforce a claim of *dower at the common law*, which of the two that remain is 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 (*u*). 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 by *Magna Charta* (*x*), that the widow shall not be distrained to marry afresh, if she chooses to live without a husband (*y*); but shall not however marry against the consent of the lord; and further, 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 (*z*). The particular lands to be held in dower must

(*s*) Litt. s. 40.

(*t*) 3 & 4 Will. 4, c. 105, s. 13.

(*u*) Mir. c. 1, s. 3.

(*x*) Cap. 7.

(*y*) Blackstone says it was also provided that she should "pay nothing for her marriage." But this seems to be an incorrect interpretation of the statute; vide Reeves's Hist. Eng. Law, vol. i. p. 242; Coleridge's Blackstone, vol. ii. p. 135, n. (15).

(*z*) 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.

[be assigned (*a*) by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir (*b*), 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 the widow her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law] by action of dower, [and the sheriff is appointed to assign it (*c*). 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 (*d*).]

4. Lastly, we are to inquire how dower may be *barred*, or otherwise defeated. [A widow may be barred of her dower not only by elopement, divorce, 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 (*e*).] A woman might also,

(*a*) Co. Litt. 34 b, 35 a.

(*b*) Gilb. Ten. 173.

(*c*) Co. Litt. 34 b, 35 a. See further as to the remedy at law, post, bk. v. c. XI. If the heir (being under age), or his guardian, assigned more than she ought to have, this was formerly remedied by *writ of admeasurement of dower*. Bl. Com. cites F. N. B. 148; Finch, l. 314; stat. Westm. 2, 13 Edw. 1, c. 7. But this (with most other real actions) is now abolished. Besides the remedy at *law* (which is exclusively in the Court of Common Pleas), the Court of Chancery also exercises a jurisdiction over dower, and will proceed to set it out on the application of the widow; but if her *title* is disputed it must first be established at law. See Maddock's Pract. vol. i. p. 242; Spence's Equitable Jurisdiction of Court of Chancery, p. 653.

(*d*) Co. Litt. 32 a.

(*e*) Anne Bedingfield's case, 9 Rep. 15 b.

while fines and recoveries were in force, be barred by these assurances as she now may by the new method of conveyance appointed by the stat. 3 & 4 Will. IV. c. 74, in substitution for a fine or recovery, in the case of a married woman. And another method of barring dower is by jointure (*f*), as regulated by the stat. 27 Hen. VIII. c. 10—a subject on which some further explanation may here be desirable.

[A *jointure*—which, strictly speaking, signifies a joint estate, limited to both husband and wife (*g*),] but in its more usual form is a sole estate limited to the wife only, expectant upon a life estate in the husband—[is thus defined by Sir Edward Coke (*h*):—"A competent livelihood "of freehold for the wife, of lands and tenements; to take "effect presently, in possession or profit, after the decease "of the husband; for the life of the wife at least." This description is framed from the purview of the stat. 27 Hen. VIII. c. 10, before mentioned, commonly called the Statute of *Uses*, of which we shall speak fully hereafter. At present it is sufficient to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses, the property or possession of the soil being vested in one man, and the *use* or profits thereof in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee simple, yet the wife was not entitled to any dower therein, he not being *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 jointtenancy or jointure; which settlement would be a provision for the wife in case she survived her husband. At length

(*f*) Vernon's case, 4 Rep. 3 b; Earl of Buckinghamshire *v.* Drury, 3 Bro. P. C. 492.

(*g*) Vide Dennis's case, Dy. 248 a; Vernon's case, 4 Rep. 3 b; Duchess of Somerset's case, Dy. 97 b.

(*h*) Co. Litt. 36 b; vide Cresswell *v.* Byron, 3 Bro. C. C. 362.

[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 entitled at the same time to any special lands that might be settled in jointure, had not the same statute provided] that, upon the husband's making or procuring to be made [such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower (*i*). But then these four requisites must be punctually observed.—1. The jointure must] be limited to (*k*) [take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur autre 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 must appear by the deed (*l*) to be, [in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage (*m*) 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 (*n*).

(*i*) Vernon's case, 4 Rep. 1, 2.

(*k*) In Blackstone it is said that it "*must* take effect, &c." This alteration of Blackstone's text is suggested by Mr. Justice Coleridge. —Coleridge's Blackstone, vol. ii. p. 138.

(*l*) Tinney *v.* Tinney, 3 Atk. 8.

(*m*) Vide Beard *v.* Nuthall, 1 Vern. 428.

(*n*) These settlements, previous to marriage, seem to have been in use among the antient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account:—"*Dotem non uxor marito, sed uxori maritus affert: intersunt parentes et propinqui, et munera probant.*" (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, quantas pecunias ab uxoribus*

[There are some advantages attending tenants in dower that do not extend to jointresses; and so *vice versâ*, 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 distrain for his debt, if contracted during the coverture (*o*). But, on the other hand, a widow may enter at once, without any formal process, on her jointure land; whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower (*p*).] So, though dower be forfeited by the treason of the husband (*q*), or by the wife's adultery (*r*), yet the title to lands settled in jointure remains, in either case, unimpeached.

Independently of the bar by jointure, if the husband makes any provision for his wife by will or otherwise, in such manner as clearly to indicate an intention that it shall be taken in lieu of dower, she will be barred of dower by her acceptance, after his death, of the provision so made; but she is allowed her option whether she will accept it or not (*s*).

Dower may also be barred by the husband's taking a conveyance of his land in a form properly adapted to that purpose. Of these forms there are several, called *convey-*

dotis nomine acceperunt, tantas ex suis bonis, æstimatione 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 provisions for widows among the Romans; but surely there is as much reason to suppose that it gave the hint for our statutable jointures.

(*o*) Co. Litt. 31 a; F. N. B. 150.

(*p*) Co. Litt. 36 b. As to the remedy at law, vide sup. p. 272.

(*q*) Co. Litt. 37 a.

(*r*) Sidney *v.* Sidney, 2 P. Wms. 277.

(*s*) Co. Litt. by Harg. 36 b, n. 1; Thompson *v.* Nelson, 1 Cox, 447; Ayres *v.* Willis, 1 Ves. sen. 230, vide 3 & 4 Will. 4, c. 105, ss. 9, 10.

ances to uses to bar dower (*t*), on which it is unnecessary in this place to say more than that they are the contrivance of conveyancers, founded on the Statute of Uses before mentioned; and intended to give the husband a clear dominion over the property he purchases, free from future claim of his wife: these forms being so managed as to vest in him the effective ownership, but not precisely such an estate as by the rules of law would be subject to dower.

While various methods have thus for a long time past existed, in which the widow's right was capable of being effectually barred, it was nevertheless, up to a late period of our legal history, secure (if *not* barred) from liability to be defeated by any alienation that the husband might think fit to make of the estate; her title always remaining paramount to that of the alienee (*u*). And while dower retained its original importance, no just objection could be made to this principle, for though it operated as a clog on the transfer of property, it was evidently essential to the full protection of the widow's right. But at the period to which we refer, that right had long sunk into comparative insignificance, owing first to the facility with which it was capable of being barred, secondly, to the great increase in modern times of personal property (out of which the husband might make ample provision for the wife by way of testamentary disposition, and of which, if he died intestate, she became entitled to her share,) and lastly, to the effect of the Statute of Wills, which, by making real property devisable, empowered him to provide for her out of the real estate, by will. Under these circumstances there appeared to be no sufficient reason for continuing the inconvenient restraint which the law of dower tended to impose on the husband's alienation; and by the statute 3 & 4 Will. IV. c. 105, it is consequently provided, that all dispositions which he may make of his land, (whether abso-

(*t*) Butler's Fearne, 346 — 349, 9th ed.

(*u*) Co. Litt. 32 a.

lute or partial, and whether by conveyance in his lifetime, or by will,) and all debts and incumbrances to which such land may be subject, shall be deemed to be valid and effectual, as against his widow's right to dower. The same act also gives still greater facilities than before existed, for the barring of dower, which it allows to be effected by a simple declaration for that purpose, introduced into the deed by which the land is conveyed to the husband, or into any deed executed by him, or into his last will and testament. And it further enacts, that where the husband devises for his wife's benefit any part of his land that had been subject to her dower, she shall be thereby excluded from her claim of dower, unless a contrary intention is declared by the will: though it is otherwise as to a bequest of personalty, or of land on which her claim would not attach; for, in the absence of a declaration to the contrary, that shall *not* be sufficient to exclude her title as dowress (*x*). It is to be observed, however, that none of the provisions of this act apply to the case of women married on or before 1st January, 1834; and that as to these the former law consequently remains in its full force.

[It is curious to observe the several revolutions which the doctrine of dower has undergone since its introduction into England. The wife's claim seems first to have extended to a moiety of the husband's lands, but forfeitable by incontinency or a second marriage, and such is still the case where the tenure is in gavelkind. By the famous charter of Henry the first, this condition of widowhood and chastity was only required in case the husband left any issue (*y*); and afterwards we hear no more of it. Under Henry the second, according to Glanvil (*z*), the

(*x*) Vide Chalmers *v.* Storil, 2 Ves. & Bea. 244; Dickson *v.* Robinson, Jacob, 503.

(*y*) "*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. 1, A.D. 1101. Introd. to Great Charter, edit. Oxon. p. iv.

(*z*) L. 6, c. 1 & 2.

[dower *ad ostium ecclesiæ* was the most usual species of dower, and here, as well as in Normandy (*a*), 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 ostium ecclesiæ* 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 (*b*). But if no specific dotation was made at the church porch, then she was endowed *by the common law* 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 (*c*); 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 (*d*) in lands which he afterwards acquired (*e*). In King John's Magna Charta, and the first charter of Henry the

(*a*) Gr. Coustum. c. 101.

(*b*) Bract. l. 2, c. 39, s. 6.

(*c*) *De questu suo* (Glanv. ibid.) *de terris acquisitis et acquirendis.* (Bract. ibid.)

(*d*) Glanv. l. 6, c. 2.

(*e*) When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, ("*quod dotat eam de tali manerio cum pertinentiis*, &c."—Bract. ibid.); and therefore in the old York ritual (Seld. Ux. Hebr. l. 2, c. 27,) there is at this part of the matrimonial service, the following rubric: "*sacerdos interroget dotem mulieris; et si terra ei in dotem detur, tunc dicatur psalmus iste*, &c." When the wife was endowed generally ("*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis*"—Bract. Ibid.) the husband seems to have said, "with all my lands and tenements I thee endow;" and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "with all my worldly goods, (or, as the Salisbury ritual has it, 'with all my worldly chattel') I thee endow;" which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by Magna Charta, c. 26, and will be further treated of in course 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.

[third (*f*), 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 lifetime (*g*); yet, in case of a specific endowment of less *ad ostium ecclesiæ*, 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 the third and Edward the first (*h*). In Henry the fourth's time it was denied to be law, that a woman can be endowed of her husband's goods and chattels (*i*): and, under Edward the fourth, Littleton lays it down expressly, that a woman may be endowed *ad ostium ecclesiæ* with more than a third part (*k*): 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 (*l*).]

And now even the common law dower itself, after falling by several gradations from its original consequence, under the influence of the causes already explained, is at length, by the statute of 3 & 4 Will. IV. above mentioned, reduced to a right of the most precarious description, which the husband may bar or defeat at his pleasure; but if he fails to exercise that power, the widow is still in a condition (as we have seen) to assert her title against the heir; to which it may be added that, by the recent statute of 19 & 20 Vict. c. 120, s. 32, she has the same right, in her capacity of tenant in dower, to demise any unsettled estate for a term not exceeding twenty-one years, as belongs to tenant by the curtesy (*m*).

(*f*) A.D. 1216, c. 7, edit. Oxon.

(*g*) "*Assignetur autem ei pro dote sua tertia pars totius terræ mariti sui quæ sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesiæ.*"—C. 7. Ibid.

(*h*) Bract. ubi sup.; Britton, c. 101, 102; Flet. l. 5, c. 23, s. 11, 12.

(*i*) P. 7 Hen. 4, 13, 14.

(*k*) Sect. 39; F. N. B. 150.

(*l*) Sect. 41.

(*m*) Vide sup. p. 266.

CHAPTER V.

OF ESTATES LESS THAN FREEHOLD.

HAVING now investigated, in some measure, the nature of freehold estates, we arrive at the consideration of those which are less than freehold (*a*), and to which the law consequently applies the denomination of *chattels real.* For it is to be understood that, in our law, *chattels* (or *goods and chattels*) (*b*) is a term used to express any kind of property which, having regard either to the subject-matter, or the quantity of interest therein, is not *freehold.* The appellation was originally derived from the technical Latin word *catalla*, which, among the Normans, primarily signified only beasts of husbandry, or, as we still call them, *cattle;* but in a secondary sense the term was applicable to all moveables in general, and not only to these, but to whatever was not a *fief* or *feud;* to which, among the Normans, there were two requisites, a given degree of duration as to time, and immobility with regard to place (*c*). And it is in this latter more extended and negative sense that our own law adopts the term, considering as a chattel whatever amounts not to freehold; which like the Norman fief, requires, as we have seen, immobility in respect of the subject-matter (*d*), and a given degree of duration, that is, a duration for a life at least (*e*), either absolute or determinable on contingency (*f*), as regards the quantity of interest or estate. Any estate in lands and tenements, which amounts not to

(*a*) Vide sup. p. 231.
(*b*) Co. Litt. 118 b.
(*c*) 2 Bl. Com. 386.
(*d*) Vide sup. p. 168.
(*e*) Ibid. 179.
(*f*) Ibid. 256.

freehold, is consequently a chattel: but inasmuch as it concerns, or, according to the technical expression, *savours* of, the realty (*g*), it is denominated a chattel *real*, in order to distinguish it from things which have no concern with the realty, viz. mere moveables, and the rights connected with them; and such things as these are, on the other hand, often described as chattels *personal* (*h*).

Chattels of either description are inferior, it is to be observed, in the eye of the law, to freehold; and they form a subordinate class of property, the different species of which are subject, in many respects, to the same incidents; so that as distinguished from estates of inheritance or for life in things real, (of whatever tenure,) they receive the common denomination of *personal estate;* while these last are on the other hand described as *real estate* (*i*). As to the incidents by which chattels real and personal are allied, it may be remarked, that though livery of seisin was a ceremony without which an estate of inheritance or for life in corporeal hereditaments of free tenure could not in general pass at the common law (*j*), it was no more requisite in the transfer of a chattel real, than in that of a chattel personal. A chattel real belongs also, on the death of the owner, to his executor or administrator, like a chattel personal, and does not descend like a freehold of inheritance to his heir. So the interest in a chattel real, as in a chattel personal, may be made to commence *in futuro*, which, as we shall see hereafter, was not allowed at common law, as to the freehold in a corporeal hereditament. Moreover, the tenant of a chattel real is not said to be *seised*, like the tenant of a freehold, but to be *possessed* only, as if it were a chattel personal. And, lastly, we may observe, there can be no estate tail in a chattel real, no more than in a chattel personal, but only in a freehold (*k*).

(*g*) Co. Litt. 118 b.

(*h*) 2 Bl. Com. p. 387.

(*i*) Ib. 386; vide sup. p. 168, n.

(*j*) This rule of the common law is now altered by 8 & 9 Vict. c. 106, s. 2, as to which vide post, bk. II. pt. I. c. XVII.

(*k*) 2 Bl. Com. 398.

[Of estates that are less than freehold, there are three sorts; I. Estates for years; II. Estates at will; III. Estates by sufferance.]

I. An estate for *years* (*l*) is where a man has an interest in lands and tenements, and a possession thereof by virtue of such interest, for some fixed and determinate period of time; as in the case where lands are let [for the term of a certain number of years, agreed upon between the lessor and the lessee (*m*), and the lessee enters thereon (*n*);] and this amounts but to a chattel real, however long the period of time for which the lands are demised; for, in contemplation of law, no interest for a certain and determinate period of time,—even for 1000 years,—is as large as an estate for life (*o*), which, as we have seen, is the lowest description of freehold.

[Though 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 (*p*). 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 stat. 21 Hen. III., the increasing day in the leap-year, together with the preceding day, shall be accounted for

(*l*) As to this estate, vide Co. Litt. 43 b—54 b.

(*m*) 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 an act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee.—Litt. s. 57.

(*n*) Litt. 58.

(*o*) Co. Litt. 46 a.

(*p*) Litt. 67.

[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.] By the common law (*q*) a "month" is, in matters temporal, a lunar month, or twenty-eight days; in matters ecclesiastical, a calendar month (*r*): though this is a rule of the most general description, and yields easily to exception where custom or the obvious meaning of parties in the particular transaction, or any other special consideration, makes it reasonable to depart from the usual construction of the term month (*s*). The ordinary rule, however, applies to the case of a lease. And consequently [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 (*t*); for herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution. In the space of a day all the twenty-four hours are usually reckoned (*u*). Therefore,] in general, [if I am bound to pay money on any certain day, I discharge the obligation if I pay it

(*q*) A recent act, however, "for shortening the language used in acts of parliament" (13 & 14 Vict. c. 21) enacts, "that in all *acts* the word 'month' shall be deemed and taken to mean 'calendar' month, unless words be added showing lunar month to be intended."

(*r*) Lang *v.* Gale, 1 Mau. & Sel. 117; Lacon *v.* Hooper, 6 T. R. 226; Blunt *v.* Heslop, 3 Nev. & Per. 553; The Queen *v.* The Inhabitants of Chawton, 1 Q. B. 251; 2 Bl. Com. 141; Simpson *v.* Margitson, 11 Q. B. 23.

(*s*) Davy *v.* Salter, 3 Salk. 346; Rex *v.* Cussons, 1 Sid. 186; Hipwell *v.* Knight, 1 Y. & Col. 401.

(*t*) Catesby's case, 6 Rep. 62 a.

(*u*) Co. Litt. 135 a; Maund's case, 7 Rep. 28 b; Duppa *v.* Mayo, 1 Saund. 287; Burbridge *v.* Manners, 3 Camp. 194.

[before twelve o'clock at night; after which the following day commences.] And it is also a general principle (though one from which it is often necessary, for the sake of justice, to deviate) that, with a view to convenience, the law will consider the ordinary periods of time without regard to their fractional parts. Thus half a year consists of 182 days, and a quarter of a year of 91; the remaining hours being in either case rejected (*x*). [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 (*y*). And therefore they were not allowed to have a freehold estate; but their interest, such as it was, vested after their deaths in their executors, who were to make up the accounts of their testator with the lord and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the antient law, be at any time defeated] by a collusive recovery, suffered by the tenant of the freehold in an action brought against him for the purpose (*z*).

[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 (*a*) that by the antient law no leases for more than forty years were allowable: because any longer possession, especially when

(*x*) Co. Litt. 135 b; Bishop of Peterborough *v.* Catesby, Cro. Jac. 167; Yelv. 100; Dy. 345 a.

(*y*) Bac. Leases.

(*z*) Co. Litt. 46 a; 2 Inst. 321; Flower *v.* Rigden, Cro. Eliz. 284; Pledgard *v.* Lake, ib. 718; Reeves's Hist. Eng. Law, vol. iv. p. 232.

(*a*) Mirror, c. 2, s. 27; Co. Litt. 45 b, 46 a.

[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 (*b*); and long terms—for three hundred years or a thousand—were certainly in use in the time of Edward the third (*c*), and probably of Edward the first (*d*). But certainly, when by the stat. 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 (*e*), long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited and determined; for every such estate must have a certain beginning and certain end (*f*). But *id certum est, quod certum reddi potest:* therefore, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years (*g*); for though it is at present uncertain, yet, when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making or delivery of the lease (*h*). A lease for so many years as J. S. shall live, is void from the beginning (*i*); for it is neither certain, nor can ever be reduced to a certainty, during the

(*b*) Madox, Formulare Anglican. No. 239, fol. 140; demise for *eighty* years, 21 Rich. 2; ib. No. 245, fol. 146, for the like term, A.D. 1429; ib. No. 248, fol. 148, for *fifty* years, 7 Edw. 4.

(*c*) 32 Ass. pl. 6; Bro. Abr. t. Mordauncestor, 42; Spoliation, 6.

(*d*) Stat. of Mortmain, 7 Edw. 1.

(*e*) Vide Ascough's case, 9 Rep. 135; Brediman's case, 6 Rep. 57.

(*f*) Co. Litt. 45 b.

(*g*) Bishop of Bath's case, 6 Rep. 35 b.

(*h*) Co. Litt. 46 b.

(*i*) Ibid. 45 b.

[continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he shall so long continue parson of Dale, is good (*k*): for there is a certain period fixed, beyond which it cannot last: though it may determine sooner, on the death of J. S. or his ceasing to be parson there.]

As already observed, the word *term*, when applied to this description of estate, signifies the estate itself which the grant confers, and not merely the period of time specified in the grant; [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 (*l*).]

As an estate for years was not created, at common law, like a freehold, by livery of seisin, so the tenant, in proper technical language, is not said to be *seised*, but to be *possessed*. Neither for the creation of this estate is it proper to limit it to a man and his "heirs," as in the case of a freehold of inheritance. The correct limitation is to a man and to his "executors and administrators;" though it is sufficient if it be granted to himself only, without mention of his personal representatives; for in these, on his death, the law will vest it without any special words of limitation.

Again, as it required no livery of seisin, so at common law this estate, for whatever length of duration, might be constituted by mere agreement, verbal or written, if followed up by the entry of the grantee. But by the statute

(*k*) Co. Litt. 45 b. (*l*) Ibid.

of frauds, 29 Car. II. c. 3, no lease for more than three years shall now be effectual, unless put into writing and signed by the party or his agent, lawfully authorized by writing (*m*). And by a late statute, 8 & 9 Vict. c. 106, s. 3, it is provided, that a lease required by law to be in writing, of any tenements or hereditaments, made after the 1st of October, 1845, shall be void at law, unless made by deed.

It is also to be remarked, that the bare grant or agreement does not in itself vest a complete estate for term of years, in the grantee: it only gives him a right of entry on the tenement; which right is called his "interest in the term," or *interesse termini* (*n*). But when he has actually so entered, the estate is then, and not before, completely vested in him. However, the *interesse termini* is so far in the nature of an estate, that, even before entry, the lessee may grant it over to another; though, on the other hand, a lessee before entry is not in a condition to maintain an action of trespass for an injury to the land (*o*).

[Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers which we formerly observed (*p*) that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, hay-bote (*q*) and the like;] and the doctrine of *waste* also applies generally to tenants of either description (*r*).

[With regard to emblements or the profits of lands sowed by tenant for years, there is this difference between

(*m*) As to this provision, vide Edge *v.* Strafford, 1 Tyrw. 295; Lord Bolton *v.* Tomlin, 5 Ad. & El. 856.

(*n*) 2 Bl. C. 144; Plowd. 198; Doe *v.* Walker, 5 Barn. & Cress. 111; Co. Litt. 338 a, 270 a; Neal *v.* Mackenzie, 1 Mee. & Wels. 747.

(*o*) As to the nature of the *interesse termini*, vide Williams *v.* Bosanquet, 1 Brod. & Bing. 248; Edge *v.* Strafford, 1 Tyrw. 302.

(*p*) Vide sup. p. 257.

(*q*) Co. Litt. 41 b.

(*r*) As to waste, vide sup. p. 258, et post, bk. v. c. VIII. It has been doubted, however, if a tenant for years is liable, in the absence of any express stipulation on the subject, for merely *permissive* waste; Herne *v.* Benbow, 4 Taunt. 764; Jones *v.* Hill, 7 Taunt. 392; Gibson *v.* Wells, 1 N. R. 290; Martin *v.* Gilham, 7 A. & E. 540; Harnett *v.* Maitland, 16 Mee. & W. 257.

[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,] in the absence of any special contract or custom to the contrary; [for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of (*s*). But where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife (*t*), 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 (*u*). Not so, if it determine by the act of the party himself: as if tenant for years does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor, and not to the lessee, who hath determined his estate by his own default (*x*). The operation of the common law right to emblements, however, is now much more limited than it once was, having ceased (as we have seen), by the effect of a recent statute (*y*), to apply to such tenants as hold farms or lands at a rack rent under a landlord entitled for life or any other uncertain interest, and whose lease or tenancy determines by the death of their landlord, or by the cesser of his estate; and a protection of a different kind being now provided for tenants so circumstanced.

(*s*) Litt. s. 68.

(*t*) A lease for years by a tenant for life, or a husband seised in right of his wife, is not in *all cases* subject to uncertainty. For by 19 & 20 Vict. c. 120, s. 32, such persons may now, under such circumstances as therein mentioned, make effectual leases for any term not exceeding twenty-one years. Vide sup. pp. 254, 258, 266, 279.

(*u*) Co. Litt. 56 a; vide sup. p. 258.

(*x*) Co. Litt. 55 b.

(*y*) 14 & 15 Vict. c. 25, s. 1, vide sup. p. 260.

II. The second species of estates not freehold, are estates *at will* (*y*). 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 (*z*). It may be constituted by written or verbal agreement without further ceremony, if followed by entry; and may in some cases arise by mere construction of law. [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 connections with the other at his own pleasure (*a*). Yet this must be understood with some restriction. For, if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits (*b*). And this for the same reason upon which all the cases of emblements turn, viz. the point of uncertainty; since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land (*c*).]

The liability of a tenant at will, in regard to waste of the voluntary kind, is similar to that of tenant for years (*d*); but he is understood to be not liable for waste merely permissive (*e*).

(*y*) As to an estate at will, vide Co. Litt. 55 a—57 b.

(*z*) Litt. s. 68.

(*a*) Co. Litt. 55 a.

(*b*) Ibid. 56 a.

(*c*) Ibid. 55 b.

(*d*) Ibid. 57. Vide sup. p. 257, p. 287, n. (*r*).

(*e*) See Harnett *v.* Maitland, 16 Mee. & W. 257.

[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 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 (*e*), or notice must be given to the lessee (*f*)—the exertion of any act of ownership by the lessor] without the lessee's consent, [as entering upon the premises and cutting timber (*g*), or taking a distress for rent and impounding it thereon (*h*);] or the lessor's [making a feoffment, or lease for years of the lands to commence immediately (*i*); or any act of desertion by the lessee, as assigning his estate to another; which is an act inconsistent with such a tenure (*k*);] or committing waste (*l*); [or (which is *instar omnium*) the death or outlawry of either lessor or lessee (*m*);—puts an end to or determines the estate at will.

The law is, however, careful that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils (*n*). 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 (*o*). 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 (*p*); but have rather held them to be *tenancies from year to year so long as both parties please*,]

(*e*) Co. Litt. 55 b.

(*f*) Hinchman *v.* Iles, 1 Ventr. 248.

(*g*) Co. Litt. 55 b. So by carrying away stone, Turner *v.* Doe *d.* Bennett, 9 M. & W. 643.

(*h*) Co. Litt. 57 b.

(*i*) 1 Roll. Abr. 860; Disdale *v.* Iles, 2 Lev. 88.

(*k*) Co. Litt. 57 a.

(*l*) Ibid.; 1 Watk. Copyh. 511.

(*m*) Oland's case, 5 Rep. 116 b; Co. Litt. 57 b, 62 b.

(*n*) Litt. s. 69.

(*o*) Leighton *v.* Theed, 2 Salk. 414; Kighly *v.* Bulkly, 1 Sid. 339.

(*p*) But a demise, wherein the in-

and will not suffer either party to determine the tenancy, without reasonable notice to the other (*q*); which reasonable notice is now fixed, by general usage, at half a year at the least, ending with the current year of the tenancy (*r*); though where the tenancy commenced at one of the usual quarterly feast days, the half-year may be computed from one feast day to another, whether there be 182 days between them or not (*s*).

This tenancy "from year to year," or "by the year," has in modern times almost entirely superseded the old tenancy at will, and prevails so much that it may be proper to enlarge a little more upon its character. It belongs properly to the first species of estate which has been noticed in this chapter, viz. the estate for years; though, from the degree of uncertainty to which its duration is subject, it partakes also in some measure of the nature of an estate at will. It may be created not only by the express agreement of the parties (verbal or written), but also by construction of law. Thus, if a man demise land to another at a yearly rent, no length of time being expressed, the law will construe this as a demise from year to year (*t*). So the law will always imply a tenancy from year to year where land is occupied at an annual rent, and there is no evidence that the occupier's estate is of a different description (*u*). And the case has been

tention of the parties is evidently to create a tenancy by will, will still be so construed by the courts. See Doe *v.* Cox, 11 Q. B. 122.

(*q*) See Sutton *v.* Temple, 12 Mee. & W. 52; Hart *v.* Windsor, ibid. 68.

(*r*) See Timmins *v.* Rawlinson, 3 Burr. 1603; Right *v.* Darby, 1 T. R. 159; Doe *v.* Smith, 5 Ad. & El. 351; Doe *v.* Stanion, 1 Mee. & Wels. 695. Blackstone remarks that this kind of lease was in use as long ago as the reign of Henry the eighth, when half a year's notice seems to have been required to determine it. T. 13 H. 8, 15, 16; 2 Bl. Com. 147.

(*s*) Doe *v.* Watkins, 7 East, 551; Roe *v.* Doe, 6 Bing. 574.

(*t*) See Richardson *v.* Langridge, 4 Taunt. 128; Shirley *v.* Newman, 1 Esp. N. P. C. 266; Doe *v.* Hazell, ib. 94; Doe *v.* Donavan, 1 Taunt. 555; Wilkinson *v.* Hall, 3 Bing. N. C. 508.

(*u*) See Doe *d.* Lord *v.* Crago, 6 C. B. 90.

adjudged to be the same, if a man is let into possession under a verbal demise for a term of more than three years—which by the statute of frauds (*x*) ought to be in writing, and by a recent act must also be by deed (*y*);—for though, by these provisions, the lease will not be effectual for the term intended, yet it has been held that the lessee must be considered as holding from year to year (*z*).

With respect to the duration of the interest, it is to be observed, that, as the half-year's notice to determine the estate (or *notice to quit* as it is called) (*a*) must always be for quitting at the end of some particular year of the tenancy, a lease "from year to year" will necessarily confer an estate for one year certain, at the outset (*b*); and if in that, or any succeeding year of the tenancy, more than half a year elapse without a notice to quit being given by either of the parties, another year certain is thereby constantly added to that which is in progress. Upon the same principle, if the lease be "*for a year*, and so from year to year," it will enure as a demise for *two years* certain at the outset (*c*); for at the expiration of the first, there is a continuation of the tenancy, which cannot be determined by a notice to quit at an earlier period than the expiration of the second year. But in other respects the law of duration is the same as in the case first supposed. It is further to be remarked, that the estate from year to year, when once constituted, does not determine (like an estate at will), by an assignment of the interest of either of the parties, or by their death: but the tenancy will con-

(*x*) 29 Car. 2, c. 3.

(*y*) 8 & 9 Vict. c. 106, vide sup. p. 287.

(*z*) See Doe *v.* Bell, 5 T. R. 471; Clayton *v.* Blakey, 8 T. R. 3; Tress *v.* Savage, 4 Ell. & Bl. 36; Lee *v.* Smith, 9 Exch. 662; Stratton *v.* Pettit, 16 C. B. 432.

(*a*) As to the manner of proving a notice to quit, see Doe *v.* Somerton, 7 Q. B. 58; Stapylton *v.* Clough, 2 Ell. & Bl. 933. As to the sufficiency of a notice to quit as given in particular cases, see Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143; Doe *d.* Bailey *v.* Foster, 3 C. B. 215.

(*b*) See Doe *d.* Hogg *v.* Taylor, 1 Jur. 960; Doe *d.* Cornwall *v.* Matthews, 11 C. B. 675.

(*c*) Denn *v.* Cartwright, 4 East, 32

time to exist between one of the parties and the assigns or representatives of the other; or between the assigns or representatives of both parties, (as the case may be,) until duly determined by the usual notice to quit (*d*). To which it may be added, that though the same law with respect to waste, (either voluntary or permissive,) as above laid down in the case of a tenant at will, is also applicable in general to a tenant from year to year, yet where the demise to the latter comprises a house, he seems bound to keep it in weather-tight condition (*e*), and consequently to be answerable for such permissive waste as may arise by his neglect to do so;—a doctrine which is not understood to be applicable to a mere tenant at will.

III. An estate at *sufferance*, is where one comes into possession of land, under a lawful demise, and, after the estate demised is ended, wrongfully continues the possession (*f*). [As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises, without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will, and dies, the estate at will is thereby determined; but if the tenant continueth possession, he is tenant at sufferance (*g*). But no man can be tenant at sufferance against the king, to whom no *laches*, or neglect, in not entering and ousting the tenant, is ever imputed by law; but his tenant, so holding over, is considered as an absolute intruder (*h*). And 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; but, before entry, the owner cannot maintain an action of trespass against the tenant by sufferance, as

(*d*) See Maddon *v.* White, 2 T. R. 159; Doe *v.* Porter, 3 T. R. 13; Buckworth *v.* Simpson, 5 Tyr. 354.

(*e*) See per Lord Kenyon, Ferguson *v.* ——, 2 Esp. N. C. 590; per Lord Tenterden, Auworth *v.* Johnson, 5 Car. & P. 241.

(*f*) Co. Litt. 57 b, 271 a; 2 Inst. 134.

(*g*) Co. Litt. 57 b.

(*h*) Ibid.; and see n. (4), by Harg.

[he might against a stranger (*i*): 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 had formerly no remedy in such cases but by entry, or an action of ejectment for the land;—followed by an action of trespass for damages; in which the tenant was bound only 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 after 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 his former rent for such time as he continues in possession (*j*).]

To give landlords, also, as against their tenants holding over, the option of a more cheap and speedy remedy than the formal one of an ejectment in one of the superior

(*i*) Trevellian *v.* Andrew, 5 Mod. 384.

(*j*) As to these statutes, see Co. Litt. by Harg. 57 b, n. (2); Wilkinson *v.* Colley, 5 Burr. 2694; Soulsby *v.* Neving, 9 East, 314; Doe *v.* Roe, 7 Barn. & Cress. 2; Messenger *v.* Armstrong, 1 T. R. 53; Page *v.* Moore, 15 Q. B. 684. Where the tenant holds over, and an ejectment is brought, he may be compelled in some cases to find sureties for payment of the costs and damages. See 15 & 16 Vict. c. 76, s. 213, post, bk. v. c. xi.

courts (*k*), where the property is of small value, it is provided by 1 & 2 Vict. c. 74 (*l*), that where a tenant has held at will, or for a term not exceeding seven years, without rent, or at a rent not exceeding the rate of £20 per annum, and such tenant or the person occupying under him, shall fail to deliver up possession after his interest has ended, or been duly determined by notice to quit or otherwise, his landlord (or any of his landlords, where there are several) may proceed (after giving written notice of the intention to do so) to recover possession by a summary proceeding before any two justices of the peace assembled in petty sessions for the district; who are authorized (unless reasonable cause is shown against it by the tenant) to issue their warrant accordingly. But where the person obtaining the warrant has no lawful right to the possession, the act of obtaining it is to be deemed a trespass; and execution of the warrant is in every case to be stayed if the tenant shall give security to bring an action to try the right, and to pay all the costs thereof in the event of judgment being given against him. Moreover, by 19 & 20 Vict. c. 108, s. 50, it is now enacted, that if the term and interest of the tenant of any corporeal hereditament—where the value of the premises or the rent payable in respect of such tenancy shall not have exceeded £50 per annum, and upon which no fine or premium have been paid—shall have expired or been duly determined by a legal notice to quit, and the tenant or any person holding or claiming through him shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint in the county court of the district (*m*), either against such tenant or such other person as aforesaid, and, after judgment

(*k*) As to ejectment, vide post, bk. v. c. XI.

(*l*) See Jones *v.* Chapman, 14 Mee. & W. 124. As to recovering possession of premises held over within the *metropolitan district*, see 3 & 4 Vict. c. 84, s. 13; 11 & 12 Vict. c. 43, s. 34; Edwards *v.* Hodges, 15 C. B. 477.

(*m*) As to the district county courts, vide post, bk. v. c. IV.

given in his favour, obtain possession through the high bailiff of the court, to whom a warrant may be issued for that purpose by the registrar (*n*).

We may conclude the present chapter with this remark, that in the case of a lease for years, as well as that of a lease for life, or gift in tail, a tenure (of the imperfect kind (*o*)) is created between the lessor and the lessee, and the latter holds of the former by the nominal obligation of fealty, and by such services as are reserved: but that it is otherwise as to a tenant at will or at sufferance, from neither of whom is any fealty due. The reason assigned as to the tenant at will, is, that "he hath not any sure estate" (*p*); and as to the tenant at sufferance, he is not considered, in strictness, as having any estate at all, but a mere "possession without privity" (*q*).

(*n*) There is a former provision nearly to the same effect in 9 & 10 Vict. c. 95, s. 122, as to which see Jones *v.* Owen, 5 D. & L. 669; Fearon *v.* Nowall, ib. 445; Ellis *v.* Peachey, ib. 675; Banks *v.* Rebbeck, 2 L., M. & P. 452; Harrington *v.* Ramsay, 8 Exch. 879; 2 Ell. & Bl. 669.

(*o*) Vide sup. p. 248.

(*p*) Co. Litt. 93 a, 93 b; 63 a, 68 b, n. (5), by Harg.; vide Denn *v.* Fearnside, 1 Wils. 176. There is an exception to this, however, in the case of copyhold, which is a species of estate at will, for fealty is due from a copyholder, though *respited* as of course, on his admittance; ibid.

(*q*) Co. Litt. 270 b.

CHAPTER VI.

OF ESTATES UPON CONDITION.

[BESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition* (*a*); 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 (*b*). And these conditional estates have been reserved 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 (*c*), without adding other words; the law

(*a* As to this estate, vide Co. Litt. 201 a—237 a.

(*b*) Co. Litt. 201 a; Lord Stafford's case, 8 Rep. 73 b.

(*c*) As to offices, vide post, bk. II. pt. I. c. XXIII; bk. IV. pt. I. c. X.

[tacitly annexes hereto a secret condition, that the grantee shall duly execute his office (*c*); on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person (*d*). Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect (*e*).

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 tenant for life or years enfeoff a stranger in fee simple]; this, *by the common law*, as we shall see hereafter (*f*), [was a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz. that the tenants shall not attempt to create a greater estate than they themselves are entitled to (*g*).

II. An estate on condition *expressed* in the grant itself] is of two kinds. The first is [where an estate is granted —either in fee simple or otherwise—with an expressed qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition (*h*),] which is described in the books as a condition *in deed* (*i*). [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"

(*c*) Litt. s. 378; vide Bartlett *v.* Downes, 3 Barn. & Cress. 619.

(*d*) Litt. s. 378.

(*e*) Earl of Shrewsbury's case, 9 Rep. 50.

(*f*) Vide post, p. 316.

(*g*) Co. Litt. 215 a; sed vide 8 & 9 Vict. c. 106, s. 4, et post, ubi sup.

(*h*) Co. Litt. 201 a. As to the commencement of estates upon condition, vide Co. Litt. 216 a—218 b; as to their enlargement on condition, vide Lord Stafford's case, 8 Rep. 74; Fearne, by Butler, 279, 9th ed.; as to their defeasance on condition, vide Co. Litt. 214 b, 215 a.

(*i*) Co. Litt. 201 a.

[are such, by the failure or non-performance of which an estate already vested may be defeated.] Thus, [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 is a condition precedent, and the fee simple passeth not till the hundred marks be paid (*k*). 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 (*l*).] But secondly, estates on condition expressed in the grant may be created not only by a condition in deed, but by a *conditional limitation* (*m*); which is, where an estate is so expressly defined 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. To this class may be referred all base fees, and fees simple conditional at the common law (*n*). 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

(*k*) Co. Litt. 217 b; Lord Stafford's case, 8 Rep. 73 b.

(*l*) Litt. s. 325.

(*m*) Co. Litt. 234 b; vide Mary Portington's case, 10 Rep. 40 b, 41 b. The term used by Lord Coke is simply "a limitation." But as "limitation" is ordinarily used to express a more general idea (viz. the definition or circumscription in any conveyance, of the interest which the grantee is intended to take), the term "conditional limitation" better expresses the idea in the text, and is frequently adopted for that purpose (as in 1 Sand. Us. 149, 2nd ed.) It is right, however, to apprise the student that this term is used by different writers in different senses; vide 1 Sand. Uses, 149, 2nd ed.; Fearne, by Butler, 10, n. (*h*), 9th ed.; Gilb. Us. by Sugd. 178.

(*n*) Vide sup. p. 239.

[heirs of his body. Upon the same principle depend all the determinable estates of freehold, mentioned in the fourth chapter: as *durante viduitate*, &c.: these are estates upon condition that the grantees do not marry, and the like (*o*).]

Between conditional limitations and estates depending on condition subsequent, (though bearing, on the whole, considerable resemblance to each other,) there is this difference—that [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; 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 take advantage of the breach of the condition, and make an entry in order to avoid the estate (*p*).] As to the necessity of entry, however, there is a diversity (says Lord Coke) between a condition annexed to a freehold and a condition annexed to a lease for years (*q*). Thus, if a lease for years be made on condition that, if the lessee goes not to Rome before such a day, the lease shall

(*o*) Vide sup. pp. 256, 257.

(*p*) Litt. s. 347, 331; stat. 32 Hen. 8, c. 34; Mary Portington's case, 10 Rep. 40 b, 41 b; Avelyn *v.* Ward, 1 Ves. sen. 420. As to the party on whom lies the *onus probandi* with respect to the breach of the condition, see Brooke *v.* Spong, 15 Mee. & W. 153.

(*q*) As to re-entry by a lessor on breach of condition, see Roberts *v.* Davey, 4 Barn. & Adol. 664; Hill *v.* Kempshall, 7 C. B. 977.

be void, the lease is *ipso facto* void upon the breach of the condition, without any entry by the lessor; but if the lease had been for life, an entry would have been necessary before it could have been defeated (*r*).

The right of entry on breach of a condition subsequent, cannot be reserved in favour of a stranger, but only of the grantor or his heirs; and on entry by him or them, after breach, the effect is to defeat altogether the estate which had before passed to the grantee; so that the grantor or his heirs are *in* as of their former seisin (*s*). It was also the rule of the common law, that the right of entry could not be assigned in any case to a stranger (*t*). So that if a man had made a lease for life, reserving a rent, with proviso for re-entry in case of non-payment, and the lessor granted over his reversionary estate to another, the latter could take no benefit from the condition (*u*). But by statute 32 Hen. VIII. c. 34 (*v*), the law in this respect is altered, and the grantee of the reversion, upon a lease for life or years, shall have the same benefit of a condition, in case of a subsequent breach, as the grantor himself would have had,—provided that it relate to the payment of rent, the restriction from waste, or other like object tending to the benefit of the reversionary interest (*x*). And with respect to *conditional limitations*, a stranger may in all cases take advantage of these even by the common law. Thus, if

(*r*) Co. Litt. 214 b. As to the nature of the entry required, see Doe *v.* Pritchard, 5 Barn. & Adol. 765.

(*s*) Fearne, by Butler, 381, n. (*a*), 9th ed. As to the rights of the grantor, or his heirs on re-entry, in respect of the *emblements*, see Davis *v.* Eyton, 7 Bing. 154.

(*t*) Litt. s. 347.

(*u*) Co. Litt. 215 a.

(*v*) As to this statute, vide Thursby *v.* Plant, 1 Saund. by Wms. 237, and the notes thereto. Buckworth *v.* Simpson, 5 Tyrw. 354; Standen *v.* Chrismas and another, 10 Q. B. 135; Wright *v.* Burroughes, 3 C. B. 685. It may be observed here, that a right of entry which has actually accrued to the lessor, &c., for a condition broken, seems not to be assignable under 8 & 9 Vict. c. 106, s. 6, so as to allow the assignee of the reversion to recover possession of the premises by reason thereof. See Hunt *v.* Bishop, 8 Exch. 675; Hunt *v* Remnant, 9 Exch. 635.

(*x*) Co. Litt. 205 b; 1 Saund. by Wms. 287, n. (16).

a man make a lease until J. S. shall return from Rome, and afterwards grant the reversion over to another, such grantee, on the return of J. S. from Rome, shall be entitled to enter, the interest of the lessee being then determined by the terms of the limitation itself (*y*).

In all instances of estates upon express condition, it is to be observed, that so long as the condition [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 (*z*); 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 reason of 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. 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

(*y*) Co. Litt. 214 b; Mary Portington's case, 10 Rep. 42.

(*z*) Co. Litt. 42 a.

[estate shall be vacated and determined: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal or repugnant (*a*). 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 (*b*).]

On the other hand, even where the condition is valid and capable of being enforced, it is also capable of being waived by the grantor at his pleasure (*c*); and as the law always leans against forfeitures (*d*), it will consider him as having waived his right to enter for breach of a condition subsequent, if, after notice of the breach committed, he does any act inconsistent with an intention to avail himself of the forfeiture. Thus, if a lease be made with a proviso that, in the event of the lessee's assigning his interest, the lessor shall be at liberty to enter on the land demised, as of his former estate, he will nevertheless not be entitled to enter, if, after an assignment made, he accepts rent from the assignee (*e*).

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

III. Estates held *in vadio*, in *gage*, or pledge: which

(*a*) Co. Litt. 206 a; Mary Portington's case, 10 Rep. 42; see judgment of Parke, B., in Doe *v.* Eyre, 5 C. B. 744.

(*b*) Co. Litt. 206 a.

(*c*) Ibid. 218 a.

(*d*) Ibid. 206 b; Clay *v.* Bowler, 5 Ad. & El. 403, n.

(*e*) See Whitchcot *v.* Fox, Cro. Jac. 398; Co. Litt. 211 b; Green's case, Cro. Eliz. 3; Pennant's case, 3 Rep. 64 a; Fenn *v.* Smart, 12 East, 444; Doe *v.* Lewis, 5 Ad. & El. 277; Doe *v.* Rees, 4 Bing. N. C. 384.

[are of two kinds, *vivum vadium*, or living pledge: and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum vadium, or living pledge,] (a term rarely or never occurring in practice) [is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 20*l. per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and, immediately on the discharge of that, results back to the borrower (*f*). 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.*), and grants him an estate (*g*) on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.*] (or, as is more usual, the said sum of 200*l.*, with interest at such a rate,) [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 (*h*).]

(*f*) Co. Litt. 205 a; vide Fenwick *v.* Reed, 1 Meriv. 119.

(*g*) As to mortgage of a *personal chattel*, see Flory *v.* Denny, 7 Exch. 581.

(*h*) Litt. s. 332. A mere deposit of title-deeds without conveyance will amount to a mortgage in contemplation of a court of *equity*. As to these *equitable* mortgages, see Russell *v.* Russell, 1 Bro. C. C. 769; Ex parte Wetherell, 11 Ves. 401; Ex parte Hardy, 2 Deac. & Chit. 393; Pain *v.* Smith, 2 Mylne & K. 417; Keys *v.* Williams, 8 You. & Coll. 55; Lister *v.* Turner, 5 Hare, 281.

As soon as the estate is created, the mortgagee, in the absence of any stipulation to the contrary, might immediately enter on the lands, but would be bound to restore them upon performance of the condition by payment of the mortgage-money at the day limited: and therefore it is usual to insert a provision that the mortgagor shall hold the land till the day assigned for payment; but in case of failure to pay at that period, the mortgagee is then entitled to enter and take possession (*i*), without any possibility at the *common law* of being afterwards evicted by the mortgagor. The mortgagee, however, is not permitted to avail himself of the forfeiture, to any extent beyond what is necessary for the satisfaction of his reasonable claims. For here [the courts of *equity* interpose; and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the *common law*, yet they will allow the mortgagor to recall or *redeem* his estate (*k*), 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.] It is, however, provided by a statute of modern date, 3 & 4 Will. IV. c. 27, s. 28, that the mortgagor shall not be entitled to redeem but within twenty years next after the time that the mortgagee shall obtain possession, unless in the mean time an acknowledgment in writing shall have been given by the mortgagee of the right of the mortgagor, in which case

(*i*) Doe *v.* Giles, 5 Bing. 421; Doe *v.* Cadwallader, 2 Barn. & Adol. 473; Thunder *v.* Belcher, 3 East, 449; Doe *v.* Maisey, 8 Barn. & Cress. 767; Partington *v.* Woodcock, 6 Ad. & El. 695. It is supposed in the text that there is no tenant in possession under a lease *prior* to the mortgage. If there be, his possession cannot of course be disturbed; but he may be compelled to pay over his rents to the mortgagee. If there be a tenant in possession under a lease granted by the mortgagor *subsequently* to the mortgage, and without the privity of the mortgagee, he may be ejected. See the same cases.

(*k*) But if the money be not repaid by the day assigned, and the mortgagee has neither demanded, nor taken any steps to compel, payment, he is entitled to receive six calendar months' notice in writing that the mortgage is to be paid off. See Shrapnell *v.* Blake, 2 Eq. Ca. Ab. *in tit.* Mortgage, pl. 34.

the power of redemption is limited to a period of twenty years from such acknowledgment. And, in favour of a mortgagee who has not obtained possession, it is enacted by 7 Will. IV. & 1 Vict. c. 28, that it shall be lawful for any person, entitled to or claiming under any mortgage of land, being land within the meaning of 3 & 4 Will. IV. c. 27, to make an entry or bring an action at law or suit in equity to recover the same, (although more than twenty years may have elapsed since his right so to do shall have first accrued,) within twenty years next after the last payment of any part of the principal or interest secured by such mortgage (*l*).

The reasonable advantage above referred to, [allowed to mortgagors, is called the *equity of redemption* (*n*);] and the mortgagor may avail himself of it by filing a "bill to redeem" (as it is called) in one of the courts of equity. If the mortgagee is not in possession, the bill merely calls upon him for a reconveyance (*m*), on payment of principal, interest, and costs of suit: but as against a mortgagee who has obtained possession, such a bill prays that an account may be taken of all the rents and profits on the one hand, and of the principal, interest, and costs on the other; and that, on payment of what may appear due on such account, a reconveyance may be made, and the possession of the premises restored (*n*). [On the other hand,

(*l*) See Doe *d.* Palmer *v.* Eyre, 17 Q. B. 366; Doe *d.* Baddeley *v.* Massey, ibid. 573.

(*m*) In certain cases of accidental or formal difficulty in obtaining a reconveyance, (as where the mortgagee has died intestate and without an heir,) the Court of Chancery is empowered to make an order having the effect of a reconveyance. See 13 & 14 Vict. c. 60, for consolidating and amending the laws relating to the conveyance and transfer of real and personal property vested in mortgagees and trustees.

(*n*) It may be here incidentally observed that, during the continuance of the equity of redemption, the Court of Chancery regards the mortgagor as the owner of the same estate as he had in the lands before the mortgage, subject only to the debt thereby created; and one consequence of this doctrine is, that on the death of the mortgagor, the mortgaged estate comes to the devisee or heir encumbered with this debt. By 17 & 18 Vict. c. 113, the estate so encumbered and devised or descending is, in the absence of an expressed in-

[the mortgagee may, where his debt remains unpaid] for more than a reasonable time after the time agreed on, file a "bill of foreclosure" in the Court of Chancery, calling 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 (*o*). And also, in some cases of fraudulent mortgages (*p*),] such as twice mortgaging the same lands without giving notice of the mortgage already effected (*q*), [the fraudulent mortgagor forfeits all equity of redemption whatsoever.] The mortgagee may also bring the estate to sale in satisfaction of his debt, (paying over the surplus proceeds, if any, to the mortgagor), even without resorting to the authority of a court of equity, if the security be taken (as is now the usual practice) in such form as to authorize that course of proceeding.

It is further to be observed, that where no suit is pending in any court of equity, either for redemption on the one hand or foreclosure on the other, but the mortgagee attempts to obtain possession by bringing an action of ejectment in one of the courts of the common law, such court is invested, by statute, with the power of exercising a species of equitable interference; for if the mortgagor still possesses the equitable right of redemption, he is enabled by 7 Geo. II. c. 20, and 15 & 16 Vict. c. 76, s. 219, to apply to the common law court for relief; and that court will accordingly compel the mortgagee to stay

tention to the contrary on the part of the mortgagor, charged with such debt. Before this act, in the absence of an expressed intention, the personal estate of the deceased mortgagor was primarily liable.

(*o*) As to the power of the Court of Chancery to direct, in such suit, a *sale of the property* instead of a foreclosure, see 15 & 16 Vict. c. 86, s. 48.

(*p*) See stat. 4 & 5 W. & M. c. 16.

(*q*) In cases where the land is mortgaged to several persons, each ignorant of the other incumbrances, the maxim *qui prior est tempore, potior est jure*, prevails, as the general rule. See Jones *v.* Jones, 8 Sim. 633; Wilmot *v.* Pike, 5 Hare, 14. But preference is given, to a certain extent, to the mortgagee in possession of the legal estate; Goddard *v.* Complin, 1 Cha. Ca. 119.

his proceedings, and to execute a reconveyance, upon payment of principal, interest and costs, to be computed by its officer (*r*).

The state of the law, as above explained, with respect to mortgages, affords the reader an example of the distinction referred to in a former place between *legal* and *equitable* estate (*s*). In the courts of common law, the ownership of the land, as we have seen, is considered as absolutely vested, upon the non-payment of the money advanced, in the mortgagee. The courts of equity, on the other hand, hold the mortgagor to be the true owner until a foreclosure takes place (*t*). There exists therefore, in respect of the same subject-matter, a legal and an equitable estate; the former being vested in the mortgagee, the latter in the mortgagor.

IV. [A fourth species of estates, defeasible on condition, are those held by *statute merchant* and *statute staple* (*u*); 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

(*r*) See Goodtitle *v.* Pope, 7 T. R. 185; Doe *v.* Roe, 4 Taunt. 887; Doe *v.* Steele, 1 Dowl. 359; Hurd *v.* Clifton, 4 Ad. & El. 814; Sutton *v.* Rawlings, 3 Exch. 407; Filbee *v.* Hopkins, 6 Dow. & L. 264; Doe *v.* Louch, ibid. 270; Corder *v.* Morgan, 18 Ves. 344.

(*s*) Vide sup. p. 231; 1 Sand. Us. 203, 2nd ed.

(*t*) Cashborn *v.* Scarfe, 7 Vin. Ab. 156; 2 Eq. Ca. Ab. 728, S. C. vide Amherst *v.* Dawling, 2 Vern. 401.

(*u*) As to these estates, vide 2 Inst. 322; 2 Saund. by Wms. 69 c, n. (3); Reeves's Hist. Eng. Law, vol. ii. pp. 161, 393.

[towns, from whence this security is called a statute staple. They are both 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, 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 direct such recognizances to be enrolled and certified into chancery. But these, by the statute of frauds, 29 Car. II. c. 3, are only binding upon the lands in the hands of *bonâ fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record.]

All these securities, however, by statute staple, statute merchant, and recognizances in the nature of a statute staple, are now fallen into disuse (*x*); having been long ago superseded by other more convenient and efficacious remedies, devised by the law in modern times for the benefit of creditors, especially by the statutes relative to bankrupts (*y*).

V. [Another similar conditional estate created by opera-

(*x*) It has been remarked (see Burt. Compend. 298) that the law relative to statute staple is still so far of practical importance, that by 33 Hen. 8, c. 39, and 13 Eliz. c. 4, persons indebted to the crown are to incur, in certain cases, the same liability as if they were bound in a statute staple. As to the statutes just cited, see Regina *v.* Ellis, 4 Exch. 652.

(*y*) As to the law of bankruptcy and insolvency, vide post, bk. II. pt. II. c. VI.

[tion 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 a subsequent part of this work (*z*). At present it may be sufficient to mention that it is the name of a writ, founded on the statute of Westminster the second (*a*),] by which, after a plaintiff or defendant has obtained judgment in an action, the sheriff gives him possession of the lands and tenements of the opposite party, to be occupied and enjoyed until the money due on such judgment is 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 judgment debt is levied (*b*).] And by this writ, at one period, only one half of the lands and tenements of the judgment debtor could be seized in execution; for as the general right which a man possessed of aliening his lands by his own act did not (as is commonly supposed) extend, at the time of the passing of the statute of Westminster the second, to the whole (*c*), that statute permitted them to be only partially affected by the process of law for his ordinary debts; though on the other hand, by the statute *De mercatoribus*, passed in the same year (*d*), the *whole* of a man's lands were liable to be pledged in a statute merchant, for a debt contracted in trade; so much more readily did the feudal restraint on alienation yield to considerations of a commercial kind, than to any others. And such continued to be the state of the law as to the writ of elegit, until the late statute 1 & 2 Vict. c. 110, which enables the judgment creditor to seize by that writ

(*z*) Vide post, bk. v. c. x.

(*a*) 13 Edw. 1, c. 18. See 2 Saund. by Wms. 68 a, n. (1); Reeves's Hist. Eng. Law, vol. ii. p. 187.

(*b*) Dighton *v.* Greenvil, 2 Vent. 327; Price *v.* Varney, 3 Barn. & Cress. 733.

(*c*) Wright's Ten. 154; Blackstone says, that "before the statute "of *Quia emptores*, 18 Edw. 1, it is "generally thought that the pro-"prietor of lands was enabled to "alienate no more than a *moiety* of "them."—2 Bl. Com. p. 161.

(*d*) 13 Edw. 1.

the whole (instead of a moiety only, as in former times) of the judgment debtor's lands and tenements (*e*).

We shall conclude our notice of the tenants by statute merchant, statute staple, and elegit, with this remark, that though they are said to hold *ut liberum tenementum* until their debts are paid, yet are their estates no freeholds, but chattels, and pass to the *personal representative* (*f*): [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 (*g*); 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.]

(*e*) 1 & 2 Vict. c. 110, s. 11. The same statute (s. 18) gives to rules of the courts of law for the payment of money (and also to decrees, &c. of the Courts of Equity) the effect of a *judgment*. As to the effect of a judgment, vide post, bk. v. c. x.

(*f*) Co. Litt. 42 a, 43 b; 2 Inst. 322.

(*g*) Co. Litt. 42 a.

CHAPTER VII.

OF ESTATES IN POSSESSION, REVERSION, AND REMAINDER.

[HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view: with regard to the *time of their enjoyment* (*a*).] When contemplated in this light, they are either in *possession* or *expectancy*. Where a man is entitled immediately to the possession of land, by virtue of any of the estates or interests which we have been considering, his estate is said to be in possession (*b*); when entitled to it, not immediately, but *in futuro*, his estate is said to be in expectancy. Of expectancies, again, there are at the common law two sorts: one called a *reversion*; the other a *remainder*.

I. Of estates in *possession* not much remains to be observed. All the estates hitherto mentioned were supposed to be of this kind; for in laying down general rules we usually apply them to such estates as these. But it is material further to remark of them, that a man may have an estate in possession in land, and may nevertheless not be in actual possession of the land; for the tenant may be

(*a*) Vide sup. p. 231.

(*b*) Blackstone defines estates in possession as "those whereby a present interest passes to and resides "in the tenant, not depending on "any subsequent circumstance or "contingency."—2 Bl. Com. 163. So it is said in 2 Cruise, Dig. 258, that "estates in possession are those "where the tenant is entitled to the "actual pernancy of the profits."

disseised (*c*), that is, put out of the actual seisin (supposing his estate to be freehold), or may be wrongfully deprived or ousted of the actual possession (whatever may be the nature of his estate), in some one of the various ways which will hereafter be described when we treat of the modes of civil injury (*d*): but will still retain an estate in possession, according to the sense in which that term is above used. In such a case the true owner is also said to have the *right of possession* (*e*); as opposed to the mere *naked possession* of the wrongdoer: and this right of possession involves also the *right of entry* (*f*), that is, the right of peaceably entering upon and taking possession of the land withheld; while, on the other hand, the naked possession of the wrongdoer is capable—by length of time and the neglect of the true owner to assert his right—of ripening, after a certain period (fixed, in general, at twenty years), into a lawful and indefeasible estate. Without pausing, however, upon these subjects, the further development of which belongs to a later portion of our work, we shall now proceed to examine the doctrine of estates in expectancy.

II. An estate, then, in *reversion* (*g*) (to the nature of which we have already had occasion in some measure to refer) is where any estate is derived, by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived; the latter interest is called the *particular estate* (as being

(*c*) As to disseisin, vide Co. Litt. 181 a; Taylor *v.* Horde, 1 Burr. 60; Williams *v.* Thomas, 12 East, 141; Doe *v.* Perkins, 3 Mau. & Sel. 275.

(*d*) Vide post, bk. v. c. VIII.

(*e*) 2 Bl. Com. 195; 3 Bl. Com. 177; Gilb. Ten. 21.

(*f*) The right of entry also involves that of proceeding against the wrongdoer by *ejectment*, which is the form of action for recovering land wrongfully withheld. The antient forms of proceeding called *real actions*, by which land might also formerly be recovered, are now (with some very few exceptions) abolished by 3 & 4 Will. 4, c. 27, s. 36, vide post, ubi sup.

(*g*) Lord Coke treats of remainders before reversions, and is followed in this by Blackstone. But the order chosen in the text would seem to be the more natural and convenient.

only a small part or *particula* of the original one), and the ulterior interest, the *reversion* (*h*). Thus, upon the creation by the owner of the fee, of any estate in tail, for life, or for years, the residue of the fee undisposed of is described as the reversion expectant upon the particular estate in tail, for life, or years, so created. As soon as the particular estate is thus carved out of the original one (no further disposition being made), the expectant interest or reversion is vested in him who was before the owner of the whole, *ipso facto* and without any special reservation for the purpose (*i*). For where a smaller estate is merely taken out of a larger, the residue remains, as of course, in the original proprietor. This reversion is an actual interest or estate (*k*); but it is an estate in expectancy only, and not in possession, because the reversioner has no right to the possession until the particular estate is determined.

The tenant of a particular estate in tail, for life, or years, holds (as we have elsewhere shown (*l*)) of the reversioner, by fealty and by such services as are reserved between them. Hence the usual *incidents* (*m*) to reversions are said to be *fealty* and *rent*; rent being the usual description of

(*h*) Lord Coke says, "A reversion "is where the residue of the estate "always doth continue in him that "made the particular estate, or "where the particular estate is de-"rived out of his estate, as in the "case tenant in fee simple maketh "gift in tail, &c. If a man extend "lands by force of a statute mer-"chant, staple, recognizance, or "elegit, he leaveth a reversion in "the conusor."—Co. Litt. 22 b. He elsewhere speaks of a reversion as a returning of the land to the grantor or his heirs after the grant is over (Co. Litt. 142 b); but this is a wider sense of the term than is usually attached to it, and would include a *possibility* of *reverter*, (vide sup. p. 244), and an *escheat*, (vide sup. pp. 179, 200, 210.) A reversion is defined by Blackstone as "the residue of an estate left in the "grantor, to commence in possession "after the determination of some par-"ticular estate granted out by him." —2 Bl. Com. 175.

(*i*) Litt. s. 19.

(*k*) Wiscot's case, 2 Rep. 61; vide Doe *v.* Gatacre, 5 Bing. N. C. 619.

(*l*) Vide sup. 248, 257, 296.

(*m*) "An incident," says Lord Coke, "is a thing appertaining to or "following another, as more worthy "or principal."—Co. Litt. 151 a.

service. [When no rent is reserved on the particular estate, fealty however results of course as an incident quite inseparable:] and in the case [where rent is reserved, it is also incident, though not inseparably so, to the reversion. 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 *è converso;* for the maxim of law is *accessorium non ducit sed sequitur suum principale* (*n*).]

Where a freehold reversion (that is, a reversion in fee, in tail, or for life) is expectant on a particular estate of freehold, the reversioner is said to be "seised of the reversion as of fee" (or if his estate be for life, "as of freehold" only) and not to be "seised of the land in his demesne as of fee" (or "freehold"), as in the case of an estate in possession; but if a freehold reversion be expectant on a particular estate for years, it is in that case correct to describe the reversioner as "seised of the land in his demesne as of fee;" for his estate is considered (owing to the small regard once paid to chattel interests) as amounting for many purposes to a freehold estate in possession, and the possession of the termor constitutes the seisin of the freeholder (*o*). Of a reversion expectant on a particular estate of freehold, no dower or curtesy can be claimed; but it is otherwise of a reversion expectant on a term of years (*p*).

By the principles of the *common law*, if the tenant of the particular estate for life or years made a conveyance by feoffment, for an estate not warranted by the nature of his own interest, as where tenant for life made a feoffment

(*n*) Co. Litt. 15, b, 152 a.

(*o*) Wrotesley *v.* Adams, Plowd. 191; Butler, Co. Litt. 330 b. n. (1); Co. Litt. 17 a; 16 East, 350; Doe *v.* Finch, 4 B. & Adol. 305.

(*p*) Co. Litt. 29 b, 32 a; 2 Bl. Com. 127; Stoughton *v.* Leigh, 1 Taunt. 410. As to *dower*, vide sup. p. 267; as to *curtesy*, sup. p. 264.

in fee, or tenant for years a feoffment even for life, it destroyed the particular estate, by converting it into a new and wrongful one, and by consequence it *displaced* or *divested* the reversion in expectancy thereon. But on the other hand, it also operated as a *forfeiture* to the person in reversion, and gave him an immediate right to enter and take possession, in defeasance of the wrongful estate so created (*q*). The law, however, on these points is now to be understood as subject to the effect of the late statute, 8 & 9 Vict. c. 106, by which it is provided (sect. 4) that "a feoffment made after 1st October, 1845, shall not have "any tortious operation (*r*)."

Another doctrine, connected with the law of estates in reversion, is that of "merger." It is a general principle of law, that where [a greater estate and a less coincide and meet in one and the same person, without any intermediate estate (*s*), the less is immediately annihilated, or in the law

(*q*) Litt. s. 415; Co. Litt. 251 a, b; Chudleigh's case, 1 Rep. 135 b; Archer's case, ibid. 66 b; 2 Bl. Com. 153, 274; Doe *v.* Howell, 10 Barn. & Cress. 191. The same effects also in general followed where the particular tenant for life made a wrongful alienation by way of *fine* or *recovery* (conveyances now abolished by 3 & 4 Will. 4, c. 74). See Co. Litt. 356 a, 251 b; Doe *v.* Gatacre, 5 Bing. N. C. 609.

(*r*) We may take the opportunity here of noticing the previous act, "To simplify the Transfer of Property," 7 & 8 Vict. c. 76, which, though repealed by the 8 & 9 Vict. c. 106, was nevertheless in force, as to the greater part of its provisions, from the 31st December, 1844, to the 1st October, 1845, and consequently still affects the title to land during that period. It contained enactments on the following subjects:—1. The conveyance of freehold land without livery of seisin, enrolment, or prior lease; 2. The partition, exchange, or assignment of freeholds or leaseholds; 3. Leases and surrenders in writing, see Burton *v.* Revell, 16 L. J. (Ex.), 85; Doe *d.* Davenish *v.* Moffatt, 15 Q. B. 257; 4. The conveyance of contingent and other future interests; 5. Implied warranties in deeds; 6. Conveyances operating by wrong; 7. Contingent remainders (as to this subject, it is repealed by 8 & 9 Vict. c. 106, *ab initio*); 8. The conveyance of the legal estate of mortgaged property; 9. The receipts of trustees; 10. The indenting of deeds; 11. The non-merger of the remedies on covenants in the reversion.

(*s*) Duncomb *v.* Duncomb, 3 Lev. 437.

[phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be a 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 (*t*). 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 autre 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, 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 (*u*). An estate tail is an exception] to the law of merger; [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 (*x*). For estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *De donis;* which operation and construction have probably arisen upon this consideration, that in the common cases of merger of estates for life or years, by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power

(*t*) By 8 & 9 Vict. c. 106, s. 9, when the reversion expectant on a lease (made either before or after the passing of that act, of any tenements or hereditaments, of any tenure) shall, after the 1st October, 1845, be surrendered or merge, "the estate "which shall for the time being con- "fer as against the tenant under the "same lease the next vested right "to the same tenements or heredi- "taments shall, (to the extent and "for the purpose of preserving such "incidents to, and obligations on, "the same reversion, as, but for the "surrender or merger thereof, would "have subsisted,) be deemed the "reversion expectant on the same "lease."

(*u*) Bracebridge *v.* Cook, Plowd. 418; Platt *v.* Sleap, Cro. Jac. 275; Co. Litt. 338 b. For cases in which a merger will be prevented, see also Fearne's Cont. Rem. 341, 9th edit.

(*x*) Wiscot's case, 2 Rep. 61 a; Lord Stafford's case, 8 Rep. 74 b.

[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 (*y*). But in an estate tail the case is otherwise: the tenant for a long time had no power at all over it so as to bar or to destroy it, and to this day cannot bar or destroy it except in a special method: 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 be merged in the fee (*z*).] Merger, it is to be observed, is not confined to cases where one of the coinciding estates is greater than the other in point of *quantity of interest*; for a term of years will merge in the immediate reversion, though that be a chattel interest also; and even where the term of years in reversion is of shorter duration than the term on which it is expectant, the merger will equally take place (*a*). So a fee simple conditional will merge in the possibility of reverter (*b*).

III. An estate in *remainder* is where any estate is granted out of a larger one, an ulterior estate immediately expectant on that which is so granted being at the same time conveyed away by the original owner. The first estate so granted is called the particular estate, and the ulterior

(*y*) Hughes *v.* Robotham, Cro. Eliz. 302.

(*z*) Where a tenant in tail, however, acquired a base fee, and had also the reversion immediately expectant upon it, the base fee would formerly merge in the reversion. (Martin *v.* Strachan, 5 T. R. 109, n; vide First Real Prop. Rep. p. 28.) But by 3 & 4 Will. 4, c. 74, s. 39, a base fee within the meaning of that statute will now be *enlarged* under such circumstances into a fee simple absolute.

(*a*) See Bac. Abr. Leases, &c. (S.) 2; 3 Prest. Conv. 182; in which last work will be found a very elaborate discussion of the whole law of merger. See also Doe *v.* Walker, 5 Barn. & Cress. 111, where the subject is fully considered.

(*b*) Simpson *v.* Simpson, 4 Bing. N. C. 333.

one the remainder (*c*). [As if a man seised in fee simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs for ever; here A. is tenant for years, remainder to B. in fee. 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 (*d*). 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

(*c*) Lord Coke defines a remainder as "a remnant of an estate in lands "or tenements expectant upon a "particular estate created together "with the same at one time;" Co. Litt. 143 a; Blackstone as "an estate "limited to take effect and be en-"joyed after another estate is deter-"mined." 2 Bl. Com. 164. As to the definition of a remainder, see also Fearne, by Butler, p. 3, n. (*c*), 9th ed. For the information of the student, it may be as well to remark that the word itself is not a term of art; that is, the use of it is not at all necessary, nor indeed usually employed for the creation of the estate. Bac. Ab. Remainder (B.) The word, however, is used in pleading. See the precedents in formedon in remainder. Rast. Ent. 369 b, &c.

(*d*) Co. Litt. 143 a; Fearne, by Butler, 308, 9th ed.

[parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, than no remainder can be limited after the grant of an estate in fee simple (*e*); because a fee simple is the highest and largest estate that a subject is capable of enjoying (*f*): 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 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.] But until the whole fee simple is granted away, any quantity of interest may be carved out of it, expectant on the determination of some preceding interest. Therefore, a remainder, like an estate in possession, may be either in fee, in tail, for life, or years.

From what has been premised, it appears that a reversion and a remainder are both estates in expectancy, but differ in this respect, that the former remains in the grantor, by act or construction of law, as part of his former estate, but a remainder is an estate newly created by the act of the grantor. And here it is very material to remark, that it is *only* by way of remainder that, at *common law* (that is, independently of certain conveyances founded on statute law to be hereafter mentioned), a man can create a new freehold estate in expectancy, in a corporeal hereditament. For it is an antient rule, which lies at the root of the learning relative to remainders, that a freehold in hereditaments corporeal cannot be created to commence *in futuro* (*g*)—that is, to take effect in possession at a distant period of time—without the interposition of a particular estate on which it shall be expectant. Thus if A., seised in fee of lands,

(*e*) Colthirst *v.* Bejushin, Plowd. 29; Gardner *v.* Sheldon, Vaugh. 269.

(*f*) Vide sup. p. 233.

(*g*) Barwick's case, 5 Rep. 94 b; 2 Bl. Com. 165.

convey them to B. to hold to him and his heirs for ever, after the end of three years next ensuing;—this is, at common law, a void conveyance. This is because no freehold can in general be created at common law, in a corporeal hereditament, without livery of seisin (*h*); a ceremony in its nature incompatible with a grant of the freehold *in futuro*, inasmuch as it imports a delivery of possession, and consequently supposes that a right to the immediate possession, and not merely a future estate, is conveyed by the feoffor. And as it is the necessity for livery of seisin which constitutes the reason of the rule, so the rule itself extends not to mere chattel interests (*i*): for these, being created, as we have seen, without that ceremony, are also capable of commencing *in futuro*. Thus, though the fee cannot be created at common law to hold as from next Michaelmas, yet a lease for seven years from next Michaelmas will be good.

But while the conveyance by livery of seisin is utterly incapable of being applied to the creation of a freehold *in futuro*, it is easily adapted to that of a freehold in remainder. For the method in this case, is to make the livery of seisin to the tenant of the particular estate; [which is effectual as a conveyance also to the remainder-man, since his estate and that of the particular tenant are

(*h*) Vide sup. p. 232. The reason here assigned for the rule, that a freehold cannot commence *in futuro*, is that usually given in the books. Vide Co. Litt. 217 a; Plowd. 156; Barwick's case, 5 Rep. 94 b; 2 Bl. Com. 165; Bac. Ab. Remainder (C). And perhaps no sufficient authority can be shown for referring it to any other origin. It is held, however, by some writers to flow from the general principle of the common law, that the freehold is not to be placed (except in cases of strict necessity) in abeyance. That this principle existed there can be no doubt; and it seems clearly to have applied both to the immediate freehold and to the ultimate fee. (See the argument of Mr. Justice Blackstone in the case of Perrin *v.* Blake, Harg. Law Tracts.) It has been considered by some as in part founded on feudal reasons, but it seems to be more satisfactorily accounted for by the inconveniences which resulted from such suspension of the fee or freehold in reference to the system of *real actions*—the remedies antiently used for the recovery of land. (See the same authority.) As to the cases where the freehold or fee *may* be in abeyance, vide sup. p. 237, n.; post, p. 327, n.

(*i*) 5 Rep. 94; 2 Bl. Com. 165.

[one and the same estate in law. Thus a man may convey to A. in tail, remainder to B. in fee; and the same livery which conveys the estate tail to A. will also pass the remainder expectant thereon to B. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder, at the same time that the particular tenant is seised of his estate tail (*k*).] And the case is the same where the particular estate is for years only. [As where one leases to A. for three years, with remainder to B. in fee, and makes livery to A.] Here the livery indeed is not necessary for the lessee himself, because he has but a chattel; but it enures to the benefit of him in remainder, and the freehold is immediately created thereby and vested in B. during the continuance of A.'s term of years (*l*).

With respect to the creation of a remainder, the following rules may be laid down, which, though they amount to no more than an exposition of the different properties expressed in the very definition of this kind of estate, may yet serve to convey to the mind of the reader a more precise idea of its character:—

1. *There must necessarily be some particular estate precedent to the estate in remainder* (*m*). The necessity of this is sufficiently indicated by the term itself; for remainder is a *relative* expression, and implies that some part of the thing is previously disposed of. And [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 (*n*). For an estate at will is of a nature so slender and precarious that it is not to be looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder.]

(*k*) Co. Litt. 143 a.

(*l*) Co. Litt. 49 a, 49 b.

(*m*) Fearne, by Butler, 390, 9th edit.

(*n*) Lord Stafford's case, 8 Rep. 75 a.

2. [A second rule to be observed is this: that *the remainder must commence or pass out of the grantor, at the time of the creation of the particular estate* (*o*).] As where it is proposed to give to A. an estate for life, with remainder to B. in fee: here B.'s remainder in fee must pass from the grantor, at the same time with A.'s life estate in possession; for if the estate ulterior to that for life, continues in the grantor, it is a reversion, and no remainder; and B. can take only by subsequent grant of this reversion.

3. It may also be laid down, as a third rule respecting the creation of remainders, that *they must be limited to take effect in possession immediately upon the determination of the particular estate* (*p*), *and neither later nor earlier.* Thus if A. be tenant for life, remainder to B. in tail, here B.'s remainder is to take effect in possession immediately upon A.'s death; or if A. and B. be tenants for their joint lives, remainder to the survivor in fee, here, on the death of either, the remainder comes into possession instantly; and therefore both these are good remainders. But if the future estate is to take effect in possession at any period *later* than the determination of the first, as if an estate be granted to A. during his life, and upon his death and one day after, to B. and his heirs, this is no remainder (*q*). So the future estate will be no remainder if it is not to *await* the proper and regular determination of the first, but to take effect in defeasance or abridgment of it; as where an estate is limited to A. for life, but if B. pays him a certain sum of money, then immediately to B. and his heirs (*r*). But though a remainder cannot be limited to take effect in possession, until the particular estate regularly determines, yet eventually it may do so before that

(*o*) Plowd. 25; Litt. s. 721; Bac. Ab. Remainder (C).

(*p*) 1 Sand. Us. 148, 2nd edit.; Chudleigh's case, 1 Rep. 135 a; Boraston's case, 3 Rep. 21 a; Co. Litt. 298 a.

(*q*) Colthirst *v.* Bejushin, Plowd. 25; Fearne, by Butler, 307, 9th ed.

(*r*) 1 Sand. Us. 143, 149; Sugd. Gilb. 152, n.; Fearne, by Butler, 261, 9th ed.

period. Thus if the particular estate determine by act of law (as by forfeiture) before its natural expiration, the remainder limited upon it will come into immediate possession, and is not required to wait until the expiration of the period originally assigned.

A remainder, when created, is subject to many of the rules already laid down with respect to reversions. Thus, in the case of a freehold remainder, the remainder-man is seised as of fee (or as of freehold), but not "in his demesne," unless the particular estate be a term of years, when seisin in demesne may be properly alleged: so *curtesy* or *dower* may be claimed of a remainder in fee, if expectant on an estate for years, but not if expectant on a freehold (*s*): thus, too, the wrongful feoffment of the tenant for life or years, where the estate immediately expectant is not by way of reversion but remainder, had at common law (now altered by 8 & 9 Vict. c. 106 (*t*), the effect of displacing the remainder, and occasioning a forfeiture to the remainder-man, as in the other case to the reversioner: moreover the union of an estate in remainder with the particular estate on which it is expectant, will produce a merger in the same cases (in general (*u*)) and on the same principles, as if it were an estate in reversion.

Hitherto our remarks have related to remainders generally considered; but it is now time to turn our attention to the distinction which exists between remainders, as being either *vested* or *contingent*. *Vested* remainders or remainders *executed* [are where the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder.] *Contingent* or *executory* remainders are those limited either to an

(*s*) As to *curtesy* and *dower*, vide sup. pp. 264, 267.

(*t*) Vide sup. p. 316.

(*u*) As to the merger of a term of years in another term of years, where the second is in *remainder*, vide Bac. Leases, &c. (S) 2.

uncertain *person*, or upon an uncertain *event* (*x*): that is, to a person not *in esse* or not ascertained (*y*); or upon an event which may not happen at all, or not happen until after the particular estate is determined (*z*). The first kind, or those limited to an uncertain person, may be exemplified by a limitation to A. for life, remainder to the first son of B., who has then no son born (*a*), for here the person is not *in esse*; or to A. and B. for their joint lives, remainder to the survivor in fee, for here the person is not ascertained (*b*). The second kind, or those limited on an uncertain event, may be exemplified by a lease to A. for life, remainder to B. for life, and if B. should die before A., then the remainder to C. for life (*c*); for B.'s dying before A. is an event that may never happen, and therefore the remainder to C. is contingent: or, as another instance, by a lease to A. for life, and after the death of B. the lands to remain to another in fee (*d*); for though it is certain that B. must die, his death may not happen until after A.'s life estate shall be determined.

(*x*) Blackstone says that they are where the remainder is "limited to "take effect either to a dubious and "uncertain *person*, or on a dubious "and uncertain *event*; so that the "particular estate may chance to "be determined, and the remainder "never take effect." Et vide Roberts *v.* Roberts, 2 Bulst. 130; 2 Black. Com. 169. Mr. Fearne enumerates four different kinds of contingent remainders:—"1st. Where "the remainder depends entirely "upon a contingent determination "of the preceding estate itself. "2ndly. Where the contingency on "which the remainder is to take "effect is independent of the deter-"mination of the preceding estate. "3rdly. Where the condition upon "which the remainder is limited is "certain in event, but the determi-"nation of the particular estate may "happen before it. 4thly. Where "the person to whom the remainder "is limited is not yet ascertained, "or not yet in being."—Fearne, by Butler, 5, 9th ed. But all these may be reduced to two, as in the text, with the aid of the distinctions there stated, as to the *nature* of the uncertainty to which the person or event may be subject.

(*y*) Fearne, by Butler, p. 9, 9th ed. See Doe *d.* Bills *v.* Hopkinson, 5 Q. B. 228.

(*z*) Fearne, by Butler, p. 8, 9th ed.

(*a*) Ibid. p. 9.

(*b*) Ibid.

(*c*) Ibid. p. 7.

(*d*) Ibid. p. 8.

It is to be observed, however, that if there be no uncertainty in the person or event upon which the remainder itself is limited, the mere uncertainty, whether it will ever take effect in *possession*, is not sufficient to give it the character of a contingent remainder (*e*). Thus in the case of a lease to A. for life, remainder to B. for life, the limitation of the remainder is to a person in being, and ascertained, and the event on which it is limited is certain, viz., the determination of A.'s life estate: it is therefore a vested, and not a contingent remainder (*f*): and yet it may possibly never take effect in possession; because B. may die before A.

We may also remark, that an estate limited to an existing and ascertained person upon the determination of an estate tail (as where there is a limitation to A. in tail, remainder to B. in fee) is a vested and not a contingent remainder; for it is considered in law, that the estate tail being a particular estate (*g*), is sure to come to an end, and that the failure of issue is consequently not a contingency, but a certain event. The case falls, therefore, within the definition of a vested remainder; the estate limited to B. being one that is invariably fixed to remain to a determinate person after the particular estate is spent.

It was laid down in a former place, that no remainder can be limited after a fee simple (*h*). A contingent remainder may, however, be limited in *substitution* for another contingent remainder in fee simple (*i*); as if land be given to A. for life, and if he have a son, then to that son in fee, and if he have no son, then to B. in fee. This has been sometimes called *a contingency with a double aspect* (*k*), and it is no violation of the rule above alluded to; for such

(*e*) Fearne, by Butler, 216, 9th ed.

(*f*) Ibid.; vide Doe *v.* Scudamore, 2 Bos. & Pul. 296.

(*g*) Vide sup. pp. 243, 318.

(*h*) Vide sup. p. 320.

(*i*) See Fearne, by Butler, 373, 9th ed.; Loddington *v.* Kime, 1 Lord Raym. 208; Keene *v.* Dickson, 3 T. R. 495; Crump *v.* Norwood, 2 Marsh. 161.

(*k*) Fearne, ubi sup.; Loddington *v.* Kime, ubi sup.

remainders as these are *concurrent*, and not *consecutive*; and though both are remainders on the particular estate, they are not remainders on each other (*l*).

It is laid down by Lord Coke, as to the nature of the contingency on which a remainder may be limited, that it must be a *common possibility* or *potentia propinqua*, as opposed to one that is too remote (*m*). [Thus a remainder to a man's eldest son who hath none, we have seen, is good, for by common possibility he may have one; but if it be limited in particular to his son John or Richard, it is bad if he have no son of that name, for it is too remote a possibility that he should not only have a son, but a son of the particular name (*n*).] It is questionable, however, to what extent this doctrine ought to be received (*o*).

Contingent remainders are subject to the following two general rules:—

1. [*If they amount to a freehold, they 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 (*p*); but if granted to A. for life, with a

(*l*) Though a contingent remainder in fee is a disposition (subject to the particular estate) of the *whole* inheritance, yet, as it is one which cannot take effect until the contingency happens, a question has been made as to what becomes of the inheritance in the mean time. According to the older authorities, it is in *abeyance*, or, according to Lord Coke's allusion, *caput inter nubila condit.* Co. Litt. 342 b; et vide 40 Edw. 3, 9. But Mr. Fearne argues (and his opinion is now generally received) that it continues to reside in the grantor. Fearne, by Butler, 360, 9th ed. Where the contingent remainder in fee is created by one of those conveyances which derive their operation from the statute of uses (as to which hereafter), it is clear that the fee remains in the grantor till the contingency happens; and where it is created by a will, the fee descends to the heir at law. 2 Saund. by Wms. 381 a, n. (16).

(*m*) Cholmley's case, 2 Rep. 51; Co. Litt. 378; Fearne, by Butler, 250, 9th ed.

(*n*) Cholmley's case, ubi sup. Such a contingency as this is sometimes called a *possibility upon a possibility.*

(*o*) See Third Real Prop. Rep. 29; Fearne, by Butler, 251, n. (*c*), 9th ed.

(*p*) Chudleigh's case, 1 Rep. 130 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 (*q*): 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 nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him: consequently the remainder is void.]

2. *Every contingent remainder must become vested either during the continuance of the particular estate, or eo instanti that it determines* (*r*).

It is obvious that when the contingent person comes into being or is ascertained, during the continuance of the particular estate, or the contingent event takes place during that period, the remainder ceases to be a contingent, and becomes a vested one. Thus if A. be tenant for life, with remainder to B.'s eldest son, then unborn, in tail; the instant that a son is born, the remainder is no longer contingent, but vested (*s*). On the other hand, if the person comes into being or is ascertained, or the event happens, not during the continuance of the particular estate, but immediately on its determination, the remainder then of course takes effect as an estate in possession; or, in other words, vests in possession, instead of vesting, as in the case first supposed, in point of interest only. Thus if land be given to A. and B. during their joint lives, remainder to

(*q*) Vide sup. p. 323; et vide Fearne, by Butler, 281, 9th ed.

(*r*) Archer's case, 1 Rep. 66 b; Co. Litt. 298 a; Bac. Ab. Remainder (D); 2 Saund. by Wms. 387, n. (7); Fearne, by Butler, 307, 310, 9th ed.; 2 Bl. Com. 168, in which last book the rule is laid down as to remainders *generally*, thus: "that the remainder must vest in the grantee "during the continuance of the particular estate, or *eo instanti* that it "determines." And this is the form in which it is often expressed. But where a remainder is not originally contingent, it is necessarily vested from the time of its creation; and cannot be said properly to vest during the continuance of the particular estate, and still less upon its determination. The rule, therefore, has in effect no application except to *contingent* remainders.

(*s*) 2 Bl. Com. 169.

the survivor in fee, this remainder, immediately on the death of either, becomes vested in possession in the survivor. The meaning of the rule, therefore, under consideration, is, that a contingent remainder must either vest as a remainder during the particular estate, or as an estate in possession at the determination thereof; and cannot remain in contingency after the latter period.

From this the important doctrine followed, that so long as a remainder was in contingency, it always required the *continuing* support of the particular freehold estate (*t*), so that if that estate came by any means to an end before the contingency happened, the remainder was altogether *defeated* (*u*); for before the happening of the contingency, there was no person entitled to take, or in whom the remainder could vest; and, by the rule under consideration, it could no longer exist as a contingent remainder, because the particular estate was determined. Thus if A. were tenant for life, with remainder to B.'s eldest son, then unborn, in tail; if A. died before the contingency happened, that is, before B. had a son, the remainder was absolutely gone: for the particular estate was determined before the remainder could vest (*v*). Nay, it has been held that, 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 *enceinte* or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of the remainder: for the particular estate determined before there was any person actually in existence in whom the remainder could vest (*x*). This decision, however, was ultimately reversed (*y*); and the case was afterwards provided for by a positive law, for [it was enacted by statute 10 & 11 Will. III. c. 16, that posthumous children shall be capable

(*t*) Colthirst *v.* Bejushin, Plowd. 25; Fearne, by Butler, 307, 9th ed.

(*u*) Purefoy *v.* Rogers, 2 Saund. 386, 387; 2 Bl. Com. 171; Fearne, by Butler, 316, 9th ed.

(*v*) 2 Bl. Com. 169.

(*x*) Reeve *v.* Long, 1 Salk. 228; 4 Mod. 282, S. C.

(*y*) Vide post, p. 330, n. (*a*).

[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 (z).]

The same consequence was held to follow from the determination of the particular freehold estate before the contingency happened, even though that estate determined prematurely, and were destroyed by the voluntary act of the particular tenant himself (a). Thus, a tenant for life, with remainder to his unborn sons successively in tail, remainder over to a stranger in fee, might, before a son was born, have destroyed the life estate by a wrongful feoffment in fee, or have surrendered it to the person in ultimate remainder, so as to merge it in the fee; and in either case the contingent remainder to the son would have been defeated (b). In these cases, therefore, it was [necessary to have trustees appointed to preserve the contingent remainders, in whom there was vested an estate in remainder for the life of the tenant for life, to commence when the estate determined (c): and then, if his estate for life determined otherwise than by his death,] for example, by wrongful alienation, or by surrender, as above supposed, [the estate of the trustees for the residue of his

(z) It was the case of Reeve v. Long, referred to sup. p. 329, n. (x), (in which the House of Lords reversed the judgment of the Courts of King's Bench and Common Pleas), that gave occasion to this statute. The case adjudicated on by the Lords laid down the law as to estates by *will*, and therefore the statute speaks merely of those "by marriage or "other settlement." It may also be noticed, that where a posthumous child takes by virtue of this statute, he is entitled to the intermediate property from the death of the parent; though, where a posthumous child takes by descent, divesting the estate of the supposed heir, he takes only from the time of his birth; vide 2 Saund. by Wms. 387 a, n. (7); Thelluson v. Woodford, 11 Ves. 139; Goodtitle v. Newman, 3 Wils. 526; Christian's Bl. Com. vol. ii. p. 169.

(a) Chudleigh's case, 1 Rep. 135 b; Archer's case, ibid. 66 b.

(b) Fearne, by Butler, 317, 9th ed.; Purefoy v. Rogers, 2 Saund. 386, 387. As to the tortious operation of a feoffment, at common law, vide sup. p. 316.

(c) As to the nature of this remainder, vide Parkhurst v. Smith, Willes, 338; 3 Atk. 138.

[natural life would then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and another 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; 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.]

When land was settled in the form here supposed, that is, by a limitation to the parent for life, and after his death to his first and other sons or children, in tail, and trustees were interposed to preserve the contingent remainders, this was called a *strict settlement.* The estate tail immediately expectant on the parent's life estate was not only exempt from the danger of being defeated before the first son was born, but remained unalienable until he attained the age of twenty-one: at that period, however, (as results from former explanations (*d*),) he might with concurrence of his parent, if then living, or at his own pleasure, if his parent were dead, bar both his own issue and those in remainder or reversion, and convert his estate tail into a fee-simple absolute; and, even without concurrence of his parent, might in all cases bar his own issue, leaving the ulterior estates undisturbed. This state of the law as regards the position of a child to whom, before his birth, a remainder in tail has been limited, expectant on a precedent life estate limited to his parent, is still unaltered: though by the effect of a late statute, to which we shall have occasion presently to refer (*e*), the interposition of trustees to preserve contingent remainders is no longer necessary to his security.

To return, however, to our immediate subject, it may be

(*d*) Vide sup. p. 252.

(*e*) See the next page.

further remarked, that, to support a contingent remainder, it was not, even at the common law, essential that the particular estate should be in actual possession; for, provided such an estate were in existence, it would suffice for that purpose, though it were reduced to a *right of entry* only (*e*). Thus, if there were an estate for life, with a contingent remainder over, and the tenant for life were disseised, that is, put out of his seisin or possession of the freehold, by a stranger, there nevertheless resided an immediate right of entry in the disseisee; and that would have been sufficient to support the remainder (*f*).

The law was said to lean against contingent remainders, as compared with vested ones, on account of the liability of the former to be defeated: and therefore in a case of doubtful interpretation, it was held that a remainder capable of being taken as vested, should not be construed as contingent (*g*). But the law relating to contingent remainders has recently undergone an alteration of a very important kind, by which much of the old learning, to which we have just had occasion to refer, has been displaced. For by 8 & 9 Vict. c. 106, s. 8, "a contingent remainder ex-" isting at any time after the 31st day of December, 1844, " shall be,—and if created before the passing of that Act, " shall be deemed to have been,—capable of taking effect, " notwithstanding the determination, by forfeiture, sur-" render, or merger, of any preceding estate of freehold, in " the same manner, in all respects, as if such determination " had not happened" (*h*).

In connection also with the subject of contingent remainders, occurs that remarkable rule of construction so

(*e*) Archer's case, 1 Rep. 66 b, 67 a.

(*f*) Ibid.

(*g*) See Ives *v.* Legge, 3 T. R. 489, n.; Driver *v.* Frank, 3 Mau. & Sel. 37; Doe *v.* Spratt, 5 Barn. & Adol. 731.

(*h*) In connection with this enactment it is necessary also to advert to 8 & 9 Vict. c. 106, s. 4, "that " a feoffment made after 1st October, " 1845, shall not have any tortious " operation."

familiar in our books under the appellation of the *Rule in Shelley's case* (*i*).

This rule is propounded in Lord Coke's Reports in the following form—that wherever a man, 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, the word *heirs* is a word of *limitation*, and not of *purchase* (*j*). In other words, it is to be understood as expressing the quantity of estate which the party is to take, and not as conferring any distinct estate on the persons who may become his representatives.

This indeed is the *ordinary* force of the word *heirs;* for (as may be inferred from the former remarks on the subject of estates of inheritance) if land is given to a man and his heirs, he takes a fee simple (*k*); if to him and the heirs of his body, a fee tail (*l*); in which cases the word plainly operates as a mere limitation of the quantity of his estate. But where land is given to A. B. for his life, and on his decease to his heirs, or to the heirs of his body; it might be supposed, from the doctrines we have been considering with respect to remainders, that this confers a separate

(*i*) See the elaborate dissertation on this rule by Mr. Fearne, Fearne, by Butler, 28—208, 9th ed.; the observations on the rule by Mr. Hargrave, in Harg. Law Tracts, and the argument of Mr. Justice Blackstone, in Perrin *v.* Blake, ibid. The cases which call for the application of this rule are very numerous in our law. But they occur much more frequently where the limitation is by will, than where it is by deed. The following are among the many modern cases on the subject; Roe *v.* Bedford, 4 Mau. & Sel. 362; Doe *v.* Jesson, 5 Mau. & Sel. 95; Doe *v.* Jones, 1 Barn. & Cress. 243; Doe *v.* Harvey, 4 Barn. & Cress. 610; Right *v.* Creber, 8 Dow. & Ry. 718; Douglas *v.* Congreve, 4 Bing. N. C. 1; Greenwood *v.* Rothwell, 5 Man. & G. 628; Harrison *v.* Harrison, 7 Man. & G. 938; Cannon *v.* Rucastle, 8 C. B. 876.

(*j*) Shelley's case, 1 Rep. 104 a. As to the terms in which the rule is expressed, see Fearne, by Butler, 76, 9th ed. The rule would seem still to apply, though the ancestor's estate of freehold is of a nature that may determine in his lifetime; Brook's Estates, 76; Fearne, ubi sup. p. 29; Curtis *v.* Price, 12 Ves. 89.

(*k*) Vide sup. p. 234.

(*l*) Vide sup. p. 243.

estate on his representatives: and that he will take for his own life only, with contingent remainder to his heirs; or to the heirs of his body; according to the apparent purport of the grant. And such ulterior limitation would in fact be a contingent remainder to them, if the previous life estate had been limited, not to A. himself, but to another person. By the effect, however, of the rule which we are considering, the heirs, or heirs of the body of A., will not take in remainder, in the case supposed, nor will A. himself take a mere life estate, but a remainder also in fee or tail; and as that remainder will absorb (according to the law of merger (*m*)) his life interest, the result upon the whole conveyance will be to give him an *estate in fee* (or in *tail*, as the case may be) *in possession*. And upon the same principle, if another particular estate, by way of vested remainder upon A.'s life estate (for example, a life estate to B.) be interposed before the ulterior limitation to A.'s heirs, or the heirs of his body, that ulterior limitation will take effect in A. himself; but as a vested remainder only in fee or tail, because the intervening estate will in that case prevent a merger. If the estate interposed, indeed, be not a vested but a contingent remainder, A. will take (as in the case first supposed) the entire fee; for while the contingency is in suspense, there is nothing to prevent the consolidation of his life estate with the ulterior limitation to his heirs; yet he takes it *sub modo* only, and in such manner that it will open and let in the intermediate estate when the contingency happens (*n*).

It is to be observed, that the interest which, by the effect of this rule passes to the ancestor, is of a kind very different from that which would belong to him if the words were to receive their more obvious construction. According to the rule, he becomes, in the first case we have supposed, proprietor of the whole fee, which it is consequently in his power

(*m*) Vide sup. p. 316.

(*n*) Fearne, by Butler, 29, 9th ed.; Lewis Bowles's case, 11 Rep. 79 b.

to aliene at his pleasure (subject, where the estate is in tail, to the ordinary restrictions); and in the two other cases, his interest is of the same description, except as regards the intervening estates: while, on the other hand, if he took an estate for life only (though with remainder to his heirs), he could aliene for no longer period than his own life, and he would have no control over the inheritance.

With respect to the *reason* of the rule, it is involved in much obscurity (*o*). But according to the prevalent opinion, it was established with a view to the protection of the feudal lord, who would have been defrauded, it is said, of his wardship and other perquisites, if the heir had been allowed to take by way of remainder, and not by hereditary succession. And the argument by which it is best supported seems to be in substance as follows: that where by the same conveyance land is given to a person for his life, and afterwards to the heirs of the same person, it is reasonable to presume that he is himself intended in both cases as the sole object of the gift; and that no benefit is designed to his heirs, except what they may derive by operation of law from his own antecedent seisin.

We shall conclude this chapter with notice of a legislative provision which applies alike to estates in remainder and to those in reversion. [In order to assist such persons as have any estate in remainder, reversion, or expectancy after the death of others, against fraudulent concealment of their deaths, it is enacted by the statute 6 Anne, c. 18, that all persons on whose lives any lands or tenements are holden shall (upon application to the Court of Chancery and order made thereupon) once in every year, if required, be produced to the court or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead,

(*o*) See Fearne, by Butler, 83, 9th ed.; argument of Mr. Justice Blackstone in the case of Perrin *v.* Blake, in Hargrave's Law Tracts; Reeves's Hist. Eng. Law, vol. iii. p. 8.

[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 (*p*).]

(*p*) See Ex parte Grant, 6 Ves. 512; Ex parte Whalley, 4 Russ. 561; Re Isaac, 4 Myl. & Cr. 11; Re Lingen, 12 Sim. 104. As to the case of the *cestui que vie's* being beyond seas, see 6 Ann. c. 18, s. 2; 19 Car. 2, c. 6. See also the last-mentioned statute providing for the case of *cestui que vie's* concealing himself for seven years together.

CHAPTER VIII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, CO-PARCENARY, AND COMMON.

[We come now to treat of estates, with respect to the number and connection of their owners, the tenants who occupy and hold them (*a*). 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 co-parcenary, 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 the contrary is expressed; [and in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. We shall therefore proceed to consider the other three species of estate, in which there are always a plurality of tenants.]

All the three last-mentioned species of estate have this common characteristic,—that the tenants hold *pro indi-*

(*a*) Vide sup. p. 231.

viso, or promiscuously (*b*). So that one person is not seised or possessed exclusively of one acre, and another person of another, (for then they would be tenants in severalty,) but the interest and possession of each extend to every specific portion of the whole land of which they are joint-tenants, coparceners, or tenants in common. And accordingly, though only one of them should happen to be in actual possession, yet his possession is considered for many purposes as that of all (*c*). But in many points of view these different species of estate are materially distinguishable from each other in their character and properties, and it will be necessary therefore to consider them separately, and in succession.

II. An estate then in *joint-tenancy* (*d*) is where an estate is acquired by two or more persons in the same land, by the same title (not being a title by descent), and at the same period; and without any limitation by words importing that they are to take in distinct shares. Thus, if there be a feoffment of lands to A. and B., without more, this makes them joint-tenants of the freehold; if to A. and B. and their heirs, this makes them joint-tenants of the fee. [The estate so acquired is called an estate in joint-tenancy (*e*), 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

(*b*) Co. Litt. 189 a, 190 b, 163 a.

(*c*) See Doe *v.* Taylor, 5 Barn. & Adol. 583; Ford *v.* Grey, 1 Salk. 285; Doe *v.* Keen, 7 T. R. 386; Doe *v.* Pearson, 6 East, 173. But now by the Limitation Act, 3 & 4 Will. 4, c. 27, s. 12, if one or more of several persons entitled as coparceners, joint-tenants, or tenants in common, shall have been in the possession of the entirety, or more than his undivided share or shares, *for his or their own benefit*, or for the benefit of any person or persons *other than the person or persons entitled to the other share or shares*, such possession shall not be deemed to have been the possession of such last-mentioned person or persons, or any of them.

(*d*) As to this estate, vide Co. Litt. 180 a—188 b; Amies *v.* Skillern, 14 L. J. (V. C.) 165.

(*e*) Litt. s. 277.

[term *jointure* is usually confined to that 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 (*g*).]

This estate of joint-tenancy has several conditions and properties, which require to be distinctly pointed out before a just conception of its nature can be attained.

1. Among joint-tenants there is a *unity of title* (*h*), that is, 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 (*i*).] 2. The estate of joint-tenants *rests in them at one and the same period* (*k*). Thus, (though in a case of remainder to A. and B. and their heirs, after a previous life estate, they take in joint-tenancy, because they take at once a vested remainder, yet) if an estate be granted to J. S. for life, with remainder to A. and the eldest son of B. (he having no son at the time), and their heirs, A. does not take in joint-tenancy with B.'s eldest son; because A. takes a vested remainder in a moiety immediately on the execution of the conveyance, while the remainder in the other moiety does not vest until a son is born to B.; nor at all if J. S. dies first. If a son is born to B. in J. S.'s lifetime, still A. had up to that period no joint interest with him; the tenancy was not *ab initio* a joint-tenancy, and not being so at first, cannot become so afterwards. 3. Among joint-tenants there is also a *similarity of interest* as regards the quantity of estate. [One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail (*l*).]

(*g*) Vide sup. p. 273.

(*h*) 2 Bl. Com. 181.

(*i*) Litt. s. 278; see Christy v. Tancred, 9 Mee. & W. 438; Draper v. Crofts, 15 Mee. & W. 166.

(*k*) 2 Bl. Com. 181; Co. Litt. 188 a. But with respect to the applicability of this doctrine to estates raised by way of *use* or *devise* (as to which vide post, bk. II. pt. I. cc. XVIII., XX.), see Fearne, by Butler, 312, 9th ed.; Co. Litt. by Harg. 188 a, n. (13).

(*l*) Co. Litt. 188 a.

On the other hand, however, there may be joint-tenants as to a portion of the fee, with a several interest in one or more of them as to the residue. Thus, 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 joint lives, and A. has a several inheritance in fee-simple; or if land be given to A. and B, and the heirs of the body of A.; here both have a joint estate for life, and A. has a several inheritance in tail (*m*). 4. There is an *entirety* and *equality of interest* among the tenants; for while they continue to hold together, they are not considered as holding in distinct shares, but each is equally entitled to the *whole*. And, on the other hand, though the entirety ceases for the purpose of alienation, every co-tenant being entitled (if he thinks proper) separately to transfer his own share, yet the equality remains; for each is capable of conveying an equal share with the rest.

This combination of entirety of interest with the power of transferring in equal shares, is expressed by the antient law maxim, that every joint-tenant is seised *per my et per tout* (*n*). And this is considered as an essential character-

(*m*) Litt. s. 285. Blackstone's expression is, that "A. has the *remainder* in severalty" in these cases. But Littleton says, "one hath a freehold and the other a fee simple," and Lord Coke, that "they are joint-tenants for life, and the fee-simple or estate tail is in one of them;" and though he afterwards speaks of "him in remainder," his remarks show that it is not a remainder properly so called, and, that though a joint-tenancy for life subsists with all the usual incidents, yet the estate of the joint-tenant, who has the fee, is for many purposes (particularly that of alienation) an entire inheritance, not broken into a particular estate and remainder thereon; vide Co. Litt. 184 b, and note 2, by Harg.; et vide Wiscot's case, 2 Rep. 60 b. See also Forrest *v.* Whiteway, 3 Exch. 367.

(*n*) Blackstone gives, as the meaning of this expression, that each has "the entire possession, as well of every parcel as of the whole," 2 Bl. Com. 182; and in this he follows the words of Littleton, s. 288. The expression, however, seems more properly to import that they are all jointly seised of the whole, with a right to transfer in equal shares, as explained in the text. Accordingly, in commenting on the words *per my et per tout*, Lord Coke (citing Bracton) remarks, "*Et sic totum tenet, et nihil tenet, scil. totum conjunctim et*

istic of a joint estate; and therefore if an estate in fee be given to a man and his wife, they are not properly joint-tenants, but are said to be tenants by *entireties;* [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 (*o*).] And so if a joint estate in land be conveyed to a husband and wife, and to a third person, the husband and wife take a moiety, and the third person the other moiety, in the same manner as if the grant had been to only two persons (*p*).

From the entirety of interest in each of the co-tenants results the most remarkable incident or consequence of a joint estate, viz., that it is subject to *survivorship.* For when two or more persons are seised of a joint estate of freehold, or are jointly possessed of any chattel interest in lands, [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 (*q*). This is the natural and regular consequence of the union and entirety of their interest.] One has not a distinct moiety from the other, but while the joint-tenancy continues each joint-tenant

nihil per se separatim." "And albeit "they are so seised, as for example, "where there be two joint-tenants "in fee, yet to divers purposes each "of them hath but a right to a "moiety, as to enfeoff, give, or de-"mise, or to forfeit, &c."—Co. Litt. 186 a. As to the meaning of the expression *per my et per tout,* the reader is also referred to a learned note by Mr. Serjeant Manning, Murray *v.* Hall, 7 C. B. 455, n. (*a*).

(*o*) Litt. s. 665; Co. Litt. 187 b; Bro. Abr. t. *cui in vita,* 8; Back *v.* Andrew, 2 Vern. 120; Purefoy *v.* Rogers, 2 Lev. 39; Greneley's case, 8 Rep. 71 b; Beaumont's case, 9 Rep. 138; Doe *v.* Parratt, 5 T. R. 652; 1 Prest. Est. 131.

(*p*) Litt. s. 291. But if a grant be made to a husband and wife, expressly to hold as *tenants in common,* they hold accordingly; Co. Litt. 187 b.

(*q*) Litt. ss. 280, 281.

has [a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of 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 (*r*) 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 the rule is that *jus accrescendi præfertur oneribus* (*s*); so that no dower or curtesy can be claimed out of a joint estate (*t*). Indeed even where one of the joint-tenants alienes his share (which discharges it from any claim of his co-tenant in respect of survivorship), yet the wife of the alienor shall not be entitled to her dower (*u*); the reason of which seems to be, that the land never was in his seisin, except as subject to the paramount claim of the survivor; and therefore there was no seisin out of which the dower can arise.

The remaining subject for our consideration is, how an

(*r*) Bracton, l. 4, tr. 3, c. 9, s. 3; Fleta, l, 3, c. 4, s. 2.

(*s*) Co. Litt. 185 a.

(*t*) As to *dower* and *curtesy*, vide sup. pp. 267, 264.

(*u*) Co. Litt. 31 b, and n. 4, by Harg.

estate in joint-tenancy may be dissolved or destroyed. And this may be done:—1. *By partition.* Thus, if two joint-tenants agree to part their lands, and hold to them in severalty, and execute a proper deed for the purpose (*x*), they are no longer joint-tenants, for they no longer hold promiscuously. And it follows that the right of survivorship also, is by such separation destroyed (*y*). [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 (*z*); 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 afterwards, [by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, joint-tenants, either of inheritances or other less estates,] were, in case of refusal by any of them, [compellable by writ of partition to divide their lands,] and though this, (together with other antient forms of action,) has been lately abolished (*a*), one joint-tenant is still entitled to file his bill in *equity* against the other for a partition (*b*); a course of proceeding to which it had been long usual to resort, and which in practice had quite superseded the antient writ (*c*). 2. *The jointure may be destroyed by alienation without partition.* [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 (*d*); 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 undivided tenancy continues.] And so if

(*x*) By 8 & 9 Vict. c. 106, s. 3, a partition must be by *deed.*

(*y*) Co. Litt. 188 a, 193 a.

(*z*) Litt. s. 290.

(*a*) By 3 & 4 Will. 4, c. 27, s. 36.

(*b*) By 4 & 5 Vict. c. 35, s. 85, recourse to the Court of Chancery may also be had to compel a partition in respect of *copyhold* and *customary* estate. As to the mode of conveyance in case of partition, vide post, p. 520. As to partitions under inclosures, post, p. 656, n. (*e*).

(*c*) Vide Co. Litt. by Harg. 169 a; n. (2); 1 Fonb. Tr. Eq. 18.

(*d*) Litt. s. 292.

one of two joint-tenants releases his share to the other (*e*), the joint-tenancy is dissolved, and turned to an estate in severalty. [But a devise of one's share by will, is no severance of the jointure,] and *jus accrescendi præfertur ultimæ voluntati* (*f*); [for no testament takes 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 (*g*)) is already vested (*h*).] 3. *The jointure may also be destroyed by an accession of interest.* Thus, [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 (*i*),] for it renders their interests dissimilar as regards the quantity of estate; [though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate (*k*).]

It is proper to add, that [whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it (*l*). Yet, if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship (*m*); and if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure (*n*).

(*e*) Vide Avery *v.* Cheslyn, 3 Ad. & El. 75.

(*f*) Co. Litt. 185 b. And even where the joint tenant so devising survives his companion, the devise is void. Swift *v.* Roberts, 3 Burr. 1488; Ambl. 617.

(*g*) Co. Litt. 185 b.

(*h*) Litt. s. 287; 3 Burr. 1488.

(*i*) Cro. Eliz. 470.

(*k*) Wiscot's case, 2 Rep. 60; Co. Litt. 182 b.

(*l*) "*Nihil de re accrescit ei, qui nihil in re quando jus accresceret habet.*"—Co. Litt. 188 a.

(*m*) Litt. s. 294.

(*n*) Litt. s. 304.

[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 two 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 his own life and the life of his companion, now each has an estate in a moiety only, for his own life merely; and on the death of either, the reversioner shall enter on his moiety (*o*).]

III. [An estate held in *coparcenary* (*p*) 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 shown, when we treat of descents hereafter; and these co-heirs are then called *coparceners*, or, for brevity, *parceners* only (*q*);] though in some points of view the law considers them as together making only one heir (*r*). [Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. (*s*).]

An estate in coparcenary resembles, in some respects, that in joint-tenancy, there being the same unity of title and similarity of interest. But in the following respects they materially differ:—1. Parceners always claim by *descent*, whereas joint-tenants always claim by *the act of parties*. [Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-

(*o*) 1 Jones, 55; Co. Litt. 191 a.

(*p*) As to this estate, vide Co. Litt. 163 a—180 a.

(*q*) Litt. ss. 241, 242.

(*r*) Co. Litt. 163 b, 164 a; Vin. Ab. Parceners (Q); R. *v.* Bonsall, 3 B. & C. 173.

(*s*) Litt. s. 265.

[tenants (*t*); 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 jointtenancy.] 2. There is no *entirety of interest* among coparceners. They are properly entitled each to a distinct share (*u*), and of course there is no *jus accrescendi* or survivorship between them, for each part descends severally to their respective heirs (*x*), though the undivided tenancy continues. And as long as the lands continue in a course of descent, and are held promiscuously, so long are the tenants therein, whether male or female, called parceners. 3. Though the interest of coparceners accrue by the same title, yet *they may accrue at different periods.* [For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are dead, their two heirs, are still parceners (*y*); the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title.] 4. And lastly, though persons related in equal degree to the ancestor are entitled in equal shares, yet as their heirs will represent them, or stand in their place, there is no necessary *equality of* interest among parceners. Thus, if a man die leaving four grand-daughters, three of them the issue of an elder daughter, and one of a younger, all four shall inherit; but the daughter of the younger shall take as much as all the other three (*z*).

With respect to an estate in coparcenary, the following rule deserves notice: [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 kins-

(*t*) Litt. s. 254.

(*u*) Co. Litt. 163, 164.

(*x*) The late statute for the amendment of the law of inheritance (3 & 4 Will. 4, c. 106), has made no alteration of the law in this respect, Cooper *v.* France, 14 Jur. 214, Ch.

(*y*) Co. Litt. 164, 174.

(*z*) Ibid. 164 b.

[woman in marriage (*a*), 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 (*b*). This mode of division was known in the law of the Lombards (*c*), 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 *hotchpot* (*d*); which term shall be explained in the very words of Littleton (*e*); "It seemeth that this word, *hotchpot*, is in English a pud-"ding; 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 (*f*) that the lands, both those given in frankmarriage and those descending in fee simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage; and if she did not choose to put her lands into hotchpot she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her sisters. The law of hotchpot took place then only, when the other lands descending from the ancestor were fee simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotchpot (*g*). 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

(*a*) Vide sup. p. 227.
(*b*) Bracton, l. 2, c. 34; Litt. s. 266 to 273.
(*c*) L. 2, t. 14, c. 15.
(*d*) Britton, c. 72.
(*e*) Litt. s. 267.
(*f*) Litt. s. 268.
(*g*) Ibid. 274.

[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 hotchpot; for no others are looked upon in law, as given for the advancement of the woman, or by way of marriage portion (*h*). And, therefore, as gifts in frankmarriage are fallen into disuse, the law of hotchpot] would hardly have been worth notice, [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 (*i*).]

The modes of dissolving an estate in coparcenary are as follows:—1. *By partition* (*k*). [Parceners are so called, saith Littleton (*l*), because they may be constrained to make "partition;" and he mentions many methods of making it (*m*), four of which are by consent and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age, or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation,] upon the first turn [the eldest and her issue, nay, her husband, or her assigns, shall present alone, before the younger (*n*),] to whom the next turn will in that case

(*h*) Litt. s. 275.

(*i*) As to the Statute of Distributions, vide post, bk. II. pt. II. c. VII.

(*k*) Though the partition dissolves the coparcenary, the parceners are still *in* by *descent*, Doe *d.* Crosthwaite *v.* Dixon, 5 Ad. & El. 834.

(*l*) S. 241.

(*m*) S. 243 to 264.

(*n*) Co. Litt. 166 b, and see note (2) by Harg.; Walker's case, 3 Rep. 22; Buller *v.* Bishop of Exeter, 1 Ves. sen. 340.

belong. [And the reason given is, that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition, and therefore is merely personal; the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est electio.* The fourth method is where the sisters agree to cast lots for their shares. And these are the methods by consent.] That by compulsion was, when one or more sued out a writ of partition against the others, whereupon the sheriff went to the lands, and made partition thereof by the verdict of a jury, and assigned to each of the parceners her part in severalty. This writ, however, being now abolished, partition can at present be compelled only by bill in equity, as in the case of joint-tenancy (*o*). [But there are some things which are in their nature impartible. The mansion-house,] for example, and certain hereditaments of an incorporeal kind, [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 (*p*).]

Besides the method of partition, the estate in coparcenary may be dissolved, 2ndly, *by the alienation of one of the parties*, which destroys the unity of title; or 3rdly, *by the whole at last descending to and resting in a single person*, which brings it to an estate in severalty (*q*).

IV. A *tenancy in common* is where two or more hold the same land, with interests accruing under different titles;

(*o*) Vide sup. p. 343.
(*p*) Co. Litt. 164 b, 165 a.
(*q*) 2 Bl. Com. 191; Doe *v.* Dixon, 5 Ad. & El. 839.

or accruing under the same title (other than descent (*r*)), but at different periods; or conferred by words of limitation importing that the grantees are to take in distinct shares (*s*).

In this tenancy there is not necessarily any *unity of title;* for one may hold by descent and the other by purchase, or the one by purchase from A. and the other by purchase from B.; nor any *unity in the time of vesting*, for the one's estate may have vested fifty years ago, and the other's but yesterday; nor any necessary *similarity* or *equality* of interest, for one tenant in common may hold in fee-simple, and the other in tail or for life; one may be entitled to two-thirds, and the other to one-third. Nor is there any *entirety* of interest, for each is seised or possessed of a distinct (though undivided) share; from which also it follows that there is no *survivorship* (*t*). The union consists only in this, that they hold the same land promiscuously.

[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, is here meant such destruction as does not bring them into estates in severalty, but puts an end only to the jointure or coparcenary: [as if one of two joint tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation (*u*). 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

(*r*) Where several parties take under the same title by descent, accruing at different periods, they hold in coparcenary. Vide sup. p. 346.

(*s*) As to tenants in common, see Co. Litt. 188 b—201 a; Murray *v.* Hall, 7 C. B. 441.

(*t*) Land, however, may be given to two persons in such manner as to make them tenants in common with benefit of survivorship, Doe *v.* Abey, 1 Mau. & Sel. 428.

(*u*) Litt. s. 292.

[titles and conveyances (*x*). If one of two parceners alienes, the alienee and the remaining parcener are tenants in common (*y*); 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 (*z*); 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 (*a*): and in this, and the like cases, their issues shall be tenants in common; because they must claim by different titles, one as heir of A., and the other as heir of B.: and those 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] undivided tenancy [continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation] in a conveyance: but here care must be taken to insert words implying that the grantees are to take distinct, though undivided, shares; for a grant without such words would give a joint estate. And it is laid down in our books that [the common law is apt in its constructions to favour joint-tenancy rather than tenancy in common (*b*); because the divisible services issuing from land (as, for example, rent,) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common.] Accordingly, though [land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common (*c*); and if one grants to another *half* his land, the grantor and grantee are also tenants in common (*d*); (because, as has been

(*x*) Litt. 295.
(*y*) Ibid. 309.
(*z*) Doe *v.* Green, 1 H. & H. 314; vide sup. p. 340.
(*a*) Litt. s. 283.
(*b*) Fisher *v.* Wigg, Salk. 392.
(*c*) Litt. s. 298.
(*d*) Litt. 299.

[before (*e*) 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 that they should take a joint interest in the whole of the tenements;)] yet on the other hand, [an estate given to A. and B. *equally to be divided* between them, in common law conveyances, hath been said to be a joint-tenancy (*f*), for it implies no more than the law has annexed to that estate, viz. divisibility (*g*).] Such a limitation however in wills, and in conveyances founded on the statute of uses, (of which we shall have occasion to treat hereafter (*h*),) is certainly a tenancy in common (*i*); for though the tendency of the antient law was to favour a joint-tenancy, the leaning in later times has been the other way (*k*); the right of survivorship being often inconvenient and harsh in its effect; and therefore in wills and the conveyances above referred to—which came into use in comparatively modern times, and where a more liberal construction is in some respects allowed, than in the case of a common law conveyance—a tenancy in common will be created by words which might operate in the latter case as a limitation in joint-tenancy.

We may take this opportunity of remarking, that when lands are given to two or more, as tenants in common, it frequently happens that a particular estate is limited to each of the grantees in his share, with remainder over to the other or others of them—as if a man give lands to his two children as tenants in common in tail, and direct that upon failure of the issue of one of them his share shall go over to the other in tail, and *vice versâ*. Such ulterior estates as these are called *cross remainders*, because each of the

(*e*) Vide sup. p. 340.

(*f*) 1 Eq. Cas. Abr. 291.

(*g*) Fisher *v.* Wigg, 1 P. Wms. 17.

(*h*) Vide post, bk. II. pt. I. c. XVIII. c. IX.

(*i*) Ratcliffe's case, 3 Rep. 39 b; 1 Ventr. 32; 1 Sand. Us. 126; Goodtitle *v.* Stokes, 1 Wils. 341; vide Co. Litt. by Harg. 190 b, n. (4).

(*k*) Joliffe *v.* East, 3 Bro. C. C. 25; Fisher *v.* Wigg, 1 P. Wms. 14.

grantees has reciprocally a remainder in the share of the other; and it is a rule respecting them, that in a *deed* they can be given only by express limitation, and shall never be *implied* (*l*); though it is otherwise with respect to *wills*, which are expounded more liberally, with a view to the presumable intent of the donor; for in these, cross-remainders may be raised not only by actual limitation, but by any expression from which the design to create them can reasonably be inferred (*m*).

A tenancy in common may be dissolved—1. *By partition;* for tenants in common, like joint-tenants, were compellable by the statutes before mentioned (*n*) to divide their lands by writ of partition, though they were not liable at common law to such a proceeding; and they may be still driven to a partition by means of a suit in equity. And—2. [*By uniting all the titles and interests in one tenant,* by purchase or otherwise, which brings the whole to one severalty.]

(*l*) Cole *v.* Levingston, 1 Vent. 224; Doe *v.* Worsley, 1 East, 416; 1 Saund. by Wms. 185, n. (6).

(*m*) A learned disquisition on the nature of cross-remainders will be found in 1 Prest. Est. 94, 115; et vide Co. Litt. 195 b, n. (1), by Butler.

(*n*) Vide sup. p. 343.

CHAPTER IX.

OF USES AND TRUSTS.

THE modes of ownership hitherto considered all belong to the division of *legal* estates, to which our attention was in the first instance to be directed (*a*); and we may also remark of them that they constitute the *primary* and *proper* forms of property in land, having been known in this country from the earliest era in the history of the Anglo-Norman jurisprudence, while all others are of considerably later introduction. But it is now time to take some notice of those of the *equitable* kind, which, in relation to the former, are not only of posterior but derivative origin, and proportionally more complex and artificial in their character; though unmixed, on the other hand, with those principles of feudal tenure fundamentally inherent, as we have seen, in the legal or common law estates.

The only example of equitable estate to which we have hitherto had occasion to refer, is that which resides in a person who, having conveyed his land by way of mortgage, is still entitled to the equity of redemption (*b*). But other interests of a various and somewhat intricate nature remain to be examined, which are embraced under the general appellation of *Uses* and *Trusts*.

Uses and trusts were in their origin closely united, but not identical (*c*). A *trust* was the confidence reposed by

(*a*) Vide sup. p. 231.

(*b*) Vide sup. p. 305. An equity of redemption is said to be a *title in equity* and not merely a trust; 1 Sand. Uses, 203, 2nd ed.; Plunket *v.* Penson, 2 Atk. 290.

(*c*) As to the manner of the introduction of uses into our law, vide Reeves's Hist. Eng. Law, vol. iii. p. 364, vol. iv. pp. 340, 516, 520; Co. Litt. by Butler, 271 b, n. (1), 290 b, n. (1).

one man in another when he invested him with the nominal ownership of property, to be dealt with in some particular manner, or held for some particular person or purpose pointed out. If the trust was of a certain description, viz., to hold land for the benefit of another person, generally, and to let him receive the profits, the sort of interest or right which consequently attached to the latter person was called a *use*, to distinguish it from the nominal ownership or estate of the trustee (*d*).

The general idea of a use or trust [answered more to the *fidei commissum* than the *usus fructus* of the civil law (*e*), which latter was the temporary right of using a thing without having the ultimate property or full dominion of the substance (*f*); but the *fidei commissum* (which usually was created by will) was the disposal of an inheritance to one, in confidence that he should convey it, or dispose of the profits, at the will of another (*g*).] The right of the latter was originally considered in the Roman law as *jus precarium* (*h*)—that is, one for which the remedy was only by entreaty or request; but by subsequent institution it

(*d*) The books are rather vague, and not always correct in their account of the original meaning of these terms. Blackstone says that "Uses "and trusts were in their original of "a nature very similar, or rather "exactly the same."—2 Bl. C. 327. There can be no doubt, however, that there might be "trusts" which involved no "uses," in the proper meaning of that term. Thus Lord Bacon expressly distinguishes a *use* from a "special" or "tran-"sitory" *trust*. — Bac. Read. Us. Again it is clear that a "trust" was referable rather to the person in whom the confidence was reposed, "use" to the person for whose benefit it was reposed. Thus it is said by Ld. Ch. Baron Gilbert, "If the use "be not a thing annexed to the land, "it will be asked of me what it is: to "which I answer, that a use is the "equitable right to have the profit "of lands, the legal estate whereof is "in the feoffee, only to the trust and "confidence reposed in him."—Gilb. Us. ed. by Sugd. 374. And again Ld. Bacon remarks, "For a "trust, *which is the way to a use*, it is "exceedingly well defined by a ci-"vilian of great understanding. *Fides* "*est obligatio conscientiæ unius ad* "*intentionem alterius*."—Bac. Read. Us.

(*e*) Gilb. Uses, by Sugd. 3, (*n*.)

(*f*) Ff. 7, l. 1.

(*g*) Inst. 2, t. 23, ss. 1, 2.

(*h*) 1 Cruise, Dig. 394.

acquired a different character (*i*): it became *jus fiduciarium*, and entitled to a remedy from a court of justice, and it was the business of a particular magistrate, the *prætor fidei commissarius*, to enforce the observance of these confidences (*k*).

[This notion of a use was transplanted into England from the civil law about the close of the reign of Edward the third (*l*), by means of the foreign ecclesiastics, who introduced it to evade the statutes of mortmain.] To explain this, we must remark that the religious houses to which they belonged fell under the legal description of *corporations*, a species of social institution on which we shall have occasion to dilate hereafter, and of which at present we shall only say, that they consist either of collective bodies of men, or of single individuals the first called corporations *aggregate*, the second, corporations *sole*), to whom the law allows an artificial, distinct from their natural, personality: and who possess, as persons corporate, the character of perpetuity: their existence being constantly maintained by the succession of new individuals in the place of those who die, or are removed (*m*). The lands belonging to such bodies were consequently said to be in *mortua manu*, or in *mortmain*, because they produced no advantage to the feudal lord by way of escheat or otherwise (*n*): and therefore, by the policy of the antient law, corporations were prohibited from the purchase of land, unless a licence in mortmain (as it was called) was obtained for the purpose. This principle was enforced by a variety of statutes, called the statutes of mortmain, which the clergy of the day were constantly exerting their ingenuity to evade. One of their expedients was to obtain grants of land, [not to their religious houses directly, but to some person to hold to the use of the religious houses.] A gift of this kind conferred no estate or interest whatever, in con-

(*i*) 1 Cruise, Dig. 395.
(*k*) Inst. 2. tit. 23. s. 5.
(*l*) Saul. Uses, p. 17. 2nd ed.
(*m*) See further as to corporations, bk. iv. pt. iii. c. i.
(*n*) [illegible] lits. 2 b.

templation of law, on those whose benefit was designed, for the principle of the feudal tenure was to look no further than to the actual and ostensible tenant, and to consider him alone as the proprietor (*o*). The use, therefore, declared upon such a gift, being in the view of the ordinary courts of justice a *non-entity*, escaped the operation of the statutes of mortmain. On the other hand, however, it did not remain without *protection*; for the clerical chancellors of those days maintained the doctrine that such gifts, though not effectual in the ordinary courts of law, were binding in conscience, and ought, like the *fidei commissa* of the Romans, to be enforced. And as these were subjected by the imperial institutions to the jurisdiction of a particular magistrate, the prætor, so the chancellors claimed the right of compelling the performance of the trusts in question in their Court of Chancery, where justice was administered upon the principles of *equity* (*p*), in contradistinction to the common law of the realm.

As regards the corporate bodies or religious houses themselves, indeed, this evasive contrivance of uses proved to be of little avail, being [crushed in its infancy by statute 15 Rich. II. c. 5,] which enacted that, for the future, uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves, unless the licence of the crown were duly obtained. Yet the idea, being once introduced, was afterwards applied to purposes not contemplated by its inventors, and took root in our system of jurisprudence: being chiefly recommended by two considerations—first, that uses were, as to the manner of their creation and transfer, and the modifications of interest to which they might be subject, free from the restrictive rules which applied to the common law estates: secondly, that they were not, in general, liable, like these estates, to forfeiture (*q*), and originally not even to forfeiture for treason (*r*);

(*o*) 1 Cruise, Dig. 402.

(*p*) Vide sup. p. 83; 3 Bl. Com. 51; Reeves's Hist. Eng. Law, vol. iii. p. 192.

(*q*) Vide sup. pp. 200, 210.

(*r*) Vide 33 Hen. 8, c. 20.

owing to which latter circumstance in particular [it happened, that 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 of securing their estates from forfeiture when each of the contending parties, as they became uppermost, alternately attainted the other; till about the reign of Edward the fourth (before whose time Lord Bacon remarks that there are not six cases to be found relating to the doctrine of uses (*s*)), the courts of equity began to reduce them to something of a regular system.]

With respect to the kinds of property that might be the subject of a use, we may observe in general, that all corporeal hereditaments, whether in possession, remainder, or reversion, and many that are incorporeal, (for example, rents and advowsons,) might be granted to a use; but not those of which the use was inseparable from the possession, and *quæ ipso usu consumuntur*, as ways, commons, and the like (*t*).

The manner in which a use was commonly created, was as follows. The owner or actual tenant of the land, conveyed it by feoffment, upon the trust or confidence (which often rested upon merely oral agreement (*u*),) that the feoffee should hold the land to the use of some third person, or it might be to the use of the feoffor himself (*x*). The effect of this transaction (as already in part explained) was, that the legal seisin or feudal tendency of the land became severed from the substantial and beneficial ownership or use, the former being vested in the trustee, otherwise called *feoffee to uses*, the latter, in the person to whose use he held, who received the appellation of *cestui que use*. Of these divided interests that of the feoffee alone obtained protection in the court of common law, where he was con-

(*s*) Bac. Read. Us.

(*t*) 2 Bl. Com. 330; 1 Sand. Uses, 70, 2nd ed.; 1 Cruise, Dig. 408; W. Jones, 127; Ld. Willoughby's case, per Doddridge, J., Gilb. Uses, 485, 3rd ed. by Sugd.

(*u*) 1 Sand. Uses, 17, 2nd ed.

(*x*) 1 Cruise, Dig. 392.

sidered as absolute owner; but a different doctrine was maintained in the courts of equity, which treated *cestui que use*, on the other hand, as the true proprietor, and compelled the feoffee to account to him for the rents and profits, and to hold the land at his disposal.

Uses, however, might be created, not only by an express agreement or declaration, but by mere implication from the nature of the conveyance itself. Thus if a man made a feoffment in fee to another, without any consideration, equity would presume that he meant it to the use of himself, and would therefore raise an implied use for his benefit (*y*), unless he expressly declared it to be to the use of another, and then nothing was presumed contrary to his own expressions (*z*). And here we may observe, that uses thus returning by way of implication to the grantor himself were called *resulting* uses (*a*). Uses also were capable of being raised in some cases upon mere contracts (*b*), without the formality of any conveyance; and this either expressly or by implication. For if a man, in consideration of natural affection, *covenanted*, that is, contracted under the solemnity of a deed (*c*), *that he would stand seised of his land to the use* of some near relative named (*d*), or of a wife, actual or intended, a court of equity, even though no valuable consideration passed, would enforce the use, and treat the covenantor thereafter as a mere trustee for the party whose benefit was designed. So if a man had *bargained and sold* his land to another, (that is, agreed to sell it him) for pecuniary consideration, but had made no actual feoffment or conveyance, equity would, under such circumstances, consider the estate as

(*y*) 1 Sand. Us. 68, 2nd ed.; Vin. Uses, F.; 1 Cruise, Dig. 442, 446, 450; Gilb. 118.

(*z*) 2 Bl. Com. 330.

(*a*) 1 Cruise, Dig. 442, 446, 450; 2 Bl. Com. 335; Doe *v.* Rolfe, 8 Ad. & El. 650.

(*b*) 1 Sand. Us. 118, 2nd ed.; ibid. II. 50; Chudleigh's case, 1 Rep. 139 b.

(*c*) 2 Bl. Com. 304.

(*d*) Gilb. Uses, 93; Sugd. Introd. to Gilb. xlvii.

belonging to the party who had paid the money, and would consequently hold the bargainor to be seised of the land from thenceforth to the use of the bargainee (*e*).

No contracts of either kind, however, would be enforced in equity, unless founded upon the particular species of consideration above described as appropriate to the case; a gratuitous engagement in favour of a stranger, being insufficient to raise a use.

In general all persons were of capacity thus to become trustees, and to hold to a use (*f*). There were, however, some exceptions. For persons attainted and aliens were for this (as for all other purposes) disqualified from holding land (*g*); and the doctrine was also established, [that neither the king nor queen, on account of their dignity royal (*h*), nor any corporation aggregate, on account of its limited capacity (*i*), could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust.]

As the feoffee, or person seised, to uses was considered at the common law as alsolute owner, his estate was of course subject to all the incidents which would attach to one held for his own benefit. It would devolve to his legal representative at his death, and might be aliened, or forfeited by his act while living, or become subject to execution for his debts, or to escheat for want of heir. His wife also would be entitled to dower; and where the feoffee was a married woman, her husband might claim an estate by the curtesy (*k*).

It is to be observed, too, that persons claiming under titles derived like these, from the feoffee, were in some cases en-

(*e*) 2 Sand. Us. 50, 2nd ed. But the precise technical words of *bargain and sale*, or *covenant to stand seised*, are not essential, if there are words tantamount; Treat. on Equity, book ii. chap. 3, s. 1.

(*f*) 1 Sand. Us. 62, 2nd ed.

(*g*) Ibid. 65.

(*h*) 2 Bl. Com. 330; 1 Sand. Us. 65, 2nd ed.

(*i*) Ibid.

(*k*) 1 Sand. Us. 75, 76, 2nd ed.; 1 Cruise, Dig. 403. As to execution for his debts, vide Gilb. Us. by Sugd. 3rd edit. p. 15; Escheat, 2 Bl. Com. 330.

titled to hold for their own benefit, free from any equitable obligation to perform the trust. Originally, indeed, it was held that the Court of Chancery could give relief only against the person himself in whom the trust was first reposed, and not against such as might derive title through him. [This was altered in the reign of Henry the sixth with respect to the heir (*l*), 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 (*m*). But a purchaser for a valuable consideration without notice,] or a creditor obtaining execution (*n*), [might hold the land discharged of any such confidence; and so 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; because they were not parties to the trust, but came in by act of law (*o*): though doubtless their title in reason was no better than that of the heir.]

The capacity of becoming *cestui que use* was even more extensive than that of becoming trustee, and it may be sufficient to observe generally, that all persons competent to take a conveyance of land might also take an interest in it by way of use (*p*).

The nature of this interest, constituting as it did a new sort of ownership, wholly distinct from the common law or legal estate, to which alone our attention was formerly directed, demands a particular consideration. It was in its nature so exclusively *equitable*, that the courts of common law accounted the *cestui que use*, if out of possession, as a mere stranger to the land; if in possession, as no more than a tenant at sufferance. They consequently allowed

(*l*) Keilw. 42; vide Year-book, 22 Edw. 4, c. 6.

(*m*) Keilw. 46.

(*n*) Gilb. Uses, by Sugd. 3rd edit. pp. 15, 16.

(*o*) See 1 Sand. Uses, 229, 2nd ed.

(*p*) 1 Sand. Uses, 66.

no effect to his alienation or demise of the land, if made without the consent of the trustee, and they held it not liable to forfeiture for his default, nor to execution for his debts (*q*). In equity, however, the properties or incidents of this kind of ownership were in a great measure assimilated to those of a legal estate; while on the other hand they were settled in certain respects upon principles more advantageous to the owner. These properties were principally as follows:—1. Contrary to the course of the common law with respect to freehold estate, uses even for life, or for a greater interest, might be created or assigned [by secret deeds between the parties, or might be devised by last will or testament (*r*); for as the legal estate in the soil was not transferred by these transactions, no *livery of seisin* was necessary,] or in its nature applicable to the case. 2. As a use was exempt from the restrictions of the common law as to the manner of creation or transfer, so it enjoyed a similar freedom as regards the modification of the interest itself. Thus uses might not only be in possession, reversion, or remainder, vested or contingent, according to the fashion of legal estates, but might also be limited for future interests not corresponding with the legal idea of a remainder. When in the nature of estates in possession, reversion, or vested remainder, they were called uses *in esse*; in other cases they were described as uses *in futuro*, *contingent* uses, or uses *in possibility* (*s*). 3. A use was not, (as before remarked) subject to forfeiture (*t*); and did not escheat upon attainder, or other defect of blood; [for escheats and the like are the consequence of *tenure*, and uses are held of nobody. 4. Again, no wife could claim dower, or husband an estate by curtesy, of a use (*u*); for no trust was declared

(*q*) 2 Bl. Com. 331; 1 Sand. Uses, 73, 74, 2nd ed.

(*r*) Bac. Read. Uses, 312, 308; 1 Sand. Uses, 72, 2nd ed.

(*s*) Chudleigh's case, 1 Rep. 136 b, 121 b; Lovies' case, 10 Rep. 85 a; Bac. Read. Us.; Bac. Ab. Uses, (G).

(*t*) Sup. p. 357.

(*u*) Vernon's case, 4 Rep. l. b; 2 And. 75. As to *dower* and *curtesy*, vide sup. pp. 267, 264.

[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 (*x*). 5. Lastly, a use could not be extended by writ of elegit, or other legal process, for the debts of *cestui que use*,] though the legal estate *was* liable to such execution for the debt of the legal tenant.

The state of things here described was, however, attended with a variety of inconveniences. A person in possession of the land as apparent owner, would often, in realty, be a mere *cestui que use*, and consequently no more than a tenant at sufferance in regard to the legal estate; or he might, on the other hand, be a mere trustee, the equitable ownership and the right to receive the profits residing in another (*y*): and as putting an estate into use was often a secret transaction, which strangers had no means of becoming acquainted with (*z*), they were in constant danger of being deceived as to the true state of the title. We cannot therefore be surprised at Lord Bacon's complaint that [this course of proceeding "was turned to deceive "many of their just and reasonable rights. A man that "had cause to sue for land, knew not against whom to "bring his action, or who was the owner of it. The wife "was defrauded of her thirds, the husband of his curtesy, "the lord of his wardship, relief, heriot, and escheat, the "creditor of his extent for debt, and the tenant of his "lease (*a*)." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestui que use* (*b*); allowed actions for the freehold to be brought against him if in actual pernancy or enjoyment of the profits (*c*); made him

(*x*) Vide sup. p. 273.

(*y*) Bac. Ab. Uses and Trusts, p. 83.

(*z*) 1 Sand. Us. 17, 18, 23; Preamble of Stat. of Uses.

(*a*) Bac. Use of the Law, 153.

(*b*) Stat. 50 Edw. 3, c. 6; 2 Rich. 2, st. 2, c. 3; 19 Hen. 7, c. 15.

(*c*) 1 Rich. 2, c. 9; 4 Hen. 4, c. 7; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1.

[liable to actions of waste (*d*); established his conveyance and leases made without the concurrence of his feoffees (*e*); and gave the lord the wardship of his heir, with certain other feudal perquisites (*f*).

These provisions all tended to consider *cestui que use* as the real owner of the estate;] and it being at length resolved to carry this idea into full effect, that celebrated act was passed in the reign of Henry the eighth, which is [usually called the *Statute of Uses* (*g*), or in conveyances and pleadings, the *Statute for transferring Uses into Possession*. The hint seems to have been derived from what was done at the accession of King Richard the third, 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 (*h*) was immediately passed, which ordained that, where he had been so enfeoffed jointly with other persons, the lands should vest in the other feoffees as if he had never been named, and that, where he solely stood enfeoffed, the estate itself should vest in *cestui que use* in like manner as he had the use. And so the statute of Henry the eighth, after reciting the various inconveniences before mentioned, and many others, enacts that where any person shall be seised] of lands or other hereditaments (*i*) to the use, confidence, or trust of any other person or body politic; the person or body politic entitled to the use, confidence or trust in fee simple, fee tail, for life or years, or otherwise,—or in remainder or reversion,—shall from henceforth stand and be seised or possessed of the said lands or other hereditaments of and in the like estates, as they have in the use, trust,

(*d*) Stat. 11 Hen. 6, c. 5.

(*e*) Stat. 1 Rich. 3, c. 1.

(*f*) Stat. 4 Hen. 7, c. 17; 19 Hen. 7, c. 15.

(*g*) 27 Hen. 8, c. 10.

(*h*) 1 Rich. 3, c. 5.

(*i*) The words in the act are, "honours, castles, manors, lands, "tenements, rents, services, rever-"sions, remainders, or other heredit-"aments;" 27 Hen. 8, c. 10, s. 1.

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 effect of this statute, wherever it comes into operation, is to *execute* the use; that is, it instantaneously (*k*), and as by a kind of parliamentary magic (*l*), transmutes the equitable interest of *cestui que use* into a legal estate of the same nature, and makes him tenant of the land accordingly, in lieu of the feoffee to uses, or trustee; whose estate, on the other hand, is at the same moment annihilated (*m*). The use is also said to be *transferred into possession* (*n*); that is, the legal estate conferred on *cestui que use* is considered as one in actual seisin or possession (according to its nature), and such as requires no further ceremony for its completion (*o*). Thus if a feoffment be made to A. and his heirs to the use of B. and his heirs, an estate in fee simple in possession is *eo instanti* vested by force of the statute, and without livery of seisin, in B.; and A. takes nothing (*p*): or if a person seised in fee bargains and sells to A. for a year, for a pecuniary consideration (which we may remember constitutes a seisin in the bargainor to the use of A. (*q*)), A. immediately becomes, by force of the statute and without entry, possessed of the land for the term of one year; the reversion remaining in the bargainor.

Here we must observe, however, that to bring the statute into operation, it is essential that there should not only be a use, but *a person seised to the use* (*r*); for its provisions are confined to the case where "one person shall be seised to the use of any other person." And therefore

(*k*) 2 Bl. Com. 333.

(*l*) Ibid. 338.

(*m*) Ibid. 333.

(*n*) 1 Saund. 251, n. (2), 234 b, n. (4).

(*o*) As to the effect upon the statutory seisin, of cestui que use *disclaiming* the use, see Burdett *v.* Spilsbury, 6 Man. & Gr. 456, *in notis*.

(*p*) A.'s momentary seisin vests no estate in him. James *v.* Plant, in error, 4 Ad. & El. 766.

(*q*) Vide sup. p. 359.

(*r*) 1 Sand. Us. 97, 113, 133; 2 Sand. Us. 58.

where an existing term of years is limited to a use, as where a term of 1000 years is assigned to B. to the use of C., it was decided by the common law judges soon after the statute passed, and has been since uniformly held, that the provisions of the statute do not apply to the case, and that the use will consequently remain unexecuted. For of such estates as these, (being mere chattels), the termor is not *seised*, but only *possessed* (*s*); and therefore there is no person seised to a use as the statute requires (*t*). Upon the same principle of close adherence to the words of the statute, it is held, that the seisin should be vested in a different person from *cestui que use* himself: for otherwise the case does not arise of one person seised to the use of *another* (*u*). And the seisin should be for an estate as extensive as the use itself; for the statute only executes the use so far as there is a corresponding seisin. Thus if land be conveyed to A. for life to the use of B. in fee; the statute will vest the legal estate in B. only during the life of A. (*x*)

(*s*) Vide sup. pp. 281, 286.

(*t*) 1 Sand. Us. 198, 2nd edit.; Gilb. Us. 79; Bac. Read. Us. 335; Dillon *v.* Fraine, Poph. 76. This case, of the limitation of a term of years to a use, must be carefully distinguished from the limitation of the *freehold* to a use for a term of years; for the latter *is* executed by the statute, Gilb. Us. 80.

(*u*) 1 Sand. Us. 96.

(*x*) 1 Sand. Us. 113; Gilb. Us. 430. There has been much controversy on the question out of what seisin "contingent uses" are in certain cases to be executed; and this involves the curious doctrine of *scintilla juris*. Thus where land is conveyed by feoffment to A. and his heirs, to the use of B. for life, remainder to the use of his unborn sons successively in tail, remainder to the use of C. in fee; it is necessary, in order that the statute should transmute all these uses into legal estates, that there should be a seisin out of which to execute not only the uses *in esse* to B. and C., but the future uses to the sons of B. And it has been thought necessary, also, that this seisin should exist with respect to each use at the time of its possessing the character of a use *in esse*. But all the actual seisin of the feoffee A. is exhausted before any son of B. is born, being drawn out of him to execute the uses *in esse* to B. and C.; which uses, taken together, extend to the entire inheritance. Here, therefore, is the difficulty; and in order to meet it, it has been held by great authorities that there still remains in the feoffee, though not an actual seisin, yet a

As regards the use itself, also, a similar rigour of construction was adopted by the early expounders of the statute (*y*), and their doctrines have long since passed into settled law. The decisions of the common law courts on this subject were as follows:—1. It was held that *no use can be limited upon a use* (*z*). Thus where A., being seised, bargains and sells for a pecuniary consideration to B., the legal estate passes (as we have seen) by force of the statute to B., to whom the use is limited by the effect of the bargain and sale; and from this it might seem reasonable to infer that where A. bargains and sells to B., to *the use of* C., the legal estate would vest in C., for the ultimate use is here limited to *him*. But the judges held that it would vest in this case also in B., and that C. would take nothing; for the statute, they said, would execute the first use limited to B., but not the second, limited to C.; the latter use being a mere nullity, inasmuch "as no use can be engendered of a use (*a*)." Upon the same principle a feoffment to A. to the use of B. in trust for C. was held to vest the legal estate in B.; and C. was allowed to take nothing (*b*). This maxim, that there can be no use upon a use, proceeded upon the principle that, after the limitation of one, another must be

scintilla juris, or possibility of *future* seisin, to serve the future uses as they come into *esse*. But, according to others, there is no necessity for resorting to this theory; it being sufficient, in their opinion, for the purpose of the statute, that at the time of the creation of the future uses there should be a seisin to serve them, though there should be none at the time of their coming into *esse*; and they conclude that in the case supposed there would remain in A. neither any seisin nor any possibility of seisin after the uses to B. and C. were executed. Dy. 340; 2 Sid. 98; 1 Sand. Us. 147; Fearne, by Butler, 291, n. (*h*); 1 Prest. Est. 170; Sugd. Gilb. Us. 131, n. (10); Burt. Compend. 60; Hayes, Convey. 48; Watk. Convey. 8th ed. 243.

(*y*) This strictness has been attributed to a disinclination on the part of the judges, to carry the abolition of uses so far as had been intended by the legislature. First Real Prop. Rep. 8.

(*z*) Gilb. Us. 347; 1 Sand. Us. 198, 2nd edit.; 2 Bl. Com. 335.

(*a*) Tyrrel's case, Dy. 155.

(*b*) 2 Bl. Com. 336; Gilb. Us. Sugd. lx.

considered as *repugnant*, and therefore void. Yet the doctrine, however firmly settled, is, upon the whole, not satisfactory; for it was clearly intended, in the cases above supposed, that C. should have the beneficial interest; and the instant the first use was executed in B. he might without impropriety have been considered as seised to the use of C.; which second use the statute might as well have been permitted to execute as it did the first (*c*). 2. The judges held, and the doctrine has since been confirmed by a variety of decisions, that *where the person entrusted has any active duty to perform, he cannot be considered as holding to a use, or at least not such a use as the statute executes.* Thus where lands where given to B. and his heirs, with a direction to *receive* and *pay over* the profits to C., this was held to be no use in C.; though, on the other hand, if the direction were to *permit C. to take* the profits, this was considered to be a use executed in him (*d*); for here, we may observe, is no active duty appointed for the trustee (*e*).

(*c*) 2 Bl. Com. 336.

(*d*) "*Home fait feoffment in fee al son use per term de vie, et que puis son decease I. N. prendra les profits: ceo fait un use in I. N. Contrar. s'il dit, que puis son mort ses feoffees prendront les profits et liveront eux al I. N.: ceo ne fait use in I. N. car il n'ad eux nisi par les mains les feoffees.*" Bro. Feoff. al Uses, 52; 36 Hen. 8. And see 2 Saund. by Wms. 11 a, n. (17); 8 Vin. Abr. 262, tit. Devise; Browne *v.* Ramsdon, 8 Taunt. 564; Doe *v.* Homfray, 6 Ad. & El. 206; Doe *v.* Scott, 4 Bing. 507.

(*e*) In reference to the distinction noticed in the text, we may observe, that though the trustee to whom some active duty is appointed takes the legal estate, he takes one only commensurate in duration with the period during which the duties are to be performed. Thus if land be given to B. and his heirs, with directions to pay over the profits to C. during the life of C., and then to permit D. to take the profits, the legal estate is vested in B. during C.'s life, but on D.'s remainder vesting in possession, *he* has a legal estate in virtue of the statute. See Barker *v.* Greenwood, 4 Mee. & W. 429; Adams *v.* Adams, 6 Q. B. 860; Doe *v.* Claridge, 6 C. B. 641. As to the case where land is given to B. and his heirs, with directions to permit C., a *married woman*, to take the profits, see Doe *v.* Scott, 4 Bing. 507; Doe *v.* Edlin, 4 Ad. & El. 582; Williams *v.* Waters, 14 Mee. & W. 166.

The uses (or intended uses) which were thus excluded from the operation of the statute, because there was no seisin to support them, or because they were limited on a precedent use, did not fail, nevertheless, to obtain protection from the courts of equity; for in both cases it was evident that the person directed to hold to the purpose which the statute was incompetent to execute (or, according to the examples, B.,) was never intended by the parties to have any beneficial interest, and that his capacity was merely fiduciary (*f*). Therefore the Court of Chancery determined that though the purposes pointed out were not uses executable by the statute, yet a *trust* subsisted in the person directed to perform the purpose, and that such trust was binding, if not at law, yet in conscience and in *equity*. To this the reason of mankind assented (*g*); and the interests in question, though rejected at law as *uses*, became established in equity under the denomination of *trusts*. A similar protection was also given, for the same reason, and under the same name, to all those confidences which were excluded from the operation of the statute, on account of the active duties imposed on the trustee; and these were a very numerous and important class, comprising not only cases where he was directed to receive and pay over the profits to other persons, but those where he was to sell the land for their benefit, or to divide it among them, or the like. These, indeed, seem always to have been described as trusts (*h*), or special trusts, and never to have received the appellation of uses. They were obviously of a very different nature from those aimed at in the statute of uses, and were some of them so essential to the purposes of civilized society, and to the protection of those who were unable to act for themselves, that it is difficult to imagine a period in our legal history when they could be wholly unknown, or to suppose that they owed their origin to the introduction of uses.

(*f*) 2 Bl. Com. 336.
(*g*) Ibid.
(*h*) Bac. Read. Us. 805; 1 Sand, Us. 2, 6, 10, 203, 2nd edit.

Both these kinds of trust have ever since continued to be copiously created: the uses not executed (or *passive* trusts as they are sometimes called), with a view to the same advantages in general as were derived from uses before the statute; the *active* or special trusts for reasons sufficiently apparent. The person whose benefit is designed by them is called *cestui que trust*, and his interest is described as *trust estate*; which distinguishes it from a *use* on the one hand, and from *legal estate* on the other.

It will be evident, however, from preceding explanations, that, in the case of a passive trust, the trust estate cannot be effectively created without taking care to reduplicate the use, or to limit it upon a term of years instead of a freehold interest. Thus, if it is intended to give C. a trust estate, which shall be subject to the jurisdiction of the Court of Chancery, and not a legal estate subject to the jurisdiction of the common law, it will not suffice (as we have seen) to convey by feoffment to B. and his heirs "to the use of," or even "in trust for," C. and his heirs; for that use would be executed by the statute, and the legal estate would vest in C. But, on the other hand, the object may be accomplished by enfeoffing "A. and his heirs to the use of B. and his heirs, in trust for C. and his heirs;" for there being in this case a use upon a use, the first only will be executed by the statute, and the trust estate is undisturbed. So it may be accomplished by enfeoffing "A. and his heirs to the use of A. and his heirs, "in trust for C. and his heirs;" for though the first use is not such a one as the statute executes (the seisin and the use being vested in the same person), yet there cannot be a use upon a use, whether the statute executes the first use or not; and therefore the interest of C. is not a use executed, but a trust (*i*). In like manner the object will be attained if an existing term for 1000 years be assigned "to A. to the use of C. and his heirs;" for A. not being

(*i*) Tipping *v.* Cousins, Comb. 312; 1 Sand. Us. 97, 2nd ed.; 2 Sand. Us. 72; Doe *v.* Passingham, 6 Barn. & Cress. 305; 9 Dowl. & Ryl. 416, S.C.

seised, but possessed only, to the use of C., the statute will not execute the use, and A. remains trustee for C. As for the case of an active trust, no such artifice of conveyancing is necessary to constitute the trust estate; the duties required to be performed being sufficient in themselves to determine its character.

Among the kinds of trusts cognizable in equity, it may be right also briefly to advert to a large class with which we have at present no direct concern, viz. those which are constituted in respect of personal chattels; for the trusts of which we have hitherto spoken relate (it will be observed) exclusively to real estate. As to personalty, it was never considered as capable of being held to a use, in the proper meaning of that term (*k*); and the statute of uses is confined in terms to "lands, tenements, and hereditaments;" but, in the nature of things, a *trust* of personal chattels must always have been of frequent occurrence (*l*); and it has long been the subject of protection in the courts of equity (*m*). In some instances, indeed, the breach of it finds remedy in those of the common law (*n*).

The wide field of exclusive jurisdiction which the courts of equity thus gradually acquired, under the general denomination of "trusts," they have from time to time

(*k*) Gilb. Us. by Sugd. 485; 1 Sand. Us. 70; per Doddridge, W. Jones, 127.

(*l*) 1 Sand. Us. 10.

(*m*) We may here take occasion to notice the 10 & 11 Vict. c. 96 (amended by 12 & 13 Vict. c. 74), containing provisions under which trustees and others having trust monies, stock, &c. in their hands or under their control, may pay or transfer the same into the name of the accountant-general, in order that the trust may be administered by the Court of Chancery. Also the "Trustee Act, 1850," 13 & 14 Vict. c. 60 (extended by 18 & 19 Vict. c. 91, s. 10), containing (inter alia) provisions for the cases where trustees of stock or choses in action, or their representatives, are out of the jurisdiction, or cannot be found, or refuse to transfer, or are lunatic, &c. See also the Reg. Gen. of the Court of Chancery, 10th June, 1848, for carrying the first of these acts into effect. In addition to which may be mentioned 20 & 21 Vict. c. 54, for punishment of the fraudulent conversion of trust funds, by trustees.

(*n*) 2 Fonbl. Treat. Eq. 1, n. (*a*); 3 Bl. Com. 432; Queen *v.* Abrahams, 4 Q. B. 159.

sedulously improved, [and by a long series of uniform determinations, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts have been made to answer in general all the beneficial ends of uses, without their inconvenience or frauds.] Of this system, so far as it regards the nature of the estate of the trustee, and that of the *cestui que trust*, we will here endeavour to point out the fundamental principles; the subject being much too copious to be fully handled in a general treatise upon the English law.

First, with respect to the word "trust" itself: it has varied somewhat, we may perceive, from its antient meaning. It formerly applied to every case where a use was created, as well as to other confidences; but where there is a use which the statute is competent to execute, there can no longer be said to exist a trust. The true definition of this term, at the present day, seems to be a confidence reposed by one man in another with respect to property committed to him as the nominal owner, but not involving a use which the statute is competent to execute. In practice, however, the term *trust*, as well as *trust estate*, is applied to express the beneficial interest of the *cestui que trust*, as well as the confidence reposed in his trustee.

Besides the distinction between *active* and *passive*, trusts are also frequently described as *executory*, or *executed*—the former term being applied to cases where the party, whose benefit is designed, is to take through the medium of a future instrument of conveyance which the trustee is directed to execute for the purpose; the latter to cases where no transaction of that kind is contemplated, but the trust estate is completely limited in the first instance (*o*). Again trusts (like uses) may be either expressly *declared*, or they may be *implied* from circumstances. Thus, if the legal estate in land be conveyed to A. upon such trusts as the grantor shall thereafter appoint; as such trusts are, prior to

(*o*) 1 Fonbl. Treat. Eq. 441, n.; Bac. Abr. Uses, A.; Butl. Fearne, 90, 118, 139, &c., 9th ed.

appointment, incapable of taking effect, and as it is clear that A. is not intended to hold the land for his own benefit; there arises, by necessary implication, until the appointment be made, a trust for the grantor (*p*). And trusts, when thus raised by implication for the benefit of the grantor himself, are called *resulting* trusts. So if an estate be purchased in the name of one person, and the consideration-money belong to or be paid by another, the land purchased will be subject to a trust for the person to whom the money belonged (*q*). And an agreement for the sale of land, when once concluded, will make the vendor a trustee in equity for the purchaser (*r*).

Though neither the crown nor a corporation aggregate could be seised (as we have seen) to a use, the case is otherwise with respect to a trust (*s*); and it may be laid down generally, that every description of person capable of holding land, is capable also of being a trustee. It is also a maxim in equity, that a trust shall never fail on account of the disability of the person appointed to perform it, or even from the omission to appoint any person as trustee. The Court of Chancery will consider the trust, when once substantially constituted, as fixing itself upon the person who, by reason of such disability or omission, may become entitled to the legal estate (*t*); and will accordingly compel him to its observance.

The estate of the trustee is at *law* (as distinguished from *equity*) subject to all the incidents which attend an ordinary ownership of land. It devolves, therefore, when he dies, to his legal representative; and is liable, while he lives, to alienation by himself; but the claim of the representative, and in general also of the alienee, is subject, in contemplation of equity, to the original trust (*u*). With respect to the latter, however, the same rule is established as formerly

(*p*) 1 Cruise, Dig. 477.
(*q*) 1 Sand. Us. 212, 2nd ed.
(*r*) Sugd. Vend. 154, 5th ed.
(*s*) 1 Sand. Us. 227.
(*t*) Ibid. 226.
(*u*) 1 Sand. Us. 227; Gilb. Sugd. 13 n. (5).

with respect to uses, that a person who becomes alienee by purchase, for valuable consideration, and without notice that the trust existed, is not compellable in a court of equity to its observance (*x*). As his claim is not inferior, in point of natural justice, to that of *cestui que trust*, equity will not interpose between them; the consequence of which is, that the legal title of the former takes effect for his own benefit, while the latter is left to his remedy against the alienor personally, for his breach of trust. On the other hand, where the legal estate still remains in the trustee or his heir, but the purposes of the trust are satisfied, he is always compellable to divest himself of it in favour of the person beneficially entitled, by executing a proper conveyance; and it is provided by 13 & 14 Vict. c. 60, that if he should refuse to do so when required (*y*), or if he should be an infant (*z*), or out of the jurisdiction, or cannot be found (*a*), or if it should be uncertain (where there are several trustees) which was the survivor (*b*), or uncertain whether the trustee last known to have been seised is living or dead, or, if dead, uncertain who is his heir or devisee (*c*),—in all these cases the Court of Chancery shall have power either to make an order vesting the estate in such person or persons, in such manner and for such estate, as the court shall direct; or may appoint some person to make the conveyance in lieu of the trustee or his heir (*d*).

Moreover, at *law*, the estate of the trustee is liable to be taken in execution for his debts (*e*); and his wife is entitled to dower (*f*), and the husband of a female trustee to curtesy (*g*). Upon these points it will be recollected that the

(*x*) 1 Sand. Us. 228.

(*y*) 13 & 14 Vict. c. 60, s. 17.

(*z*) Sects. 7, 8.

(*a*) Sects. 9, 10.

(*b*) Sect. 13.

(*c*) Sects. 14, 15.

(*d*) Sect. 20. See also sects. 16, 18, containing like provisions, where lands are subject to a contingent right in trust; and sects. 3, 4, for provisions in the case of a lunatic trustee.

(*e*) 1 Sand. Us. 230, 231; 1 P. Wms. 278.

(*f*) 2 Ves. sen. 634. As to *dower*, vide sup. p. 267.

(*g*) 7 Vin. Ab. 159. As to *curtesy*, vide sup. p. 264.

position of the feoffee to uses, before the statute of Henry VIII., was the same: while, on the other hand, *cestui que use* remained without protection. But herein the modern trust differs remarkably from the use; for *equity* will now interfere in each of these cases, on behalf of *cestui que trust*, and give him relief against the party who sets up any title of this description to the legal estate. Until a recent period, the incidents of forfeiture and escheat also applied (generally speaking) to the estate of the trustee (*h*). But now by the 13 & 14 Vict. c. 60, ss. 46, 47, (repealing an act of 4 & 5 Will. IV. on the same subjects), if a person seised of land in trust dies intestate as to such lands without an heir, the Court of Chancery may appoint a person to convey the land in such manner as it may deem expedient; and no land shall escheat or be forfeited by reason of the attainder or conviction of a trustee or mortgagee, for any offence, except so far as relates to any beneficial interest of such trustee or mortgagee therein.

Such are the points that most deserve attention in regard to the estate of the trustee. If we turn now to the other party or *cestui que trust*, we may remark in the first place, that every person is competent to stand in that capacity, unless labouring under such disability as would disqualify him from becoming the tenant of land. As to the nature of his interest, it is not the subject of protection, or even of notice (generally speaking), in the courts of law (*i*), but subsists in equity only; and there it may be of various kinds or degrees, according to the particular character of the trust created. It is in some instances a mere *charge* on the land; the *ownership* being vested in another person: as where a man by his will devises land to one, and directs that it shall be charged with the payment of the legacy to another. In other instances it amounts, in contemplation of equity, to the actual *ownership*; and this estate or in-

(*h*) 1 Sand. Us. 250.

(*i*) See Britten v. Britten, 4 Tyrw. 473; Roe v. Reed, 8 T. R. 118.

terest is modelled in general, upon the rules of the common law with respect to legal estates; for in this and in other particulars the principle professed by the courts of equity is, that *æquitas sequitur legem* (*k*). Thus there may be an equitable estate for life or years, or in fee or tail; and in the latter case the method of barring the entail will be the same as if the estate were legal. So an equitable interest may be either in possession or expectancy, as in the case of a legal estate. But where it is in the nature of a *contingent remainder*, it has never been held subject to the common law rule, now abolished, of being defeated by the determination of the particular estate before the contingency happens (*l*). The doctrine of "merger" also seems to apply to equitable as well as legal estates, providing the coalescing estates be both of the equitable description, and the merger would not be productive of any injustice or inconvenience (*m*). So the same rules of construction will in general apply to equitable as well as to legal estates; and particularly the important rule in Shelley's case (*n*). A trust of inheritance is also subject to the curtesy of the husband of *cestui que trust*, as if it were an estate at law (*o*); and in this respect it is placed on a more satisfactory footing than a use, which was exempt, as we have seen, from curtesy (*p*). It followed, indeed, till lately, the nature of a use, it being exempt from dower; a circumstance resulting rather from the [cautious adherence to some hasty proceedings, than to any well-grounded principle (*q*);] but by 3 & 4 Will. IV. c. 105, s. 2, the widow may now in equity claim dower

(*k*) 2 Bl. Com. 330.

(*l*) 1 Prest. Est. 241; Hopkins *v.* Hopkins, Cas. temp. Talb. 44; 1 Atk. 590. As to the recent enactment with respect to this rule, vide sup. p. 332.

(*m*) Vide Hopkins *v.* Hopkins, 1 Atk. 592; Phillips *v.* Phillips, 1 P. Wms. 41; 3 Prest. Conv. 558. As to *merger*, vide sup. p. 316.

(*n*) Bale *v.* Coleman, 1 P. Wms. 142; Fearne, by Butl. 124, 9th ed. As to the "Rule in Shelley's case," vide sup. p. 338.

(*o*) 1 Sand. Us. 205. As to *curtesy*, vide sup. p. 264.

(*p*) Vide sup. p. 362.

(*q*) 2 Bl. Com. 337.

out of any estate of inheritance in possession (other than in joint-tenancy), to which the husband was entitled beneficially, and in which she is not dowable at law; and this, whether the estate of the husband was wholly equitable, or partly legal and partly equitable. Again, a trust estate, though formerly protected like a use from execution for debt, is now, with more regard to justice, made subject to such process; for by the Statute of Frauds (*r*), and by the late act of 1 & 2 Vict. c. 110, s. 11, a judgment creditor is entitled to sue out a writ of elegit against the lands and tenements of which any person is seised or possessed in trust for the judgment debtor, as well as those of which such debtor himself is seised or possessed. And so, by the same act of Victoria, s. 18, a judgment or rule of the superior courts at Westminster and orders and decrees in equity whereby any money costs charges or expenses shall be payable to any person, shall operate as a charge upon all lands tenements or hereditaments, in which the judgment debtor, or party against whom the rule order or decree is sought to be enforced, has any estate or interest whatever, whether at law or in equity (*s*).

But though, in general, a trust follows the nature of a common law estate, yet on the other hand it may be limited, like a use, in forms that the common law will not allow. It is also exempt in its nature from the common law restrictions with respect to the manner of conveyance, for it has always been capable of being created or assigned, even for an estate of freehold duration, by deed without livery, or by last will and testament. It might originally, indeed, have been established upon mere parol evidence. But now, by the Statute of Frauds (*t*), all trusts and confidences of lands, except such as arise by implication of law, must be manifested and proved by some writing signed by

(*r*) 29 Car. 2, c. 3, s. 10.

(*s*) But by 1 & 2 Vict. c. 110, s. 19, it will not affect land as against purchasers, mortgagees, or creditors, until entered with an officer of the Court of Common Pleas; vide sup. p. 253, n. (*r*).

(*t*) 29 Car. 2, c. 3, s. 9.

the party, or by his written will (*u*). And the Act makes the like ceremony essential to the validity of any grant or assignment of this species of interest. A trust is also exempt from forfeiture (*x*) by reason of the attainder or conviction of the trustee for any offence; nor does a trust of inheritance escheat for want of inheritable blood; for the defect of an heir confers no title, in this case, on the lord: it merely enables the trustee to hold the land discharged of the trust (*y*). In all these incidents the modern trust, it will be observed, follows the principle of the antient use.

It may be proper before we conclude to take some notice of the subject of terms held *in trust to attend the inheritance*. Upon the purchase of real property it has been common to assign upon a trust of this description, any mortgage term or trust term connected with the title, but of which the purposes have been satisfied. Thus, where land held in fee is mortgaged for a long term of years (as a thousand years), and upon the estate being sold, the mortgagee is paid off out of the purchase money, it has been usual for the purchaser (instead of taking a surrender of the term to himself and so merging it in the inheritance) to keep it on foot and have it assigned to a trustee of his own nomination, in trust for himself (the purchaser), "and to attend and protect the inheritance." The reason of this practice was, that the beneficial or equitable interest in a term assigned upon such a trust, followed (though a mere chattel) all the limitations of the inheritance—be-

(*u*) As to the effect of the provisions of the statute of frauds with respect to trust estates, vide 2 Saund. by Wms. 11 a, n. (*m*); Harris *v.* Pugh, 4 Bing. 335; Harris *v.* Booker, ibid. 96; Scott *v.* Scholey, 8 East, 467.

(*x*) 1 Sand. Us. 206; Hob. 214; Attorney-General *v.* Sands, Hard. 490; 13 & 14 Vict. c. 60, ss. 46, 47. There was formerly an exception as to this in the case of treason. See 33 Hen. 8, c. 20; 1 Sand. Us. 207.

(*y*) Burgess *v.* Wheate, 1 Bl. Rep. 123; 1 Eden, 177; Barclay *v.* Russell, 3 Ves. 430; 2 Bl. Com. 337.

longed to the heir or devisee of the new owner, and not to his executor or administrator—and was subject to the other incidents of a fee simple (z); so that for all purposes of convenience the case was the same as if it had merged into the inheritance; while on the other hand it afforded the purchaser a security which he could not have had if a merger had actually taken place. For if it afterwards turned out that prior to the purchase, but posterior to the creation of the term, there had been an intermediate alienation or incumbrance of the fee in favour of another person, to which the then trustee of the outstanding term had been no party, and of which the subsequent purchaser had had no notice when he took his conveyance and paid his purchase money, he would be protected against it, through the medium of the term; for this, being the elder title, would also take the priority in point of legal effect, and being assigned expressly in trust for him, became, for all beneficial purposes, his property. No such protection, however, resulted from a satisfied term where the precaution of thus assigning it over was neglected: for though, by construction of equity, the term would in that case also become attendant on the inheritance, the effect of this was only to make it attendant for the benefit of the different persons who from time to time became entitled to the inheritance; so that, in the example above given, the mortgage term, if left outstanding and not assigned, would be held in trust for the first and not for the second purchaser,—the title of the former being preferable in point of date (a). And by a recent change in the law the practice of assigning satisfied terms is now altogether at an end. For the protection afforded by that practice being for several reasons precarious, and even when effectual, being obtained at the expense of an innocent party, whose title was in point of natural justice at

(z) Best v. Stamford, Prec. Ch. 252; 2 Freem. 288, S. C.; Wray v. Williams, 1 P. Wms. 137; 1 Sand. 229; Cooke v. Cooke, 2 Atk. 67.

(a) Second Report of Real Property Commissioners, p. 8.

least as good as that of the party protected, it has been with great wisdom provided by 8 & 9 Vict. c. 112 (*b*), with respect to *satisfied terms of years*, that such as should, either by express declaration or by construction of law, on the 31st December, 1845, be attendant upon the inheritance or reversion of any lands, should on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof they should be so attendant; with a proviso, however, that every such term of years made so attendant by *express declaration* (although thereby made to cease and determine,) should afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand, as it would have afforded him if it had continued to subsist, but had not been assigned or dealt with after 31st December, 1845; and should for the purpose of such protection be considered in every court of law and of equity to be a subsisting term. And with respect *to terms of years* (then subsisting or thereafter to be created) *becoming satisfied* after the 31st December, 1845, that such as should, either by express declaration or by construction of law, after that day become attendant upon the inheritance or reversion of any lands should, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term should become so attendant.

We have now touched the principal points in the law of Uses and Trusts, considered as species of estates; and for the present may dismiss them from our view. With respect to uses, indeed, there is another aspect under which they will very soon require to be again examined, viz. in their important (but incidental) connection with our system of

(*b*) See the following cases which have occurred under the statute: Doe *v.* Price, 16 Mee. & W. 603; Hall *v.* Moulsdale, ibid. 689; Doe *v.* Phillips, 10 Q. B. 130; Garrard, *dem.*, Tuck, *resp.*, 8 C. B. 231.

conveyances. But this is a subject which belongs not to the present chapter. It will find a more proper place when we are engaged in the consideration of Title, or the manner in which estates may be acquired or lost (*c*).

(*c*) As to conveyances under the statute of uses, vide post, bk. II. pt. I. c. XVIII.

CHAPTER X.

OF TITLE IN GENERAL.

HAVING described the tenures by which lands or corporeal hereditaments may be held, and the kinds of estate that may be had in such as are of free tenure (*a*), we are next to consider, in pursuance of the division before laid down (*b*), the *title* to them, or manner of acquiring and losing estates therein. And it is to be observed, that the learning on this subject applies to equitable as well as to common law estates, but principally to the latter; because, though the rule of descent is the same in both (*c*), and conveyances of the same kind are commonly used to create or transfer both, yet equitable estates are capable of being also created or transferred by simpler methods, and indeed by any instrument sufficiently indicating the intention of the parties, the only formality to which they are in general subject being that introduced by the provision of the Statute of Frauds, referred to in the last chapter, which requires that all grants and assignments of any trust or confidence shall be in writing, and under the signature of the party (*d*).

In proceeding to treat of the manner in which estates may be acquired and lost, it is obvious that we shall not have occasion to detach the consideration of loss from that of acquisition, but that they are reciprocal ideas; because, [by whatever method one man gain an estate, by that same method, or its correlative, some other man has lost it. As

(*a*) Vide sup. p. 229.
(*b*) Vide sup. p. 173.
(*c*) Goodright *v.* Wells, Doug. 771.
(*d*) Vide sup. p. 377.

[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. So in case of forfeiture, the tenant by his own mistaken view or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default. And in alienation by common assurances the two considerations of loss and acquisition are so interwoven and so constantly contemplated together, that we never hear of a conveyance without at once receiving the ideas as well of the grantor as the grantee.]

The acquisition, then, of an estate in land is commonly said to be either by *descent* or *purchase* (these being the principal methods); but, more accurately speaking, it is either by *act of law* or *act of the party* (*e*); which last is technically called *purchase* (*perquisitio*).

Title by act of *law* expresses all those modes of acquisition where the law itself casts the right to the estate upon

(*e*) This division is, in substance, suggested by Mr. Hargrave, Co. Litt. by Harg. 18 b, n. (2). Blackstone considers all title as either by *descent* or *purchase*, and defines *purchase* (after Littleton, sect. 12) as "the "possession of lands and tenements "which a man hath by his own act "or agreement, and not by de-"scent from any of his ancestors "or kindred."—2 Bl. Com. 201, 241. And according to Blackstone, *purchase* comprises *escheat* (ibid. 244), which, however, it may be observed, falls under the negative part only and not the positive part of Littleton's definition. And accordingly Lord Coke remarks, "that an "escheat or the like" is "not said "to be a purchase," "because the "inheritance is cast upon, or a title "vested in the lord, by act in law, "and not by his own deed or agree-"ment."—Co. Litt. 18 b. The truth is, that it is impossible to reduce all titles to the alternative of *descent* or *purchase*; and as to *escheat* more particularly, it seems clear that it is neither the one nor the other. We may observe here, that in the inheritance act, 3 & 4 Will. 4, c. 106, the meaning of the word *purchaser* is settled by a definition contained in the act itself. But this is only so far as its particular provisions are concerned; vide post, p. 389.

the acquirer, independently of any act or interference of his own, or of any other person, for that purpose. Of these the principal kind is title by *descent;* but the term will also properly include title by *escheat*, and also that of tenant by the *curtesy*, and of tenant in *dower* (*f*).

Purchase, on the other hand, though [in its vulgar and confined acceptation it is applied only to such acquisitions of land as are obtained by way of bargain and sale for money or some other valuable consideration,] yet it properly includes every lawful (*g*) mode of coming to an estate by the act of a party, as opposed to the act of law; among which, our attention will chiefly be directed to the title by *occupancy*, by *forfeiture*, and by voluntary transfer; which last is usually described as that by *alienation* or *conveyance* (*h*).

This use of the term, *purchase*, by which it is distinguished from title by mere act of law, and more particularly from descent, corresponds, it may be remarked, with that of *conquest* (*conquæstus* or *conquisitio*) among the feudists (*i*), and in the law of Scotland (*k*). And in like manner the first purchaser (or he who first brought the estate into the family which at present owns it) was styled among the Norman jurists the conqueror or *conquereur* (*l*),

(*f*) Co. Litt. 18 b. As to *escheat*, sup. p. 200; as to *curtesy*, p. 264; as to *dower*, p. 267.

(*g*) According to Lord Coke, the term purchase imports only a *lawful* acquisition, for he says, that "such "as attain to lands by mere injury "or wrong, as by disseisin, intru-"sion, abatement, usurpation, &c. "cannot be said to come in by pur-"chase, no more than robbery, bur-"glary, piracy, or the like, can "justly be termed purchase."—Co. Litt. 18 b; et vide acc. 3 b.

(*h*) Other methods of transfer belong to the head of *purchase;* which it is nevertheless deemed expedient to reserve for discussion in subsequent divisions of the work, those for example which the statute law has provided for the official or judicial assignment of a man's property, such as the seizure of lands under an execution by elegit, and the different forms of proceeding by which the real estate of a bankrupt or insolvent is vested in his assignees; see 1 & 2 Will. 4, c. 56, s. 26; 1 & 2 Vict. c. 110, ss. 37, 45; 12 & 13 Vict. c. 106; et post, bk. II. pt. II. c. VI.

(*i*) Crag. l. 1, t. 10, s. 13.

(*k*) Dalrymple of Feuds, 10.

(*l*) Gr. Coustum. Gloss. c. 25.

[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 *conquestus*, and himself *conquestor* or *conquisitor*, signifying that he was the first of his family who acquired the crown of England, and from whence therefore all future claims by descent must be derived.]

Among the different titles that have been enumerated we have already been led incidentally to discuss those of tenant by the curtesy and tenant in dower (*m*). At present, therefore, we may confine our attention to *descent*, *escheat*, *occupancy*, *forfeiture*, and *alienation*; the two first being titles by act of law, the three last titles by purchase.

(*m*) As to tenancy by the curtesy, vide sup. p. 264; as to dower, vide sup. p. 267.

CHAPTER XI.

OF TITLE BY DESCENT.

We have seen in a former place (*a*) that there are certain estates called estates "of inheritance," which descend to a man and his heirs; and that these are either in fee simple or fee tail. We are now to consider more particularly the nature of such descent (*b*), and the rules by which it is governed. The discussion will turn principally, indeed, upon the nature of the descent in fee simple, for that in fee tail is only in the nature of an exception or variation upon the ordinary law of succession; and when that law is fully understood, the explanations before given with respect to estates tail in general, will throw sufficient light on the nature of the descent *per formam doni.*

[The doctrine of descent, or law of inheritance 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 descent 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.] In order [to treat a matter of this universal consequence more clearly, it will be expe-

(*a*) Vide sup. p. 232.

(*b*) As to descent, vide Co. Litt. 237 a—250 a; and the act for improvement of the law of inheritance, 3 & 4 Will. 4, c. 106. In this act "descent" is defined as "the title "to inherit land by reason of con- "sanguinity, as well where the heir "shall be an ancestor or collateral "relation, as where be shall be a "child or other issue."

[dient to lay aside such matters as will only tend to breed embarrassment and confusion in an enquirer. We shall therefore decline considering, at present, who are and who are not capable of being heirs, reserving that for the chapter of escheats (*c*).] We shall also pass over descents by particular custom (as to all the sons in gavelkind, and to the youngest in borough-English) (*d*), for these cannot conveniently form a subject for separate consideration in a treatise so general as the present. And our present inquiry will therefore almost exclusively relate to the subject of descent in fee simple at the common law.

It may be right, however, before we proceed further, to make this preliminary remark with respect to the nature of the heir's title,—that [no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est hæres 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, 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 (*e*).]

It may also be material to observe, that the estate claimed

(*c*) Vide post, bk. II. pt. I. c. XII.
(*d*) Vide sup. pp. 55, 213.
(*e*) 2 Bl. Com. 208.

by the heir must necessarily be one that remained in the ancestor or deceased owner, at the time of his death, and of which he has made no testamentary disposition; the title of an alienee in his lifetime, or of a devisee under his will, being of course preferable to that of the heir.

These things being premised, let us now examine the doctrine of descent itself, or the rules according to which the heir to an estate in fee simple is to be ascertained, when the succession to it opens or becomes vacant upon the death of the proprietor.

This branch of law is founded for the most part not on statute, but on the custom of the realm, being in point of antiquity referable to a period at least as early as the reign of Henry the second (*f*). At that time, indeed, its development appears to have been in some degree imperfect; but it had attained to complete maturity in the reign of Henry the third, or at latest in that of Edward the first (*g*); after which, it underwent no change for the space of more than five hundred years, until at length partially reconstructed in the last reign by the act of 3 & 4 Will. IV. c. 106, passed "for amendment of the law of inheritance" (*h*). As now modified by this statute, it may be reduced to the following rules or canons (*i*):—

I. In every case the descent shall be traced from the purchaser.

(*f*) This appears from the treatise of Glanville (written about 1181), whose account of the law of inheritance comprises all the principal features of the existing system.

(*g*) Hale's Hist. C. L. c. 11; Reeves's Hist. Eng. Law, vol. i. p. 311; vol. ii. pp. 246, 317.

(*h*) This act was founded on the report of the commissioners appointed to revise the laws of real property.

(*i*) The statute applies to no descent which took place on a death prior to the 1st of Jan. 1834. For the law by which such a descent was governed we must refer to the system of Blackstone, which is as follows:—

Rule 1. That inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*, but shall never lineally ascend.

Rule 2. That the male issue shall be admitted before the female.

This primary law of descent is laid down in the form here propounded by the act of parliament to which we have just referred (*k*); and it gives its own definition of the sense in which the word *purchaser* is here to be understood —which is somewhat different from that which properly belongs to the term, as explained in the last chapter—for, in substance, the statute includes under its definition of purchaser every person who takes otherwise than by descent (*l*).

The effect then of the rule above laid down is as follows: that if the deceased owner of an estate in fee simple came to it by purchase, that is, in any other manner than by inheritance, the party claiming it as heir must make *him* the *propositus*, or person from whom consanguinity is to be traced; while on the other hand, if he came to it by inheritance from some purchasing ancestor, *that ancestor* must be made the *propositus*. Thus if John Stiles, in the annexed table of descent, dies the proprietor of an estate, which he is known to have acquired by purchase, any

Rule 3. That when there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

Rule 4. 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.

Rule 5. 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.

Rule 6. That the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

Rule 7. That in collateral inheritance 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.

(*k*) 3 & 4 Will. 4, c. 106, s. 2.

(*l*) Sect. 1. The words of the act are, that the purchaser "shall mean "the person who last acquired the "land otherwise than by descent, "or than by any *escheat*, *partition*, "or *enclosure*, by the effect of which "the land shall have become part "of or descendible in the same "manner as other land acquired by "descent."

person claiming it as heir must prove that he is heir to John Stiles, that is, stands in such relation of consanguinity to John Stiles (either *ex parte paternâ* or *ex parte maternâ*), as the laws of descent hereafter laid down make sufficient in the particular case; but if John dies owner of an estate which descended to him from Geoffrey his father, by whom it appears to have been originally purchased, the claimant must prove that he is heir to Geoffrey the father, who becomes in that case the *propositus* instead of John, the last owner; the consequence of which is, that no relation to John *ex parte maternâ* can, as such, ever inherit. Again, if the estate descended to John from Lucy Baker, his mother, who is known to have been the purchaser, the descent must in that case be traced from *her*, and John's relations *ex parte paternâ* are, on the same principle, necessarily excluded. It often happens, however, especially in long descents, that it is uncertain by whom an estate was originally purchased; and against this difficulty of proof the act of parliament provides by the following rule of *evidence*, which is to be understood as a necessary supplement to the rule of descent under consideration; viz. that the last owner, or (as the act describes him) "the person last entitled" (*m*) to the land, shall be considered to have been the purchaser, unless it shall be proved that he inherited it; and that the same rule shall be constantly applied at every step upward of the pedigree (*n*). Therefore if John Stiles is the person last entitled to an estate, and dies, and it does not appear whether he purchased it or not, the claimant must prove descent from *him*. So if it appears that he inherited it from his father Geoffrey, but it is unknown whether Geoffrey purchased it or not, the claimant must make himself heir to *Geoffrey*; and on

(*m*) The act provides that the expression "last entitled, shall extend "to the last person who had a right "thereto, whether he did or did "not obtain the possession, or the "receipt of the rents and profits "thereof."—3 & 4 Will. 4, c. 106, s. 1.

(*n*) 3 & 4 Will. 4, c. 106, s. 2.

the same principle, if it can be shown that Geoffrey took by descent from George, then *George* must be made the *propositus*.

This rule, though newly introduced by the Inheritance Act, is mainly founded on the antient maxim, that *none shall claim as heir who is not of the blood of the purchaser* (*o*), a maxim [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 further than the last owner of the estate, but assigned him an heir without considering by what title the estate was gained, or from what ancestor derived: but the antient law of Normandy agreed with ours in this respect (*p*); nor indeed is that agreement to be wondered at, since the law of descent in both is of feudal origin, and this rule cannot otherwise be accounted for than by recurring to feudal principles.

When feuds first began to be hereditary,] that is, subject to succession according to consanguinity, [it was made a necessary qualification of the heir who would succeed to a feud, that he should be lineally descended from the first feudatory or purchaser (*q*). In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feodum 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 *feodum antiquum*, that is, one descended to the vassal from his ancestors, then, in failure of his own descendants, his brother, or such other collateral relation as was descended or derived his blood, from the first feudatory, might succeed to such inheritance.

To this purpose speaks the following rule: "*frater fratri sine legitimo hærede defuncto, in beneficio quod eorum patris*

(*o*) "And note, it is an old and "true maxim in law, that none shall "inherit any lands as heir, but only "the blood of the first purchaser."—Co. Litt. 12 a; et vide 2 Bl. Com. 220.

(*p*) Grand Coustum. c. 25.

(*q*) 1 Feud. 20.

[*fuit, succedat ; sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo hærede, frater ejus in feudum non succedit* (*r*)." The true feudal reason for which rule was this, that what was given to a man for his personal service and personal merit, ought not to descend to any but the heirs of his person; and therefore as now in estates tail, (which a proper feud very much resembled,) so in the feudal donation, "*nomen hæredis in primâ investiturâ expressum tantum ad descendentes ex corpore primi vasalli extenditur, et non ad collaterales, nisi ex corpore primi vasalli sive stipitis, descendant* (*s*);" 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 *allodium* (*t*), 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.]

Under this system therefore it was necessary that a person claiming by descent on the death of the last proprietor, should prove himself not only to be of the blood of, but lineally descended from, the purchaser, for neither in a *feudum novum* nor *feudum antiquum* were the collateral relations of the purchaser entitled to succeed. [However, in process of time, when the feudal rigour was in part abated, a method was invented to let in the collateral relations, in failure of the descendants of the grantee, to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum;* that is, with all the qualities annexed to a feud derived from his ancestors;] and then (though the lineal ancestors themselves were always excluded, for reasons which will hereafter appear,) yet the collateral relations of the purchaser,—that is, the descendants of those ancestors, —were admitted to succeed, even *in infinitum*, because they might have derived their blood from the first *imaginary* purchaser. [For since it was not ascertained in such ge-

(*r*) 1 Feud. sect. 2.

(*s*) Crag. l. 1, tit. 9, sect. 36.

(*t*) As to *allodium*, vide sup. pp. 174, 186.

[neral grants whether this feud should be held *ut feodum paternum*, or *feudum avitum*, but *ut feudum antiquum*, merely as a feud of indefinite antiquity,—that is, since it was not ascertained from which of the ancestors of the] real purchaser [this feud should be supposed to have descended,—the law would not ascertain it, but would suppose any of his ancestors *pro re nata* to have been the first purchaser; and therefore it admitted any of his collateral kindred (who had the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.]

Of this nature, it is said (*u*), have been all the grants of fee simple estates in this kingdom. They were no other than grants of a *feudum novum*, to be held *ut antiquum*, or feud of indefinite antiquity; while, on the other hand, a gift in tail (where none but the lineal descendants of the first donee are admitted) proceeded on the principle of a *feudum stricte novum*.

But while the old feudal requisite of a lineal descent from the real purchaser was thus substantially set aside, it continued nevertheless to be necessary that the claimant should be of his *blood;* for no person, without being related to him either lineally or collaterally, could be supposed to be lineally descended from the imaginary purchaser. And as it was necessary that the claimant should be of his blood, so it was from him, as a root, that the descent was in some cases to be traced; for if the estate which descended was of a kind in which the owner cannot acquire actual seisin of the land, (as is the case with a reversion or remainder expectant upon freehold, for there the actual seisin belongs to the particular tenant), the rule was that the claimant must trace his descent from (or, as it was usually expressed, *make himself heir to*), the purchaser (*x*). Supposing the estate descended, however,

(*u*) Vide Wright's Tenures, 180; 2 Bl. Com. 222.

(*x*) Ratcliffe's case, 3 Rep. 42 a; Co. Litt. 15 b, 191 b; Burton's

to have been one in possession (*y*) (which includes the case where it is a reversion or remainder expectant on a term of years in possession), the rule was different; for here another antient maxim intervened, and required *that the claimant should make himself heir to the person last actually seised of the inheritance* (*z*); every person who obtained an actual seisin, whether he were an original purchaser, or derived his title by descent, being considered as a new root, from which all future claimants were to spring (*a*): a principle that was briefly expressed by the adage *seisina facit stipitem*, and of which the origin seems never to have been fully and satisfactorily traced (*b*). Thus if Geoffrey Stiles, the father, died seised of land of which he was the purchaser, and which descended to John as his

Compend. 112; Doe *v.* Hutton, 3 Bos. & Pul. 649, 656; Roe *d.* Thorne *v.* Lord, 2 Bl. Rep. 1099.

(*y*) As to an estate in possession, vide sup. p. 312.

(*z*) "A man that claimeth as heir "in fee simple to any man by de-"scent must make himself heir to "him that was last seised of the "actual freehold and inheritance." —Co. Litt. 11 b; et vide Ratcliffe's case, 3 Rep. 41 b, 42 a.

(*a*) Hale's Hist. C. L. c. 11.

(*b*) Blackstone's explanation is, that the law required notoriety of possession as evidence that the ancestor had that property in himself which was to be transmitted to his heir; "which notoriety," says he, "had succeeded in the place of "the antient feudal investiture, "whereby, while feuds were pre-"carious, 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 feu-"dal peers; till at length, when the "right of succession became inde-"feasible, an entry on any part of "the lands within the county (which, "if disputed, was to be afterwards "tried by those peers) or other no-"torious possession, was admitted "as equivalent to the formal grant "of seisin, and made the tenant "capable of transmitting his estate "by descent."—2 Bl. Com. 209. Et vide Wright's Ten., Gilb. Ten. But though this may explain why descent was not to be traced except from a person who had obtained actual seisin, it falls short of showing why the person last seised was to be the *propositus* or root of descent in preference to a known purchaser, who had also obtained actual seisin. This probably depended on the principle, that the *last* entry carried with it, from its comparative recency, greater notoriety than could belong to any other.

heir, and John died before entry, the next claimant was to make himself heir to Geoffrey; but if John entered and obtained actual seisin, it would then be necessary to claim as heir not to Geoffrey, but to John. And the difference was material; because the heir to the person last seised and the heir to the purchaser were not necessarily the same person. If John, for example, died leaving a half brother, his father's son, the latter might possibly, on John's decease, be next heir to Geoffrey the father; but it was impossible, as the law then stood, that he should be heir to John, descent not then being allowed between those related by the half blood (*c*). The rule of which we speak did not make it the less necessary, indeed, that the claimant should be of the *blood* of the purchaser; for this, in every case of descent, was universally required; but if he had that qualification, and could make himself heir to the person last seised, he was entitled to succeed, whether he could make himself heir to the purchaser or not (*d*); while, on the other hand, his being heir to the purchaser was not sufficient, unless he was also heir to the person last seised. Thus if John Stiles had purchased land and died, leaving no other kindred than his father's brother and his own brother of the half blood (his father's son), the uncle would have been his heir, as the brother (by the rule already noticed) could not have claimed in that character; and if the uncle had also obtained seisin and died, without other kindred than John's half brother, the latter would then have been entitled to succeed, for he would have been heir to the person last seised, and of the blood of the purchaser, though not the heir of the purchaser (*e*). On the other hand, if John Stiles had inherited land purchased by Geoffrey, and died seised without other kindred than his half brother (his father's son), the latter could not have inherited, because unable to make himself

(*c*) Co. Litt. 15 b.
(*d*) Hale's Hist. C. L. c. 11.
(*e*) H. Chit. Desc. 115.

heir to John; and yet he would have been heir to Geoffrey.

It is to be observed, however, that in many cases to trace descent from the person last seised, amounted in effect to the same thing as tracing descent from the purchaser. For where the last owner (or person on whose death the succession became vacant) happened to have been in fact the purchaser of the estate, he would also be the person last actually seised. Thus if it were an estate in possession acquired by feoffment, this implied (as elsewhere shown (*f*)) a real delivery to him of the actual seisin; and supposing it to have been acquired by devise (under the statute of wills), or by a conveyance under the statute of uses (of the nature of which we shall speak hereafter), the case would be in effect the same, for the actual seisin (so far at least as would suffice to make him the root of descent) would here be transferred to him without entry, by construction of law (*g*). So if it were a reversion or remainder in fee expectant on an estate for years, he would be clothed with an actual seisin of the fee (upon a principle before explained (*h*)), through the medium of the possession of his particular tenant. In all such cases, therefore, if the claimant made himself heir to the purchaser, he would also make himself heir to the person last actually seised; and as he would thereby moreover

(*f*) Vide sup. p. 232.

(*g*) Per Holt, 1 Show. 74; R. *v.* Sutton, 3 A. & E. 611; Watk. Desc. c. 1, s. 6. The expression used by the learned author of that treatise is, that "such a property" is thereby "vested or fixed" in the purchaser, as to make the land descendible to his heirs. But as regards estates in possession, it seems more correct not to depart from the expression *actual seisin*, as nothing short of this will suffice to satisfy the terms of the rule, *seisina facit stipitem*. It is true, that Lord Coke appears to consider the seisin acquired under a devise or the statute of uses as a seisin in *law*, Co. Litt. 111 a, 266 b; but he probably means by this, an actual seisin by construction of law. It is clearly not such a seisin in law as that of the heir, which requires to be completed by entry, and is no actual seisin.

(*h*) Vide sup. p. 321.

prove his consanguinity to the purchaser, he would satisfy both the conditions required to make out a descent in fee simple.

These explanations will suffice not only to explain the nature of the new rule now laid down by the Inheritance Act, but to prove also its convenience and propriety. It discards in effect the maxim of *seisina facit stipitem*, and establishes in every case the rule, which formerly obtained only in certain instances, that descent shall be traced from the purchaser (*i*). In point of simplicity and uniformity of system, the advantage is consequently obvious; while, on the other hand, nothing is sacrificed which it could be useful to retain. In very numerous instances, the descent (as we have seen) was in effect already traced from the purchaser; and though it was otherwise in cases where the last owner had become entitled by descent to an estate in possession, no sufficient reason could at the present day be shown (whatever may formerly have existed) in favour of such a distinction. Indeed the maxim of *seisina facit stipitem* was attended with material inconvenience; for it was sometimes difficult to determine what would amount to a seisin sufficient to constitute a *stipes;* and highly unsatisfactory besides, that the right to the succession should in any case depend on so unimportant a circumstance as the omission of the owner to make entry, before his death, on the land he had acquired by inheritance (*k*).

II. A second general rule or canon is, that inheritances shall in the first place lineally descend to the issue of the purchaser, *in infinitum.*

The principle of placing the lineal descendants first in

(*i*) In the case of a reversion expectant upon freehold which has never been purchased since its creation, the descent was, before the act, to be traced from the person who created it; Ratcliffe's case, 3 Rep. 42 a; Co. Litt. 15 a, 191 b; Doe *v.* Hunt, 3 B. & P. 64; Burton's Compend. 113. And such it is presumed is still the rule.

(*k*) See First Real Prop. Rep. p. 15.

succession to their ancestor is, under all systems of descent, invariably adopted, and may be said to be of universal obligation or propriety; for even if it be held that the laws by which property is transmitted from one man to another, are in every case of an arbitrary nature, and *juris positiri* only (a doctrine which there is great difficulty in admitting as regards the succession of relatives), yet at least, in the choice of rules, it may happen that there are some much more consonant than others to the common feelings of mankind and the natural sense of propriety; and such principles as these seem universally to suggest, 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 offspring, as those to whom they have given being, and for whom they are therefore bound to provide.]

III. We may lay it down as a third rule, that the children of the purchaser are preferred to their own issue; and, among such children, males to females, and an elder male to a younger; but females (where there are several) take together.

This involves three principles: first, that the descent is to the children rather than their descendants; secondly, that the male children are admitted before the female; thirdly, that among the male, primogeniture is the rule, though not among the female.

1. The children (as being nearer in blood to the purchaser) are of course preferred to their own descendants; that is, if any child of the purchaser, living at his decease, has issue also living at the same period, the estate will descend to the child (who is more nearly related to the purchaser), and not to the grandchild or other descendants, who are more remote.

2. But, secondly, among the children of the purchaser, males take before females, [or (as our male law-givers have somewhat unceremoniously expressed it) the worthiest of

[blood shall be preferred (*l*).] Thus [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 (*m*), and also among the states of Greece, or at least among the Athenians (*n*), but was totally unknown to the laws of Rome (*o*) (such of them, at least, as are now extant), wherein brethren and sisters are allowed to succeed to equal portions of the inheritance. Without entering into the comparative merit of the Roman and the other constitutions in this particular, or examining into the greater dignity of blood in the male or female sex, it is sufficient to 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 (*p*), yet our Danish predecessors who succeeded them seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance (*q*). 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 filiæ* "*hæreditatem relinquent. Qui defunctus non filios sed filias* "*reliquerit, ad eas omnis hæreditas pertineat* (*r*)." 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 (*s*). The true reason of pre-

(*l*) Hale's Hist. Com. Law, c. 11.
(*m*) Numbers, chap. xxvii.
(*n*) Petit. LL. Attic. lib. 6, tit. 6.
(*o*) Inst. iii. l. 6.
(*p*) Stat. Wall. 12 Edw. 1.
(*q*) Wilkins, Leges Anglo-Sax. LL. Canut. c. 68.
(*r*) Tit. 7, s. 1 and 4.
(*s*) Leg. Hen. 1, c. 70.

[ferring 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 (*t*), 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 the total exclusion of the 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 where there is no son: our law, like that of the Saxon feudists before mentioned, thus steering a middle course between the actual rejection of females, and the putting them on a footing with males.]

3. Primogeniture is established among the male children of the purchaser, but not among the female. [As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters: but if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners (*u*).

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 (*x*), in the same manner as with us, by the laws of King Henry the first (*y*), 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 (*z*). 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

(*t*) 1 Feud. 8.

(*u*) Litt. s. 5; Hale's Hist. C. L. c. 11. As to coparceners, vide sup. p. 345.

(*x*) Selden de Succ. Ebr. c. 5.

(*y*) Leg. Hen. 1, c. 70.

(*z*) Glanv. l. 7, c. 3.

[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 (*a*), or, as they styled them, *feuda individua*, and in consequence descendible to the eldest son alone. This example was further 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 (*b*). These reasons occasioned an almost total change in the method of feudal inheritances abroad, so that the eldest male began universally to succeed to the whole of the lands, in all military tenures; and in this condition the feudal constitution was established in England, by William the Conqueror. Yet we find that socage estates frequently descended to all the sons equally, so lately as when Glanville (*c*) wrote, in the reign of Henry the second; and it is mentioned in the Mirror (*d*), as a part of our antient constitution, that knight's fees should descend to the eldest son, and socage fees should be partible among the male children. However, in Henry the third's time we find by Bracton (*e*), that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands, except in Kent, where they gloried in the preservation of their antient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons (*f*),—and, except in some parti-

(*a*) 2 Feud. 55.
(*b*) Hale's Hist. C. L. c. 11.
(*c*) Glanv. l. 7, c. 3.
(*d*) Mirror, c. i. s. 3.
(*e*) Bract. lib. 2, c. 30, 31.
(*f*) Somner, Gavelkind, 7.

[cular manors and townships, where their local customs continued the descent, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the 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* (*g*); 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 confer it on which of them he pleases (*h*): 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; viz. that the lord might bestow them on which of the sons he thought proper; "*progressum est ut ad filios devenirel, in quem scilicet dominus vellet beneficium confirmare* (*i*)."]

The last rule supposed all the children of the purchaser to be living at his decease; but in the case of the death of any of them, then—

IV. A fourth rule is, that the issue of the children of the purchaser *represent* or take the place of their parents

(*g*) Co. Litt. 165 a.
(*h*) Ibid.
(*i*) 1 Feud. 1.

in infinitum; the children of the same parent being always subject (among each other) to the same law of inheritance as contained in the third rule.

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

This taking by representation is called succession *per 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 (*l*).] In our law, indeed, it [is a necessary consequence of the double preference given, first, to the male issue, and next to the first-born among the males. For if all the children of three sisters were, in England, to claim *per capita*, in their own right, as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female, then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which, by the first rule, it gives to the males and the first-born in the descent to issue. Whereas by dividing

(*k*) Hale's Hist. C. L. c. 11. (*l*) Selden de Succ. Ebr. c. 1.

[the inheritance according to the roots or stirpes, the rule of descent is kept uniform and steady; the issue of the eldest son excludes all other pretenders, as the son himself, if living, would have done; but the issue of two daughters divide the inheritance between them, provided their mothers, if living, would have done the same: and among these several issues or representatives of the respective roots the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves—the sons or daughters of the deceased. As if a man hath two sons, A. and B., and A. dies, leaving two sons, and then the grandfather dies: now the eldest son of A. shall succeed to the whole of his grandfather's estate; and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But if a man hath only three daughters, C., D., and E., and C. dies, leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who is younger than his sister; here, when the grandfather dies, the eldest son of C. shall succeed to one-third, in exclusion of the younger; the two daughters of D. to another third, in partnership; and the son of E. to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum.*

Yet this right does not appear to have been thoroughly established in the time of Henry the second, when Glanville 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 in times comparatively modern, we find that proximity of blood took place of representative primogeniture, in the lower Saxony; that is, the younger surviving brother was 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 (*m*). Yet Glanville with us, even in the twelfth century, seems (*n*) to declare for the right of the nephew by representation, provided the eldest son had not received a provision in lands from his father, or (as the civil law would call it) had not been forisfamiliated in his lifetime. King John, however, who kept his nephew Arthur from the throne, by disputing the right of representation, did all in his power to abolish it throughout the realm (*o*); 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 (*p*).] And thus much for descents to the *issue* of the purchaser.

V. A fifth rule is, that on failure of the issue of the purchaser, the inheritance shall descend to the nearest lineal ancestor then living in the preferable line;—supposing no issue of a nearer deceased ancestor in that line to exist.

Under this rule we are to remark, that,

1. After the issue, the next descent is to the lineal ancestry.

This principle is but recently adopted into our law (*q*), which, in failure of descendants of the deceased, would admit the descendants of his lineal ancestor (that is, his

(*m*) Mod. Un. Hist. xlii. 334.
(*n*) Glanv. l. 7, c. 3.
(*o*) Hale's Hist. C. L. c. 11.
(*p*) Bract. lib. 2, c. 30, s. 2.
(*q*) It was however the rule among the Anglo-Saxons. See Hallam's Middle Ages, vol. 2, p. 467, 7th ed. citing Leges Hen. 1, c. 70; et vide post, p. 406.

own collateral heirs,) under colour of a fiction formerly explained (*s*); but always excluded the lineal ancestor himself: so that the land would rather escheat to the lord (*t*) than ascend to a father or a grandfather; to illustrate which the inheritance of an estate is compared, by an antient writer, to the descent of a falling body. "*Descendit jus* (says Bracton) *quasi ponderosum quid, cadens deorsum rectâ lineâ; et nunquam reascendit eâ viâ quâ descendit* (*u*)." This resulted, like many other of our institutions, from the doctrines of feudal tenure. [For it was an express rule of the feudal law (*x*), that "*successionis feudi talis est natura quod ascendentes non succedunt*,"] and we find the same principle recognized in the old law of France (*y*). [Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line (*z*); but this soon fell again into disuse, for so early as Glanville's time (who wrote under Henry the second) we find it laid down as an established law, that *hæreditas nunquam ascendit* (*a*), which from that time remained an invariable maxim. These circumstances evidently show this antient peculiarity of our law to be of feudal original, and taken in that light, there were some arguments in its favour. For if the feud of which the son died seised was really *feodum 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 have come to the son, unless it were *feodum maternum*, or one descended from his mother, and then the father would be excluded by the feudal maxim already considered, as he did not derive his

(*s*) See Rule I.

(*t*) Litt. s. 3.

(*u*) Bract. lib. ii. c. 29. As remarked by a very distinguished commentator on Blackstone, the words *eâ viâ quâ descendit* are a necessary qualification. For the inheritance might ascend *indirectly*, as from the son to the uncle.—Coleridge's Blackstone, vol. ii. p. 212, (n.)

(*x*) 2 Feud. 50.

(*y*) Domat, part 2, lib. 2; Montesq. Esp. des Lois, lib. 31, c. 33.

(*z*) Ll. Hen. 1, c. 70; Blackborough *v.* Davis, 1 P. Wms. 40.

(*a*) Glan. lib. 7, c. 1.

[blood from the purchaser. And if it were *feudum novum*, or one newly acquired by the son, the father would still be excluded by the same maxim; which was founded indeed not only upon the personal merit of the vassal which might be transmitted to his children, but also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, 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. Thus, whether the feud were strictly *novum* or strictly *antiquum*, or whether it was *novum* or *ut antiquum*, in none of these cases the father could possibly succeed.] Such at least have been alleged, (and apparently with truth,) as the reasons of the rule which excluded the ascending line (*b*). The reasoning, however, was not consistently applied; for it has been justly observed, that if the father is not to inherit the estate, because it must be presumed to have already passed him in the course of descent, the elder brother should, upon the same principle, never be heir to the younger; and if the object is merely to pass over a decrepit feudatory, the father's elder brother should never succeed to his nephew; and yet a succession in both these collateral lines was always permitted by law (*c*). The rule besides was opposed to natural justice, and the common feelings of mankind; which evidently suggest not only that a man's progenitors should be allowed to inherit his estate, but that their proper place in the succession is second only to that of his posterity. Such accordingly is now the rule; and we owe this great improvement to the same statute of 3 & 4 Will. IV. c. 106, to which we have already had occasion

(*b*) See Co. Litt. by Harg. 11 a, n. (1).

(*c*) Christian's Blackstone, vol. ii. p. 212.

to refer. Its provision on this subject is as follows: "that "every lineal ancestor shall be capable of being heir to "any of his issue; and in every case where there shall be "no issue of the purchaser, his nearest lineal ancestor shall "be his heir, in preference to any person who would have "been entitled to inherit, either by tracing his descent "through such lineal ancestor, or in consequence of there "being no descendant of such lineal ancestor (*d*)."

2. The descent is to the nearest living ancestor in the preferable line.

How the preference is to be settled between two different lines of ancestry, will appear by the next rule. But in the mean time we are to observe, that in the same line the nearest of blood has the precedency.

Thus, if in failure of the issue of John Stiles, we proceed to inquire for his heir, among his lineal ancestors, we are to prefer Geoffrey Stiles, his father, to George, his grandfather (supposing both to be living,) and so we are to prefer Lucy, his mother, to Esther, his maternal grandmother.

This branch of the rule, though in a direct sense also resting on the same positive enactment, is not, like the other, new in its *principle*, but agrees in substance with the law as it stood prior to the late act of parliament. For though the lineal ancestors were not themselves permitted to succeed, yet they were always regarded as the fountains of inheritable blood, and the stocks from which the next succession must spring, so that their issue were admitted, in right of descent from *them*, to the inheritance (*e*); and as to their issue, the rule was, that the descendants of a nearer lineal ancestor, in the preferable line, were preferred to those of one more remote (*f*). Very similar to which, as Blackstone observes, was the law of inheritance among the antient Germans our progenitors, "*hæredes successoresque sui cuique liberi, et nullum testamentum: si liberi non*

(*d*) Sect. 5.
(*e*) 2 Bl. Com. 226.
(*f*) Ibid.

sunt, proximus gradus in possessione, fratres, patrui, avunculi (*g*)."

3. The rule applies only in the event of the issue of every nearer deceased ancestor in the same line being extinct. For if the issue of any such ancestor exist, the order of succession is governed, as we shall see hereafter, by a different rule.

VI. It may be laid down as a sixth rule, that, among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser, or of any ancestor male or female,) is always preferred to the maternal.

Therefore Geoffrey, the father, in the annexed table of descent, will succeed rather than Lucy, the mother; and if Geoffrey be dead, any of his male ancestors, George, Walter, and Richard, (according to their proximity,) will have the preference to any of his maternal ancestors, or to the maternal ancestors of George, or Walter respectively; though, on the other hand, all these maternal ancestors will take precedence of Lucy the mother, or any ancestor of hers. Upon the same principle, when, upon failure of the main line of John's paternal ancestry by the extinction of the blood of Richard, we inquire for the next heir, we are to select Ann Godfrey, the mother of the more remote male paternal ancestor, in preference to Christian Smith, the mother of a male paternal ancestor less remote; for if we were to give the preference to Christian, we should be resorting to the maternal line of George, instead of his paternal, which would be contrary to our rule.

This preference of the paternal line, is now founded on the express enactment of the late statute for amendment of the law of inheritance (*h*), which provides, by sect. 7, " that none of the maternal ancestors of the person from " whom the descent is to be traced, nor any of their de-

(*g*) Tacitus de Mor. Germ. 21. (*h*) 3 & 4 Will. 4, c. 106.

" scendants, shall be capable of inheriting, until all his " paternal ancestors and their descendants shall have failed; " and also that no female paternal ancestor of such person, " nor any of her descendants, shall be capable of inheriting " until all his male paternal ancestors and their descendants " shall have failed." And by section 8, " that where there " shall be a failure of male paternal ancestors of the person " from whom the descent is to be traced, and their de- " scendants, the mother of his more remote male paternal " ancestor, or her descendants, shall be the heir or heirs of " such person in preference to the mother of a less remote " male paternal ancestor, or her descendants; and where " there shall be a failure of male maternal ancestors of " such person, and their descendants, the mother of his " more remote male maternal ancestor, and her descend- " ants, shall be the heir or heirs of such person in pre- " ference to the mother of a less remote male maternal " ancestor, and her descendants."

The first of these sections is a mere adoption of the principle of the former law, under which the blood of the paternal ancestor of the purchaser was constantly preferred to that of the maternal, the blood of the male paternal ancestor of the purchaser to that of the female paternal, and the blood of the male maternal to that of the female maternal (*i*).

In the preference of relatives *ex parte paternâ*, [the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden (*k*), and Petit (*l*); though among the Greeks in the time of Hesiod (*m*), when a man died without wife or children, all his kindred, without any distinction, divided his estate among them. It is likewise warranted by the example of the Roman laws, wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the

(*i*) 2 Bl. Com. 234.
(*k*) De Succ. Ebr. c. 12.
(*l*) LL. Attic. Lib. 1, tit. 6.
(*m*) Θεογον, 606.

[mother, till the edict of the Emperor Justinian(*n*) abolished all distinction between them. It is also conformable to the customary law of antient Normandy (*o*), which indeed in most respects agrees with our English law of inheritance.]

The principle no doubt originated (with us) in that maxim of the antient feudal institutions, to which we have already more than once referred,—that the heir must in all cases derive his blood, that is, be lineally descended, from the purchaser. This of course would have excluded altogether both the lineal ancestors and collateral relations of a man who died tenant of land which he had acquired by purchase; but where his estate was in fee simple, his collateral relations were nevertheless (as we have seen) let in by the aid of a fiction which supposed him to hold it as a feud of indefinite antiquity, in other words, to have acquired it, not by purchase, but by inheritance from an unknown antecedent purchaser, at some former period. The collaterals (however remote) were thus admitted, because they might be supposed to descend from this unknown purchaser, so as to satisfy the feudal maxim; but upon the same principle those collaterals who would be most likely to have descended from him (supposing such an ancestor to have existed) were entitled to have the preference over those whose pretensions would be less probable. Now the collaterals of the last tenant, *ex parte paternâ*, would be more probably of the blood of this unknown purchaser, than those *ex parte maternâ*, because the estate presumably came to the last tenant through his male progenitors rather than his female. For, as, by the third and fourth rules (which are founded on the common law, and have always prevailed), males are constantly preferred (in the course of descent) to females, it is more likely that the land should have belonged to his father, than his mother; to his father's father than to his father's mother; and so continually upwards.

The 8th section of the new act has settled a question

(*n*) Nov. 118. (*o*) Gr. Coustom. c. 25.

which had formerly been the subject of much controversy. For though the universal preference of the stocks in the male paternal line was always free from doubt, yet where, upon failure of the male paternal line, it became necessary for the first time to resort to a female stock, it was an unsettled point whether the descent should be traced through the mother of the nearer or more remote ancestor in that line. Thus it was disputed, whether the issue of the paternal grandfather's maternal grandfather, or the issue of the paternal grandmother's father, were the true heir of the purchaser (*p*). According to many antient authorities (including Lord Bacon (*q*) and Sir Matthew Hale (*r*)), the latter had the better claim, it being held by these writers (in conformity with a more antient opinion), that all the female ancestors, on the part of the father, were equally worthy of blood, and that in that case *proximity* shall prevail. Blackstone, however, had dissented from that doctrine (*s*); and his view would seem to be the more correct one; for, reverting to what has just been said of the fiction by which collaterals were introduced into the succession, it will appear, that as we are led by a chain of successive presumptions to suppose the estate of John Stiles, in the annexed table of descent, to have descended from his father Geoffrey, rather than his mother Lucy, and from his grandfather George Stiles, rather than his grandmother Cecilia Kempe; so, if it did not descend to George, from Walter his father, the next presumption would be, that it descended from his mother Christian Smith, who again would presumably derive it from her father William; so that the issue of William Smith, the paternal grandfather's maternal grandfather, would necessarily have better title than the issue of Luke Kemp, the paternal grandmother's father, who stands lower (if we may so speak) in the chain of presumptions.

(*p*) See First Real Property Rep. 11.

(*q*) Bac. Elem. c. 1.

(*r*) Hist. Com. Law, c. 11.

(*s*) 2 Bl. Com. 238; vide Davies v. Lowndes, 5 Bing. N. C. 169.

But whatever may have been the merits of this question, it is now set at rest by the 8th section of the Inheritance Act, which, in accordance with the view taken by Blackstone (*t*), prefers the maternal line of the more remote male paternal or male maternal ancestor, to the maternal line of the nearer, both as regards the issue of lineal ancestors, and the lineal ancestors themselves, now first introduced into the succession.

VII. A seventh rule is, that where an ancestor, to whom, if living at the purchaser's death, the inheritance would according to the fifth rule, have descended, dies before the purchaser, leaving issue, the issue of such ancestor *in infinitum* shall represent him, according to the same law of succession as before laid down with respect to the issue of the purchaser; but with this addition, that those related by the whole blood to the purchaser, are preferred to those related by the half-blood.

It is obvious from the nature of consanguinity, which means a descent from the same common ancestor, that, as regards the purchaser, the issue of his lineal ancestor are necessarily his collateral kindred, and that such of them as becomes his heir, in capacity of issue to his ancestor, must inherit as collateral heir to himself. The seventh rule thus transfers us from the subject of *lineal* inheritance (to which alone our preceding rules referred) to that of collateral inheritance.

On the subject of collateral inheritance, it deserves remark, in the first place, that the right of collaterals no longer depends (as it formerly did) on the fiction that the estate of the purchaser was granted as a feud of indefinite antiquity (*u*), but on a positive statute-law of descent. For the new act of parliament has now by express provision introduced both the "lineal ancestors" of the purchaser and their "descendants" into the succession (*x*). Indeed, when

(*t*) See First Real Property Rep. p. 14.

(*u*) Vide sup. p. 392.

(*x*) Sects. 7, 8.

the right of the former was established, that of the latter would follow of course, upon the common law principle of representation. It would seem, therefore, that an estate purchased in fee-simple can no longer be considered as granted to hold *ut feudum antiquum*, but rather as a new feud, with inheritable properties different from those which attached to a new feud under the antient system, being descendible not only to those who derive their blood from the purchaser, but those also from whom he derives his, and to their descendants.

It is also to be observed, that the right of collaterals is now referable universally, and in every case, to that of the ancestor from whom they descend, and it is only in his right, that they can ever be considered as heirs to the prochaser. Under the former system this was subject, in a particular case, to exception, it being held that between brothers and sisters, the descent was to be considered, for some purposes, as *immediate* (*y*). But by the new Act, no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent (*z*).

But to revert to the rule under consideration.

First, the issue of the purchaser's lineal ancestor represent him *in infinitum ;* and that according to the same law of succession as prevails among the issue of the purchaser.

Thus, if John Stiles, in the annexed table of descent, purchases land, and dies entitled to the same, without issue, and his father Geoffrey be dead, it descends to Francis, the eldest son of Geoffrey, the brother of John, rather than to George his grandfather; or if Francis be also dead, leaving several children, then to the eldest son of Francis, the nephew of John, and does not pass to any remoter ancestor of John, unless the issue of Geoffrey are exhausted. So, it will descend to a son, or even a *daughter* of Francis (if he left no son) rather than to Oliver Stiles, the brother of

(*y*) 2 Bl. Com. 226; Watk. Desc. 111 n.; H. Chit. Desc. 64, 354.

(*z*) 3 & 4 Will. 4, c. 106, s. 5.

John; for such son or daughter represents the father, who, as the eldest son of Geoffrey, represented *him*.

This branch of the rule is open, in general, to the same remarks as those which have been already made under Rules III. and IV., and will require no further discussion; though it may be worth while to notice [the correspondence of the Jewish law with ours in this particular, as well as in the representation among the issue of the deceased; for on failure of issue, the father or other lineal ancestor was himself said to be the heir, though long since dead, as being represented by the persons of his issue, who were 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 (*a*).]

As to the remaining branch of the rule, viz. that which regards the distinction between the whole and half-blood, —it results from the first branch of the rule (taken in connection with Rule VI.) that the collateral heir of the purchaser is the issue of the nearest of his lineal ancestors in the preferable line, who has left posterity living at the death of the purchaser, subject to the principles as to sex, primogeniture, and representation. But among such issue, some may be relations to the purchaser of the whole blood, and some of the half-blood only; and it is consequently necessary to lay down an additional principle to determine whether both these classes are admissible, and whether any and what precedency is to be allowed between them.

[A kinsman of the whole blood, is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For every man's blood is compounded of the bloods of his respective ancestors; and he only is of the whole or entire blood with another, who hath, so far as the distance of degrees will permit, all the same ingredients in the composition of his blood, that the other hath. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father and Lucy Baker his mother,

(*a*) Num. c. 27; Seld. de Succ. Ebræor. c. 12.

[therefore his brother Francis, being descended from both the same parents, has entirely the same blood with John Stiles, or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker, the mother, marries a second husband, Lewis Gay, and 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.] So also if the father has two sons, A. and B., by different wives (or, according to the technical expression, by different venters), now these brethren are not brethren of the whole blood, but of the half-blood only.

The Inheritance Act assigns to such of the purchaser's collateral kinsmen as are of the whole blood, and their issue, the preference to those who are of the half-blood only, in the same degree, but admits the latter to the next place in the succession (*b*). Thus if the father have a son A., by one venter,—and two sons, B. and C., and a daughter by another venter,—and B. purchases land, and dies without issue, and the father be also dead, C., the younger brother, or on failure of C. and his issue, the sister, shall succeed in preference to A., the elder brother. But the latter (though only of the half-blood), and his issue, will succeed in preference to any collateral relation not descended from B.'s father, though of the whole blood with B. So on the death of John Stiles the purchaser, in the annexed table, without issue, his father Geoffrey being also dead, he will be succeeded not only by his elder brother Francis, or his second brother Oliver, but even by his sisters Bridget and Alice, in preference to his half-brother, the son of his mother Lucy and Lewis Gay, who cannot indeed inherit until the paternal line are exhausted; for his mother, whom he represents, could not (by the sixth rule) have taken while any of the

(*b*) 3 & 4 Will. 4, c. 106, s. 9.

paternal line remained. But the son of Lucy and Lewis Gay (and his issue after him) will stand next to his mother, in the order of succession, and in preference to any other collateral relation of John Stiles *ex parte materna*, though of the whole blood of John Stiles.

In the admission of the half-blood, the Inheritance Act introduces a new principle of inheritance; for, as the law before stood, the half-blood (like the lineal ancestor) were totally excluded, and the land would rather escheat to the lord than go to any kinsman (however near), bearing that kind of relation to the person from whom descent was to be traced. Therefore A. in one of the cases just supposed, and the son of Lucy and Lewis Gay in the other, would have been absolutely incapable of the succession. Nay, even when a father died, and his lands descended to his eldest son A., who entered thereon, and died seised without issue, still B., the son of the same father by another venter, could not be heir to these lands, because he was only of the half-blood to A., the person last seised; but they would descend to a sister (if any) of the whole blood to A., [for in such cases the maxim was, that *possessio fratris facit sororem esse hæredem.* Yet if A. had died without entry, then B. might have inherited; not as heir to A. his half-brother, but as heir to their common father, who was the person last actually seised (*c*).]

This exclusion of the half-blood was a feature almost peculiar to the law of England (*d*); and (it must be added) one of the most harsh and unreasonable aspect. Its vindication was rested entirely upon the plea that it ought to be considered as a mere auxiliary rule, to carry into effect that principle of the feudal law which required the heir to derive his blood from the purchaser. For as it was a consequence from this principle (as already shown) that the collaterals of the deceased purchaser could only be let in by supposing them to be lineal descendants of some one of his ancestors, from whom the estate had been originally

(*c*) 2 Bl. Com. 227. (*d*) 2 Bl. Com. 228.

derived, so it was obvious that those related to him of the whole blood were in general more proper subjects for that supposition, than those of the half-blood. This results from the consideration that he who is the kinsman of the whole blood to the person deceased can have no ancestors beyond or higher than the common stock, but what are equally the ancestors also of the deceased, and *vice versâ;* and therefore is very likely to be derived from that unknown ancestor of his from whom the inheritance is supposed to have descended. But a kinsman of the half-blood in the same degree with the other, is not so probably sprung from the same original purchaser, for he has but one half his ancestors, beyond or higher than the common stock, the same with those of the deceased.

[To illustrate this by example:—Let there be John Stiles and his brother Francis, by the same father and mother, and another brother born of the same mother by Lewis Gay, a second husband. Now if John dies seised 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 sure to be in the line of descent from the first purchaser, whether it were the line of the father or mother. But the mother's son by Lewis Gay is to the full as likely not to be descended from the original purchaser as to be descended,] and there is consequently no reasonable presumption of his being derived from the original purchaser. It was argued, therefore, by the apologists of the antient rule of exclusion, that it should not be thought hard that collateral relations of the half-blood should be disinherited; for as they owed their admission only to the fiction that they were the issue of an imaginary purchaser, it was just to exclude them in every case where, supposing that purchaser to have really existed, there would be no fair reason to suppose that they could in truth have descended from him (*e*). It was obvious, however, even to the apologists themselves, that the exclusion

(*e*) See note by Christian, 2 Bl. Com. 231.

was carried further in practice than the principle on which it was founded would warrant: for a kinsman of the half-blood to the deceased, supposing him to have derived the estate from some unknown ancestor, would in some instances have the same chance of being descended from that ancestor as a kinsman of the whole blood in a remoter degree, and in other instances a much greater. Thus a brother of the half-blood would have the same chance as an uncle of the whole, on the same side, and more than a great uncle; and yet, in these instances, the remoter kinsman was always admissible, while the nearer was incompetent to succeed. The rule of exclusion was, besides, applied even where the deceased tenant did not take by purchase, but by descent, and had a relative of the half-blood known to be descended as well as himself from the purchaser;—as in the case already noticed, where upon the death of A. without issue, seised of lands which had descended to him, from his father, his half-brother B., son of the same father, was debarred from the inheritance. [This was universally allowed to carry a hardship with it, even upon feudal principles; for as the estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it was demonstrable that the half-brother must be of the blood of the purchaser, who was either the father or one of the father's ancestors. And indeed it should seem as if originally the custom of excluding the half-blood, in Normandy, extended only to exclude a *frater uterinus* where the inheritance descended *a patre*, and *vice versâ* (*f*); and possibly in England also; as even with us it remained a doubt in the time of Bracton and of Fleta 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 (*g*), extends no further than this, *frater fratri uterino non succedet in hære-*

(*f*) Gr. Coustom. c. 25. (*g*) Fort. De Laud. Leg. Ang. c. 5.

[*dilute paternâ.* It is moreover worthy of observation, in this place, that the crown (which is the highest inheritance in the nation) always by law descended (as it still does) to the half-blood of the preceding sovereign (*h*), so that it be the blood of the first monarch of the reigning family who was *conqueror* (which in feudal language is the same as *purchaser*) of the realm. 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 though none can be a claimant to the crown unless known to be descended from the original stock (which was formerly King William the Norman, and is now, by act of parliament, the Princess Sophia of Hanover (*i*)), yet when such descent is known, the feudal rule is satisfied, whether he be related to the last sovereign by the whole, or by the half-blood. Upon the same principle, in titles of honour (*k*) and in all estates tail (*l*), half-blood was never an impediment to the descent,] because in these cases the pedigree from the first donee must be strictly proved; and the feudal maxim is consequently carried into effect, without resorting to any auxiliary rule. But now, as we have seen, the maxim which excluded the half-blood has given way, in *every* case, to a sounder and more satisfactory principle. Having been long generally disapproved, as founded on defective reasoning and opposed to natural justice, it was at length abolished by the Inheritance Act, the provision of which, as regards this subject, is expressed in the following terms:—"That any "person related to the person from whom the descent is to "be traced by the half-blood shall be capable of being his "heir; and the place in which any such relation by the "half-blood shall stand in the order of inheritance, so as "to be entitled to inherit, shall be next after any relation

(*h*) Plowd. 215; Co. Litt. 15 b.

(*i*) On this princess, granddaughter of James I., and the heirs of her body (being Protestants), the Crown was settled by 12 & 13 Will. 3, c. 2. See bk. IV. pt. I. c. III.

(*k*) Co. Litt. 15.

(*l*) Litt. ss. 14, 15 b.

"in the same degree of the whole blood and his issue, "where the common ancestor shall be a male, and next "after the common ancestor, where such common ancestor "shall be a female; so that the brother of the half-blood "on the part of the father shall inherit next after the "sisters of the whole blood on the part of the father and "their issue, and the brother of the half-blood on the part "of the mother shall inherit next after the mother (*m*)."

Having now treated of the several rules of which we conceive the law of descent, as new modelled by the act of parliament just mentioned, to consist, we may remark, as the result of the investigation, that, upon the death of the owner of an estate in fee simple, we are to ascertain the heir, by considering, first, who was the *purchaser* of that estate, according to the sense which the statute has affixed to the term: and we are then to look for the heir, first, among his issue,—where the heir will be his descendant next to him in blood, but subject to the principles which obtain as to sex, primogeniture, and representation: and, failing his issue, among his lineal ancestors, or their issue, —where the heir will be his lineal ancestor next in blood in the preferable line, or the issue of such ancestor, if deceased; applying the same law of succession as in the case of the purchaser's issue, and also the principle which prefers the whole to the half-blood.

Before we conclude this branch of our inquiries, however, it may not be amiss to *apply* the rules more particularly, and to supply the reader with a short sketch of the manner in which we must search for the heir of a person, —as John Stiles,—who dies entitled to land which he acquired otherwise than by inheritance; and of which, therefore, he was the purchaser.

In the first place succeeds the eldest son, Matthew Stiles, or his issue, No. 1. If he and his heirs be extinct, then Gilbert Stiles, and the other sons respectively in order of birth, and their issue, No. 2. In default of these, all the daughters together, Margaret and Charlotte Stiles, or

(*m*) 3 & 4 Will. 4, c. 106, s. 9.

their issue, No. 3. On failure of the descendants of John Stiles, his father Geoffrey (being his nearest lineal ancestor in the preferable line) is admitted, No. 4. Then the issue of his father, viz. first, Francis Stiles, the eldest brother of the whole blood, or his issue, No. 5; then Oliver Stiles and the other whole brothers respectively, in order of birth, or their issue, No. 6; then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue, No. 7; then the son of Geoffrey (the paternal brother of the half-blood), No. 8, or his issue; and the paternal sisters of the half-blood, No. 9, or their issue. In default of them, George Stiles, the paternal grandfather is admitted, No. 10, and then his issue, viz. first, his issue of the whole blood with John, No. 11, then his issue of the half-blood with John, No. 12. In default of these, Walter Stiles, the paternal grandfather's father, is admitted, No. 13. Then the issue of Walter, viz., first his issue of the whole blood with John, No. 14, then his issue of the half-blood, No. 15. In default of these, Richard Stiles, the paternal grandfather's paternal grandfather, is admitted, No. 16, or his issue, No. 17, and so on, in the paternal line of Walter Stiles, *in infinitum*. In failure of this, (that is, supposing the decease of Richard, and of all his maternal and paternal ancestors, and the failure of their issue both of the whole and of the half-blood,) we are next to resort to the maternal line of Walter Stiles, rather than of a nearer male ancestor; and the paternal grandfather's paternal grandmother, Anne Godfrey (according to the maiden name), No. 18, will consequently be the person next entitled to succeed, and so on in the maternal line of Walter Stiles, *in infinitum*. In failure of which we are to resort to the maternal line of George Stiles; and the paternal grandfather's mother, Christian Smith, No. 19, will be the person next entitled, and then her issue of the half-blood to John, No. 20. Then the paternal grandfather's maternal grandfather, William Smith, No. 21; and then his issue, No. 22; and so on in the paternal line of Christian Smith, *in infinitum*. On failure of which, we are to resort to her

maternal line; and the paternal grandfather's maternal grandmother, Jane King, No. 23, will be the person next entitled, and so on in the maternal line of Christian Smith, *in infinitum.* On failure of which we are to resort to the maternal line of Geoffrey Stiles; and the paternal grandmother, Cecilia Kempe, No. 24, will be the person next entitled; and then her issue of the half-blood to John, No. 25. Then the paternal grandmother's father, Luke Kempe, No. 26; then his issue of the whole blood to John, No. 27. Then his issue of the half-blood to John, No. 28. Then the paternal grandmother's paternal grandfather, Thomas Kempe, No. 29. Then his issue, No. 30, and so on in the paternal line of Luke Kempe, *in infinitum.* In failure of which we are to resort to his maternal line; and the paternal grandmother's paternal grandmother, Sarah Browne, No. 31, will be the person next entitled; and so on in the maternal line of Luke Kempe, *in infinitum.* On failure of which we are to resort to the maternal line of Cecilia Kempe; and the paternal grandmother's mother, Frances Holland, No. 32, will be the person next entitled. Then her issue of the half-blood to John, No. 33. Then the paternal grandmother's maternal grandfather, Charles Holland, No. 34; then his issue, No. 35; and so on in the paternal line of Frances Holland, *in infinitum.* In failure of which we are to resort to the maternal line of Frances Holland; and the paternal grandmother's maternal grandmother, Mary Wilson, No. 36, will be the person next entitled; and so on in the maternal line of Frances Holland, *in infinitum.* In failure of which the paternal blood of John Stiles entirely failing, recourse must then, and not before, be had to his maternal relations, or the blood of the Bakers, Nos. 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47; the Bates's, No. 48; the Willes's, Nos. 49, 50, 51, 52; the Carters, No. 53; the Thorpes, Nos. 54, 55, 56, 57, 58, 59, 60; the Bishops, No. 61; the Whites, Nos. 62, 63, 64, 65; and the Wards, No 66, in the same regular successive order as in the paternal line.

We have thus seen how land is acquired by descent in fee simple. But before we conclude the chapter, it will be proper to notice some miscellaneous points of law connected with this title.

1. We may remark, that in order to make the title complete, where the estate descended is one in possession, the heir is required to make *entry* on the land; for until then he is said to have seisin in *law* only, and not in *deed;* and is incompetent to bring any action of trespass for injuries committed to the land (*n*). If the estate be one in expectancy, he has of course no right of entry until the particular interest determines; but if it be a reversion or remainder immediately expectant on an estate for *years*, the possession of the particular tenant operates, upon a principle before explained, as that of the heir, whose seisin is in that case considered as a seisin in deed, and not in law only (*o*). The distinction, however, between these kinds of seisin, as regards the heir, has recently lost much of its importance—which chiefly resulted from this consideration, viz. that until entry he could not become the root of a future descent; for this is a capacity which can no longer in any case attach to him, as by the new provision of the Inheritance Act, the purchaser is now the only root from which descent can be traced.

2. Both by the effect of the statute just referred to, and by the principle of the antient law, the estate which a man has acquired by descent, retains in his hands its former quality of descending only to the blood of the same purchaser, so that, on decease of the owner, none of his relations on the mother's side can ever be entitled to succeed, supposing the estate to have descended to him in the paternal line, nor *vice versâ* any relation on the father's side, if it came in the maternal line; except only in the case of a relation who, being heir in one of these lines,

(*n*) Bac. Ab. Trespass (C.); Browning *v.* Beston, Plowd. 142; Goodtitle *v.* Newman, 3 Wils. 516.

(*o*) Co. Litt. 15 a; Doe *v.* Keen, 7 T. R. 390; Doe v. Whichelo, 8 T. R. 213.

happens to belong to the other also,—a case which may occur when the owner's parents have been connected by consanguinity. In this respect the title by descent differs remarkably from that by purchase; for by the latter [the estate acquires a new inheritable quality, and is descendible to the owner's blood in general,] that is, first to those of the paternal, and then to those of the maternal line. And from this it follows, that if a person who has acquired an estate by descent conveys it to a new purchaser, the line of descent is *broken:* and even if that purchaser conveys it back again to him, the interruption still continues; for the former holder will then hold it as by purchase, and not as by descent, and will therefore be able to transmit it to his heirs on either side. Thus, if a man seised of lands as heir on the part of his mother (and which consequently no relation on the father's side can, as such, inherit), conveys them to another, and afterwards obtains a reconveyance of them, to hold to him and his heirs, and then dies without issue, his heirs on the part of his father shall inherit, and in preference to those on the mother's side (*p*). But a mere alteration in the quality or circumstances of an estate will not break the descent; and therefore if parceners make partition of their land, they are still *in* of their respective shares by inheritance, though those shares are no longer held in coparcenary, but in severalty.

3. The heir is liable, out of an estate taken by descent in fee simple, to be charged with the debts of the ancestor from whom it descended (*q*). This liability has always attached to him in the courts of the common law, in respect of the ancestor's special obligations, (or, in legal language, those accruing by *specialty*); which consist of two kinds,

(*p*) Co. Litt. 12 b; Doe *v.* Morgan, 7 T. R. 105; 1 Prest. Est. 420, 458, 459. And in like manner the descent will now be broken where a person who took by descent makes a conveyance (subsequent to 31st December, 1833), although an estate should be limited to *himself* by the same conveyance. See the Inheritance Act, 3 & 4 Will. 4, c. 106, s. 3.

(*q*) Vide Bushby *v.* Dixon, 3 Barn. & Cress. 298.

either matters of record (such as judgments and the like (*r*), recorded in the courts of justice), or *deeds*, (that is, contracts under seal): but with a distinction as to the latter, between deeds in which the ancestor has bound himself and his heirs *eo nomine*, and those in which the heirs are not bound; for to these last the liability of the heir in the courts of the common law does not extend, though there is a remedy, as we shall presently see, in equity. Nor is he liable, whatever the kind of obligation may be, to be charged as of his own proper debt; but only so far as he has taken, in his character of heir, an estate of his ancestor sufficient (to some extent at least) to satisfy the debt; which sufficient estate is called, in law, *assets*, from the French word *assez*, enough (*s*). The assets which descend to an heir, however, may consist either of legal or equitable estate; and though equitable interests are not in general noticed in the common law courts, yet in this case it is otherwise; for by the Statute of Frauds, 29 Car. II. c. 3, s. 10, if any *cestui que trust* shall die, leaving a trust in fee simple to descend to his heir, the trust shall be assets by descent, and the heir liable to be charged with the same, in the same manner as if it were an estate at common law.

But though the *heir* was always subject to this liability for the specialty debts of his ancestor (to the extent at least of the legal estate inherited), it did not formerly extend to a *devisee*, or person taking the estate of the deceased by *devise* under his will; and therefore to protect creditors from such devises as may tend to their prejudice, it was provided, by statute 3 & 4 William and Mary, c. 14, called the Statute of Fraudulent Devises, (repealed, but with a re-enactment of this provision, by 11 Geo. IV. & 1 Will. IV. c. 47 (*t*),) that where a deceased person shall

(*r*) Vide Harbert's case, 3 Rep. 12 b.

(*s*) 2 Bl. Com. 243, 244. The law on the subject of the heir's liability is fully stated, 2 Saund. by Wms. 7, n. (4).

(*t*) As to these statutes vide Wilson *v.* Knubley, 7 East, 128; Farley

have devised any real estate, without making it subject to the payment of his debts, his devisee shall be liable to be charged in respect of the real estate so devised, in the same manner as, and jointly with, the heir: and a creditor bringing an action at law for that purpose, shall be entitled either to make the devisee a joint defendant with the heir, or to sue the devisee alone, where there is no heir liable.

Still, however, the law afforded no remedy against the real estate of a deceased person (whether in the hands of an heir or devisee), to that large and important class of creditors who claim upon *simple contract* (or contract without specialty), nor to those claiming under deeds in which the heirs are not expressly bound. There have been few defects perhaps in the English jurisprudence more calculated to excite surprise than this, or more at variance with the natural sense of justice. And it is satisfactory, therefore, to be able to add that it exists no longer: for though it has not been thought convenient to alter the principle of the *common law* in this particular, the claims of creditors of every class are now effectually secured through the medium of proceedings in *equity*. Yet the redress came late, and by slow and cautious advance. For at first it was confined to the case where the deceased was a person carrying on trade within the meaning of the bankrupt laws; it being provided by 47 Geo. III. sess. 2, c. 74, and afterwards by 11 Geo. IV. & 1 Will. IV. c. 47, that, in a case of that description, the creditors by simple contract should be entitled by a suit in equity, in such manner as therein mentioned, to enforce payment out of the real estate descending on his heir, or devised by his will,—and not made subject to the payment of his debts. But now, by 3 & 4 Will. IV. c. 104, it is enacted more extensively—that when any person shall die seised of or entitled to any real estate, which he shall not by his will

v. Briant, 3 Ad. & El. 839; Hunting *v.* Sheldrake, 9 Mee. & W. 256. The statute 11 Geo. 4 & 1 Will. 4, c. 47, has been explained and amended, as to certain of its provisions, by 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87.

have made subject to the payment of his debts, such estate shall be considered as assets, to be administered in courts of equity, for payment of his debts as well on simple contract as on specialty. To secure, however, a just priority to those who, in his lifetime, may have had the precaution to place their claims upon a basis of stronger obligation, it is further provided, that in the administration of assets by courts of equity under that statute, all creditors by specialty in which the heirs are bound shall be paid the full amount of their debts before any payment is made either to creditors by simple contract, or to those claiming on specialties in which the heirs are not bound (*u*).

4. Such being the properties of a title by descent, as distinguished from a title by purchase, it becomes important to consider, in any case where they appear to come into collision, to which the preference shall be given by law.

First, then, a man will take by *purchase*, even lands of which he is the heir, if they have also been limited to him by individual designation under the will of his ancestor; as where a testator devises lands, in fee or in tail, to his "heir," or to the person by name, who at his decease becomes his heir. This has always been the effect of the gift, where it was made with other limitations than the course of descent would direct; as is the case upon every devise in tail: but where the gift was such that the devisee would be entitled by it to an estate in fee, and precisely of the same quality that he would have otherwise taken by descent, the rule was once firmly settled that the descent should take effect, and that nothing should pass under the devise; for the law gave the preference to the descent, as

(*u*) It may however be observed, that if the debtor by his will have charged his real estate with the payment of his debts, his creditors of whatever kind will, on the general principle observed by the Court of Chancery, that "equality is equity," participate in the produce equally. See Bailey *v.* Ekins, 7 Ves. 319.

the elder title (*x*). The contrary rule, however, which is manifestly more consonant with reason and convenience, is now established by the legislature; it being provided by the Inheritance Act, 3 & 4 Will. IV. c. 100 (sect. 3), as to all cases without distinction, "that when any land shall "have been devised by any testator who shall die after "31st December, 1833, to the heir (*y*), or to the person "who shall be the heir of such testator, such person shall "be considered to have acquired the same as a devisee, "and not by descent."

Secondly. A man will take by purchase, lands limited to the "heirs," or "heirs of the body" (*eo nomine*) of his ancestor, by the conveyance of a stranger,—provided the limitation fall not within the rule in Shelley's case (*z*); for then he will take by descent. Thus if the owner of lands conveys them to A. for life, remainder to the "heirs," or "heirs of the body," of B., and B. be then deceased, or be then living, but die during the continuance of the particular estate (*a*),—the person who at the time of the conveyance in the first case, or at the time of B.'s death in the second, answers the description of his "heir," or "heir of his body," will take as *purchaser*; and his estate will be a fee simple, or fee tail, as the case may be; for such words amount not only to a description of the grantee, but to a limitation of the estate which he is to take (*b*). But if the life estate had been limited to B., with the like remainder, B. himself would then, by the rule in Shelley's case, have

(*x*) 2 Bl. Com. 242; 2 Saund. by Wms. 7, n. (4); 1 Roll. Ab. 626; Doe *v.* Timins, 1 Barn. & Ald. 530. This is the reason assigned in the books. It seems probable, however, that the rule had a feudal object, and that it was intended for the protection of the lord, who would lose the fruits of seigniory, where the heir did not take by descent.

(*y*) The effect of a devise to the testator's *heirs* (in the plural) was, before the statute, similar to that of a devise to his *heir*, and seems not to be altered by this enactment.

(*z*) Vide sup. p. 333.

(*a*) If B. were to survive A. the limitation in remainder would fail, for want of a person to take; for *nemo est hæres viventis*, vide sup. p. 387.

(*b*) Co. Litt. 10 a, 319 b; 1 Roll. Ab. 627; 2 Bl. Com. 241; 1 Prest. Est. 280, 452, 453.

taken an estate of inheritance; or in other words, his heir would have taken by descent. And even in cases of the first description, the estate acquired by purchase, is anomalous as regards its hereditary quality; the descent being traced not from the purchaser, but from the ancestor named; it being provided by the 4th section of the act just cited, "that when any person shall have acquired any "land by purchase, under a limitation to the heirs, or to "the heirs of the body of any of his ancestors, contained "in an assurance executed after the 31st December, 1833, "or under a limitation to the heirs, or to the heirs of the "body of any of his ancestors, (or under any limitation "having the same effect,) contained in a will of any tes-"tator who shall depart this life after the said 31st De-"cember, 1833, then, and in any of such cases, such land "shall descend, and the descent of it shall be traced, as if "the ancestor named in such limitation had been the pur-"chaser of such land (*c*)."

(*c*) The law was the same before the Act passed, in every case where the heirs *of the body* took *eo nomine* as purchasers; Fearne, by Butler, 80, 9th edit.

CHAPTER XII.

OF TITLE BY ESCHEAT.

[ESCHEAT, we may remember (*a*), was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman (*b*), in which language it signifies chance or accident;] but with us it is applied to the case where the tenant of land in fee dies without having aliened them in his lifetime, or disposed of them by his last will and testament, and leaves no heir behind him to take them by descent, so that they result back, [by a kind of reversion, to the original grantor or lord of the fee (*c*).] And here it is to be observed, that the [land so escheating afterwards follows the seigniory, as being a fruit thereof. Therefore, if the lord was entitled to the seigniory by purchase, the land escheated will descend to his heirs general; if by descent, it will be inheritable only by such of his heirs as are capable of inheriting the seigniory (*d*).]

[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 (*e*), on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting rent of a stranger who usurps the possession, his title by escheat is barred (*f*). It is

(*a*) See ante, p. 200.

(*b*) *Eschet* or *échet*, formed from the verb *eschoir* or *échoir*, to happen.

(*c*) 11 Feud. 86; Co. Litt. 13 a.

(*d*) Co. Litt. 13 a.

(*e*) Formerly he might either enter or sue out a *writ of escheat*, but this, with other real actions, is now abolished. Where the crown is entitled, the course is to issue a *commission of escheat*, see Doe *v.* Redfern, 12 East, 96. Upon an escheat for felony or treason, the lord cannot enter until it appears that the king has had his year, day and waste. Hawk. b. 2, c. 49, s. 9.

(*f*) Bro. Ab. tit. Acceptance, 25; Co. Litt. 268.

[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;] but both descent and escheat vest an inchoate title at least in the party, without the active interference of any person whatever; and they are both properly referable, therefore, to the same head, of title by "act of law" (*f*). And though Blackstone has enumerated escheat as one of the modes of purchase, yet, as he himself observes, [the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent in a kind of caducary succession (*g*).

The law of escheats is founded upon this single principle, that the blood of the purchaser is, by some means or other, utterly extinct and gone: and, since none can inherit his estate but such as are of his blood and consanguinity, it follows, as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum*, and must result 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 (*h*).] And we propose, successively, to advert to both, distinguishing, under the first, several different cases in which the deficiency of inheritable blood may occur.

1 and 2. [The first two 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 de-

(*f*) See chap. x.

(*g*) 2 Bl. Com. 245; acc. Co. Litt. 18 b.

(*h*) Co. Litt. 13 a, 92 b.

scended. In these cases, the blood of the first purchaser is at an end; and therefore the law directs, upon the principle already referred to, [that the land shall escheat to the lord of the fee.

3. A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but, although it hath deformity in any part of its body, yet if it hath human shape, it may be heir (*i*). This is a very antient rule in the law of England (*k*); and its reason is too obvious and too shocking to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions (*l*); yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby (*m*), (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 (*n*); 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.

4. Bastards are incapable of being heirs.] Bastards, by our law, are such children as are not born of lawful wedlock (*o*). [Such are held to be *nullius filii*, the sons of no-

(*i*) Co. Litt. 7 b.

(*k*) "*Qui contra formam humani generis converso more procreantur, ut si mulier monstrosum vel prodigiosum enixa sit, inter liberos non computentur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut si sex vel tantum quatuor digitos habuerit, bene debet inter liberos connumerari: et, si membra sint inutilia aut tortuosa, non tamen est partus monstrosus.*"—Bract. l. 1, c. 6, s. 7, and l. 5, tr. 5, c. 30, s. 10.

(*l*) Ff. 1, 5, 14.

(*m*) Ff. 50, 16, 135; Paul. 4, sent. 9, s. 63.

(*n*) Co. Litt. 29 b. As to *curtesy*, vide sup. p. 264.

(*o*) "Bastards by our law are such "children as are not born either in "lawful wedlock or within a com-"petent time after its determina-"tion."—2 Bl. Com. 247. See further as to bastardy, post, bk. III. c. III.

[body; for the maxim of the law is, "*Qui ex damnato coitu nascuntur, inter liberos non computantur* (*p*)." 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 (*q*). The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father (*r*): 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 (*s*); and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not (*t*). But our law, in favour of marriage, is much less indulgent to bastards.

There is indeed one instance in which our law has shown them some little regard; and that is usually termed the case of *bastard 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 (*u*) expresses it in his Latin, *filius muliceratus*; 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 seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puisné* and all other heirs (though minors, married women, or under any incapacity whatsoever) are totally barred of

(*p*) Co. Litt. 8 a; Bract. l. 1, c. 6, s. 7.
(*q*) Finch, Law, 117.
(*r*) Nov. 89, c. 8.
(*s*) Ibid. c. 12.
(*t*) Cod. 6, 57, 5.
(*u*) L. 7, c. 1.

[their right (*x*). 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 canon law (following the civil) did allow such *bastard eigné* to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shown to no other kind of bastard; for if the mother was never married to the father, such bastard could have no colourable title at all (*y*).

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 (*z*).] But though the descent from a bastard is necessarily confined to his issue, yet he is capable of holding land in fee simple, in such sense at least that he may make an un-

(*x*) Litt. s. 399. The rule also applies if a man has two *daughters*, the elder a bastard, and they both enter peaceably as co-parceners; Co. Litt. 244 a.

(*y*) Litt. s. 400; Blackstone here gives as an additional reason for the rule as to bastard *eigné*, that "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."—2 Bl. Com. 248. And the same reason is given in Co. Litt. 244 a. But the correctness of this view is questionable; for there is no other case in which the temporal courts allow the maxim, that a man shall not be bastardized after his death; see Co. Litt. by Butler, 244 b, n. (1).

(*z*) Bract. l. 2, c. 7; Co. Litt. 244.

limited alienation of it, and that his alienee will take an estate to his heirs general (*a*).

5. [Aliens also (*b*) are incapable of taking by descent, or inheriting (*c*): 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.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold] real estate [by purchase (*d*), 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 (*e*), because they have not in them any inheritable blood.]

Therefore, if an alien be made a British subject, or *denizen* (as he is in that case more properly called), by letters patent from the crown, [and then purchases lands, (which the law allows such a one to do,) his son, born before his denization, shall not (according to the rule of the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires an here-

(*a*) 1 Prest. Est. 468.

(*b*) As to the subject of *aliens* generally, vide sup. p. 134, et post, bk. IV. pt. I. c. II.

(*c*) Co. Litt. 8 a. By a late act, (7 & 8 Vict. c. 66, s. 3), a person born out of her majesty's dominions, *of a mother being a natural-born subject*, may now inherit land, or take it by devise or purchase. This statute, however, does not make him in other respects a natural-born subject, though previous statutes have admitted to that condition a person born out of the queen's dominions, whose *father* or *grandfather* on the father's side were natural-born subjects. Vide post, bk. IV. pt. I. c. II.

(*d*) Co. Litt. 2 b. See the last note.

(*e*) Ibid.; 1 Lev. 59.

[ditary quality, which will be transmitted to his subsequent posterity. Yet, if he had been *naturalized* by act of parliament (*f*), such eldest son might then have inherited: for naturalization cancels all defects, and is allowed to have a retrospective energy, which simple denization has not (*g*).]

At common law, too, aliens could not be the *channels* of descent, for [Sir Edward Coke (*h*) 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 though this opinion of his was afterwards overruled (*i*), it was only on the ground that the descent from one brother to the other might be considered as *immediate*, and without regard to the *commune vinculum:* an exception from the general law of inheritance, which we have before shown to have formerly obtained (*k*); but which has been lately abolished by the Inheritance Act 3 & 4 Will. IV. c. 106.

The subject, however, of tracing descent through an alien, has been regulated since the time of Lord Coke by act of parliament. For [it is enacted by the statute 11 & 12 Will. 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

(*f*) An alien may now also be naturalized for most purposes by the certificate of a secretary of state; 7 & 8 Vict. c. 66, s. 6; vide post, bk. IV. pt. I. c. II.

(*g*) Co. Litt. 129 a.

(*h*) Co. Litt. 8 a.

(*i*) Collingwood *v.* Pace, 1 Vent. 415; 1 Lev. 59; 1 Sid. 193.

(*k*) Sup. p. 414.

[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 as to the case, where lands shall descend to the daughter of an alien (*l*): 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 of descents by the common law (*m*).]

Such is the state of the law with respect to escheats *propter defectum sanguinis;* as to which we shall only further observe, that by recent legislation (*n*) an exception has been made from the general law, in the case where the land was held by the party deceased, *under a trust or mortgage,*—it being provided for the protection of the party beneficially interested, that where a trustee or mortgagee dies intestate without an heir, (or his heir or devisee is not known,) the Court of Chancery shall have power to make an order vesting the lands in such person and in such manner as the court shall direct.

We now arrive at the consideration of escheats *propter delictum tenentis;* those, namely, where by attainder, the

(*l*) Vide Co. Litt. by Harg. 8 a, (n.); Christian's Blackst. 374, n.

(*m*) Vide sup. p. 387.

(*n*) 13 & 14 Vict. c. 60, ss. 14, 19. This statute repeals 11 Geo. 4 & 1 Will. 4, c. 60; 4 & 5 Will. 4, c. 23; and 1 & 2 Vict. c. 69, by which provisions of the same kind were made.

blood of the person attainted is so corrupted as to be rendered no longer inheritable.

Attainder imports that extinction of civil rights and capacities which takes place whenever a person who has committed treason or felony, receives judgment of death or outlawry for his crime (*o*); and (besides other consequences) it involves in certain cases *the corruption of blood*, so as to prevent the descent of land (which depends, as we have seen, on blood or consanguinity) to the offender or his heirs.

The antient law with respect to corruption of blood upon attainder, and the consequent escheat of the offender's lands and tenements to the lord of the fee, has been so much narrowed in its application by the recent enactments, to which we shall presently refer, as to have lost much of its former importance. As the greater part of its doctrines, however, are still capable of being occasionally called into action, they continue to deserve our attention; and we shall here proceed to examine them.

By the law, then, as it stood prior to the late alterations, [the blood of the tenant by the commission of any felony (under which denomination all treasons were formerly comprised (*p*),) was corrupted and stained, and the original donation of the feud was 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 were held to be broken, the estate instantly fell back from the offender to the lord of the fee, and the inheritable quality of his blood was extinguished and blotted out for ever.]

[Here, however, great care must be taken to distinguish between forfeiture of lands to the crown and this species of escheat to the lord, which, by reason of their similitude in some circumstances, and because the crown is very fre-

(*o*) As to attainder, vide post, bk. VI. c. XXIII.

(*p*) 3 Inst. 15; stat. 25 Edw. 3, st. 5, c. 2, s. 12.

[quently the immediate lord of the fee, and therefore entitled to both, have been often confounded together.] For, independently of any escheat (*p*), all lands and tenements, to which the offender had an existing title, were, by force of the attainder, immediately forfeited to the crown: in the case of treason, for ever; in other felonies for a year and a day (*q*). And so strict was this forfeiture, that by 5 & 6 Edw. VI. c. 11, s. 13, the wife of one attainted of treason was even excluded of her dower (*r*).

Escheat to the lord, therefore, operated in subordination to forfeiture to the crown; which latter incident intervened in the case of treason, to intercept the escheat altogether; and in the case of other felony, to intercept it for the limited period that has been stated: though, after that period, the land still escheated, in the case last mentioned, to the lord of the fee (*s*). Indeed, the law of forfeiture was (in the case of treason at least) of older date in this country than that of escheat; for the former doctrine prevailed in the old Saxon times (*t*), while the latter appears to have been the result of the introduction of the Norman tenures (*u*). And in illustration of this, we may refer to an incident already noticed as attaching 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 (*x*).]

[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 stopped; but the law of escheat pur-

(*p*) 2 Inst. 64; 1 Salk. 85.

(*q*) 3 Inst. 47; 2 Inst. 37; Abbrev. Placit. 317 a; stat. 17 Edw. 2, st. 1, c. 16; Bullock *v.* Dodds, 2 Barn. & Ald. 258; Doe *v.* Pritchard, 5 B. & Adol. 765; Rex *v.* Bridger, 1 Mee. & W. 145; Symonds *v.* Blake, 4 Dowl. 263. As to forfeiture in treason and felony, vide post, bk. VI. c. XXIII.

(*r*) It was otherwise, however, on attainder for other felony. 1 Edw. 6, c. 12, s. 17. As to dower, vide sup. p. 267.

(*s*) Wright's Ten. 120; 2 Bl. Com. 252; 4 Bl. Com. 386.

(*t*) Wilkins's Leges Anglo-Sax. Ll. Alfred, c. 4; Ll. Canut. 54.

(*u*) 2 Bl. Com. 252.

(*x*) See stat. 17 Edw. 4, stat. 1, c. 16.

[sued the matter still further. For the blood of the tenant being utterly corrupted and extinguished, it followed,] not only that all that he then had should escheat from him, [but also that he should be incapable of inheriting any thing for the future. This may further illustrate the distinction between forfeiture and escheat. If, therefore, a father were seised in fee, and the son committed treason and was attainted, and then the father died, here the land would escheat to the lord; because the son, by the corruption of his blood, was incapable to be heir, and there could be no other heir during his life: but nothing would be forfeited to the king, for the son never had any interest in the lands to forfeit (*y*). In this case the escheat operated, and not the forfeiture; but in the following instance the forfeiture worked, and not the escheat. As where a new felony was created by act of parliament, and it was provided (as was frequently the case) that it should not extend to corruption of blood; here the lands of the felon would not escheat to the lord, but yet the profits of them would be forfeited to the king for a year and a day and so long after as the offender lived (*z*).

There was yet a further consequence of the corruption and extinction of hereditary blood, which was this, that the person attainted would not only be incapable himself of inheriting, or transmitting his own property by heirship, but would also obstruct the descent of lands or tenements to his posterity, in all cases where they were obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, was not only exhausted for the present, but totally dammed up and rendered impervious for the future. This was 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 (*a*). But by the law of England,

(*y*) Co. Litt. 13 a.
(*z*) 3 Inst. 17.
(*a*) Van Leeuven, in 2 Feud. 31.

[a man's blood was so universally corrupted by attainder, that his sons could neither inherit to him nor to any other ancestors (*b*), at least on the part of their attainted father.

This corruption of blood could not be absolutely removed but by authority of parliament. The king might excuse the public punishment of an offender; but could not abolish the private right, which had accrued, or might accrue, to individuals as a consequence of the criminal's attainder. He might remit a forfeiture, in which the interest of the crown is alone concerned; but he could not wipe away the corruption of blood; for therein a third person had an interest, the lord who claimed by escheat. If, therefore, a man had a son, and was attainted, and afterwards pardoned by the king, this son could 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 was made a new man, and might convey new inheritable blood to his after-born children (*c*).

Herein there was, however, a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law took no notice; and therefore we have seen that an alien elder brother would not impede the descent to a natural-born younger brother. But in attainders it was otherwise; for if a man had issue a son, and was attainted, and afterwards pardoned, and then had issue a second son, and died: here the corruption of blood was not removed from the eldest, and therefore he could not be heir; neither could the youngest be heir, for he had an elder brother living, of whom the law took notice, as he once had a possibility of being heir: and therefore the younger brother would not inherit, but the land would 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 had no cor-

(*b*) Co. Litt. 391 b.

(*c*) Co. Litt. 392 a.

[ruption of blood (*d*). So, if a man had issue two sons, and the elder in the lifetime of the father had issue, and then was attainted and executed, and afterwards the father died, the lands of the father would not descend to the younger son; for the issue of the elder, which had once a possibility to inherit, would impede the descent to the younger, and the land would escheat to the lord (*e*).]

[Upon the whole it appears, that a person attainted was 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, was blotted out, corrupted and extinguished for ever; the consequence of which is, that estates thus impeded in their descent, resulted back and escheated to the lord.]

But the doctrine of corruption of blood, arising as it did from feudal principles, and perhaps extending further than even those principles would warrant, was in modern times always looked upon as a peculiar hardship, at least as regarded the family of the offender. [And therefore in most (if not all) of the new felonies created by parliament since the reign of Henry the eighth, it was declared that they should not extend to any corruption of blood (*f*).] And now at length by the statutes 54 Geo. III. c. 145; 3 & 4 Will. IV. c. 106; and 13 & 14 Vict. c. 60 (*g*), the same spirit has been infused (subject to some wholesome exceptions) into the general law of the realm; and whatever savoured of inhumanity or harshness under the antient system effectually removed. For by the first of these acts, it

(*d*) Co. Litt. 8 a.

(*e*) Dyer, 48 a.

(*f*) By 7 Anne, c. 21 (the operation of which was postponed by 17 Geo. 2, c. 39) it was enacted, that after the death of the Pretender and his sons, no attainder for treason should operate to the prejudice of other than the offender himself; but this provision was repealed by 39 Geo. 3, c. 93.

(*g*) The last-mentioned statute repeals 4 & 5 Will. 4, c. 23, which contained provisions of the same kind.

is provided that no attainder for felony, except for *treason* or *murder*, "shall extend to the disinheriting of any person, "nor to the prejudice of the right or title of any person or "persons other than the right or title of the offender, during "his natural life only, and that it shall be lawful to every "person to whom the right or interest of any lands, tene-"ments or hereditaments, after the death of such offender, "should or might have appertained if no such attainder "had been, to enter into the same." By the second, "that "when the person, from whom the descent of any land is "to be traced, shall have had any relation, who having "been attainted shall have died before such descent shall "have taken place, then such attainder shall not prevent "any person from inheriting such land who would have "been capable of inheriting the same by tracing his "descent through such relation, if he had not been at-"tainted, unless such land shall have escheated in conse-"quence of such attainder before 1st January, 1834." And by the last, that "no lands (*h*), stock (*i*) or chose in "action, vested in any person upon any *trust*, or by way "of *mortgage* (*k*), or any profits thereof, shall escheat or "be forfeited to her majesty, her heirs or successors, or to "any corporation, lord or lady of the manor, or other "person, by reason of the attainder or conviction, for *any* "offence of such trustee or mortgagee, but shall remain in "such trustee or mortgagee, or survive to his or her co-"trustee, or descend or vest in his or her representative, "as if no such attainder or conviction had taken place." This provision, however, has no application to any *beneficial* interest which the trustee or mortgagee may have in the property so vested in him, such interest being made recoverable in the same manner as if the act had not been passed.

(*h*) See 13 & 14 Vict. c. 60, s. 2, containing the interpretation of the word *land*, for the purposes of that statute.

(*i*) See same section as to the word *stock*, et vide 18 & 19 Vict. c. 91, s. 10.

(*k*) See same section as to the word *mortgage*.

In conclusion of the chapter we may remark, that even where an escheat has actually taken place, its consequences are now frequently remitted, where the crown is the party entitled to take the benefit. For by modern acts of parliament, in all cases where a title has accrued to the crown by escheat for want of heirs, or by reason of any forfeiture, the sovereign is empowered, (notwithstanding the statute which has restrained the alienation of the royal demesnes in general to leases for thirty-one years (*l*),) to make grants to any person or persons, for the purpose of restoring the land to the family of the former owner, or carrying into effect any grant, conveyance, or devise of it, that he may have intended to make (*m*).

(*l*) 1 Anne, stat. 1, c. 7, s. 5. See 48 Geo. 3, c. 73, s. 3.

(*m*) Vide 39 & 40 Geo. 3, c. 88. s. 12; 47 Geo. 3, sess. 2, c. 24; 59 Geo. 3, c. 94; 6 Geo. 4, c. 17.

CHAPTER XIII.

OF TITLE BY OCCUPANCY.

[OCCUPANCY is the taking possession of those things which before belonged to nobody. This, as we have seen (*a*), is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But when once it was agreed that everything capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating anything 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 (*b*), *quod nullius est, id ratione naturali occupanti conceditur.*

This right of occupancy, so far as it concerns real property (for of personal chattels we do not in this place 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 autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died] (without alienation), [during the life of *cestui que vie*, or him by whose life it was holden: in this case, he that

(*a*) Vide sup. p. 152.

(*b*) Ff. 41, l. 3.

[could first enter on the land might lawfully retain the possession so long as *cestui que vie* lived, by right of occupancy (*c*).

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 (*d*) was supposed so to do, for he had parted with all his interest so long as *cestui 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 *hæreditas 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 *cestui que vie*, under the name of an occupant.] But if [the estate *pur autre vie* had been granted to a man *and his heirs* during the life of *cestui que vie*,] and the grantee died without alienation, and while the life for which he held continued, there could not be a title by common occupancy, but the heir would succeed, and was called a *special* occupant (*e*). And so the law continues to this day, in the absence of any alienation during the life of the grantee or any devise by him, (for such an estate as we

(*c*) Co. Litt. 41 b. As to title by occupancy, vide Geary *v.* Bearcroft, Carter, 59; Vaughan, 187.

(*d*) Bract. l. 2, c. 9; l. 4, tr. 3, c. 9, s. 4; Flet. l. 3, c. 12, s. 6; l. 5, c. 5, s. 15.

(*e*) As to the case where an estate *pur autre vie* is granted to a man and "his executors, administrators, and "assigns," and the right in which the executor, &c. in that case takes, vide Westfaling *v.* Westfaling. 3 Atk. 460; Williams *v.* Jekyl, 2 Ves. sen. 683; Ripley *v.* Waterworth, 7 Ves. 425; Fitzroy *v.* Howard, 3 Russ. 230. As to the grant of it to heirs and executors, Atkinson *v.* Baker, 3 T. R. 229; Carpenter *v.* Dunsmure, 3 Ell. & Bl. 918.

shall presently see is now devisable);—the heir succeeding, according to the doctrine most commonly received, in virtue of a special exclusive right by the terms of the original grant to enter upon and occupy the land during the residue of the estate granted; for as there is no estate of inheritance, he cannot, properly speaking, take by descent. But by other authorities the heir (though termed a special occupant) does in reality take by descent, and his estate, though not a fee, is a descendible freehold (*f*).

An estate *pur autre vie* may be granted, not only to a man and his heirs, but to a man and the heirs of his body; and this is termed a *quasi entail;* the interest so granted not being properly an estate tail (for the statute *De donis* applies only where the subject of the entail is an estate of inheritance (*g*)); but yet so far in the nature of an estate tail, that it will go to the heir of the body as special occupant during the life of *cestui que vie,* in the same manner as an estate of inheritance would descend, if limited to the grantee and the heirs of his body. And such estate may be also granted with a remainder thereon during the life of *cestui que vie:* but the alienation of the *quasi* tenant in tail will bar not only his issue but those in remainder; and the alienation for that purpose (unlike that of an estate tail properly so called) may be effected by *any* method of conveyance (*h*) *inter vivos* (*i*).

The title of *common* occupancy in an estate *pur autre vie,* is now in effect annihilated by successive provisions of the legislature. For by the statute of frauds 29 Car. II. c. 3, 14 Geo. II. c. 20, and 7 Will. IV. & 1 Vict. c. 26, such

(*f*) See Vaughan, 201; Doe *v.* Martin, 2 W. Bl. 1150; Doe *v.* Luxton, 6 T. R. 291; Bearpark *v.* Hutchinson, 7 Bing. 188; Carpenter *v.* Dunsmure,, 3 Ell. & Bl. 918.

(*g*) Co. Litt. by Harg. 20 a, n. (5).

(*h*) See 3 Cox, P. Wms. 265, n. (*i*); Norton *v.* Frecker, 1 Atk. 524; Grey *v.* Mannock, 2 Eden, 339; Osbrey *v.* Bury, 1 Ball & B. 53.

(*i*) See Doe *v.* Luxton, 6 T. R. 289; Campbell *v.* Sands, 1 Sch. & Lef. 294; Dillon *v.* Dillon, 2 Ball & B. 77; Hopkins *v.* Ramadge, 1 Batty, 365.

an estate (except, as it would seem, in the case of a quasi entail) is rendered devisable by will (*k*); and when no disposition of it has been made by the deceased owner, and there is no special occupant, it is placed, on the death of the owner, on the same footing with his personal estate. The statute last mentioned, after repealing the former provisions, except as to the estates *pur autre vie* of persons dying before 1st January, 1838 (*l*),) provides (in terms somewhat more extensive than the prior enactments), that an estate *pur autre vie*, of whatever tenure (*m*), and whether it be a corporeal or incorporeal hereditament, may be devised by last will and testament; and that if no disposition by will be made of an estate *pur autre vie* of a freehold nature, it shall be chargeable in the hands of the heir, if it comes to him by reason of special occupancy, as assets by descent (*n*) (as in the case of freehold land in fee simple); and in case there shall be no special occupant of any estate *pur autre vie*, it shall go to the executor or administrator of the party that had the estate by virtue of the grant; and, in every case where it comes to the hands of such personal representative, shall be assets in his hands, to be applied and distributed in the same manner as personal estate (*n*).

It is only in an estate *pur autre vie* (as already remarked), that our law affords any example of the acquisition of land (*o*) by occupancy. It is difficult at least to put any other instance wherein there is not some owner of the land appointed by the law (*p*). [In the case of a sole

(*k*) It seems not to have been devisable previously, 1 Powell, Dev. 34. As to the effect of the two first statutes mentioned in the text, vide Co. Litt. by Harg. 41 b, n. (5); Doe *v.* Robinson, 8 Barn. & Cress. 296; Doe *d.* Lewis *v.* Lewis, 9 Mee. & W. 662.

(*l*) 7 Will. 4 & 1 Vict. c. 26, ss. 2, 34.

(*m*) The earlier statutes did not apply to copyholds, Zouch *v.* Forse, 7 East, 186.

(*n*) As to assets, vide sup. p. 426.

(*o*) As to the title by occupancy in regard to *watercourses* and *lights*, vide post, bk. II. pt. I. c. XXIII.

(*p*) 2 Bl. Com. p. 261.

[corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential,* ownership subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And in all other instances where the tenant dies intestate, and no other owner of the lands is to be found in the common course of descent, there the law vests an ownership in the crown, 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.] Thus, [in case a new island rise in the *sea*, though the civil law gives it to the first occupant (*p*), yet ours gives it to the sovereign (*q*). And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma;* 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 land immediately behind, for *de minimis non curat lex.* But if the alluvion or dereliction be sudden and considerable, in this case it belongs *de jure communi* to the crown; for the soil, when the sea flowed over it, was *primâ facie* the crown's property (*r*), and therefore ought

(*p*) Inst. 2, 1, 22.

(*q*) Hale, *de Jure Maris*, 17; Callis of Sewers, 45, 2nd edit. The treatise of Hale, *de Jure Maris*, was published by Mr. Hargrave, and has been generally received as a work of Lord Hale, but doubt is thrown on this point in a learned argument of Mr. Serjeant Merewether, in Attorney-General *v.* Mayor, &c. of London, before the Court of Chancery.

(*r*) Hale, *de Jure Maris*, p. 14; see Blundell *v.* Catterall, 5 B. & Ald. 268.

to remain so, though no longer covered by the sea (*s*). And upon the same principle, a sudden inundation from the sea will not deprive the former owner, of the land submerged, of his right (*t*): though, on the other hand, it has been decided, that where the sea gains upon the land by gradual advance, (the crown being the owner between high and low water-mark,) the crown becomes also the owner of the land newly covered with water (*u*). It is said too by Bracton, [that if an island rise 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 (*x*).] 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 (*y*),—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.] It is further laid down in our books, that [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, his

(*s*) 2 Bl. Com. 262; see Hale, *de Jure Maris*, p. 14; 2 Roll. Ab. 170; Dyer, 326; Callis, 51, 53; Rex *v.* Lord Harborough, 3 Barn. & Cress. 91; 5 Bing. 163; Scratton *v.* Brown, 4 Barn. & Cress. 505; Duke of Beaufort *v.* Mayor, &c. of Swansea, 3 Exch. 413. It is to be observed, however, that in Hale, *de Jure*, &c. p. 17, it is laid down that the king may grant a manor *cum littore maris* to a subject, and that the shore (that is, the space between the ordinary high and low water-mark, ibid. p. 12) will pass; and it would seem that after such a grant, a sudden increase of land by alluvion or dereliction, within these limits, must belong to the grantee.

(*t*) Hale, *de Jure*, &c., pp. 15, 17.

(*u*) In re Hull and Selby Railway, 5 Mee. & W. 327.

(*x*) Bract. lib. 2, c. 2.

(*y*) Smith *v.* Kemp, Salk. 637.

land will not be lost (z). [And this law of alluvions and derelictions, with regard to rivers, is nearly the same in the imperial law (a), from whence indeed those our determinations seem to have been drawn and adopted; but we ourselves, as islanders, have applied them to *marine* increases.]

(z) Callis, 51, 2nd edit. In Blackstone the statement on this subject is, that "he shall have what the river has left in any other place;" but this seems not to be supported by the authorities.

(a) 2 Inst. 1, 20, 21, 22, 23, 24.

CHAPTER XIV.

OF TITLE BY FORFEITURE.

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

Lands may be forfeited by various means; some of which it will not be convenient to discuss in this place, as they are incidental only to subjects of a more general description, belonging to other divisions of the work. But there are three kinds of forfeiture which require a distinct and separate consideration, and to which the present chapter will consequently be devoted. The first of them accrues by alienation in mortmain; the second, by the wrongful alienation of particular tenants; the third, by wrongful disclaimer.

1. [Alienation in *mortmain*, *in mortuâ manu*, is an alienation of lands or tenements to any corporation (*a*),—sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one "dead hand," this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain; in deducing the history of which statutes, it will be matter of curiosity

(*a*) Co. Litt. 2 b. As to corporations, vide sup. pp. 356, 360, 373; post, bk. IV. pt. III. c. I.

[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, obtained a decisive victory.]

By the common law, a corporation is as capable of purchasing lands as an individual (*b*);—subject to this distinction, that persons corporate take the fee to hold to their *successors*, instead of their *heirs*. Yet [it was always, and is still, necessary for corporations to have a licence in mortmain from the crown, to enable them to] become the holders of [lands (*c*): for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants that can never be attainted or die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest (*d*). 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 lands so aliened in mortmain, as a forfeiture.] Yet [such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses] without licence [happened within less than two centuries after the Conquest.] But, when these [began to grow numerous, it was observed that the feudal services, or-

(*b*) Case of Sutton's Hospital, 10 Rep. 30; Co. Litt. 2 b.

(*c*) F. N. B. 221. It should be observed, however, as to the antiquity of the principle, that a doubt is expressed by a writer of great authority, whether before Magna Charta, any restraint was put by the common law upon alienations in mortmain: see Hallam's Middle Ages, vol. ii. p. 321, 7th edit.

(*d*) Selden, Jan. Angl. l. 2, s. 45.

[dained for the defence of the kingdom, were every day visibly withdrawn; and that the lords were curtailed of the fruits of their seigniories,—their escheats, wardships, reliefs, and the like: and therefore in order to prevent this (*e*), it was ordered by the second of King Henry the third's great charters (*f*), and afterwards by that printed in our common statute books, that all such gifts should be void, and the land forfeited to the lord of the fee (*g*).

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 (*h*), in this were to be commended, that they ever had of their council the best learned men that they could get—found many means to creep out of this statute, by buying in lands that were 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 became 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 a 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,

(*e*) Blackstone enumerates, as another of the mischiefs, the prevention of which was designed, "that "the circulation of landed property "from man to man began to stag-"nate."—2 Bl. Com. 269. Lord Coke, however, in 2 Inst. 75, lays it down (in conformity with the language of the statute *De Religiosis*), that the causes of the law were two, viz. that the services for defence of the realm were withdrawn, and that the lords lost their escheats and the like; et vide Co. Litt. 2 b. Though the holding of lands in mortmain naturally tended to restrain alienation, this does not appear to have formed one of the reasons on which the policy of the law of mortmain was originally founded.

(*f*) A.D. 1217, c. 43, edit. Oxon.

(*g*) Mag. Chart. 9 Hen. 3, c. 36. It is laid down by Lord Coke that the prohibition extended as well to the case where the religious house *kept* the land so conveyed, as where they *gave it back* to hold of themselves; 2 Inst. 74.

(*h*) 2 Inst. 75.

[or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land which it was intended they should have, and to bring an action to recover it against the tenant, who, by fraud and collusion, made no defence, and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right which afterwards became the great assurance of the kingdom, under the name of *common recoveries* (*i*). 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 (*k*), 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 subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord (*l*), a proviso was inserted (*m*) that this should not extend to authorize any kind of alienation in mortmain. And when

(*i*) Vide sup. p. 250; post, bk. II. pt. I. c. XIX; 2 Reeves's Hist. Eng. Law, p. 155.

(*k*) 13 Edw. 1, c. 33.

(*l*) 2 Inst. 501.

(*m*) 18 Edw. 1, c. 3.

[afterwards the method of obtaining the king's licence by writ of *ad quod damnum*] was recognized (*n*) [by the statute 27 Edw. I. stat. 2, it was further provided by statute 34 Edw. I. stat. 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 lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestui 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 (*o*), 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 Rich. 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 churchyards, 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

(*n*) The expression of Blackstone is, "marked out," but it has been justly observed, that the statute itself mentions the proceeding as a thing "accustomed;" 2 Bl. Com. by Hovenden, p. 271, (n). As to the nature of the proceeding, vide Reeves's Hist. Eng. Law, vol. ii. p. 230.

(*o*) Vide sup. p. 356.

[to be within the mischief, and of course within the remedy provided.]

The policy of these statutes prohibitory of alienation in mortmain, was afterwards considered as fit to be extended, also, to the case where lands, though not conveyed to corporate bodies, were given on trust for parish churches, or other institutions "erected and made of devotion;"—for the trustees to carry such uses into effect being generally numerous, and the land belonging, on the decease of each trustee, to the survivors, these gifts operated like gifts in mortmain, properly so called, to the diminution of descents, with their attendant feudal perquisites, and, for the same reason, to that of escheats (*p*). It was consequently declared by the statute 23 Henry VIII. c. 10, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, should be void (*q*).

As to the prohibition, however, to aliene to bodies corporate, it is to be observed, that [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. stat. 3, c. 3. But as doubts were conceived at the time of the Revolution how far such licence was

(*p*) See the preamble of 23 Hen. 8, c. 10, and the argument in Porter's case, 1 Rep. 23 b. The protection of the feudal rights, however, was probably not the only object. "As the age became enlightened" (remarks an useful writer), "gifts "of this kind were viewed with a "less favourable eye. These senti-"ments, concurring with the designs "of the enterprising prince upon the "throne, contributed towards the ge-"neral attack which was soon after-"wards made on one branch of such "institutions" (those erected for devotion), "the religious houses."—Reeves's Hist. Eng. Law, vol. iv. p. 237.

(*q*) On the subject of superstitious uses, see also 1 Edw. 6, c. 14; Porter's case, 1 Rep. 22 b; Adams and Lambert's case, 4 Rep. 104; Da Costa *v.* De Pas, Ambl. 228; Bac. Ab. Char. Us. (D.)

[valid (*r*),—since the king had no power to dispense with the statutes of mortmain by a clause of *non obstante* (*s*), which was the usual course, though it seems to have been unnecessary (*t*),—and as, by the gradual declension of mesne seigniories through the long operation of the statute of *Quia emptores*, the rights of immediate lords were reduced to a very small compass,—it was therefore provided by the statute 7 & 8 Will. III. c. 37, that the crown for the future, at its own discretion, may grant licences to aliene or take in mortmain, of whomsoever the tenements may be holden (*u*).]

Nor is this the only relaxation that has taken place in the law of mortmain; [for after the dissolution of monasteries under Henry the eighth, 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 Ph. & 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, under the influence of much more commendable views, it was enacted, by 17 Car. II. c. 3 (*x*), and by many subsequent Acts (among which may be particularized 43 Geo. III. c. 108, 55 Geo. III. c. 147, 3 & 4 Vict. c. 60, 6 & 7 Vict. c. 37, s. 22, 17 & 18 Vict. c. 84, and 19 & 20 Vict. c. 104, s. 23,) that augmentations of poor livings may be made in such manner as therein provided, free from the restrictions of the statutes of mortmain; and upon the same principle,

(*r*) 2 Hawk. P. C. 391; vide Co. Litt. by Harg. 99 a, n. (1).

(*s*) Stat. 1 W. & M. stat. 2, c. 2.

(*t*) Co. Litt. 99 a.

(*u*) Since this statute "the writ "of *ad quod damnum* seems no longer "necessary." —Coleridge's Blackstone, vol. ii. p. 273, n. (2); et vide Co. Litt. by Harg. 99 a, n. (1).

(*x*) By 1 & 2 Vict. c. 106, s. 15, the statute of 17 Car. 2, c. 3, was repealed *in toto;* but it is revived, so far as this subject is concerned, by 6 & 7 Vict. c. 37, s. 25.

provisions have been likewise made relaxing the laws of mortmain, in favour of the governors of Queen Anne's bounty (*z*); and grants of land are permitted to be made to corporate bodies, for several purposes connected with the education of the poor, and with charities in general (*a*).

[It hath also been held (*b*), 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 notwithstanding that statute, for the maintenance of a school, or the sustenance of poor people, or any other *charitable* uses (*c*). [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,] to the disherison of their lawful heirs (*d*); it is therefore enacted by the statute 9 Geo. II. c. 36 (*e*), that no lands or tenements, or money to be laid out in the purchase thereof, shall be given or conveyed, or anyways charged or incumbered, in trust for, or for the benefit of, any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar

(*z*) 2 & 3 Ann. c. 11. As to Queen Anne's bounty, vide post, bk. IV. pt. I. c. VII.

(*a*) Among the Acts on this subject are 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37, as to sites for schools, &c.; and 16 & 17 Vict. c. 137, s. 27; and 18 & 19 Vict. c. 124, s. 41, as to the purchase, by the incorporated trustees of any charity, of land, for house, garden, playground, or appurtenances, for the purposes of the charity.

(*b*) Porter's case, 1 Rep. 24.

(*c*) As to charitable uses, vide 43 Eliz. c. 4; 52 Geo. 3, c. 101; Bac. Ab. Char. Us.; British Museum *v.* White, 2 Sim. & Stu. 596; Da Costa *v.* De Pas, Ambl. 228; Attorney-General *v.* Cock, 2 Ves. sen. 273.

(*d*) As to the objects of the act, see the remarks in Attorney-General *v.* Stewart, 2 Meriv. 161; Doe *v.* Lloyd, 5 Bing. N. C. 741.

(*e*) See the following cases which have arisen under this statute (often called, though without much propriety, the Mortmain Act): Doe *v.* Copestake, 6 East, 328; Wright *v.* Smythies, 10 East, 409; Doe *v.* Pitcher, 3 M. & S. 410; Doe *v.* Hawthorn, 2 Barn. & Ald. 96; Doe *v.* Wrighte, ibid. 710; Doe *v.* Howells, ibid. 744; Doe *v.* Waterton, 3 Barn. & Ald. 149; Doe *v.* Lloyd, 5 Bing. N. C. 741; Doe *v.* Munro, 12 Mee. & W. 845; Doe *v.* Harris, 16 Mee. & W. 517; Doe *v.* Hawkins, 2 Q. B. 212; Young *v.* Grove, 4 C. B. 668; Trye *v.* Corporation of Gloucester, 21. L. J. (Ch.) 81.

months before the death of the donor, and enrolled in the Court of Chancery, within six calendar months after its execution; and unless such gift be made to take effect immediately, and be without power of revocation, or other clause for the benefit of the donor, or those claiming under him (*f*).

Where any conveyance is made contrary to the provisions of the act last mentioned, not only is the charitable use inoperative, but the conveyance itself is void to all intents and purposes (*g*). Its provisions, however, are subject to partial exception in the case of stock in the public funds to be laid out in the purchase of lands, tenements or hereditaments, on charitable uses, as to which the statute, instead of a deed executed twelve months before the donor's death, requires that the transfer in the bank books should be made six calendar months at least before his death. There is also an exception in the case of all conveyances by way of *bonâ fide* purchase, and where a full valuable consideration is paid down at the time; for such purchases will be valid, notwithstanding the death of the vendor within twelve months after the execution of the deed (*h*). The universities of Cambridge and Oxford, their colleges, and the scholars on the foundation of Eton, Winchester, and Westminster, are also entirely exempted from the operation of the act; and a similar exemption has been since extended, by 5 Geo IV. c. 39, to the British Museum.

2. Alienations by *particular tenants*, when they conveyed by a common law conveyance, such as feoffment, fine, or recovery, a greater estate than the law entitled them to make, were, at common law, forfeitures to the person in

(*f*) The reader will not fail to observe that the wording of this enactment makes it impossible to give lands for charitable uses *by will*. See Walker *v.* Richardson, 2 Mee. & W. 882; Attorney-General *v.* Glyn, 12 Sim. 84.

(*g*) Doe *v.* Wrighte, 2 Barn. & Ald. 710.

(*h*) As to this exception, see 9 Geo. 4, c. 85.

immediate remainder or reversion (*l*). As if tenant for his own life aliened by feoffment 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 was not only beyond his power, and inconsistent with the nature of his interest, but was also a forfeiture of his own particular estate, to him in remainder or reversion, who was entitled to enter immediately (*m*). For which the reason seems to be, that the tenant, by thus taking upon himself to assert a more extensive right than he derived from the lord of the fee, violated the feudal compact (which bound him to fidelity), and consequently no longer deserved to retain its benefit (*n*). He had therefore by his own act determined,

(*l*) Co. Litt. 251; vide sup. pp. 316, 324. According to Blackstone, vol. ii. p. 274, "the forfeiture accrues "when the alienations are greater "than the law entitles them to make, "and *divest the remainder or rever-* "*sion.*" which is also the expression of Lord Coke, Co. Litt. 251 a. But where the reversion or remainder is in the crown, it is not divested, and yet a forfeiture equally accrued; Co. Litt. 251 b. So the levying of a fine in fee, by the particular tenant, of a thing lying in grant, used to work a forfeiture; and yet it did not divest the remainder or reversion; ibid. Et vide Podger's case, 9 Rep. 106 b.

(*m*) Bl. Com. vol. ii. p. 274, cites Litt. s. 415.

(*n*) Vide sup. pp. 173, 177, 298; et Gilb. Ten. 38, 39, where, after observing that if the vassal renounced the feud this was always a cause of forfeiture by the old feudal law, the learned author proceeds to remark, that "if the tenant for life makes "a feoffment, or levies a fine, it is "palpably contrary to his oath of "fidelity to the reversioner, and "therefore that is a plain renuncia-"tion of the feud." The statement of Blackstone on this subject is, that there seem to be *two* reasons for the forfeiture. "First, because such "alienation amounts to a renuncia-"tion of the feudal connection and "dependence; it implies a refusal "to perform the due renders and "services to the lord of the fee, of "which fealty is constantly one; and "it tends in its consequence to de-"feat and divest the remainder or "reversion expectant: as therefore "that is put in jeopardy, by such act "of the particular tenant, it is but "just that, upon discovery, the par-"ticular estate should be forfeited "and taken from him, who has shown "so manifest an inclination to make "an improper use of it. The "other reason is, because the par-"ticular 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."—2 Bl. Com. 274.

and put an entire end to, his own original interest; and, on such determination, the next taker was entitled to enter regularly, as in his remainder or reversion. The same law which is thus laid down with regard to tenants for life, held also with respect to lessees and other tenants of mere chattel interests; but if tenant in tail aliened in fee, this was no immediate forfeiture to the remainder-man, but a mere *discontinuance* (as it was called (*o*)) of the estate-tail, which the issue might afterwards avoid by one of the class of actions called *real*; or after the abolition of real actions, simply by entry (*p*): [for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct.] This kind of forfeiture, viz. by alienation contrary to law, differed materially, it is to be observed, from forfeiture by breach of condition in deed, to which we had occasion to refer in a former chapter; for in that case the reversioner is *in* as of his former seisin (*q*); and consequently not only the estate of the tenant himself, but all interests derived out of it (even though derived before the forfeiture) are defeated (*r*); but in case of such forfeitures by particular tenants, all legal estates by them before created, (as if tenant for twenty years granted a lease for fifteen,) and all charges by them lawfully made on the land, were good and available in law. The whole subject, however, of forfeiture by alienation has now lost much of its former importance, in consequence of changes in the state of the law relative to the chief conveyances by which this doctrine of the common law was brought into operation; viz. the abolition of fines and re-

(*o*) Co. Litt. 328 a; 2 Inst. 335; Co. Litt. by Butler, 333 a, n. (1).

(*p*) A *discontinuance* formerly took away the right of entry, and put the issue, and those in reversion and remainder, to the necessity of bringing a real action; Litt. ss. 595, 596, 597; Doe *v.* Finch, 1 Nev. & M. 130. But now, by the 39th sect. of the 3 & 4 Will. 4, c. 27, (abolishing real actions,) no discontinuance shall take away any right of entry.

(*q*) Vide sup. p. 301.

(*r*) Gilb. Ten. 200; Dy. 344 a; 4 Rep. 24 a; Co. Litt. 234 a; 1 Rol. Ab. 474.

coveries by 3 & 4 Will. IV. c. 74, and the provision of 8 & 9 Vict. c. 106, s. 4, formerly noticed, "that a feoffment "made after 1st of October, 1845, shall not have any "tortious operation (*s*)."

3. Analogous [both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer:* as where a tenant, who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure, in any court of record, is a forfeiture of the lands to the lord (*t*), upon reasons most apparently feudal. And so likewise, if in any court of record, the particular tenant does any act which amounts to a virtual disclaimer,]—as if, being tenant for life, he claims a fee (*u*),—such behaviour amounts to a forfeiture of his particular estate.

And in reference, as it would seem, to the general principle on which both this head of forfeiture and the last are founded, (viz. the obligation of fealty due from the tenant to the reversioner,) it has been held that where a tenant for term of years deserted the premises, and afterwards delivered up the possession of them, with the lease, to a third party, who claimed by title paramount to the landlord, with intent to assist that party in setting up the adverse title, the termor forfeited, under those circumstances, his own estate for years (*x*).

(*s*) Vide sup. p. 316.
(*t*) Finch, 270, 271.
(*u*) Co. Litt. 251 b.
(*x*) Doe *d.* Ellerbrook *v.* Flynn, 4 Tyrw. 619. Vide Doe *d.* Graves *v.* Wells, 10 Ad. & Ell. 427.

CHAPTER XV.

OF TITLE BY ALIENATION IN GENERAL.

THE most usual title to real estates is that of alienation or conveyance (*a*): [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 (*b*), 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.] And as the feudatory [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 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 (*c*). And therefore it was usual in very antient feoffments, to express that the

(*a*) As to title by alienation, vide Co. Litt. 118 b; and for the early state of the law as to the power of alienation, Wild's case, 6 Rep. 17.

(*b*) Vide supra, p. 179.

(*c*) Co. Litt. 94 b; Wright, Ten. 169.

[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 (*d*). And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his seigniory without the consent of his vassal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprised of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighbouring clan (*e*). This consent of the vassal was expressed by what was called *attorning* (*f*), or professing to become the tenant of the new lord (*g*): which doctrine of attornment was afterwards extended to all lessees for life or years,] between whom and the lessor there still exists (as we have seen) the feudal relation of lord and tenant (*h*). [For if one bought an estate with

(*d*) Madox, Formul. Angl. Nos. 316, 319, 427.

(*e*) Gilb. Ten. 83.

(*f*) The same doctrine and the same denomination prevailed in Bretagne—"*possessiones in jurisdictionalibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vasallus, ejurato prioris domini obsequio et fide, novo se sacramento, novo item domino acquirenti obstringebat; idque jussu auctoris.*"—D'Argentre, Antiq. Consuet. Brit. apud Dufresne, i. 819, 820.

(*g*) As to attornment, vide Co. Litt. 309 a—325 a; Harris *v.* Booker, 4 Bing. 99; Birch *v.* Wright, 1 T. R. 378; Doe *v.* Boulter, 6 Ad. & El. 675; Brown *v.* Storey, 1 Man. & G. 128, where see the note of the learned reporters.

(*h*) Vide sup. pp. 257, 296. It is to be observed, however, that the attornment of the particular tenant was as necessary upon the grant of a *remainder*, as a *reversion*; and yet there is no feudal tenure between the particular tenant and the remainder-man. The reasons assigned for this are, 1st, that the remainder-man came in by the feudal feoffment, and therefore the remainder would not pass without the utmost notoriety; and this was by attornment *coram paribus*, to which such notoriety was attributed, that the feudal feoffment could not be altered without it; 2nd, because the action of waste, and the right of forfeiture of tenant for life accrued to him in remainder; and therefore, the tenant for life being to some purposes at-

[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 (*i*): which was also an additional clog upon alienations.

But by degrees this feudal severity is worn off; and experience hath shown that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared, in the first place, by a law of King Henry the first, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power, than over what had been transmitted to him in a course of descent from his ancestors (*k*); a doctrine which is countenanced by the feudal constitutions themselves (*l*); but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate (*m*). Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by name: but if his *assigns* were not specified in the purchase deed, he was not empowered to aliene (*n*); and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir (*o*). By the great charter of Henry the third (*p*),] no alienation was permitted of any part of the land, [unless sufficient was

tendant on the remainder-man, it was fit that he should attorn to his grant.—Gilb. Ten. 90, 91.

(*i*) Litt. § 551.

(*k*) "*Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam.*"—Wilkins, Leg. Anglo-Sax. LL. Hen. 1, c. 70.

(*l*) Feud. l. 2, t. 39.

(*m*) "*Si questum tantum habuerit is, qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum hæredem exhæredare.*"—Glanv. l. 7, c. 1.

(*n*) Mirr. c. 1, s. 3. This is also borrowed from the feudal law. Feud. l. 2, t. 48.

(*o*) Mirr. ibid.

(*p*) 9 Hen. 3, c. 32.

[left to answer the services due to the superior lord; which sufficiency was probably interpreted to be one-half or moiety of the land (*q*). But these restrictions were in general removed by the statute of *Quia emptores* (*r*), whereby all persons except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion (*s*):] subject only to the provision that all conveyances of the fee should be to hold of the chief lord, and not of the grantor (*t*). [And even these tenants *in capite* were by the statute 1 Edw. III. c. 12, permitted to aliene on paying a fine to the king (*t*). 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 aliene 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.] The restraint of *devising* lands by will, (except in some cases by particular custom,) after being partially taken off by the statute of wills, 32 Hen. VIII. c. 1, was at length totally removed, on the abolition of military tenures by the statute of Charles just mentioned. [The doctrine of *attornments* continued later than any of the rest, and became extremely troublesome, though many methods were invented to evade them (*u*); till at last they were by statute 4 & 5 Anne, c. 16, made no longer necessary to complete the grant or conveyance; 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.]

The result of these several relaxations has at length been the complete disengagement of the realty from all the feudal

(*q*) Dalrymple of Feuds, 95.

(*r*) 18 Edw. 1, c. 1.

(*s*) Vide sup. pp. 200, 210.

(*t*) 2 Inst. 67.

(*u*) "The Statute of Uses and the "Statute of Wills," (of which hereafter,) "in all cases in which they "applied, 'made attornments unne-"cessary."—Coleridge's Blackstone, vol. ii. p. 290, n. (3).

restraints on alienation;—so that it may be laid down as a general maxim, subject to very few exceptions, that all estates in land are now freely transferable, unless granted under express stipulation to the contrary. And even such stipulations are in some instances inefficacious to the end designed. For if there be a conveyance in fee simple, with condition prohibiting the grantee and his heirs, or the grantee himself, from all alienation, the condition is merely void (*x*); and a similar proviso annexed to an estate tail, will not prevent the tenant from making a valid conveyance in fee simple, in such method as the law has prescribed for that purpose (*y*). So upon a conveyance of an estate for years, or any other chattel real or personal,—provided it be the whole interest of the grantor, and he retains no reversion (*z*),—a condition restraining the grantee from all alienation is invalid. But upon all conveyances, a partial restraint of the grantee from alienation (as to a particular person only) is allowed (*a*); and so is a limitation by way of use, or a devise, that, in the event of the grantee attempting to make any alienation of the land, it shall go over to another person (*b*). Estates at will, or at sufferance,

(*x*) Co. Litt. 222 b, 223 a.

(*y*) Ibid. 223 b; Mary Portington's case, 10 Rep. 35. Such a condition, however, if annexed to a lease for years, is binding; Co. Litt. 223 b; Roe *v.* Galliers, 2 T. R. 133. The reason assigned in Co. Litt. for the invalidity of a condition restraining a tenant in fee simple or fee tail from any alienation whatever, is the repugnancy of such a restriction to the nature of the gift. A condition, however, restraining him and his *heirs* from alienation, is also opposed to that policy of the law which will not suffer any attempt to create a *perpetuity*, that is, to confine property in a given course of devolution *in perpetuum*;—a subject on which we shall have occasion to say more hereafter. It is to conditions restraining tenants in tail from alienation, that the term "perpetuity" seems to have been first applied.—See Third Real Property Report, p. 30.

(*z*) Co. Litt. 223 a, 223 b.

(*a*) Shep. Touch. 126; Doe *v.* Pearson, 6 East, 173.

(*b*) Brandon *v.* Robinson, 18 Ves. 433; Woodmaston *v.* Walker, 2 Russ. & Mylne, 197; Watk. Conv. 8th edit. 413, in notis. As to clauses in *restraint of anticipation*, in settlements on married women, see Parkes *v.* White, 11 Ves. 221; Jackson *v.* Hobhouse, 2 Mer. 483; 19 & 20 Vict. c. 120, s. 37.

also are, for reasons obviously resulting from their nature and constitution, not assignable. And besides these, there were, at the common law, some other interests which generally speaking, were incapable of transfer. For a man who had been ousted of the possession of his land by the wrongful act of a stranger, so as to retain a *right of entry* only, could not in general convey that right to another, [lest pretended titles might be granted to great men, whereby justice might be trodden down and the weak oppressed (*c*).] And the same law was established with respect to a *contingent* interest (*d*); as to which, however, this further doctrine obtained, that though not generally transferable at law, yet the assignment of it for a valuable consideration was considered as effectual in a court of equity (*e*). But by 7 Will. IV. & 1 Vict. c. 26, s. 3, both a right of entry and a contingent interest were made capable of passing by devise. And now by 8 & 9 Vict. c. 106, s. 6, these interests may also pass by deed;—it being provided, that after the 1st October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, and also a right of entry (*f*), whether immediate or future, and whether vested or contingent, in or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; with a saving, however, as to the regular modes of alienation of the interests of tenants in tail and married women,—which are still to be observed.

Having made these remarks on the subject of alienation

(*c*) 2 Bl. Com. 290.

(*d*) Forrester *v.* Goodright, 8 East, 552; Doe *v.* Tomkinson, 2 M. & Sel. 170; 7 Will. 4 & 1 Vict. c. 26, s. 3. As to the binding of a contingent interest by *estoppel*, vide Goodtitle *v.* Morse, 3 T. R. 371; Doe *d.* Martin, 5 Barn. & Cress. 527; Christmas *v.* Oliver, 10 Barn. & Cress. 181; Right *v.* Bucknell, 2 Barn. & Adol. 278; and the authorities mentioned post, 482, n. (*d*).

(*e*) 1 Prest. Est. 89; 1 Fonb. Tr. Eq. 213, 214.

(*f*) As to assigning a "right of entry" under this section, see Hunt *v.* Bishop, 8 Exch. 675; Hunt *v.* Remnant, 9 Exch. 635.

in general, we shall now proceed to inquire, first, [*who* may aliene, and to *whom*; and then, more largely, *how* a man may aliene, or the several modes of conveyance.]

1. [Who may aliene, and to whom: or, in other words, who is capable of conveying and who of purchasing,] the latter term being of course here used, not in its popular but in its technical sense (*g*). [And herein we must consider rather the incapacity, than capacity, of the several parties; for all persons are *primâ facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities.]

Until the late mitigation of the law of attainder, all persons *attainted* of treason or felony, though capable of *purchase*, were disabled to *hold*, as against the crown and the lord (*h*); [the lands so purchased, if after the attainder, being subject to immediate forfeiture; if before, to escheat as well as forfeiture, according to the nature of the crime (*i*).] They were also incapable of *conveying*, as against the crown and the lord: and that from the time of the offence committed, provided that attainder followed; for such conveyance by them might tend to defeat the king of his forfeiture, or the lord of his escheat (*k*). But as regards the present state of the law, these positions will now require qualification, being materially affected by the recent statutes, to which we had occasion to refer in our chapter on Title by Escheat (*l*).

In like manner [*corporations* (*m*), 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 (*n*).] As to their

(*g*) Vide sup. p. 383.

(*h*) Bullock *v.* Dodds, 2 B. & Ald. 275.

(*i*) Co. Litt. 2 b.

(*k*) Co. Litt. 42 b. But it seems that such conveyances would bind all persons except the king and the lord; Doe *v.* Pritchard, 5 B. & Adol. 782.

(*l*) Vide sup. p. 431.

(*m*) Vide sup. p. 356.

(*n*) See however the exceptions noticed sup. pp. 459, 460.

power of alienation, it was formerly more extensive than at present. For at the common law corporations in general might make estates at their pleasure, of any lands and tenements that they held in their corporate right (*o*); and though, as to ecclesiastical corporations sole, this power was somewhat restrained by the necessity of obtaining the confirmation of certain other parties to make the alienation binding on their successors, (as for example, in the case of a bishop, the confirmation of the dean and chapter); yet by the *enabling* statute of 32 Hen. VIII. c. 28 (which is still in force as far as this point is concerned (*p*),) even this restraint was removed as regards leases for not more than twenty-one years or three lives, granted by corporations sole who are seised in fee in right of their churches, (among whom however parsons and vicars are not included); it being provided, that such leases, though made without such concurrence as above mentioned, shall be binding on successors, if made in other respects in such form and under such conditions as the statute requires (*q*). But it was afterwards thought right, with a view to the protection of successors, to introduce enactments of a *disabling* kind in reference to ecclesiastical alienations; and therefore by 1 Eliz. c. 19, those made by archbishops or bishops (even *with* such confirmation as above mentioned), and by 13 Eliz. c. 10, those made by colleges, cathedrals, hospitals, parsons or vicars, or other holders of spiritual livings, are void if they exceed the term of twenty-one years or three lives from the making, or are not in such form and under such conditions as in those cases respectively required (*r*). On the other hand, however, there are particular objects (chiefly such as con-

(*o*) 2 Bl. Com. 318.

(*p*) This statute, which applied to other cases also, has been repealed generally by 19 & 20 Vict. c. 120, s. 35. But the repeal is subject to exception so far as relates to leases by persons having estates in right of their churches.

(*q*) 2 Bl. Com. pp. 319—324.

(*r*) See also the statutes 13 Eliz. c. 20; 14 Eliz. cc. 11, 14; 18 Eliz. cc. 6, 11; 39 Eliz. c. 5; 1 Jac. 1, c. 3; 21 Jac. 1, c. 1.

duce to the welfare of the church herself,) in favour of which these restrictions have been to a certain extent relaxed; and among the statutes passed with this view, may be particularly noticed 5 & 6 Vict. c. 27, c. 108; 13 & 14 Vict. c. 95; 14 & 15 Vict. c. 97, c. 104 (*s*); 17 & 18 Vict. c. 84, c. 112, s. 6, c. 116; 18 & 19 Vict. c. 124, s. 38; 19 & 20 Vict. c. 104, s. 4 (*t*). The powers of alienation belonging at common law to corporations have also been restrained in the case of such *lay* corporations as are called *municipal*, (viz. incorporated towns,)—which are disabled by 5 & 6 Will. IV. c. 76, s. 94, from selling or mortgaging any lands, tenements, or hereditaments (*u*), (and in general also from demising them for any term exceeding thirty-one years,) except in pursuance of some agreement entered into by the body corporate before 5th June, 1835. But by the same act, and by 6 & 7 Will. IV. c. 104, s. 2, it is provided, that any disposition of such lands, tenements, or hereditaments may nevertheless be made by the approbation of the lords of the treasury, or any three of them; and on such terms as they may think fit to approve (*v*). And as to lay corporations aggregate in general, they have a right (subject to the restraint thus imposed on such as are municipal) to aliene freely their lands of inheritance (*w*).

(*s*) Continued by 20 & 21 Vict. c. 74.

(*t*) A more particular account of the state of the law on ecclesiastical alienations will be found, post, bk. IV. pt. II. c. III.

(*u*) By 2 & 3 Will. 4, c. 69, s. 3, also, municipal corporations were restrained from selling lands, &c. to defray the expenses of parliamentary elections.

(*v*) See also 4 & 5 Vict. c. 38, s. 6; 5 & 6 Vict. c. 98; 8 & 9 Vict. c. 56; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49, enabling municipal corporations to mortgage lands for building or repairing prisons or court houses, and all corporations and persons under disability to sell and convey land to be used for borough prisons or court houses, or for sites of schools for the poor, &c., or to charge lands with the expenses of improvements by way of drainage. And as to the sale, by municipal corporations, of their church patronage, see 5 & 6 Will. 4, c. 76, s. 139; 6 & 7 Will. 4, c. 77, s. 26; c. 104, s. 3; 1 & 2 Vict. c. 31.

(*w*) Colchester *v.* Lowten, 1 Ves. & B. 226.

The conveyances of *idiots and insane persons* (except during a lucid interval) are also generally speaking, void (*x*). The *feoffments* however of insane persons are said not to be absolutely *void* but *voidable* only (*y*), owing to the solemnity of livery with which they are accompanied;—the practical difference between a void and a voidable transaction being chiefly this, that the former is a mere nullity, and therefore incapable of confirmation, but the latter may be either avoided or confirmed *ex post facto* (*z*). And it is also held, that though the feoffment of a *non compos* may during his life be avoided by the party legally authorized to act for him, or after his death, by his heir, or any other person interested (*a*), yet it cannot be avoided by the *non compos* himself, on the ground of his own past insanity; there being a maxim in the law, in regard to transactions merely voidable, that no man shall be allowed to stultify himself (*b*), that is, to plead his own unsoundness of mind in a court of justice. But this is a maxim which has no application where the transaction, (as is generally the case with the conveyances of idiots or lunatics,) is absolutely void (*c*). Such being the state of the law with respect to the conveyances of an insane person, it is laid down on the other hand, that he is competent to purchase, and also to retain what he purchases (*d*); but he cannot be compelled

(*x*) Thompson *v.* Leach, Comb. 468. As to idiots and insane persons, vide post, bk. II. pt. II. c. V.; bk. III. c. II.; bk. IV. pt. I. c. VI.; bk. IV. pt. III.; bk. VI. c. II. c. XXV.

(*y*) Thompson *v.* Leach, ubi sup.

(*z*) 2 Bl. Com. 293. See also Whelpdale's case, 5 Rep. 119; 2 Inst. 483; Moor, 43.

(*a*) 2 Bl. Com. 292.

(*b*) Ibid.; Beverley's case, 4 Rep. 123 b; Stroud *v.* Marshall, Cro. Eliz. 398; Sugd. Pow. 395, 2nd edit.

(*c*) 2 Bl. Com. 291; Yates *v.* Boen, 2 Stra. 1104; Beverley's case, ubi sup.; Sugd. ubi sup.; F. N. B. 202; Litt. s. 405; Jenk. 40; 3 Mod. 310; 1 Eq. Ca. Ab. 279. The reason of the distinction seems to be, that where the transaction was merely *voidable*, as in the case of a feoffment, the party, by the rules of pleading, could only have *avoided* it, by alleging specially *his own incapacity* at the time,—but where a deed was absolutely *void* (as in the case of insanity it generally was), he might treat it as a *nullity* by simply saying it was *not his deed.*

(*d*) Co. Litt. 3 b.

to retain it,—the transaction (if found to be disadvantageous to him) being liable to subsequent avoidance on the ground of his insanity (*e*).

The conveyances and purchases of *infants* (*f*) (that is, persons under twenty-one) are in general not void, but voidable (*g*); and that either by themselves in their lifetime, or by their representatives after their death, though their disposition by will is void altogether (*h*). But if the transaction, when voidable only, has been confirmed by the infant on his coming of age, it cannot afterwards be impeached by his representative (*i*). The case is similar with respect to persons who purchase or convey under *duress* (*k*); for they may either affirm or avoid the transaction whenever the duress has ceased (*l*).

[The case of a *married woman* (*m*) 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 (*n*). 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] ratification of the transaction (*o*). But all *conveyances* of her estate by a married woman (except as far as regards her equitable interest in land settled to her separate use) are

(*e*) 2 Bl. Com. 292; Sugd. Purch. vol. ii. p. 107, 9th edit. See Molton v. Camroux, 2 Exch. 487; Beavan v. Macdonnell, 9 Exch. 309; 10 Exch. 184, as to personal contracts with lunatics, supposed to be sane by those who deal with them.

(*f*) As to infants, vide post, bk. III. c. IV.; bk. VI. c. II.

(*g*) See Zouch v. Parsons, 3 Burr. 1794; Moor, 43; Baylis v. Dineley, 3 Mau. & Sel. 477; Gibbs v. Merrill, 3 Taunt. 307.

(*h*) 7 Will. 4 & 1 Vict. c. 26.

(*i*) 2 Bl. Com. 292; 2 Inst. 483; 5 Rep. 119.

(*k*) As to duress, vide sup. p. 140.

(*l*) 2 Inst. 483; 5 Rep. 119; 2 Bl. Com. 292.

(*m*) As to married women, vide post, bk. III. c. II.

(*n*) Co. Litt. 3 a.

(*o*) Ibid.

absolutely void (*p*), unless made in such particular method as the law has specifically appointed for that purpose. And this was formerly, for the most part (*q*), by fine or recovery; but by 3 & 4 Will. IV. c. 74, it is provided (*r*), that in lieu of these proceedings (which the act abolishes) her conveyance shall, after 31st December, 1833, be by deed *acknowledged* (upon being first examined apart from her husband) in such form as therein directed, and executed with the concurrence of her husband (*s*). And in this method she may now in general dispose of any estate which she either alone, or she and her husband in her right, may have in lands of any tenure (*t*). And by 8 & 9 Vict. c. 106, s. 7, it is moreover provided, that an estate or interest in any tenements or hereditaments in England, of any tenure, may be *disclaimed* by a married woman by deed; and every such deed shall be made conformably to the provisions of the act 3 & 4 Will. IV. c. 74, for abolishing fines and recoveries.

The case of an *alien born* (*u*) is also peculiar. For though he might always purchase any thing, yet after purchase he could, till very lately, [*hold* nothing except a lease for years of a house] for his habitation, in case he were an alien friend and merchant; [all other purchases (when found by an inquest of office) being immediately forfeited to the king;] to which, however, there was an exception, in the case where a lease of a dwelling-house or

(*p*) 2 Bl. Com. 293; Perk. s. 154; Gilb. L. Ev. 319; 1 Fonb. Eq. 103.

(*q*) In concurrence with her husband, however, she might also be a party to leases under the statute 32 Hen. 8, c. 28,—now repealed (except as to persons having estates *jure ecclesiæ*) by 19 & 20 Vict. c. 120, s. 38.

(*r*) 3 & 4 Will. 4, c. 74, s. 77.

(*s*) Sects. 77, 79, 91; and see 17 & 18 Vict. c. 75. As to this acknowledgment, see also the following cases:—Ex parte Ann Duffill, 6 M. & G. 378; In re Maria Pickersgill, 6 M. & G. 250; In re Way and Campbell, ibid. 1046; In re Sarah Woodcock, 1 C. B. 437; Jolly *v.* Handcock, 7 Exch. 820; Bancks *v.* Ollerton, 10 Exch. 168.

(*t*) Vide post, bk. II. pt. I. c. XIX.

(*u*) See the definition of an alien, sup. p. 134; and as to aliens and their disabilities generally, vide post, bk. IV. pt. I. c. II.; pt. II. c. II.

shop was made to an alien *artificer*; for this, by statute 32 Hen. VIII. c. 16, s. 13 (*v*), was altogether *void* (*w*). The state of the law however is now modified; for by 7 & 8 Vict. c. 66, s. 3, every person born out of her majesty's dominions of a mother being a natural-born subject (*x*), shall be capable of taking to him, his heirs, executors, or administrators, any estate, real or personal, by devise, or purchase, or inheritance, or succession; and by sect. 5, every alien residing in any part of the united kingdom, and being the subject of a friendly state, may take and hold any lands, houses or other tenements, for the purpose of residence or occupation by him or his servants, or for the purpose of any business,, trade or manufacture, for a term not exceeding twenty-one years, as fully as if he were a natural-born subject, except as to the right to vote at the election of members of parliament.

Having now considered the capacities of persons as alienors and alienees respectively, we may take occasion in connection with the first branch of the subject, viz., the capacity of *alienors*, to advert to the legislative provisions which have been made at various times to prevent the inconveniences apt to arise from the disability of parties (through insanity, infancy, coverture, or otherwise, as above explained,) to exercise such powers of alienation as would otherwise be incident to their estates. And here notice is, in the first place, due to a variety of statutes which, in respect of the alienation of estates generally considered, have empowered the Lord Chancellor, or committees, guardians and others acting under his authority, to execute instruments for lunatics or infants, where loss or disadvan-

(*v*) As to this statute, see Wootton *v.* Steffenoni, 12 M. & W. 130.

(*w*) Co. Litt. 2 b; and note (7) by Harg.; Jevens *v.* Harridge, 1 Saund. by Wms. 6, and n. (1); Lapierre *v.* M'Intosh, 1 Per. & Dav. 629.

(*x*) A person born out of her majesty's dominions, his *father*, or *grandfather by the father's side*, being a natural-born subject, is, by force of prior statutes, no alien, but is himself a natural-born subject; vide post, bk. IV. pt. I. c. II.

tage would be sustained by their incapacity to execute for themselves (*y*). To these, however, a very important addition has been just made by the 19 & 20 Vict. c. 120, in reference to the alienation of settled estates (*z*). It is in the case of *these*, that (owing to limitations in favour of parties yet unborn, or the infancy, coverture, &c., of various parties in existence,) the inconveniences, above referred to, have been chiefly felt; and particularly as regards the impossibility, under such circumstances, of making effectual leases or sales as the interest of the settled property at large has been found from time to time to require. In order therefore to "facilitate leases and sales of settled estates," it has been now provided by this statute, that the Court of Chancery may,—upon the application of any person entitled to the possession or to the receipt of the rents and profits of any such estates, for a term of years determinable on his death, or for an estate for life, or for any greater estate (*a*), —authorize leases to be made of them upon the several terms and conditions in the act set forth (*b*),—or authorize a sale of the whole or any part of such estates (*c*). These enactments, however, are qualified by directing that the application shall be made only by consent of such parties as in the act specified, (*d*) (including the trustees of estates, on behalf of unborn children, and the guardians and committees of infants and lunatics (*e*)); or, if not so made, shall not take effect so as to bind such parties (*f*);

(*y*) See 43 Geo. 3, c. 75; 59 Geo. 3, c. 80, s. 2; 6 Geo. 4, c. 74; 9 Geo. 4, c. 78; 11 Geo. 4 & 1 Will. 4, c. 65; 3 & 4 Will. 4, c. 74, ss. 33, 91; 8 & 9 Vict. c. 97, s. 3, c. 118, ss. 20, 137; 13 & 14 Vict. cc. 35, 60; 16 & 17 Vict. c. 70; 18 & 19 Vict. cc. 13, 43; 20 & 21 Vict. c. 13.

(*z*) As to these, vide sup. pp. 253, 258, 266, 279.

(*a*) 19 & 20 Vict. c. 120, s. 16.

(*b*) Sect. 2.

(*c*) Sect. 11.

(*d*) Sect. 17.

(*e*) Sect. 36.

(*f*) Sect. 18. By this section it is provided, "that unless there shall "be a person entitled to an estate of "inheritance whose consent or con-"currence shall have been refused "or cannot be obtained, it shall be "lawful for the court, if it shall think "fit, to give effect to any petition" (viz. petition to exercise the powers conferred by the act), "subject to and "so as not to affect the rights, estate "or interest of any person whose con-

and that the powers conferred on the court shall only be exercised in cases where it deems such a course "proper "and consistent with due regard to the interests of all "parties entitled under the settlement" (*g*); and shall not "be exercised in any case where an express declaration "or manifest intention that they shall *not* be exercised "is contained in the settlement, or may reasonably be "inferred therefrom, or from extrinsic circumstances or "evidence" (*h*).

In connection also with the second branch of the subject that has been under discussion, viz. the capacity of *alienees*, it may be fit to remark, that no person can be compelled to take an estate against his will. If land, therefore be conveyed *in invitum*, (as not unfrequently happens, where it is given by will, upon trust, without having obtained the consent of the proposed trustee to his nomination,) the effect of the conveyance may always be avoided by the execution of a deed of disclaimer on the part of the dissentient alienee (*i*).

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.

A translation or transfer of property being once 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

"sent or concurrence has been re-"fused or cannot be obtained, or "whose rights, estate or interest "ought, in the opinion of the court, "to be excepted."

(*g*) 19 & 20 Vict. c. 120, ss. 2, 11.

(*h*) Sect. 26.

(*i*) See Townson *v.* Tickell, 3 Barn. & Ald. 31; Nicholson *v.* Wordsworth, 2 Swanst. 365; Begbie *v.* Crook, 2 Bing. N. C. 70. As to disclaimer by a married woman, vide sup. p. 476.

[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 or *conveyances* (as they are ordinarily termed) will be examined in their order; but because most of them are usually transacted by the means of that particular kind of instrument called a *deed*, we purpose to consider the nature of deeds separately, and in the first instance, before we enter upon the different kinds of conveyance.

CHAPTER XVI.

OF DEEDS.

[In treating of deeds we shall consider, first, what a deed is; secondly, its requisites; thirdly, how it may be avoided;] lastly, the general rules which the law has laid down for its construction.

1. [First, then, a deed is a writing sealed and delivered by the parties (*a*),] and used in a great variety of different transactions: among which, one of the most important is the alienation of real estates. Indeed, by 8 & 9 Vict. c. 106, s. 3, it is expressly provided, that certain conveyances in the act specified, made after the 1st October, 1845, shall be void at law, unless made in that method (*b*). Such writing under seal and delivered [is sometimes called a charter (*c*), *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called "a deed," (in Latin, *factum*, κατ' ἐξοχήν,) because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed,]

(*a*) Co. Litt. 171 a. A contract by writing, *not* sealed and delivered, is called a *simple* or *parol* contract; vide post, bk. II. pt. II. c. v.

(*b*) The conveyances mentioned in 8 & 9 Vict. c. 106, are a "feoffment" (other than a feoffment made under custom by an infant); a "partition" or an "exchange" of hereditaments, not being copyhold; a "lease," required by law to be in writing, of any hereditaments; an "assignment" of a chattel interest, not being copyhold, in any hereditaments; and a "surrender" in writing of an interest in any hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing.

(*c*) Co. Litt. by Harg. 9 b, n. (1.)

that is shall not be [permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed (*d*).] And for the same reason, when an engagement has been made by way of simple contract (that is, without deed), and afterwards the very same engagement is made between the same parties by deed, the first contract is merged in the second (*e*); to which may be added this further rule, that a contract by deed is not capable of being contradicted or explained by any other contract or declaration between the same parties, which is not itself also under seal (*f*). [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 the deed so made is called an *indenture*, because each part used formerly to be cut or indented in acute angles (*instar dentium*, or like the teeth of a saw) on the top, or side, to tally or correspond with the other (*g*). Formerly too, [when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment,

(*d*) We may here remark, that there are other species of estoppel besides the estoppel by *deed* mentioned in the text, viz. estoppel by *record*, and estoppel by matter *in pais*. The first obtains in the case where any fact is alleged in a court of record, or any judgment given therein; the second, where an act is done out of court. By such matter of record, persons who were parties to the suit—and by such matter *in pais* persons who were parties to the act in question—are in general precluded from afterwards alleging matters which would be contradictory to what the record or act imports. For further information as to estoppel, and the different species thereof, vide Plowd. 434; Co. Litt. 260, 352 a; 1 Saund. by Wms. 325 a, n. (4) and (c); 2 Saund. by Wms. 148; Hill *v.* Manchester Company, 2 Barn. & Adol. 544; Right *v.* Bucknell, 2 Barn. & Adol. 278; Lainson *v.* Tremeere, 1 Ad. & El. 742; Bowman *v.* Taylor, 2 Ad. & El. 278; Whitton *v.* Peacock, 2 Bing. N. C. 411; Cardwell *v.* Lucas, 2 M. & W. 117; Carpenter *v.* Buller, 8 M. & W. 209; Carter *v.* James, 13 M. & W. 137; Lyon *v.* Read, ibid. 285; Downs *v.* Cooper, 2 Q. B. 256; R. *v.* Leominster, 5 Q. B. 640; Pargeter *v.* Harris, 7 Q. B. 708; Dawson *v.* Gregory, ibid. 756; Smith's Leading Cases, vol. ii. pp. 436, 460.

(*e*) See Bayley on Bills, 334; Price *v.* Moulton, 20 L. J. C. P. 102.

(*f*) Gwynne *v.* Davy, 1 Man. & G. 857.

(*g*) Vide Co. Litt. 47 b; Litt. s. 371. The history of the practice of indenting is given in Co. Litt. by Butl. 229 a, n. (1).

[with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists (*h*); and with us *chirographa*, or hand-writings (*i*); the word *cirographum* or *cyrographum*, being usually that which was divided in making the indenture:] and in the indentures of a fine, this custom continued to be observed until the recent abolition of that species of conveyance. But for a long time past the practice of cutting through any letters has, in all other instances, been disused; and even that of indenting saw-wise: the modern method being to cut the top of the parchment in a waving line. Neither this, however, nor any other method of indenting, is necessary to the legal validity of the instrument (*k*). [When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts;* though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party, only, is not indented, but *polled* or shaved quite even; and is therefore called a *deed-poll*, or a single deed (*l*).

II. We are in the next place to consider the *requisites* of a deed. The first of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing or subject-matter,

(*h*) Lyndew. l. 1, t. 10, c. 1.

(*i*) Mirror, c. 2, s. 27; Co. Litt. by Harg. 143 b, n. (4).

(*k*) In certain cases a deed *indented* is made by statute essential to the validity of the transaction; vide Co. Litt. by Butl. 229 a, n. (2). And in such cases it was, till lately, necessary that the deed should have been *actually* indented; but by 8 & 9 Vict. c. 106, s. 5, it is now provided, that a deed, purporting to be an indenture, shall have the effect of an indenture though not actually indented.

(*l*) Mirror, c. 2, s. 27; Litt. s. 371, 372; Gardner *v.* Lachlan, 8 Sim. 123.

[to be contracted for; all which must be expressed by sufficient names (*m*). Thus 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 *written* or *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 (*n*). 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. It must also have the regular stamps imposed on it by the several statutes for the increase of the public revenue (*o*); else it cannot be given in evidence.]

Thirdly, [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 (*p*). 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

(*m*) Co. Litt. 35 b.

(*n*) Co. Litt. 229 a; F. N. B. 122.

(*o*) The principal Stamp Acts now in force, affecting deeds, are the 55 Geo. 3, c. 184, 13 & 14 Vict. c. 97, 16 & 17 Vict. c. 59, c. 63, and 17 & 18 Vict. c. 83 (for a fuller enumeration of the other Stamp Acts, vide post, bk. IV. pt. I. c. VII.) By the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125, ss. 28, 29,) it is provided, that on the production of any document at the trial of a cause, it shall be the duty of the officer of the court reading such document to call the attention of the judge to any omission or insufficiency of the stamp; and the document shall not be received in evidence till the proper stamp duty and the penalty required by statute and the additional penalty of one pound be paid: provided always, that the document is one which by law may be stamped after execution thereof, upon payment of the duty and a penalty. As to this enactment, see Tattersall, app., Fearnley, resp., 17 C. B. 368.

(*p*) Co. Litt. 225 a.

[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 such of them as are appropriate to deeds containing a conveyance of land, shall here be mentioned in their usual order (*q*).

1. [The *premises* may be used to set forth the number and names of the parties, with their additions or titles,] and in the case of an indenture, the deed is always formally described as made *inter partes*, that is, as made between such an one *of the one part*, and such another *of the other part*. As to which, this distinction was formerly established, that one named as party in an indenture could not covenant with a stranger (or person not named as party), nor could the latter take an estate by the deed, except by way of remainder; though on the other hand, a stranger might covenant with one who was party, and bind himself by executing the deed (*r*). But by 8 & 9 Vict. c. 106, s. 5, it is now provided, that an immediate

(*q*) Co. Litt. 6 a. It is necessary to notice in this place two acts, passed in 1845, to enable parties (if they think fit) to abridge the language in which deeds relating to real property have been usually drawn. The first is the 8 & 9 Vict. c. 119, intituled "An Act to facilitate the "Conveyance of Real Property," the second, 8 & 9 Vict. c. 124, intituled "An Act to facilitate the "granting of certain Leases." In these acts two columns, numbered I. and II., are inserted; column II. containing the terms of the usual covenants in conveyances and leases given *in extenso*, and column I. containing condensed forms of expression of the same general import; and it is provided that where the words in column I. are employed, they shall operate as if the words in column II. had been employed; but it is also provided, that such abridged deed shall be chargeable with the stamp duty as an ordinary conveyance, and that the remuneration for preparing it shall be not according to length, but according to the labour and skill employed, and the responsibility incurred.

(*r*) Co. Litt. 259 b; Salter *v.* Kidgley, Carth. 76; Storer *v.* Gordon, 3 M. & Sel. 322; Berkeley *v.* Hardy, 5 B. & Cress. 355.

estate and interest in any hereditaments, and benefit of a condition or covenant respecting any hereditaments, may be taken, though the taker be not named a party to the same indenture. The premises [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.] With respect to the last, that is, the description of the thing granted, a conveyance of any *land* will suffice (as we have elsewhere seen (*s*)) to pass also the structures or buildings thereon, as well as all mines below the surface; but a conveyance by deed, of certain land, or of a certain house, even adding the words *with the appurtenances*, will not pass land not specified, although it may have been usually occupied together with the property which is specified; unless indeed it consist of the orchard, garden, or curtilage of a house, in which case it would pass under a grant of the house and its *appurtenances*, or even (as it should seem) under a grant of the house simply (*t*).

2, 3. [Next comes the *habendum* and *tenendum* ("to have and to hold.)" The office of the *habendum* is properly to determine what estate or interest is granted by the deed (*u*); though this may be performed, and sometimes

(*s*) Vide sup. p. 169.

(*t*) See Co. Litt. by Harg. 5 b, n. (1); 2 Saund. by Wms. 401, n. (2). As to the word *appurtenances*, vide Co. Litt. 121 b; Hinchliffe *v.* Kinnoul, 5 Bing. N. C. 1, 25. It is to be noticed here, that by the acts of 8 & 9 Vict., referred to supra, p. 483, in n. (*q*), it is provided that every deed made conformably to those acts shall, *unless any exception be specially made therein*, be held to include all houses, out-houses, &c. &c., and hereditaments and appurtenances whatsoever to the lands therein comprised belonging, or in anywise appertaining, &c.; and also (in the case of a conveyance of the fee) the reversion and remainders, &c., and all the estate, &c., both at law and equity of the grantor, &c.

(*u*) As to the effect of an habendum as from a day antecedent to the time of the execution of the deed, see Wybard *v.* Tuck, 1 Bos. & P. 464; Shaw *v.* Kay, 1 Exch. 412.

[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 versâ*; here A. has an estate tail and a fee simple expectant thereon (*x*). But had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would be utterly void (*y*); 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 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 Edw. 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 antient charters, that the tenements shall be holden *de capitalibus dominis feodi* (*z*); but as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

4. Next follow the terms of stipulation, if any, upon which the grant is made; the first of which is the *reddendum*, or reservation whereby the grantor doth create or reserve some new thing to himself out of what he had before granted. As "rendering therefore yearly the sum of 10*s.*, or a peppercorn, or two days ploughing, or the like." Under the

(*x*) Co. Litt. 21 a; Thurman *v.* Cooper, 2 Rol. Rep. 19, 23; Cro. Jac. 176. Vide Goodtitle *v.* Gibbs, 5 B. & Cress. 709.

(*y*) Baldwin's case, 2 Rep. 23; Earl of Rutland's case, 8 Rep. 56.

(*z*) Madox, Formul. passim.

[pure feudal system, this render, *reditus*, return or rent, consisted, in chivalry, principally of military services: in villenage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, or of any other certain profit (*a*). To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some or one of them, and not to any stranger to the deed (*b*). But if it be of antient services or the like, annexed to the land, then the reservation may be to the lord of the fee.

5. Another of the terms upon which a grant may be made is a *condition;* which is a clause of contingency, on the happening of which, the estate granted may be defeated; as "provided always, that if the mortgagor shall "pay the mortgagee 500*l.* upon such a day, the whole "estate granted shall determine," and the like (*c*).

6. Next may follow a clause of *warranty;* whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted (*d*). By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might "vouch," or call the lord or donor to warrant or ensure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense (*e*). And so, by our antient law, if before the statute of *Quia emptores*, a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself

(*a*) Vide sup. pp. 202, 206.

(*b*) Browning *v.* Beston, Plowd. 132; Whitlock's case, 8 Rep. 71.

(*c*) As to mortgages, vide sup. p. 303.

(*d*) As to *warranty*, see Co. Litt. by Butl. 365 a, n. (1), 373 b, n. (2), where the whole subject is copiously discussed. Et vide Doe *v.* Jones, 1 Tyrw. 506; 1 Cromp. & Jer. 528, S. C. It is now, however, a subject of little importance, except in its connection with the antient state of the law; for warranties have long fallen into disuse. Indeed, it is by no means clear (having regard to recent enactments) what effect would now belong to a warranty. See 3 & 4 Will. 4, c. 27, s. 36 (abolishing the writ of *warrantia chartæ* and real actions in general). See also sect. 39 of same statute, and 3 & 4 Will. 4, c. 74, s. 14.

(*e*) Feud. l. 2, t. 8 and 25.

[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 (*f*).] And upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs were evicted of his share, the other and his heirs were bound to warranty (*g*), because they enjoy the equivalent. And so upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) were bound to warrant the title (*h*). But in a feoffment in fee by the verb *dedi*, since the statute of *Quia emptores*, the feoffor only was bound to the implied warranty, and not his heirs (*i*); 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 now by 8 & 9 Vict. c. 106, s. 4, it is enacted, that an exchange or partition of any tenements or hereditaments made by deed executed after the 1st October, 1845, shall not imply any condition in law, and that the word "give" or the word "grant" in a deed, executed after the same day, shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word "give" or the word "grant" may, by force of any act of parliament, imply a covenant. In other forms of alienation, gradually introduced since the statute of *Quia emptores*, no warranty whatsoever has ever been held to be implied; [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 [can only be created by the verb *warrantizo* or *warrant* (*k*).

(*f*) Co. Litt. 384 a. But the word *concessi* implied no warranty. Ibid.

(*g*) Co. Litt. 174, 384 a.

(*h*) Co. Litt. 384 b.

(*i*) Ibid.

(*k*) Litt. s. 733; Co. Litt. 384 a; Vide Doe v. Prestwidge, 4 M. & Sel. 178, 182. So an express warranty cannot be created without deed. Co. Litt. 386 a.

[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 (*l*). For though he at the death of his ancestor might have entered on any tenements that were aliened without his concurrence, yet if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompense in lands of equal value; the law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood (*m*); 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 an ancestor, being the rightful tenant of the freehold, either 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 (*n*). *Collateral* warranty was, where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty; this was collateral to the elder brother (*o*).]

[In both lineal and collateral warranty, the obligation of

(*l*) Vide sup. p. 465.
(*m*) Co. Litt. 373 a.
(*n*) Litt. ss. 703, 706, 707.
(*o*) Ibid. ss. 705, 707.

[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 (*p*). But though, without assets (*q*), 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 (*r*) 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 warranty should be a bar, unless where assets descended from the same ancestor (*s*): 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 Anne, 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.]

(*p*) Co. Litt. 102 a.

(*q*) As to assets, vide sup. p. 426.

(*r*) Litt. ss. 711, 712.

(*s*) Co. Litt. 373.

But this statute did not affect the collateral warranty of tenant in tail in possession; and it had been previously held, that the collateral warranty of tenant in tail (though without assets) barred the remainderman or reversioner on whom it descended, [not being within the statute *De donis*, as that act was principally intended to prevent the tenant in tail from disinheriting his own issue (*t*).] It had been settled, too, that the lineal warranty of tenant in tail with assets, was a sufficient bar to the issue, [being indeed nothing more in effect than exchanging the lands entailed for others of equal value,] though on the other hand, his lineal warranty without assets, was held, by analogy to the statute of Gloucester, to be no bar (*u*). And such continued to be the state of the law, till both one bar and the other were abolished by the late statute 3 & 4 Will. IV. c. 74, s. 14.

7. A deed of conveyance usually contains, in the next place, [*covenants*, (*conventiones*),—which are clauses of agreement whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or to 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 (*x*); the grantee may covenant to pay his rent, or keep the premises in repair, &c.] A covenant in any deed gives to the covenantee and his representatives, in case of its breach, a right of action for damages against the covenantor and his representatives; and in a deed of *conveyance*, a covenant directly relating to the land conveyed will also, in general, *run with*

(*t*) Co. Litt. 374 b; 2 Inst. 335.

(*u*) Litt. s. 712; 2 Inst. 293.

(*x*) By the common law, the words "grant," "give," or "demise," raised an *implied* covenant for quiet enjoyment, &c., except so far as it might be controlled by some express covenant; but by 8 & 9 Vict. c. 106, s. 4, the word *give* or *grant* in a deed executed after the 1st October, 1845, shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as they may, by force of any act of parliament, imply a covenant. As to the former rule, see Cro. Eliz. 674; Merrill *v.* Frame, 1 Taunt. 319; Baber *v.* Harris, 9 Ad. & El. 532.

the land; that is, not only the original parties, or their representatives, but each successive owner of the land will be entitled to its benefit, or be liable (as the case may be) to its obligation (*y*). It is consequently usual, so far as covenants of title are concerned, for a person who sells land which he himself bought, to covenant only against his own acts; or if he did not acquire it in that method, then to extend the covenant as far back as to the acts of the last buyer, but no further (*z*): which is a sufficient security to the vendee, where all former vendors have entered into a similar covenant; because all these engagements run with the land, and consequently operate for his protection. A covenant for title so framed is more reasonable and convenient than a warranty; which is an indemnity against all mankind; and for this and other reasons the former has long superseded the latter in practice.

8. [Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly or by reference to some day and year before mentioned therein. 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 30th of February: provided the real day of its being dated or given, that is, of its being delivered, can be proved (*a*).]

Fourthly, the formal and orderly parts of a deed being now discussed, we may proceed to the consideration of a fourth requisite, [the *reading* of it. This is necessary,

(*y*) As to covenants *running with the land*, see Co. Litt. 384 b, 385 a; Shep. Touch. 161; Third Real Property Report, pp. 45—58; Spencer's case, 5 Rep. 16 a; Mayor of Congleton *v.* Pattison, 10 East, 130; Vyvian *v.* Arthur, 1 Barn. & Cress. 410; Easterby *v.* Sampson, 6 Bing. 644; Lambert *v.* Norris, 2 Mee. & W. 333; Simpson *v.* Clayton, 4 Bing. N. C. 780; Doughty *v.* Bowman, 11 Q. B. 444; Badeley *v.* Vigurs, 4 Ell. & Bl. 71.

(*z*) Browning *v.* Wright, 2 Bos. & Pul. 22; Sugd. Law Vend. vol. ii. p. 450, 10th ed.

(*a*) Co. Litt. 46 b; Dyer, 28. As to date, vide Styles *v.* Wardle, 4 Barn. & Cress. 908.

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

Fifthly, it is necessary [that the party, whose deed it is, should *seal*, and now in most cases 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 (*c*). 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 (*d*). In the civil law also (*e*), 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 (*f*). For though Sir Edward Coke (*g*) 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 cir-

(*a*) Reading is not necessary unless the party executing the deed requires it. Rex *v.* Longman, 1 Nev. & M. 576.

(*b*) Manser's case, 2 Rep. 3; Thoroughgood's case, 2 Rep. 9; Piggot's case, 11 Rep. 27.

(*c*) 1 Kings, c. 21; Daniel, c. 6; Esther, c. 8.

(*d*) "And I bought the field of "Hanameel, and weighed him the "money, even seventeen shekels of "silver. And I subscribed the evi-"dence, and sealed it and took wit-"nesses, and weighed him the money "in the balances. So I took the evi-"dence of the purchase, both that "which was sealed according to the "law and custom, and that which "was open."—Jer. c. 32.

(*e*) Inst. 2, 10, 2 and 3.

(*f*) See Palgrave, Eng Com. ccxv.

(*g*) Co. Litt. 7 a.

[cumstance 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 indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters (*h*). In like manner, and for the same unsurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England (*i*). 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 (*k*). And in the reign of Edward the first, every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals (*l*). The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced

(*h*) *Propria manu; pro ignorantia literarum, signum sanctæ crucis expressi et subscripsi.*"—Seld. Jan. Ang. l. 1, § 42. And this (according to Procopius) the Emperor Justin in the east, and Theodoric King of the Goths in Italy, had before authorized by their example, on account of their inability to write.

(*i*) Lamb. Archeion, 51.

(*k*) "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in cæram impressam mutant, modumque scribendi Anglicum rejiciunt.*"—Ingulph.

(*l*) Stat. Exon. 14 Edw. I.

[into seals, nor indeed into any other use, till about the reign of Richard the first, who brought them from the crusade in the Holy Land, where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained (*m*).

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds,—"*sealed* and delivered," continues to this day.] The statute of frauds, however, [29 Car. II. c. 3, 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 (*n*).

A sixth requisite to a good deed is, that it be *delivered* (*o*) by the party himself or his certain attorney, which therefore is also expressed in the attestation; "sealed and *delivered*;"] and, in practice, is held to be performed by placing the finger on the seal, uttering the words, "I de-

(*m*) Merely placing the finger on a seal already made, is equivalent to sealing. (Shep. Touch. 57). And there is no necessity that the seal should be made either with wax or with a wafer, but only that some impression should be made on the parchment or paper, with the intent of sealing it. See the Queen *v.* Trustees of Covent Garden, 7 Q. B. 238, n.

(*n*) Lemayne *v.* Stanley, 3 Lev. 1; Warneford *v.* Warneford, Stra. 764. It has been doubted, whether the statute 29 Car. 2, c. 3, applies to the case of writings *under seal*, 1 Shep. Touch. by Preston, 56; Cooch *v.* Goodman, 2 Q. B. 596; Aveline *v.* Whisson, 4 Man. & G. 804.

(*o*) As to sealing and delivery, vide Doe *d.* Garnons *v.* Knight, 5 Barn. & Cress. 671; Talbot *v.* Hodson, 7 Taunt. 251; Hall *v.* Palmer, 3 Hare, 532; Fletcher *v.* Fletcher, 4 Hare, 67; Grugeon *v.* Gerrard, 4 You. & Coll. 119; Exton *v.* Scott, 6 Sim. 31; Hall *v.* Bainbridge, 12 Q. B. 699; Goode *v.* Burton, 1 Exch. 189.

liver this as my act and deed." [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 (*p*).] Moreover, [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 (*q*).

The *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses* (*r*): though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers (*s*); which were written memorandums introduced to perpetuate the tenor of the conveyance and investiture.] With this view [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 a memorandum, thus: "*hijs testibus Johanne Moore, Jacobo Smith,*

(*p*) Perk. § 130.

(*q*) Co. Litt. 36 a. As to delivery as an escrow, vide Holford *v.* Parker, Hob. 246; Johnson *v.* Baker, 4 Barn. & Ald. 440; Murray *v.* Lord Stair, 2 Barn. & Cress. 82; Simpson *v.* Sikes, 6 M. & Sel. 295; Hooper *v.* Ramsbottom, 6 Taunt. 12; Bowker *v.* Burdekin, 11 M. & W. 128. An escrow, on the performance of the condition, takes effect as a deed from the date of the sealing and delivery; Froset *v.* Walsh, Bridg. Rep. 51; Graham *v.* Graham, 1 Ves. jun. 274.

(*r*) Deeds affecting real property in Middlesex and Yorkshire also require to be *registered*, as to which vide post, p. 612.

(*s*) Feud. l. 1, t. 4.

[*et aliis ad hanc rem convocatis* (*t*)." This, like all other solemn transactions, was originally done only *coram paribus* (*u*), and frequently when assembled in the court baron, hundred, or county court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.* (*x*). 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 (*y*); till that also was abrogated by the statute of York, 12 Edw. II. st. 1, c. 2. And in this manner, with some such clause of *hijs testibus*, are all old deeds and charters, particularly *Magna Charta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner (*z*). But in the sovereign's common charters, writs, or letters-patent, the style is now altered: for at present the letters-patent are attested thus: "*teste meipso*, witness ourself at Westminster, &c.," a form which was introduced by Richard the first (*a*), but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijs testibus* entirely discontinued till the reign of Henry the eighth (*b*): which was also the era of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestations, either at the bottom, or on the back of the deed (*c*).

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

(*t*) Co. Litt. 6 a.
(*u*) Feud. l. 2, t. 32.
(*x*) Spelm. Gloss. 228; Madox, Formul. Nos. 21, 322, 660.
(*y*) Co. Litt. 6 b.
(*z*) 2 Inst. 77.
(*a*) Madox, Formul. No. 515.
(*b*) Madox, Dissert. fol. 32.
(*c*) 2 Inst. 78.

[1, Proper parties, and a proper subject-matter; 2, Writing on paper or parchment, duly stamped (*d*); 3, Sufficient and legal words, properly disposed; 4, Reading, if desired, before the execution; 5, Sealing, and by the statute of frauds, in most cases, signing also; or 6, Delivery:—it is, in all such cases, 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 (*e*). 2, By breaking off or defacing the seal (*f*). 3, By delivering it up to be cancelled (*g*), 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 of the husband, where a married woman is concerned; or of an infant or person under duress, when those disabilities are removed; and the like.]

Deeds are also in some cases avoided by objections relating to the *consideration* on which they are founded, or to their want of consideration.

The consideration of a deed [may be either a *good* or a *valuable* one. A good consideration is such as that of blood or of natural love and affection, where a man grants an estate to a near relation;—being founded on motives of generosity, prudence, and natural duty: a valuable consi-

(*d*) Vide sup. p. 482.

(*e*) See Com. Dig. Fait (F. 1); Pigot's case, 11 Rep. 27; Henfree v. Bromley, 6 East, 312; Matson v. Booth, 5 M. & Sel. 223; Hall v. Chandless, 4 Bing. 123; Hudson v. Revett, 5 Bing. 368; Davidson v. Cooper, 13 Mee. & W. 343. If there be an erasure or interlineation in a *deed*, it will be presumed, in the absence of proof to the contrary, to have been made at or before the time of execution; see Tatham v. Cattamore, 20 L. J. Q. B. 364. On the other hand, in a *will* the presumption is the other way; Doe *d.* Shallcross v. Palmer, 20 L. J. Q. B. 367.

(*f*) Matthewson's case, 5 Rep. 23.

(*g*) As to the effect of cancellation, vide Vin. Abr. Faits (X. 2, 3, 4); 1 Shep. Touch. 70; Todd v. Emly, 11 Mee. & W. 4.

deration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant (*h*).] Deeds made without any consideration whatever, or even those made for good, though not for valuable, consideration, are said to be *voluntary;* and by force of the statute 27 Eliz. c. 4 (*i*), voluntary deeds are void as against *bonâ fide* purchasers (*k*); and also void by 13 Eliz. c. 5, as against creditors, where the grantor is indebted to such creditors at the time, to the extent of insolvency (*l*). So all deeds are liable to be impeached if founded on immoral or illegal consideration (*m*), or if obtained by fraud. But in general, their legal efficacy will not be prevented by the mere want of consideration. For in this respect they are distinguished from *simple contracts*, that is, contracts not under seal; to the validity of which some consideration is essential: but a writing sealed and delivered as a deed, is supposed, by the law, to be made with due deliberation; and to express, fully and absolutely, the intention of the party by whom it is executed: he is therefore bound by its execution, whether he received a consideration for the grant or engagement which it comprises or not (*n*). We may add here, that whenever it appears that a deed was obtained by fraud, force, or other foul practice, or it is

(*h*) Twyne's case, 3 Rep. 83; 2 Rol. Abr. 779; Palm. 214.

(*i*) Made perpetual by 39 Eliz. c. 18, s. 31.

(*k*) See Johnson *v.* Legard, 6 M. & Sel. 60; Doe *v.* Manning, 9 East, 59; Doe *v.* Rolfe, 8 Ad. & El. 650; Metcalfe *v.* Pulvertoft, 1 Ves. & Bea. 183; Richards *v.* Jervis, 20 L. J. Q. B. 177.

(*l*) See Bac. Abr. Fraud (C); Glaister *v.* Herver, 8 Ves. 200; Battersbee *v.* Farrington, 1 Swanst. 113; Holloway *v.* Millard, 1 Mod. 419; Johnson *v.* Legard, Turn. & Russ. 293; Tarleton *v.* Liddell, 20 L. J. Q. B. 507.

(*m*) Collins *v.* Blantern, 2 Wils. 341; et vide post, bk. II. pt. II. c. v.

(*n*) Bac. Read. Uses, 79; Bunn *v.* Guy, 4 East, 200; Irons *v.* Smallpiece, 2 Barn. & Ald. 554; Pratt *v.* Barker, 4 Russ. 507. According to Blackstone, a deed made without consideration 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."—2 Bl. Com. 296. But this properly applies only to conveyances; and, even as to these, is too largely laid down; for it is clear, that a conveyance, if intended to be gratuitous, or by way of mere gift, will operate accord-

proved to be an absolute forgery, such instrument is not only incapable of being enforced, but may be formally set aside by the judgment or decree of a court of judicature. This was antiently the province of the Court of Star Chamber, and it now belongs to the Court of Chancery (*o*). In reference, moreover, to this subject, it may be useful to remark, that a deed may not only be *avoided*, but *discharged*. For by a *release* a party may be discharged from the obligations even of a valid deed; but such release to be effectual must be itself by deed (*p*).

IV. As to the general rules which our law has established relative to the *construction* of deeds, they are principally as follows:

1. A deed is to be expounded according to the intention, where the intention is clear, rather than according to the precise words used (*q*). For "*verba intentioni debent inservire;*" and "*qui hæret in litera, hæret in cortice.*" [Therefore by a grant of a remainder, a reversion may well pass, and *è converso* (*r*).] And upon a similar principle, it is a maxim that ["*mala grammatica non vitiat chartam;*" neither false English nor bad Latin will destroy a deed (*s*), which perhaps a classical critic may think to be no unnecessary caution.]

2. To explain an ambiguity in the language of a deed, no evidence *dehors* the deed itself is admissible (*t*). For in such cases the doubt arises merely from the failure of the parties to express their own meaning in proper terms;

ingly, and be effectual for the benefit of the grantee, except as far as it may interfere with the rights of creditors or *bonâ fide* purchasers. Vide Irons *v.* Smallpiece, 2 Barn. & Ald. 554; Pratt *v.* Barker, 4 Russ. 507.

(*o*) 1 Shep. Touch. 70; 2 Bl. Com. 309.

(*p*) See West *v.* Blakeway, 2 M. & G. 729.

(*q*) Chapman *v.* Dalton, Plowd. 289; Hasker *v.* Sutton. 1 Bing. 500.

(*r*) Hob. 27. Et vide 2 Saund. by Wms. 96 b, n. (1).

(*s*) Osborn's case, 10 Rep. 133; 2 Show. 334.

(*t*) Bac. Max. Reg. 23. The same general rule applies even to written agreements, not amounting to deeds.

and if the law allowed the difficulty to be removed by extraneous evidence, it would render precision of less importance, and introduce inconvenient laxity into the structure of deeds in general (*u*). But here it is necessary to distinguish between *patent* and *latent* ambiguities (*x*). The first are, where the doubt arises upon the face of the instrument itself; and to these the rule applies: the second are, where the doubt is introduced by the existence of a fact not apparent on the face of the deed; and to these the rule has no application (*y*): the reason for which seems to be, that where the ambiguity itself is produced by circumstances extraneous to the deed, its explanation must of necessity be sought for through the same medium.

3. The construction of a deed should be made upon the entire instrument, and so as to give effect, as far as possible, to every word that it contains (*z*).

4. The construction should be *favourable*, and such that "*res magis valeat quam pereat* (*a*)." In connection apparently with which rule, it is also laid down, that [if the words will bear two senses, one agreeable to and another against law, that sense shall be preferred which is most

See Higgins *v.* Senior, 8 Mee. & W. 844. It is to be observed, however, that the terms of a contract may, in some cases, be expounded by reference to usage, Spicer *v.* Cooper, 1 Q. B. 424; Grant *v.* Maddox, 15 Mee. & W. 745.

(*u*) Or (as expressed by Lord Bacon) it would "make all deeds "hollow, and subject to averments." Bac. Max. Reg. 23.

(*x*) As to *patent* and *latent* ambiguity, vide 4 Cru. Dig. 425; 6 Cru. Dig. 165; Bac. Max. Reg. 23; Sanderson *v.* Piper, 5 Bing. N. C. 425; Doe *v.* Needs, 2 Mee. & W. 129; Doe *v.* Hiscock, 5 Mee. & W. 363; Doe *v.* Rouse, 5 C. B. 442; Queen *v.* Wooldale, 6 Q. B. 549; Chitty on Contracts, 104; Smith on Contracts, 28.

(*y*) In the case of devises under a will (to which, as to all other written instruments, the rule applies), a "latent" ambiguity has been thus illustrated, that if a man devise to his son John, having two sons of that name, evidence will be admitted to show which son the testator meant. Vide 5 Rep. 68 b; 2 Atk. 372; 2 P. Wms. 135.

(*z*) 2 Bl. Com. 379.

(*a*) See Plowd. 156; Shep. Touch. 82, 83; 2 Bl. Com. 380; 2 Saund. by Wms. 96, n. (1); Roe *v.* Tranmar, Willes, 682; James *v.* Plant, in error, 4 Ad. & El. 766; Doe *v.* Davies, 2 Mee. & W. 511.

[agreeable thereto (*b*). As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.]

5. When any thing is granted, the means necessary for its enjoyment are also granted by implication; for it is a maxim that "*cuicunque aliquid conceditur, conceditur et id sine quo res ipsa non esse potuit* (*c*)." Thus, if a man conveys a piece of ground in the midst of his estate, a right of way to come to it, over the land not conveyed, will pass to the grantee.

6. [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 (*d*).]

7. Ambiguous words shall be taken most strongly against the grantor, and in favour of the grantee (*e*). "*Verba fortius accipiuntur contra proferentem.*" [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 [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 (*f*).]

(*b*) Co. Litt. 42 a.

(*c*) See Co. Litt. 56 a; Shep. Touch. 89; Liford's case, 11 Rep. 52; 1 Saund. by Wms. 323 a, n. (6); Lord Darcey *v.* Askwith, Hob. 234; Earl of Cardigan *v.* Armitage, 2 Barn. & Cress. 211; Harris *v.* Ryding, 5 Mee. & W. 60; Hinchliffe *v.* Kinnoul, 5 Bing. N. C. 24.

(*d*) See Shep. Touch. 88; Hard. 94; Doe *d.* Leicester, 2 Taunt. 113; Doe *v.* Pedley, 1 Mee. & W. 677; *secus* as to *wills*, vide post, p. 601.

(*e*) See Co. Litt. 36 a; Bac. Max. Reg. 3; 2 Bl. Com. 380; Doe *v.* Edwards, 1 Mee. & W. 556; Bullen *v.* Denning, 5 Barn. & Cress. 842; *secus* as to where the grantor is the *crown*, vide post, p. 618.

(*f*) Bac. Max. Reg. 3.

Having thus considered the general nature of deeds, we may remark finally, as to their use and application, that it is not only through these instruments that "conveyances" are for the most part transacted, but that a deed is in some cases absolutely essential to the transaction, as will be more fully noticed when the occasions shall arise.

CHAPTER XVII.

OF ORDINARY CONVEYANCES—AND FIRST, OF THOSE AT THE COMMON LAW.

THE branch of law which relates to "conveyances," or the instruments of voluntary alienation, is properly of a practical character, and seems in the nature of things capable of being regulated with great simplicity. It involves, however, in the English jurisprudence, considerations of a very complex and subtle kind, and has been elaborated into a highly artificial system, known under the denomination of *conveyancing*,—a system which maintains its own separate body of practitioners and professors (*a*), and constitutes a science in itself.

In the earlier times, and indeed down to so late a period as the reign of Henry the eighth, the chief distinction between the different mode of conveyance, as regards lands of free tenure, to which alone our attention is at present directed, was this, that they were either by matter *in pais*, or by matter of *record* (*b*); the first, which were the ordinary class, comprehending such as were transacted between two or more persons *in pais*, in the country (that is, according to the old common law, upon the very spot to be transferred (*c*)); the second, such as were effected by an assurance in the superior courts of justice. But in and subsequent to the reign just mentioned, various acts of par-

(*a*) See 44 Geo. 3, c. 98, s. 14; Taylor *v.* The Crowland Gas and Coke Company, 10 Exch. 293.

(*b*) As to records, vide sup. pp. 48, 480, n.; as to matter in pais, vide sup. p. 480, n.

(*c*) 2 Bl. Com. 294.

liament have been passed, the effect of which has been to introduce a new class of conveyances, distinguished from the more antient ones, as deriving their force and authority from these statutes, and not from immemorial custom, or the common law of the realm; and it will be found convenient, in discussing the general subject of conveyances, to keep the latter distinction, as well as the former, prominently in view.

We shall therefore divide the conveyances of land of freehold tenure (as with copyhold we have at present no concern), first, into conveyances of the *ordinary* kind (being in effect the same with those antiently described as *in pais*); secondly, into conveyances by *matter of record;* which, as compared with the other, are of a rarer or more special description. The first of these, we shall again subdivide into two classes, first, conveyances *at common law;* secondly, conveyances *by statute law.* The conveyances at common law will constitute the subject of the present chapter, and they may be thus enumerated:—I. Feoffment. II. Grant. III. Lease. IV. Exchange. V. Partition. VI. Release. VII. Confirmation. VIII. Surrender. IX. Assignment. X. Defeazance.

I. A Feoffment (*d*). In the course of our past disquisitions, we have already had frequent occasion to refer to this method of conveyance, because it was for ages the only method in ordinary use by which our ancestors were wont to convey the freehold of land in possession; and the doctrines relating to it are by consequence very closely connected with the fundamental principles of the law of real property, and essential to their illustration. And for the same reason, we shall proceed now to give a somewhat fuller account of its nature and properties than its actual importance, in practice, would seem to justify. For it is necessary here to apprize the reader, that this conveyance has now fallen, in great measure, into disuse, having been

(*d*) As to feoffment, vide Co. Litt. 48 a.

almost entirely supplanted by some of that class which are founded on the statute law of the realm.

A feoffment, then, [is derived from the verb to enfeoff, *feoffare* or *infeudare*, to give one a feud,] and is a method of alienation applicable to the purpose above described, viz. that of conveying an estate of freehold in possession in a corporeal hereditament; and to that purpose only (*e*).

[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*" (*f*). And it is still directed and governed by the same feudal rules; insomuch 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*" (*g*). 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 præsumatur, quam in donatione expresserit;*" so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath barely an estate for life (*h*). For as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life: unless the feoffor, by express provision in the creation and

(*e*) A reversion or remainder, however, and the particular estate on which it is expectant, may be created by the same feoffment; vide supra, p. 321. And so a freehold reversion already created, if expectant on a particular estate for years, may be transferred by feoffment, with the consent of the particular tenant. Co. Litt. 48 b. But where his consent is not given, the conveyance must be by grant, and the livery is void. Litt. s. 567; Co. Litt. 48 b.

(*f*) Co. Litt. 9 a. As to the effect of these words, in respect of their not now *implying* any covenant in law, vide sup. p. 490, n.

(*g*) Wright's Ten. 21.

(*h*) Co. Litt. 42 a.

[constitution of the estate, hath given it a longer continuance.] It has therefore been the practice in all feoffments, from time immemorial, to limit, by express words, the nature of the estate intended to be conveyed.

[But by the mere words of the donation the feoffment is by no means perfected; there remains a very material ceremony to be performed, called *livery of seisin* (*i*),] without which the transaction cannot operate as a feoffment. [This livery of seisin is no other than the pure feudal investiture or delivery of corporal possession of the land or tenement, which was held absolutely necessary to complete the donation (*k*). "*Nam feudum sine investitura nullo modo constitui potuit*" (*l*); and an estate was then only perfect when, as the author of Fleta expresses it in our law, "*fit juris et seisinæ conjunctio*" (*m*).

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 bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such as claimed title by other means, might know against whom to bring their actions.

In all well-governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain the property of lands. In the Roman law, *plenum dominium* 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

(*i*) Litt. s. 70.
(*k*) Vide sup. p. 177.
(*l*) Wright's Ten. 37.
(*m*) L. 3, c. 15, s. 5.

[to possess, and an actual seisin or entry into the premises, or part of them, in the name of the whole (*n*). 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 (*o*), 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 ecclesiastical 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,] as we have seen (*p*), [has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands.]

[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 hand, in the presence of credible witnesses, which, by agreement, should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. Among the Jews, we find the evidence of a purchase thus defined in the book of Ruth (*q*): "Now this was the man-" ner in former time, in Israel, concerning redeeming and

(*n*) "*Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire.*"—Ff. 41, 2, 3.—And again: "*traditionibus dominia rerum, non nudis pactis, transferuntur.*"—Cod. 2, 3, 20.

(*o*) Decretal. l. 3, t. 4, c. 40.

(*p*) Vide sup. p. 424, where it is noticed that an heir before entry cannot maintain an action of trespass. So under the rule that formerly required a title by descent to be traced from the person last seised of the inheritance, the heir was incapable, before entry, of being made the root of descent, vide sup. p. 394.

(*q*) Ruth, ch. iv. v. 7.

["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 (*r*). With our Saxon ancestors, the delivery of a turf was a necessary solemnity to establish the conveyance of lands (*s*). 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.] For the donation when depending on the remembrance and testimony of 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,] without an absolute sale thereof, [and of making them liable to a multitude of conditions and minute designations.] Written deeds (*t*) were consequently introduced, [in order to specify and perpetuate the peculiar purposes of the party who conveyed:] and now by the statute of frauds (29 Car. II. c. 3, s. 1), no estate created by livery of seisin only, and not in writing signed by the party, or his agent by writing lawfully authorized, shall be of any force except to constitute an estate at will. Since this statute, therefore, a feoffment has not been effectual unless

(*r*) Stiernhook, de Jure Sueon. l. 2, c. 4.

(*s*) Hickes, Dissert. Epistolar. 85.

(*t*) A deed of feoffment is also called a *charter* of feoffment; and this is the more appropriate term. Co. Litt. 9 b (and note (1), by Harg.), 36 a.

accompanied either by deed or writing so signed, though the transaction has been nevertheless considered as deriving its legal force from the livery, and not from the written instrument (*u*). And now by 8 & 9 Vict. c. 106, s. 3, a feoffment made after 1st October, 1845, other than a feoffment made under a custom by an infant (*x*), shall be void at law unless evidenced by deed.

[Livery of seisin is either "in deed" or "in law." Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney as by the principals themselves in person), 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 seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door (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 (*y*). And in all these cases it is prudent and usual to indorse 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 (*z*).] 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,

(*u*) Co. Litt. 222 b, 48 a.

(*x*) As to this custom in gavelkind, vide sup. p. 214.

(*y*) Co. Litt. 48 a; West. Symb. 251. Further information will be found in Blackstone (Bl. Com. vol. ii. p. 315) as to the cases in which more than one livery will be required, in consequence of the lands lying in different counties, or the like.

(*z*) As to the manner of making livery of seisin, see Roe *v.* Rashleigh, 3 Barn. & Ald. 156; Doe *v.* Taylor, 2 Nev. & M. 508.

[if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise.] By the antient law, indeed, if he dared not enter through fear of his life or bodily harm, his *continual claim* (*a*)—made yearly in due form—would suffice without an entry. But this is now altered by 3 & 4 Will. IV. c. 27, s. 11, which provides that no right of entry or action shall in future be preserved by *continual claim*. [Livery "in law" cannot be given or received by attorney, but only by the parties themselves (*b*).]

By feoffment, not only a fee simple may be conveyed, but an estate tail or an estate for life; for these (as we have seen) are all estates of freehold. But the *term* "feoffment" is considered as importing more properly a conveyance of the *fee*; while the conveyance of an *estate tail* is more technically called a *gift*; that of an estate for life, a *demise* or *lease* (*c*).

The last point that we shall notice with respect to this conveyance, is, that up to a recent period it has been distinguished from others by the following property, that when made (without fraud) by a person in actual possession, it would always have the effect of passing to the feoffee a freehold, either by right or by wrong. For it was a delivery of the actual seisin, that is, of the actual possession, as for an estate of freehold, in fee, in tail, or for life; so that if the feoffor was himself lawfully seised to the full extent of the estate that he conveyed, a freehold as of right would pass; and even if he was not lawfully seised, or not lawfully seised to that extent, a freehold would still pass, though a freehold by *wrong* (*d*). And when by such

(*a*) Litt. s. 421; Co. Litt. 48 b; 2 Inst. 483.

(*b*) Co. Litt. 52 b.

(*c*) Litt. s. 59; Co. Litt. 9 a; 2 Bl. Com. 316. Blackstone enumerates "gift" as a separate conveyance; but, as he himself remarks, "it differs in nothing from a feoffment, but in the nature of the estate passing by it."

(*d*) Litt. ss. 599, 611; Co. Litt. 367 a; Fermor's case, 3 Rep. 77; Taylor *v.* Horde, 1 Burr. 60; Co. Litt. by Butl. 330 b, n. (1); 2 Sand. Us. 18, 20; Doe *v.* Hall, 2 Dow. & Ry. 38; Doe *v.* Lynes, 3 Barn. &

means, or by any other, a wrongful or tortious freehold was created, the effect was, that the person lawfully entitled to the freehold in possession was *disseised;* and if there were any persons in reversion or remainder, such reversion or remainder was *displaced* or *divested*, so that each of these parties ceased to retain (strictly speaking) an *estate;* though each nevertheless possessed a *right of entry;* that is, was entitled, in his proper turn, to enter, and eject the wrong-doer, and thus to revest his own estate (*e*). But all this doctrine, *so far as regards the operation of a feoffment by wrong*,—long diminished in practical importance by the growing rarity of feoffments, and by other causes, and latterly involved in some degree of obscurity,—is now abolished by the provision of 8 & 9 Vict. c. 106, s. 4, to which we have had frequent occasion already to refer, that "a feoffment made after the 1st October, 1845, shall not have any tortious operation."

II. A Grant is effected by mere deed, without livery of seisin, containing words expressive of the intention to con-

Cress. 388; Doe *v.* Taylor, 5 Barn. & Adol. 575. The doctrine in the text, though no longer in force, yet deserves attention from its tendency to illustrate the principles of the law of real property. It is to be observed, that, independently of a feoffment, a tortious estate may be created by *any* act that produces a disseisin, or any wrongful ouster of the freehold. Co. Litt. 2 a. The nature of these wrongful acts will be explained in that part of the work which treats of civil injuries, vide post, bk. v. c. VIII.

(*e*) Co. Litt. 251 a, b, 327 b; 1 Saund. by Wms. 319 n. (1); Focus *v.* Salisbury, Hard. 401, 402. In the particular case, however, of a wrongful feoffment by tenant in tail in possession, the effect was different; for it was a *discontinuance*, which formerly deprived the reversioner or remainder-man (as well as the issue in tail) even of his *right of entry*, and left him nothing but a *right of action;* Co. Litt. 327 b. But by 3 & 4 Will. 4, c. 27, s. 39, a discontinuance is no longer to be attended with this effect (see also 8 & 9 Vict. c. 106, s. 4). A discontinuance, besides, involved (as we have seen, vide sup. p. 463,) no *forfeiture* of the particular estate; but it was otherwise with a wrongful feoffment by tenant for life or years. Vide supra, p. ibid.

vey. The appropriate words are "*dedi et concessi*," "have given and granted," but they may be supplied by others of the like import (*f*). This was the regular method, by the common law, of transferring estates in expectancy (*g*) (that is, reversions and remainders) in corporeal hereditaments, as feoffment was of transferring a freehold estate in possession. And the same mode, viz. grant, was appropriate also to the transfer (for whatever estate) of hereditaments incorporeal (*h*) (such as advowsons, commons, rents, &c.), of which we are to treat hereafter. For it obviously results from the nature both of things incorporeal, and of corporeal things in expectancy, that no livery can be made of them; not of the first, because they are not capable of possession; nor of the last, because the possession is in the particular tenant, and not in the grantor. For which reason they were formerly both said to *lie in grant*; while corporeal hereditaments in possession were said to *lie in livery* (*i*). And as the latter passed by force of the livery of seisin, so the former passed by force of the deed. But the conveyance by grant is now extended to all kinds of hereditaments, for by 8 & 9 Vict. c. 106, s. 2, it is enacted, that, "after the 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." It is also to be remarked under this head, that by the antient law, besides the grant itself, an additional ceremony was required where a reversion or remainder was the subject of transfer; viz. the attornment of the tenant of the particular estate to the

(*f*) 2 Sand. Us. 47; vide 8 & 9 Vict. c. 119, before noticed, supra, p. 483, *in notis*. In the form sanctioned by this act *grant* is the only word used. The word "give" or "grant" is by 8 & 9 Vict. c. 106, s. 4, to imply no covenant as to title or otherwise; vide sup. p. 490, *in notis*.

(*g*) Co. Litt. 172 a, 332 a, b.

(*h*) Co. Litt. 172 a, 332 a, b. As to incorporeal hereditaments, vide sup. p. 171; post, bk. II. pt. I. c. XXIII.

(*i*) 2 Rep. 31 b; Doe *v.* Cole, 7 Barn. & Cress. 243.

grantee (*k*). But by the statute 4 & 5 Anne, c. 16, this requisite is now dispensed with (*l*).

III. A Lease (*m*) (or "demise") is a conveyance by which a man grants lands or tenements (*n*) (usually with the reservation of a rent) to another, for life, for years, or at will, such estate being short of the lessor's own interest therein (*o*): for if it be to the full extent of that interest, it is then properly an "assignment" and no lease (*p*). A lease of land for life, being a freehold interest, could not be constituted by the common law without livery of seisin, and therefore the lease could, in such case, be only by way of feoffment (*q*): but if the estate were for years, or at will, no livery was required (*q*): nor was the deed, or even any writing, formerly essential to the efficacy of a demise of land (*r*). The law, however, on this subject has been since altered; for by the Statute of Frauds, 29 Car. II. c. 3, ss. 1, 2, all leases whatever, with the exception of those not exceeding three years, with a rent of not less than two-thirds of the improved value, must now be put into writing and signed (*s*) by the lessor or his agent law-

(*k*) Litt. s. 568, 569; Doe *v.* Finch, 4 B. & Adol. 303. As to attornment, vide sup. pp. 466, 468; Litt. s. 551; Co. Litt. 309 a; Gilb. Ten. 90, 91.

(*l*) See Doe *d.* Agar *v.* Brown, 2 Ell. & Bl. 331.

(*m*) As to leases, vide Co. Litt. 43 b; as to leases under powers defectively executed, 12 & 13 Vict. cc. 26, 110; 13 & 14 Vict. c. 17.

(*n*) Litt. s. 58. A lease may be either of land in the possession of the lessor, or of land whereof he has the reversion or remainder; for of the latter he may make a lease for years *in futuro*, to take effect in possession, on the determination of the particular estate; and he may also grant the reversion for a term short of his own interest therein; but such grant must be by deed. Vide Co. Litt. 47 a; Bac. Abr. Leases (N.)

(*o*) As to the nature of leases generally, vide Bac. Abr. Leases, &c., "where the subject is treated in a "perspicuous and masterly manner: "being supposed to be extracted "from a manuscript of Sir Geoffrey "Gilbert."—2 Bl. Com. 323, (n.)

(*p*) 2 Bl. Com. 317.

(*q*) Litt. s. 59.

(*r*) But a lease of an incorporeal hereditament could not be made at common law without deed. Co. Litt. 49; Bird *v.* Higginson, 6 Ad. & El. 824; Rex *v.* Marquis of Salisbury, 8 Ad. & El. 716.

(*s*) As to the necessity of signature in the case of demises *under seal*, vide sup. p. 492.

fully authorized in writing. And, by the recent statute of 8 & 9 Vict. c. 106, it is now provided, that a lease, required by law to be in writing, of any tenements or hereditaments, made after 1st October, 1845, shall be void at law unless made by deed (*t*): while, on the other hand, (by the effect of the same statute, sect. 2, which provides that all corporeal hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery,) a lease even for life may now be effected by grant, without livery of seisin. It results, however, from the former observations with respect to estates for years (*u*), that a lease of land for years will not vest in the lessee a complete estate for all purposes, until he has made *entry* on the land demised; and that in the mean time he takes nothing beyond an *interesse termini*.

When the lease is for years only, the estate may be granted to take effect in possession either immediately, or at some future time (*x*); and, in the latter case, the lessee has of course no right to enter until that future time has arrived. But it is important carefully to distinguish these leases *in futuro* from mere *agreements to let;* for an intended lessor may, without using such words as actually to divest himself of any interest present or future, simply engage to grant a lease at a future period; and as no interest in the mean time passes, this will be a mere agreement, and no lease (*y*). And with respect to such agreements, it is material to remark, that by the fourth section of the Statute of Frauds, above cited, they are required even

(*t*) 8 & 9 Vict. c. 106, s. 3.

(*u*) Vide sup. p. 287.

(*x*) Vide sup. p. 323.

(*y*) Whether a given instrument amounted to a lease, or only to an agreement to let, was (before the late provision of 8 & 9 Vict. c. 106, s. 3, mentioned in the text,) a question of construction upon the words used, and often a difficult one. See Poole *v.* Bentley, 12 East, 168; Doe *v.* Groves, 15 East, 244; Doe *v.* Ries, 8 Bing. 178; Warman *v.* Faithful, 5 B. & Adol. 1042; Hayward *v.* Haswell, 6 Ad. & E. 265; Chapman *v.* Bluck, 4 Bing. N.C. 187; Doe *v.* Benjamin, 9 Ad. & Ell. 644; Doe *v.* Clarke, 7 Q. B. 211; Chapman *v.* Towner, 6 Mee. & W. 100; Curling *v.* Mills, 6 Man. & G. 182. The statute above mentioned will probably have the effect of preventing, to a certain extent, the occurrence of this question.

where the term agreed for is less than three years, to be in writing (*z*).

[The usual words of operation in a lease are "demise, "grant, and to farm let (*a*)," *demisi, concessi, et ad firmam tradidi.*] For [*farm* or *feorme* is an old Saxon word signifying provisions (*b*), 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, *firmarius*, was one who held his lands upon payment of a rent or feorme,—though at present, by a gradual departure from the original sense, the word farm is brought to signify the very estate or lands so held upon farm or rent.] Neither the words "to farm let," however, nor any of the others above specified, (though usual,) are indispensable to the effect of a demise; any expressions sufficiently indicating the intention of one of the parties to divest himself of the possession, for a determinate period, in favour of the other, being clearly sufficient to constitute a lease (*c*). And it has been adjudged that even the words "agree to let" may be so used as to amount in construction of law to an actual demise, and are not necessarily to be expounded as a mere agreement for a lease (*d*). In reference to the covenants contained in a lease, we may here observe, that it results from what has been before stated as to covenants *running with the land* (*e*), that the lessee is liable not only to the original landlord or reversioner, but in case of the grant of the reversion, then to the grantee also, for the future performance of all such covenants contained in the lease, on the part of the lessee; and is entitled, on the other hand, to enforce against the grantee as well as the original landlord, the future performance of all such as are

(*z*) Inman *v.* Stamp, 1 Stark. N. P. C. 12; Edge *v.* Strafford, 1 Tyrw. 293.

(*a*) Co. Litt. 45 b. See 8 & 9 Vict. c. 124, before noticed (supra, p. 483, *in notis*). In the form sanctioned by this act, *demise* is the only word used.

(*b*) Spelm. Gloss. 229.

(*c*) Bac. Abr. Leases, &c.; Doe *v.* Ashburner, 5 T. R. 163; Barry *v.* Nugent, 5 T. R. 165, n.

(*d*) Poole *v.* Bentley, 13 East, 168. Vide sup. p. 516.

(*e*) Vide sup. p. 492.

contained in it on the part of the lessor (*f*). As to the covenants in a lease, it is also material to notice that to improve the landlord's security the lease usually contains a proviso that, on breach of any of them by the tenant, the landlord shall be at liberty to *re-enter* and resume and hold possession of the land, as if no lease of it had ever been made. Such a proviso constitutes, in case of a breach of covenant, a most advantageous addition to the landlord's remedies,—which would otherwise be confined to right of action for damages, and (as regards the nonpayment of of rent,) a right of distress.

IV. [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 (*g*). The estates exchanged must be equal in quantity (*h*), not of *value* (for that is immaterial), but of *interest*;—as fee simple for fee simple,] a lease for years for another lease for years, and the like (*i*). And [no livery, even in exchanges of freehold, was, at the common law, necessary to perfect the conveyance (*k*): 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.] Yet by the Statute of Frauds, 29 Car. II. c. 3, ss. 1, 3, an exchange is required to be in writing; and by the late statute, 8 & 9 Vict. c. 106, s. 3, it must be, in every case (except that of an exchange of copyhold), by deed. Moreover, by the common law, [entry must be made on both sides; for if either party die before entry, the exchange is void for want of sufficient notoriety (*l*). And so also] it

(*f*) See Thursby *v.* Plant, 1 Saund. by Wms. 2306; Wright *v.* Burroughes, 16 L. J. (C. P.) 6.

(*g*) Co. Litt. 50, 51; Eton College *v.* Bishop of Winchester, 3 Wils. 468. See the provision 8 & 9 Vict. c. 106, s. 4, mentioned in the next page.

(*h*) Litt. ss. 64, 65.

(*i*) As to whether an exchange by lessee for twenty years with lessee for thirty or forty years would be good, see Perk. sect. 275; 2 Shep. Touch. 296.

(*k*) Litt. s. 62.

(*l*) Co. Litt. 51 b.

was held, that [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 (*m*). 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 (*n*).] But this doctrine seems now to be affected by the provision of the late statute, 8 & 9 Vict. c. 106, s. 4, that an exchange of any tenements or hereditaments made by deed executed after 1st October, 1845, shall not imply any condition in law. It may be proper too, before we conclude this head, to point the reader's attention to the distinction between the conveyance properly called an *exchange* (that is, one made in the method above pointed out), and a transaction where the parties execute *mutual conveyances* of their respective lands under some other form or forms of assurance; for to such a case the doctrines above laid down, as to *exchanges*, have no application (*o*).

V. [A Partition (*p*) is where two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part.] Here, as they all hold *pro indiviso* or promiscuously (*q*), [it is necessary that they all mutually convey

(*m*) Perk. s. 288. As to exchange of preferments, see Downes *v.* Craig, 9 Mee. & W. 166.

(*n*) As to warrantry, vide sup. p. 486.

(*o*) Vide Eton College *v.* Bishop of Winchester, 3 Wils. 491. It is further to be observed, that exchanges of land may now be effected under provisions specially devised for that purpose in the General Inclosure Acts, and that not only in cases of inclosure, but even as regards lands not subject to be inclosed, or in respect of which no proceedings for inclosure are pending. See 8 & 9 Vict. c. 118, ss. 92, 147; 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c 99; 12 & 13 Vict. c. 83; 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97.

(*p*) As to partition, vide Co. Litt. 165 b.

(*q*) Vide sup. p. 340.

[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] could not have done it without deed; which deed, on the other hand, if duly sealed and delivered, did not require to be signed: [and the statutes of 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, though they subjected them to a writ of partition (*r*), yet made no alteration as to the manner of conveyance where the partition took place without writ (*s*).] However, it would seem that, by the Statute of Frauds before mentioned (*t*), an instrument in writing, signed by the party or his agent, is now necessary in every case of partition, as well between coparceners as others (*u*). And by the express provision of 8 & 9 Vict. c. 106, s. 3, partitions of all hereditaments (not being copyhold) shall be void at law, unless made by deed (*x*).

The common law conveyances which have been hitherto considered, are all (it may be remarked) of a *primary* or *original* character. Those which remain are of a [*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

VI. A Release (*y*); which may be defined as a conveyance of an ulterior interest in lands or tenements to a particular tenant, or of an undivided share to a co-tenant, (the relessee being in either case in privity of estate with the relessor,)—or of the right, to a person wrongfully in possession. It was always effected without

(*r*) Vide sup. pp. 343, 349.

(*s*) Co. Litt. 169 a.

(*t*) 29 Car. 2, c. 3.

(*u*) 2 Bl. Com. 324; Co. Litt. by Harg. 169 a, n. (4).

(*x*) It is also provided by 8 & 9 Vict. c. 106, s. 4, that a partition of any tenements or hereditaments made by deed executed after 1st October, 1845, shall not imply any condition in law. Partitions as well as exchanges may now be effected under provisions specially devised for that purpose under the General Inclosure Acts. See 11 & 12 Vict. c. 99, s. 13, and the other Acts referred to, sup. p. 519, note (*o*).

(*y*) As to releases, vide Co. Litt. 264 a. Some account of the early state of the law respecting them will be found in Reeves's Hist. Eng. Law, vol. iii. p. 354.

livery of seisin, even though the interest conveyed were freehold; for the doctrine of release is founded on this principle, that though the freehold in possession could not pass at common law without livery (which made a notoriety to the country), yet where another person was already in the possession, the reason and propriety of that ceremony failed, and the grantor might consequently convey such right or interest as he had, by mere deed (z). A deed, however, is essential to the efficacy of this conveyance (a); and the proper operative word to be employed in it, is that of "*release* (b):" yet it is to be observed, that the release of a right may not only be *express*, but may also be *implied by law* from circumstances; and when it is of this kind, it may take place without deed (c).

A release (in conformity with the definition) may enure in several ways.

1. [By way of enlarging an estate, or *enlarger l'estate*,] which is the species of release that most frequently occurs; and consists of a conveyance of the ulterior interest to the particular tenant; [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.] But to the validity of such releases as these, it is necessary that the estate of the relessee should be a *complete and vested* one (d), [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;] and this because the lessee has, in such case, a mere

(z) 2 Bl. Com. 325; Gilb. Ten. 53.

(a) Co. Litt. 264 b.

(b) This is the technical word employed, not only as to the conveyance in question, but in all cases where a renunciation of any right or claim is concerned, whether as regards real estate or things personal, or rights of action. Vide sup. p. 499.

(c) Co. Litt. 264 b.

(d) Co. Litt. by Butl. 270 a, n. (3). If the estate of the relessee, therefore, is an estate in possession, he ought to be in actual possession of the land (vide Litt. ss. 455, 456, 459); for otherwise his estate is incomplete. But otherwise actual possession of the land is not necessary: for "if a "man make a lease for years, with "remainder for years, and the first "lessee doth enter, a release to him "in the remainder for years is good "to enlarge his estate."—Co. Litt. 270 a. Et vide 270 b.

interesse termini, and not an estate upon which a reversion can properly be expectant (*e*). And further [there must be a *privity of estate* between the relessor and relessee; that is, one of their estates must be so related to the other as to make but one and the same estate at law:] as in the case where the ulterior estate conveyed is a reversion or remainder mediately or immediately expectant upon the particular estate of the relessee; all which, in contemplation of law, form parts of the same estate, as being derived at the same time, out of the same original seisin (*f*). Thus, if a man make a lease for years, with remainder for life, a release by the lessor to the lessee for years, and to his heirs, is good; for that he hath both a privity and an estate: and a release to him in the remainder for life, and his heirs, is good also (*g*). But if A. makes a lease to B. for life, and B. makes a lease for years; and afterwards A. releases to the tenant for years, and his heirs, this release is void to enlarge the estate, because there is no privity between A. and the lessee for years (*h*). Upon the same principle a release to a tenant at will, is good, because he has a sufficient estate for the purpose, and a privity with the lessor; but a release to a tenant at sufferance, is void, because he has a possession without privity (*i*). 2. A release may enure [by way of passing an estate, or *mitter l'estate;* as where one of two coparceners releases all her right to the other, this passeth the fee simple of the whole (*k*).] But in this species of release, as well as the former, there must

(*e*) "Before entry," says Lord Coke, "the lessee has but *interesse* "*termini*, an interest of a term and "no possession; and therefore a "release, which enures by way of "enlarging an estate, cannot work "without a possession: for before "possession, there is no reversion." Co. Litt. 270 a. It is to be observed, however, that if the estate for years be created by a conveyance under the Statute of Uses, and not at common law, no actual entry is necessary to give effect to the release. The reason of this will appear when we treat of conveyances of that class.

(*f*) Vide 2 Prest. Conv. 324; 2 Bl. Com. 325; Gilb. Ten. 70, 71; Goodright *v.* Forrester, 1 Taunt. 602.

(*g*) Co. Litt. 273 a.

(*h*) Ibid. 272 b.

(*i*) Co. Litt. 270 b. As to tenants by sufferance, vide sup. p. 293.

(*k*) Co. Litt. 273.

be a privity of estate between the relessor and relessee (*l*); and therefore one tenant in common cannot release to his companion, because they have distinct freeholds, and there is no necessary unity of title between them (*m*). 3. It may enure [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 (*n*). 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 (*o*). 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 (*p*).] And here we may observe, with respect to the four last species of release, that the fee may be conveyed by them all, without the use of words of inheritance (*q*); in which respect they differ from releases to enlarge the estate; and indeed from feoffments also, and from grants; for as to all these, it is a general rule (though subject to exception in particular cases) that an estate of inheritance cannot be created without the word *heirs* (*r*).

VII. [A Confirmation (*s*) is of a nature nearly allied to a release. Sir Edward Coke defines it (*t*) to be a conveyance of an estate or right *in esse*, whereby a voidable

(*l*) 2 Bl. Com. 325; Co. Litt. 273 b.

(*m*) Co. Litt. 200 b; Gilb. Ten. 74; vide sup. p. 349.

(*n*) Litt. s. 466.

(*o*) Ibid. s. 470.

(*p*) Co. Litt. 278 a.

(*q*) Ibid. 9 b.

(*r*) Litt. s. 1; Co. Litt. 8 b; vide sup. p. 238.

(*s*) As to confirmations, vide Co. Litt. 295 b, 308 b.

(*t*) Co. Litt. 295 b.

[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" (*u*). An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion: yet if he hath confirmed the estate of the lessee for years before the death of tenant for life, it is no longer voidable but sure (*x*). 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.] It is to be observed that a confirmation (like a release, and for the same reason,) has always been effectual without livery of seisin, even though a freehold estate be the subject (*y*); and that a deed is, in like manner, essential to the validity of a conveyance of this kind (*z*). There may, also, be a confirmation, *implied by law* (*a*) from circumstances, as well as an express confirmation by deed.

VIII. [A Surrender (*b*), (*sursum redditio*, 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 (*c*) a yielding up of an estate for life or years to him that hath an immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them.] And accordingly it is held, that the surrenderee must have such an estate, that the estate surrendered may be capable of merging in it; so that [tenant

(*u*) Litt. ss. 515, 531. As to confirmations, see also Reeves's Hist. Eng. Law, vol. iii. pp. 354, 355.

(*x*) Litt. s. 516.

(*y*) 2 Bl. Com. 326.

(*z*) Shep. Touch. by Preston, vol. ii. p. 312.

(*a*) See Co. Litt. 295 b; Doe *v.* Jenkins, 5 Bing. 469; Jenkins *v.* Church, Cowp. 482; Ludford *v.* Barber, 1 T. R. 86; Doe *v.* Archer, 1 Bos. & Pul. 531.

(*b*) As to surrender, vide Co. Litt. 373 b.

(*c*) Ibid. 337 b; Burton *v.* Barday, 7 Bing. 757.

[for life cannot surrender to him in remainder for years (*d*).] A surrender [is done by these words, "hath surrendered, "granted, and yielded up,"] or the like (*e*). And though the estate surrendered be for life [there is no occasion for livery of seisin (*f*); for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards.] Nor was any deed or writing required, at common law, to effect the surrender of land (*g*). But by the Statute of Frauds, 29 Car. II. c. 3, s. 3, no lease (except of copyhold) shall be surrendered unless by *operation of law* (for a surrender, like a confirmation, may be implied by law from circumstances (*h*)), or unless by deed or note in writing, signed by the party or his agent, lawfully authorized by writing (*i*). And now by the statute 8 & 9 Vict. c. 106, s. 3, a surrender in writing of an interest in any tenement or hereditament, —not being a copyhold interest, and not being an interest which might by law have been created without writing,— made after the 1st October, 1845, shall be void at law unless made by deed. It is laid down that, upon a surrender, no entry is required to complete the title of the surrenderee, except for the purpose of bringing an action for any trespass committed; so that if a tenant for life or years sur-

(*d*) Perk. s. 589.

(*e*) 2 Roll. Ab. 497.

(*f*) See Farmer *v.* Rogers, 2 Wils. 26; Co. Litt. 338 a; Shep. Touch. 307; Sleigh *v.* Bateman, Cro. Eliz. 487.

(*g*) Co. Litt. 338 a; Shep. Touch. 307.

(*h*) Shep. Touch. 301; Bac. Ab. Leases (S.) 3. See also the following cases as to surrenders in law, Davison *v.* Stanley, 4 Burr. 2210; Phipps *v.* Sculthorpe, 1 Barn. & Ald. 50; Thomas *v.* Cook, 2 Barn. & Ald. 119; Dodd *v.* Acklom, 6 Man. & G. 672; Lyon *v.* Reed, 13 Mee. & W. 285; Nickells *v.* Atherstone, 10 Q. B. 944.

(*i*) See Roe *v.* Archbishop of York, 6 East, 86; Gore *v.* Wright, 8 Ad. & El. 118. A mere cancellation of the lease is no surrender; (Doe *v.* Thomas, 9 Barn. & Cress. 285;) but may, under particular circumstances, be evidence of one. (Walker *v.* Richardson, 2 Mee. & W. 882.)

render at a place off the land, to him in reversion, and the latter agree to it, he has the land in him without further ceremony (*k*).

As to the effect of this conveyance, we may also remark that if a lessee for life or years make a lease for years, reserving rent, and then surrender his estate to him in reversion, the estate for years so derived out of the estate for life will continue notwithstanding the surrender, but the under-tenant will be discharged (in general) from the rents and covenants of the under-lease: for the reversionary estate to which they were annexed has ceased to exist (*l*). But now by the statute 4 Geo. II. c. 28 (*m*), it is provided in the particular case of a lease surrendered for the purpose of *renewal*, that the new lessee shall have the like remedy as to the rent and covenants, and the under-lessee shall hold, as if the original lease had been kept on foot: and the chief landlord shall have the like remedy by distress and entry as he would in the same case have had, so far as the new rent exceeds not that reserved by the original lease (*n*). By 8 & 9 Vict. c. 106, s. 9, moreover, it is provided more generally, that when the reversion expectant on a lease (made either before or after the passing of that act of any tenements or hereditaments of any tenure) shall, after the 1st October, 1845, be surrendered or merge, the estate which shall, for the time being, confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, (to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as but for the surrender or merger thereof, would have subsisted,) be deemed the reversion expectant on the same lease.

IX. An Assignment of land or real estate is properly a

(*k*) Shep. Touchstone, 307, 308; Thompson *v.* Leach, 2 Vent. 198.

(*l*) Lord Treasurer *v.* Barton, Moore, 94; Webb *v.* Russell, 3 T. R. 402; 3 Prest. Conv. 140.

(*m*) As to renewal of leases of *crown* lands, see 8 & 9 Vict. c. 99, s. 7.

(*n*) Doe *v.* Marchetti, 1 B. & Ad. 715.

transfer, or making over to another, of a person's whole interest therein, whatever that interest may be; but it is more particularly applied to express the transfer of an estate for life or years. And an assignment for life or years differs from a lease only in this, that by a lease a man grants an interest less than his own, reserving to himself a reversion; by an assignment he parts with the whole property, and the assignee consequently stands in the place of the assignor (*o*). Thus where a lease is assigned, the assignee becomes liable to the landlord or reversioner, for the future performance of the covenants made by the lessee: and he remains so, until the assignee assigns over in his turn to another person (*p*). And this liability attaches to him even without entry (*q*). Yet he is not liable by force of the assignment, except on such covenants as *run with the land* (*r*),—a term that has been explained in a former chapter (*s*). And, on the other hand, he is entitled, during the same period, to enforce against the reversioner any covenants of that description, which the lease contains in favour of the lessee; and in case the reversioner conveys his interest to another, then to enforce them also for the future against the grantee of the reversion (*t*). It is to be observed, however, that if the transfer of the term be for a single day short of the residue of the term, no liability or claim on the original covenants can arise between these parties: for it is then an under-lease and no assignment; and the alienee, not coming precisely into

(*o*) 2 Bl. Com. 326.

(*p*) Taylor *v.* Shum, 1 B. & Pul. 21; Harley *v.* King, 2 C. M. & R. 18; 1 Gale, 100; Wolveridge *v.* Steward, 3 Tyr. 637. The original lessee, however, is not discharged from liability by an assignment over, but remains liable on his covenants; Barnard *v.* Godscall, Cro. Jac. 309.

(*q*) Williams *v.* Bosanquet, 1 Brod. & Bing. 248.

(*r*) Whitton *v.* Peacock, 2 Bing. N. C. 411.

(*s*) Vide sup. p. 493.

(*t*) 32 Hen. 8, c. 34; Thursby *v.* Plant, 1 Saund. by Wms. 230 b; Wright *v.* Burroughes, 16 Law Journ. (C. P.) 6. As to the effect of this statute in reference to the proper parties to actions, see also Stephen's Lush's Pract. pp. 29, 30.

the place of the alienor, is in no privity with the reversioner (*u*). No deed or writing was necessary, at common law, to the validity of an assignment (*x*); though in the case of a lease for life, it could not be effected, at common law, without livery of seisin (*y*); but now by the Statute of Frauds, the same provision as to the necessity of a deed or written instrument is made with respect to an assignment, as before mentioned in the case of a surrender. And by 8 & 9 Vict. c. 106, s. 3, an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments shall be void at law, unless made by deed; while on the other hand, by the effect of the same statute, sect. 2, an assignment even of a lease for life, may now be effected by deed of *grant* without livery of seisin. The operative words in an assignment are "assign, transfer, and set over;" but it may be effected by any words sufficient to express the intention (*z*).

X. [A Defeasance (*a*) 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* (*b*), 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 defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the

(*u*) Holford *v.* Hatch, Doug. 182; Baker *v.* Gostling, 1 Bing. N. C. 19.

(*x*) Noke *v.* Awder, Cro. Eliz. 373, 436; Moore, 419, S. C.

(*y*) Earl of Derby *v.* Taylor, 1 East, 502.

(*z*) Parminter *v.* Webber, 8 Taunt. 593. As to an agreement to assign, not amounting to an assignment, see Hartshorn *v.* Watson, 5 Bing. N. C. 477. A transaction which would be void as an assignment may still be held valid as an under-lease, if the intention of the parties can be so effected. See Poulteney *v.* Holmes, 1 Stra. 405; Pollock *v.* Stracy, 16 Law Journ. (Q. B.) 132.

(*a*) As to defeasance, vide Co. Litt. 236 b.

(*b*) From the French verb, *defaire*, *infectum reddere*.

[same time with the original feoffment, was considered as part of it by the antient law (*c*): and on that account only indulged.] For a conveyance of the freehold at common law cannot be defeated or recalled by a deed executed afterwards; and if such conveyance were to contain a proviso that it shall be lawful for the grantor by subsequent act to revoke the same, the proviso would be void for repugnance (*d*). [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 defeasances made subsequent to the time of their creation (*e*).] Defeasances of land are now of rare occurrence (*f*): the practice in modern times being to include, in the same deed, both the conveyance of the land to the alienee, and the conditions (if any) to which it is to be subject, and by which its effect may be defeated.

(*c*) Co. Litt. 236.

(*d*) Co. Litt. 237 a. But if there be a conveyance under the Statute of Uses with a proviso that the grantor shall have power to revoke the uses, "this proviso being coupled with a "*use* is allowed to be good, and not "repugnant to the former estates." —Ibid. This subject will be noticed in the next chapter.

(*e*) Co. Litt. 237 a. If a thing, however, which is executory in its commencement be afterwards executed, it cannot be defeated by a subsequent defeasance; Co. Litt. by Butler, 237 a, n. (1).

(*f*) "In the case of Cotterill *v.* "Purchase, Lord Talbot said he "should always discourage the prac-"tice of drawing an absolute deed "and making a defeasance, as it "wore the face of fraud: Ca. temp. "Talbot, 61, 64."—Co. Litt. by Butler, ubi sup.

CHAPTER XVIII.

OF CONVEYANCES UNDER THE STATUTE OF USES.

THE subject of common law conveyances having now sufficiently engaged our attention, we are next to examine those which derive their force from the statute law: among which, the first place is due to conveyances founded on the Statute of Uses.

It is evident from what was said in a former chapter (*a*), that this statute entirely failed to accomplish the object contemplated by its provisions. For, instead of extinguishing equitable ownerships, it made only a slight alteration in the formal words by which they might be constituted, and changed their name to that of *trusts*—under which they took root more firmly, and flourished in greater vigour than before. But while the statute thus missed its mark, it led to accidental results of a most important character, the nature of which we shall here proceed to explain.

The methods employed for creating or raising uses at the period when the statute passed, were principally three; viz. feoffment, covenant to stand seised to uses, and bargain and sale (*b*). The first transferred the legal estate in the manner already explained when we treated of common law conveyances; and it was applied to the purpose now in question, by declaring in the deed of feoffment, or some other collateral instrument (*c*), to whose use the feoffee was

(*a*) Vide supra, p. 354.

(*b*) Reeves's Hist. Eng. Law, vol. iv. p. 161—163.

(*c*) 1 Sand. Us. 172, 173; Sugd. Gilb. Introd. xlii.

to hold, and defining the estate or interest for which such use was to subsist. The two last emanated from that doctrine of the courts of equity formerly noticed (*d*), that the owner of land who covenanted to stand seised of it to the use of some near relative, or entered into a bargain and sale of it for pecuniary consideration, was thenceforward to be considered as holding it to the use of the covenantee or bargainee respectively, in the cases supposed. As soon as this doctrine was established, the object of putting land into use could be accomplished with the greatest facility, by the mere execution on the part of the owner of a deed of covenant to stand seised, or an instrument of bargain and sale, for such estate as therein mentioned, to the intended *cestui que use;* because a use conformable to that estate immediately arose in his favour (*e*); and though the original owner continued seised (there being no transfer of the legal estate), his ownership became nominal only, for he held subject to the use. In these two latter modes, therefore, as well as by feoffment, it had become the common practice to raise uses before the statute passed.

After that event, it became obvious that uses had now become capable of being turned to a new purpose (though one that had not been designed by the legislature), viz. the conveyance of the legal estate upon a principle unknown to the common law. For we may remember that by the effect of the statute, whenever there is a *seisin to a use*, that use is executed, or (in other words) transmuted into equivalent legal estate (*f*). A party, therefore, who desired to aliene his land after the passing of this act, had only to create (by whatever means) a seisin to the use of the proposed alienee, for such interest as intended (*g*); and a legal estate of the same description was then transferred to him by force of the statute, as effectually as if it had been conveyed by one of the ordinary methods of the common law.

(*d*) Vide sup. p. 359.

(*e*) 1 Sand. Us. 172; Fox's case, 8 Rep. 941, n.

(*f*) Vide sup. p. 364.

(*g*) 1 Cruise's Dig. 440.

It was also obvious that this new principle of conveyance presented parties with the means of escaping from any of the restrictions of the common law, with respect to the modification of estates; for uses (as we have seen) might be limited with greater freedom than the land itself (*h*); and as by a covenant to stand seised, or a bargain and sale, a seisin to uses might be created without any solemnity beyond the simple execution of a secret deed, any persons, who were desirous to avoid the publicity and other inconveniences connected with livery of seisin, might effect the purpose with ease, by resorting to one of these methods, and making it a medium for the operation of the new principle (*i*). Under these circumstances it naturally happened that the same three methods which, before the statute, had been ordinarily employed to raise uses, now began to be employed as modes of transferring the legal estate for the benefit of the transferee; and in connection with this, they were also made, as often as occasion required, to fulfil their former office of creating equitable interests; to effect which, nothing more is necessary than to insert in them a limitation of one use upon another, in the manner described in the chapter on Uses and Trusts (*k*); for while the use is executed by the statute, and becomes legal estate, the second retains, under the name of *trust*, the equitable character designed. Such is the principle of conveyances under the Statute of Uses, considered as a class. They comprise not only the feoffment to uses, the covenant to stand seised, and the bargain and sale, but that species called a lease and release, added to their number since the statute passed, and a fifth, now recently introduced, which may be denominated a grant to uses. Indeed this last, for reasons to be presently stated, is likely to supersede all the rest, in the future practice of conveyancing. Yet as some acquaintance with the four former will continue to be of importance, so far as the investigation of antient titles to land, and the history

(*h*) Vide sup. p. 362.
(*i*) 2 Sand. Us. 40; 2 Bl. C. 337.
(*k*) Vide sup. pp. 367, 370.

of the law in general is concerned, it will be necessary here to examine, individually and in detail, the whole that have been just enumerated. And we will begin with—

I. A Feoffment to Uses (*l*). This is the ordinary conveyance of the common law, of which the nature was explained in the last chapter (*m*), but with a limitation to uses superadded. Thus if A. be desirous to convey to B. in fee, he may do so by enfeoffing a third person, C. (of course with livery of seisin), to hold to him and his heirs to the use of B. and his heirs; the effect of which will be to convey the legal estate in fee simple to B. For since the statute, the legal estate passes to the feoffee by means of the livery, as it would have done before; but no sooner has this taken place, than the limitation to uses begins to operate, and C. thereby becomes seised to the use defined or limited; the consequence of which is, that, by force of the legislative enactment, the legal estate is *eo instanti* taken out of him, and vests in B., for the like interest as was limited in the use, that is, in fee simple. B. thus becomes the legal tenant as effectually as if the feoffment had been made to himself, and without the intervention of a trustee. This method, however, involving as it does the necessity of making livery of seisin, has not been of frequent occurrence in modern practice (*n*).

II. A Covenant to stand seised to Uses (*o*). This is a conveyance by deed (*p*); and is adapted to the case where a person seised of land in possession, vested remainder, or reversion (*q*), proposes to convey his estate to his wife, child, or kinsman (*r*). In its terms it consists of a covenant

(*l*) Vide 1 Sand. Us. 173; 2 Sand. Us. 13.

(*m*) Vide sup. p. 505.

(*n*) 2 Sand. Us. 13. It is likely now to be absolutely laid aside, in consequence of the recent provision of 8 & 9 Vict. c. 106, s. 4, depriving a feoffment of all tortious operation.

(*o*) Vide Roe *v.* Tranmaer, Willes, 682; Doe *v.* Davies, 2 Mee. & W. 503.

(*p*) 2 Fonb. Tr. Eq. 33, 34.

(*q*) 2 Sand. Us. 34, 94.

(*r*) 2 Bl. Com. 338.

by the alienor to stand seised to the use of the intended party. Before the Statute of Uses, this would merely have raised a use in favour of such party; but now the legal estate will be transferred to him; for, the covenantor being by the effect of his covenant seised to the use of the covenantee, the statute will immediately execute that use. Before the statute, however, no use would be raised in contemplation of equity, upon a mere contract, unless that contract were founded on consideration (*s*), that is, either the consideration of money (which made it a bargain and sale), or that of natural affection, which brought it under the description of a covenant to stand seised (*t*). As a consequence from this, the modern conveyance in question is also held to be ineffectual, unless it is to operate between persons standing in some relation to each other, in which natural affection may be presumed to influence the gift; namely, the relation of marriage or of near consanguinity; for there is, otherwise, no use for the statute to take effect upon (*u*). It is on account of inconveniences connected with this principle, and for other reasons, now wholly laid aside (*x*).

III. A Bargain and Sale. This is a conveyance by deed or other instrument in writing (*y*); and is adapted to the case where a person seised of land in possession, vested remainder, or reversion, proposes to convey it to some other person. In its terms it consists of a bargain and sale by the alienor, to the intended alienee, for money. By the effect of this contract, the former becomes seised to the

(*s*) Reeves's Hist. Eng. Law, vol. iv. p. 162.

(*t*) 2 Sand. Us. 90. But a use might be raised on a *feoffment* without consideration. Sugd. Gilb. 90, 91.

(*u*) 2 Sand. Us. 94; Sharrington *v.* Stratton, Plowd. 300.

(*x*) 2 Fonb. Tr. Eq. 25; 2 Bl. Com. 338; 2 Sand. Us. 91; 2 Saund. by Wms. 97 a, n. (b). See Doe *d.* Starling *v.* Prince, 10 L. J. (C. P.) 223.

(*y*) It must be in writing by the Statute of Frauds, 29 Car. 2, c. 3. And by the Statute of Inrolments, 27 Hen. 8, c. 16, it must be by *indenture*, in the cases to which the statute applies.

use of the latter, in fee, or tail, for life, or years, (according to the nature of the limitation); and this before the statute was the whole effect of the instrument; but now the statute will execute that use, and clothe the latter with a commensurate legal estate. 'But as it is essential to the efficacy of a covenant to stand seised, that it should be made in consideration of natural affection, so, for the like reason, it is requisite in the case of a bargain and sale, that it should be founded on pecuniary consideration; for otherwise no use would be raised, and there would be nothing for the statute to operate upon.

With respect to this conveyance, it is to be observed that it possessed in a peculiar degree the recommendation to which we before adverted, of enabling parties to transfer a freehold without livery of seisin. For the covenant to stand seised could be rarely made available to the purpose, as it operated only between persons standing in particular relations to each other; but in the extensive class of conveyances which take place between seller and purchaser, a bargain and sale afforded the ready means of dispensing with livery of seisin and attornment; and by the insertion into the deed of a small sum of money, as the nominal consideration of a transfer, it was easy, even when the transaction was not really of the pecuniary kind, to obtain the benefit of the same mode of conveyance (z). And not only the freehold in possession might be thus conveyed without livery, but a remainder or reversion too might pass by the same method (as indeed it might also by covenant to stand seised), without attornment (a). But secret transfers of land were strongly opposed (for reasons before sufficiently explained) to the antient policy of the law. As soon therefore as the legislature perceived that these might be accomplished with facility, by means of a bargain and sale, it hastened to provide a remedy; and that devised for the

(z) 2 Sand. Us. 41.

(a) 2 Sand. Us. 40; 1 Saund. by Wms. 234 b, n. (4); Shove v. Pincke, 5 T. R. 124. As to attornment, vide sup. p. 466.

purpose was, to connect with this new conveyance a new ceremony, calculated to ensure publicity (*b*), and to operate as a permanent memorial of the transaction. It was accordingly enacted by statute 27 Hen. VIII. c. 16 (called the Statute of Inrolments), that no bargain and sale shall enure to pass a freehold, unless the same be by *indenture enrolled* within six months after its date, in one of the courts of Westminster Hall, or with the *custos rotulorum* of the county (*c*).

A bargain and sale, it is to be observed (and the remark is equally applicable to a covenant to stand seised), is also capable of conferring a complete estate for years, without entry; a property that belongs not to a conveyance at common law: for a lease for years gives (as formerly shown) no complete estate until entry has been made (*d*); but if a man seised of land, bargain and sell it for a term of years, the use thus raised will be executed and become a complete estate for years, by force of the statute, without any additional ceremony: upon the same principle that a bargain and sale for a freehold interest will enure to pass a freehold, without livery of seisin (*e*). And though the Statute of Inrolments provides compensation for the tendency of bargains and sales to dispense with livery in freehold conveyances, it makes no similar provision to guard against their effect in conveying a term of years without entry; for these chattel interests were of a very precarious nature till about six years before the statute passed, and were not thought of sufficient importance to be included in its enactment (*f*). A bargain and sale for term of years will therefore be effectual without enrolment (*g*); and differs, in this respect, from a bargain and sale for an estate of freehold.

(*b*) 2 Sand. Us. 43, 44, 51; Bac. Use of Law; 2 Bl. Com. 338.

(*c*) 2 Sand. Us. 41. Hereditaments lying within any city or town corporate, the officers of which have authority to make inrolment of deeds, are excepted from this statute. 2 Sand. Us. 66.

(*d*) Vide sup. p. 287.

(*e*) Barker *v.* Keate, 2 Mod. 249; Mallory's case, 5 Rep. 113.

(*f*) 2 Bl. Com. 338.

(*g*) Ibid.

It is material to observe, that no particular form of words is essential to the efficacy either of a bargain and sale or a covenant to stand seised (*h*). "Bargain and sell" are the words of transfer ordinarily used in the one case, and "covenant to stand seised" in the other. But other words will have the same effect (*i*); and the distinctive character of each of these conveyances is determined by the consideration on which it is founded (*k*). Where the use is raised upon a pecuniary consideration, the conveyance will be good as a bargain and sale, whatever the terms used; where on the consideration of natural affection, it will avail as a covenant to stand seised (*l*). If the words employed, however, are such as to indicate that there is no intention of conveying by the instrument in which they are contained, for example, if they amount merely to an engagement to convey by a future one, no use will arise, and no estate consequently will pass (*m*).

The rule, which requires a bargain and sale to be founded on pecuniary consideration, is held to be matter of form only, and sufficiently complied with if the conveyance *purport* to be so founded; and for this purpose any trivial sum may be inserted (*n*), though the consideration which really passes between the parties be of larger amount, or even though it be in fact not of a pecuniary nature. It is also immaterial whether the sum so inserted be actually paid or not (*o*).

IV. A Lease and Release. The conveyance so described is of a compound description, consisting of two separate parts; first, a bargain and sale; secondly, a common law conveyance of release: and, (like the bargain and sale) it is adapted to the case where a person seised of land in pos-

(*h*) 2 Sand. Us. 56, 90; Doe *v.* Davies, 2 Mee. & W. 503.

(*i*) 2 Sand. Us. 90.

(*k*) 2 Fonb. Tr. Eq. 47.

(*l*) 2 Sand. Us. 90; 2 Saund. by Wms. 96 b, n. (1), n. (2).

(*m*) 1 Sand. Us. 118, 120.

(*n*) 2 Sand. Us. 54.

(*o*) Sugd. Gilb. 96.

session, vested remainder, or reversion, proposes to convey his interest to another.

A conveyance of the same denomination was among those which obtained occasionally (*p*) at the common law, and was omitted in our former enumeration of them only because it has long fallen into complete disuse. Its principle (which is material to our present purpose) was as follows:—A party desiring to convey in fee would first make to the proposed alienee, a demise or lease; for example, for one year, which, if perfected by his actual entry, would confer upon him a complete estate of leasehold (*q*). He would then be capable of receiving a release of the reversion, for he would be tenant of the particular estate on which that reversion was expectant (*r*); and the next step therefore would be to execute a release of the land to him and his heirs: so that, by the conjoint operation of the two conveyances, he would become, without livery of seisin, tenant in fee in possession. When the Statute of Inrolments (*s*) had rendered it impossible to effect a secret and summary conveyance of the freehold, by the method of bargain and sale, the practitioners of the day were left to explore new means of attaining that favourite object; and they accordingly invented for the purpose, a new conveyance under the Statute of Uses; the hint of which was supplied by this common law expedient of lease and release (*t*). Instead of a lease or demise, the conveying party was made to execute a bargain and sale for some leasehold interest, for example, for the term of one year. This, without any inrolment, passed the legal estate for a year to the bargainee, (the Statute of Inrolments extending to freeholds only,) and the estate so transferred was complete (as we have seen) without actual entry (*u*). The transferee there-

(*p*) 2 Sand. Us. 70, where it is said not to have been frequent. See Reeves's Hist. Eng. Law, vol. iii. p. 357; vol. iv. p. 356.

(*q*) 2 Bl. Com. 144.

(*r*) Vide sup. p. 322.

(*s*) Vide sup. p. 536.

(*t*) 2 Sand. Us. 71; 2 Prest. Conv. 219.

(*u*) Supra, p. 536. See 2 Sand. Us. 71.

fore was capable of receiving a release of the freehold and reversion (*x*); which release was accordingly granted to him on the next day (*y*). This compound conveyance (which is said to have been invented by Serjeant Moore soon after the Statute of Uses (*z*)) was called, like its common law prototype, a lease and release; though, properly speaking, it is rather a bargain and sale with release. As it is competent to pass the freehold without livery of seisin, entry, or inrolment, or any other ceremony than the execution of the deeds themselves (*a*), and was in some other technical points more advantageous than a bargain and sale (*b*), it soon grew into familiar use, and became so generally established as almost entirely to supersede every other method of conferring a freehold estate, whether at common law, or under the Statute of Uses. It is almost superfluous to add, that its legal validity became also, in progress of time, too firmly settled to be shaken, though great lawyers have formerly entertained doubts on that subject (*c*).

On the release, some use was ordinarily engrafted. If it was one to the relessee himself in fee, he took the legal estate as at common law (*d*); for this is not such a use as the statute executes (*e*); but if the use were declared to a third person, it would be executed by the statute, and the legal estate in the freehold conveyed would pass accordingly to *him*.

The lease (or bargain and sale) and the release, in practice, used always to constitute separate deeds, the former bearing date the day before the latter; but if comprised in the same deed, they were understood to be equally effectual (*f*). And by 4 & 5 Vict. c. 21, intituled "An Act for rendering

(*x*) 2 Sand. Us. 71; 2 Prest. Conv. 219.

(*y*) Ibid.

(*z*) 2 Bl. Com. 338; Reeves's Hist. Eng. Law, vol. iv. p. 355.

(*a*) 2 Sand. Us. 72.

(*b*) 2 Sand. Us. 60.

(*c*) 2 Bl. Com. 339.

(*d*) 2 Sand. Us. 72.

(*e*) Vide supra, p. 370.

(*f*) Sugd. Gilb. 229, (n.)

"a Release as effectual for the Conveyance of Freehold "Estates as a Lease and Release by the same Parties," every instrument purporting to be a release of a freehold (*g*) estate, and expressed to be made in pursuance of that act, shall be as effectual for all purposes as if a bargain and sale or lease for a year had been executed, although such bargain and sale or lease shall not in fact have been executed.

V. A Grant to Uses. Though we have not thought ourselves at liberty to dispense with the former learning relative to the lease and release, so lately the principal conveyance in our law, and to the other methods before enumerated in this chapter, it is improbable, as already remarked, that any of them will hereafter find a place in practice; for by the obvious effect of that most important provision of the 8 & 9 Vict. c. 106, s. 2, to which we formerly had occasion to refer, abolishing the antient maxim that corporeal hereditaments lie in livery only and not in grant, by enacting that they "shall, as regards the "conveyance of the immediate freehold thereof, be deemed "to lie in grant as well as in livery," all conveyances of hereditaments, whether corporeal or incorporeal, and whether for an estate of freehold or for an inferior estate, may now be brought within the range of that common law conveyance discussed in the last chapter under the head of grant, though in its antient and proper application that conveyance was confined, as we have seen, to the transfer of incorporeal hereditaments and estates in expectancy; and as it is in itself a simpler, more convenient, and more rational method than that by feoffment with livery of seisin, or than any of those which passed the legal estate through the unnatural intervention of ma-

(*g*) For the purposes of this act, the word *freehold* is defined to extend to all lands and hereditaments for the conveyance of which a bargain and sale or lease for a year, as well as a release, would have been used, if the act had not been passed; 4 & 5 Vict. c. 21, s. 3.

chinery intended as equivalent for livery of seisin, and is equally capable with these of being combined with limitations to uses, there seems no reason to doubt that a grant to uses will now supplant all other methods of conveying real estate, and become the universal expedient.

Having now considered the different species of conveyances under the Statute of Uses, it is time to make some remarks applying to them as a class, in the course of which it will appear that though, since the passing of the statute of 8 & 9 Victoria just mentioned, there is no longer a necessity for resorting to any of them *for the purpose of passing the legal estate without livery of seisin*, which may now be effected by a common law grant, i. e. a simple grant without uses, yet there still exists, in reference to objects of another kind, reasons for adopting, in most cases, a conveyance to uses in preference to this or any other of the pure and unmixed conveyances at the common law.

We may remark then, in the first place, that conveyances to uses must comprise (of course) all the circumstances necessary to bring the Statute of Uses into operation. Some use therefore (either *in esse* or otherwise (*h*)) must be raised by them, and some sufficient seisin to such use must be constituted; or in the language of conveyancers there must be a seisin proper to support or *serve* the use (*i*). And from this necessity of a seisin to a use it follows, that an existing term of years cannot be transferred by any method of conveyance depending on the Statute of Uses for its operation; for of a mere chattel interest there can be no seisin: though the owner of the freehold may (as we have seen) convey it by these methods, for a term of years; for he has a seisin out of which the use for the term may be served (*k*). For the same reason it has also been supposed that a corporation aggregate cannot aliene land by a conveyance under the Statute of

(*h*) Vide sup. p. 365.

(*i*) 2 Sand. Us. 59; 1 Sand. Us. 97, 133, 140.

(*k*) 2 Sand. Us. 59.

Uses (*l*); for as formerly remarked (*m*), it was part of the antient doctrine with respect to uses, that such bodies as these could not be seised to any use but their own. When corporations aggregate have occasion, therefore, to make conveyances of their lands, the method usually adopted has commonly been that of a feoffment, or a lease with actual entry, followed by a release (*n*).

With respect, however, to the use which is required for the purpose of a conveyance under the statute, this may either be expressly declared, or implied by law. Thus, if A. conveys by feoffment or lease and release to B. in fee, without consideration, and without declaring any use, there will be a *resulting* use, by construction of law, to himself the grantor; which use the statute will execute accordingly (*o*).

With respect to the limitation of estates by these methods of conveyance, it may be laid down as a general proposition, that a limitation of the legal estate by way of use, is governed by the same principles as apply to the creation of estates by a common law assurance (*p*). Thus we have seen that the word *heirs* is necessary at common law, to create an estate of inheritance (*q*); and in like manner, if a man bargains and sells to A., without adding *and his heirs*, A. has only an estate for life (*r*). So an estate may be limited by way of use (as well as in a common law conveyance) in possession, in remainder, or in reversion (*s*); and, if in remainder, must be limited to take effect in possession immediately on the determination of

(*l*) 2 Sand. Us. 58; 4 Cru. Dig. 175; Sugd. Gilb. 7, (n.)

(*m*) Vide sup. p. 360.

(*n*) 2 Sand. Us. 59; Sugd. Gilb. 7, n. (1).

(*o*) Co. Litt. 271 b; 1 Sand. Us. 106, 109; Doe *v.* Rolfe, 3 Nev. & Per. 648. Vide sup. p. 373.

(*p*) 1 Sand. Us. 123, 124; Corbet's case, 1 Rep. 87 b. A more liberal construction, however, is in some cases allowed in a limitation to uses, than in a common law conveyance; vide sup. pp. 522, 529, *in notis*.

(*q*) Vide sup. p. 238; 2 Bl. Com. 109; Nevell *v.* Nevell, 1 Roll. Ab. 837.

(*r*) 1 Sand. Us. 124.

(*s*) Sugd. Gilb. lvii. lviii.

the particular estate (*t*). So the remainder may be either vested or contingent (*u*); and is subject (if contingent) to the common law rule, that if it amount to freehold, it cannot be limited on a particular estate less than freehold (*x*). Legal estates, created by way of use, have also been subject in general to the same incidents as if created by the methods of the common law (*y*). Thus, where a particular estate was limited by way of use, it was liable to forfeiture if the tenant made a feoffment for a larger estate than his interest warranted; and if a contingent remainder was limited by way of use, and the particular estate was destroyed before the contingency happened, the remainder was also (prior to the late statute of 8 & 9 Vict. c. 106, s. 8, altering the law on this subject (*z*)) defeated (*a*).

But while a limitation by way of use, is thus in general subject to common law principles, there are some very material particulars, in which it has always been allowed a greater latitude (*b*). The nature of these may be explained as follows.

1. By the common law, a man could not in any case be a purchaser (that is, take an estate) by his own conveyance; for he could not, in the nature of things, unite the opposite capacities of grantor and grantee (*c*). Thus A. seised in fee, could not convey to himself for life, remainder over to B. in fee; nor to B. for life, remainder to himself, the grantor, in fee. In the first case, the whole conveyance would be void; in the second, the remainder: A. in such case taking no remainder, but continuing in the *reversion*, as of his former estate (*d*). And the distinction involved

(*t*) Sugd. Gilb. ib. 164; vide sup. p. 323.

(*u*) Sugd. Gilb. lviii. 153, 164.

(*x*) Ibid. 164, 165; vide sup. p. 327.

(*y*) 1 Sand. Us. 166.

(*z*) Vide sup. p. 332.

(*a*) Sugd. Gilb. 298.

(*b*) 1 Sand. Us. 130.

(*c*) Per Hale, Pibus *v.* Mitford, 1 Vent. 378; Southcot *v.* Stowell, 2 Mod. 210; 1 Sand. Us. 131, 132; "*Nemo potest esse agens et patiens*," 2 Prest. Est. 20.

(*d*) Co. Litt. 22 b; Read *v.* Errington, Cro. Eliz. 321; 2 Bl. Com. 176. It is to be recollected here that a reversion is always the old estate, a remainder a new one; vide sup. pp. 313, 318.

this practical difference, that the reversion, being the old estate, was in its descent confined to the blood of the same purchaser as before; whereas if A. had taken (or in other words purchased) it as a remainder, it would (according to the general law of inheritance) have been descendible to his heirs general, whether his former title had been by purchase or descent (*e*). But indirectly, and through the medium of a limitation to uses, it has been always practicable for a man to become purchaser by his own conveyance (*f*). Thus A. may by feoffment, or lease and release, convey to a third person C., to the use of himself, the grantor, for life, with remainder to the use of B., in tail or in fee; or to the use of B. for life, with remainder to the use of himself, the grantor, in tail; and in all these cases he will take the legal estate by purchase accordingly (*g*); though if the remainder were to the use of himself in *fee*, he would formerly not have taken by purchase; at least not in such sense as to make him a purchasing ancestor; for such a use was considered as amounting only to the *old use in reversion*, so that it would be converted by the statute into a legal estate in *reversion*, which would descend to the blood of the same purchaser as before (*h*). And such was the state of the law at the time of passing the Inheritance Act, 3 & 4 Will. IV. c. 106; but that act has now established a new rule with respect to the limitation which a man makes in his own favour, in his own conveyance; the terms of the provision (section 3) being as follows:—"that when any land (*i*) shall have been limited

(*e*) 2 Bl. Com. 176; Watk. Desc. 169; vide sup. p. 425.

(*f*) Per Hale, Pibus *v.* Mitford, ubi sup.; Southcot *v.* Stowell, ubi sup.; Watk. Desc. 180.

(*g*) Co. Litt. 22 b; Co. Litt. by Harg. 13 a, n. (2); 1 Sand. Us. 135; Sugd. Gilb. 150, 151.

(*h*) 1 Rep. 129 b, 130 a; Co. Litt. 23 a; Reed *v.* Errington, Cro. Eliz. 321; Ld. Raym. 802; Godolphin *v.* Abingdon, 2 Atk. 57. The case was the same where the use in fee *resulted* to the grantor, instead of being expressly limited. As to resulting uses, vide sup. p. 359.

(*i*) The word *land* is used in this act in a sense much larger than properly belongs to it, and is to be understood to extend to all hereditaments, corporeal or incorporeal, freehold or copyhold, and every interest

"by any assurance, executed after the 31st December, "1833, to the person, or to the heirs (*k*) of the person, "who shall thereby have conveyed the same land, such "person shall be considered to have acquired the same as "a purchaser by virtue of such assurance, and shall not "be considered as entitled thereto as his former estate, or "part thereof." We may add here, that upon the same principle which made it impossible for a man to convey to himself, he could not at common law convey to his wife (*l*); she being considered by that law as the same person with him; yet the object may be effected through the medium of a limitation to uses; that is, by creating a seisin in another person, and declaring a use to the wife (*m*).

2. At common law, a freehold cannot be created to commence in futuro; or in other words, cannot be limited to take effect at a future period, except by way of remainder upon some particular estate also passing at the same time out of the grantor; for which rule, and the reasons on which it is founded, the reader is referred to a former part of the work (*n*). But this may be effectually done by a conveyance under the Statute of Uses; for a use was never subject to the like restriction, but may be limited for any extent of interest, to commence *in futuro* (*o*); and the statute, taking effect on such future interest, transmutes it into

capable of being inherited, including chattels and other personal property, if transmissible to *heirs*; vide sect. 1.

(*k*) A limitation by a man to his own heirs, is equivalent to a limitation to himself and his heirs; "for," says Lord Coke, "*hæres est pars antecessoris*. And this appeareth in a "common case, that if land be given "to a man and his heirs, all his "heirs are so totally in him, as he "may give the land to whom he "will."—Co. Litt. 22 b; et vide 1 Vent. 378; 2 Bl. Com. 176. A limitation by a man to his own heirs was consequently subject, before this statute, to the same rules as stated in the text with respect to a limitation by him to himself in fee, or to his own use in fee. 1 Rep. 129 b, 130 a; Co. Litt. 22 b.

(*l*) Co. Litt. 112 a; Moyse *v.* Giles, 2 Vern. 385; Lucas *v.* Lucas, 1 Atk. 271; Arthur *v.* Bokenham, 11 Mod. 156.

(*m*) 1 Sand. Us. 132.

(*n*) Vide sup. p. 321; Sugd. Gilb. 163, (n.); 1 Sand. Us. 138.

(*o*) Vide sup. p. 362.

legal estate (*p*). Thus a man may covenant to stand seised to the use of another in fee seven years hence, or bargain and sell to him in fee after seven years, and such conveyance will be effectual (*q*). So by feoffment, or lease and release, an estate may be conveyed to A. and his heirs, to the use of B. and his heirs at the death of C. (*r*). A use thus limited *in futuro*, independently of any preceding estate, is called a *springing* use (*s*). Such a use is also often described as *executory*, because it is not executed by the statute until it comes into *esse* by the arrival of the period contemplated. Thus, in the two first examples, the whole fee remains in the covenantor or bargainor, till the seven years expire (*t*); in the two latter, a use results to the feoffor or releasor, till the death of C. (*u*). But on these events the springing use is executed, and the *cestui que use* is clothed with the legal estate in fee.

3. By a common law conveyance, an estate cannot be limited, upon a future event, to one person, in abridgment or defeasance of an estate of freehold, first limited to another (*x*); which is often expressed, where the dispositions are both in fee simple, by the maxim that *a fee cannot be limited on a fee* (*y*). Thus land cannot be conveyed at common law to B. in fee, or for life, with provision that

(*p*) Sugd. Gilb. 161, (n.)

(*q*) 1 Sand. Us. 139.

(*r*) Ibid. 140.

(*s*) Sugd. Gilb. 153.

(*t*) Ibid. 161, (n.) 153, (n.)

(*u*) 1 Sand. Us. 140.

(*x*) Co. Litt. by Butl. 203 (b), n. (1); Cogan *v.* Cogan, Cro. Eliz. 360; Fearne, by Butl. 14, 15, 18, 264, 9th edit.

(*y*) Fearne, by Butl. 372, 9th ed.; 1 Sand. Us. 143; 2 Bl. Com. 173, 164. This maxim applies, not only to such limitations as referred to in the text, but also to limitations of one fee upon another by way of *remainder*. For no remainder (as we have seen) can be limited on a fee-simple (vide sup. p. 320.) And therefore if land be given to A. and his heirs, so long as B. has heirs of his body (which is a fee-simple qualified, supra, p. 239, note (*x*)), with remainder in fee to C., this remainder is void. Fearne, by Butl. 372, 9th edit. And the maxim, in this sense of it, applies to conveyances under the Statute of Uses, as well as those at common law. It is, however, to be recollected, that there may be *alternate* or *substituted* limitations of the fee, where each of them is by way of contingent remainder; vide sup. p. 326.

when C. returns from Rome, it shall thenceforth immediately go over to C. in fee (*z*). For this would be to defeat the first estate by force of a condition, which can only be done by the entry of the grantor, or his heirs; and the effect of such entry would be to destroy the second limitation as well as the first, and to restore the grantor and his heirs to their former estate (*a*). But a use might always be made to shift, in this manner, from one person to another (*b*); and therefore, since the statute, land may be conveyed through the medium of a use, in like manner; as by limiting it to A. and his heirs, to the use of B. and his heirs, with proviso, that when C. returns from Rome, the land shall be to the use of C. and his heirs (*c*). A use so limited in derogation of a preceding estate, is called a *shifting* or *secondary* use (*d*); and this also is of the executory kind, the operation of the statute being suspended till the event arrives (*e*). Thus, in the example just given, there is a use first executed by the statute in B., and when C. returns from Rome, the use to C. comes into *esse*, and is executed in him. As to the form of disposition itself, it is often called a *conditional limitation* (*f*); but the term cannot with propriety be applied to it, in an exclusive sense (*g*). For there is a conditional limitation of another kind, which is capable of being created at the common law; as where land is given to B. *until* C. returns from Rome, and after the return of C., then to C. in fee (*h*). And the distinction between the two cases is this, that, in the latter, the estate to C. is not directed to come into possession till that to B. naturally determines by the effluxion of the period for which it was limited, and it is therefore

(*z*) Fearne, by Butl. 14, 15, 9th ed.

(*a*) Co. Litt. 379 a; Litt. ss. 721, 722, 723; 1 Sand. Us. 151; vide sup. p. 301.

(*b*) Sugd. Gilb. 153, 154, (n.); 1 Sand. Us. 152.

(*c*) 1 Sand. Us. 149.

(*d*) 1 Sand. Us. 152; Sugd. Gilb. 152, (n.)

(*e*) Sugd. Gilb. 154, 155, (n.); 1 Sand. Us. 144.

(*f*) Fearne, by Butl. 15, 9th ed.

(*g*) Sugd. Gilb. 178, (n.); vide sup. p. 299, n. (*m*).

(*h*) 1 Sand. Us. 151; Fearne, by Butl. 13, 9th edit.

good as a *remainder* (*i*); but in the prior one, C.'s estate takes effect in abridgment or exclusion of B.'s, and is consequently no remainder (*k*); for every remainder must await the determination of the particular estate (*l*). It remains only to observe, that, upon questions of legal construction, a preference is always given to the modifications of the common law; and therefore it is firmly settled, that no estate capable of being considered as a remainder (according to the rules by which remainders are limited) shall ever be construed as a shifting or springing use (*m*).

4. The grantor, in a common law conveyance, cannot reserve to himself, nor confer on any other person, the power of revoking or altering the grant, by any future act or instrument; for that is deemed repugnant to the conveyance itself (*n*). The utmost that the common law allows, is a deed of defeasance (coeval with the grant, and therefore esteemed a part of it) upon events specifically mentioned (*o*). But the limitation of a *use*, subject to a power of this description, was not considered as involving any repugnancy; for a use was a mere direction to the trustee, how he was to deal with the legal estate: which might well be recalled or changed (*p*). Therefore, in a conveyance under the statute, a proviso giving to the grantor or grantee, or a stranger, authority to revoke or alter, by a subsequent act, the estate first granted, will be valid; for it is in effect no more than an authority to revoke the use first limited, or to

(*i*) Fearne, by Butl. 12, 13, 14, 9th ed. It is to be understood here that the particular estate limited to B. amounts, by construction of law, to an estate for his *life, determinable* on C.'s return from Rome; and therefore the whole fee, except this determinable life estate, remains in the grantor, to be granted over as he may think proper. The remainder to C., being limited on an uncertain event, is of course a *contingent remainder*, Fearne, by Butl. 13, n. (*h*), 9th edit.

(*k*) Co. Litt. 379 a; Litt. ss. 721, 722, 723.

(*l*) Vide sup. p. 318.

(*m*) 2 Saund. by Wms. 388; Fearne, by Butl. 393, 9th edit.

(*n*) Co. Litt. 237 a; 2 Bl. Com. 327, 335; 2 Fonb. 158, 159.

(*o*) 2 Bl. Com. 335; vide supra, p. 528.

(*p*) Sugd. Gilb. 158, (n.)

declare a new one (*q*). Such provisoes are called *powers* (*r*); (a term properly applicable, as we have seen (*s*), to *all* authorities, as distinguished from estates); and are either mere *powers of revocation* (*t*), enabling the grantor simply to recall what he has bestowed, or *powers of revocation and new appointment* (*u*), authorizing the grantor, or some other person, to alter or make a new disposition of the estate conveyed. The first will of course hardly find a place except in grants of a gratuitous nature, (or *voluntary* conveyances as they are called,) though in these they are naturally to be expected (*v*); mankind, according to the remark of Lord Bacon, having always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards (*x*). But with respect to powers of revocation and new appointment, they are of frequent occurrence in the more common case of conveyances founded on consideration, and particularly in family settlements; their object not being to indulge the caprice of any party, but to carry into effect with greater convenience the arrangements actually contemplated. Thus, if a life estate be limited to the settlor, with remainder over, it is common to insert a power enabling him from time to time to make effectual leases of the property in possession, for terms not exceeding twenty-one years; a privilege reasonable and convenient in itself, but such as a mere tenant for life could not, as the law, up to a very recent period, stood (*y*), exercise in any case, without any aid of an express proviso of this description. Of the same nature, in general, are the usual powers of jointuring, selling, charging land with the payment of sums of money, and the like (*z*); and all

(*q*) Sugd. Gilb. 158, (n.)

(*r*) "The limitation and modifying of estates by virtue of powers, "came from equity into the common "law with the Statute of Uses."—1 Burr. 120.

(*s*) Vide sup. 230.

(*t*) A power of appointment implies power of revocation, but not *è converso*; 4 Cruise, Dig. 232.

(*u*) 1 Sand. Us. 155; 4 Cruise, Dig. 228.

(*v*) 2 Fonb. 155, n. (*q*).

(*x*) 2 Bl. Com. 335.

(*y*) Vide sup. p. 258.

(*z*) 2 Sand. Us. 81.

these are technically described as powers of revocation and new appointment,—because, in authorizing a new disposition not made by the conveyance itself, they operate *pro tanto* as a revocation of those which it contains (*a*). Such a power, if closely considered, will be found to amount to an authority to create a use, to take effect in derogation to a certain extent, of the uses first limited; or rather to the virtual limitation of an executory use of that description, in favour of such person, and for such estate, as shall be defined by the subsequent act of the donee of the power (*b*). This subsequent act or exercise of the power is called an *appointment* (*c*); and its effect (when it correctly pursues the authority (*d*)) is to raise in favour of the appointee, a use corresponding to the estate appointed; which being served out of the original seisin, is immediately executed by the statute, and transmuted into equivalent legal estate (*e*). An appointment is not considered as an independent conveyance (*f*). It is merely

(*a*) 1 Sand. Us. 155; 4 Cruise, Dig. 228. The term *power of revocation and new appointment* is not, however, usually applied to a mere power of leasing, jointuring, or the like; but to powers of a different nature, as where a man conveys his estate to trustees to certain uses, with proviso that it shall be lawful for him at any future time to revoke these uses and declare new ones, &c.; ibid.; et vide 1 Cruise, Dig. 438; Doe *v.* Martin, 4 T. R. 39.

(*b*) Sugd. Gilb. 152, 153 (n.); 2 Sand. Us. 81.

(*c*) 2 Sand. Us. 31. "In whatever mode the power is exercised, "whether by grant, bargain and sale, "will, &c. the instrument in every "case operates strictly as an appointment or declaration of the use; "and therefore, in consequence of "the rule before noticed, that there "cannot be a use upon a use, the "bargainee, &c. takes the legal estate, the appointment being made "to him; and if any ulterior use is "declared, it operates merely as a "trust in equity."—2 Sugd. Powers, 14th edit. 1836; et vide ibid. vol. i. p. 240.

(*d*) As to what is a valid execution of a power, vide Sugd. Pow. vol. ii. p. 94, 6th edit.; Rutland *v.* Doe, 5 Mee. & W. 688; Burdett *v.* Spilsbury, 6 Man. & G. 386; as to the manner of executing a power to appoint by *will*, vide 7 Will. 4 & 1 Vict. c. 26, ss. 27, 10, et post, p. 606; as to *illusory* appointments, vide 11 Geo. 4 & 1 Will. 4, c. 46. See also 12 & 13 Vict. c. 26, (suspended by 12 & 13 Vict. c. 110, and repealed in part by 13 & 14 Vict. c. 17,) giving relief against the defective execution of *leasing* powers.

(*e*) 2 Sand. Us. 82; 4 Cruise, Dig. 228.

(*f*) 2 Sand. Us. 84.

ancillary to the former deed; which (as already observed) contains, in effect, a prospective limitation of the new use. The appointee, therefore, is considered, for most purposes, as deriving his title under the original conveyance (*g*); and to be in the same position as if that instrument had actually contained a limitation in his favour, to the extent of the estate appointed.

Not only as to the limitation of estates, but in other particulars, there were important differences between conveyances to uses, and those that take effect at common law. For most purposes (as we have seen) an actual possession is deemed to be given, by the former conveyances, equivalent to that which would have been obtained if the alienee (supposing the interest conferred to be freehold) had received livery of seisin, or (supposing it leasehold) had made actual entry (*h*). But as a bargain and sale, a covenant to stand seised, and a lease and release, convey the actual possession by construction of law only, so they differed from a feoffment, in such incidents as result from its real delivery in point of fact. Therefore, though a feoffment, when made by the tenant in actual possession, would convey a wrongful estate of freehold (supposing his title insufficient to give a rightful one), and, when made by a particular tenant for a greater estate than he can lawfully convey, would occasion a forfeiture (or, in the case of tenant in tail, a discontinuance) of the particular estate, and the contingent remainders dependent on that estate were consequently liable to be defeated (*i*), no such results would follow from any conveyance by way of covenant to stand seised, bargain and sale, or lease and release (*k*). For by the feoffment there was an actual investiture of the possession, as for an estate of freehold; which, as it

(*g*) 4 Cruise, Dig. 282, 497; Bringloe *v.* Goodson, 4 Bing. N. C. 734; vide Sugd. Powers, vol. ii. p. 25, edit. 1836.

(*h*) 2 Sand. Us. 52; vide sup. pp. 232, 281, 287.

(*i*) Vide sup. p. 461.

(*k*) 2 Sand. Us. 73.

was held, must take effect either *de jure* or *de facto;* but the other conveyances could, in their nature, pass no more than the grantor might lawfully transfer (*l*). For this reason they received, by way of distinction from a feoffment, (and others now abolished of the like nature,) the appellation of *innocent* conveyances (*m*). But the statute 8 & 9 Vict. c. 106, s. 4, having (as we have seen) provided, that a feoffment made after the 1st October, 1845, shall not have any tortious operation, the whole learning on the subject to which we have here referred, (so far as regards future conveyances,) has, by the effect of this provision, been swept away.

The reader who reflects attentively on the nature of a conveyance under the Statute of Uses, as we have attempted to explain it in the present chapter, will not fail to be impressed with the importance of the changes which this act of parliament incidentally occasioned. It has been said to have had little other effect than to make a slight alteration in the formal words of a conveyance (*n*),—a remark alluding to the practice it has introduced of limiting one use upon another, when the intention is to give a trust estate. So far indeed as the creation of that species of interest is concerned, such, and such only, was its result, but the remark puts altogether out of sight its operations in regard to the legal estate. We have seen that it enabled the owner to dispose of this, in methods obviously more suitable to the exigencies of social life than the conveyances formerly employed, and exempt from the harsh and inconvenient effects with which these were sometimes

(*l*) Fearne, by Butler, 322, 9th ed.; Smith *v.* Clyfford, 1 T. R. 744.

(*m*) Fearne, ubi sup.; in Smith *v.* Clyfford, 1 T. R. 744, they are termed *lawful* conveyances. The same property of passing no estate beyond what the grantor may properly transfer, belongs also to a *grant* at common law. Co. Litt. 332 a; 2 Sand. Us. 49.

(*n*) 2 Bl. Com. 336. The learned Commentator, however, notices immediately afterwards, p. 337, its having introduced new species of conveyance.

attended; and (what is of still greater consequence) that it materially enlarged the power of alienation itself, by affording him the means of subjecting his property to a variety of arrangements of which it was before incapable.

In thus affording escape, however, from the rigours of the antient law, the statute would have opened the door (unless closely watched) to inconveniences of a different description; for it would have enabled conveying parties, through the medium of springing and shifting uses, and powers of revocation and new appointment, to prescribe the course in which their property shall devolve, and prevent its effectual alienation, for any period of time however extended; and therefore to curb this licence, it was found necessary to establish a rigid rule of restriction. In order to explain this, we shall be led into some examination, before we close the chapter, of a subject which now for the first time presents itself, viz. that of *perpetuity* (*o*). In settlements (by which we here mean conveyances by way of provision for a family, whether made in consideration of marriage or otherwise), grantors have always been naturally prone to confine an estate as long as practicable to the same line of succession. The earliest known method pursued for the accomplishment of this object, was the creation of an estate tail: which once operated as a sure and perpetual settlement of the property, in the line of the first donee, for the remotest generations. But as all such fixed and permanent arrangements of the grantor's estate necessarily imply that, during the period for which they are to last, the right of alienation is to be withheld from the succeeding proprietors, they have been considered in later times with reasonable jealousy and dislike, as tending to embarrass the transactions of mankind, and to frustrate the

(*o*) On the subject of perpetuity, see Co. Litt. by Butl. 379 b, 327 a; 1 Sugd. Pow. 491, edit. 1836; 1 Pow. Dev. 388; 3 Reeves's Hist. Eng. Law, 324; 1 Smith's Leading Cases, 183; Cadell *v.* Palmer, 10 Bing. 140; Tollemache *v.* Lord Coventry, 8 Bligh, N. S. 547; Monypenny *v.* Dering, 16 Mee. & W. 418.

purposes for which property was first established (*p*). To these feelings was doubtless in some measure attributable (*q*) the doctrine established by Taltarum's case, in the reign of Edward the fourth (*r*), by which a common recovery was allowed to have the effect of unfettering an estate tail. In the same spirit, when limitations by way of springing and shifting uses, and powers of revocation and new appointment, came into practice, the courts of justice soon began to contemplate with alarm the tendency of these devices to impose restraints on alienation. For as the estate limited by the executory use defeats, as soon as that use comes into *esse*, the estate already vested, no effectual and absolute conveyance can be made during the interval, however protracted it may be. It was thought necessary therefore to impose some check on limitations of this kind, and to establish some limit after which they should not be allowed to operate. The period which the courts have thought fit to prescribe for this purpose, was derived from the state of the law applicable to entails. Even upon the most permanent plan, viz that of strict settlement (to which we adverted in a former place (*s*)), an estate tail could not, after the doctrine established by Taltarum's case, be preserved from alienation longer than during the life of the first taker, and the nonage of the tenant in tail next in remainder; for on attaining the age of twenty-one the latter was competent, with the concurrence of the former, to suffer a recovery. By analogy to this (*t*), it is held, that an estate by way of executory use, must be so limited as necessarily to vest in possession before the termination of some life or lives in being, and the subsequent minority of some infant person; or, instead of such minority, a fixed period of twenty-one years (*u*); the periods of life and

(*p*) See 2 Bl. Com. 173.

(*q*) See Taylor *v.* Horde, 1 Burr. 60; 5 Cruise, Dig. 328.

(*r*) See as to this case, 5 Cruise, Dig. 422, 423; et sup. p. 249.

(*s*) Vide sup. p. 331.

(*t*) Co. Litt. by Harg. 20 a, n. (5).

(*u*) Cadell *v.* Palmer, 10 Bing. 140; Doe *v.* Ewart, 7 Ad. & El. 648; 8 Bligh, N. S. 547; Long *v.*

minority being each taken as inclusive of that of gestation *in utero* (*x*). Nor is the restriction just mentioned applicable to executory uses only; for it has been long established as a general principle, that the law abhors perpetuity (*y*); that is, any limitation of real estate (whether for legal or equitable interests, and whether by way of executory use, remainder, or otherwise), which tends to make it unalienable during a longer period than that above specified. Thus if lands be limited to a person *in esse*, with remainder after his decease to his unborn children, and afterwards to the children of such unborn children, this last remainder is absolutely void (*z*).

In connection with the subject of perpetuity, we may notice here the state of the law with respect to the accumulation of the income of property, even where there is no transgression of the period which the law prescribed for the commencement of an executory estate. A remarkable instance of this kind having occurred, in which a testator had recourse to the expedient of directing the income of his property to be accumulated during the lives of all his children, grandchildren and great-grandchildren, who were living at the time of his death, for the benefit of some future descendants to be living at the decease of the survivor (*a*), it was thought expedient to

Blackall, 7 T. R. 100. As to the effect of this rule on powers of sale, vide 1 Sudg. Pow. 181, 6th edit.; 1 Hayes' Conv. p. 497, and as to the exception to the rule, where the shifting use is preceded by an estate tail, 2 Hayes' Conv. p. 170, (n.)

(*x*) See the same authorities. A man's legal existence includes, as we may recollect, by the general rule of law, the period while he is in *ventre sa mère*; vide sup. p. 140.

(*y*) 2 Bl. Com. 174. It is said in 10 Rep. 113 b, that "perpetuities, "monopolies, and patents of con-"cealment were born under an un-"fortunate constellation, for as soon "as they have been brought in ques-"tion, judgment has always been "given against them, and none at "any time given for them."

(*z*) Fearne, by Butler, 502, 9th edit. See Monypenny *v.* Dering, 16 Mee. & W. 428.

(*a*) This was the case of Mr. Thellusson's will, as to which vide Fearne, by Butler, 436, (n.), 9th edit. The property is said to have consisted of landed estates of about £4000 a year, and personalty of above half a million; and the probable amount of the accumulated fund was estimated at above £19,000,000.

put a check, for the future, on dispositions of this description; and it is consequently now provided by act of parliament (39 & 40 Geo. III. c. 98), that no such accumulation shall be allowed for a longer term than the life of the grantor, or twenty-one years from the death of the grantor or testator; or during the minority of any person living or in *ventre sa mère* at his death; or during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated (*b*). But any direction to accumulate which exceeds such time as thus allowed, is valid to the extent of that time, though void as to the excess (*b*); and the act does not extend to any provision for payment of debts, or for raising portions for children (*c*), or to any direction touching the produce of woods or timber.

(*b*) Williams on Real Property, p. 274, 5th ed. On the construction of this statute, vide Southampton *v.* Hertford, 2 Ves. & B. 54; Marshall *v.* Holloway, 2 Swanst. 432; Haley *v.* Bannister, 4 Mad. 275; Shaw *v.* Rhodes, 1 Myl. & Cr. 135; and the other authorities cited in 1 Smith's Leading Cases, p. 186. See also Wilson *v.* Wilson, 20 L. J. (N. S.), Ch. 365; Middleton *v.* Losh, 22 L. J. (N. S.) Ch. 422; Curtis *v.* Lukin, 5 Beav. 147; Boughton *v.* James, 1 Coll. 26; Scarisbrick *v.* Skelmersdale, 17 Sim. 187.

(*c*) See Halford *v.* Stains, 16 Sim. 488; Barrington *v.* Liddell, 2 De Gex, M. & G. 480; Edwards *v.* Tuck, 3 De Gex, M. & G. 40.

CHAPTER XIX.

OF CONVEYANCES BY TENANTS IN TAIL AND MARRIED WOMEN.

Both conveyances at common law, and those under the Statute of Uses, are capable of being applied to transfer the interests of tenants in tail and married women; but as they are not effectual for these purposes, except by virtue of certain acts of parliament, distinct from the Statute of Uses, nor without observing the solemnities which those acts prescribe, they may therefore properly be considered, when applied to either of these purposes, as constituting a separate class of conveyances by force of the statute law.

Though a tenant in tail has an estate of inheritance, yet by none of the conveyances hitherto examined, if in their simple form, that is, unaccompanied with the solemnities above referred to, can an indefeasible interest be granted by him beyond the period of his own life (except in such case and to such extent as is provided for by a very recent statute referred to in a former place) (*a*); for whatever estate he grants, must either determine with his life, or at least is liable to be defeated, after his decease, by his issue, or, in default of issue, by the remainderman or reversioner. And again, a married woman, or, (as she is technically called) a *feme covert*, is not capable by any of these conveyances (*b*) in their simple form, to make alienation of her lands and tenements (except as regards her equitable interest in property given in trust to her separate use), for any estate whatever or to subject them to any charge (*c*).

(*a*) Vide sup. p. 254.

(*b*) 2 Bl. Com. 292.

(*c*) The restriction on a feme covert's power of alienation does not

These incapacities result indeed, in the two cases, from very different causes. That of the tenant in tail is by the effect of the statute *de Donis* (c), passed to protect the interest of those in succession and expectancy, in the case where land is given to a man and the heirs of his body; but the incompetency of the feme covert is a personal one, and imposed upon her by the common law (with other similar disabilities) in consequence of her being subject to the control of her husband, and presumably deprived of her freedom of agency. In both cases, however, notwithstanding the general rule of restriction, the law has long allowed a more ample power of alienation to be exercised through the medium of particular methods of assurance; in former times by *fines* and *recoveries*, which were altogether of a special nature, and now by any of the ordinary conveyances already examined, with the accompaniment only of certain forms or solemnities of a special kind. The mode of alienation as regards tenant in tail and married women respectively, may be considered therefore as naturally forming one entire or consolidated subject, and has in fact been so treated by the legislature.

This branch of law is now chiefly regulated by the 3 & 4 Will. IV. c. 74 (the statute for abolishing Fines and Recoveries), by the provisions of which a tenant in tail is empowered, in such methods as therein mentioned, to bar the estate tail (as it is commonly expressed), that is, to confer a fee simple absolute (or any less estate) on the person to whom he conveys, indefeasible by the issue, or by any ulterior claimants; and a married woman may also, by such means as there specified, dispose, with the husband's concurrence, of any estate which she alone, or he in her right, may have, as fully and effectually as if she were a

extend however to the case where she conveys in execution of a mere *power* or *authority*, or in performance of a *condition*, as where land is vested in her on condition to convey to others. And such acts as these may be done by her without her husband. Co. Litt. by Harg. 112, n. (6).

(c) 13 Edw. 1, c. 1; vide sup. p. 213.

feme sole (*d*). The modes of proceeding to be adopted for these purposes are (as already stated) new, and by way of substitution for the antient methods of fine and recovery; which being now abolished (*e*), and of a character besides peculiarly abstruse and uninviting, we would gladly pass by without further notice. The learning, however, which they involve, is still so material to the history of existing titles, and even to the correct apprehension of the new system, that they cannot with propriety be left unexamined; and before we attempt to give any further account of the substituted methods, we shall think it expedient to discuss, at some length, the nature of a fine and of a recovery.

They were both of the class of conveyances by matter of record; and both consisted of fictitious suits in the Court of Common Pleas at Westminster, in which the intended alience was supposed to recover the estate by process of law. In their origin, indeed, they were actual suits commenced at law for the recovery of the possession; but being found competent to confer a title, in cases where the ordinary conveyances would not suffice, they were at length adopted as mere means of transfer between persons not really standing in the relation of adverse litigants (*f*). It will be necessary however to consider them successively and in detail.

And first, of *Fines.*

A fine [was so called, because it put an end, not only to the suit then commenced, but also to all other suits and controversies concerning the same matter. Or as it is expressed in an antient record of parliament (*g*), 18 Edw. I., "*Non in regno Angliæ provideatur vel sit aliqua securitas major seu solennior per quam aliquis vel aliqua statum certiorem habere possit, vel ad statum suum verificandum aliquod solennius testimonium producere, quam finem in curiâ domini regis levatum; qui quidem finis sic vocatur, eo quod*

(*d*) Sect. 77.
(*e*) Sect. 2.
(*f*) 2 Bl. Com. 349, 357.
(*g*) 2 Roll. Ab. 13.

[*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 (*h*) and Bracton (*i*), in the reigns of Henry the second and Henry the third, as things then well known and long established; and instances are produced of them, even prior to the Norman invasion (*k*). 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 was as follows.

1. The party to whom the land was to be conveyed, or assured, commenced an action or suit of law against the intended vendor, generally an action of covenant (*l*), by suing out a writ of covenant] (denominated from its initial words, when the proceedings were in Latin, a writ of *præcipe quod teneat conventionem*) [the foundation of which was a supposed agreement or covenant that the defendant should convey the lands to the plaintiff; on the breach of which agreement the action is brought. On this writ, there was due to the crown, by antient prerogative, a *primer fine*, or a noble for every five marks of land sued for, that is, one tenth of the annual value (*m*). The suit being thus commenced, then followed, 2. The *licentia concordandi*, or leave to agree the suit (*n*). For as soon as the action was brought, the defendant, knowing himself to be in the wrong, was supposed to make overtures of peace and accommodation to the plaintiff, who accepted them, but having, upon suing out the writ, given pledges to

(*h*) L. 8, c. 1.

(*i*) L. 5, t. 5, c. 28, s. 7.

(*k*) Plowd. 369.

(*l*) A fine might also be levied on a "writ of mesne," of *warrantia chartæ*, or *de consuetudinibus et servitiis*. Finch, L. 278.

(*m*) 2 Inst. 511.

(*n*) It seems doubtful whether this is the true principle on which the licence was required; for it is said by Robertson, Cha. V., Sect. I., that, in the times of strict feudal jurisdiction, if a vassal had commenced a suit in the lords court, he could not abandon it without leave, lest the lord should be deprived of his perquisites for deciding the cause.

[prosecute his suit, which he endangered, if he now deserted it without licence, he therefore applied to the court, for leave to make the matter up. This leave was readily granted; but, for it, there was also another fine due to the king, by his prerogative, which was an antient prerogative of the crown, and was called the *king's silver*, or sometimes the *post fine* with respect to the *primer fine* before mentioned. And it was as much as the primer fine and half as much more, or 10*s.* for every five marks of land; that is, three-twentieths of the supposed annual value (*o*). 3. Next came the *concord*, or agreement itself, after leave obtained from the court; which was usually an acknowledgment from the deforciants (or those who kept the other out of possession), that the lands in question were the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine was called the *cognizor*, and he to whom it was levied the *cognizee*. The acknowledgment was to 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 were bound, by statute 18 Edw. I. st. 4, to take care that the cognizors were of full age, sound memory, and out of prison. If there were any feme covert among the cognizors, she was privately examined, whether she did it willingly and freely, or by compulsion of her husband. By these acts, all the essential parts of a fine were completed; and if the cognizor died the next moment after the fine was acknowledged, provided it were subsequent to the day on which the writ was made returnable (*p*), still the fine was to be carried on in all its remaining parts: of which the next was, 4. The *note* of the fine, which was only an abstract of the writ of covenant, and the concord,

(*o*) 5 Rep. 39; 2 Inst. 511; stat. 32 Geo. 2, c. 14.

(*p*) Price *v.* Davies, Comb. 71.

[naming the parties, the parcels of land, and the agreement. This was to be enrolled of record in the proper office, by direction of the statue 5 Hen. IV. c. 14. And 5. The fifth part was the *foot* of the fine, or conclusion of it, which included the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this, there were indentures made or engrossed at the chirographer's office, and delivered to the cognizor and the cognizee, usually beginning, thus: "*Hæc est finalis concordia*, this is the final agreement," and then reciting the whole proceedings at length. And thus the fine was completely levied at common law.]

To render the fine more universally public, and less liable to be levied by fraud or covin, it was directed by 4 Hen. VII. c. 24 (in confirmation of a previous statute), that a fine, after engrossing, should be openly and solemnly read and *proclaimed* in court (during which all pleas should cease) sixteen times; viz., four times in the term in which it was made, and four times in each of the three succeeding terms, which was reduced to one in each term by 31 Eliz. c. 2; and these proclamations were endorsed on the back of the record (*q*).

[Fines thus levied were of four kinds:—1. What in our law French was called a fine *sur cognizance de droit come ceo que il ad de son don*, or a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This was the best and surest kind of fine; for thereby the deforciant, in order to keep his

(*q*) Though in modern times fines have always been levied with proclamations, yet trouble and expense were often incurred in procuring evidence that they were so levied; and therefore, by 11 & 12 Vict. c. 70, it is now provided, that all fines theretofore levied in the Court of Common Pleas shall be conclusively deemed to have been levied with proclamations—with proviso, however, that this shall not affect any proceedings then pending, nor extend to any fine theretofore levied of lands which were then actually possessed by any person under a title adverse to or inconsistent with the operation of such fine if levied with proclamations.

[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, acknowledged in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. This fine was therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual delivery, so that this assurance was rather a confession of a former conveyance, than a conveyance then originally made; for the deforciant or cognizor acknowledged the right to be in the plaintiff, or cognizee, as that which he had *de son don*, of the proper gift of himself, the cognizor. 2. A fine *sur cognizance de droit tantum*, or upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This was commonly used to pass a *reversionary* interest which was in the cognizor. For of such reversions there could be no feoffment, or donation with livery, supposed, as the possession during the particular estate belonged to a third person (*r*). It was 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 (*s*)." 3. A fine *sur concessit* was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this might be done, reserving a rent or the like, for it operated as a new grant (*t*). 4. A fine *sur don, grant et render* was a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.* and the fine *sur concessit*, and might be used to create particular limitations of estate, whereas the fine *sur cognizance de droit come ceo, &c.* conveyed nothing but an absolute

(*r*) Danver's case, Moore, 629.

(*s*) West. Symb. p. 2, s. 95.

(*t*) Ibid. s. 66. This was commonly used for the creation of smaller estates, as for life or years, though it might be also used to convey the fee simple. Burt. Compend. 24.

[estate, either of inheritance, or at least of freehold (*u*). In this last species of fine, the cognizee, after the right was acknowledged to be in him, granted back again, or rendered to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine *sur cognizance de droit come ceo, &c.* was the most used.]

We are next to consider the force and effects of a fine, which were principally as follows (*v*):

1. Like all other conveyances, it bound the *parties* thereto, and also all "*privies*," that is, persons deriving title under the parties, and this whether levied with proclamations or not (*x*). But in this respect, it had a force peculiar to itself; for even if one of the parties was a married woman, she would be bound, notwithstanding her coverture, by the fine; and (supposing her husband to concur in it (*y*)) it would effectually pass any estate, or bar any right of dower that she might have in the lands therein comprised (*z*): though the coverture would suffice to avoid her alienation, either of estate or dower, in the case of an ordinary conveyance (*a*). And this peculiarity was justified by the circumstance that the court would not allow a fine, affecting her interest, to pass without privately examining her as to her voluntary consent; which removed the general suspicion of compulsion by her husband (*b*).

2. A fine with *proclamations* (*c*) bound not only parties and privies, but even *strangers* (that is, persons not parties

(*u*) Hunt *v.* Bourne, Salk. 340.

(*v*) A fine had several other effects, the enumeration of which will be found in the First Real Property Report, p. 21; et vide Co. Litt. by Harg. 121 a, n. (1).

(*x*) 2 Bl. Com. 355; see 5 Cruise, Dig. 133, 159, 202. It did not, however, unless levied with proclamations, bar the issue in tail of their right to bring an action of formedon; Hunt *v.* Bourne, Salk. 340; Doe *v.* Jones, 1 Tyrw. 517; vide post, p. 567.

(*y*) 5 Cruise, Dig. 82, 154.

(*z*) Ibid. 156.

(*a*) 4 Cruise, Dig. 20. As to the probable reason for allowing this effect to a fine, vide Co. Litt. by Harg. 121 a, n. (1).

(*b*) 2 Bl. Com. 355; 5 Cruise, Dig. 82, 153. This was by the statute 18 Edw. 1, *de modo levandi fines.*

(*c*) As to proclamations, vide sup. p. 562.

or privies), if they failed to put in their claims within the time allowed by law (*d*), and if during all that period they were subject to no legal disability sufficient to excuse their acquiescence. It was in reference to this property of a fine, (which belonged to it from the remotest period of legal history,) that rights are said in our books to be barred *by fine* and *non-claim* (*e*). The doctrine, indeed, was abolished for a time, by a statute made in 34 Edw. III. c. 16, which admitted persons to claim and falsify the fine at any indefinite distance (*f*). But by 1 Richard III. c. 7 (*g*), and 4 Henry VII. c. 24, the doctrine itself was again restored, though the time of claim was extended; and after the latter statute, and until the late abolition of these assurances, the state of the law was as follows,—that by a fine, when duly *proclaimed*, the right of all strangers whatever was bound (*h*), unless they made claim by way of action, or lawful entry (not within one year and a day, as at the common law, but) within five years after proclamation made: except femes covert, infants, prisoners, persons beyond the seas, and such as were not of whole mind,—who had five years allowed to them and their heirs after the death of their husbands, their attaining full age, recovering their liberty, returning to England, or being restored to their right mind (*i*). By the statute 4 Anne, c. 16, it was also provided, in cases where the claim was made by entry, that it should be of no avail unless an action was brought within one year afterwards, to try the right of the claimant, and unless the same were prosecuted with effect. It is to be observed, however, that, in order

(*d*) 2 Bl. Com. 354. There were antiently 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. But the second of these was not in force after the statute of Henry 7. The time for making the claim was a year and a day after the fine levied.

(*e*) 2 Bl. Com. 354.

(*f*) Ibid.; Litt. s. 441.

(*g*) Vide Co. Litt. by Harg. 121 a, n. (1).

(*h*) 4 Hen. 7, c. 24; Davies *v.* Lowndes, 5 Bing. N. C. 172.

(*i*) 2 Bl. Com. 356.

to bar by non-claim persons who were not parties or privies, it was necessary that the person levying the fine should be seised of the freehold, either by right or by wrong (*k*): for if he had nothing in the land, or if his possession were merely as tenant for a term of years, or other chattel interest, the fine might be avoided by pleading *partes finis nihil habuerunt* (*l*). And it is further to be remarked, that persons having no estate in possession, but only in remainder or reversion, were not bound to make claim within five years after proclamation made, but within the same period after their right of entry accrued (*m*).

3. A fine levied by tenant in tail, with proclamations, barred the issue in tail. It had indeed been expressly provided by the statute *de Donis*, that a fine should have no such effect (*n*); but by 32 Hen. VIII. c. 36, it was at length enacted, that when levied with proclamations according to 4 Hen. VII. c. 24, by any person of full age, of lands or tenements before in anywise entailed to him, or to any of his ancestors, in possession, reversion, or remainder, it should be a sufficient bar and discharge for ever against him and his heirs, claiming only by force of such entail (*o*). It did not, however, bar those in remainder or reversion upon his estate (*p*); who (upon his death and the failure of his issue) had either a right of entry, or at least a right of action, according to the distinction to be presently stated.

4. If a tenant in tail of a corporeal hereditament in pos-

(*k*) Davies *v.* Lowndes, 5 Bing. N. C. 172.

(*l*) Stat. 4 Hen. 7, c. 24; 2 Bl. Com. 356; 1 Saund. by Wms. 319, n. (1); Doe *v.* Jones, 1 Tyrw. 506. As to the effect of a feoffment to create a seisin by wrong, vide sup. pp. 462, 512.

(*m*) Co. Litt. 372 a; 1 Saund. by Wms. 319, n. (1).

(*n*) 2 Bl. Com. 355; Doe *v.* Jones, 1 Tyrw. 517; Burton, 239.

(*o*) Before the statute of 32 Hen. 8, it had been held that, under the preceding act of 4 Hen. 7, a fine with proclamations would have the effect of barring the issue in tail; but the doctrine was considered as doubtful, and the 32 Hen. 8 was passed to remove the doubt, vide Co. Litt. by Harg. 121 a, n. (1).

(*p*) 5 Cruise, Dig. 148.

session levied a fine "*sur cognizance come ceo, &c.*," with or without proclamations, it was a discontinuance of the entail (*q*); the effect of which was, that the issue in tail, and those in remainder, or reversion, lost their right of entry, which, upon the death of the tenant in tail, would otherwise have accrued to them respectively; but the latter parties had nevertheless a remedy in a particular form of action called a *formedon*; and so had the issue in tail, unless the fine was levied with proclamations, so as to bar them. But a fine levied by a tenant in tail of an incorporeal hereditament, or of an hereditament corporeal in remainder upon an estate of freehold, was no discontinuance (*r*). Such a fine levied in fee, only created a base fee; and the estate of those in remainder or reversion (as well as the right of entry or action of the issue in tail, where it was levied without proclamations) remained without disturbance (*s*). A discontinuance (as we have elsewhere had occasion to remark (*t*)) might also be occasioned by the *feoffment* of tenant in tail; but the learning relative to discontinuances, however effected, has now become of no account, as far as *future* transactions are concerned, not merely in consequence of the abolition of fines, but by the effect of a statute passed a short time previously (the 3 & 4 Will. IV. c. 27), which provides (sect. 29) that no discontinuance shall thereafter avail to take away a right of entry (*u*).

5. A fine "*sur cognizance come ceo, &c.*" levied by a

(*q*) Co. Litt. 327 b; 2 Inst. 335, 336; Odiarne *v.* Whitehead, Burr. 714; 1 Saund. by Wms. 319 c, n. (1); 1 Saund. by Wms. 258 a, n. (8); Doe *v.* Finch, 4 Barn. & Adol. 283; Doe *v.* Jones, 1 Tyrw. 506. The principle on which the *discontinuance* of an estate tail proceeded is explained in Co. Litt. by Butler, 325 a, n. (1), 326 b, n. (1); 2 Inst. 335.

(*r*) There can be no discontinuance of things lying in grant; Co. Litt. 332 a; 5 Cruise, Dig. 236.

(*s*) Co. Litt. by Butl. 331, n. (1).

(*t*) Vide sup. p. 463.

(*u*) See also the recent statute, 8 & 9 Vict. c. 106, s. 4, enacting that "a feoffment made after 1st October, "1845, shall not have any tortious "operation."

tenant for life in possession, would, like a feoffment, work a forfeiture, if for a greater estate than the law entitled him to make, and would consequently destroy the contingent remainders (if any) expectant on his life interest (*x*). The same result as regards forfeiture would also follow, where such fine was levied by a tenant for a term of years (*y*).

Secondly, of *Recoveries.*

A recovery (or a *common* recovery as it was also called, to distinguish it from a real adjudication (*z*)), differed from a fine, in this general point of view, that it supposed a suit not immediately compromised, but carried on through every regular stage of proceeding (*a*). Its nature and progress were as follows.

Let us in the first place suppose Daniel Edwards to have been tenant of the freehold, for example, tenant in tail in possession, 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 was to bring an action against him for the lands; and he accordingly sued out a writ called a *præcipe quod reddat.* In this writ, the demandant Golding alleged that the defendant Edwards (here called the tenant) had no legal title to the land, but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings were made up into a record or recovery roll, in which the writ and complaint of the demandant were first recited; whereupon the tenant appeared, and called upon one Jacob Morland, who was supposed, at the original purchase, to have warranted the title to the tenant. And thereupon he prayed that the said Jacob Morland

(*x*) Vide sup. pp. 328, 332; 2 Bl. Com. 274; 5 Cruise, Dig. 203, 236; 2 Cruise, Dig. 361. It is to be observed, that though a fine *sur cognizance, &c.* generally implied a conveyance in fee, it might be for life only. Hunt *v.* Bourne, Salk. 340.

(*y*) Burt. Compend. 318.

(*z*) 5 Cruise, Dig. 269.

(*a*) 2 Bl. Com. 357.

[might be called in to defend the title which he so warranted. This was called the *voucher* (*vocatio*, or calling of Jacob Morland,) *to warranty*, and Morland was called *the vouchee*. Upon this Jacob Morland, the vouchee, appeared, was impleaded, and defended the title. Whereupon Golding, the demandant, desired leave of the court to *impark*, or confer with the vouchee in private, which was (as usual) allowed him. And soon afterwards the demandant Golding returned to court, but Morland, the vouchee, disappeared, or made default. Whereupon judgment was given for the demandant Golding, then called the *recoveror*, to recover the lands in question against the tenant Edwards, who was then the *recoveree;* and Edwards had judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and lost by his default; which was agreeable to the doctrine of warranty mentioned in a preceding chapter (*b*). This was called the recompense, or *recovery in value.* But Jacob Morland having no lands of his own, being usually the crier of the court (who from being thus frequently vouched, was called the *common vouchee*), it was plain that Edwards had only a nominal recompense for the land so recovered against him by Golding, which lands were then absolutely vested in the said recoveror, by judgment of law; and seisin thereof was delivered by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee simple from Edwards the tenant in tail, to Golding the purchaser. The recovery here described was with a single voucher only, but sometimes it was with *double*, *treble*, or further voucher, as the exigency of the case might require. And indeed it was in modern times usual always to have a recovery with double voucher at the least, by first conveying,] where the person whose estate tail was intended to be barred was *immediate* tenant in tail, [an estate of freehold to any indifferent person against whom the *præcipe*

(*b*) Vide sup. p. 488.

[was brought,] (which was called making a tenant to the *præcipe*); and then the tenant to the *præcipe* [vouched the tenant in tail, who vouched over the common vouchee. For if a recovery was had immediately against a tenant in tail, it barred only such estate in the premises of which he was then actually seised, whereas, if the recovery were had against another person, and the tenant in tail were vouchee, it barred every latent right and interest which he might have in the lands recovered (*c*). But where there was already a tenant for life in possession, with remainder over in tail, no other tenant to the *præcipe* (of course) was required to be made, in order to effect a voucher of the tenant in tail. If Edwards therefore were tenant of the freehold in possession, and John Barker were tenant in tail in remainder; here Edwards did first vouch Barker, and then Barker vouched Jacob Morland, the common vouchee, who was always the last person vouched, and always made default; whereby the demandant Golding recovered the land against the tenant Edwards, and Edwards recovered a recompense of equal value against Barker, the first vouchee, who recovered the like against Morland, the common vouchee, against whom such ideal recovery in value was always ultimately awarded.

In all recoveries it was necessary that the recoveree should be seised of the freehold in possession, else the recovery was void (*d*). For all actions to recover the seisin of lands were required to be brought against the actual tenant of the freehold, otherwise the suit would lose its effect, since the freehold could not be recovered of him who had it not (*e*). And though these recoveries were in them-

(*c*) Bro. Ab. tit. Taile, 32; Plowd. Manxel's case, [8].

(*d*) Pigot, 28.

(*e*) This, it will be observed, applies only to actions "to recover the seisin," that is, *real* actions, to which class (now abolished) the action on which the recovery was supposed to be founded belonged. An ejectment, which has long been the ordinary (and is now, subject to very few exceptions, the *only*) action for recovery of land, may be brought against a tenant, whether seised of the freehold or not. But it is not, in its form, brought to recover the *seisin*.

[selves fabulous and fictitious, yet it was necessary that there should be *actores fabulæ*, properly qualified.]

From this doctrine resulted two important corollaries; first, that where the object was to vouch a tenant in tail in possession, instead of bringing the *præcipe* against him, it became necessary that he should previously make a tenant to the *præcipe* in manner already explained (*f*),—that is, convey some freehold estate in possession to some other person, so as to qualify the latter to sustain the character of tenant in the action.

The second consequence was, that a tenant in tail in remainder only, expectant on an estate of freehold, could not resort to a recovery to bar the entail, without the concurrence of the person in whom that precedent estate was vested, for unless the latter joined in the proceedings, there could be no sufficient tenant to the *præcipe*, he alone possessing the necessary qualification. [But the nicety once thought to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, was lessened by the provision of 14 Geo. II. c. 20 (*g*), which enacted, with a retrospect and conformity to the antient rule of law, that though the legal freehold were vested in lessees, yet those who are entitled to the next freehold estate in remainder or reversion might make a good tenant to the *præcipe*;—that though the deed or fine which created such tenant were subsequent to the judgment of recovery, yet if it were in the same term, the recovery should be valid in law;—and that though the recovery itself did not appear to be entered, or were not regularly entered on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the recovery, should after a possession of twenty years, be sufficient evidence on behalf of a purchaser for valuable consideration, that such recovery was duly suffered] In addition to which, provision has now been made by

(*f*) Vide sup. p. 569.

(*g*) As to this Act, see Pigot, 41, &c.; 1 Prest. Convey. p. 61 et seq.; Taylor *v.* Horde, 1 Burr. 115.

3 & 4 Will. IV. c. 74, establishing the validity of recoveries that have been suffered, in several other cases where they were before subject to fatal objection (*h*).

As to the force and effect of recoveries, supposing them to be suffered in due form, they operated,

1st. To pass to the recoveror an estate in fee simple absolute, and thereby to bar not only the estate tail itself, but all remainders and reversions expectant thereon, and all executory limitations and conditions whatever, to which it had been subject (*i*). This was not by virtue of any legislative enactment, but by construction of the courts of law, as explained more at large in a former chapter (*k*). The reasons, which really swayed the judges in allowing this effect to a common recovery, have been also before stated (*l*); but the ground on which they attempted to justify the doctrine was the supposed recompense in value awarded, in the result of this proceeding, to the tenant in tail. For it was said, that any lands which he might obtain from the common vouchee would supply the place of those which he lost by the recovery, and would descend to the issue in tail (*m*). Yet it is obvious that this recompense was merely ideal; and even if realized, it was held that it would not extend to reversioners, nor (in some cases) to those in remainder (*n*); and on the whole, therefore, it is impossible not to concur in the opinion expressed by a learned judge, that it is futile to endeavour to vindicate the principle of a common recovery (*o*). There were some cases, it is to be observed, in which this proceeding would not avail to the purpose above described: for by statute 11 Henry VII. c. 20, no woman, after her husband's death, unless with the

(*h*) Sects. 8, 9, 10. See also 5 & 6 Vict. c. 32, in reference to the validity of certain recoveries and fines suffered and levied in the abolished Courts of Sessions in Wales and Chester.

(*i*) Vide 2 Bl. Com. 361.

(*k*) Vide sup. p. 249.

(*l*) Ibid.

(*m*) 2 Bl. Com. 360.

(*n*) Lacy *v.* Williams, 2 Salk. 569; 2 Bl. Com. 360.

(*o*) 1 Wils. 73. See 2 Bl. Com. 360, n. by Christian.

concurrence of those in reversion, could suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors; which was called an estate tail *ex provisione viri* (*p*). And further, it was provided by 34 & 35 Hen. VIII. c. 20, that no recovery had against tenant in tail of the king's gift, whereof the remainder or reversion was in the king, should bar such estate tail, or the remainder or reversion of the crown (*q*).

2. A recovery, like a fine, would bind a married woman when she became a party to it, with her husband's concurrence (*r*); and, as in the case of fine, she was privately examined by the court in such cases, to ascertain that she acted without compulsion.

3. And lastly, if a recovery was suffered by a tenant for life, it would work a forfeiture of the particular estate, and by consequence destroy all contingent remainders expectant thereon (*s*). It was, however, expressly provided by 14 Eliz. c. 8, that a recovery so suffered, without consent of the persons in reversion or vested remainder, should as against such persons be utterly void (*t*).

Having now considered fines and recoveries in a separate point of view, it will be necessary to direct our attention shortly to an incident common to both species of assurance, viz., the deed to *lead* or to *declare* their *uses*. For [as the most usual fine *sur cognizance de droit come ceo*, &c., conveyed an absolute estate without any limitations to the cognizee, and as common recoveries did the same to the recoveror, these assurances could not in themselves be made to answer the purposes of family settlements,] wherein a variety of designation and arrangement is often expedient.

(*p*) As to this statute, vide 5 Cruise's Dig. 399; Kirkman *v.* Thompson, Cro. Jac. 474; et post, p. 582, n. (*o*).

(*q*) Vide Co. Litt. 372; Perkins *v.* Sewell, 1 Bl. Rep. 654; Duke of Grafton *v.* Birmingham Railway Company, 5 Bing. N. C. 27; et post, p. 582, n. (*n*).

(*r*) 5 Cruise Dig. 392.

(*s*) Doe *d.* Davies *v.* Gatacre, 5 Bing. N. C. 609. Vide sup. p. 330.

(*t*) Ibid. Besides those noticed in the text, a recovery had other effects; as to which, vide First Real Property Report, p. 22.

The fine or recovery itself, [like a power once gained in mechanics,] was applied therefore, through the medium of *uses*, [to give efficacy to an infinite variety of movements, in the vast and intricate machine of a voluminous family settlement. And if these deeds were made previous to the fine or recovery, they were called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As if A., tenant in tail, with reversion to himself in fee, would settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee, that is what by law he had no power of doing effectually, while his own estate tail was in being. He therefore usually, after making the settlement proposed, covenanted to levy a fine to (or if there were any intermediate remainders, to suffer a recovery in favour of) E., and directed that the same should enure to the uses in such settlement mentioned. This, then, was a deed to *lead* the uses of the fine or recovery; and the fine when levied, or the recovery when suffered, would enure to the uses so specified, and no other. For though E., the cognizee or recoveror, had a fee simple vested in himself by the fine or recovery, yet, by the operation of this deed, he became a mere instrument or conduit-pipe, seised only to *the use* of B., C. and D. in successive order; which use was executed immediately by force of the Statute of Uses. Or if a fine or recovery were had without any previous settlement, and a deed were afterwards made between the parties, *declaring* the uses to which the same should be applied, this would 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 Anne, c, 16, indentures to declare the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, are made good and effectual in law, and the fine and recovery are to 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.]

The cumbrous fictions, of which a slender abstract only

has been here presented to the reader, constituted, in actual practice, a branch of conveyancing of the most subtle, intricate, and costly character. After being allowed for centuries to deform our jurisprudence, their inconvenience at length began to excite attention. With respect to recoveries, in particular, we find in the work of Blackstone, a suggestion that they might be advantageously abolished, and the tenant be empowered to bar his estate tail, by the more simple expedient of a solemn deed to be enrolled in some court of record (*u*). It was not, however, until a recent period, that this great improvement was carried into effect; and for its realization the public is indebted to the commission appointed in the ninth year of king George the fourth, to revise the laws relating to real property. At the suggestion of that learned body, early in the succeeding reign, the act of parliament mentioned at the commencement of this chapter (3 & 4 Will. IV. c. 74) was passed, "For the abolition of Fines and Recoveries, and "for the substitution of more simple modes of Assurance." This statute (to which we had before occasion briefly to advert (*x*)) first enacts, that after the 31st December, 1833, no fine shall be levied or recovery suffered of lands of any tenure, with the exception of such as should then be in actual progress (*y*); and then proceeds to provide new methods for effectuating, in future, such of the results of these assurances as it was deemed right to preserve, viz., the barring of estates tail, and the passing or binding of the estates or interests of married women: while, on the other hand, it purposely omits to appoint any substitute for them, so far as regards their effect in working a forfeiture, —or the bar by nonclaim, or discontinuance, in the case of fine (*z*).

(*u*) 2 Bl. Com. 360.

(*x*) Vide sup. p. 252.

(*y*) 3 & 4 Will. 4, c. 74, s. 2.

(*z*) As to the particular case of persons liable, after 31st December, 1833, to levy a fine or suffer a recovery under a contract for that purpose, entered into before 1st January, 1834, vide 3 & 4 Will. 4, c. 74, s. 3.

I. In reference to the first of the results perpetuated (the barring of estates tail), the enactment (*a*) is in substance as follows: that every actual tenant in tail (*b*), whether in possession, remainder, contingency, or otherwise, shall have full power (subject to the provisions hereinafter mentioned as to *protectorship*) to dispose of the lands (*c*) entailed, for an estate in fee simple absolute, or any less estate, as against all persons claiming under the estate tail, or in respect of any ulterior estate (*d*); and in lieu of a fine and recovery, it directs that such disposition may be made by any of the assurances (a will excepted) which would have sufficed for the purpose, supposing the estate to have been one in fee simple absolute; so that the disposition be an actual conveyance, and not one resting in contract only, and so that it be by deed, and inrolled in the High Court of Chancery within six calendar months after the execution (*e*). An estate tail in lands of freehold tenure (for copyholds are not to our present purpose (*f*)) may now consequently be barred as against the grantor himself, the issue in tail, and all others in remainder, reversion, or other expectancy (subject to the provisions as to protectorship before referred to), by any of those conveyances (whether at common law or under the Statute of Uses) that have been discussed in former chapters, supposing such

(*a*) 3 & 4 Will. 4, c. 74, s. 15.

(*b*) The definition of "actual tenant in tail," (as the term is used in this act,) is thus given, "the tenant of an estate tail which shall not have been barred," vide sect. 1.

(*c*) The word *lands* when used generally in this act extends to all hereditaments of whatever tenure (except copy of court roll,) and whether of the corporeal or incorporeal class. It extends also to copyhold, where accompanied by expressions denoting that tenure, vide sect. 1.

(*d*) In this the *crown* is expressly included, ib. sect. 15.

(*e*) Ib. sects. 40, 73. And by sect. 41, if the assurance be a bargain and sale, it will, if enrolled in due time in the Court of Chancery according to this act, be as valid as if it had been inrolled within the time prescribed by the statute 27 Henry 8; as to which vide sup. p. 556.

(*f*) As to copyholds, vide post, bk. II. pt. I. c. XXII.

conveyance to be by deed, and by deed duly inrolled. The inrolment, indeed, is not essential in every case, it being dispensed with, where the disposition is by way of lease not exceeding twenty-one years, to commence from the date, or within twelve calendar months from the date, and reserving a rack rent, or not less than five-sixths of a rack rent. Supposing the inrolment (when required) to be made in due time (*g*), the deed takes effect from the execution (*h*); but a subsequent deed, if first inrolled, will be entitled to priority (*i*).

To understand the provisions as to protectorship, we must recollect, that though, by a fine, the issue might always be barred at pleasure, a common recovery (which alone had any effect as regarded those in remainder or reversion) was ineffectual when suffered by a tenant in tail not having an estate of freehold in possession, unless he obtained the concurrence of the person in whom the immediate freehold was vested (*k*). Now this check would have been entirely taken off, if the new statute, in abolishing recoveries, had proceeded simply to provide, that the tenant in tail might, in future, bar all parties through the medium of a deed inrolled. But it was not the design of the legislature to go so far. The restraint in question was merely the accidental consequence, it is true, of the fiction on which a recovery is built, and its general tendencies were useless and injurious; but it happened, on the other hand, to secure one important object, that of affording protection to family settlements. For in these, it is usual to limit estates in remainder to the sons successively in tail, expectant on the determination of the parent's life estate; and the doctrine, which required the concurrence of the parent, as the immediate tenant of the freehold, put it out of the power of the eldest son to defeat the settlement, at his own pleasure, by a recovery, which he would otherwise have always been in a condition to do, as soon as he attained the period of majority. So far,

(*g*) 3 & 4 Will. 4, c. 74, s. 41.
(*h*) Sect. 74.
(*i*) Ibid.
(*k*) Vide sup. p. 568.

therefore, as this object is concerned, it was deemed expedient that the substitute provided by the act in question (when used for the purpose of a common recovery, and not merely the purpose of a fine,) should be subjected to a check of the same description as the recovery itself; though, as a general rule, the concurrence of the person seised of the immediate estate of freehold is no longer required. The specific provision to which we here refer (*l*), is to the following effect: that no disposition, by a person who is tenant in tail under a settlement, shall be effectual under the act to bar any person but those claiming by force of the entail, unless it be made with consent of the person who (within the meaning of the act) is "owner" of the first estate of freehold, (or for years determinable on life or lives,) prior to the estate tail (*m*); and the person, whose consent is thus required, receives accordingly the appellation of *protector of the settlement*. This provision, however, it is material to remark, is expressly confined to the case where the prior estate is created *by the same settlement* as the entail; for where it is constituted by a different assurance, the reason on which the protectorship is founded fails, and the act consequently leaves the tenant in tail to the free exercise of his power of disposition (*n*).

Where an assurance is executed by a tenant in tail, in such form and with such attendant ceremonies as the statute requires, it passes an indefeasible estate in fee simple absolute, for life, or years, or otherwise, according to the nature of the limitation. But if it be executed without consent of the protector, in a case where a protector exists, its effect

(*l*) 3 & 4 Will. 4, c. 74, s. 34.

(*m*) Sect. 22. The words of the act are, "any estate for years determinable on the dropping of a life "or lives, or any greater estate, not "being an estate for years, prior to "the estate tail."

(*n*) It is to be observed that an estate created by appointment, under a power in the settlement (3 & 4 Will. 4, c. 74, s. 1), an estate confirmed or restored by the settlement (sect. 25), an estate resulting to the settlor (sect. 22), and an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement (sect. 22),—are to be considered as "created by the "settlement."

is to bar the grantor and his issue in tail only, and the rights of other persons claiming in expectancy on the estate tail are not affected (*o*). An assurance purporting to be in fee simple absolute, will therefore in such case convey no more than a base fee (*p*) determinable on the failure of issue (*q*); though it is in the power of the grantor, by afterwards obtaining the consent of the protector, and making a new disposition thereon, to enlarge such base fee into a fee simple absolute (*r*). And in the particular case, when, for want of the protector's consent, such base fee is created, and the immediate remainder or reversion in fee happens also to become united in the same person with the base fee, the latter will *ipso facto*, and without any such consent or new disposition, enlarge into a fee simple absolute (*s*). But whether the bar effected be general or partial only in its nature, it is to be understood that in all cases it operates without prejudice to the interests of other parties not claiming by force of, or in expectancy upon, the entail. It consequently leaves all estates prior to the estate tail undisturbed (*t*).

Although, in general, the act provides that the "owner" of the first prior estate (being of the kind already described) shall be the protector of the settlement, yet we may remark, that there are many cases in which the qualification for the protectorship is subject to more specific provision. For first, in certain cases arising before 31st December, 1833 (the date from which fines and recoveries are abolished), the person, who, under the old law, would have been the proper party to make a tenant to the *præcipe*, is now, without regard to any other rule of qualification, to be the protector (*u*). The act also provides that the first prior estate shall not avail to confer the protectorship on any persons who take that estate as lessees at a

(*o*) 3 & 4 Will. 4, c. 74, ss. 15, 34.
(*p*) Sect. 1.
(*q*) Ibid.
(*r*) Sects. 19, 35.
(*s*) Sect. 39.
(*t*) Sects. 15, 19.
(*u*) Sects. 29, 30, 31.

rent, doweresses, bare trustees, heirs, executors, administrators, or assigns (*x*)—with the exception, however, as to bare trustees, of such as, under any settlement made before the act, would have been the proper parties to make a tenant to the *præcipe* (*y*)—the office being, in every case of exclusion, cast upon the owner of the *next* estate (if any) qualified to constitute a protectorship (*z*). Nor is the creation of the office always by the mere act of law. For the settlor himself is entitled, in the settlement creating the entail, to appoint any person or persons *in esse* (not exceeding three in number, and not being aliens,) to act in this capacity (the tenant of the prior estate being included in the number or not, at the pleasure of the settlor): and also to insert in the deed a power for the substitution of others, in the event of the death or retirement of those originally nominated (*a*).

The office is intended to be in every case a *personal* one, and therefore a protector does not lose his right to act in that capacity by a transfer of the estate in virtue of which it was acquired; whether that transfer takes place by his own alienation, or by his other act or default (*b*). But when the person who would otherwise be protector is incompetent by reason of insanity, the Lord Chancellor (or other person deputed to exercise the royal functions with respect to idiots and lunatics) is to become protector in his stead; and where he, who would otherwise be protector, is disabled by treason or felony, the office is vested in the Court of Chancery, to which latter jurisdiction it is also confided in some other particular cases (*c*). A married woman, however, is competent to be protector; and if the prior estate, in respect of which she becomes so, is settled to her separate use, she is to hold the office independently of her husband, but, where not so settled, in conjunction with him only (*d*). We may remark, too, that the office is

(*x*) 3 & 4 Will. 4, c. 74, ss. 26, 27.
(*y*) Sect. 31.
(*z*) Sect. 28.
(*a*) Sect. 32.
(*b*) Sect. 22.
(*c*) Sects. 33, 48. In re Wainwright, 13 Sim. (Ch.) 260.
(*d*) 3 & 4 Will. 4, c. 74, ss. 24, 45, 79

in every case of a purely discretionary character, so that the protector is absolutely free from all control in its exercise, and cannot, even by his own previous agreement, fetter his free agency on this subject (*e*). And lastly, that as to the consent which it is thus absolutely in his power to grant or to withhold, it may either be given by the same instrument which makes the disposition, or by a separate one to be executed on or before the same day with the other, and to be duly inrolled (*f*); but when once given, it is incapable of being revoked (*g*).

It is not only on *legal* estates that an assurance under the statute in question will operate, nor in respect of these only that its operation was required. It is indeed generally true, that *equitable* interests will pass by any instrument sufficient to indicate the intention of the grantor; but equitable estates entailed, or those belonging to married women, and not settled to their separate use, are exceptions to the rule, and cannot be transferred by an ordinary conveyance. It was consequently the practice before the statute passed, to convey interests of the former description (to which alone our attention is now directed) through the medium of fines and recoveries (*h*), which, though always transacted in a common law court (viz. the Common Pleas), were considered in equity as legitimate assurances for the purpose. Thus, if lands were given to the use of A. in fee in trust for B. in tail, with remainder over, a fine levied or recovery suffered by B. in the Common Pleas was recognized in the courts of equity, as a bar to his equitable estate; that is, a bar to the same extent to which the same assurance would have operated on a legal estate of the same description (*i*). By the act for abolishing fines and recoveries, a similar effect now belongs to the substituted assurance; the word "estate" being used throughout its provisions, "to express an estate in equity,

(*e*) Sects. 36, 37.

(*f*) Sects. 42, 46.

(*g*) Sect. 44.

(*h*) 5 Cruise, Dig. 301, 461; Boteler *v.* Allington, 1 Bro. C. C. 72.

(*i*) Vide Doe *v.* Ewart, 7 Ad. & El. 636.

as well as at law" (*k*). The act is also framed to take effect not only on actual entails, but upon money or land liable to be converted into entailed estate. This happens in the case where trustees have been directed to invest money in land, which, when purchased, is to be settled in tail for the benefit of a certain party; or to sell land and to invest the produce in like manner. With respect to trusts of this description, the statute provides, that all the clauses it contains shall be applicable (so far as circumstances will permit) to the monies or lands so to be invested, in the same manner as they would apply to the lands to be purchased, supposing the same to be actually purchased and settled conformably to the trust. But when the trust fund consists of leasehold estate, or of money, it is to be considered (as to the person in whose favour or for whose benefit the disposition is to be made) as *personal* estate; and any disposition of it by the intended tenant in tail must be made, not by a conveyance appropriate to the passing of the realty, but by mere deed of assignment inrolled in the High Court of Chancery within six calendar months after the execution (*l*).

As the power of disposition given by this act applies both to legal and equitable interests, so it extends to almost every species of entailed estate. The only exceptions appear to be the case of tenant in tail *after possibility of issue extinct* (*m*), and those who by the 34 & 35 Hen. VIII. c. 20 (*n*), or any other statute, are restrained from barring their estates tail (*o*).

(*k*) 3 & 4 Will. 4, c. 74, s. 1.

(*l*) Sect. 71.

(*m*) Sect. 18. As to this estate, vide sup. p. 262. By 14 Eliz. c. 8, a recovery suffered by a tenant in tail of this description was void as against those in reversion and remainder, if suffered without their consent.

(*n*) 3 & 4 Will. 4, c. 74, s. 18. It may be remarked here that estates tail within the restriction of 34 & 35 Hen. 8, are excepted also from the operation of the powers given to the Court of Chancery as to settled estates by 19 & 20 Vict. c. 120. See sect. 42 of that act.

(*o*) Among these statutes, the 11 Hen. 7, c. 20, as to estates tail *ex provisione viri* (as to which vide sup. p. 573), is not included. As to future settlements of that description, the act of 11 Hen. 7 is repealed; and as to existing settlements, the power of

II. With regard to the second object comprised in the Fine and Recovery Act, viz. the passing or binding of the estate or interests of *married women* (*q*), it contains a general provision that a feme covert shall be as competent as if she were a feme sole, to dispose, by deed, of lands of any tenure (*r*), or of money subject to be invested in the purchase of lands, and also to extinguish any estate which she, or she and her husband in her right, may have, or any power, which may be vested in her, in regard to lands or to money of that description;—provided only that her husband shall concur in the deed (*s*), and that upon her executing the same, or afterwards, she produce and acknowledge it before the proper authorities (*t*). The persons before whom it is to be acknowledged are—a judge of one of the superior courts at Westminster, or two of the perpetual or special commissioners appointed for that purpose in the manner directed by the act (*u*); and they are directed, before they receive the acknowledgment, to examine her apart from her husband, in order to ascertain her free and voluntary consent; in the absence of which, the acknowledgment is to be rejected, and the deed becomes, as far as relates to her execution, void (*v*). Supposing the acknowledgment on the other hand to be received, an official memorandum of the fact is to be written on the foot or margin of the deed, and a certificate of it is to be also drawn up and signed on a separate piece of parch-

disposition is conferred, but subject to such assent as would have been required under the act of Henry the seventh to render valid a fine or recovery (3 & 4 Will. 4, c. 74, ss. 16, 17).

(*q*) As to the general state of the law with respect to purchases and conveyances of land by married women, vide sup. p. 475.

(*r*) As to the exception contained in this act with respect to *copyholds*, vide sup. p. 574.

(*s*) 3 & 4 Will. 4, c. 74, s. 77. See Crosse *v.* Middleton, 25 L.J. (Ch.) 513.

(*t*) 3 & 4 Will. 4, c. 74, s. 79.

(*u*) By the Fine and Recovery Act, the "Masters in Chancery" are also specified as persons before whom an acknowledgment may be taken. But, as to the masters in chancery, see 15 & 16 Vict. c. 80; post, bk. v. c. iv.; Ex parte Webster, 1 Dowl. N. S. 678. By 19 & 20 Vict. c. 108, s. 73, the acknowledgment may now be received by a judge of a county court also, in the same manner as by a judge of a superior court.

(*v*) 3 & 4 Will. 4, c. 74, s. 80.

ment and verified by affidavit; and the certificate and affidavit are then to be filed of record, in the Court of Common Pleas at Westminster (*t*). Until so recorded, the deed will have no effect as regards the party under coverture (*u*); but when the record is complete, will operate to affect her interest, (by relation,) as from the time when it was acknowledged. When the object of the disposition is to bar the estate tail of a married woman, the same course of proceeding is to be observed as in the case of other tenants in tail; and the ceremony of acknowledgment (with all its attendant forms) is to be superadded (*x*).

The proceedings relative to acknowledgment are made subject, as to some of their details, to the regulation of the Court of Common Pleas at Westminster (*y*); which is also empowered by order, in a summary way, upon the application of the wife, and upon such evidence as to the court shall seem meet, to dispense (in every case where it shall appear reasonable to do so) with the concurrence of the husband in her acts (*z*), whether in barring an estate tail, or executing a deed for any other purpose. The latter provision, however, is made with an express saving of such rights as the husband may possess independently of the statute (*a*).

(*t*) By 17 & 18 Vict. c. 75 (passed to remove some doubts), no deed acknowledged by a married woman before a judge, &c., as above mentioned, shall be impeached, at any time after the certificate of acknowledgment has been filed, by reason only that such judge, &c., was interested or concerned in the transaction giving occasion for such acknowledgment.

(*u*) See Jolly *v.* Handcock, 7 Exch. 820.

(*x*) 3 & 4 Will. 4, c. 74, ss. 40, 79.

(*y*) 3 & 4 Will. 4, c. 74, s. 89. The Rules of the Court of Common Pleas under this act are of Hilary and Trinity Terms, 1834; vide 10 Bing. 458; 1 Bing. N. C. 242. There had been previous Rules (now revoked) of Michaelmas, 1833. See also Reg. Gen. T. T. 4 Will. 4.

(*z*) 3 & 4 Will. 4, c. 74, s. 91. Vide In re Atherton, 3 Dow. & L. 26; In re Darling, 2 C. B. 347; In re Street, ibid. 364; Re Turner, 3 C. B. 166; Re Woodall, ib. 639; Ex parte Gilmore, ib. 967; Re Dixon, 4 C. B. 631; Ex parte Taylor, 7 C. B. 1. The court has power, under this section, to authorize her to dispose of *copyhold*. Ex parte Shirley, 1 Arnold, 484.

(*a*) 3 & 4 Will. 4, c. 74, s. 91.

Such are the substitutes now provided by the legislature, in lieu of fine and recovery. The superiority of the new methods is manifest at the first glance; but, in order to obtain a clear idea of the extent and nature of the reform which has been effected, it will be useful to advert to some of the specific points of difference between the present and the former system.

The most obvious improvement is, that instead of applying modes of assurance altogether peculiar and anomalous, to the case where a tenant in tail or a married woman is the conveying party, the law now enables them to pass their interests by an instrument of the same description (in general) as is used in other alienations of real estate, and thus establishes a greater uniformity in the methods of conveyance. Nor is this a benefit of small amount; for all deviations from general rule engender difficulties, render the practice of the law less certain, and powerfully promote the purposes of chicanery. The forms recently introduced possess also the advantage of being incomparably clearer and simpler than those which they have superseded. Considerable subtlety indeed attends a conveyance under the Statute of Uses; but it is to be recollected that fines and recoveries (when taken in connection with their appendages, the deeds to lead or declare the uses) themselves operated as conveyances under the statute; while at the same time they involved a fiction of the most intricate and artificial description, from which the substituted assurances are exempt. To this it may be added (and the point is by no means of subordinate importance), that the substitutes are considerably less expensive than their predecessors, the charges connected with a fine or recovery (particularly the latter) having been so high as to form one of the most prominent reasons for their abolition. To pass from general to particular considerations, the former system was objectionable, from the necessity which it frequently occasioned of creating a *tenant to the præcipe;* for, besides the inconvenience of being obliged to make an actual trans-

fer of the freehold, for this purpose, to a stranger, it frequently happened that parties, without whose concurrence the freehold could not be effectually conveyed, were by some mistake not joined in the proceedings, or refused to join in them, or could not be discovered (*b*). But, under the new system, all these annoyances are, by a neat and simple arrangement, avoided, while the only real benefit resulting from the antient practice is at the same time effectually secured. For as the protector is always constituted by the same settlement as the tenant in tail, there can rarely be any difficulty in finding him out; and supposing the relation of parent and child to exist between them (as will usually be the case), there can be no reason to fear that compliance will be refused from an unworthy motive; nor, in case of compliance, will any conveyance to a stranger be necessary, the mere consent of the protector (given in due form) being all that the statute requires. It ought, lastly, to be mentioned, as a further recommendation of the new assurances, that they are capable of being executed at any time that convenience may suggest; in which respect they differ very materially from the former methods, particularly that of recovery, which the law did not allow to be transacted, except during the *terms;* for, as it was at those stated times only that the Court of Common Pleas was open, some of the proceedings in the fictitious suit were necessarily confined to the same periods; from which circumstance it frequently resulted that the death of parties would intervene to prevent the intended recovery, and defeat for ever the purposes which it was designed to effectuate (*c*).

(*b*) Vide First Real Property Report, p. 24.

(*c*) The reader desirous of further information with respect to the Fine and Recovery Act, will find an ample and luminous disquisition upon it in the first volume of Mr. Hayes's Introduction to Conveyancing.

CHAPTER XX.

OF DEVISES.

THE modes of assurance hitherto examined, all operate or come into force from the time of the execution of the instrument (*a*); but there is another (and it is the last conveyance of an ordinary kind, to which we shall have occasion to refer), which is founded on a different principle, namely, a devise by last will and testament (*b*). For a will is of no force until after the death of the disposing party, but during his life is (in the language of the law) merely *ambulatory*, that is, of an unsettled and fluctuating character. "*Omne testamentum morte consummatum est, et voluntas testatoris est ambulatoria usque ad mortem*" (*c*).

A *will* or *testament* are terms generally used without distinction, to express the instrument by which a man makes voluntary disposition of his property, after his death. Testaments are said, both by Justinian (*d*) and Sir Edward Coke (*e*), to be so called [because they are *testatio mentis*; an etymon which seems to savour too much of 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 nostræ justa sententia, de eo quod quis post mortem suam fieri velit*" (*f*);

(*a*) Shelford on Wills, 5.

(*b*) The term *conveyances* is sometimes applied to voluntary alienations *inter vivos* exclusively, and so as not to include wills. But it is also properly used in the larger sense assigned to it in the present work.

(*c*) Co. Litt. 112.

(*d*) Inst. 2, 10.

(*e*) Co. Litt. 112 b, 322 b.

(*f*) Ff. 28, 1, 1.

[which may be thus rendered into English, the legal declaration of a man's intentions, which he wills to be performed after his death. It is called *sententia* to denote the circumspection and prudence with which it is supposed to be made; it is *voluntatis nostræ sententia*, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically styled his *will;* it is *justa sententia*, that is, drawn, attested, and published, with all due solemnities and forms of law; it is *de eo quod quis post mortem suam fieri velit*, because it is of no force until after the death of the testator (*g*).] While defining a will, we may also take occasion to explain the term *codicil*, which is derived from the Latin *codicillus* (importing a little book or writing), and is an instrument made subsequently to the original will, by which its dispositions are explained or altered (*h*). It is subject, in general, to the same remarks as the original instrument itself, of which indeed it is considered as forming a part (*i*); so that what may be laid down as law relating to a will, may be taken generally as applicable also to all codicils thereto annexed (*k*).

With respect to the principle on which a disposition by will is allowed, [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 alienation. 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 property would again become common, and create an infinite variety of strife and confusion. The law of very

(*g*) 2 Bl. Com. 500.

(*h*) Ibid.

(*i*) Ibid.

(*k*) In the new Statute of Wills, 7 Will. 4 & 1 Vict. c. 26, the term "will" is to be taken as extending to a codicil also; sect. 1.

[many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name (*l*).

Testaments are of very great antiquity. We find them in use among the antient Hebrews, though the example usually given (*m*), of Abraham's complaining that, unless he had some children of his body, his steward Eliezer of Damascus, would be his heir (*n*), will be hardly thought quite conclusive to show that he had made him so by *will*. And indeed a learned writer (*o*) 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 (*p*). 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 (*q*)), it is apprehended that a much more authentic instance of the early use of testaments may be found in the sacred writings (*r*), wherein Jacob bequeaths to his son Joseph a portion of his inheritance, double to that of his brethren; which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens (*s*), but in many other parts of Greece they were totally discountenanced (*t*). In Rome they were unknown until the laws of the Twelve Tables were compiled, which first gave the right of bequeathing (*u*): and among the Northern

(*l*) Puff. L. N. lib. 4, c. 10.

(*m*) Barbeyr. Puff. 4, 10, 4; Godolph. Orph. Leg. 1, 1.

(*n*) Genesis, c. 15.

(*o*) Taylor, Elem. Civ. Law, 517.

(*p*) Vide sup. p. 163.

(*q*) Seld. de Succ. Eb. c. 24.

(*r*) Genesis, c. 48.

(*s*) Plutarch in Vita Solon.

(*t*) Pott. Antiq. l. 4, c. 15; Hermann's Antiq. s. 20.

(*u*) Inst. 2, 22, 1. See Vinn. lib. 2, t. 10.

[nations, particularly among the Germans (*x*), 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 (*y*); 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.]

In this country, both real and personal estate have long been capable of transmission by will; (the latter, indeed, from time immemorial;) and a recent statute, 7 Will. IV. & 1 Vict. c. 26, (to which we shall soon have occasion more particularly to refer,) has now confirmed and further regulated this power, and placed it, for the future, on a new basis. As regards personal estate, however, and chattels real, (which are considered as personalty,) and also as relates to copyholds, it would be premature to consider fully, in this place, the law of testamentary disposition (*z*): and we shall confine our present inquiries, for the most part, to the nature of that right as it affects estates of freehold duration and tenure; or, as it is commonly expressed, the law of *devises*.

To obtain a clear idea of this subject, it will be desirable to consider under separate heads:—I. The power of devise itself, to what person it belongs, and to what estates and interest it applies. II. The solemnities with which the will containing a devise must be executed, and how it may be revoked or revived. III. The rules of construction to which devises are subject. IV. Their operation in conveying or limiting real estate.

I. As to the power of devising, [it seems sufficiently clear that, before the Conquest, lands were devisable by will (*a*).

(*x*) Tacit. de Mor. Germ. 20.

(*y*) Vide sup. p. 163; 2 Bl. Com. 13.

(*z*) As to wills of personal estate, vide post, bk. II. pt. II. c. VII.; and as to devises of copyhold, post, bk. II. pt. I. c. XXII.

(*a*) Wright's Ten. 172.

[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 consent of the lord.] So that [by the common law of England, since the Conquest, no estate greater than for term of years could be disposed of by testament (*b*), except only in Kent and in some antient boroughs, and a few particular manors, where their Saxon immunities by special indulgence subsisted (*c*). And though the feudal restraint on alienation 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 (*d*). 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 any transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct] from the legal estate (*e*), [uses began to be devised very frequently (*f*); and the devisee of the use could, in Chancery, compel its execution. For it is observed by Gilbert (*g*), 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 by the effect of the statute 27 Hen. VIII. c. 10, these uses afterwards became legal estate, which was not devisable; and this [might have occasioned

(*b*) 2 Inst. 7.

(*c*) Litt. s. 167; Co. Litt. 111. Vide Rob. Gavel. 235.

(*d*) Glan. lib. 7, c. 1.

(*e*) The expression of Blackstone is, "a thing distinct from the *land*;" which scarcely conveys the idea intended.

(*f*) Plowd. 414.

(*g*) On Devises, 7.

[a great revolution in the law of devises (*h*), had not the *Statute of Wills* been made about five years after—viz. 32 Hen. VIII. c. 1 (explained by 34 & 35 Hen. VIII. c. 5), —which enacted, that all persons being seised in fee simple (except feme coverts, infants, idiots, and persons of non-same memory,) might by will and testament in writing devise to any other person, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage; which] afterwards, [through the alteration of tenures by the statute of Charles the second, amounted to the whole of their landed property except their copyhold.]

A devise under these statutes took effect, not only upon legal estate, but upon equitable; which indeed will pass under any form of conveyance applicable to the former species of interest. The statutes did not, however, apply to the chattels of the testator, whether consisting of terms of years in land, or of chattels personal, for these might pass by will before (*i*); as we shall have occasion to show more particularly in a subsequent part of the work. And even with respect to a freehold interest, a devise under these statutes was inoperative, unless it belonged to the testator at the time of executing the will; so that after-acquired lands were incapable of passing under such devise; and if the testator was desirous of including them in his testamentary dispositions, a new will or codicil, or a re-execution of the existing will, was required for the purpose (*k*).

It may also be remarked, that, as to the persons capable of becoming devisees, the statutes made an express exception of corporations, which was done to prevent the exten-

(*h*) Vide Butler and Baker's case, 3 Rep. 25; Arthur *v.* Bokenham, 11 Mod. 148; Wyndham *v.* Chetwynd, Burr. 420.

(*i*) 2 Bl. Com. 374.

(*k*) 2 Bl. Com. 378. See Arthur *v.* Bokenham, ubi supra; Langford *v.* Pitt, 2 P. Wms. 629; Marston *v.* Roe, 8 Ad. & El. 14. But after-acquired personal estate has been always capable of passing under a will.

sion of gifts in mortmain (*l*). Afterwards, indeed, it was held, that a devise to a corporation for a *charitable use* was valid, as operating in the nature of an *appointment*, rather than a bequest (*m*). But we have had occasion in another place (*n*) to advert to the statute 9 Geo. II. c. 36, by which devises to charitable uses are now generally made void, and which has consequently rendered that decision, and some others of the same tendency (*o*), less material.

Such was the state of the law with respect to the power of devising (or transmitting real property by will), at the time of the passing of the new act, 7 Will. IV. & 1 Vict. c. 26; and thus it still stands with respect to all wills made before 1st January, 1838: but as to all others, the statute just mentioned has repealed the former enactments, making, in lieu of them, a new and more ample provision. It enacts (*p*), that it shall be lawful for all persons—except married women (*q*), and infants under twenty-one (*r*)—to dispose by will of all their real and personal estate (*s*), either at law, or in equity, to which they shall be entitled at the time of their deaths, and which, but for such disposition, would pass to the heir at law or to the personal represen-

(*l*) 2 Bl. Com. 375.

(*m*) 2 Bl. Com. 375.

(*n*) Vide sup. p. 460.

(*o*) 2 Bl. Com. 375.

(*p*) 7 Will. 4 & 1 Vict. c. 26, s. 1.

(*q*) Sects. 7, 8. The 8th section providesthat no will by a married woman shall be valid, except such as might have been made by a married woman before the passing of the act. Before the act a married woman could not in general dispose of land by will, Forse and Hembling's case, 4 Rep. 60 b; but might do so under a *power* expressly conferred on her for the purpose. See Johns *v.* Dickinson, 8 C. B. 934, as to what is due execution of such a power.

(*r*) As to the precise time when the age of twenty-one is attained, vide Vin. Abr. Devise, (G.) pl. 20. Before this act, infants might make a will of their personal estate at *eighteen*, and, according to some authorities, still earlier. 2 Bl. Com. 497; Harg. Co. Litt. 89, n. (6); Hearle *v.* Greenbank, 3 Atk. 709.

(*s*) "Real estate" is to be understood in this act as extending to all hereditaments of whatever tenure, and whether corporeal, incorporeal, or personal, and to every estate, right, or interest therein, other than a chattel interest; and "personal estate" to all property whatsoever which by law devolves upon the executor or administrator; 7 Will. 4 & 1 Vict. c. 26, s. 1.

tative; and it expressly extends the same power to their estates *pur autre vie*, and to all their contingent, executory, or other future interests, and even their rights of entry upon land: which latter subject was previously considered as incapable of being devised (*t*). The power is also expressly extended to after-acquired lands, by a provision that all real and personal estate, to which the testator is entitled at the time of his death, shall pass, notwithstanding that he may become entitled to the same subsequently to the execution of his will (*u*); and it is further to be remarked, that as to the person capable of taking by devise, there is no exception (as under the former statutes) of corporations; so that a devise to a body corporate will now be valid; subject of course to the enactments of the Statutes of Mortmain, by which corporations are required to obtain the crown's licence, to enable them to become the *holders* of land (*x*), and subject also to the prohibition of 9 Geo. II. c. 36, as to a devise to charitable uses. No exception, indeed, is made by the act, except in the case of infancy or coverture, to the power of devising; but we must of course understand the exception to be tacitly added which would be introduced by the general rules of law, in respect of idiots, insane persons, and others labouring under general incapacity to aliene (*y*).

II. With respect to solemnities. When the former Statute of Wills had for the first time given efficacy to devises, innumerable frauds and perjuries were quickly introduced (*z*), which can excite no surprise when we consider that bare notes, in the handwriting of another person, then became good wills within the statute (*a*), if only *published* as such, that is, declared by the testator to be intended to operate

(*t*) See Doe *v.* Tomkinson, 2 Man. & Sel. 165; Roe *v.* Jones, 1 H. Bl. 30; 3 T. R. 88; Goodright *v.* Forrester, 8 East, 552.

(*u*) Sect. 3. Marston *v.* Roe, 8 Ad. & El. 14.

(*x*) Vide sup. p. 454.

(*y*) Vide sup. pp. 474, 477.

(*z*) 2 Bl. Com. 376.

(*a*) Ibid.

as his will and testament. For except *publication* (*b*), no other ceremony had been essential to a written will of personalty, before this statute passed; and the statute itself prescribes no particular solemnity in reference to a devise of real estate, except that it requires the wills to be *in writing*. [To remedy which, the *Statute of Frauds and Perjuries*, 29 Car. II c. 3, directed that all devises of lands and tenements should not only be in writing, but signed (*c*) by the testator, or some other person in his presence, and by his express direction; and should be subscribed, in his presence, by three credible witnesses (*d*). And a solemnity nearly similar was requisite for *revoking* (*e*) a devise by writing, though the same might be also revoked by the burning (*f*), cancelling, tearing, or obliterating thereof by the devisor, or in his presence, and with his consent] (if done *animo revocandi* (*g*)); as likewise, impliedly, by any new modification of the interest of the devisor, in the estate devised (*h*), [or by such a great and entire alteration in his circumstances as arose from marriage and the birth of a child (*i*),] or, in case of a woman, marriage only (*j*). In

(*b*) As to this requisite, vide Doe *v.* Sir F. Burdett, 4 Ad. & El. 14.

(*c*) As to signing by a *mark*, vide Baker *v.* Denning, 8 Ad. & El. 94.

(*d*) See Roberts *v.* Phillips, 4 Ell. & Bl. 450.

(*e*) A will is always capable of revocation, though it purport in the strongest words to be irrevocable; for to hold the contrary, says Lord Bacon, 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. Bac. Elem. c. 19.

(*f*) As to revocation by burning, vide Bibb *v.* Thomas, 2 W. Bl. 1043; Doe *v.* Harris, 6 Ad. & El. 209; 8 Ad. & El. 1.

(*g*) Burtenshaw *v.* Gilbert, Cowp. 52; Doe *v.* Perkes, 3 B. & Ald. 489.

(*h*) See Sparrow *v.* Hardcastle, 3 Atk. 802; Williams *v.* Owens, 2 Ves. jun. 599; Langford *v.* Little, 8 Ir. Eq. R. 546; 4 Real Prop. Rep. 24.

(*i*) 2 Bl. Com. 376; Marston *v.* Roe, 8 Ad. & El. 14. Blackstone observes, that this kind of revocation bore some analogy to the Roman rule, which set aside testaments as *inofficious* if any child was wholly passed by without assigning a sufficient reason, 2 Bl. Com. 502. And to this rule he is inclined to attribute the vulgar error as to the necessity of leaving the heir one shilling, or some amount of legacy, in order to cut him off effectually.

(*j*) Forse and Hembling's case, 4 Rep. 60 b.

the construction of this last statute, it had been [adjudged that the testator's name, written with his own hand at the beginning of his will, as "I John Mills do make this my last will and testament," was a sufficient signing] within the Statute of Frauds, if so intended by the testator (*k*). It had also [been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they might do it at different times (*l*); but that they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument (*m*). And in one case, determined by the Court of King's Bench (*n*), the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses, for they would not allow any legatee, nor, by consequence, a creditor] by simple contract (*o*), [where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise,] as the law then stood, [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 pro-

(*k*) 2 Bl. Com. by Chitty, 376, n. (6).

(*l*) Freem. 486; 2 Ch. Ca. 109; Pr. Ch. 185.

(*m*) Longford *v.* Eyre, 1 P. Wms. 740.

(*n*) Holdfast *v.* Dowsing, Stra. 1253. Sed vide contrà Wyndham *v.* Chetwynd, Burr. 414.

(*o*) Vide sup. p. 427.

[perty, was held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted, but leaving their credit, (like that of all other witnesses,) to be considered on a view of all the circumstances, by the court and jury before whom such will should be contested.]

But now as to all wills, except those made before 1st January, 1838 (*o*), the former provisions as to execution and attestation are, by 7 Will. IV. & 1 Vict. c. 26, repealed (*p*); and it is enacted (*q*), that no will,—with the exception of those made as to personal estate by soldiers and seamen in certain cases, as provided for by former statutes (*r*),—shall be valid, unless it be in writing, and signed at the foot or end thereof (*s*), by the testator, or some other person, in his presence, and by his direction; such signature being also made or acknowledged by him, in the presence of two or more witnesses present at the

(*o*) 7 Will. 4 & 1 Vict. c. 26, s. 34. By this section, every will re-executed, or re-published or revived by any codicil, shall for the purposes of the Act, be deemed to have been made at the time when so re-executed, re-published, or revived. Vide Doe *v.* Walker, 12 Mec. & W. 591; Winter *v.* Winter, 5 Hare, 306. The statute extends to wills made before 1st January, 1838, if altered subsequently to that date. Croker *v.* Hertford, 4 Moore's P. C. Cases, 339.

(*p*) 7 Will 4 & 1 Vict. c. 26, s. 2.

(*q*) Sects. 9, 11, 12.

(*r*) Statute of Frauds, 29 Car. 2, c. 3; 11 Geo. 4 & 1 Will. 4, c. 20; see 2 Bl. C. 500; Shelford on Wills, 77; which last work contains a very full and useful exposition of the statute. Since this statute, new provisions have been made as to the wills, wages and effects of deceased merchant seamen, 17 & 18 Vict. c. 104, ss. 194—204.

(*s*) As to the *position* of the signature, it is by 15 & 16 Vict. c. 24, sufficient if it be placed *at* or *after*, or *following*, or *under*, or *beside*, or *opposite to* the end of the will, in such manner that it shall be apparent on the face of the will, that the testator intended to give effect, by such signature, to the writing signed as his will; but the signature is not sufficient to give effect to any dispo-

same time, and such witnesses attesting and subscribing the will in his presence (*t*). Where these requisites, however, are complied with, no other is now imposed by law (*u*); and the statute expressly enacts, that no *publication* other than is implied in the execution so attested, shall in future be necessary.

The former provisions with respect to the competency of witnesses having an interest, are also repealed as to wills taking effect under the new law (*x*); and the new enactments on this subject are, first, that in case of the incompetency of any attesting witness, the will shall not, on that account, be invalid; secondly, that any beneficial gift or appointment by the will, to an attesting witness, or to the husband or wife of an attesting witness, (except a charge for payment of debts,) shall be void, and the evidence of the witness admissible; thirdly, that where land is charged by the will with payment of debts, and the creditor, or husband or wife of the creditor, is an attesting witness, such witness shall nevertheless be competent; fourthly, that no person shall be incompetent as a witness, on account of his being an executor of the will. These enactments, however, are now of the less importance, as by the later statute of 6 & 7 Vict. c. 85, the objection to a witness on the ground of *interest*, (which once applied generally in our law, and not merely in the instance of wills,) is in all cases taken away (*y*).

As to revocation, also, the former law is altered by the 7 Will. IV. & 1 Vict. c. 26; and it is provided, that every

sition *underneath* or *following* it, or *inserted after the signature is made.*

(*t*) As to what is a sufficient *attestation*, see Harrison *v.* Elvin, 3 Q. B. 117; Hott *v.* Genge, 4 Moore's P. C. Cases, 265; Roberts *v.* Phillips, 4 Ell. & Bl. 450.

(*u*) *Appointments by will under a power* are to be executed and attested in the same manner with other wills; even where other solemnities have been prescribed by the donor of the power; 7 Will. 4 & 1 Vict. c. 26, s. 10. As to the prior law with respect to attestation in such cases, vide Doe *v.* Sir F. Burdett, 4 Ad. & Ell. 11.

(*x*) 7 Will. 4 & 1 Vict. c. 26, ss. 14, 15, 16, 17.

(*y*) There is a proviso that this shall not be taken to repeal the enactments of 7 Will. 4 & 1 Vict. above referred to.

will taking effect under this statute shall be revoked by *the marriage* alone of the testator or testatrix,—unless such will was made in exercise of a power of appointment, and in a case where the estate would not have passed, in default of appointment, to his or her representatives (*z*): but that, on the other hand, no will "shall be revoked by any pre-"sumption of an intention on the ground of an alteration "in circumstances (*a*)," nor in any other manner, except by marriage as aforesaid; or by another will or codicil, or some writing of revocation executed like a will; or except by burning, tearing, or otherwise destroying the original will (*animo revocandi*), by the testator or some person in his presence and by his direction (*b*); and that, with the exception of such acts as these, no act whatever subsequent to the execution of the will shall prevent its taking effect on any estate which the testator shall have power to dispose of at his death (*c*). With respect to obliteration or other alteration made after execution (*d*), it is in like manner provided that they are to have no effect (where the original meaning can still be deciphered) unless executed with the same ceremonies as the will itself; though it will be sufficient if the signature of the testator, and the subscription of the witnesses, be made opposite or near the part altered, or at the foot or end of some memorandum written on the will, and referring to the alteration (*e*). And so when a will is once revoked, it is not to be *revived* otherwise than by re-execution of the original; or by a codicil duly executed, and showing an intention of revival (*f*).

III. With respect to the construction of devises, they are subject, in a great measure, to the same rules of inter-

(*z*) 7 Will. 4 & 1 Vict. c. 26, s. 18.

(*a*) Sect. 19.

(*b*) Sect. 20. Francis *v.* Grover, 5 Hare, 39.

(*c*) 7 Will. 4 & 1 Vict. c. 26, s. 23.

(*d*) See as to alterations or erasures, Cooper *v.* Bockett, 4 Moore's P. C. C. 419; Gann *v.* Gregory, 22 L. J. (Ch.) 1059. Et vide sup. p. 499, n. (*c*).

(*e*) 7 Will. 4 & 1 Vict. c. 26, s. 21.

(*f*) Sect. 22. See as to revival, Andrews *v.* Turner, 3 Q. B. 177.

pretation as apply to conveyance by deed (*g*); but as in making a will, a party is supposed to be *inops consilii* (*h*), there are instances in which the law will carry his intended limitations into effect, though the words used would be insufficient or improper for the purpose in a deed (*i*). Thus by devise it was held—even before the late act 7 Will. IV. & 1 Vict. c. 26 (rendering the fee devisable without words of limitation (*k*)),—that [a fee may be conveyed without words of inheritance (*l*), and an estate tail without words of procreation (*m*),] provided that other words be used sufficient to indicate the design; though, in conveyances by deed, the case, as we have seen, is otherwise. [So an estate may pass by mere implication, without any express words to direct its course. As where a man devises lands to his heir at law, after the death of his wife. Here though no estate is given to the wife in express terms, yet she shall have an estate for life by implication (*n*); for the intent of the testator is clearly to postpone the heir, until after her death: and if she does not take it, nobody else can. So also where a devise is of Blackacre to A., and of Whiteacre to B. in tail, and if they both die without issue, then to C. in fee:—here A. and B. have *cross-remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole, and C.'s remainder over shall be postponed till the issue of both shall fail (*o*). But where any implications are allowed, they must be such as are necessary, or at least highly probable, and not merely possible implications (*p*).] There is also this difference between

(*g*) See Clayton *v.* Lord Nugent, 13 Mec. & W. 200. As to these rules of interpretation, vide sup. p. 501.

(*h*) 2 Bl. Com. 172.

(*i*) Co. Litt. by Butler, 272 a, n. (1); Doe *v.* Roberts, 7 Mee. & W. 386; Slater *v.* Dangerfield, 15 Mee. & W. 263. As to the construction of wills in reference to the description of the *devisee*, see Doe *v.* Hiscocks, 5 M. & W. 363; Doe *v.* Rouse, 5 C. B. 422.

(*k*) Vide post, p. 602.

(*l*) Vide supra, p. 238.

(*m*) Doe *v.* Bannister, 7 Mee. & W. 298; Lewis *v.* Puxley, 16 Mee. & W. 733; vide sup. p. 246.

(*n*) H. 13 Hen. 7, 22; 1 Vent. 376.

(*o*) Freem. 484. As to cross-remainders, vide sup. p. 352.

(*p*) Vaugh. 262.

deeds and wills in point of construction, that supposing a will to contain two inconsistent clauses, that which comes last in order shall prevail (*q*); though in a deed (as we have seen) the preference is due to that which comes first (*r*).

A will also is subject to a less strict rule, than a conveyance by deed, in respect of the description of the thing granted. Thus, if I convey my house by deed, without any specification of land, no land can pass, (as we have seen,) except the orchard, garden, and curtilage (*s*); but the question what shall pass by the *devise* of a house (or of a house "with the appurtenances") is purely a question of intention, to be determined, like other points of construction, by the tenor of the whole will. A devise in either form, may, under special circumstances, have the effect of passing adjacent land or buildings (*t*).

There are also some particular points of construction, established by parliamentary enactment, with regard to devises. For the former state of the law upon these points, as settled by judicial decisions, being deemed unsatisfactory, it was thought fit in the recent Statute of Wills before referred to, to regulate them for the future upon different principles. The act, however, it must be recollected, does not extend to wills executed before 1st January, 1838, which consequently remain subject, in respect of the same questions, to the *former* rules of interpretation. The points to which we refer are principally as follows.

1. As the dispositions made by a testator cannot take effect, and are not intended to take effect, till after his death, it has often become a question whether in his de-

(*q*) There is some contrariety in the books as to this point; but the doctrine as laid down in the text appears to be supported by the better authorities. Vide Co. Litt. 112 b; Plowd. 541, *in notis*; Doe *v.* Pedley, 1 Mee. & W. 677.

(*r*) Vide sup. p. 503.

(*s*) Vide sup. p. 486.

(*t*) 2 Saund. by Wms. 401, n. (2). See also the following recent cases on the construction of wills, in reference to the description of the *thing devised*: Doe *v.* Cranstoun, 7 Mee. & W. 3; Doe *v.* Lightfoot, 8 Mee. & W. 553; Doe *v.* Earles, 15 Mee. & W. 450.

scription of the property devised, or of the persons in whose favour he devises, he shall be considered as referring to the state of things which exists when he executes his will, or to that which may exist at the time of his death. As to bequests of personal estate, the rule has been, that the will speaks as at the time of death: but in devises of the realty, the opposite construction has obtained, and the will has been held to speak, in general, as at the time of its execution (*u*). But the new statute has now assimilated the construction of *devises* upon this point, to that of *personal bequest;* for it provides, "that every will shall be construed "with reference to the real estate and personal estate com-"prised in it, to speak and take effect as if it had been ex-"ecuted immediately before the death of the testator, unless "a contrary intention shall appear by the will (*x*)."

2. Though (as before observed) an estate in fee was always allowed to pass by devise, without apt words of inheritance, provided there were other expressions to show the testator's intention to confer a fee, yet, prior to the late Act, a long train of judicial decisions had established that a mere devise of house or land would not suffice to indicate that intention, but would confer only an estate for *life*. Thus, if I were seised in fee of a house at A., and devised my house at A. to B. *and his heirs*, or devised it to him with equivalent words, expressive of an intention that he should take my whole estate therein, the house would pass to him, in either case, in fee; but if I devised to him my house at A., without adding *and his heirs*, or using such other equivalent words as above mentioned, he would take an estate in it for his life only (*y*). This rule had always given much dissatisfaction, as establishing a construction contrary to that which common sense presumes

(*u*) Vide Lomax *v.* Holinden, 1 Ves. sen. 295; Pow. Dev. 307, (n.), by Jarman; King *v.* Bennett, 4 Mee. & W. 36.

(*x*) 7 Will. 4 & 1 Vict. c. 26, s. 24. See O'Toole *v.* Browne, 3 Ell. & Bl. 572.

(*y*) Roe *v.* Blackett, Cowp. 235; Silvey *v.* Howard, 6 Ad. & Ell. 253. See Doe *v.* Fawcett, 3 C. B. 274.

to be the real intention of the party (*z*); and by the new statute it is accordingly provided, "that where any real "estate shall be devised to any person without any words "of limitation, such devise shall be construed to pass the "fee-simple, or other the whole estate or interest which the "testator had power to dispose of by will, in such real estate, "unless a contrary intention shall appear by the will (*a*)."

3. In devises to *trustees*, it had been a general rule prior to the new Statute of Wills, that though no words of inheritance were used in the limitation to them, yet they should take such an estate (even to the extent of the whole fee) as might be necessary to enable them to perform the purposes of the trusts; but the question often arose, whether in particular instances they would take the fee, or a less estate, and if the fee, whether it would be determinable or not when the trusts were satisfied (*b*). But by this Act, a rule of construction is laid down, by which the subject will be hereafter governed; it being provided, "that where any "real estate (other than or not being a presentation to a "church) shall be devised to any trustee or executor, such "devise shall be construed to pass the fee simple, or other "the whole estate or interest which the testator had power "to dispose of by will in such real estate, unless a definite "term of years, absolute or determinable, or an estate of "freehold, shall thereby be given to him expressly, or by "implication (*c*)." And further, "that where any real "estate shall be devised to a trustee, without any express "limitation of the estate to be taken by such trustee, and "the beneficial interest in such real estate, or in the surplus "rents and profits thereof, shall not be given to any person "for life—or such beneficial interest shall be given to any "person for life, but the purposes of the trust may continue "beyond the life of such person—such devise shall be con-

(*z*) Denne *v.* Page, 11 East, 605, n.

(*a*) 7 Will. 4 & 1 Vict. c. 26, s. 28.

(*b*) See Doe *v.* Ewart, 7 Ad. & El. 666; Doe *v.* Edlin, 4 Ad. & El. 582; Barker *v.* Greenwood, 4 Mee. & W. 429; Adams *v.* Adams, 6 Q. B. 860.

(*c*) 7 Will. 4 & 1 Vict. c. 26, s. 30.

" strued to vest in such trustee the fee simple, or other the " whole legal estate which the testator had power to dis- " pose of by will, in such real estate, and not an estate " determinable when the purposes of the trust shall be " satisfied (*d*)."

4. If, in the interval between the execution of a will and the death of the testator, one of the objects of his bounty dies, the devise to such party will, by the general rule of law, *lapse*, that is, fail, and take no effect, and the subject-matter of the will be considered as not disposed of by the will. This rule had, till lately, applied to all cases without distinction; but where the party dying left children, it was sometimes attended with peculiar hardship (*e*). For if there were a devise to A. and the heirs of his body, and he died before the testator, the gift was void by the effect of this rule, even though he left issue; and yet it was manifest that the children, as well as the parent, had been designed to take the benefit of the gift. So if a testator gave his property among his own children, and one of them died before him, leaving issue, such issue would take nothing under the will, though the probability was, that this consequence could not have been intended. It is true that a testator had it always in his power to make a new disposition in favour of the children of a deceased devisee; but either from negligence or ignorance of the law, or from other accidental causes, this was often omitted; and an alteration of the law itself, as applicable to cases of this description, was therefore thought desirable (*f*). The new Act accordingly provides, " that where any person to whom " any real estate shall be devised for an estate tail, or an " estate in *quasi* entail, shall die in the lifetime of the tes- " tator, leaving issue who would be inheritable under such " entail, and any such issue shall be living at the time of " the death of the testator—such devise shall not lapse, but

(*d*) 7 Will. 4 & 1 Vict. c. 26, s. 31.

(*e*) Fourth Real Property Report, pp. 73, 74.

(*f*) Vide Fourth Real Property Report, p. 73.

"shall take effect as if the death of such person had happened immediately after the death of the testator, unless "a contrary intention shall appear by the will (*g*)." And further, "that where any person, being a child or other "issue of the testator, to whom any real or personal estate "shall be devised or bequeathed, for any estate or interest "not determinable at or before the death of such person, "shall die in the lifetime of the testator, leaving issue, and "any such issue of such person shall be living at the time "of the death of the testator,—such devise or bequest shall "not lapse, but shall take effect as if the death of such "person had happened immediately after the death of the "testator, unless a contrary intention shall appear by the "will (*h*)." In addition to which enactments, and in connection with the subject of lapse, we may notice this further provision, introductory of a new rule, in cases where a lapse occurs,—"that unless a contrary intention shall "appear by the will, such real estate or interest therein as "shall be comprised, or intended to be comprised, in any "devise in such will contained, which shall fail or be void "by reason of the death of the devisee in the lifetime of "the testator, or by reason of such devise being contrary "to law, or otherwise incapable of taking effect, shall be "included in the *residuary devise* (if any) contained in such "will (*i*)."

5. Under a devise by a testator, who has a lease for years, but no freehold estate,—of "all my lands and tenements," the lease for years has been always allowed to pass, for there would otherwise be nothing for the will to operate upon. But this being considered as the only reason for such a construction, it was, on the other hand, a general rule, that if a testator, using such words, had both lands in fee, and lands for years at the time, the lands in fee only

(*g*) 7 Will. 4 & 1 Vict. c. 26, s. 32.

(*h*) Sect. 33.

(*i*) Sect. 25. The rule of law before the statute passed was different as to real estates, but the same as to personal. See Doe *v.* Underdown, Willes, 293.

would pass (*k*). It is now, however, by the new Act provided, "that a devise of the land of the testator, or of the "land of the testator in any place, or in the occupation of "any person mentioned in his will, or otherwise described "in a general manner, and any other general devise which "would describe a customary copyhold or leasehold estate, "if the testator had no freehold estate which could be de-"scribed by it—shall be construed to include the customary "copyhold and leasehold estates of the testator, or his "customary copyhold and leasehold estates, or any of them, "to which such description shall extend, as the case may "be, as well as freehold estates, unless a contrary intention "shall appear by the will (*l*)."

6. In like manner, where a party, having an *estate* in lands (which he is consequently competent to devise), is also entitled, by virtue of a *power* conferred on him for the purpose, to appoint other lands by his last will and testament, it was formerly the rule, that a general devise of his lands would operate only on those in which he has the estate, and would not affect those subject to the power, though it was otherwise if he expressly referred to the power, or if it appeared by other circumstances (as by his having no estate for the will to work upon), that he intended the subject of the power to pass (*m*). And such is still the rule where the power is special, and to be exercised only in favour of particular individuals or classes of persons; but where it is general, and enables the testator to appoint to any person that he pleases, (which amounts in substance to an ownership,) the law is now altered by the new Statute of Wills: for by the 27th section it is provided, "that a general devise of the real estate of the

(*k*) See Rose *v.* Bartlett, Cro. Car. 293; Doe *v.* Williams, 1 H. Bl. 25; Thompson *v.* Lawley, 2 Bos. & Pul. 303; Knight *v.* Selby, 3 Man. & Gr. 92; Parker *v.* Marchant, 5 Man. & Gr. 498.

(*l*) 7 Will. 4 & 1 Vict. c. 26, s. 26; Wilson *v.* Eden, 5 Exch. 752. As to the case of freehold passing under a devise of leasehold, see Doe *d.* Dunning *v.* Cranstoun, 7 Mee. & W. 3.

(*m*) Denn *v.* Roake, 5 Barn. & Cress. 731.

"testator, or of the real estate of the testator in any "place, or in the occupation of any person mentioned in "his will, or otherwise described in a general manner,— "shall be construed to include any real estate, or any real "estate to which such description shall extend (as the "case may be), which he may have power to appoint in "any manner he may think proper; and shall operate as "an execution of such power, unless a contrary intention "shall appear by the will (*n*)."

7. By a rule of legal interpretation, at variance with the common apprehension of mankind, and founded upon reasons of a purely technical description, it had long been settled law, that the words *dying without issue*, (as where an estate of freehold or leasehold was devised to A., and *upon his dying without issue*, then over to B.), in general imported an *indefinite* failure of issue; that is, a failure not merely at the death of the party whose issue were referred to, but at any subsequent period, however remote (*o*). But by the new Statute of Wills such words are, in future, to receive a more natural exposition; it being enacted (7 Will. IV. & 1 Vict. c. 26, s. 29), "that in any devise or "bequest of real or personal estate, the words 'die with- "out issue,' or 'die without leaving issue,' or 'have no "issue,' or any other words which may import either a "want or failure of issue of any person in his lifetime, or "at the time of his death, or an indefinite failure of his

(*n*) 7 Will. 4 & 1 Vict. c. 26, s. 27, also contains a similar provision as to appointment of *personal* estate. As to the construction of the word "estate" in a devise, see Sanderson *v.* Dobson, 1 Exch. 141.

(*o*) See Fearne by Butler, 478, 480, 9th edit.; Doe *v.* Ewart, 7 Adol. & Ell. 648; Doe *v.* Taylor, 10 Q. B. 718; Gee *v.* Mayor of Manchester, 17 Q. B. 737; Foster *v.* Hayes, 4 Ell. & Bl. 717; Cole *v.* Goble, 13 C. B. 445; Bamford *v.* Lord, 14 C. B. 708. It is to be observed, however, that such words would receive the opposite construction, if accompanied by any other expression tending to limit the failure of issue to the time of the party's death; and the law admitted such a construction much more readily, in the case of a bequest of a term of years, than in that of a devise of the freehold. Fearne by Butler, 471, 9th edit.; Doe *v.* Ewart, ubi sup.

"issue,—shall be construed to mean a want or failure of "issue in the lifetime or at the death of such person, and "not an indefinite failure of his issue, unless a contrary "intention shall appear by the will, by reason of such "person having a prior estate tail, or of a preceding gift, "being (without any implication arising from such words) "a limitation of an estate tail to such person or issue, or "otherwise." It is, however, provided, that the Act shall not extend "to cases where such words as aforesaid im-"port if no issue described in a preceding gift shall be "born, or if there shall be no issue who shall live to "attain the age or otherwise answer the description re-"quired for obtaining a vested estate by a preceding gift "to such issue."

IV. As to the operation of devises in conveying and limiting real estate, a will of land [is considered by the courts of law, not so much in the nature of a testament, as of a conveyance (*p*) 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 (*q*), though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead; but in devises of lands such subscription is absolutely necessary by statute, in order to identify a conveyance which in its nature can never be set up until after the death of the devisor.]

As a devise is in the nature of a declaration of uses, so estates may be thereby limited upon the same principles as by a conveyance operating under the Statute of Uses (*r*). For we may recollect that a conveyance of that kind is free, in many respects, from the restrictions incident to those at the common law, by which a man was unable to limit a freehold *in futuro*, or a fee upon a fee, or any estate whatever in defeasance of a prior estate of free-

(*p*) Wyndham *v.* Chetwynd, Burr. 429.

(*q*) Vide sup. p. 497.

(*r*) 2 Bl. Com. 334; Arthur *v.* Bokenham, 11 Mod. 154.

hold (*s*). But as by the medium of executory uses, all these dispositions may be effected in a conveyance *inter vivos*, so they are also allowed in a will (*t*), which is analogous to a declaration of uses; and upon the same principle, and also because a will takes no effect until the death of the testator, it is competent to a man to devise to his wife (*u*), though he cannot convey to her (as we have seen) through the medium of a common law assurance (*x*). Yet is there this difference between a limitation to uses and a devise, that the latter is capable of operating by way of direct gift; and independently of any execution of the use, by force of the statute of 27 Hen. VIII c. 10 (*y*). Indeed, it has been doubted whether that statute has any effect in the case of a devise (*z*); and though where uses are expressly and formally declared by the will, it may often be inferable that the testator had the statute in view, and intended the conversion of the use into legal estate, according to its known mode of operation, yet it is rather by force of his *intention*, than of the statute itself, that the legal estate, in such cases, would seem to pass; while, on the other hand, it is clear that a use so declared will not be executed by the statute, where such conversion of it into legal estate, is contrary to the manifest or presumable purpose of the testator (*a*).

A devise, by which any future estate is thus allowed to be limited, contrary to the rules of the common law, is called an *executory devise* (*b*);—though that term is more especially applied to the particular case of limiting a fee upon a fee; as where an estate is given to A. and his heirs,

(*s*) Vide sup. p. 543.

(*t*) Fearne by Butler, 395, 9th ed.; 381, n. (*a*); 2 Bl. Com. 173, 334.

(*u*) Litt. s. 168; Arthur *v.* Bokenham, 11 Mod. 156.

(*x*) Vide sup. p. 545.

(*y*) 2 Bl. Com. 334; Co. Litt. by Butl. 272 a, n. (1), viii.

(*z*) Ibid.; 1 Sand. Us. 196.

(*a*) Co. Litt. by Butl. 272 a, n. (1), viii.; Biscoe *v.* Perkins, 1 Ves. & B. 485.

(*b*) Fearne by Butl. 386, 9th ed.; 2 Bl. Com. 172.

but if he dies before the age of twenty-one, then to B. and his heirs (*c*);—and with respect to all such dispositions, it is material to remark, that though the law will give effect to them when made by will, yet (upon the same principle to which we had before occasion to advert, in the case of a springing or shifting use (*d*)) it is a rule that no limitation capable of being considered as a remainder shall ever be construed as an executory devise (*e*). All "executory devises" (whether of the freehold, or of terms of years, or other chattels) are also subject, like springing and shifting uses, to the rule against *perpetuity* (*f*). And therefore, until the Statute of Wills before referred to (*g*), it was held that if a chattel real or personal were bequeathed to A., and upon his *dying without issue*, then to B., the limitation over to B. was void, as being too remote (*h*); for such words imported (as we have seen) an *indefinite* failure of issue. But in devises of the freehold, similarly worded, the objection of remoteness did not usually arise; for, in general, the law gave effect, in this case, to the limitation over, by considering the estate of the first taker as amounting, by implication, to an estate *tail*, (a construction not admissible in the former case, as there can be no estate tail in a chattel (*i*),) and the ulterior estate, by consequence, as a *remainder*; which, as it might always be barred by the recovery of the tenant in tail, did not fall within the rule against perpetuity. By the express provision, however, of the new Will Act, the rule of inter-

(*c*) 2 Bl. Com. 173.

(*d*) Vide sup. p. 547.

(*e*) See Fearne by Butl. 386, 394, 525, 9th ed.; Doe *v.* Selby, 2 Barn. & Cress. 930; Doe *d.* Evans *v.* Challis, 20 L. J. (Q. B.) 113.

(*f*) 2 Bl. Com. 173, 334; Fearne by Butl. 430, 9th ed.; Co. Litt. by Butl. 271 b, n. (1), vii. 2. As to perpetuity, vide sup. p. 553. The period allowed for vesting is computed, in the case of a devise, from the death of the testator, not the date of his will. Ibid.

(*g*) 7 Will. 4 & 1 Vict. c. 26.

(*h*) Fearne by Butl. 460, 9th ed.; Doe *v.* Ewart, 7 Ad. & El. 648; Doe *v.* Duesbury, 8 M. & W. 531.

(*i*) 2 Bl. Com. 398; vide sup. p. 281.

pretation as to the words *dying without issue* (on which the whole of these doctrines were founded) is now (as we have seen) itself abolished (*k*).

With respect to the operation of a devise, it remains only to remark, that it vests in the devisee an actual freehold by construction of law (*l*); being similar in this respect to a conveyance under the Statute of Uses; but different from a descent, which vests in the heir no complete estate, until he has made entry on the lands descended (*m*).

We have now adverted to all the ordinary kinds of assurance. Among which, the conveyances under the "Statute of Uses" and devises [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 corporeal seisin of the lands) this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances; and there has never been yet any sufficient guard provided against fraudulent charges and incumbrances, since the disuse of the old Saxon custom of transacting all conveyances at the county court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery (*n*), and the failure of the general register established by King Richard the first, for the stars or mortgages made to Jews, in the *Capitula de Judaeis*, of which Hoveden has preserved a copy. How far the establishment of a like general register for deeds

(*k*) Vide sup. p. 610.

(*l*) Co. Litt. 111 a; Doe *v.* Lawes, 7 Ad. & El. 212. He may, however, by an express act of dissent, waive the devise before entry. Ibid.

(*m*) Vide sup. p. 424.

(*n*) Hickes, Dissertat. Epistolar. 9.

[and wills, and other acts affecting real property, would remedy this inconvenience,] is a subject that was very fully considered by the eminent persons who were appointed in 1828, under a commission from the crown, for investigation of the state of the law relative to real property; and they recommended for adoption a plan of registry, the nature and merits of which, it would be foreign to the object of the present work to discuss. It suffices to say, that the suggestion has not hitherto been carried into effect; and that, for the present, no general registry of deeds or conveyances exists in England, with the exception of the counties of York and Middlesex; in each of which a system of that kind has been long established, (though it is said not with effect decidedly beneficial (*o*),) by authority of the legislature (*p*).

(*o*) Vide 2 Bl. Com. 343, where it is remarked, that "however plausible provisions for registration "may appear in theory, yet it has "been doubted by very competent "judges, whether more disputes "have not arisen in those counties "by the inattention and omission of "parties, than prevented by the use "of registers." It may be observed, however, that the efficacy of the system has been much impaired by the interference of the courts of equity, to prevent its unfair application in particular cases; for though, by the registry acts, a registered deed shall be preferred to an unregistered one of prior date, yet it was decreed by Lord Hardwicke (and the doctrine has ever since prevailed), that if the subsequent purchaser by the registered deed had *notice* of the unregistered one, he shall not avail himself of his deed, but the first purchaser shall be preferred. L'Neve *v.* L'Neve, 1 Ves. sen. 64; Vide Christian's Blackstone, vol. ii. p. 343, (n.)

(*p*) As to the registration of deeds in Yorkshire, vide 2 & 3 Anne, c. 4; 5 Anne, c. 18; 6 Anne, c. 35; 8 Geo. 2, c. 6; Tunstall *v.* Trappes, 3 Sim. 301. As to registration of deeds in Middlesex, vide 7 Anne, c. 20; 25 Geo. 2, c. 4; Doe *v.* Allsop, 5 A. & E. 142; Sumpter *v.* Cooper, 2 B. & Adol. 223; Queen *v.* Registrars of Middlesex, 7 Q. B. 156; Wollaston *v.* Hakewell, 3 Man. & G. 297.

CHAPTER XXI.

OF EXTRAORDINARY CONVEYANCES,—OR THOSE BY MATTER OF RECORD.

HAVING now completed our view of all conveyances of the ordinary class, whether founded on common or statute law, we proceed next to the examination of *conveyances by matter of record;* which (as formerly remarked) are in use on particular and comparatively rare occasions, and which may therefore, by way of distinction from the former, be designated as extraordinary conveyances. These are, 1. Private acts of parliament; and 2. Royal grants; both of which, as connected but slightly with the main body of the law, will be treated with brevity, and the rather, because our method will lead us to omit, for the present, any examination of the nature of the parliamentary and royal authorities on which they are respectively founded; these subjects having both their appropriate place under the division of the work which relates to *public rights.*

I. Private *acts of parliament* (*a*) have been resorted to as a mode of assurance more frequently in modern than in antient times. [For it may sometimes happen that, by

(*a*) As to private acts of parliament, vide sup. p. 71; et post, bk. IV. pt. I. c. I. tr. VI. See also 14 & 15 Vict. c. 49, as to preliminary inquiries to be made in cases of application for *local acts* giving power to construct works on the sea-shore, or affecting the navigation of any port or navigable river, &c.; 10 & 11 Vict. c. 69, 12 & 13 Vict. c. 78, as to taxation and costs on *private bills;* and 13 & 14 Vict. c. 21, s. 7, providing that all acts for the future shall be *public* acts, unless the contrary shall be expressly declared therein.

[the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of resulting trusts, springing uses, executory devises, and the like artificial contrivances (*a*), (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 (*b*). 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 transcendant power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the Restoration, by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as a noble historian expresses it (*c*), every man had raised an equity in his own imagination, that he

(*a*) Blackstone also enumerates *contingent remainders;* but these *were* known to the common law. "They "were probably considered en-"croachments on the common law," say the Real Property Commissioners, "but were certainly al-"lowed by it. They were early "attempts to meet the contingencies "of family settlements, and were "introduced long before the Sta-"tute of Uses."—Third Real Prop. Rep. 23.

(*b*) Relief against inconveniences of this kind may now, in some cases, be attained under the very recent provisions of 19 & 20 Vict. c. 120.

(*c*) Lord Clar. Contin. 162.

[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 (*d*), that the good old rules of law are the best security, and to wish that men might not have too much cause to fear that the settlements which they make of their estates shall be too easily unsettled, when they are dead, by the power of parliament.

Acts of this kind are, however, at present, carried on, in both houses, with great deliberation and caution; particularly in the House of Lords they are usually referred to two judges, to examine and report on the facts alleged, and to settle all technical forms (*e*). 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 (*f*).

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

(*d*) Lord Clar. Contin. 163.

(*e*) Whenever a private bill, in the nature of an estate bill, is brought up from the Commons, it is referred to two of the judges in rotation, not being lords of parliament. But, except in special cases, no other Commons' bills are referred to the judges. May's Pr. of Parl. p. 595, 3rd ed.

(*f*) See 8 Rep. 138 a; Godb. 171; vide Westby *v.* Kiernan, Ambl. 697; Provost of Eton *v.* Bishop of Winchester, 3 Wills. 483; Chapman *v.* Brown, 3 Burr. 1626.

[printed or published among the other laws of the session; and it hath been relieved against, when obtained by fraudulent suggestions (*g*).] Formerly, too, it was subject in every case to this further distinction, that though all public statutes are noticed by the court *ex officio*, no private one was entitled to judicial notice unless specially set forth and pleaded. And such is still the rule as to those passed up to 4th Feb. 1851, inclusive; but by 13 & 14 Vict. c. 21, s. 7, it is now provided that every act passed after that date shall be judicially taken notice of, unless the contrary be expressly provided and declared by the act itself. And as to all private acts, without distinction, it is to be observed, that they have in one respect the same notoriety as public ones; namely, that they are always [inrolled 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. *Royal grants* [are also matter of public record (*h*). For as St. Germyn says (*i*), the excellency of the sovereign is so high in the law, that no freehold may be given to, nor derived from, the crown, 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 royal grants must pass, and be transcribed, and inrolled: that the same may be narrowly inspected by the officers of the crown, who will inform the sovereign if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or aught besides, are contained in charters, or letters-*patent*, that is, open letters, *literæ patentes*; so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are

(*g*) See Richardson *v.* Hamilton, Canc. 8th January, 1773; M'Kenzie *v.* Stuart, Dom. Proc. 13th March, 1754; Biddulph *v.* Biddulph, 4 Cru. Dig. 549.

(*h*) Vide post, bk. v. c. xv.

(*i*) Doct. and Stud. b. 1, d. 8.

[usually directed or addressed by the sovereign to all subjects of the realm. And therein they differ from certain other letters of the sovereign, 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*, *literæ clausæ*, and are recorded in the *close rolls*, in the same manner as the others are in the *patent rolls*.]

The course of proceeding observed till of late with respect to the making out of a grant by letters-patent was in general as follows (*k*):—They were first to pass by *bill*, which was prepared by the attorney and solicitor-general, in consequence of a warrant from the crown, and was then signed, that is, superscribed at the top with the sovereign's own *sign manual*, and sealed with the *privy signet*, which was always in the custody of the principal secretary of state; and then sometimes it immediately passed under the great seal, in which case the patent was subscribed in these words, "*per ipsam reginam*, by the queen herself" (*l*). Otherwise the course was to carry an extract of the bill to the keeper of the *privy seal*, who made out a writ or warrant thereupon to the Chancery; so that the sign manual was the warrant to the privy seal, and the privy seal was the warrant to the great seal; and in this last case the patent was subscribed, "*per breve de privato sigillo*, by writ of privy seal" (*m*). But the practice is now greatly simplified by the statute 14 & 15 Vict. c. 82, which (after repealing a statute of 27 Hen. VIII. c. 11, on the subject) provides, that in every case where any gift, grant or writing whatsoever to be passed under the great seal would have before required a queen's bill or bills from the offices of the signet and the privy seal (*n*) respectively, her Majesty may, by warrant under the royal

(*k*) Vide 2 Bl. Com. 343.
(*l*) 2 Rep. 17 b.
(*m*) Ibid.; 2 Inst. 555.
(*n*) By 14 & 15 Vict. c. 82, s. 3, the offices of clerks of the signet and of the privy seal are abolished.

sign manual, addressed to the lord chancellor, command him to cause letters-patent to be passed under the great seal according to such warrant; and that such warrant shall be prepared by the attorney or solicitor-general, and shall set forth the proposed letters-patent, and shall be countersigned by one of the principal secretaries of state, and sealed with the privy seal; and that it shall be lawful for the lord chancellor from time to time to frame such further regulations with respect to the passing of letters-patent under the great seal as to him shall seem expedient. Such is the general course as now established by this statute (*o*). Some letters-patent, writs, commissions or other instruments, however, might, before the statute, be passed under the great seal, by authority of the lord chancellor or otherwise, without passing through the offices of the signet and the privy seal; and these are excepted by an express proviso from its operation. There are also [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,] and to these of course the statute has no application.

[The *manner* of granting by the crown, does not more differ from that by a subject, than the *construction* of such grants when made. For, 1. A grant made by the crown, *at the suit of the grantee*, shall be taken most beneficially *for* the crown, and *against* the party; whereas the grant of a subject, is construed most strongly *against the grantor* (*p*). Wherefore it is usual to insert in the royal grants, that they are made, not at the suit of the grantee, but "*ex speciali gratiâ, certâ scientiâ, et mero motu reginæ* (*aut regis*);" and then they have a more liberal construction (*q*);] as is also the case where they are made upon a valuable consideration (*r*). 2. [A subject's grant shall be

(*o*) See the provisions of 15 & 16 Vict. c. 83, in the particular case of letters-patent for an invention.

(*p*) Vide sup. p. 503.

(*q*) Finch, L. 100; 10 Rep. 112.

(*r*) 6 Rep. 6 a.

[construed to include many things besides what are expressed, if necessary for the operation of the grant (*s*). 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 (*t*); and if a feoffment of land was made by a lord to his villein, this operated as a manumission (*u*); for he was otherwise unable to hold it. But the grant of the crown shall not enure to any other intent than that which is precisely expressed in the grant. As if it grants land to an alien, it operates nothing: for such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant (*x*). 3. When it appears, from the face of the grant, that the crown 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 the royal title to the thing granted be different from what was supposed; or if the grant be informal; or if an estate be granted contrary to the rules of law, in any of these cases the grant is absolutely void (*y*). For instance, if the crown grants lands to one and his *heirs male*, this is merely void; for it shall not be an estate tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue; neither is it a fee-simple, as in common grants it would be (*z*); because it may reasonably be supposed, that the king meant to give no more than an estate-tail (*a*); the grantee is therefore (if anything) nothing more than tenant at will (*b*).] And to prevent deceits being practised on the sovereign, [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 the crown shall

(*s*) 1 Saund. by Wms. 323 a, n. (6).

(*t*) Co. Litt. 56 a.

(*u*) Litt. s. 206.

(*x*) Bro. Abr. tit. Patent, 62; Finch, L. 101.

(*y*) Freem. 172; Gledstanes *v.* Earl of Sandwich, 4 Man. & G. 995.

(*z*) Vide sup. p. 246; post, bk. IV. pt. I. c. IX.

(*a*) Finch, 101, 102.

(*b*) Bro. Abr. tit. Estates, 33; tit. Patents, 104; Dyer, 270; Dav. 45.

[be good, unless in the grantee's petition for them express mention be made of the real value of the lands (*c*).] As to the mode of proceeding for calling into question the validity of the crown's grant, it is by writ or action of *scire facias* at suit of the crown, issued at the instance, or at least by the sanction, of the attorney or solicitor-general; and any points of law or of fact arising thereon are determinable in the superior courts of common law, where also the judgment is to be given and execution awarded (*d*).

Lastly, we may observe with respect to the *subject-matter* of the royal grants, that—in connection with the provision now usually made by parliament, for support of the royal dignity—restrictions have been placed by legislative enactment (*e*) on the alienation of the royal domains; the general effect of which (though subject to a variety of exceptions) is to make such alienation unlawful for any longer period than thirty-one years (*f*); but the private property of the sovereign, that is, all estates purchased by her majesty, her heirs or successors, out of the privy purse, or coming to her or them, by descent or otherwise, from persons not being kings or queens of the realm, may be disposed of like estates belonging to private individuals (*g*).

[And thus we have taken a transient view, in this and the four preceding chapters, of a very large and diffusive subject, the doctrine of common assurances] as applied to the principal division of things real, viz. *land or corporeal*

(*c*) See also 34 Geo. 3, c. 75, s. 8, as to the survey, estimate, and certificate required, before a grant of lands is made by the crown.

(*d*) See on this subject the provisions of 12 & 13 Vict. c. 102, s. 29, &c.

(*e*) Vide 1 Anne, st. 1, c. 7; 34 Geo. 3, c. 75; 48 Geo. 3, c. 73; 52 Geo. 3, c. 161; 55 Geo. 3, c. 190; 38 Geo. 3, c. 60; 42 Geo. 3, c. 116.

(*f*) Vide 1 Anne, st. 1, c. 7; 48 Geo. 3, c. 73, s. 3.

(*g*) See 39 & 40 Geo. 3, c. 88 (amended by 47 Geo. 3, st. 2, c. 24); 46 Geo. 3, c. 151; 48 Geo. 3, c. 73; 52 Geo. 3, c. 161; 55 Geo. 3, c. 190. See also Mr. Thomas's arrangement of Co. Litt. vol. i. p. 66, vol. ii. p. 606, where the law relative to crown grants is collected.

hereditaments of free tenure (*h*); [which concludes our observations on the *title* to them, or the means by which they may be reciprocally lost and acquired (*i*). And 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 connection of the persons entitled to hold them (*k*).] What remains of the law relative to the rights of property in things real in general, (exclusive of the wrongs and remedies,) is the learning relative to land of *copyhold* tenure, and to *incorporeal hereditaments;* to the first of which we shall accordingly proceed in the next chapter.

(*h*) Vide sup. p. 168.
(*i*) Vide sup. p. 173.
(*k*) Vide sup. p. 230.

CHAPTER XXII.

OF COPYHOLDS.

Our attention has been hitherto confined to hereditaments of free tenure; and these we have considered in reference to the estates that may be had in them, and the means by which those estates may be acquired or lost. But the reader will recollect, that lands may also be held by the base tenure of *copyhold;* a distinction of which some general notice has been already taken in a former chapter of this work (*a*). And we are now to examine copyhold lands in reference to the same considerations of estate and title, which have already engaged our attention in the course of the disquisition upon hereditaments of free tenure (*b*). As this, however, is in the nature of a mere variation upon that general scheme of real property which has been already unfolded as largely as the nature of an elementary work permits, our notice of it may be compressed within proportionably narrow limits. It shall be directed chiefly to the following points: I. The general nature of copyhold estates. II. Certain incidents peculiar to those estates, and not applicable to such as are of free tenure. And in what we shall have occasion to say on this subject, we are to be understood as speaking of copyhold commonly so called; the particular species of antient demesne, and the rest, not requiring in the present work a more particular notice than has already been bestowed upon them (*c*).

(*a*) Vide sup. p. 215.
(*b*) Vide sup. p. 230.
(*c*) Vide sup. pp. 223, 224.

I. Referring to what we before said of copyholds, we may collect from it, first, that it is in *manors* only that they are to be found, all copyholds being, from their nature, necessarily parcel of a district of that description. Secondly, that it is by the immemorial custom of the particular manor, that the nature of the copyholder's interest must always be regulated. [In some manors, where the custom hath been to permit the heir to succeed the ancestor, the estates are called copyholds of inheritance; in other, where the lords have been more vigilant to maintain their rights, they remain copyholds for life or years only (*d*);] but though the interest of the copyholder may be thus in fee or for life, and consequently may partake of the nature of freehold, in respect of the *quantity of estate*, it is nevertheless, for want of the remaining ingredient, viz. that of free tenure (*e*), no *freehold*. Indeed, in every case of copyhold, the law still distinguishes between the strictly legal, and the customary, estate; for as regards the former, it supposes the seisin and freehold of the land to be vested in the lord (of whose *demesnes* it is properly parcel (*f*)), and the copyholder to be mere tenant at will; but as he is tenant at will *according to the custom*, that is, to hold in fee, or for life, or years, (as the case may be,) it considers him as having a customary estate to that extent (*g*); and one that is fixed and permanent in its nature, such as it is out of the power of the lord to defeat or encroach upon (*h*). In consonance with

(*d*) 2 Bl. C. 97; 3 Real P. R. 14. It is to be observed, that a copyhold of inheritance may always be granted for a less estate. Co. Litt. 52 b.

(*e*) Vide sup. p. 231.

(*f*) Dearden *v.* Evans, 5 Mee. & W. 11, vide sup. p. 215.

(*g*) The law accordingly permits copyholders as well as freeholders to vote for members of parliament, 2 Will. 4, c. 45, s. 19, and makes them equally liable to serve on juries, 6 Geo. 4, c. 50, s. 1.

(*h*) Brown's case, 4 Rep. 21; Co. Cop. 5, 58; Litt. s. 92, Trespass. By these authorities it appears that copyholders were formerly ousted by their lords at pleasure. The reformation of this, was, in the opinion of Chief Baron Gilbert, "by some positive "law;" Gilb. Ten. 156, 161; but it is generally supposed to have been

the latter view, which assigns to the copyholder the character of a permanent tenant, he is deemed to hold fealty to his lord (*i*); which, as we have seen in a former place, is an obligation from which a mere tenant at will is always exempt (*k*). This complicated kind of interest, according to which [the same man shall, with regard to the same land, be at one and the same time tenant in fee simple, and also tenant at the lord's will,] seems to have arisen, in the manner formerly explained (*l*), from the nature of villenage tenure.

In the enumeration of the estates of which a copyhold may consist, it will be observed, that we have not included estates *tail;* it being only by particular custom (*m*), that copyholds are capable of being entailed. For the statute *De Donis* is held not to extend to lands of that tenure: from which it follows that a limitation to a man and "the "heirs of his body," in a copyhold, will ordinarily create not an estate tail, but a fee simple conditional at common law (*n*).

Not only in regard to the quantity of interest, (as being in fee, for life, or for years,) but in regard also to the various modifications to which that interest may be subject, the nature of a copyholder's estate in general resembles that of an estate held in free tenure (*o*). But as to this, there are some exceptions. Thus, as to estates in dower and by the

gradual. Upon the whole, the origin and progress of this tenure are involved in singular obscurity; but the following notices of a very diligent investigator of the Year Books, deserve attention. As early as the fourth year of Edward the first, we find mention of *custumarii tenentes.* Towards the latter end of the reign of Edward the third, of tenants per roll *solonque la volonte le seigniour;* and in the reign of Henry the fifth, the term of *copyholders* occurs. Reeves's Hist. Eng. Law, vol. iii. p. 312.

(*i*) Vide sup. p. 296, n. (*p*).

(*k*) Ibid. These considerations seem to show that in treating of copyhold in that division of this work which relates to estates at will, the arrangement of Blackstone is objectionable.

(*l*) Vide sup. pp. 218, 220.

(*m*) Co. Litt. 60 b; 2 Bl. Com. 113.

(*n*) Doe *v.* Clark, 5 B. & Ald. 458.

(*o*) Co. Cop. 110; Gilb. Ten. 258; 2 B. & Ad. 440.

curtesy, it is laid down that copyholds are not of common right subject to either of these (*p*), though they may each obtain, and in fact do very frequently obtain (the former under the name of *free-bench*), by the special custom of particular manors (*q*). And to this we may add, that as the mode in which copyholds are conveyed (of which we shall speak hereafter (*r*)) differs from any of those which are applicable to freeholds; so the limitation of an estate, in the former, is free from some of the restraints imposed by the ordinary rule of the common law, in the case of the latter. Thus in a conveyance of a copyhold estate *inter vivos*, though no assistance can be here derived from the Statute of Uses (*s*), yet an estate in fee or for life may be limited *in futuro*, or a fee may be limited upon a fee, or a man may convey to himself, or to his wife (*t*). And a copyhold has been always capable, in the manner hereafter mentioned, of alienation by will; in which all these modes of limitation are allowed with as much freedom as in the case of a devise of freehold.

II. There are some incidents also of a copyhold estate in which it differs from one of free tenure; and these regard, first, the estate itself, and, secondly, its title or manner of acquisition.

First. As regards the estate itself, a copyholder, even where his interest is in fee, has no right (except in particular manors where it may be warranted by a special custom) to commit *waste*, (for example, to cut down timber, unless for reasonable botes or estovers (*u*), or to dig for

(*p*) As to *dower*, vide sup. p. 267; as to *curtesy*, sup. p. 264. Vide 4 Rep. 22 a, where Sir E. Coke gives as a reason, that copyhold lands, though *descendible* by custom, nevertheless do not possess all the other collateral qualities of estates of inheritance *simpliciter*.

(*q*) Co. Cop. 110, 111; Gilb. Ten. 161.

(*r*) Vide post, p. 631.

(*s*) Ibid.

(*t*) Boddington *v.* Abernethy, 5 B. & C. 782; Co. Cop. 81. As to the rules on these points in respect of *freeholds*, vide sup. pp. 543, 545, 546.

(*u*) As to these, vide sup. p. 257.

minerals (*x*); for the law considers him in these respects in the light of a tenant at will. And yet this restriction is attended with no corresponding benefit to the lord; for the law does not allow him (unless there be a special custom for the purpose) to enter on the land to take the timber or minerals to his own use, without the consent of the copyholder (*y*); whose possession, though in strictness a tenancy at will, is nevertheless protected from all invasion. By such waste, and by many other acts of a wrongful kind,—such as an alienation in fee, or for life, by a common law mode of conveyance proper to freehold, and not applicable to a base tenure—a demise for more than one year, without the lord's licence—a refusal to perform the proper services, —or a disclaimer of his tenancy in open court,—the copyholder forfeits his estate to the lord (*z*).

Moreover the copyholder is ordinarily subject to *quit rents* and *fines*, and, sometimes, to *heriots;* burthens of which the first and last rarely attach to lands of free tenure (*a*); the second, never. The nature of "quit rents" (or rents of assize) will be noticed in the following chapter, when we shall have occasion to consider the subject of *rent* in general (*b*). "Fines," to which we had occasion to advert in a previous part of the work (*c*), are payments due, by the custom of most manors, to the lord, upon every descent or alienation of a copyhold tenement; and they accrue by force of the *admittance* (*d*), to which we are about presently

(*x*) Doe *v.* Wilson, 11 East, 56; Gilb. Ten. 235.

(*y*) Whitechurch *v.* Holworthy, 4 Mau. & Sel. 340; Lewis *v.* Brentwate, 2 Barn. & Adol. 438.

(*z*) 1 Watk. Cop. 326; 2 Bl. Com. 284; where the several acts which occasion a forfeiture are enumerated.

(*a*) It is but seldom, comparatively, that a freehold of inheritance is now held of a private lord; vide sup. p. 236.

(*b*) Vide post, p. 671.

(*c*) Vide sup. pp. 215, 223.

(*d*) Watk. Cop. 286. As to admittance, vide post, p. 634. As to the liability of remainder-men to pay fines, vide Dean of Ely *v.* Caldecot, 8 Bing. 439; Phypers *v.* Eburn, 3 Bing. N. C. 250. As to fines and fees payable by a person admitted under several titles, Evans *v.* Upsher, 16 Mee. & W. 675; Traherne *v.* Gardner, 5 Ell. & Bl. 913. As to fees payable to stewards of manors on alienations compulsory by act of

to refer more at large. They are either *certain* or *arbitrary* —the one being fixed by custom and independently of the will of the lord as to the amount,—the other being assessed at his will: though, as formerly remarked (*e*), that will is so far restrained, that the amount is, under ordinary circumstances, never allowed to exceed two years' improved value of the land (*f*). This fine is paid by "tenants in common" apportionably—that is, each pays a separate fine according to his share (*g*); but "joint tenants" and "coparceners" pay a single fine for all (*h*); and the case of joint tenants is an exception to the general rule as to amount; for, on their admittance, the course is to allow two years' value for the first life, half of that on the second, and half of that last sum on the third; and so according to this descending series, whatever may be the number of tenants (*i*). For as such tenants are entitled to succeed each other by mere survivorship, and without a new admittance, (without which, no new fine could be due), the application of the general rule to this case would operate unfairly on the lord. With respect to "heriots," they are also a tribute to the lord of whom a tenement is held; and they [are usually divided into two sorts, heriot service, and heriot custom (*k*). The former are such as are due upon a special reservation in a grant or lease of lands;] but do not usually occur except in manors, where they form part of the services at which some *particular* tenement within the manor has been held from time immemorial, and which may therefore be supposed to have been reserved by the grant of it originally

parliament, Cooper *v.* The Norfolk Railway Company, 3 Exch. 546.

(*e*) Vide sup. p. 215.

(*f*) 1 Watk. Cop. 308. The amount due depends on the *value*, not the actual rent. Lord Verulam *v.* Howard, 7 Bing. 327. And it is the value after deduction of quit-rents, but not of land-tax. Doug. 724, (n.).

(*g*) See Queen *v.* Manor of Everdon, 16 L. J. (Q. B.) 18; Queen *v.* Eton College, 8 Q. B. 526.

(*h*) Burt. Compend. 433; R. *v.* Manor of Bonsall, 3 B. & Cress. 175.

(*i*) Wilson *v.* Hoare, 2 Barn. & Adol. 350; S. C. 10 Ad. & El. 236; Sheppard *v.* Woodford, 5 Mee. & W. 608.

(*k*) 2 Bl. Com. 422.

made. [The latter arise upon no special reservation whatsoever, but depend merely upon custom;] being founded on a *general* usage within some manor from time immemorial; as that every tenement within the manor has always paid, under certain circumstances, a heriot to the lord (*l*). A heriot may be due either from the free or from the copyhold tenant of a manor (*m*); and it may accrue either in respect of the death or alienation of the tenant; but it is claimed more ordinarily in respect of the death (*n*). It is [sometimes the best live beast or *averium* which the tenant dies possessed of (*o*), sometimes the best inanimate good, under which a jewel or piece of plate may be included; but it is always a personal chattel (*p*), which immediately upon the death of the tenant who was the owner of it, being ascertained by the option of the lord, 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 (*q*); for she can have no ownership in things personal. In some places there is a customary composition in money, as ten

(*l*) Heriots are of great antiquity, being mentioned in England as early as the time of Edgar, (Hallam's Mid. Ages, vol. ii. p. 416, cites Selden's Works, vol. ii. p. 1620). Blackstone observes that we find in the laws of Canute, c. 69, the several *heregeates* specified which were then exacted by the king, from the highest *eorle* down to the most inferior *theygne* or landholder; and that these consisted for the most part in arms, horses, and habiliments of war, which the word itself, according to Spelman, signifies; 2 Bl. Com. 423. But the heriot of the villein, unlike that of the military tenant, was generally some beast used for the purposes of agriculture. Wilkins's Leges Anglo-Sax. Ll.Gul. Conq. 29.

(*m*) 2 Bl. Com. 423; see Damerell *v.* Protheroe, 10 Q. B. 20.

(*n*) 2 Watk. Cop. 135, 145.

(*o*) "*Est quædam alia præstatio, quæ nominatur heriettum, 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.*" —Bract. l. ii. c. 36, s. 9. And this, he adds, *magis fit de gratia quam de jure;* in which, says Blackstone, (Bl. Com. vol. ii. p. 424,) Fleta and Britton agree; and he infers that the gift was, in its origin, only voluntary.

(*p*) As to the meaning of "personal chattels," vide sup. p. 280.

(*q*) Hob. 60.

[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 (*r*).] And it is further to be remarked, that if the tenement should happen to be at any time divided into distinct shares, either by becoming vested in tenants in common, or by alienation of parcel, in severalty, the heriot is *multiplied* accordingly (*s*); though upon the subsequent re-union of the parts in a single owner, the multiplication (at least in the case of a tenancy in common) ceases (*t*).

A copyhold estate, while subject to particular burthens, enjoyed on the other hand, until a recent period, some improper immunities. For it was not assets in the hands of the heir or devisee; and was consequently exempt, after the tenant's death, from the claims of his creditors (*u*); nor could any part of it be taken, even during his life, upon an *elegit* (*x*). But this abuse is now substantially rectified; for by 3 & 4 Will. IV. c. 104, when any person shall die seised of or entitled to any estate, whether freehold, customaryhold, or copyhold, which he shall not have charged with or devised subject to the payment of his debts, it shall be assets to be administered in *equity*, for payment of his debts, whether due on simple contract or specialty, but with a preference of all debts accruing under a specialty in which the heirs are bound. And by 1 & 2 Vict. c. 110, s. 11, the sheriff is empowered to deliver execution to any person recovering judgment in one of the superior courts at Westminster, as well of copyhold or customary, as of freehold

(*r*) Co. Cop. s. 31; Parkin *v.* Radcliffe, 1 Bos. & Pul. 282; Croome *v.* Guise, 4 Bing. N. C. 148.

(*s*) 2 Watk. Cop. 149, 159; see Garland *v.* Jekyll, 2 Bing. 273.

(*t*) See Attree *v.* Scutt, 6 East, 476; Garland *v.* Jekyll, 2 Bing. 273; Holloway *v.* Berkeley, 6 Barn. & C. 2; Queen *v.* Manor of Everdon, 16 L. J. (Q. B.) 18.

(*u*) 4 Rep. 22 a; 1 Watk. Cop. 224. As to assets, vide sup. p. 426.

(*x*) 2 Eq. Ca. Ab. 226, pl. 6; 1 Watk. Cop. 224. As to the writ of *elegit*, vide post, bk. v. c. x; as to the estate of tenant by elegit, vide sup. p. 309.

lands, tenements, or hereditaments; by section 13, a judgment of any of these courts shall operate as a *charge* upon all lands, tenements and hereditaments, whether copyhold, customary, or freehold, to which the person against whom judgment is entered shall be entitled, or over which he shall have a disposing power at the time of entering up such judgment, or afterwards; and, by section 18, the effect of a common law judgment is given to rules of the superior courts of law and orders and decrees in equity, whereby any money, costs, charges or expenses shall be payable to any person.

In order to complete our general view of the peculiar incidents of copyhold, as far as regards the nature of the estate, we must also recollect that it is capable, as we have elsewhere noticed, of *enfranchisement* (*y*), or conversion of the base tenure into free; and that either by a conveyance to the tenant of the lord's freehold estate in the copyhold premises, or by a release from the lord to the tenant of the seignorial rights (*z*); the effect in either case being, that the tenant thereafter no longer holds of the lord of the manor, but of the superior lord of whom he himself held, and by the same free tenure (*a*); from which this consequence also follows, that the tenement is discharged from all copyhold burthens to which it was before subject; and divested of all copyhold rights (for example, that of common) to which it was before entitled (*b*).

But an enfranchisement must be in every case the act of the lord; for if the tenant be the active party, and make a conveyance to the lord, this is no enfranchisement; because the tenure by the lord was *already* free; though it amounts to an *extinguishment* of the copyhold (*c*). And to work an entire enfranchisement, it was moreover necessary, until the new provisions hereafter noticed, that the lord

(*y*) Vide sup. p. 222.
(*z*) 1 Watk. Cop. 362.
(*a*) Ibid. 367.
(*b*) 3 Real P. R. 17; 1 Watk. Cop. 368.
(*c*) 1 Watk. Cop. 359, 361; Blenerhasset *v.* Homberstone, W. Jon. 41.

should have in his manor, and the tenant in his copyhold, an estate of inheritance in fee simple; and this is a circumstance which had tended considerably to check transactions of this description (*d*).

Secondly. The incidents of copyhold in regard to the title or manner of acquisition are in some respects the same with those of freehold, and particularly as regards the mode of descent; though this is much varied by the special custom of particular manors. There are, however, many incidents of a peculiar kind, and these, in general, result from the fundamental idea before remarked upon, that the interest of the copyholder is in strictness no more than a tenancy at will. Considered as such, it would be wholly incapable of direct alienation, for that would be a determination of the will (*e*); and therefore to this day, the attempt to transfer a copyhold, either for an estate of inheritance or for life, by any of those direct methods which are applicable at common law to a freehold estate, is in general attended with no other effect but to occasion a forfeiture to the lord (*f*). And though a copyhold may be conveyed in trust, yet it cannot be transferred by a conveyance under the Statute of Uses, the enactments of which are held not to extend to lands of this tenure (*g*). Yet, by the lord's licence, the copyholder may demise for a term of years (*h*); and, even without his licence, for a single year; and [custom and the indulgence of the law, which favours liberty,] also allows him to exercise a substantial right of alienation to any extent whatever, whether in fee, for life, or for years, under colour of a *surrender* of his interest to the lord, and

(*d*) 3 Real P. R. 17. See further as to the subject of the voluntary enfranchisement of copyholds, post, p. 644.

(*e*) Vide sup. p. 290.

(*f*) 1 Watk. Cop. 326; Dimes *v.* Grand Junction Canal, 16 L. J. (Q. B.) 107.

(*g*) 1 Watk. Cop. 100, 212; Rowden *v.* Maltster, Cro. Car. 44; 2 Ves. 257.

(*h*) 1 Watk. Cop. 302. But he cannot convey in fee, or demise for *life*, even by licence. 2 Watk. Cop. 119.

an *admittance* or grant by the latter, *de novo*, to the tenant's nominee, attended with those ceremonies of investiture which marked in former days the original donation of a fief (*i*).

The nature of this proceeding is, in a general point of view, and according to the custom of most manors, as follows: [the tenant comes to the steward of the manor, either in court (*k*) (or if the custom permits, out of court), or else to two customary tenants of the same manor,] or to one tenant, [provided there be also a custom to warrant it (*l*), and then 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,] or single tenant, [all his interest and title to the estate,] in order that the same may 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.] Upon such surrender, the lord, by his steward, accordingly grants the same land again to the surrenderor's nominee [(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 same tenant the rod, or glove, or the like, in the name and as the symbol of corporeal 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 (*m*).]

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 and the admittance: considered in reference, not to their form (for of that enough has been

(*i*) Vide sup. p. 177.

(*k*) As to the customary court here referred to, vide sup. p. 221.

(*l*) 1 Watk. Cop. 78.

(*m*) 2 Bl. Com. p. 365. As to the stamp duty on admittance, see 55 Geo. 3, c. 184, sched. pt. 1; 13 & 14 Vict. c. 97, sched. As to the *costs* of admittance, see Cole *v.* Jealous, 5 Hare, 51.

said), but to the doctrine and principles to which they are respectively subject.

1. A "surrender" is [rather a manifestation of the alienor's intention, than a transfer of any interest in possession (*n*). For until admittance] of the surrenderee, the lord [taketh notice of the surrenderor as his tenant, and the surrenderor still receives the profit of the land to his own use, and shall discharge all services due to the lord (*o*). 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,] and he is considered as trustee for the surrenderee, who has an equitable interest, capable of being devised or otherwise assigned (*p*). The latter also has a right to call upon the lord to admit him, and in the event of his refusal may compel him to do so by a bill in Chancery, or by a mandamus (*q*). But no estate whatever is vested in the surrenderee as *copyhold tenant,* before admittance. [If he enters, he is a trespasser, and punishable in an action of trespass; and if he surrenders to the use of another, such surrender is merely void (*r*), and by no matter *ex post facto* can be confirmed. For though he be admitted in pursuance of the original surrender, and thereby acquire afterwards a sufficient and plenary interest as absolute owner, yet his surrender previous to his own admittance is absolutely void *ab initio,* because, at the

(*n*) In the absence of special custom the lord is not bound to accept a surrender by a deed burthened with trusts. Flack *v.* The Master of Downing College, 13 C. B. 945.

(*o*) Hence before admittance the lord can maintain no action, for the fine due in respect thereof, against the surrenderee; Lord Wellesley *v.* Withers, 4 Ell. & Bl. 750.

(*p*) 1 Watk. Cop. 102.

(*q*) See 2 Bl. Com. 369; R. *v.* Manor of Bonsall, 3 Barn. & Cress. 175; The Queen *v.* Powell, 1 Q. B. 352; Doe *v.* Harrison, 6 Q. B. 631; Queen *v.* Dendy, 22 L. J. (Q. B.) 39; Queen *v.* Lord Wellesley, 2 Ell. & Bl. 924.

(*r*) Doe *v.* Tofield, 11 East, 246, 251. As to a devise by the surrenderee, before admittance, see Matthew *v.* Osborne, 13 C. B. 919.

[time of such surrender, he had but a possibility of an interest, and could therefore transfer nothing; and no subsequent admittance can make an act good which was *ab initio* void.]

2. ["Admittance" is the last stage or perfection of copyhold assurances,] and considered in that light, it may either be [an admittance upon surrender by the former tenant, or an admittance upon a descent from the ancestor.] In both these [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 the claim of the tenant who is admitted is solely under him that made the surrender, or under the ancestor (*s*). [And, therefore, neither in the one case nor the other is any respect had to the quality or quantity 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 (*t*).

Admittances, however, upon surrender, differ from admittances upon descent, in this, that, by surrender, nothing] beyond an equitable interest [is vested in the surrenderee, before admittance; 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*,] that is, as one of the tenants present at the lord's court: [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. He may enter into the lands before admittance; may take the profits; may punish any trespass

(*s*) 2 Bl. Com. 370, cites 4 Rep. 27; Co. Litt. 59.

(*t*) 4 Rep. 27; 1 Rep. 140.

[done upon the ground (*u*);] may devise (*x*); [nay, upon satisfying the lord for his *fine* (*y*) due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine; and not so much necessary for the strengthening and completing the heir's title. Hence, indeed, an observation might arise, that, if the benefit which the heir is to receive by the admittance is not equal to the charge of the fine, he will never come in and be admitted to his copyhold in court; and so the lord may be deprived of his fine. But to this we may reply in the words of Sir E. Coke (*z*)—"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 in every manor is in this point "compulsory. For either upon pain of forfeiture of the "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 de-"cease (*a*)."]

But though, in the case of an admittance upon surrender, no copyhold estate is vested in the surrenderee until he is admitted, and it is distinguishable in this respect from an admittance upon descent, yet it is material to observe, that even an admittance upon surrender, when made, has a retrospective relation, in point of time, to the surrender itself. And therefore if the surrenderor dies after the surrender, and before admittance, though his heir will take by descent

(*u*) 4 Rep. 23.

(*x*) Right *v.* Banks, 3 Barn. & Adol. 644; Doe *v.* Wilson, 5 Ad. & El. 321; 7 Will. 4 & 1 Vict. c. 26, s. 3.

(*y*) Vide sup. p. 626.

(*x*) Co. Cop. s. 41.

(*a*) As to the admittance of infants, *femes covert*, and lunatics, see 9 Geo. 1, c. 29; 11 Geo. 4 & 1 Will. 4, c. 65; Dimes *v.* Grand Junction Canal, 9 Q. B. 469.

in the interim, yet on the admittance of the surrenderee, the heir's estate will be defeated (*b*).

Such is, in general, the nature of a surrender and admittance, in the simplest form; and the only variations upon the proceeding, which we deem it material at present to notice, relate to a conveyance by way of mortgage (*c*), and a conveyance by a married woman. In the first case the surrender is made upon *condition* that the money remains unpaid at the time appointed; but in the meantime no admittance takes place; and if the money be then paid, the surrender not having been perfected by admittance, is void without further ceremony. Nor is it the usual course to complete the copyhold estate by admittance, even supposing the money to remain unpaid, unless the mortgagee wishes to take possession; but the conditional surrender constitutes the only security, and continues to do so, until the mortgage be satisfied, and entry of such satisfaction made on the court roll; after which, the original title of the mortgagor is considered as remaining in full force (*d*). A surrender of the copyhold estate of a married woman (*e*) is made by the husband and wife together, she being at the same time examined apart by the steward; and, when accompanied with this ceremony, it will suffice to pass her copyhold lands, and to bind her and those claiming under her (*f*).

The admittances of which we have hitherto spoken are those used to complete an inchoate title by surrender or descent. It is to be observed, however, that there is another kind, viz. that which is connected with an original voluntary grant from the lord himself, and not with any preceding surrender or descent (*g*). This occurs chiefly in

(*b*) 1 Watk. Cop. 103; et vide Doe *v.* Hall, 16 East, 208.

(*c*) As to mortgages in general, vide sup. p. 303.

(*d*) 1 Watk. Cop. 116, 117; Burt. Compend. 420.

(*e*) As to conveyances by married women in general, vide sup. p. 475.

(*f*) 1 Watk. Cop. 63; Kewley *v.* Ryan, 2 H. Bl. 344; Driver *v.* Thompson, 4 Taunt. 294.

(*g*) 2 Bl. Com. 370.

the case where the lord has acceded to the copyhold interest, in consequence of some escheat, forfeiture, descent, surrender to the lord's own use, or other circumstance (*h*), so that the freehold and copyhold interest are united in his person; which produces, upon the principle already referred to, an extinguishment of the copyhold (*i*). In such cases [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;] or, if he thinks proper, he is also at liberty, notwithstanding the extinguishment of the former copyhold estate, to grant the lands out *de novo* to hold by copy (*k*); but if he does this [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,] which, as this tenure depends on immemorial usage, cannot be done. Thus, if a copyhold for life falls into the lord's hands by the tenant's death, and 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 (*l*); nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord (*m*).]

The lord may also, where there is a special custom in the manor to that effect, make grants of portions of the *waste* (*n*), to be held for the first time by copy of court roll; but a custom to grant out every part of the waste without restriction, would be illegal, as trenching too much upon the general common right of the tenants (*o*); and to the validity of the grant of any portion, the assent of the *homage* is, by the custom of some manors, essential (*p*).

(*h*) 1 Watk. Cop. 36, 39.

(*i*) Vide sup. p. 630.

(*k*) 1 Watk. Cop. 93, 361.

(*l*) Co. Cop. s. 41.

(*m*) 8 Rep. 63.

(*n*) As to "the lord's waste" in a manor, vide sup. p. 216. As to *approving*, vide post, p. 654.

(*o*) 1 Watk. Cop. 35; see Lord Northwick *v.* Stanway, 3 Bos. & Pul. 346; The King *v.* Wilby, 2 M. & S. 509; Badger *v.* Ford, 3 B. & Ald. 153.

(*p*) As to this assent, vide 4 & 5 Vict. c. 35, s. 9.

A surrender and admittance, and a voluntary grant and admittance, though the most antient and of the most general application, are yet not the only methods of passing copyhold property, for it is also directly devisable by will. Formerly this was otherwise; for where a man wished to devise a copyhold, the object was effected, till a recent period, not by virtue of any statute (those of Henry the eighth (*q*) being held not to apply to this tenure (*r*)), but by surrender and admittance, the devisor making a surrender *to the use of his will;* which, upon his death, entitled the person designated therein as devisee to be admitted (*s*); and, except by special custom, a devise without previous surrender of this kind was inoperative (*t*). But by 55 Geo. III. c. 192 (passed 12th July, 1815), every disposition made by will, by a person dying after the passing of that act, was made as effectual without surrender to the use of his will, as it would have been if such surrender had taken place (*u*). And now by the Statute of Wills, 7 Will. IV. & 1 Vict. c. 26 (*x*) (repealing the former act, except as to wills made before 1st January, 1838), it is provided that all the real estate of the testator may be devised; and under that description all his copyholds, though he should not have surrendered them to the use of his will, nor have even been admitted to them, are expressly included.

A copyhold may moreover pass by a conveyance under the act for abolishing fines and recoveries, 3 & 4 Will. IV. c. 74 (*y*). In the case where the custom of the particular

(*q*) Vide sup. p. 592.

(*r*) Neither these statutes nor the Statute of Frauds apply to copyhold. But a devise of *customary* estates, as distinguished from copyhold, is within the Statute of Frauds. 1 Watk. Cop. 122, 131.

(*s*) Co. Cop. s. 36.

(*t*) 1 Watk. Cop. 122; vide Doe *v.* Bartle, 5 Barn. & Ald. 492; Cuthbert *v.* Lempriere, 3 M. & S. 158.

(*u*) Vide Doe *v.* Thompson, 7 Q. B. 897; Glasse *v.* Richardson, 2 De G. M'N. & G. 659; Wellesley *v.* Withers, 4 Ell. & Bl. 750; Traherne *v.* Gardner, 5 Ell. & B. 913.

(*x*) Vide sup. p. 593.

(*y*) Vide sup. p. 576. The provisions of this act as to land held by

manor regards a limitation to a man "and the heirs of his body" as an estate *tail*, it was held, prior to the act just mentioned, that such customary entail might be barred by a customary recovery founded on a fictitious action in the lord's court, according to the analogy of a common recovery in the Court of Common Pleas (*z*); and where neither this nor any other method was established by particular custom, an entail was always capable of being barred by surrender (*a*). But now by the statute in question it is enacted, that a disposition by tenant in tail of the legal estate in a copyhold, shall be in every case by surrender (*b*); subject to provisions as to the consent of the protector (where there is one), analogous to those which the statute introduces in relation to the disentailing of freehold (*c*); but it is provided that such surrender shall require no inrolment, otherwise than by entry on the court rolls (*d*). It is also enacted by the same statute, with respect to the copyhold of a *married woman* when *not* tenant in tail (for when she is so, her estate is to pass by surrender), that she may by deed, acknowledged in such manner as therein directed, and executed with the concurrence of her husband, convey her estate, or extinguish any interest or power vested in her, as effectually as if she were a *feme sole;* though this enactment is expressly declared not to extend to her legal estate in any case in which the

copy of court roll do not (it would seem) extend to land held as *customary freehold.* R. *v.* Ingleton, 8 Dowl. P. C. 693.

(*z*) Doe *v.* Dauncey, 7 Taunt. 674; 1 Watk. Cop. 161. As to a common recovery, vide sup. p. 568. If a fine or recovery of land held in antient demesne was had in the Court of Common Pleas (as if it were freehold), it might be reversed by a particular form of action brought by the lord, called a *writ of disceit*, and the land consequently restored to its former state of copyhold; but if the fine or recovery were not duly reversed, the tenure of the land would be thereby altered, and converted into *frank fee* or freehold. 2 Bl. Com. 368; vide 3 & 4 Will. 4, c. 74, s. 5.

(*a*) Doe *v.* Dauncey, 7 Taunt. 678; 1 Watk. Cop. 178.

(*b*) 3 & 4 Will. 4, c. 74, s. 50.

(*c*) Sects. 40, 51, 52, 90.

(*d*) Sect. 54.

object of that provision could, before the passing of the act, have been effected by a surrender (*e*).

The preceding remarks relate, it will be observed, to the manner of conveying the *legal* estate in copyhold. With respect to *equitable* interests in lands of this tenure, they do not in general pass by surrender, (for none but the owner of the legal estate is tenant to the lord, nor consequently entitled to surrender (*f*),) but by any ordinary mode of conveyance sufficient to pass an equitable interest in other cases; and a mere instrument in writing, signed as directed by the Statute of Frauds, will suffice. But as to equitable estates tail, and the equitable estates of married women not tenants in tail, it is provided by the statute last cited, that they shall pass either by surrender or deed (*g*); subject, in other respects, to the same ceremonies, in general, as are attached to the like transaction in the case of legal estate.

We have thus endeavoured to trace the principal features of the law of copyhold, one of the most unsatisfactory divisions (it must be owned) of the general fabric of our jurisprudence (*h*). It is open, at first sight, to the censure of being an unnecessary and embarrassing variation upon the fundamental scheme of tenure; and it has been justly remarked by the commissioners, appointed in the ninth year of George the fourth to revise the law of real property, that, where the complexity which must always belong to the legal institutions of a civilized country "is wantonly aggra-" vated by the admission of several concurring systems,

(*e*) 3 & 4 Will. 4, c. 74, s. 77.

(*f*) 1 Watk. Cop. 60.

(*g*) Sects. 50, 53, 77, 90.

(*h*) The select Committee of the House of Commons, appointed to consider of the enfranchisement of copyholds, express an opinion in their Report of 13th August, 1838, that this tenure is "a blot on the "juridical system of the country;" and they cite the remark of Roger North in his Life of Lord Keeper Guildford, that "it was somewhat "unequal, when the parliament took "away the royal tenures *in capite*, "that the lesser tenures of the gentry "were left exposed to as grievous "abuses as the former."

"serious mischiefs are likely to arise from the ignorance or "forgetfulness of practitioners, and even of judges, how-"ever carefully selected." Many inconveniences are also pointed out by the same learned persons, as incident to the nature of copyhold tenure, individually considered: of which the principal appear to be, the multiplicity and uncertainty of the different manorial customs on which it depends,—the check to agricultural improvement occasioned by the state of the law with respect to timber and minerals, —the liability to arbitrary fines,—the numerous payments due to stewards, on account of fees,—and the vexatious and oppressive character of heriots. The efforts of legislative reform have of late therefore been assiduously directed towards this branch of the law; and have given birth at length to a statute, 4 & 5 Vict. c. 35, (amended by 6 & 7 Vict. c. 23, 7 & 8 Vict. c. 55, 15 & 16 Vict. c. 51, and 16 & 17 Vict. c. 57,) by which new regulations of great importance are introduced. These acts apply themselves to the following objects: first, to give effect to agreements for commutation of manorial burthens and restrictions, and to improve, in some other respects, the tenure; secondly, to facilitate enfranchisement.

In promotion of these views they first establish a Board of "Copyhold Commissioners (*i*)," and then enact, that the future rents, fines, and heriots, and the lord's right in timber, and also (if so expressed) in mines and minerals, may be *commuted* by an agreement (*k*), which shall be compulsory on all parties interested in the manor, or in the lands held of the manor; provided the parties to such agreement be respectively interested in such manor and lands to the extent of three-fourths at least in value, and

(*i*) 4 & 5 Vict. c. 35, s. 2. With this board, the Tithe Commissioners and the Inclosure Commissioners are consolidated; see 14 & 15 Vict. c. 53. By 20 Vict. c. 8, the powers of appointing commissioners are continued until 1 August, 1857, and from thenceforth until the end of the then next session of parliament.

(*k*) 4 & 5 Vict. c. 35, s. 13.

the number of the tenants be at least three-fourths of the whole; and also provided that all ecclesiastical and other corporations and patrons of livings, interested in such manner as mentioned in the act, be parties to the agreement, and that it be afterwards confirmed by the Copyhold Commissioners (*l*). The acts also authorize commutation to be, in like manner, made between the lord of the manor and any one or more of the tenants, (whatever may be the amount of their respective interests,) so as to be binding, after confirmation by the commissioners, on those parties, and on all other persons connected with them in title: though, both in this case and the former, they require notice to be given to persons next in remainder, reversion, or expectancy, of an estate of inheritance,—and not parties to the agreement,—and permit them to urge before the commissioners any objection to the proposed arrangement (*m*). These commutations may be made either in consideration of a conveyance of lands, or of any right to mines or minerals,—subject, so far as possible, to the same uses and trusts as the lands commuted, at the time of commutation (*n*); or of any right to waste in the manor lands (*o*); or of a rent-charge, with a nominal fine not exceeding 5*s*. on death or alienation; or of a fine simply, payable on death, alienation, or at some fixed periods; and it is moreover provided, that after any commutation under the act, or the execution of any deed for a voluntary commutation, the lands, although still remaining copyhold for most purposes, shall cease to be subject to any customary mode of descent, or any custom relating to dower, or freebench, or tenancy by curtesy, (except as to persons previously married); and shall be liable, in all that regards those matters, to the same law as lands held in free and common socage (*p*): with a saving, however, of gavelkind in the county of Kent, which is to remain unaltered by the act (*q*).

(*l*) 4 & 5 Vict. c. 35, ss. 22, 23.
(*m*) Ibid. s. 52.
(*n*) 7 & 8 Vict. c. 55, s. 5.
(*o*) 6 & 7 Vict. c. 23, s. 1.
(*p*) 4 & 5 Vict. c. 35, s. 79.
(*q*) Ibid. s. 80.

Besides the provisions above noticed, the following improvements of the present tenure are introduced. To remove doubts before existing on the subject, it is provided, that it shall be lawful for courts of equity to make partition of copyhold lands, as well as of lands of freehold tenure (*r*). To obviate certain inconveniences before attaching to the practice of surrenders, admittances and grants, it is enacted, that lords of manors, or their stewards, or deputy stewards, may hold customary courts, though there should be no copyhold tenant at the time, or none should be present (*s*); and may grant lands to be held by copy, and also admit to lands to be held by copy, at any time or place (whether within or without the manor), and without holding a court. And whereas before these statutes it was in many cases necessary that a surrender or other act *out* of court, should be afterwards *presented* in court by the homage, or tenants of the manor there assembled (*t*), it is provided that every copy of a surrender, will or codicil delivered to the lord, steward or deputy, and every grant and admission, shall be forthwith entered on the court rolls of the manor; and such entry shall be taken to be an entry in pursuance of a presentment; and it shall not be essential in any case to the validity of an admission, that a presentment should be made of the surrender, or other matter in consequence of which the admission was granted; with this proviso, however, that when by the custom of any manor, the lord is authorized, by consent of the homage, to grant parcel of the waste to be held by copy, the consent of the homage assembled at a customary court, duly summoned and held according to custom, shall still be necessary. And whereas by the custom of some manors, a licence, from the lord, to aliene is required (*u*); and in some of these cases lords were restrained, by the custom, from granting licences to their tenants to aliene

(*r*) 4 & 5 Vict. c. 35, s. 75.

(*s*) Before this act, a customary court could not be held unless two copyholders were present. 3 Real Property Rep. 20.

(*t*) 1 Watk. Cop. 79, 80.

(*u*) 1 Watk. Cop. 287, n. (*x*), 322.

their antient tenements, otherwise than by entireties, it is enacted that licences to aliene parcels may now be granted, and such alienation made accordingly (*x*).

Lastly, with the view of facilitating *enfranchisement*, the same acts provide, in substance (for no minute detail of their provisions can be attempted in this place), that it shall be lawful for the lord of any manor, whatever may be his interest therein, with consent of the commissioners, to enfranchise all or any of the lands holden of his manor, in consideration of such sum or sums of money, whether payable forthwith or at a future time, as shall be agreed to be paid by the tenants whose lands are to be enfranchised; or in consideration of a conveyance of lands, or of a right to mines or minerals —subject as far as possible to the same uses as the lands to be enfranchised—(*y*); or of the grant of an annual rent in fee charged on the land to be enfranchised; and that it shall be lawful for any tenant (whatever his interest), with the like consent, to accept such enfranchisement. And even independently and in the absence of any mutual agreement, it is further enacted (*z*), that at any time after the next admittance to any lands which shall take place on or after the 1st July, 1853, it shall be lawful either for the tenant so admitted, or for the lord, to *require* and *compel* enfranchisement, the consideration payable to the lord in that behalf being fixed, under the direction of the copyhold commissioners, by two valuers, to be mutually appointed; and such consideration to consist, where the enfranchisement is at the instance of the tenant, of a given sum of money; or where it is at the instance of the lord, of a rent charge, issuing out of the lands enfranchised: though, by agreement between the parties, either of these modes of compensation may in either case be adopted. It is also provided, that the expense of a compulsory enfranchisement shall be borne by the party (whether the lord or

(*x*) 4 & 5 Vict. c. 35, s. 92.

(*y*) 6 & 7 Vict. c. 23, s. 1; 7 & 8 Vict. c. 55, s. 5.

(*z*) 15 & 16 Vict. c. 51.

the tenant) who shall have required the same (*a*); that upon every enfranchisement (whether compulsory or voluntary) the land shall become in all respects of freehold tenure, and cease to be subject to any custom of borough-English, or gavelkind (except gavelkind in the county of Kent), or any other custom whatever; but that no compulsory enfranchisement shall compulsorily affect any right to mines or minerals, or any right of fair or market, or in respect of game, fish, or fowl; and that the provisions with respect to compulsory enfranchisement shall not extend to any copyhold lands held for life, lives, or years only, where the tenant has no right of renewal.

(*a*) All costs properly payable by any persons interested in the enfranchisement of any land are directed by 16 & 17 Vict. c. 57, s. 10, to be settled and ascertained by the commissioners or assistant commissioners; and it is enacted that no costs or expenses of or relating to any enfranchisement shall be recoverable from any person until certified under the hands and seals of the said commissioners, or an assistant commissioner, to have been reasonably and properly incurred.

CHAPTER XXIII.

OF INCORPOREAL HEREDITAMENTS.

An incorporeal hereditament, which, according to the arrangement formerly laid down (*a*), now presents itself in its turn for consideration, is in its wider sense any possession or subject of property, whether real or personal, capable of being transmitted to heirs, and not the object of the bodily senses. But as there is scarcely any instance of a subject of this description in the class of things personal (*b*), (which almost invariably devolve to the executor and not to the heir), the term of incorporeal hereditament is in effect exclusively applied to the class of things *real;* and may in such case be defined as a right annexed to, or issuing out of, or exercisable within, an hereditament corporeal of that class (*c*). Thus a man may have a right of common of pasture for his cattle, or a right of way (which are incorporeal hereditaments) to be exercised over the land (which is corporeal) of another person. [As the logicians speak, corporeal hereditaments are the substance,

(*a*) Vide sup. p. 171.

(*b*) An annuity, descendible *to a man's heirs*, is however an instance that occurs. Co. Litt. 20 a.

(*c*) Co. Litt. 6 a, 20 b; Plowd. 170. The term incorporeal hereditament is often applied so as to include *remainders and reversions* (as distinct from *estates in possession*) in corporeal hereditaments (Hale, Anal.; 2 Sand. Us. 39); but the more convenient and juster arrangement is that adopted by Blackstone and followed in the text. The larger use of the term confounds the estate which may be had in the subject of property, with the subject of property itself. A similar error is pointed out, sup. p. 168, n. (*a*), in reference to the classification of chattels real as things personal.

[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.] Thus if we take the example of the right of feeding cattle in another's land, the grass, which is the fruit or product of the right, is doubtless of a corporeal nature, yet the right itself [is a thing invisible—has only a mental existence, and cannot be delivered over from hand to hand.] Incorporeal hereditaments seem never to have been reduced to any regular system of division, nor is even a complete enumeration of them to be discovered in our books. But they consist for the most part (though, as we shall see hereafter, not exclusively (*d*)) of rights *in alieno solo;* and these are generally distributable either into *profits*, such as the right to feed cattle, or to take fish (*e*); or *easements*, tending rather to the convenience than the profit of the claimant, such as a right of way (*f*).

In the account given of incorporeal hereditaments by Blackstone, he takes specific notice of *advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, pensions, annuities* and *rents* (*g*). But for the discussion of many of these subjects, places more distinctly appropriate

(*d*) Vide post, p. 661, as to franchises.

(*e*) As to *water* issuing from a well or spring, see Race *v.* Ward, 4 Ell. & Bl. 702.

(*f*) As to this distinction, see 2 & 3 Will. 4, c. 71; Robins *v.* Barnes, Hob. 131; Peers *v.* Lucy, 4 Mod. 365; Jac. Dict. "Easement," "Prescription;" Manning *v.* Wasdale, 5 Ad. & El. 758, 413; Bailey *v.* Appleyard, 8 Ad. & El. 167.

(*g*) 2 Bl. Com. 21. The enumeration in Hale's Analysis, 48, is as follows:—"*Rents, services, tithes, commons,* and *other profits in alieno solo, pensions, offices, franchises, liberties, villeins, dignities.*"

will be found hereafter; while, on the other hand, the enumeration omits some incorporeal hereditaments of importance, which can nowhere be introduced with so much advantage as in the present chapter. We shall therefore depart from Blackstone's method in this particular, and in lieu of it, direct the reader's attention to the following heads:—*commons, ways, watercourses, lights, franchises,* and *rents* (*h*).

I. *Common* (or right of common) is [a profit which a man hath in the land of another (*i*), as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like.] And it derives its name from the community of interest which thence arises between the claimant and the owner of the soil, or between the claimant and other commoners entitled to the same right; all which parties are entitled to bring actions for injuries done to their respective interests —and that both as against strangers and against each other (*k*). [Common is chiefly of four sorts—common of pasture, of piscary, of turbary, and of estovers.]

1. Common of pasture. This is the principal and most frequent sort, being the [right of feeding one's beasts in

(*h*) It has appeared to the author that *advowsons* and *tithes* will be more conveniently examinable as part of the general law relating to the church (vide post, bk. IV. pt. II. c. III.); that *offices* and *dignities* (which indeed have in most instances no connection with the realty (Co. Litt. by Harg. 19 a, note (3),) will be more properly considered in that part of the work relating to the state or government (vide post, bk. IV. pt. I. cc. IX. X.); that the notice due to *annuities* will be most advantageously bestowed upon them in connection with rents (vide post, p. 671); and that with respect to *corodies* and *pensions* it will be sufficient briefly to state that they were both, at the common law, species of allowances in money or food, payable by religious houses to the king, their founder, for the sustenance of his servants. (Cowell's Inter. in tit. F. N. B. f. 230, 233; 34 & 35 Hen. 8, c. 16.) On the other hand he has been of opinion, that *watercourses* and *lights* (omitted by Blackstone) are of sufficient importance to deserve a place in the present list.

(*i*) As to this definition, see Lloyd *v.* Earl Powis, 4 Ell. & Bl. 485.

(*k*) For the law on this subject, see Robert Marys's case, 9 Rep. 113; 1 Saund. by Wms. 346.

[another's land,] and it is [either *appendant, appurtenant, because of vicinage*, or *in gross* (*l*).]

Common of pasture *appendant* is the privilege belonging to the owners or occupiers of arable land holden of a manor, to put upon the wastes of the manor (*m*) (thence called *commons*) their commonable beasts; that is, such beasts as are necessary either for the ploughing of land or for its manuring, viz. horses and oxen, cows and sheep (*n*). This is a matter of universal right (*o*); and it originally arose in this manner, that where a lord having a certain extent of waste ground, enfeoffed any one of a parcel of arable land to hold of his manor in socage, for services to be rendered, it was found necessary to allow the feoffee to have common of pasture in the waste ground, as incident to his tenancy: for he could not plough or manure his own land without beasts, nor could he on the other hand sustain the beasts upon it, while it was sown with corn (*p*). From this of course it follows, that it is only in respect of arable land that common appendant can be claimed (*q*); though it may be claimed by that name, as appendant to a farm in fact containing pasture at the present day; for the land shall be presumed (where there is usage to sustain the claim) to have been all originally arable (*r*). It follows, also, that common appendant is incapable of being created at the present day (*s*); for all

(*l*) Co. Litt. 122.

(*m*) As to the waste or wastes of a manor, vide sup. 216.

(*n*) 37 Hen. 7, 34 (Year Book), F. N. B. 180; 4 Vin. Ab. in tit. Com. (F). It is laid down in the books, that swine, goats, geese, and the like, are not commonable animals, as "not being necessary to "plough or compester the soil."—Bro. Ab. tit. Com. 13; Fin. Law, 56; Co. Litt. 122 a.

(*o*) 1 Rol. Ab. 396, l. 44; Co. Litt. 122 a. It is said by Blackstone to obtain in Sweden and the other northern kingdoms, much in the same manner as in England. And he cites Stiernh. de Jure Suevor. l. 2, c. 6.

(*p*) Tyringham's case, 4 Rep. 37 a; Co. Litt. 122 a; Bennett *v.* Reeve, Willes, 231; Reeves's Hist. Eng. Law, vol. i. p. 262.

(*q*) 1 Rol. Ab. 397, l. 28, 29.

(*r*) Bac. Ab. Common, (A 1).

(*s*) 1 Rol. Ab. 396, l. 42; 26 Hen. 8, 4 a.

manorial tenure must have had existence before the passing of the statute of *Quia emptores*, in the eighteenth year of Edward the first (*t*).

Common *appurtenant* (which is said to be frequently confounded with common appendant (*u*)), [ariseth from no connection of tenure, nor from any absolute necessity; but may be annexed to lands in other lordships (*x*), or extend to other beasts besides such as are generally commonable; as to hogs, goats, geese or the like. This, not arising from any natural propriety or necessity, like common appendant, is not therefore of general right,] but can only be claimed by grant, or by the long usage of particular persons to enjoy the same (*y*); which latter title is commonly called a title by prescription; and is supposed by the law to be founded on a special grant or agreement originally made 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 naturally into the other's fields without any molestation from either. This, indeed, is 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. 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 (*z*).] In close connection with this, and

(*t*) Vide sup. p. 235.

(*u*) Bennett *v.* Reeve, Willes, 232.

(*x*) Sacheverill *v.* Porter, Cro. Car. 482; 1 W. Jones, 397, S. C.

(*y*) Tyringham's case, 4 Rep. 36 b; Cowlan *v.* Slack, 15 East, 108; as to the title by prescription, vide post, p. 682, where it will be explained *what* length of usage is sufficient to create a prescription.

(*z*) Co. Litt. 122 a. As to common *pur cause de vicinage*, see Heath *v.* Elliott, 4 Bing. N. C. 388; Jones *v.* Robin, 10 Q. B. 581, and the three cases reported in the same volume immediately following the case last named.

substantially of the same kind, is the right described in the books as *common of shack*—or the right of persons occupying lands lying together in the same common field, to turn out their cattle after harvest to feed promiscuously in that field (*a*). Indeed, this kind of common, which in the beginning was but in the nature of a pasture "because of "vicinage," and founded on the same reason (*b*), has now long since in many parts of the country insensibly changed its nature, and become, by the force of custom, a right so fixed, that even though the owner of any particular parcel should assume, merely on his own authority, to inclose his land in severalty, it would still continue subject to the antient rights of the intercommoners (*c*). In a case like this (which is of familiar occurrence in parts of the country where the land still lies in open field), the right would seem to be properly classed under the head of *common appurtenant* (*d*).

[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 a prescriptive right,—as by a parson of a church, or the like corporation sole. This is a separate inheritance,] entirely distinct from any other landed property vested in the person to whom the common right belongs.

Common of pasture, of whatever kind, may, in respect of time, be either limited or unlimited; that is, may either be confined to particular seasons of the year, or last all the year round (*e*). As to the number of beasts to be turned on, the right is in general subject to restriction; for all commons (except those in gross) must be either claimed in respect of some number in particular, or at least in such

(*a*) Corbet's case, 7 Rep. 5; Cheesman *v.* Hardham, 1 Barn. & Ald. 710.

(*b*) Corbet's case, ubi sup.

(*c*) Ibid.

(*d*) Lord Coke says, "it is by "custom altered into the nature of "common appendant or appurte-"nant." Corbet's case, ubi sup.

(*e*) 2 Bl. Com. 34.

manner as tends to limit the number, as for all cattle *levant* and *couchant* on the land to which the common is appendant or appurtenant; that is, for so many as the land is capable of maintaining during the winter. And a claim subject to no limitation of either kind, (except perhaps in the case where an express grant to that effect could be shown), would be void (*f*). But with respect to a common in gross, it would seem that it may be either limited to a particular number, or be absolutely unlimited, which is called a common *without stint*, or *sans nombre* (*g*).

2, 3. [Common of *piscary* is a liberty of fishing in another man's water—as common of *turbary* is a liberty of digging turf upon another man's ground (*h*). There is also a common of digging for coals, minerals, stones (*i*), 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 of digging for coals, and the like, are a right of carrying away the very soil itself.] With respect to common of turbary in particular it may be remarked that, like common of pasture, it may be either by grant or prescription; and may be either appurtenant or in gross; but it is usually claimed as appurtenant, and by prescription; and as to a common of turbary of this kind, we may notice that it cannot be

(*f*) 1 Saund. by Wms. 28 b, n. (4); Bennett *v.* Reeve, Willes, 231; Benson *v.* Chester, 8 T. R. 396; Cheesman *v.* Hardham, 1 Barn. & Ald. 711. As to the number of beasts which may be turned on in common because of vicinage, vide Corbet's case, 7 Rep. 5.

(*g*) Co. Litt. 122 a; How *v.* Strode, 2 Wils. 274; 3 Bl. C. 237, 239. It has been denied that even a common in gross can be *sans nombre*, 1 Saund. 346. But see Co. Litt. by Harg. ubi sup. n. (5). We may observe here, that the term *sans nombre* is sometimes applied to the case of common for cattle *levant* and *couchant*, 1 Saund. by Wms. 28 b, n. (4). But this is not the sense in which it is used by Lord Coke.

(*h*) Co. Litt. 122; Wilson *v.* Willes, 7 East, 121; Peardon *v.* Underhill and others, 20 L. J. (Q. B.) 133.

(*i*) Peppin *v.* Shakespear, 6 T. R. 748.

claimed as appurtenant to land, but only to a house (*k*); and it authorizes not the taking of turf except for the purpose of using the same as fuel in the particular house to which the right is annexed (*l*).

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,] and may be claimed, like common of pasture, either by grant or prescription. Estovers indeed may be taken (as formerly shown (*m*)) by every tenant or lessee from off the land let or demised to him, [without waiting for any leave, assignment or appointment of the lessor, unless he be restrained by special covenant to the contrary (*n*).] But this right is not to be confounded with *common* of estovers, which (as already explained) is the liberty of taking such wood on the soil of a *stranger*. These several species of common, when originally established in our law, had all reference, no doubt, to the same object as common of pasture, viz. [the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary for his fuel:] and estovers [for repairing his house, his instruments of tillage, and the necessary fences of his grounds.]

[By the Statute of Merton, 20 Hen. III. c. 4 (*o*), the lord of a manor may inclose] against common *of pasture* (though not in general against common of estovers or of turbary) (*p*) [so much of the waste as he pleases, for tillage

(*k*) Tyringham's case, 4 Rep. 37 a.

(*l*) Valentine *v.* Penny, Noy, 145.

(*m*) Vide sup. p. 257.

(*n*) Co. Litt. 41.

(*o*) Et vide 13 Edw. 1, c. 46; 29 Geo. 2, c. 36; 31 Geo. 2, c. 41; 10 Geo. 3, c. 42; see also 13 Geo. 3, c. 81, for regulation, by the commoners, of the mode of enjoying their common rights.

(*p*) 2 Inst. 87; Bateson *v.* Green, 5 T. R. 416; 1 Saund. by Wms. & Pat. 353 b, n. (*b*); Arlett *v.* Ellis, 7 Barn. & Cress. 369.

[or wood ground,—provided he leaves common sufficient for such as are entitled thereto (*q*). This inclosure, when justifiable, is called in law "approving," an antient expression, signifying the same as "improving (*r*)."] And this right is considered as applying equally to any owner of the waste, though he may not fall within the description of lord of the manor (*s*).

But the inclosure of common fields and waste lands, and the consequent extinction of common rights therein, are objects of so much importance to agricultural improvement, that they have not been left in modern times to depend on this antient statute, but have been extended very generally, throughout entire manors and parishes in almost every part of the kingdom, by force of local acts of parliament, passed from time to time for the purpose; in aid of which practice was passed the act of the 41 Geo. III. c. 109 (*t*), consolidating a number of regulations, and making them applicable to every case of local inclosure, so far as the particular act, under which the proceeding takes place, contains no provision to the contrary. Of these regulations, too numerous, and for the most part too minute, to be detailed in a work like the present, we shall only notice the following; that the commissioners to be appointed under any act for dividing and allotting the common fields and waste lands of any parish or place, shall take a certain oath for the faithful performance of their office (*u*); that they shall allot the different shares to the persons in actual possession of the tenements, in lieu or in right of which such allotment is made, with-

(*q*) Arlett *v.* Ellis, 7 B. & C. 369; see Patrick *v.* Stubbs, 9 Mee. & W. 833; Lake *v.* Plaxton, 10 Exch. 196.

(*r*) 2 Inst. 474.

(*s*) Glover *v.* Lane, 3 T. R. 445.

(*t*) As to the construction of this statute, see Doe *v.* Spencer, 2 Exch. 752. It has been hitherto usually described as *The General Inclosure Act.* But since the passing of the more recent statutes to be presently mentioned, the description has become somewhat ambiguous.

(*u*) 41 Geo. 3, c. 109, s. 1.

out prejudice to any question of title to the same (*x*); that immediately after the allotments shall have been made, and the award for that purpose executed by the commissioners, or from such other time as shall be ascertained by proper notice, the common or other rights, which it is the object of the proceeding to commute, shall be extinguished (*y*); and that the award, being written on parchment, and read and executed by the commissioners at a meeting of the proprietors called for the purpose, shall be proclaimed in the parish church, and enrolled in one of the courts of record at Westminster, or with the clerk of the peace for the county (*z*).

It is not, however, by force of local Acts, or of the general regulations of 41 Geo. III. c. 109, thus connected with them, that an improvement of this description is now usually effected, but under general provisions for facilitating inclosure lately introduced by the legislature, to enable parties to avoid the expense and delay of obtaining a local Act for the purpose of each particular case. By the first Act containing provisions of this description, viz. 6 & 7 Will. IV. c. 115, it is enacted, that such inclosure may take place in any open and common lands, whether arable, meadow or pasture (*a*), without the sanction of an act of parliament, provided the consent of two-thirds in number or value of the persons entitled to rights of common, or other rights therein, be obtained for the purpose; and, when the consent of seven-eighths shall be obtained, may take place even without the intervention of commissioners (*b*). And for this purpose the statute lays

(*x*) 41 Geo. 3, c. 109, s. 7.

(*y*) Sect. 14; vide Farrer *v.* Billing, 2 Barn. & Ald. 171.

(*z*) 41 Geo. 3, c. 109, s. 35; see also 1 & 2 Geo. 4, c. 23, and 3 & 4 Will. 4, c. 87, containing some general regulations as to allotments and awards.

(*a*) 6 & 7 Will. 4, c. 115, s. 1. The words are, "any open and common arable fields (including any "untilled slips or balks therein), or "any open and common meadow or "pasture lands or fields in any "parish, township or place in England or Wales, known by metes "and bounds, or occupied according "to known or legal rights."

(*b*) Sect. 40.

down a variety of regulations, conformable in some degree to those which are observed under the local inclosure acts. But it is provided, that nothing therein contained shall in any case authorize the inclosure of any *waste*, whether the soil thereof shall or shall not be vested in the lord of any manor: or extend to places within ten miles of London, or within certain distances of other large towns comprising a certain amount of population (*c*). And as owing to the limits within which it is thus restrained, and to other causes, this statute was found inadequate to the public exigencies, it was succeeded not long afterwards by the 8 & 9 Vict. c. 118 (*d*), by which (after reciting that it is expedient to facilitate the inclosure and improvement of commons and other lands, subject to rights of property, which obstruct cultivation and the productive employment of labour, and to facilitate such exchanges of lands (*e*), and such divisions of lands intermixed or divided into inconvenient parcels, as may be beneficial to the respective owners, and to provide remedies for the defective or incomplete execution, and for the non-execution, of powers created by general and local acts of inclosure, and to authorize the revival of such powers in certain cases)—an extensive and elaborate system

(*c*) 6 & 7 Will. 4, c. 115, s. 55.

(*d*) This Act has been amended by 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31.

(*e*) The provisions of the 8 & 9 Vict. c. 99, and the subsequent Acts as to *exchanges*, are extended to *partitions* by 11 & 12 Vict. c. 99, ss. 13, 14; and see 12 & 13 Vict. c. 83, s. 7, as to the application of those provisions to exchanges of rights of common or fishing, manorial rights, easements, quit rents, heriots, tithes, &c. for any other of the said rights. See also further provisions as to exchanges and partitions, 20 & 21 Vict. c. 31, ss. 4—11. It is to be observed that both an exchange and a partition may take place on the application of parties interested, even in cases where no proceedings for an inclosure are pending, or where the lands are not subject to be inclosed under the acts, 8 & 9 Vict. c. 118, s. 147; 9 & 10 Vict. c. 70, s. 9; 11 & 12 Vict. c. 99, s. 13; 12 & 13 Vict. c. 83, s. 7; 17 & 18 Vict. c. 97, ss. 2, 3. On the construction of the provisions of these Acts relative to exchanges, see Minet *v.* Leman, 24 L. J. R. Ch. 545.

of regulations is accordingly laid down in reference to these several purposes. We can attempt no more, however, in this place, than to give a summary statement of its general principle, which is to establish, for the conduct of proceedings in cases of proposed inclosure, a board of commissioners, under the denomination of "The Inclosure Commissioners for England and Wales (*f*)," who are empowered – on the application of one-third in value of the persons interested in any lands subject to be inclosed under the act (*g*), and provided the consent of two-thirds in value of the persons interested, and of the lord of the manor (in case the lands be waste of a manor), be ultimately obtained,—to inquire into the case, and report for

(*f*) This board has since been consolidated with the "Copyhold Commissioners" and the "Tithes Commissioners." Vide sup. p. 641, n. (*i*).

(*g*) As to the persons deemed "*interested*" within the meaning of 8 & 9 Vict. c. 118, see s. 16 of that act. As to the description of lands subject to be inclosed it is given in the 11th section as follows:—All lands subject to any rights of common whatever, and whether such rights may be exercised at all times, or only at limited times and seasons; or subject to any suspensions or restrictions in respect of the time of enjoyment; all gated and stinted pastures in which the property of the soil either is or is not in the owners of the cattle or other gates or stints; all land held, occupied or used in common, either at all times or during any time or season, or periodically, and either for all purposes or for any limited purpose, and whether the separate parcels of the several owners of the soil shall or shall not be known by metes or bounds, or be otherwise distinguishable; all land in which the property or right to the vesture or herbage, or any part thereof, during the whole or any part of the year, or to the wood or underwood growing thereon, is separated from the property of the soil; and all lot meadows and other lands the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise. Moreover, by 11 & 12 Vict. c. 99, s. 1, a party interested in any land not otherwise subject to a proposed inclosure may nevertheless submit it, upon terms, to the operation of such inclosure; which shall be extended to it accordingly, if the commissioners think that course beneficial. And by 17 & 18 Vict. c. 97, s. 3, the word "land" in the Inclosure Acts shall extend to incorporeal as well as corporeal hereditaments, and any undivided share thereof.

the information of parliament the expediency of making such inclosure; upon which report, if parliament think fit to pass an act to the effect that such inclosure be proceeded with (*h*), the allotment and inclosure of the lands shall take place accordingly, by the aid of a valuer to be appointed for the purpose, and under the superintendence of the commissioners (*i*).

II. A second species of incorporeal hereditaments is that of *ways*, [or the right of going over another man's ground.] We speak not here of *highways*, which are common to the public, and which consequently belong to the division of public and not of private rights (*j*), but of [private ways, in which a particular man may have an interest and a right, though another be owner of the soil.] These may be grounded on actual grant: as when the owner of the land, by deed (*k*), bestows on another the liberty of passing over his ground to go to church, to market, or the like; or they may be by prescription (*l*); as if all the owners and occupiers of such a farm have long used to cross such a ground for such a particular purpose; or by custom; as if a similar practice has obtained with respect to all the inhabitants of a certain hamlet (*m*); [for this antient usage supposes an

(*h*) For the form of such an act, whether upon a general annual report of the commissioners or upon a special report, see 19 & 20 Vict. c. 11, c. 106.

(*i*) 8 & 9 Vict. c. 118, ss. 32, 33; 15 & 16 Vict. c. 79, s. 1.

(*j*) As to highways, vide bk. IV. pt. III.

(*k*) Without deed, it would be a mere revocable permission. See Wood *v.* Leadbitter, 13 Mee. & W. 838.

(*l*) As to title by prescription, vide post, p. 682.

(*m*) 2 Bl. Com. 35. Blackstone says, that "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 re-"pair, he who had the right of way "might go over any part of the "land he pleased, which was the "established rule in public as well "as private ways. And the laws of "England in both cases seem to "correspond with the Roman." But as to private ways not of necessity, the contrary was decided in Taylor *v.* Whitehead, Doug. 745. See note in Coleridge's Blackstone, vol. ii. p. 36.

[original grant] whereby a right of way was originally created; and upon whichever of these titles the right may stand, it is capable, like that of common, of being either *appurtenant* to some particular house or land, or *in gross*, and annexed to the person of the grantee. A right of way may also arise by necessity; [thus 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 (*n*),] for that is necessary to its enjoyment: [and I may cross his land for that purpose, without trespass.] In like manner a tenant at will shall, after the determination of his interest by the lessor, have free entry, egress and regress into the land, in order to cut and carry away the emblements: for when the law gives a right, it gives every thing necessary to its exercise (*o*).

III. *Watercourses* are also a species of incorporeal hereditament. A watercourse may be defined generally, as the right which a man may have to the benefit of the flow of a river or stream; but such right most commonly refers to a stream passing through his own land (*p*), and the banks of which belong either to himself on both sides, or to himself on one side and to his neighbour on the other; in which latter case, (unless the stream be navigable, for then the bed of it, so far at least as the tide of the sea flows, presumably belongs to the crown (*q*),) the proprietor of each bank is considered as *primâ facie* the proprietor also of half the land covered by the stream, that is, *usque filum aquæ* (*r*).

(*n*) See 1 Saund. by Wms. 323, n. (6); Clark *v.* Cogge, Cro. Jac. 170; Dutton *v.* Tayler, 2 Lutw. 1487; Howton *v.* Frearson, 8 T. R. 50; Morris *v.* Edgington, 3 Taunt. 24; Bullard *v.* Harrison, 4 Mau. & Sel. 392; Hinchliffe *v.* Lord Kinnoul, 5 Bing. N. C. 24, 25; Allan *v.* Gomme, 11 A. & E. 759; Henning *v.* Burnet, 8 Exch. 187.

(*o*) Co. Litt. 55 a, 56 a. As to emblements, vide sup. pp. 258, 288.

(*p*) See Wright *v.* Williams, 1 Tyr. & Gran. 398; Wood *v.* Waud, 3 Exch. 748.

(*q*) Williams *v.* Wilcox, 8 Ad. & El. 333.

(*r*) Hale de Jure Maris, part i. c. 1; Wright *v.* Howard, 1 Sim. & Stu. 190; 2 Rol. Ab. 170.

In either case, however, we are to remark, that the right in question is distinguishable from that of merely using the water upon the soil, (which is incident as of course to the property in the soil itself); it is that of having the course of the stream kept free from any interruption or disturbance to his prejudice, by the acts of persons from without and in parts not within his own territory, whether consisting in a diversion of it, or an obstruction, or a pollution by offensive commixture. This right *primâ facie* belongs to every occupier of land over which water passes (*s*); for though running water, air and light are all *publici juris*, yet to a certain extent they are subject (as before shown (*t*)) to appropriation by force of an actual occupancy (*u*); and he who is in possession of any soil, is *primâ facie* in possession also of the free course of the streams which flow over its surface (*x*). But the right may be divested by express agreement between the parties interested, or by long usage, which is evidence of some antient agreement of that description. And therefore my general claim to have the water of such a stream flowing freely and without disturbance over my land, may be successfully opposed by my neighbour, if he can prove that, by some grant of mine or of my ancestors, he is authorized to keep up a mill or the like, and thereby to cause an obstruction of the stream—or if he can establish a title by long usage to do so. He has then a watercourse for such special purpose, by grant or by prescription (*y*); to which the general right, that I might otherwise have had by occupancy, has become subordinate (*z*).

(*s*) Shury *v.* Piggott, 3 Bulst. 340.

(*t*) See sup. p. 156.

(*u*) Canham *v.* Fisk, 2 Tyrw. 156.

(*x*) It is to be observed, that the doctrines laid down in the text as to watercourses apply only to *surface* streams or rivers. As to wells, or springs beneath the ground, vide Acton *v.* Blundell, 12 Mee. & W. 324; Wood *v.* Waud, 3 Exch. 748; Dickinson *v.* Grand Junction Canal Company, 7 Exch. 282; Race *v.* Ward, 4 Ell. & Bl. 702.

(*y*) As to the title by prescription, vide post, p. 682.

(*z*) See Mason *v.* Hill, 3 Barn. & Adol. 304; 5 Barn. & Adol. 1, and the cases there cited, where suffi-

IV. Of a nature very similar to watercourses are *lights* (*a*); a term used to express a man's right to have the access of the sun's rays to his windows, free from any obstruction by the occupier of the adjoining land. The element of light, like that of water, is capable to a certain extent of appropriation by mere occupancy—for a man on his own land has a right to all the light which will come to him, and may erect a house (even at the boundary line of his property, and so as to overlook his neighbour) with as many windows as he pleases (*b*). And by force of a grant, or prescription, he may become entitled to maintain these windows in freedom from all obstruction (*c*). But on the other hand, in the absence of any grant, and before the period has elapsed which suffices for the establishment of a prescriptive claim, it is competent to the owner of the adjoining land to construct a wall or house on it, so near to the former one, as to intercept the light, which it would otherwise have received (*d*); for his right to erect edifices on any part of his own soil, is as clear as that of the first builder.

cient authority for the positions in the text on this somewhat obscure subject will (it is conceived) be found. Et vide per Holroyd, J., Cross *v.* Lewis, 2 Barn. & Cress. 690; Frankum *v.* Lord Falmouth, 2 Ad. & El. 452; Bower *v.* Hill, 1 Bing. N. C. 549; 2 Bing. N. C. 339; Hall *v.* Swift, 4 Bing. N. C. 381; Magor *v.* Chadwick, 11 Ad. & El. 571; Wright *v.* Howard, 1 Sim. & Stu. 190; Doe *v.* Williams, 11 Q. B. 688; Embrey *v.* Owen, 20 L. J. Ex. 212.

(*a*) As to these, vide Aldred's case, 9 Rep. 58 b; Cross *v.* Lewis, 2 Barn. & Cress. 686; Moore *v.* Rawson, 3 Barn. & Cress. 332; Garrit *v.* Sharp, 3 Ad. & El. 325. See also as to the custom of London with respect to lights, Shadwell *v.* Hutchinson, 2 Barn. & Adol. 97; Wynstanly *v.* Lee, 2 Swanst. 333; Salters' Company *v.* Jay, 3 Q. B. 109.

(*b*) Per Bayley and Holroyd, Js., Cross *v.* Lewis, 2 Barn. & Cress. 689, 691; per Littledale, J., Moore *v.* Rawson, 3 Barn. & Cress. 340.

(*c*) Blanchard *v.* Bridges, 4 Ad. & El. 195; Swansborough *v.* Coventry, 9 Bing. 305. As to the title by prescription in the case of lights, and the length of time which suffices for its establishment, vide post, p. 689.

(*d*) Blanchard *v.* Bridges, ubi sup. Per Littledale, J., Moore *v.* Rawson, ubi sup.

V. *Franchises* are a fifth species. [Franchise and liberty are used as synonymous terms; and their definition is a royal privilege (*e*), or branch of the crown's prerogative, subsisting in the hands of the subject. Being therefore derived from the crown, they must arise from royal grant, or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant (*f*). The kinds of them are various and almost infinite; we will here mention 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 a former grant (*g*).

To be a county palatine is a franchise vested in a number of persons (*h*). 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.] So there may be a franchise [to have a bailiwick or liberty exempt from the sheriff of the county, wherein the grantee only and his officers are to execute all process (*i*);] and other franchises there are which are frequently annexed to *manors* (*k*); as for a man to hold a court leet for the administration of criminal justice, in certain cases, among the tenants and residents of his manor (*l*); [to have waifs, wrecks, estrays, treasure-trove, royal fish, and forfeitures (*m*),] (the nature of which will more particularly

(*e*) Finch, L. 164.

(*f*) Co. Litt. 114 a.

(*g*) 2 Roll. Ab. 191; Keilw. 196. As to the forfeiture of franchise, vide post, p. 691.

(*h*) As to counties palatine, vide sup. p. 124.

(*i*) See 13 & 14 Vict. c. 105, for facilitating the union of liberties with the counties in which they are situate.

(*k*) As to manors, vide sup. p. 215.

(*l*) As to a court leet, vide post, bk. VI. c. XIV.

(*m*) Blackstone (vol. ii. p. 37) adds "deodands" to these instances of franchises; but by 9 & 10 Vict. c.

appear when we come to speak of the crown's prerogative (*n*); to have a fair or market, or ferry or the like, with the right of taking toll there (*o*); or [to have forest, chase, park, warren, or fishery.] Among these there are many which belong, in point of arrangement, to other parts of the present treatise; but to others more particular notice is due in this place.

1. And, first, as to fairs, markets, and ferries. A man may have a right to hold a fair or market, or to keep a boat for the ferrying of passengers; and this either by royal grant or by prescription (*p*), from which a royal grant may be presumed to have been at some time conferred. But (unless under an act of parliament) no other title than these will suffice; for no fair, market or ferry can be lawfully set up without licence from the crown (*q*). On the other hand, a man may, under such titles, lawfully claim to be lord of a fair or market, though he be not the owner of the soil on which it is held (*r*); or to be the proprietor of a ferry, though he be not the owner of the water over which it is exercised (*s*), or of the soil on either side of the river (*t*); but he must possess over it such rights at least as will authorize him to embark and disembark his passengers (*u*). The right to take toll, also,

62, deodands are abolished. See as to their nature, post, bk. IV. pt. I. c. VII.

(*n*) Vide post, bk. IV. pt. I. c. VI.

(*o*) As to the tolls of fairs or markets belonging to the crown, see 15 & 16 Vict. c. 62, s. 6.

(*p*) 2 Inst. 220; Trotter *v.* Harris, 2 Y. & J. 285. Fairs and markets are, however, often regulated by act of parliament; and see 10 & 11 Vict. c. 14 (called "The Markets and Fairs Clauses Act, 1847"), consolidating into one statute certain provisions usually inserted in such acts of regulation. As to days on which fairs and markets are not to be held, see 27 Hen. 6, c. 5; 13 & 14 Vict. c. 23. As to Greenwich market, see 12 & 13 Vict. c. 28. As to a metropolitan market in lieu of Smithfield, 14 & 15 Vict. c. 61.

(*q*) 2 Inst. 220; R. *v.* Marsden, 3 Burr. 1812; Willes, 512, (n.); Com. Dig. Piscary, B.; Hale, *de Jure Maris*, part i. c. 2.

(*r*) Bac. Ab. Fairs, &c. D. n. (*a*); Mayor of Northampton *v.* Ward, 2 Stra. 1238; 1 Wils. 107; sed vide per Littledale, J., R. *v.* Starkey, 7 Ad. & E. 106.

(*s*) Com. Dig. Piscary, B.

(*t*) Peter *v.* Kendal, 6 B. & C. 703.

(*u*) Ibid.

from the customers, is usually (though in the case of a fair or market not necessarily (*x*)) a part of the privilege; and the tolls of a fair or market are due either in respect of goods sold there (that is, from the seller, not the buyer), or for stallage or pickage, or the like, in respect of stalls or poles fixed in the soil (*y*). But the right of the crown to authorize the collection of tolls is viewed by the law with a salutary jealousy; so that no burthen of that kind can be imposed on the public, unless it have (in the language of the books) a reasonable commencement (*z*); that is, unless it be founded on an adequate consideration as between the public and the grantee: which consideration, in the case of a fair or market, is the duty incumbent on the grantee to provide ground for the purpose, and to regulate the proceedings; in that of a ferry, to keep up a boat for the passage over a stream not otherwise fordable (*a*). And it is also essential that the burthen be reasonable in its amount (*b*); for where the tolls granted are outrageous, the franchise is illegal and void (*c*). It is however to be remarked, that, when any of the privileges in question can be shown to exist, the party entitled to it has a right of action, not only against those who refuse or evade payment of toll where it is due, but against those also who disturb his franchise by setting up a new fair, market or ferry, so near to his as to diminish his custom (*d*); while on the other hand he is himself liable to be criminally indicted, if by his wilful act, or even by his neglect of duty, the subjects of the realm are obstructed in its lawful use (*e*).

(*x*) Heddy *v.* Wheelhouse, Cro. Eliz. 558, 592; Lord Egremont *v.* Saul, 6 Ad. & El. 924; R. *v.* Starkey, 7 Ad. & El. 106.

(*y*) 2 Inst. 219.

(*z*) 2 Bl. Com. 37; Mayor of Nottingham *v.* Lambert, Willes, 116.

(*a*) Heddy *v.* Wheelhouse, ubi sup.

(*b*) Ibid.; 2 Inst. 219.

(*c*) Stat. 1 Westm. c. 31; 2 Inst. 219; Cro. Eliz. ubi sup.; 2 Bl. Com. 37; Willes, ubi sup.

(*d*) 2 Roll. Ab. 140; Com. Dig. Action on the Case for a Nuisance, (A); Blisset *v.* Hart, Willes, 503; De Rutzen *v.* Lloyd, 5 Ad. & E. 456; Bridgland *v.* Shapter, 5 Mee. & W. 375; Pim *v.* Curell, 6 Mee. & W. 234.

(*e*) Willes, 512, (n.); Payne *v.* Partridge, 1 Show. 231.

2. As to the franchises of forest, chase, park, warren, and fishery.

A *forest* (in the legal sense) is the right of keeping, for the purpose of venary and hunting, the wild beasts and fowls of forest, chase, park, and warren, (which means in effect all animals pursued in field sports,) in a certain territory or precinct of woody ground or pasture set apart for the purpose, with laws and officers of its own, established for protection of the game (*f*). It is a principle of our law, that will be noticed more fully in its proper place, that in general no man can make title to animals *feræ naturæ*—which, while they remain wild, are accounted *nullius in bonis*, or (what amounts to the same thing) as the common property of mankind. From this it results, that, though a man may take or kill on his own lands any particular animals that may happen to be found there (*g*),—subject to the restrictions imposed by the Game Acts, of which we shall speak hereafter (*h*), and so that he invade not any exclusive franchise of sporting, which another person may possess over the same territory) (*i*),—yet he is not at liberty to confine beasts of venary in a wild state within a particular precinct, for the mere purpose of diversion (even

(*f*) Co. Litt. 233 a; Manwood, Forest Laws, 41, 52, edit. 1665.

(*g*) Case of Monopolies, 11 Rep. 87 b. Blackstone has supposed that the Norman race of kings introduced the doctrine, that the right of pursuing and taking beasts of venary belongs in every case to the sovereign only, or those by him authorized; and he considers this as a still existing doctrine of our law, and holds that (however common the contrary supposition may be) no private person is entitled at common law to kill game, unless he can show a right of freewarren. But Blackstone's views on this subject have been with reason controverted; and the true rule seems always to have been that which is stated by the learned commentator himself, as allowed among the Saxons, viz. that in general every man has a right to hunt, &c. on his own grounds (vide Wilk. Leg. Angl. Sax. LL. Can. c. 77)—a right however that is modified by the restraints in the Game Acts, and subject to exception where another has freewarren, &c. over the land. See Christian's Blackstone, vol. ii. p. 415; Chit. Game Laws, 3; 11 Rep. 87 b; Ld. Raym. 251; Salk. 555.

(*h*) Vide post, bk. II. pt. II. c. II.

(*i*) Lord Dacre *v.* Tebb, 2 Bl. Rep. 1151.

though on his own soil); for this is in some sense to appropriate what belongs equally to others, and is in the nature of an unlawful monopoly (*k*). Such at least was the principle of the antient law, which appears in this particular to remain unaltered; though by a distinction introduced in comparatively modern times, some kinds of animals *feræ naturæ*, such as deer, rabbits, and the like, may be lawfully kept by any person in an inclosed place, if preserved as *property*, and not merely for the purpose of the chase (*l*). But the practice of keeping up animals in a wild state for mere diversion, though forbidden to the subject, has been at all times permissible, as a matter of prerogative, to the sovereign. For we find, that even among the Saxons there were woody and desert tracts called the forests, which, [having never been disposed of in the first distribution of lands, were held therefore to belong to the crown,] and that [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 explained in the laws of Canute (*m*), which indeed was the antient law of the Scandinavian continent (*n*), from whence Canute probably derived it (*o*).] Afterwards, upon the Conquest, the Norman race of sovereigns exceeded even their predecessors in the eager enjoyment of this branch of the prerogative; for not only

(*k*) None can make a park, chase, or warren without the king's licence: for that is, *quodammodo*, to appropriate those creatures which are *feræ naturæ*, and *nullius in bonis*, to himself; and to restrain them of their natural liberty; Case of Monopolies, 11 Rep. 87 b; et vide ibid. 86 a; 2 Rol. Ab. 33, 812; 2 Inst. 199; Com. Dig. Chase, (D).

(*l*) See Davies *v.* Powell, Willes, 48; Morgan *v.* Abergavenny, 8 C. B. 768.

(*m*) Wilk. Leg. Angl. Sax. LL. Can. c. 77.

(*n*) "*Cuique in proprio fundo quamlibet feram quoquo modo venari permissum.*"—Stiernhook, de Jure Sueon. l. 2, c. 8.

(*o*) 2 Bl. Com. 415.

did they extend the limits of the antient forests, by encroachment on the lands of their subjects, and lay out new ones at their pleasure, without regard to the rights of private property (*p*), but they established a particular system of *forest law* (*q*), under colour of which [the most horrid tyrannies and oppressions] were exercised (*r*); so that our ancestors at length became [as zealous for its reformation, as for the relaxation of the feudal rigours and other exactions introduced by the Norman family,] and struggled for the *Charta de Foresta* as strenuously as for the Great Charter itself (*s*). By this forest charter (confirmed in parliament in the ninth year of Henry the third (*t*)) many forests unlawfully made, or at least many precincts added by unlawful encroachment to the antient ones, were *disafforested*, so as to remit to the former owners their rights (*u*),—though in the case of such precincts, called thenceforward *purlieus*, the crown still continued to exercise some of its privileges (*x*),—while in the forests that remained entire many abuses were reformed or mitigated. And owing to the variety of statutes afterwards made for amelioration of the forest laws, and above all to the entire disuse of them for centuries past by our sovereigns (*y*), this branch of the prerogative has long

(*p*) Manw. 319; 4 Inst. 300, 301.

(*q*) 1 Reeves's Hist. Eng. Law, 206.

(*r*) "The penalty for killing a "stag or boar was loss of eyes—for "William loved the great game," says the Saxon Chronicles, "as if he "had been their father."—Hallam's Mid. Ages, vol. ii. p. 426, 7th edit.

(*s*) 2 Bl. Com. 416.

(*t*) Its clauses had been previously incorporated in the Great Charter of John, granted at Runnymede. Hallam's Mid. Ages, vol. iii. p. 222, n. 7th edit.

(*u*) Reeves's Hist. of Eng. Law, vol. i. p. 254. This charter is considered by Lord Coke as only a declaratory law, and he holds that the king could never make forests in the land of his subjects, without their consent. 4 Inst. 300.

(*x*) 4 Inst. 303, 304; Com. Dig. Chase, 1. Purlieu is variously derived from *pur lieu* (exempt place), 4 Inst. ubi sup.; or *pourallée*, perambulation, Com. Dig. Chase, (I. 1.)

(*y*) An attempt to revive them was made by Charles the first, and courts were held by the chief justice in eyre, for recovery of the king's forestal rights, Hallam's Const. Hist. vol. ii. p. 13; but by 16 Car. 1, c. 16, the extent of the royal forests is now

ceased to be a grievance to the subject (*z*). Some of the royal forests however still exist (*a*); and with some few exceptions, such as the New Forest in Hampshire, founded by the Conqueror, that of Windsor by Henry the eighth, and that of Richmond by Charles the first (*b*), are of such remote antiquity, that no trace is said to remain in history of their first creation (*c*).

Though a forest is in general a royal possession, we are nevertheless to observe that it is capable of being vested in a subject (*d*); for if the sovereign grant a forest to a private person, with words expressly authorizing the administration of forest law there, the grantee will have that franchise to its full extent, with all the appropriate courts and officers (*e*). It is also to be remarked, that a forest is a right which the owner thereof (whether sovereign or subject) may have either in his own lands or the lands of another (*f*); and in this respect it differs from a right of common, and the other incorporeal hereditaments above described, for these, as they issue out of the soil, cannot

fixed according to their boundaries in the twentieth year of James the first, and no place is to be hereafter accounted forest, where forest courts were not held within sixty years before the first year of the reign of Charles the first.

(*z*) 2 Bl. Com. 416.

(*a*) See 12 & 13 Vict. c. 81, authorizing a commission to inquire into rights or claims over the New Forest and Waltham Forest; 14 & 15 Vict. c. 43, for disafforesting the forest of Hainault; 14 & 15 Vict. c. 76, 16 & 17 Vict. c. 19, and 17 & 18 Vict. c. 49, as to her Majesty's rights in the New Forest; 16 & 17 Vict. c. 36, and 19 & 20 Vict. c. 32, as to disafforesting the forest of Whichwood; 16 & 17 Vict. c. 42, as to disafforesting the forest of Whittlewood, 18 & 19 Vict. c. 46, as to disafforesting the forest of Woolmer; 19 & 20 Vict. c. 13, for management of lands of her Majesty within the late forest of Delamere.

(*b*) As to Richmond Park, see Hallam's Const. Hist. vol. ii. p. 14, n. 3rd edit.

(*c*) 4 Inst. 319, where it is said that the forests in England are in number sixty-nine; see also as to the antiquity of the forests, 4 Inst. 293, 294.

(*d*) Co. Litt. 233 a.

(*e*) Case of Leicester Forest, Cro. Jac. 155; vide Coleridge's Blackstone, vol. ii. p. 38, n. (19).

(*f*) 4 Inst. 301, 318; Lord Dacre *v.* Tebb, 2 Bl. Rep. 1151; Sutton *v.* Moody, Ld. Raym. 251.

exist in the same man who is general owner of the soil itself, (the latter title superseding all inferior claims like these,) and are consequently rights which a man can claim to exercise only *in alieno solo* (*g*); but a forest, and indeed all franchises in general, are inheritances collateral to the ownership of the land (*h*), and may be claimed by a man either *in proprio solo* or *in alieno* (*i*). The owner of a forest is also considered (notwithstanding the general rule that title cannot be made to things *feræ naturæ*) as having a qualified property in the wild animals of chase and venary there found, so long as they continue therein; and no other person can lawfully take them within those precincts, or chase them from thence and take them in other ground (*j*). But if a wild animal strays from the forest, it ceases to be the property of the owner of the franchise, and will belong to the first taker (*k*).

A *chase* is a franchise granted by the crown to a subject, empowering the latter to keep for his diversion, within a certain precinct so called, the wild animals of chase, (which in a legal sense are the same with those to which the right of forest extends (*l*)); but not authorizing the establishment of forest law within such precinct (*m*).

A *park* properly signifies an inclosure, and is popularly applied to any ground which a gentleman chooses to surround with a wall or paling, and to stock with a herd of deer; but in the technical sense in which we now use the term, a park is nearly equivalent to a chase, being in effect no other than a chase *inclosed* (*n*).

(*g*) See Lloyd *v.* Earl Powis, 4 El. & Bl. 485.

(*h*) 4 Inst. 318.

(*i*) 2 Bl. Com. 38.

(*j*) Sutton *v.* Moody, ubi sup.; 2 Bl. Com. 394, 395, 419.

(*k*) 12 Hen. 8, f. 10, cited 2 Christian's Black. 419, n.; et vide Keilw. 30; Sutton *v.* Moody, ubi sup.

(*l*) Co. Litt. 233 a.

(*m*) Manw. 52; see also 2 Bl. Com. 415, where a chase or a park is described as "a smaller forest in "the hands of a subject, but not "governed by the forest laws."

(*n*) Manw. 52; 2 Bl. Com. 38.

A *free-warren* (*o*) is a similar franchise, granted by the crown to a subject, [for preservation or custody, which the word signifies, of beasts and fowls *of warren*,] which, according to Lord Coke, are "hare, coney, roe," "partridge, "quail, rail, &c.," "pheasant, woodcock, &c.," "mallard, "heron, &c.," (*p*). To this, as well as to chase and park, apply generally the principles which have been before noticed in respect of a forest; with this exception, however, as to a park, that it is incapable of being claimed *in alieno solo*, and can exist only in land belonging to the owner of the franchise himself (*q*).

[A *free-fishery* (*r*), or exclusive right of fishing in a public river, is also a royal franchise (*s*).] As the bed or soil (*t*), so the right of fishing presumably belongs, in private rivers (viz. those not navigable), to the owners of the land on either side, and to them only (*u*). In those which are

(*o*) See Bro. Ab. tit. Warren; Dyer, 30 b; Co. Litt. 2 a, 114 b; Keilw. 148, n.; Bowlston *v.* Hardy, Cro. Eliz. 548; Wadhurst *v.* Damme, Cro.Jac.45; Case of Leicester Forest, ibid. 155; 1 Saund. 84 n. (3); Attorney-General *v.* Parsons, 2 Tyrw. 223; Morris *v.* Dimes, 1 Ad. & El. 654; Vere *v.* Lord Cawdor, 11 East, 568; Merest *v.* Harvey, 5 Taunt. 442; Lord Dacre *v.* Tebb, 2 Bl. Rep. 1151; Patrick *v.* Greenway, 1 Saund. 346 b; Pickering *v.* Noyes, 4 B. & C. 639; Duke of Devonshire *v.* Lodge, 7 B. & C. 36; Pannell *v.* Mill, 3 C. B. 625.

(*p*) Co. Litt. 233 a; where these &c.'s are left without explanation. Manwood, on the other hand, says, "There are only two beasts of war-"ren, the hare and the coney, and "but two fowls of warren, the "pheasant and the partridge."—Manw. 95; and see Barrington's case, 8 Rep. 138 b. Grouse are not birds of warren; Duke of Devonshire *v.* Lodge, 7 B. & C. 36.

(*q*) 2 Bl. Com. 38. Blackstone remarks on the other hand, that free-warren *may* be claimed *in alieno solo*; and accounts for it by the fact, that antiently keen sportsmen, on selling their lands, often reserved to themselves and their heirs the freewarren that they had in them. Ibid. 39.

(*r*) See Hale, de Jure Maris, part i. c. 4; Lord Fitzwalter's case, 1 Mod. 105; Warren *v.* Matthews, 1 Salk. 357; Smith *v.* Kemp, 2 Salk. 637; Carter *v.* Mercot, 4 Burr. 2162; Case of River Banne, Davies, 55.

(*s*) Blackstone adds, that it "is "considered as such in all countries "where the feudal polity has pre-"vailed," and cites Seld. Mar. Claus. i. 24; Dufresne, v. 503; Crag. de Jure Feod. II, 8, 15.

(*t*) Vide sup. p. 451.

(*u*) Hale, de Jure Maris, pt. i. c. 4.

public (that is, navigable (*x*),) the bed (so far at least as the tide flows) appertains *primâ facie* to the crown—the right of fishing to the public at large (*y*). But in either one or the other, there may be a particular title in some individual, by which such general or presumptive right may be controlled (*z*); and this may take place in a public river, by force of some royal grant or prescription entitling a private person and his heirs to the exclusive right of fishing therein: a privilege called by Blackstone a free fishery (*a*). Grants of this description can no longer be made by the crown (*b*), being prohibited by King John's great charter (*c*), and the second and third confirmations of it in the reign of his successor; but the right of conferring them was considered, prior to these charters, as one of the flowers of the prerogative (*d*); and it is from this origin that the validity of a free fishery at the present day must in every case be derived. The privilege materially differs, it will be observed, from the right of *common of piscary* formerly mentioned (*e*), which is not exclusive in its nature, nor a franchise, but referable to private rivers,

(*x*) Hale, de Jure Maris, pt. i. c. 1, 2.

(*y*) Ibid. c. 4; Ward *v.* Cresswell, Willes, 265; Mayor, &c. of Orford *v.* Richardson, 4 T. R. 437; 2 H. Bla. 182, S. C.; Bagott *v.* Orr, 2 Bos. & Pul. 472; Blundell *v.* Catterall, 5 B. & Ald. 268; Williams *v.* Wilcox, 8 Ad. & E. 333.

(*z*) Hale, de Jure Maris, part i. c. 1, 4.

(*a*) There are in law, the three different terms of *free fishery*, *several fishery*, and *common of fishery* or *piscary* (Smith *v.* Kemp, Salk. 637); and it is remarked by Blackstone (vol. ii. p. 40) that "they are very "much confounded in our law "books;" and a doubt is expressed in Co. Litt. by Harg. 122 a, n. (7), whether Blackstone's own use of the term free-fishery is quite correct, and whether it does not apply to all streams, whether public or private. As to the term "several fishery," see Holford *v.* Bailey, 8 Q. B. 1000.

(*b*) 2 Bl. Com. 39; Duke of Somerset *v.* Fogwell, 5 B. & Cress. 875. As to the re-grant of a former franchise of free fishery, when forfeited to the crown, vide Mayor of Colchester *v.* Brooke, 7 Q. B. 385.

(*c*) Cap. 47, edit. Oxon.; see as to Magna Charta, sup. p. 185.

(*d*) The right was also exercised by the crown, and granted out to subjects, of making *weirs* on our public rivers; but this was in like manner restrained by Magna Charta and subsequent statutes; see Williams *v.* Wilcox, 8 Ad. & E. 314.

(*e*) Vide sup. p. 652.

and capable of being created by the grant of a subject. In further illustration of the difference between them, we may add that, in a free fishery, a man has a qualified property in the fish before they are caught; in a common of piscary, he has no property till afterwards (*f*).

VI. *Rents* are the last species of incorporeal hereditaments that we propose to notice. [The word rent (*reditus*) signifies a compensation or return] yielded periodically, to a certain amount, out of the profits of some corporeal hereditament, by the tenant thereof. To obtain a clear idea of rent, it may be useful to dwell a little upon some of the points of this definition. First, then, it is yielded, that is, paid as a thing due. And therefore it is said by the antient lawyers, to *lie in render*, in contradistinction to such incorporeal hereditaments, as common or the like, which the party entitled to them is to take for himself, and which are consequently said to *lie in prendre* (*g*). It must also be of certain amount, or that which may be reduced to certainty, by either party, for *certum est quod certum reddi potest* (*h*). It must besides be payable periodically, as yearly, or in every second, third or fourth year, or the like (*i*). Again, it is considered as payable out of the profits (*k*) of the land, and must consequently [not be part of the land itself, wherein it differs from an exception in a grant, which is always of part of the thing granted (*l*).] Thus a man cannot reserve, by way of rent, the vesture or herbage of the land demised (*m*). [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 (*n*).] Moreover, [it must issue

(*f*) 2 Bl. Com. 40; F. N. B. 88; Smith *v.* Kemp, 2 Salk. 637.

(*g*) Burton, Compend. 375.

(*h*) Co. Litt. 142 a.

(*i*) Ibid. 47 a.

(*k*) Ibid. 141 b, 142.

(*l*) Plowd. 13; 8 Rep. 71; Co. Litt. 142 a.

(*m*) Co. Litt. 142 a.

(*n*) Ibid.; Doe *v.* Benham, 7 Q. B. 982.

[out of hereditaments *corporeal*. Therefore a rent cannot be reserved out of a common, a franchise, or the like (*o*).] And, lastly, the person from whom it is due must be the tenant of the land. But his tenancy may be either in possession, remainder or reversion; for a rent may be as well reserved upon the grant of a reversion or remainder, as on the conveyance of an estate in possession (*p*).

[There are at common law (*q*) three manner of rents, rent-service, rent-charge, and rent-seck.] *Rent service* is where the rent accrues in connection with a tenure, attended (as tenure almost invariably is) by fealty or by fealty and other services (*r*); and this, whether the party to whom the rent is due be entitled to fealty, as having the reversion of the land out of which it issues, or as having the mere seigniory (*s*). Thus if A., seised in fee, make a gift of land to B. in tail, or demise to him for life, or years, reserving a rent, or if B. be seised in fee of a tenement holden of A. as lord of a certain manor, at a certain antient rent, such rent is in either case rent-service; for it is due as from a tenant owing fealty to his lord (*t*). To rent of this description the common law attached, as of common right, (and independently of any express provision for that purpose between the parties (*u*),) the power of *distress* (*x*);

(*o*) Co. Litt. 142 a, 144 a, 47 a; Gilb. Rents, 20. The sovereign, however, by prerogative, and in some cases a subject, by statute, may have a rent issuing out of an incorporeal hereditament; Gilb. Rents, 22. And in every case the reservation of rent upon an incorporeal inheritance will be binding on the lessee, as a contract to pay so much money. Cruise, Dig. Rents.

(*p*) Co. Litt. 47 a, 142 a; Bac. Ab. Rent, B.

(*q*) Litt. s. 213.

(*r*) Ibid.; Co. Litt. 142 a.

(*s*) Vide sup. pp. 248, 257.

(*t*) If a man holds as tenant at will only, though subject to a rent, yet it is not rent service, for there is no fealty; vide sup. p. 296. The lessee, however, may distrain of common right. Co. Litt. 57 b.

(*u*) Litt. s. 214.

(*x*) Lord Chief Baron Gilbert remarks, that "antiently the not paying attendance on the lord's courts, or not doing the feudal service, was punished with the forfeiture of the estate, but that these feudal forfeitures were afterwards turned into distresses, according to the pignorary method of the civil law." And this," he adds, "may easily account why the power of distrain-

that is, the lord was entitled, in the event of the rent's falling into arrear, to enforce payment without legal process, by entering the land, and seizing the goods and chattels found thereon. The other two species of rent differ from the former, in having no connection with fealty. But more particularly—a *rent-charge* is where the owner of the rent has neither seigniory nor reversion, and can consequently claim no fealty, but is entitled nevertheless, by force of an express contract, to distrain, [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 in arrear or behind, it shall be lawful to distrain for the same (*y*):] or where a man by deed grants out of the land whereof he is seised, a certain rent payable to another, with a like clause of distress (*z*). In either of these cases [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 (*a*).] A *rent seck* (*reditus siccus*) is where the owner of the rent has neither seigniory nor reversion, nor any such express power of distress as above described. Thus, in either of the cases of rent-charge we

"ing always attended the fealty, because the power of seizure (for forfeiture) could only belong to him in whose homage the tenant was, and to whom the lands must return when the feudal donation to the tenant was spent."—Gilb. on Rents, 3, 5. See further as to *distress for rent*, post, bk. v. c. i. tr. v.

(*y*) Litt. s. 217.

(*z*) Ibid. s. 218.

(*a*) Ibid. s. 217. By 18 & 19 Vict. c. 15, s. 12, any annuity or rent-charge granted after the passing of that act otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate, determinable on one or more life or lives, shall not affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until a memorandum or minute thereof, such as the act describes, shall be left with the senior master of the Court of Common Pleas at Westminster, to be by him registered in a book, which book all persons shall be at liberty to search. But by sect. 14, the registry of annuities, or rent-charges, given by will, is not required.

have just mentioned, if no clause of distress were inserted in the deed, the rent would be rent seck (*b*).

We must be careful, however, to distinguish here between the two kinds of rent last above described and an *annuity*, which [is a yearly sum chargeable only upon the *person* of the grantor (*c*). 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 (*d*), no land at all shall be charged with it, but it is a mere personal annuity,] and does not belong to the class of things real: though, (by an anomaly which has sometimes led to confusion,) a man may have an estate of inheritance in it, that is, it may be made descendible to his heirs (*e*), while personalty in general can devolve only to the executors or administrators.

[There are also other species of rents which are reducible to the three above enumerated. *Rents of assize*] are rents at which the freeholders or copyholders of a manor have held under the lord from time immemorial (*f*); and they [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 was quit and free of all other services. When these payments were received in silver or white money, they were antiently called white rents (*reditus albi*) (*g*), in contradistinction to rents reserved in grain or baser money, which were called *reditus nigri*, or black mail (*h*).] Being connected with a

(*b*) Litt. ss. 217, 218.

(*c*) Co. Litt. 144, 20 a, and n. (4), by Harg.

(*d*) As to the cases in which the grant shall be construed as rent-charge, vide Co. Litt. 147 a.

(*e*) Co. Litt. 2 a. According to Blackstone, "a man may have a "real estate in it." But it seems clear that this can only be in the sense of an estate of inheritance, and that an annuity savours in no other respect of the realty; see 2 Bl. Com. by Hovend. p. 40, n. (81); Co. Litt. 20 a; Aubin *v.* Daly, 4 B. & Ald. 59.

(*f*) 2 Inst. 19.

(*g*) In Scotland this kind of small payment is called *blanch holding*, *reditus albæ firmæ*.

(*h*) 2 Inst. 19.

tenure by fealty, they are consequently rent service, from which it follows that the lord is entitled as of common right to distrain for them when they fall into arrear (*k*). *Rack rent* is a term expressive only of the proportion a rent bears to the value of the tenement on which it is charged: when it is [of the full value of the tenement, or near it,] the rent is said to be a rack rent. A *fee farm rent* is where an estate in fee is granted subject to a rent in fee [of at least one-fourth of the value of the lands at the time of its reservation (*l*);] and such rent appears to be called fee farm, because [a grant of lands reserving so considerable a rent, is indeed only letting lands to farm in fee simple, instead of the usual method for life or years.] It results from former explanations, that such a rent, if created by a subject since the statute of *Quia emptores* (*m*), can never be a rent service, for no fealty can be due to the grantor; but it may be either a rent seck or a rent-charge (*n*).

These are the general divisions of rent; but though their correct apprehension is still of importance, the difference which formerly existed as to the remedies to be pursued in case of their non-payment, is, for practical purposes, nearly at an end. For it is provided by stat. 4 Geo. II. c. 28 (*o*), that every person shall have the like remedy by distress, in cases of rent-seck, rents of assize, and chief rents, which had been duly answered or paid for the space of three years within twenty years before the first day of the ses-

(*k*) 2 Watk. Cop. 191; vide stat. Hen. 8.

(*l*) Co. Litt. 143 b. Blackstone defines a fee farm rent as a *rent-charge* issuing out of an estate in fee of at least one-fourth, &c. (Bl. Com. vol. ii. p. 43;) but apparently by a misconception of Lord Coke's meaning. See Co. Litt. by Harg. 144 a, n. (5); and in Doug. 627.

(*m*) As to this statute, vide sup. p. 235. According to Mr. Hargrave, a fee farm rent *cannot* be created by a subject since this statute, it being in his opinion essential to the definition of a fee farm rent, that it should be a rent service; Co. Litt. by Harg. 144 a, n. (§); but see the other authorities cited in the last note.

(*n*) Doug. 627, note (1); et vide Litt. 217.

(*o*) See Musgrave *v.* Emmerson, 16 L. J. (Q. B.) 174.

sion of parliament in which the act was passed, or should be thereafter created, as he would have had in the case of rent reserved upon lease.

With respect to the manner of creating rents, it may be observed generally, that the methods are two—for either the owner of land may grant a rent out of it, or he may grant the land itself, subject to a rent (*p*). Rent-charge or rent seck may be constituted in either of these ways (*q*); rent service in the latter only.

[Rent is regularly due and payable upon the land from which it issues, if no particular place is mentioned in the reservation (*r*). But in the case of the sovereign, the payment must be either to the crown's officers at the Exchequer, or its receiver in the country (*s*). And strictly rent is demandable and payable before the time of sunset of the day whereon it is reserved (*t*), though perhaps not absolutely due till midnight (*u*).]

By the common law, if the estate or interest of the person entitled to any rent determined in the interval between one of the days of payment and another (as by his death, supposing him to be tenant for life,) the periodical sum then accruing was entirely lost to him and his representative (*x*); and supposing the rent itself not to determine, but to continue payable to some person in remainder or reversion, the whole sum accruing in respect of such interval would belong to that person, though the greater portion of it should have elapsed in the time of his predecessor. But by 4 & 5 Will. IV. c. 22 (*y*), (passed 16th June, 1834,) it is provided, that in case of any rent service reserved on a lease made subsequent to the act, by a tenant

(*p*) Anon. *v.* Cooper, 2 Wils. 375.

(*q*) Vide Litt. ss. 217, 218.

(*r*) Co. Litt. 201 b.

(*s*) 4 Rep. 73.

(*t*) Co. Litt. 202 a; 1 Anders. 253.

(*u*) 1 Saund. 287; Prec. Chanc. 555; Salk. 578; Lord Rockingham *v.* Penrice, 1 P. Wms. 178.

(*x*) Vide Jenner *v.* Morgan, 1 P. Wms. 392.

(*y*) Before this statute an apportionment had been provided for by 11 Geo. 2, c. 19, in the particular case where, on the death of a tenant for life, the lease, under which the rent was reserved, determined.

in fee or for life, or person demising under a power—and also in case of all other rents and fixed periodical payments of any description payable under any instrument executed, or (in case of a will) coming into operation after the passing of that act—there shall be an *apportionment* thereof whenever the interest of the person entitled to the same determines by death or otherwise; so that the executors, or administrators, or assigns of such person, or the person himself, as the case may be, shall be entitled to a proportion thereof, according to the time that elapses between the last period for payment, and such the determination of his interest. But this is subject, in the case of rent reserved by lease of lands and tenements, to a proviso that such apportionment shall not be claimed from the party liable under the lease, who is still to make payment of the whole to the party who would have been entitled if the act had not been made; the latter, however, being made accountable, both at law and in equity, to the person claiming the apportionment (*z*).

There is also another kind of apportionment, as where the tenant under a lease has been evicted of part of the land out of which the rent issues, by a person having title paramount to that of the lessor, or where part of it has been surrendered by the tenant to the lessor, or where the lessor has aliened the reversion as to part. In all these cases the rent must be apportioned (*a*); and so much of it only shall be payable to the lessor, as corresponds with the value of what is still held by the tenant under him; though where the tenant has been tortiously expelled by the act of the landlord himself even from a part of the premises only, there shall be no apportionment, but the whole rent will be suspended so long as the expulsion continues (*b*). The doc-

(*z*) The act has no application to annual sums made payable by any policy of assurance, nor to any case in which a stipulation has been made that no apportionment shall take place. Sect. 3.

(*a*) Co. Litt. 148 a; Bliss *v.* Collins, 5 Barn. & Ald. 876.

(*b*) Gilb. Rents, 178; Neale *v.* Mackenzie, 1 Mee. & W. 747.

trine of apportionment, however, is not confined to rent, but applies to some other kinds of incorporeal hereditaments (*c*). For if a man, seised of forty acres of land, to which common of pasture is appurtenant, alienes five acres of it to another, the alienee will be entitled to common *pro tanto;* that is, for all his commonable cattle *levant* and *couchant* on the five acres (*d*).

With regard to the remedies for the recovery of rents, including the doctrine of distress—these belong properly to a subsequent part of these Commentaries, which will treat of civil injuries, and the means by which redress for them may be obtained (*e*).

Having now taken notice of such particular incorporeal hereditaments as appeared to be fit for the present to engage our attention, we shall advert in conclusion to some of the principal points of learning relative to this division of things real, when considered in a general view, and without reference to the individual species of which they are composed.

In the first place then we may remark, that many incorporeal hereditaments are capable of being either annexed as an accessory to some hereditament corporeal, or of existing independently, and *per se;* being described, in the former case, as *appendant* or *appurtenant*, in the latter, as *in gross* (*f*). But to be connected as principal and accessory, things must of course be of a nature suitable to that relation; and therefore hereditaments corporeal cannot be appendant or appurtenant to corporeal, nor incorporeal

(*c*) As to apportionment of rent or fine on lands acquired under the Church Building Acts, see 17 & 18 Vict. c. 32.

(*d*) Wyat Wild's case, 8 Rep. 78 b.

(*e*) Vide post, bk. v. c. I.

(*f*) Co. Litt. 121 b, 122 a. The *accessorium* of the civil law is that which answers best to our terms of *appendant* or *appurtenant*. Co. Litt. by Harg. 121 b, n. (6). As to the difference between these terms, Lord Coke remarks, "that *appendants* are "ever by prescription, but *appur-* "*tenants* may be created, in some "cases, at this day."—Co. Litt. 121 b.

(generally speaking) to incorporeal (*g*). Where the connection exists, the effect is that the thing appendant or appurtenant will pass (without any particular mention of it) by any conveyance or alienation of the land to which it is annexed; and this whether the land be conveyed expressly "with its appurtenances" or not (*h*). But if the principal be conveyed without the accessory, or the accessory without the principal (as in some instances may be done (*i*)), the accessory becomes thereafter, in either case, a thing in gross.

Incorporeal hereditaments are not, in a strict and proper sense, the subjects of *tenure*, like those of the corporeal kind (*j*); but they satisfy, in general, the legal description of *tenements*, and are expressly held to be within the meaning of that word as used in the statute *De Donis*, so as to be capable of being *entailed* (*k*). And where an incorporeal hereditament is appendant or appurtenant, it will of course be subject, in respect of the land to which it is annexed, to all the rules of tenure.

The same *estates* may be had in incorporeal as in corporeal hereditaments, and in many respects they are upon the same footing with regard to *title*, or the manner in which estates are acquired or lost. More particularly we may notice, that though the former subjects of property are intangible in their nature, yet they are substantially in the same predicament with the latter, even in regard to some of those laws of title which are founded upon an

(*g*) Co. Litt. by Harg. 121 b, n. (7); Potter *v.* North, 1 Vent. 386; Plowd. 85, 168, 170; Capel *v.* Buszard, 6 Bing. 161.

(*h*) Co. Litt. 121 b, n.; Barlow *v.* Rhodes, 3 Tyr. 280; James *v.* Plant, 4 Ad. & El. 749; et vide sup. p. 486.

(*i*) Plowd. 381; Com. Dig. Append. and Appurt. (D.); 2 Saund. 32.

(*j*) Co. Cop. 97; Co. Litt. 20 a; Bac. Ab. Tenure (A.). It is observable, however, that under the feudal system, as it formerly prevailed on the continent, not only lands, but "casual rents, such as the profits of "a toll, the fare paid at ferries, the "salaries of offices, and even pen-"sions, were held as *fiefs*, and mili-"tary service performed on account "of them."—Robertson's Charles V. vol. i. n. (8).

(*k*) Vide sup. pp. 244, 558.

actual *seisin* or occupation. Thus with respect to *descent*, the rule of *seisina facit stipitem* (*l*) has the same application to things incorporeal as to corporeal, that is, it governs, since the Inheritance Act (3 & 4 Will. IV. c. 106), all descents which took place on a death prior to the 1st of January, 1834 (*m*). For if a man who died before that day had what is *equivalent* to corporeal *seisin* in hereditaments that are incorporeal (*n*) and in gross (for of those that are appendant or appurtenant we do not speak, as they follow the land to which they are annexed (*o*))—thus if in the case of a rent he had obtained the actual receipt of it (*p*)—such constructive *seisin* makes him the root of descent with respect to these hereditaments (*q*), though he was not himself the purchaser. But upon more recent successions, the universal rule before laid down as to corporeal, obtains also to incorporeal hereditaments, that descent is to be traced from the purchaser (*r*). So hereditaments of the latter, as well as of the former description, fall within the doctrine of *special occupancy* (*s*). For though it seems that at common law there could be no title by *common* occupancy to things of which no corporeal or actual seisin could be had, yet the heir might take as *special* occupant (*t*); and incorporeal hereditaments are now expressly included in all the legislative provisions with respect to estates *pur autre vie*,

(*l*) Vide sup. p. 394.

(*m*) No descent prior to that day was within the operation of the Inheritance Act; vide sup. p. 388, n. (*i*).

(*n*) 2 Bl. Com. 212.

(*o*) Co. Litt. by Harg. 15 b, n. (1); Watk. Desc. 60, 61.

(*p*) 2 Bl. Com. ubi sup., who also notices the instance of a presentation to a church, in the case of an advowson in gross.

(*q*) Co. Litt. 15 b. It is to be observed, however, that it is not in the nature of all incorporeal hereditaments to admit of this constructive possession. Thus Lord Coke makes an express exemption of *Dignities*, in which he says a man cannot by any act "gain more actual possession (if it may be so termed) than "by law descended to him."—Ratcliffe's case, 3 Rep. 42 a.

(*r*) 3 & 4 Will. 4, c. 106, ss. 1, 2; vide sup. p. 397.

(*s*) Vide sup. p. 447.

(*t*) Bearpark *v.* Hutchinson, 7 Bing. 186; vide 2 Bl. Com. 259.

which we had occasion to notice in a former part of the work (*u*).

But on the other hand, in some important particulars, the law of title, in incorporeal things, differs from that which applies to things corporeal. For the former (that is, such of them as are in gross (*x*), to which alone we would be understood to refer when the contrary is not expressed) cannot in their nature pass by *feoffment*, this implying, as we have seen, an actual livery (*y*). But they are capable in every instance of passing by *grant* (*z*); and therefore they are said (like remainders and reversions of hereditaments corporeal) to *lie in grant*, and not *in livery* (*a*). In this, however, we refer not only to a grant properly so called, but also to a surrender, if by deed (*b*) and to a conveyance operating under the Statute of Uses (*c*), for every existing incorporeal hereditament may be limited to a use, and such use will be executed (as in the case of a conveyance of land) by the statute (*d*). Nor is it by grant alone, that title may be made to an incorporeal hereditament. This indeed is the only universal method; but there are others applicable to particular cases. For, first, rents may be created by *reservation* (*e*) in a lease or other convey-

(*u*) Bearpark *v.* Hutchinson, 7 Bing. 186; vide sup. p. 255.

(*x*) Those that are appendant or appurtenant will pass (as before observed, sup. p. 680) by the conveyance of the land to which they are annexed.

(*y*) Vide sup. p. 506.

(*z*) 2 Sand. Us. 33, 36, 37, where the only exceptions mentioned are the cases in which the policy of the law forbids *any* assignment at all, as in the case of an office of trust and confidence; vide Welcome *v.* Upton, 6 Mee. & W. 536. A *grant*, it will be recollected (vide sup. p. 513), implies a deed, i.e. an instrument under seal. Without deed, an incorporeal hereditament will not pass. Wood *v.* Leadbitter, 13 Mee. & W. 838.

(*a*) Formerly, on the other hand, corporeal hereditaments were said (*è converso*) to lie in livery and not in grant. But this, as we have seen, is now altered by a recent statute; vide sup. p. 514.

(*b*) Vide Co. Litt. 338 a.

(*c*) Vide sup. p. 530.

(*d*) 2 Sand. Us. 33, 49, 59, 111; sup. p. 364.

(*e*) Bac. Ab. Rent, C.; vide Doe *v.* Lock, 2 Ad. & El. 705, 743; Wickham *v.* Hawker, 7 Mee. & W. 72.

ance (*f*); as where a man seised in fee demises land to another for life or years, the latter yielding and paying for the same a certain sum of money. Again, there are certain hereditaments which may be claimed by *custom*; as for all the inhabitants of a certain hamlet to have a right of way over a certain field for a particular purpose (*g*). This species of title, however, is subject to a very important restriction, viz. that no man can claim, by way of custom, a *profit in alieno solo*. And therefore a custom for all the inhabitants of a certain hamlet to take, from a private close, sand drifted from the sea, for the purpose of manure, has been adjudged to be bad in law (*h*). Besides these, there is also the claim by *prescription* (*i*), which applies to almost every kind of hereditament incorporeal (*k*), and as well to those which are appendant or appurtenant, as those in gross. And this species of title involves so many points of nicety, as to demand a more particular explanation than we have bestowed on any of the former.

The subject indeed has been in some measure unavoidably anticipated, so far at least as to state that prescription is a title by long usage. But we are now to examine its nature more closely, and, as a preliminary point, we would remark, that, though depending on usage, it is not to be confounded with custom. The distinction between custom (of which we had occasion to inquire at large in a preceding part of these Commentaries (*l*)) and prescription, is this, that custom is properly a *local* usage, and prescription a

(*f*) Vide Litt. s. 217.

(*g*) Coleridge's Blackstone, vol. ii. p. 36, n. (14).

(*h*) Blewitt *v.* Tregonning, 1 Har. & W. 431.

(*i*) "*Prescriptio est titulus ex usu et tempore, substantiam capiens ab authoritate legis.*"—Co. Litt. 113 b. The title of prescription was well known to the Roman Law by the name of *usucapio*. Ff. 41, 3, 3; vide 2 Bl. Com. 264, where the subject of prescription is discussed at large.

(*k*) The title by prescription, however (whether at common law or under the stat. 2 & 3 Will. 4, c. 71, to be presently noticed), applies to *no other* than incorporeal hereditaments. Wilkinson *v.* Proud, 11 Mee. & W. 35.

(*l*) Vide sup. p. 54.

personal one, attaching to a man and his ancestors, or those whose estate he has (*m*). [As for example, if there be a [usage] time out of mind [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 to be a lawful usage (*n*),) this is strictly a custom, for it is applied to the *place* in general, but not to any particular *persons;* but if the tenant who is seised of the manor of Dale in fee alleges, that] he and [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.]

The subject of prescription has been newly regulated by the statute 2 & 3 Will. IV. c. 71; but its provisions are of a nature by no means to supersede the former state of the law in regard to this species of title, and prescription will be best understood by contemplating it in two distinct points of view—first, as it exists at common law; secondly, as it is modified by the statute in question.

With respect to prescription *at common law*, the following points appear principally to deserve attention:—1. This title is always founded on the actual usage of enjoying the thing in question; and without this, a mere claim, however often repeated or long continued, and whether its validity has been questioned or not, will not suffice to establish a prescriptive right (*o*). 2. The enjoyment on which a prescription is founded, must have been constant and peaceable; for generally, when it has been subject to interruption and dispute, it is of no avail. Yet where the right is shown to have once attached in consequence of an uniform and tranquil usage for a sufficiently long tract of time, a wrong-

(*m*) Co. Litt. 113 b; Potter *v.* North, 1 Vent. 386; 2 Bl. Com. 263.

(*n*) Abbot *v.* Weekly, 1 Lev. 176.

(*o*) But a right may be presumed, in some cases, more extensive than the actual user. Manifold *v.* Pennington, 4 Barn. & Cress. 161; De Rutzen *v.* Lloyd, 5 Ad. & El. 456; vide Jones *v.* Richards, 6 Ad. & El. 532.

ful interruption of the enjoyment during a subsequent period of comparatively short duration (as for ten or twenty years) will not destroy the prescription (*p*). 3. As to the length of time sufficient to establish the right, the rule of the common law is, that there must have been a usage from *time immemorial*, or, as it is technically termed, *from time whereof the memory of man is not to the contrary*, which period (as before shown in our remarks upon *custom*) refers to so remote an era as the beginning of the reign of Richard the first (*q*). And therefore if the usage can be shown to have commenced at any time since that period, the prescription (where it is claimed as at common law) is destroyed (*r*). But a commencement shown prior to the reign of Richard the first would constitute no objection; for all time prior to that era is out of the time of legal memory (*s*). Supposing no evidence to be given as to the time at which the usage commenced, but that it appears, either by the testimony of living witnesses, or by any other means of proof (*t*), that it has had continuance for a period of twenty years or more, this will in general amount, at common law (*u*), to a presumption that it is immemorial, so as to sustain the prescription, supposing no circumstances of a contrary tendency to appear (*x*); and even proof of a shorter continuance than twenty years will have the same effect, if corroborated by other attendant circumstances indicative of the existence of an antient right (*y*). But the presumption of immemorial right, that would otherwise arise from an enjoyment of twenty years, or any other period within legal

(*p*) Co. Litt. 114 b; 2 Inst. 653; Com. Dig. Prescription, E.

(*q*) Co. Litt. 115 a; vide sup. p. 58.

(*r*) Mayor of Hull *v.* Horner, Cowp. 108.

(*s*) 9 Rep. 27 b; Com. Dig. Prescription, Pract. lib. ii. c. 22; Stark. Ev. 1205.

(*t*) Stark. Ev. 1217, 1st edit.; Co. Litt. 115 a.

(*u*) This applies, it will be observed, to a prescription at common law only. As to the case of a claim under the Prescription Act, vide post, p. 688.

(*x*) Rex *v.* Joliffe, 2 Barn. & Cress. 59; Hill *v.* Smith, 10 East, 476; Daniel *v.* North, 11 East, 372; Chad *v.* Tilsed, 2 Brod. & Bing. 403.

(*y*) Stark. Ev. 1217, 1st ed.

memory, will be defeated by showing that such enjoyment took place by virtue of a grant or licence from the party interested in opposing it, or that it was without the knowledge of him or his agents, during the whole time that it was exercised (*z*). 4. Every prescription must be certain and reasonable; and therefore a prescription to pay tithes one penny *or thereabouts* for every acre of arable land, or to take as much clay *as required* for making bricks at a certain kiln out of another's field, is bad in law (*a*). 5. All prescription, at common law, must be laid either in a man and *those whose estate he hath* in certain lands (as in the example above given of a prescriptive common of pasture), which is called [prescribing in a *que estate* (*b*),] or it must be in a man *and his ancestors* (*c*). And here this distinction is to be made—that if a man prescribes in a *que estate* [nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim anything as the consequence or appendix of an estate, with which the thing claimed has no connection; but if he prescribes in himself and his ancestors, he may prescribe for anything whatever that lies in grant (*d*).] And [formerly a man might by the common law have prescribed for a right which had been enjoyed by his ancestors at any distance of time, though his or their enjoyment of it had been suspended 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, unless such seisin or possession hath been within threescore years next before such prescription made.] 6. A prescription in a *que*

(*z*) Bright *v.* Walker, 4 Tyr. 509.

(*a*) Com. Dig. Prescription, E. 3; Clayton *v.* Corby, 5 Q. B. 415; Hilton *v.* Granville, ibid. 701.

(*b*) Vide Richards *v.* Fry, 7 Ad. & El. 704; Padwick *v.* Knight, 22 L. J., Exch. 198.

(*c*) But a prescription may also be in a body corporate, and their predecessors. "For as a natural "body," says Lord Coke, "is said to "have ancestors, so a body politic "or corporate is said to have pre-"decessors." Et vide Mellor *v.* Spateman, 1 Saund. 342.

(*d*) Co. Litt. 121 a.

estate [must always be laid in him that is tenant of the fee. A tenant for life, for years, or at will, or a copyholder, cannot prescribe by reason of the imbecility of their estates (*e*). 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 tenant for life, or for other estates short of the fee, [must prescribe 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 plead that John Stiles] is seised in fee of the manor, and that he and all those whose estate he hath [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.] 7. [A prescription cannot lie 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 (*f*).] 8. Another rule is, [that what is to arise by matter of record (*g*), cannot be prescribed for,] such as, for instance, the right to forfeitures of felons' goods, and the like, being among the franchises to which we before made brief allusion in the course of this chapter (*h*); for these forfeitures are [found by the inquisition of a jury, and so made a matter of record,] to which, prescription, (which is a mere usage *in pais*, says Lord Coke,) cannot extend (*i*). [But the franchises of treasure trove, waifs, estrays, and the like, may be claimed by prescription, for they arise from private contingencies, and not from any matter of record (*k*).]

(*e*) 4 Rep. 31, 32.
(*f*) Potter *v.* North, 1 Vent. 387.
(*g*) As to Records, vide sup. p. 48.
(*h*) Vide sup. p. 662.
(*i*) Co. Litt. 114 a; Case of Abbott of Strata Marcella, 9 Rep. 24 a.
(*k*) Co. Litt. 114 b.

9. Lastly, we may observe that a person having title to any thing by prescription, is not to be considered as being himself the purchaser, so as to make it descendible to his heirs general, according to the ordinary rule of inheritance (*l*); for prescription, inasmuch as it presupposes a grant, is in strictness [rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo* :] but the rule on this subject is, that where a man prescribes for any thing, (for example, 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 :] but if he prescribes for it in a *que estate*, [it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase ;—for every accessory followeth the nature of its principal.]

Having thus obtained some view of the nature of the title by prescription, as it exists at common law, we will next proceed to the consideration of the late statute 2 & 3 Will. IV. c. 71, being, as its title imports, an act "For "shortening the time of prescription in certain cases." This statute originated in a reasonable dissatisfaction with the rule of the common law, requiring an enjoyment from time immemorial (in the legal sense of that term) as the indispensable foundation, in every case, of a prescriptive right. The effect of that rule (as already shown) is, that while, in general, an enjoyment for even twenty years is sufficient to sustain a claim by prescription (because it constitutes a presumption of immemorial antiquity), a usage which is shown to have lasted even for centuries will not suffice, if accident should supply the adverse party with the means of proving that, at some period subsequent to the commencement of the reign of Richard the first, such usage had no existence. To obviate the injustice and inconvenience resulting from this doctrine, the act in question was passed; and its general plan is to dispense (in all

(*l*) Vide sup. p. 388.

the ordinary cases of prescription) with the necessity of making out an immemorial usage, either by presumption or otherwise, and to allow an enjoyment for a certain period to constitute a direct and intrinsic right.

In pursuance of this view, it provides, with respect to rights of common "and all other profits or benefits to be "taken and enjoyed from or upon any land" (with the exception, however, of tithes, rents and services, which remain as at common law), that where there shall have been an enjoyment of them by any person claiming right (*m*) thereto, without interruption (*n*), for thirty years (*o*) next before the commencement of any suit upon the subject (*p*), the prescriptive claim shall no longer be defeated (as it would have been before the act), by showing only that the enjoyment commenced at a period subsequent to the era of legal memory. There is a provision, however, that it may be defeated in any *other* way in which it was defeasible before the act passed (*q*). And therefore a case of thirty years' enjoyment would still be satisfactorily answered by showing that it was without the knowledge of the adverse party, or that it was by his mere licence or permission; for either of these circumstances would, before the act, have rebutted the presumptive right (*r*). It is also provided, that the time during which the adverse party shall have been an infant, idiot, *non compos mentis, feme*

(*m*) See Tickle *v.* Brown, 4 Ad. & El. 369; Kinloch *v.* Nevile, 6 Mee. & W. 795; Magor *v.* Chadwick, 11 Ad. & El. 584.

(*n*) See Onley *v.* Gardiner, 1 Horn & Hurl. 381; Flight *v.* Thomas (in error), 11 Ad. & El. 688. A mere non-user by the claimant is not interruption. Carr *v.* Foster, 3 Q. B. 581. As to interruption, see also Davies *v.* Williams, 20 L. J. (Q. B.) 330.

(*o*) See Richards *v.* Fry, 7 Ad. & El. 698; Wright *v.* Williams, Tyr. & Gr. 375; Bailey *v.* Appleyard, 8 Ad. & El. 161, 778.

(*p*) See Parker *v.* Mitchell, 11 Ad. & El. 788; Clayton *v.* Corby, 2 Q. B. 824; 5 Q. B. 415; Ward *v.* Robins, 15 Mee. & W. 242.

(*q*) See Mill, claimant, The Commissioner of the New Forest, objector, 18 C. B. 60.

(*r*) See Daniel *v.* North, 11 East, 372; Bright *v.* Walker, 4 Tyr. 509; Kinloch *v.* Nevile, 6 Mee. & W. 795; Eaton *v.* Swansea Waterworks Company, 20 L. J. (Q. B.) 482.

covert, or tenant for life (*s*), or during which any action or suit shall have been pending, which shall have been diligently prosecuted until abated by death of parties (*t*), shall be excluded in the computation of this period of thirty years. But where there has been an enjoyment for as much as sixty years, the claim is to be absolute and indefeasible, except only by proof that such enjoyment took place under some deed, or written consent or agreement; while on the other hand, if the period of enjoyment shall have been less than thirty years, it is to be wholly unavailable, even to raise the slightest presumption of right. In addition to these regulations as to the time for a prescription, there are others as to the manner of making it, and among them the following,—that he who prescribes under this act shall not be required in any case to claim as in right of the owner of the fee (*u*).

The act makes similar provisions with respect to another class of incorporeal hereditaments, viz. any "way or other "easement (*v*), or any watercourse, or the use of any "water, to be enjoyed upon, over, or from any land or "water" (*x*), and "the access or use of light (*y*) to and "for any dwelling-house, workshop, or other building;" but with this difference, that the periods constituting a prescriptive right in the case of ways or other easements, and waters, are twenty and forty years, in lieu of thirty and sixty respectively, and that an uninterrupted enjoyment of lights for twenty years, constitutes (*z*), in every

(*s*) See Pye *v.* Mumford, 11 Q. B. 666.

(*t*) As to abatement of a suit by death of parties, see 17 Car. 2, c. 8; 8 & 9 Will. 3, c. 11; 15 & 16 Vict. c. 76, ss. 135—140; 17 & 18 Vict. c. 125, s. 92. Et vide post, bk. v. c. x.

(*u*) 2 & 3 Will. 4, c. 71, s. 5.

(*v*) See Battishill *v.* Reed, 18 C. B. 696.

(*x*) See Wood *v.* Waud, 3 Exch. 748; Beeston *v.* Weate, 5 Ell. & Bl. 986.

(*y*) As to a prescription for light, under this statute, see Harbidge *v.* Warwick, 3 Exch. 552.

(*z*) As to interruption, within this section, see Plasterers' Company *v.* Parish Clerks' Company, 20 L. J. (Exch.) 362.

case, an absolute and indefeasible right to them, any local usage or custom to the contrary notwithstanding (*a*), unless it shall appear that the enjoyment took place under some deed, or written consent or agreement. There is moreover a provision with respect to ways and waters, that when the land over which such rights as these are claimed has been held for term of life, or a term exceeding three years, such term shall be excluded from the computation of the forty years, in the event of the person who may be entitled in reversion resisting the claim within three years after the term determines.

Besides those which have been above noticed, there still remains another point of title appropriate to incorporeal as distinguished from corporeal hereditaments: viz. that the former are capable of *extinction*, in a manner peculiar to themselves. Thus, they may be extinguished by *release* (*b*): as when a person entitled to common, releases it to the owner of the soil over which it is claimed (*c*). And after disuse of them for twenty years, a release will in general be presumed (*d*). So they may be extinguished by *unity of seisin*; as where the person entitled to a way or common becomes seised in fee, by purchase or otherwise, of the land which is subject to the right. For the dominion of the soil itself, and of an incorporeal right relating to the same soil, cannot in general subsist together in the same individual, because as soon as they are combined in his person, the latter right, being merely of a particular and subordinate kind, is absorbed and extinguished in the superior title of general ownership (*e*). To

(*a*) See Salters' Company *v.* Jay, 2 Gale & D. 414; Truscott *v.* Merchant Tailors' Company, 11 Exch. 855.

(*b*) Co. Litt. 280 a, 270 a; Litt. s. 479, 480.

(*c*) As to the extinguishment of common by a release of it as to *part* of the land over which it is claimed, or by purchase of part, vide Benson *v.* Chester, 8 T. R. 401.

(*d*) Moore *v.* Rawson, 3 Barn. & Cress. 339.

(*e*) See 4 Rep. 38 a; Cro. Eliz. 570; 3 Taunt. 24; Whalley *v.* Tompson, 1 Bos. & Pul. 371; Cruise, Dig. Ways, s. 23—28. As to the extinguishment of a *right of way* by

this, indeed, there is an exception in the case of franchises (*f*); which, as before remarked (*g*), are of a nature *collateral* to the inheritance itself, and are consequently not affected by unity of seisin. Even these, however, may be extinguished by a reunion with the Crown, from which they emanated; or by forfeiture for *misuser*, that is, such use of them as is contrary to the express or implied condition on which the royal grant may have proceeded; or by forfeiture for *nonuser*, as if a vill was incorporated by the king, before the commencement of the period of legal memory, and that franchise has never been acted upon since (*h*). Lastly, we may remark as to some particular species of incorporeal hereditaments, viz. *lights* and *water-courses*, that, as they are acquired by mere occupancy, they are in like manner capable of being extinguished after their acquisition, by a simple act of abandonment; that is, by the mere discontinuance of the enjoyment, though for a period short of twenty years; provided, however, that the abandonment be absolute,—for if it take place under circumstances which imply the intention of future resumption within a reasonable time, the right in that case will not be lost (*i*).

The whole law relative to the rights of property in things real, (exclusively of what relates to their infringement, and to the remedies in such case provided,) has now come, in due order, under discussion; and the second part of the present Book of these Commentaries—the part relating to Things Personal—will be entered upon in the next volume.

The subject which has thus employed our attention, is of very extensive use and importance, but it must be con-

unity of possession, see Winship *v.* Hudspeth, 10 Exch. 5.

(*f*) 4 Inst. 318.

(*g*) Vide sup. p. 661.

(*h*) 3 Cruise, Dig. 302. As to the re-grant of a former franchise when forfeited, vide Mayor of Colchester *v.* Brooke, 7 Q. B. 385.

(*i*) Liggins *v.* Inge, 7 Bing. 692 Moore *v.* Rawson, 3 Barn. & Cress. 332.

fessed, not very attractive at the first aspect. [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] so many [centuries without any order or 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 our 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 it is not to be presumed that we have always been thoroughly intelligible to such readers as were before strangers even to the very terms of art which we have been obliged to make use of, though whenever those have first occurred, we 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 we shall close this branch of our inquiries with the words of Sir Edward Coke (*k*),—"albeit the "student shall not, at any one day, do what he can, reach "to the full meaning of all that we have 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 pro-"bably removed."]

(*k*) Proeme to 1 Inst.

END OF THE FIRST VOLUME.

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