# LECTURES,

## ELEMENTARY AND FAMILIAR,

ON

## English Law.


BY

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## CORRIGENDA.

Page 18, line 13.—*For* "Charles, Edward and Henry," *read* "Charles Edward and Henry."

„ 90, „ 6.—*For* "closed," *read* "close."

# INTRODUCTION.

In the composition and publication of this work I make but slight pretensions to be the author of a Law Book. These lectures, written from materials compiled from various sources, for the use of two junior law students, to whom they are addressed, and in whose progress I take a deep interest, are now published in the hope that they may be useful to other young Englishmen, serving to make them familiar with the laws which the self-governing people of England have formed for themselves. In addition to my desire to render assistance to young professional students, my object is to initiate, in the study of law, others of our youth, destined, many of them as magistrates to administer, some of them as legislators to amend, and all as Englishmen to obey and defend, the laws of their country. With these views, far from attempting a regular treatise, I have selected and endeavoured to explain the more prominent parts of our law, and also those parts which appear to me the most likely to attract and interest young and well-trained minds. Hence it is that, of the many faults which will be perceived in this work, the most conspicuous, if not the most real, is the great fault of being too discursive, too full of digressions. If I can be said to have begun with a plan, I have found it impossible to adhere to it. The temptation has often been irresistible to offer what seemed useful information on interesting points, not within my original scheme. This has been especially the case when I have been treating of subjects with reference to which great changes have, in this age of legislation, been

made by acts of parliament. Changes of this sort have, since the year 1832, been so numerous, so important, so comprehensive in plan, so minute in detail, as of themselves to justify an attempt to write a new elementary work on English law. In my earlier lectures, however, I have thought it right to confine the attention of the student to some of the remains of the old common law of the land. In subsequent lectures will be found frequent explanations of the details of modern legislation.

# LECTURE I.

1. *Common Law.* | 2. *Statute Law.*
3. *Judge-made Law.*

It is usual to speak of the laws of a country as being of two sorts, the unwritten law, and the written law: leges non scriptæ; leges scriptæ. In the case of England, the unwritten laws, consisting of the ancient customs and usages of the people, are called the Common Law, or the common law of the land. The written laws are the Statutes, or Acts of Parliament. These latter derive their authority from the common law. Thus, according to an ancient custom and usage, part of the common law, an assembly called the Parliament has the most complete legislative power. Laws made by it become as completely parts of the law of the land as the common law itself. It is an ancient custom and usage of the people to obey acts of parliament: therefore it is a part of the common law that they are to be obeyed. They supersede the parts of the common law with which they happen to be inconsistent.

I shall have occasion to speak more at large of acts of parliament; but I think it right to dispose, in the first instance, of the subject of the common law.

The common law differs from the written or statute law in this, that what the statute law is, we know from the very words used by the legislature, written in the records of the parliament, proclaimed in former times in every county by the sheriff, and printed and published in modern times for the information of the people: but the common law is not to be found in any formal set of words, like the codes of some countries, or our own statute law. It is properly known by tradition; and the greater part of it is to be

found in ancient treatises, which are quoted as authorities even in courts of justice. The more usual sources of information are the decisions given from time to time by the different courts, and reported and printed soon after they are delivered. But a student generally uses treatises, written by modern lawyers, in which the common law itself, the decisions of courts in ancient and modern times, and various statutes, are arranged and digested so as to form manuals either for study or practice. Of these, Blackstone's celebrated Commentaries have always been, and, as adapted by modern writers to the law in its present state, still continue to be, the most useful to the student.

Some of the treatises, referred to by Blackstone as having a degree of intrinsic authority, are those of Glanvil, Bracton, Britton, Fleta, Littleton and Coke. In the lapse of time, and by reason of the great accumulation of the modern authorities, chiefly, as will be explained, decisions of courts of justice, showing the present state of the common law, references to the works of these ancient authors are becoming every day more rare; but no writer, since the time of Coke, Chief Justice in the reign of James the First, has attained an authority like that to which their writings are entitled.

Coke's chief work is the large book, usually spoken of as Coke upon Littleton, called by himself his First Institute: a great mass of commentaries, abounding in digressions, upon a concise treatise of tenures by Littleton, who, in the reign of Edward the Fourth, was a Judge of the Common Pleas.

Some of the proper evidences of the common law are the records of courts of justice. English lawyers regard with a blind reverence judicial decisions, which, when delivered after argument and deliberation, are afterwards, in similar cases, implicitly obeyed, as being most decisive as to the present state of the law.

When questions arise, for the decision of which direct authorities are not to be found, either in the common law

or the statute law, the judges are guided by analogies or inferences. Assisted by advocates who plead before them, they are supposed to infer, to collect, to discover, from known laws and principles, laws until then unknown, or not until then expressed in words. However this may be, the decisions of the courts of justice on new points partake in effect of the nature of legislation; and we sometimes hear of Judge-made law. A great deal, and some think the best part, of English law is Judge-made law. An important difference between this and regular legislation may be thus stated. A statute or act of parliament establishes a general rule to be obeyed in each particular instance to which it applies. A decision of a court, on a new point, gives an instance from which the existence of a rule is to be inferred.

Sometimes, however, the arguments of the judges stating the grounds of a decision express, or intimate more or less plainly, the rule for which their decision is in future to be an authority. Nevertheless, the deference shown by English lawyers to judicial decisions converted into precedents, does, to some extent, expose them to censure like that applied by Blackstone to the Roman law, giving the force of laws to the rescripts of the emperor: "that contrary to all true forms of reasoning, this is arguing from particulars to generals." There is, however, this great difference between a decision of one of our courts and a rescript of a Roman emperor, that the court has not any proper legislative power. The emperor was himself the legislature of the empire, and when by a rescript he answered a particular case stated for his opinion, he was not only deciding the question then brought before him; he was in effect legislating for future similar cases.

Doubtless it often happens that an English lawyer, whether practitioner or judge, of independent mind, feels impatient when he finds himself fettered, not by regular legislation, but by opinions of his predecessors or contemporaries to which he cannot give his assent, and which he

must nevertheless accept and act upon as binding law. Nay, he meets with cases in which courts have argued away the plain words and plain intention of acts of parliament. These instances of Judge-made law, some of them flagrant, and commonly animadverted on in law text-books, must, by reason of their technical character, be reserved for future parts of these lectures. You will be then better able to appreciate them. It is enough now to caution you, that though you cannot now, as students, or in future times, as practitioners, do otherwise than treat with constant deference the reported decisions of the judges, you must be most careful to avoid a habit which a person engaged in the study and practice of English law is in danger of forming, the servile habit, I mean, of at once adopting and obeying the opinions of persons of apparent authority, without testing and investigating them. Seriously it has happened that practice for a few years has so shackled a man's mind as to make him little else than an index to decisions of the courts, and expressed opinions of the judges, helpless, unless guided by precise authority.

By the excessive respect of English lawyers for precedents, and by the implicit obedience which appears to have been at all times requisite on the part of English judges to the decisions of their predecessors, the minds of some have been fettered to the extent of being deprived of the power, or of the courage, or of both, to appreciate, much more to discuss or apply, a principle of jurisprudence. There have been men whose minds were crowded storehouses of reported decisions, and whose profession, or rather whose trade, was to retail opinions made up (manufactured would not be an unfit expression) from the contents of books of reports, and from their own digests and indexes. These men have been sometimes called case-mongers. Hence the frequent sarcasms of statesmen and legislators on the character of the mere lawyer.

Happily the times when these sarcasms derived their force from their truth are drawing to a close. The very

great modern improvements in the administration of justice in all its branches, the virtual destruction of the ancient technical system of pleading, by means of which litigated questions were prepared for the consideration of the courts, the substitution of a less complicated system and of more simple forms, and the almost equal similar change in the practice of conveyancers, by whom are prepared deeds transferring property, settlements, wills and other private documents, are having, among their other more direct advantages, the effect of relieving the lawyers of this country from the shackles of forms and precedents, and of aiding them to take their place among scientific jurists, such as are found in Germany, Scotland and France. Those who are to be their successors, and for whom the Benchers of the Inns of Courts are providing additional means of instruction, will never, fortunately for themselves, have been subject to the necessity of loading their memory and checking the elasticity of their minds with the lumber to be found in the hundreds of volumes compiled by laborious reporters.

This change is making perceptible progress. Formerly our advocates and our judges seldom looked for a principle unless when precedents failed. Now they often seek out principles, and refer to decided cases only to support and illustrate their arguments and decisions.

## LECTURE II.

1. *Common Law.*
2. *Proceedings in Courts.*
3. *Criminal Law.*
4. *Common Law and Statute Law blended to form one Rule.*

RETURNING to the subject of common law, I think I cannot do better than quote Blackstone's summary of it, and then proceed to point out in what respect the summary is not now applicable to the common law, altered as it has been in two most important particulars.

This is the paragraph I refer to: "As to general customs, "or the common law properly so called, this is that law by "which proceedings or determinations in the king's ordinary "courts of justice are 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; "the several species of temporal offences, with the manner "and degree of punishment; and an infinite number of "minuter particulars, which diffuse themselves as ex-"tensively as the ordinary distribution of common justice "requires. Thus, for example, that there shall be four "superior courts of record,—the Chancery, the King's "Bench, the Common Pleas and the Exchequer;—that the "eldest son alone is heir to his ancestor;—that property "may be acquired and transferred by writing;—that a "deed is of no validity unless sealed and delivered; that "wills should be construed more favourably, and deeds "more strictly;—that money lent upon bond is recoverable "by action of debt;—that breaking the public peace is an "offence, and punishable by fine and imprisonment;—all "these are doctrines that are not set down in any written "statute or ordinance, but depend merely upon imme-

"morial usage—that is, upon common law—for their "support." (*a*)

In this age of legislation, two important parts of this summary are no longer correct.

It is no longer true, as in the time of the commentator, that the common law guides and directs the proceedings in the ordinary courts of justice. With few exceptions, all proceedings in courts of justice are now prescribed and regulated by acts of parliament.

Again, in modern times, acts of parliament have so altered and formed into a system the laws relating to crimes, that in very few particulars is it now true that the common law settles the manner and degrees of punishment for temporal offences. It still, however, mainly settles the several species of crimes: for instance, the distinction with which every one is familiar between murder and manslaughter depends on the common law.

The words "for the most part" serve to render the rest of the summary sufficiently consistent with the law in its present state: therefore I need not now point out parts of it affected to a limited extent by recent legislation. I wish you to bear in mind the words last quoted, "for the most part," when reading again the paragraph in which they occur. In your future reading, and later still, in your practice, you will find it necessary, upon almost every subject, to blend common law and statute law, to form one rule.

(*a*) Blackstone's Commentaries, I. 68.

## LECTURE III.

1. *Common Law.*
2. *Statute Law.*
3. *Inheritance.*
4. *Lineal Descent.*
5. *Representation.*
6. *Ancestral Inheritance.*
7. *Collateral Descent.*

Of all the titles or heads into which the common law might be divided it would be difficult, if possible, to find one the details of which have not been to some extent changed by some act of parliament. Until the year 1833, the rules of the common law in respect of the inheritance of lands remained unchanged. In that year, an act of parliament (*a*) was passed "for the Amendment of the Law "of Inheritance." This act altered the law in several important particulars, especially with reference to cases of owners of land dying without issue. Contrary to the common law, it made the father or other lineal ancestor of a deceased person capable of being his heir in preference to persons descended from such father or lineal ancestor. Also, contrary to the common law, it made a person's kinsman of the half-blood capable of being his heir in preference to more remote kinsmen of the whole blood. It regulated the order of descent among collateral kinsmen.

In the case of an owner of land dying, leaving children, or descendants of children, the statute just referred to did not make any change; and the law, in such a case, is in the same state as if parliament had never dealt with the law of inheritance. I am glad to find a portion of the mere common law, though a limited portion of one department of it, to treat of, without occasion to refer to any part of the statute law; and I am well pleased that the portion I am thus able to select is a part of the law of inheritance. Of every system of jurisprudence the law of inheritance, especially in respect of lineal descents, is one of the most

(*a*) Statute 3 & 4 William IV. chapter 106.

prominent parts. It is usually found by instructors to supply for younger students an attractive subject for investigation and discourse: and it is easily illustrated by references to passing events, as well as to events related in history.

It is peculiarly consistent with the plan of these Lectures to state now the purport and some of the details of the common law of inheritance applicable to cases of persons dying leaving issue, inasmuch as the subject to which, next after that of the general common law, I intend to proceed is that of local customs; and it so happens that the most important and the best known local customs to be found in this country are, in fact, certain usages which have established, in certain districts, peculiar modes of descent among children and other descendants of deceased owners of land. These customs or usages are exceptions to the common law of inheritance. To avoid occasions for referring at this time to the statute law, I shall now confine my attention and yours, as closely as may be, to lineal descents, excluding, as much as I can, every reference to descents in cases of persons dying without issue.

If an owner of land dies leaving an only son, or more sons than one, his only son or his eldest son is his heir. If, leaving no sons, he leaves an only daughter, she is his heir. If, leaving no sons, he leaves two or more daughters, all his daughters are his heirs and share the inheritance equally. Technically, daughters thus inheriting are called parceners, or coparceners, and are said to hold in parcenary, or coparcenary.

The rules just stated are clear enough in the case of a man's only child, or all his children, surviving him: but, in the case of any of his children having died in his lifetime, the rules are thus qualified: any issue of a deceased child take his place, and are said to represent him. Thus, if a man dies, leaving several sons, and also one grandson, or several grandsons, by a deceased eldest son, the only

grandson or the eldest of the grandsons succeeds in preference to his uncles, the surviving younger sons, though they are nearer in blood to his grandfather. So, if the deceased eldest son had left a daughter, or several daughters, and no son, and no descendant of any son, the only daughter, or all the daughters equally, would have succeeded in preference to their uncles, the younger sons of their grandfather.

Suppose the case of John having three sons, Thomas, Richard and Robert; and of Thomas the eldest dying in the life of John leaving a son William; at John's death William represents Thomas, takes his place, and is the heir of John in preference to Richard and Robert. So, if Thomas had left an only daughter, Mary, or two daughters, Mary and Elizabeth, and no son, and no descendant of any son, Mary would have been the heir, or Mary and Elizabeth would have been the co-heirs, of their grandfather John, in preference to Richard and Robert.

In the application of the right of representation there is the same preference, in every descent to a second or third or more remote generation, of males and the issue of males to females and the issue of females, and the same preference of the elder of several males and of his issue, and the same equality among females, as in the more usual case of a descent to an only or eldest son, or to several daughters.

The right of representation being strictly observed, there cannot be a descent to, or through, a second or third or other younger son while there is any descendant living, whether male or female, of any elder son. Nor can there be any descent to, or through, any daughter or daughters while there is any descendant living of any son.

In the case of the death of one or more of a man's daughters, and of his death not leaving any son or any issue of any son, the rule of representation is thus applied: the representative of each deceased daughter takes only what would have been her part if she had survived her father; and there is in every generation the same preference,

as before stated, of males and the issue of males to females and the issue of females; and the same preference of the eldest of several males, and the same equality among females. Suppose the case of John dying, not leaving any son, nor any descendant of any son, and having had three daughters, Mary, Eliza and Jane; and of Jane having died in his lifetime, leaving an only or eldest son Thomas; John's co-heirs, as parceners, are Mary, Eliza and Thomas, each taking a third of the inheritance. But suppose Thomas to be also dead in the lifetime of his grandfather John, leaving two daughters, Margaret and Edith, and no son, and no descendant of any son; then John's co-heirs are his daughters Mary and Eliza, and his two great-grand-daughters Margaret and Edith; Mary's share being one-third, Eliza's share being one-third, and what would have been Jane's share being equally divided between Margaret and Edith, each of these two taking a sixth of the whole. It is easy to suppose, and, with a little attention, it is easy to understand, cases by means of which in conversation the rules of the common law, in respect of lineal descents, may be impressed on the student's mind; and I recommend you to devote an hour or two to the solution of questions raised in this manner. Blackstone puts the case of John having two daughters, Margaret and Charlotte, and of Margaret dying in his life leaving six daughters: at John's death, his co-heirs are his daughter Charlotte and his six grand-daughters; Charlotte taking one-half of his estate, and each of the granddaughters taking a twelfth.

I adhere to my purpose of excluding at this moment from my attention and yours the laws of inheritance applicable to cases of persons dying without issue. In each case, guided by rules which, as with reference to most subjects of jurisprudence, may be formed from statute law and common law blended, you are to seek the heir among the lineal ancestors and collateral kinsmen of the deceased. I content myself, therefore, with referring you to Black-

stone's Commentaries and the Statute of 1834, merely adding, that in cases of collateral descent you will find a preference of males, a preference of the eldest of several males, an equality among females and rights of representation; these preferences, this equality, and these rights taking effect in like manner as in cases of lineal descent.

## LECTURE IV.

1. *Crown Descent.*
2. *Henry the Seventh.*
3. *Henry the Eighth.*
4. *Female Primogeniture.*
5. *Half-Blood.*
6. *Representation.*
7. *James the First.*
8. *Revolution.*
9. *Crown: Settlement by Act of Parliament.*
10. *Princess Sophia of Hanover.*

THE descent of the Crown of England is, according to the rules of the common law, with two exceptions: firstly, that of several females next in succession, the eldest only inherits; and secondly, that the exclusion of the half-blood never prevailed with reference to the Crown.

You know enough of the common law of inheritance to find an instructive lesson in tracing the descent of the Crown from the accession of Henry the Seventh in 1485, to the Revolution of 1688, and from the death of Queen Anne in 1714, until the present time. In doing this you will find instances of the application of most of the rules with which you are now familiar.

Strange though it may seem, I trace with you the descent of the Crown, with the object of impressing on your minds the rules of descent in respect of private inheritances. For this purpose, the many points in which the two modes of descent differ may be of as much use as those in which they are alike.

By a statute passed in the first year of the reign of Henry the Seventh, it was declared that the inheritance of the Crown should remain in that King and the heirs of his body. In a settlement of land, the effect of such a limitation is to give to the person named what is technically called an estate tail; that is, an estate which descends according to the course of the common law of inheritance among his descendants only, and not on failure of his issue to any lineal ancestor, or collateral kinsman. With sufficient propriety it may be said that, by force of the

statute, Henry the Seventh was tenant in tail of the Crown. But for Henry's title by conquest, and but for the statute, his wife Elizabeth, daughter of Edward the Fourth, was, by reason of the deaths of her brothers, King Edward the Fifth and Richard Duke of York, both without issue, entitled to the regal dignity and power.

By Elizabeth, whom he survived, Henry the Seventh had four sons, Arthur, Henry, Edmund and Edward, and four daughters, Margaret, Mary, Elizabeth and Catherine. Edmund, Edward, Elizabeth and Catherine all died in childhood. Arthur, the eldest son, died in his father's life, and without issue. You will soon perceive why I am thus particular in my account of all the children of Henry and Elizabeth.

At the death of Henry the Seventh in 1509, his heir was his only surviving son Henry the Eighth. This King may be said to have had by descent three titles to the Crown. Firstly, he was the heir of Henry the Seventh, who gained the Crown by conquest. Secondly, he was the heir of Henry the Seventh, upon whom and the heirs of his body the Crown was settled by act of parliament. Thirdly, he was the heir of his mother Elizabeth, the true heir of the Crown.

Henry the Eighth died in 1547, leaving three children by different mothers; one son, Edward, and two daughters, Mary and Elizabeth. The son became King by the title of Edward the Sixth.

Upon the death of Edward the Sixth in 1553, without issue, and leaving two sisters, his eldest sister, though of the half-blood, Mary, became Queen; Elizabeth being excluded by reason of the Crown being excepted from the ordinary mode of descent to two or more females next in succession.

Upon the death of Queen Mary in 1558, without issue, Elizabeth, the only surviving child of Henry the Eighth, though Mary's sister of the half-blood only, became Queen.

True it is that, in compliance with the caprices of Henry the Eighth, several acts of parliament were passed in his reign, regulating the succession to the Crown; and the inheritance by Edward, Mary and Elizabeth successively was in conformity with the provisions made by the last of these acts. Nevertheless Edward was, in point of fact, Henry's heir; and as the exclusion of the half-blood never applied to the Crown, though Edward, Mary and Elizabeth were children of Henry by three different mothers, Mary was, in point of fact, Edward's heir, and Elizabeth was, in point of fact, Mary's heir. Accordingly, an act of parliament, made in the first year of the reign of Queen Mary, declared that the Crown had come to her by descent; and in the first year of the reign of Queen Elizabeth, her title by descent was also asserted by an act of parliament.

Upon the death of Queen Elizabeth in 1603, without issue, there was a failure of issue of Henry the Eighth. You will now see why I have been very particular in my account of the children of Henry the Seventh. As all the sons of that king, except Henry the Eighth, had died without issue, and as Margaret, the eldest of his surviving daughters, was dead, leaving issue, it followed that, on the death of Henry the Eighth, the heir of the Crown was, according to the right of representation, to be found among her descendants. She was the wife of King James the Fourth of Scotland, by whom she was the mother of King James the Fifth. The only child of James the Fifth was Mary Queen of Scots, whose only child was King James the Sixth of Scotland. James the Fifth and his daughter Mary being both dead at the time of the death of Queen Elizabeth, James the Sixth stood, by right of representation, in the place of his great-grandmother Margaret, and inherited the Crown of England.

This king, who in England is called James the First, had two sons, Henry and Charles. Henry, the eldest, died without issue during his father's life. Upon the death of

James in 1625, his only surviving son, Charles, succeeded him.

The first Charles had three sons, Charles, James and Henry. At his death in 1648, his eldest son became by descent king, by the title of Charles the Second, though excluded from the regal power until the restoration in the year 1660.

Upon the death of Charles the Second in 1684, his only surviving brother became king by the title of James the Second.

By his first wife, James the Second had two daughters, Mary and Anne. By his second wife, he had one son, James, the father of Charles, Edward and Henry.

At the time of the revolution in 1688, the convention having, after the flight of James, declared the throne vacant, and having placed on it William and Mary, the succession to the Crown was settled, in derogation of the claims of the son of James and his descendants, and, therefore, contrary to the common law of descent, which, but for the tyranny and flight of James, and the consequent revolution, ought after his death to have prevailed. Thus the Crown was limited by act of parliament to William Prince of Orange and his wife Mary, William being a nephew, and Mary being the eldest daughter, of James, during their lives and the life of the survivor; and after the death of the survivor, to the heirs of the body of Mary; and for default of such issue, to Anne, the other daughter of James, and the heirs of her body; and for default of such issue, to the heirs of the body of William.

Mary having died without issue, and William having survived her, and there being no hopes of his leaving issue, and Anne's son, the Duke of Gloucester, being dead without issue, and there being no hopes of Anne leaving other issue, a further settlement of the Crown was, late in the reign of William the Third, made by an act of parlia-

ment (*a*). This statute, called the Act of Settlement, limited the Crown in the events of the death of William without issue, and the death of Anne without issue, to the Princess Sophia of Hanover, and the heirs of her body, being Protestants. This princess, the youngest daughter of Elizabeth Queen of Bohemia, the daughter of James the First, was the nearest Protestant of the blood royal after William and Anne. The settlement of the Crown upon her was, in derogation of what might otherwise have been the rights of the son of James the Second, and of many descendants of Elizabeth Queen of Bohemia, whose claims, but for the Act of Settlement, might have been preferable to those of the Princess Sophia and her descendants. The wisdom of the statesmen to whom this country owes this last limitation of the monarchy has been proved by the result, the long-continued freedom and prosperity of the kingdom.

(*a*) 12 & 13 William III. chapter 2.

## LECTURE V.

1. *Crown Descent.*
2. *Princess Sophia of Hanover.*
3. *Representation.*
4. *Queen Victoria.*
5. *Heir Presumptive.*
6. *Heir Apparent.*

As, by reason of an act of parliament, we started with Henry the Seventh, as the root of the pedigree by means of which the descent of the Crown was to be traced, so, by reason of another act of parliament, the Act of Settlement mentioned in the last lecture, we must now substitute for Henry, the Princess Sophia, as the root of the royal pedigree.

William and his successor Queen Anne both died without issue. Sophia died during the life of Anne, leaving a son George, Elector of Hanover, who, on the death of Anne in 1714, became King of England.

Upon the death of the first George in 1727, he was succeeded by his only son George the Second.

We now come to another instance of the right of representation taking effect. George the Second had two sons, Frederick Prince of Wales, and William Duke of Cumberland. Frederick had four sons, and died during the life of his father George the Second; upon whose death in 1760, the eldest of Frederick's sons stood by right of representation in his place, and became king by the title of George the Third.

King George the Third had many children; and dying in 1820, was succeeded by the eldest of his sons, George the Fourth.

The only child of George the Fourth, the Princess Charlotte of Wales, died without issue during his life, indeed before his accession to the throne. Frederick Duke of York, the second son of George the Third, having died without issue during the life of George the Fourth, the latter was succeeded in 1830 by the Duke of Clarence,

the third son of George the Third, by the title of William the Fourth.

Upon the death of William the Fourth, without issue, in 1837, occurred an instance of the right of representation taking effect in the person of a female princess in preference to a male nearer in blood to the deceased sovereign. William's heir was our present sovereign Lady Queen Victoria, the only child of Edward Duke of Kent, the fourth son of George the Third, in preference to her uncle, Ernest Duke of Cumberland, who was the fifth son of George the Third, and who succeeded to the throne of Hanover, from the succession to which females are excluded.

Of the several children of Queen Victoria, the first-born was a daughter, Victoria, the Princess Royal, now married to the Prince Frederick William of Prussia. The second born was a son, Albert, now Prince of Wales. These circumstances make this a convenient place to bring to your notice the distinction between an heir presumptive and an heir apparent. It is a maxim, Nemo est hæres viventis. At any time during a person's life, the person who, in the case of his death at that time would be his heir, is properly termed either his heir presumptive or his heir apparent. Now an heir presumptive is a person who, if another person were to die at this time, would be his heir; but who may possibly be deprived of his chance of inheriting by the birth of a third person. Thus, if John's father is dead, and if John has no child and has a brother Thomas, John's heir presumptive is Thomas, who may, by the birth of a child of John, be deprived of his chance of the inheritance. In like manner John's father, if living, would have been his heir presumptive, by reason of the Statute of 1834, making a person's lineal ancestor capable of being his heir. So if John has a daughter Mary, and no sons, his heir presumptive is Mary, who may, by the birth of a son, lose her chance of the inheritance. An heir apparent is a person who, if another person were to die at this time, would be his heir, and who cannot, by the birth

of another, be deprived of his chance of the inheritance. Thus it is, that a person's only or eldest son is his heir apparent. Also, by representation, a person's heir apparent may be an only or eldest son of his deceased only or eldest son.

Frederick Prince of Wales was the eldest son and heir apparent of George the Second. When Frederick died his eldest son George, afterwards George the Third, became, by representation, the heir apparent of George the Second.

Before the birth of Albert Prince of Wales, his sister Victoria, the Princess Royal, was the heir presumptive of Queen Victoria. She ceased to be the heir presumptive on the birth of an heir apparent in the person of her brother.

The case in which a female can be an heir apparent is that of a daughter of an only or eldest son dying without sons, or any issue of any sons, during the life of his father. In this case the daughter stands, by representation, in her father's place, and is the heir apparent of her grandfather.

## LECTURE VI.

1. *Peerages. Descent.*
2. *Half-Blood.*
3. *Peerages. Co-Heiresses.*
4. *Abeyance.*
5. *Peerages by Tenure.*
6. *Bishops.*
7. *Office of Honour.*
8. *Co-Heirs of an Advowson.*
9. *Partition.*
10. *Judge-made Law.*

EVEN before the Statute of 1834, in the descent of a peerage, a kinsman of the half-blood was not excluded from the inheritance. Thus, if a peer dies, leaving a son and daughter by a first wife and a son by another wife, and if the eldest son having inherited the peerage dies without issue, his brother of the half-blood, and not his sister of the whole blood, inherits the peerage quite irrespectively of the Statute of 1834. As regards half-blood, that statute altered the laws of inheritance only with reference to inheritable property, and not with respect to inheritable dignities.

Most peerages are created by patents; and the usual practice has for a long time been so to word a patent as to limit the dignity to the person made a peer and the heirs male of his body; thus excluding females from the succession. There are, however, some ancient peerages originating in writs of summons, or perhaps existing by prescription, not thus limited; the descent to which is according to the common law of inheritance, not excluding females. But this law is modified to meet the difficulty that a peerage is not divisible like an ordinary inheritance. In the case of the Crown we have seen that the same difficulty is met by preferring the eldest of several sisters. But if a peer, whose dignity is not limited to male heirs, dies, leaving several females his co-heirs, the peerage does not devolve upon either: it remains in abeyance until the abeyance is determined by the Sovereign in favour of one of the co-heirs, or of some person who, after her death, stands in her

place by representation, or until the abeyance determines by the death and failure of issue of all the co-heirs but one, upon whom or whose heir the dignity then devolves. An instance of the determination of an abeyance of a peerage is that of the barony of Camoys, which fell into abeyance by the death of the second baron early in the reign of Henry the Sixth, leaving his sisters his co-heirs. In the year 1839, after the lapse of more than 400 years, Queen Victoria determined the abeyance in favour of Thomas Stonor, the representative of the eldest of the co-heirs. Another instance is that of the barony of De la Zouche. Soon after the death of Cecil Lord De la Zouche, in 1828, leaving no son, and leaving two daughters, the Crown determined, in favour of his eldest daughter, the abeyance of his peerage.

I have spoken of these ancient peerages which descend according to the course of the common law as originating in writs of summons. The meaning of this is, that if, without a patent creating a peerage, a man is summoned to parliament as a peer, the writ of summons is proof that the person summoned is entitled to a peerage, which for want of a patent regulating its descent, descends according to the course of the common law.

But besides these inheritable peerages there are others, the existence of which are, I think, also properly proved by means of ancient writs of summons. I mean peerages by tenure, peerages to which the owners of certain landed estates are entitled by reason of their tenure of those estates. Of these dignities there are but few instances. The Duke of Norfolk possesses one, the Earldom of Arundel, as the owner of Arundel Castle. A claim of Sir Maurice Berkeley to be Baron de Berkeley by tenure, he being the owner of Berkeley Castle, has been referred by the Crown to the House of Lords, and is now pending there. There appears to be strong ground for believing that writs of summons addressed in ancient times to Barons de Berkeley, being owners of Berkeley Castle, were sent to them by reason of

their tenure of that castle, for in the reign of Henry the Seventh, the castle was granted by its then owner to that king and the heirs male of his body, the last of whom was Edward the Sixth; and it appears that during the time the castle was thus the property of the Crown, the then representatives of the Berkeley family were not summoned to parliament, though before and after that period the owners of the castle were so summoned as Barons de Berkeley.

A peerage of this sort cannot be properly spoken of as itself an inheritable dignity. It is an appendage to certain estates, as the patronage of a church, or, to use a more homely illustration, a right to turn cattle to feed on a common may be. With the estate it may descend from ancestor to heir, or be made the subject of a family settlement, or pass from buyer to seller, and so frequently change hands. There is believed to be now an unwillingness to recognize a peerage, which might in these commercial, as distinguished from feudal, times, be bought or sold like any ordinary property, or possibly be made subject to pecuniary incumbrances; but it cannot be supposed that feelings of this sort can have any effect when judicial consideration is given to the strong proofs adduced in support of Sir Maurice Berkeley's claim.

Coke, Blackstone and other writers refer the title of the bishops to be summoned to parliament to their tenure of certain ancient baronies belonging to their sees. This can hardly be correct as to the bishops whose sees were created by King Henry the Eighth, those of Oxford, Peterborough, Gloucester and Bristol, and certainly not as to the recently-created sees of Manchester and Ripon. Chief Justice Hale denied this origin of the right of the bishops to be members of the House of Lords, and referred it to ancient usage only. The point has been a subject of controversy. Certain it is that by an ancient usage, being, like other ancient usages, a part of the common law, the bishops are lords of parliament, whether this usage did or did not originate in the tenure by some of them of ancient baronies.

Not as in the case of a peerage, nor as in the case of the Crown, if a man dies possessed of an inheritable office of honour, leaving several daughters his co-heirs, the husband of the eldest executes the office, and, if she is not married, it must be executed by a deputy (*a*). The instance given by Coke of an office of honour is that of High Constable of England. The office of Earl Marshal of England is, you know, one of the hereditary possessions of the Duke of Norfolk.

If the co-heirs of an advowson, the right of patronage of an ecclesiastical benefice, cannot agree to present together, as the right is not divisible, they present in turns, the eldest taking the first turn, and the others taking their turns in the order of their births. The right of the elder of several parceners to her turn may descend with her share to her representative: but it is an unsettled point whether she can, with her share, transfer to another her turn (*b*).

Estates inherited by parceners are sometimes divided by commissioners. When the shares into which the lands are to be divided are arranged by the commissioners, the eldest sister has not a right to choose her share. If the commissioners cannot agree as to the allotment of the shares, they may be reduced to the necessity of drawing lots. In a suit for the partition of an estate devised by a testator to his two daughters who were his only children, commissioners appointed by the Court of Chancery, having divided the estates into two shares, made a return that they could not agree as to which share should be allotted to either sister. The difficulty appeared to be, that each sister wished to have the share of which the chief mansion-house on the estate formed a part. In a judgment given by Vice-Chancellor Kindersley (*c*), sending back to the com-

(*a*) Coke upon Littleton, 165 a.

(*b*) Hargrave's Note to Coke upon Littleton, 166 b, Note 2.

(*c*) *Canning* v. *Canning*, 23 Law Journal, New Series, Chancery, 879, 1854.

missioners their return to be reconsidered, and suggesting several points to be considered, he made the remark, that perhaps an elder sister might have a priority of choice, for though her being the elder would not give her a right of choice, still it was a fact which might be taken into consideration by the commissioners. Other points the Vice-Chancellor suggested for consideration were, that one of the sisters might have property adjoining one of the shares; that in the case before him the elder sister was married; that the husband had assumed her family name, and they would live in the mansion-house, a more suitable residence for her than for a single lady. The commissioners upon reconsideration could not agree, and did not, as they might have done, draw lots. The Vice-Chancellor directed a new commission, directed to them, and a third commissioner, a Queen's counsel. The ultimate result is not stated in the report. I know that the elder sister and her husband do reside in the mansion-house; and it may be supposed that the commissioners decided in their favour the point in dispute. This case is a precedent which may be of use to future commissioners for the partition of estates: and is rather a good instance of judicial legislation, especially upon the point of priority of choice. If future judges regard it as law, they may be amenable to Blackstone's censure, that they argue from particulars to generals.

The authority I have just been considering applies only to the modern practice of making partitions by the authority of the Court of Chancery. Of the five modes of partition specified by Littleton, commented upon by Coke, and explained by Blackstone, four resolve themselves into partitions by the agreement of the parties. According to the first, the sisters simply agree as to the division of the lands, and the share which each is to take. According to the second, the sisters choose a friend, who divides the land into equal shares, and each sister makes her choice, beginning with the eldest. According to the third, the eldest

sister divides the lands, and each sister makes her choice, beginning with the second, the share last left being taken by the eldest. According to the fourth, the lands being divided either by agreement, or by a friend, or by the eldest sister, all the sisters drew lots for the shares. The fifth, and the only compulsory mode of partition provided by the common law, was the execution of a writ of partition sued out by one of the parceners and directed to the sheriff, who, with the assistance of a jury, divided the lands into shares. In this case, as in the case of a commission from the Court of Chancery, the eldest sister had not a right of choice; but the sheriff assigned to each sister the share he thought right (*a*). This writ of partition, which had become a very unusual proceeding, is one of many common law remedies abolished by an act of parliament in 1834 (*b*).

(*a*) Littleton, section 249; Coke upon Littleton, 168 a.
(*b*) Statute 3 & 4 William IV., chapter 27, section 36.

## LECTURE VII.

1. *Local Customs.*
2. *Gavelkind.*
3. *Borough English.*
4. *Local Custom. Proof.*
5. *Gavelkind and Borough English. Proof.*
6. *Gavelkind in Kent.*
7. *Disgavelled Estates.*
8. *Gavelkind. Co-Heirs of an Advowson.*
9. *Borough-English, applying to Lineal Descent.*
10. *Borough-English, applying to Collateral Descent.*

We are now arrived at a point at which we may with great propriety proceed to the consideration of customs which are not part of the general law of the land, but prevail only in particular districts or places, and are therefore called local customs. Within those districts they are a part of the law because they have always been there observed. The best known of these local customs are those of gavelkind and borough-English: both exceptions to the common law rule of inheritance, that when a man dies leaving two or more sons, the eldest son is his heir.

By the custom of gavelkind, which prevails in Kent and in some other parts of England, lands descend to all the sons instead of the eldest only.

By the custom of borough-English, which prevails in certain ancient boroughs, lands descend to the youngest son only of an owner who dies leaving more sons than one. One of these boroughs is Ledbury, in Herefordshire; another is Gloucester, which became a city when made by Henry the Eighth the see of a bishop, without losing its character of an ancient borough.

In Montesquieu's Spirit of Laws you will find this chapter (*a*):—"Father Du Halde says, that among the Tartars "the youngest of the males is always the heir, by reason "that as soon as the elder brothers are capable of leading "a pastoral life, they leave the house with a certain number "of cattle given them by their father, and build a new

(*a*) Montesquieu, Book 18, Chapter 21.

" habitation. The last of the males who continues at home " with the father is then his natural heir.

" I have heard that a like custom was also observed in " some small districts of England; and we find it still in " Brittany, the Duchy of Rohan, where it obtains with " regard to ignoble tenures. This is doubtless a pastoral " law, conveyed thither by some of the people of Britain, " or established by some German nation. By Cæsar and " Tacitus we are informed that the latter cultivated but " little land."

It may be suggested that the custom of borough-English had an origin similar to that attributed by Montesquieu to the custom of the Tartars in favour of youngest sons. It is probable that anciently the owners of dwelling-houses in boroughs were tradesmen, burgesses who lived in them. As the sons of a burgess grew up to manhood, they were, in turns, set up by their father, with capital in trade for themselves; the youngest remained at home to assist his parents, and continued after his father's death in possession of the house in which he had lived.

Between the general customs which constitute the common law and local customs, there is an essential distinction. Everybody knows, or is supposed to know, what the law of the land is upon every possible point. In no case is any person allowed to plead ignorance of the law; but whenever any person relies in a court of justice on a merely local custom, he is bound to prove by evidence the existence of the custom and its application to the subject in question. For instance, suppose it to be a custom of a particular place that a widow shall have for her life the whole or one-half of her husband's lands for her dower, instead of one-third according to the common law. In such a case no one, not even any court of justice, is expected to know either that such a local custom exists, or that any particular lands in question are so situate as to be affected by it. These are points which it would be for a widow claiming for her dower more than a third of her husband's lands to

establish by evidence, in the same way as any other matter of fact upon which a party relies ought to be established: for instance, a gift or a loan, or a contract or a breach of a contract.

With reference, however, to gavelkind and borough-English, the law requiring proof of the existence of a custom and of its application is thus qualified: those customs are so notorious and so much more general than any other local custom, that every person and every court is bound without evidence to know of their existence; or, to use more technical language, to take notice (notitiam) of them. When, therefore, a person relies upon either of these two customs, what he has to prove by evidence is, not the existence of the custom, but that the land in question is so situate as to be affected by it.

All lands in Kent are presumptively subject to the custom of gavelkind. But many estates in that county have, at the instance of the owners of them, been disgavelled, by acts of parliament, and so made subject to the ordinary law of primogeniture. Any person alleging any land in Kent to be exempt from the custom of gavelkind must identify it as an estate, or part of an estate thus disgavelled. He then establishes an exception to an exception.

From a remark made by Coke, it would seem, that the custom of gavelkind properly applies to lineal descent only and not to collateral descent; for Littleton saying that in gavelkind the sons (fits males is his barbarous law-French phrase for sons) inherit, Coke adds: "And this is the "general custom extending to sons; but yet by custom, "when one brother dieth without issue, all the other "*brethren may* inherit" (*a*). I apprehend that if in any case it were alleged that the gavelkind custom, as observed in a particular district, extends to collateral descents, it would be for the person making the assertion to prove, affirmatively, its truth. However this may be, it appears

(*a*) Coke upon Littleton, 140 a.

that the extension of gavelkind to collateral descents prevails universally in Kent (*a*).

As in the case of women, parceners, so in the case of gavelkind co-heirs of an advowson, the co-heirs, if they cannot agree to present together, present in turns, the eldest taking the first turn; but it seems an unsettled point whether the eldest can transfer his first turn to another (*b*).

Properly, the custom of borough-English regulates only lineal descents. If an owner of borough-English lands dies without children, leaving two or more brothers, the eldest of the brothers inherits alone according to the general law, unless the peculiar custom of the particular place, superadded to the borough-English custom, gives a preference to the youngest brother. Any youngest brother relying on such a peculiar extension of the custom would be bound to prove it affirmatively. So also would it be in the case of several more remote collateral kinsmen being the next in succession.

At Gloucester the custom does not extend to collateral descents, so that, in the case of brothers or other more distant kinsmen of a person deceased being the next in succession, the eldest would be heir according to the common law.

(*a*) Hargrave's note to Coke upon Littleton, 140 b, note 1; Hargrave refers to Robinson on Gavelkind, 92.

(*b*) Hargrave's note to Coke upon Littleton, 166 b, note 2.

## LECTURE VIII.

1. *Copyhold.*
2. *Customary Freehold.*
3. *Ancient Demesne.*
4. *Customs progressive.*
5. *Villenage.*
6. *Slavery.*
7. *Personal Freedom.*
8. *Political Liberty.*

The most common local customs are the various customs of different manors in respect of copyhold lands. The essential, the practical difference between freehold tenure and copyhold tenure may, with sufficient accuracy, be thus stated. In the present state of the law the ordinary evidence of the title to freehold lands are title deeds made upon sales, mortgages and settlements, and remaining in the possession of the successive owners. Copyhold lands are transferred by a formal surrender, made by the owner, into the hands of the lord of the manor of which they are part, and a formal grant by the lord to the person to whom the intention is to transfer them. Transactions of this sort are recorded in the rolls or records of the manor; and copies of these rolls, authenticated by the steward of the manor, are the proper evidences of the title to any copyhold lands. The lands are usually said, in the rolls, to be holden by copy of court roll at the will of the lord according to the custom of the manor. There are some instances of lands holden by a tenure of the nature of copyhold, but called customary freehold, by reason of the words "at the will of the lord" being omitted from the rolls.

Of the origin of copyhold tenure in the existence in this country of villenage, a state of slavery to which many of the peasantry were, in remote times subject, I shall say but little, leaving you to read of it in Blackstone's Commentaries or, still better, in the corresponding part of Stephen's Commentaries. This origin has been doubted by some; but I think not on sufficient grounds.

The lands now holden by copyhold tenure are lands which were formerly holden by villeins, themselves the property of the lords of the manors, of which the lands were part. That villeins might be deprived of their lands at the pleasure of their lords was a necessary consequence of their servile condition; but successive lords of some manors having permitted villeins and their families to remain in possession of particular lands, usages sprung up and prevailed, regulating the enjoyment of the lands and at length controlling the wills of the lords themselves, so great is the force of custom. Thus is accounted for the present use of the phrase, "at the will of the lord according to the custom of the manor." In some manors copyhold tenure is termed base tenure.

In some manors, now or formerly parts of the Crown demesnes, may be met with a tenure called ancient demesne, somewhat resembling copyhold tenure. A satisfactory account of the origin of this may be found in Bracton, who wrote in the reign of Henry the Third. I direct your attention to an extract made from Bracton by Stephen in his Chapter of Tenures. Looking at the extract, you will think it clear that the predecessors of our modern copyholders held their lands in pure villenage (puro villenagio), and that the predecessors of the modern tenants in ancient demesnes held their lands in privileged villenage (villenagio privilegiato). The services of the pure villeins were uncertain. They were bound to do whatever their lords commanded, and might at the pleasure of their lords be deprived of their lands. The privileged villeins could not be deprived of their lands, while they rendered certain fixed services.

Ancient demesne lands are rare; and, I think, I have said enough of them. The only instance of them with which I am familiar is, that of the manor of Dymock, in Gloucestershire. According to one of the customs of that manor, ancient demesne lands are, upon any change of tenants, conveyed to the purchaser and the heirs of his

body, with remainder in default of his issue, to the lord of the manor. The conveyance is, as in the case of an ordinary freehold, by a deed, and not, as in the case of an ordinary copyhold, by surrender and admittance. It is not safe for an unmarried man, or a married man not having healthy children, to purchase ancient demesne lands in Dymock, or, if he does purchase them, he ought to have them conveyed to a trustee, having healthy children and grandchildren.

The history, you will read in the Commentaries, of the disappearance of villenage, will forcibly remind you that it is of the nature of law which depends on custom and usage to be progressive, to adapt itself gradually to changes of manners and of religion, to increased prevalence of religious motives, to improvements in the arts of life and of commerce, to successive states of higher civilization. Thus, as you may read, has the law glided, as it were, without direct legislative help, from giving its sanction to villenage, serfdom, slavery, from a system, according to which men were the property of men, into a system which prohibits slavery in all its forms.

In England, now, according to the cherished usage and custom of the people, every man is a free man. It is not a metaphor, it is strictly true, that a slave cannot tread the soil of England. A slave who lands here becomes, at the very moment, a free man.

Montesquieu spoke of the English as the one nation in the world that had, for the direct end of its constitution, political liberty. It is difficult, if possible, to separate the ideas of political liberty and personal freedom. To me it seems, that personal freedom is something greater than political liberty, and, in the instance of England, at least, contains it; and I think it an improvement on Montesquieu's idea, to assert that the chief direct end of the common law of England is to maintain every man in the enjoyment of personal freedom. To each of us this blessing is preserved by the very restraints to which our own laws make us all

subject, servi sumus legibus ut possimus esse liberi. That they are our laws, our own usages amended by ourselves, is a feature of our political liberty. Personal freedom and political liberty, by their mutual reaction, strengthen each other.

From this flight, which I am sure does not surprise you, I must descend to a not very attractive technicality—copyhold tenure.

## LECTURE IX.

1. *Copyhold Customs.*
2. *Copyhold Custom, like the Custom of Borough-English.*
3. *Copyhold. Primogeniture among Females.*

An important difference between freehold and copyhold tenure is this. The laws which relate to freehold lands are, of course, except when qualified by some local custom, as in the case of gavelkind or borough English, parts of the general common law of the land. The rules applicable to any particular copyhold lands are usually the customs of the manor of which they are part. These customs of different manors are infinitely various; some of them very strange. It is probable, that the wills, the actual wishes and intentions, sometimes the whims, of the lords of manors, had some influence in the rise and formation of the customs which now regulate the possession, the rents, fines and services for, and the descent and transfer of, lands still nominally holden at the will of the present lords, but in reality possessed independently of their will.

There are instances of its being the custom of a manor, that when a copyhold tenant dies, leaving two or more sons, the youngest son inherits the copyhold tenement. There are also instances of its being the custom of a manor, that if a copyhold tenant dies, not leaving sons, but leaving two or more daughters, the eldest daughter only inherits the copyhold tenement. These remarkable instances of a disregard of primogeniture among males, and of a regard to primogeniture among females, conflict greatly with the spirit of the common law.

The extract from Montesquieu, introduced into my remarks on borough-English, may throw some light on this part of our subject. Speaking of the descent of land to the youngest son of a deceased owner, he says: "I have heard that a like custom was also observed in some

small districts of England; and we find it still in Brittany, the duchy of Rohan, where it obtains with regard to ignoble tenure."

In England, copyhold lands are sometimes spoken of as being of base tenure. They are thus distinguished from freehold lands. Now, in feudal times, primogeniture was of the essence of the nobler tenure, freehold. It was a matter of public concern that, upon the death of the owner of lands, they should fall into the possession of the eldest of his sons, as being, probably the most matured in personal strength and character, and the most experienced in affairs and in arms. In the case of a small tenement in a borough, possessed by a trader, these reasons had so little application, that the convenience of the family of the deceased owner prevailed. Much less could these reasons apply to the case of lands holden by villeins or serfs, and the wills of the lords of some manors may well be supposed to have preferred the youngest and weakest of the sons of a deceased villein, to take his lands and remain in his dwelling, in preference to his brothers, stronger and better able to shift for themselves. The many instances of customs prescribing the descent of copyholds to youngest sons may perhaps be thus accounted for.

## LECTURE X.

1. *Copyhold.* *General Law.*
2. *Timber.*
3. *Minerals.*
4. *Buildings.*
5. *Fines.*
6. *Enfranchisement.*
7. *Judge-made Law.*

Of copyhold tenure there are many instances in all parts of England. It is a tenure recognized by the general common law, which provides some general rules applicable to it; those, for instance, which preserve to the lord of the manor, as the owner of the freehold, his property in the timber and minerals, and prohibit waste of buildings by a copyhold tenant, and those which regulate the fines and other payments to which the lord is entitled on changes of tenants by death or alienation. When lands are shown to be of copyhold tenure, a court of justice applies to them such parts of the general law as are applicable to that tenure; and any person relying on any alleged peculiar custom of a manor in respect of its copyholds is bound to prove the existence and application of the alleged custom.

By the common law, the timber and minerals, part of a copyhold tenement, are the property of the lord of the manor; but he has no right to cut the timber or dig the minerals, unless there is a special custom of the manor, enabling him to do so. In the absence of such a custom, unless the lord can by purchase or otherwise obtain the tenant's consent to timber being felled, it may, as the tenant has no right, in the absence of a special custom in his favour, to cut it, except for the purpose of repairs, remain on the tenement until it goes to decay. In like manner the lord has no right to work for minerals without a special custom enabling him to do so. In the absence of a custom giving the lord or the tenant a right to dig minerals, they may remain unworked until made the subject of

an arrangement between the lord and the copyholder. By the custom of the manor of Franfield, in Sussex, "every "tenant may fell timber on his copyhold for his own use, "and dig for minerals" (*a*).

The fines payable to lords of manors upon the admittance of new tenants, in consequence of deaths or on the occasion of alienations, are the subject of an important rule of the common law. In some manors there are customs fixing these fines, which are then termed fines certain. According to the customs of other manors the fines are assessed by the lords at their wills, and they are then termed fines arbitrary. But here steps in the common law and says, these arbitrary fines must be reasonable, and declares, that to be reasonable they must not in any case exceed two years' improved value of the land. In a judgment of Lord Loughborough, printed in Douglas's Reports (*b*) in a note, the history of this rule is traced. It does not appear why two years' value is fixed on as the maximum of a reasonable fine. The rule appears to be a valuable piece of gradually established Judge-made law, an arbitrary restriction on the exercise of an otherwise arbitrary power.

I think it needless to say anything of the modern acts of parliament relating to the enfranchisement of copyholds and their conversion into freeholds, inasmuch as the enfranchisement provided for is not, like the commutation of tithes, compulsory. The acts facilitate, regulate and give effect to voluntary enfranchisements agreed on by the parties interested, and the commutation of rights in respect of copyhold lands. Facilities are thus given for getting rid of the difficulties I just now referred to, with reference to timber and minerals.

(*a*) Watkins on Copyholds, ii. 493.
(*b*) Douglas, 724.

## LECTURE XI.

1. *Copyholds of Inheritance. Descent according to Common Law.*
2. *Copyhold Custom, like Gavelkind.*
3. *Copyhold Custom, like Borough-English.*
4. *Copyhold Descent to youngest Daughter.*
5. *Copyhold Descent to youngest of collateral Kinsmen.*
6. *Copyhold Primogeniture among Females.*
7. *Copyhold Exception of Females from Descent.*
8. *Other Copyhold Customs of Descent.*

THE details I have in the last Lecture given of the law of copyholds may seem inconsistent with the very elementary character of other parts of these Lectures: but I have found it impossible, consistently with my present plan, to omit them. They serve so greatly to illustrate the force attributed in England to customs and usages, whether general or exceptional.

With the same view I have selected from a large collection of copyhold customs, printed by Watkins at the end of his Book on Copyholds, many of the customary modes of descent. Familiar as you are with the preceding parts of these Lectures, my reason for preferring this to any other class of special customs is too obvious to need explanation.

Looking through these instances of special customs, you must bear in mind that, whenever by the custom of any manor copyholds are inheritable, the course of descent is according to the general common law, unless varied by a special custom of the particular manor. You will perceive in each specified custom a deviation, greater or less, from the common law course of descent.

A custom similar to that of gavelkind prevails in the manor of Highbury, in Middlesex, in favour of several sons of a deceased tenant. But the custom of the manor of Wareham, in Dorsetshire, is still more remarkable. In

" render to the contrary; and if he have no son, the " youngest daughter shall be heir after the same manner; " and if the same man have a second wife, and purchase " lands, now the youngest son of the second wife shall be " heir after the same manner in that land purchased; and " if they have more wives, after the same manner."

If you look at the various custumals printed by Watkins, you will find customary modes of descent which I have not noticed in this Lecture, and also peculiar customs relating to an infinite variety of points in connection with copyhold tenure.

## LECTURE XII.

1. *Trial of Questions of Fact, as distinguished from the Decision of Questions of Law.*
2. *Customs. Trial.*
3. *Custom of London.*
4. *Trial by Certificate.*

You must acquire a very clear understanding on this point: generally speaking, when a question of fact is in dispute, it is tried before a jury, and determined by their verdict; whereas a question of law is usually argued before a court of justice, and determined by the judgment of the court. This point may be illustrated thus: if parties in litigation are agreed as to the facts, but differ as to what the law is as applicable to the facts and to the matter in dispute, the question between them is argued before, and determined by, a court of justice, without the intervention of a jury. But according to the common law, and irrespectively of many instances to the contrary, provided for by acts of parliament and some of which I shall hereafter detail, if a fact be in dispute, the question is determined by a jury. Thus if of two parties, one were to assert, and the other to deny, that one promised to pay the other a certain sum of money, a jury would be the proper tribunal to try whether such a promise was made. But if the fact of the promise having been made, and the circumstances under which it was made were admitted by both parties, and if the only question were, whether, under the circumstances, the promise is legally binding, this would be a point of law, to be decided by the judgment of a court, and not by a jury. There will be many occasions for saying a great deal on this subject, and on the subject of exceptions from the general rule; that questions of fact are to be submitted to a jury; questions of law to a court; some exceptions having reference to the subjects of the questions in dispute, and some having reference to the tribunals before which the

questions arise. For the present purpose it is enough to say that the existence of a local custom and its application are generally as much a matter of fact to be tried by a jury as the making of a promise or the commission of a crime.

To this there is one remarkable exception. The city of London has several peculiar customs. If a party in litigation disputes the existence of an alleged custom of the city, this, though a question of fact, is not tried by a jury. It is sufficient for the recorder of London to appear in court and certify in the names of the mayor and aldermen what the custom of the city is upon the point in question. His certificate is held to be so conclusive, that ever after, even in litigations between other parties, the court to which it is given takes notice (notitiam) of the certified customs. An instance of this being done occurred in the year 1856, in the Court of Chancery (*a*).

In a case in which the corporation is interested, the custom cannot be thus certified, but the question is tried by a jury. A City Court takes notice of the customs of the City without proof (*b*).

Other cases in which a question can be tried by certificate are detailed by Blackstone and other writers. Many of these exceptions to the general law are obsolete, and some are too technical or too rare in practice to be subjects suitable for these Lectures.

(*a*) 26 Law Journal, New Series, Chancery, 148, 1857. It will be observed, that when I refer to modern cases my references are chiefly to the Law Journal Reports. My reason for preferring them to what are considered the more regular reports is, that the Law Journal is usually the more readily accessible to students resident in the country, and equally to those resident in London.

(*b*) Douglas, 380.

## LECTURE XIII.

1. *Usages of Merchants.*
2. *Right of Action.*
3. *Bills of Exchange.*
4. *Drafts on Bankers.*
5. *Accommodation Bills.*
6. *Use and Abuse of Laws.*
7. *Usury.*

You must be careful to understand the difference between local customs, and certain usages which have been established and observed among certain classes of persons, and which have been, as it were, imperceptibly adopted into, and are now part of, the common law of the land, even with reference to persons not of those classes, when engaged in transactions to which such usages relate. You already understand that a local custom is, within the district in which it is observed, regarded as a part of the law; to speak with precision, it is a local law. A usage such as I am now to speak of prevails throughout England, in the same way as if it were one of the general immemorial customs and usages which form the common law. But that this may be understood an example is requisite. To make clear the example I have selected, it must be premised that, by the common law, a right of action, that is, a right which cannot be enforced except by legal proceedings, cannot be transferred from one person to another. Thus, if John owes Thomas a sum of money, Thomas, by the common law, cannot by sale, or in any other manner, transfer the debt to William; that is, he cannot make William, instead of himself, John's creditor. But, by the usage of merchants, which has so far prevailed as to have been imperceptibly adopted as a part of the common law, there are means by which a right of action, a debt of a particular sort, may be and often is transferred. Now we come to the example: an endorsement of a bill of exchange. In its ordinary form, a bill of exchange is a writing by which the person who signs it, and who is called the drawer, requests

the person to whom it is directed, and who may be called the drawee, to pay to a third person named in the bill or his order a certain sum of money at a certain time. In modern times, it is very usual not to name a third person as payee, but to make the bill payable to the drawer or his order, in this form: Pay myself, or order. The same person is then, in effect, both drawer and payee. If upon this document being presented to the drawee, he accepts it by writing his name across it, he is then called the acceptor; and is, by the very act of acceptance, a debtor to the payee. This debt, provided the words "or order" are used in the bill, the payee can effectually transfer to any person by endorsing the bill, that is, by writing his name on the back of it. By the indorsement, the debt, a right of action, is effectually transferred to any person to whom the bill is delivered, who also may by delivery, with or without endorsement, transfer it to another: and so the right of action may pass, contrary, or by way of exception, to the general law, from one person to another, without limit as to the number of persons who may thus in succession be entitled to it. If the words "or order" are omitted, the bill is said to be not negotiable, and it cannot be transferred by indorsement or otherwise.

If, for the word order, the word bearer is substituted, the bill may then pass from hand to hand without indorsement, and with the bill passes the right to receive the money. A bill thus payable to bearer is said to be negotiable by delivery. Of this sort of bill of exchange is a common cheque or draft on a banker, which is almost always made payable to a person named "or bearer." No future time being named for payment, it is, to use the appropriate mercantile expressions, payable on demand or at sight, and need not, like a bill payable at a future time, be presented for acceptance. Its first presentment is for payment.

There are instances of bills of exchange being made expressly payable on demand or at sight. These words speak for themselves; the bill is payable on presentment.

When a bill of exchange, payable to a person named or order, has once been indorsed by him generally, that is, by merely writing his name on the back of it without naming any indorsee, it becomes negotiable by delivery without any future indorsement, and the money is payable to the person who at the end of the period named in the bill is the possessor of it. Though, in an indorsement, an indorsee be named, the bill nevertheless becomes negotiable by delivery without any further indorsement. To deprive a bill of its negotiable character an indorsement must be in one of these forms: "Pay A. B. only;" "Pay A. B. and no one else," or in some equivalent form.

Of the great utility of bills of exchange to persons engaged in manufactures and in commerce, facilitating, as they do, remittances of money and payments of the prices of merchandize carried to distant parts, your professional practice will soon make you well aware.

Sometimes, when goods are sold upon credit, the seller draws on the buyer a bill, which the latter accepts for the price. This bill the seller indorses to his banker or a bill discounter, from whom he thus obtains an advance of money, paying him for his profit, what is called a discount, according to the time the bill has to run before it is due. The seller has, thus, in his hands, the price of his goods, sooner than he could otherwise have it. This is a great advantage to many traders in various ways, but especially to manufacturers paying large sums every week in wages.

You will also find that bills are greatly made use of as securities for money borrowed, or for debts for the payment of which time is required. Bills of this sort are commonly discounted. Blackstone speaks of bills of exchange as securities originally invented among merchants in different countries, for the more easy remittance of money, and the use of which has since spread itself into almost all pecuniary transactions.

There are various proper uses of these securities, but in

innumerable instances the facilities which they give for obtaining credit or advances of money are greatly abused. The ruin every year of hundreds, traders and others, is caused or hastened by these facilities.

Accommodation bills are very common. The use of them is one of the vices of the present time. An accommodation bill is given, not when, as ought to be the case, the acceptor is indebted to the drawer, but when both wish to gain a fictitious credit, and so raise money to supply the wants of one or both. Little traders are apt to be guilty of this imprudence, but also it is known that some men of superior rank are prone to it, even persons of high rank, nay members of learned professions. What is more to the purpose I tell you that, when I was in practice, circumstances led me to know that the practice of signing accommodation bills prevailed, to a serious extent, among some mere students.

Enormous discounts are charged for money advanced on accommodation bills, which good-natured persons are induced to sign (lend their names this is called) for the supposed benefit of their friends in immediate want of money. It often happens that the money, spite of the promises of the person accommodated, is not paid when the bill is due, and his friend has to pay it, or perhaps the money lender permits the bill to be renewed for an increased amount, interest and expenses being added. The day of payment, or, in very many cases, of personal arrest, comes at last.

Believe me, I cannot urge you too strongly to form and persist in a resolution never, whether in youth or manhood, to be induced to sign an accommodation bill. By signing one, to assist a friend, you may postpone, but you will not make less certain, his ruin, and you will take a step towards your own.

You are not to consider my last remarks misplaced. The use and abuse of particular laws are most worthy of your attention. In this point of view I wish you to regard

our present subject. Custom having, with the object of promoting commerce, sanctioned a departure from the simplicity of the common law, and made it lawful to transfer, by certain means, money payable by one person to another, it was found that this privilege could not well be confined to mercantile persons or to mercantile transactions, and custom gradually extended it to other persons and to other transactions. The paper, the circulation of which is thus sanctioned by law, passes readily from hand to hand. Many large towns are infested by usurers, who for the sake of large profits incur great risks. You would be astonished if I had the means before me, at this time, of telling you of the high rates of interest which, in cases in which I have presided, have been shown to have been paid by persons having urgent occasion for money, and procuring it on bills to which they have induced their friends to attach their names. I have known discounts taken on such bills at the rate of 30*l.*, or 40*l*, or 50*l.*, or even 60*l.* per cent. per annum.

I had at one time begun a sketch within the limits of probability of the progress towards ruin of two young men lending each other their names to accommodation bills, renewed from time to time. This sketch I purposed to insert in this lecture; but upon reflection I thought this not an appropriate place for it. In a lecture on the law against theft, it would be out of place to trace the progress of a thief from the time he begins to pilfer to the time of his being sentenced to penal servitude for housebreaking or highway robbery.

There are few instances of persons, who once enter on a course of accommodation bills, escaping ultimate ruin and disgrace, or, at the best, life-long embarrassments. A succession of usurers prey on them; and even the last of the succession, if he is not repaid the money he advances, regards his loss as an ordinary trade loss to be made good by more fortunate transactions.

But you will say: can the legislature find no remedy for

these evils? I answer: no legislature, in any age or country, has been able, by laws against usury or by other means, to protect those who need money from being plundered by unscrupulous possessors of it.

For several reasons, one being that it was desirable that owners of money should be induced to lend it to prudent borrowers at fair discounts or interest, greater or less according to the greater or less relative demand and supply of money, the legislature has, by successive enactments, abolished all laws against excessive usury, except in the case of pawnbrokers lending money on pledges. These changes, besides effecting their proper object, have unfortunately greatly facilitated the circulation of accommodation bills, and it is believed that, if any attempts to restrain these mischievous securities could be expected to succeed, usurers would readily devise other ways equally effectual of plundering the imprudent.

## LECTURE XIV.

1. *Law Merchant.*
2. *Legislation.*
3. *Month.*
4. *Bills of Exchange.*
5. *Promissory Notes.*
6. *Bank Notes.*
7. *Accommodation Note.*

BILLS of exchange are said to be regulated by the custom of merchants, or, as it is sometimes called, the law merchant (lex mercatoria). This law consists, as respects this country, of such of the usages of mercantile men as have been adopted into our common law.

Of these usages, those which relate to bills of exchange are the most conspicuous and the most in daily operation. They illustrate the power of usage as a species of legislation. This sort of legislation has obviously, and probably in a greater degree than more direct legislation, one great merit: that of having the assent of those who obey it. You see that I often avail myself of opportunities of impressing on your minds the fact that the laws of England are the work of the people of England, whether originating in ancient usage and custom, or whether being express enactments of a legislature representing the people and deriving its power from ancient usage. A more certain instance of this does not, I think, exist, than that of the law merchant. It has itself, in instances to which I may have occasions to refer, been amended by acts of parliament.

The law merchant differs from the general common law in a curious particular, serving to show how by usage an exceptional rule may be engrafted on a general rule, itself originating in usage. Thus, generally speaking, when the word month is used, it means, according to the common law, twenty-eight days, unless the words "calendar month" are used; and then is meant, either one of the months designated by name in the almanack, or the time reckoned from and excluding a specified day of one of those months

to, and including the same day of the next of them. But, by one of the customs of merchants, adopted into the law of England, the word month, when used in a bill of exchange, means a calendar month, though the word calendar is not used. So that, if a bill of exchange, dated the eighteenth of September, is payable three months after date, the three months expire on the eighteenth of December, the end of ninety-one days, and not on the eleventh of December, the end of three times twenty-eight days: eighty-four days. The custom of merchants goes a little further as to the time at which a bill becomes payable. At the end of the stipulated time, three days, called days of grace, are allowed. In the case just supposed, payment could not be required until the twenty-first of December, though the three months expired on the eighteenth.

Bills of exchange are the subject of a very extensive branch of the law, comprising a variety of rules with which every practitioner must be familiar. In this early stage of your studies, I must not load your minds with this multitude of technical rules applying to the presentment of bills of exchange for acceptance, the presentment of them for payment, the dishonor of them, that is, the non-acceptance or the non-payment of them, notices of dishonor to the drawers and indorsers, the responsibility of the drawers and indorsers consequent on dishonor, and many other points on which an experienced practitioner is at all times ready to be consulted. These rules are best learnt when the student has an opportunity of seeing their practical application. Some of them have been amended, others have been introduced by acts of parliament.

There is a security for money resembling a bill of exchange which I ought not to leave unnoticed: a promissory note, or, as it is sometimes called, a note of hand.

By a promissory note, in its usual form, the person who signs it promises to pay a person named, or order, a sum of money at a specified period. Notwithstanding the use of the words "or order," or of the words "or bearer," the

common law rule prohibiting the transfer of rights of action prevented the transfer of a promissory note or of the debt constituted by it, until this was altered by a statute (*a*) made in the reign of Queen Anne, beginning thus:

"Whereas it hath been held that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over within the custom of merchants to any other person, and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action by the custom of merchants against the person who first made and signed the same, and that any person to whom such note should be assigned, indorsed or made payable, could not within the said custom of merchants maintain any action upon such note against the person who first drew and signed the same: Therefore, to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted." Then follows a long enactment, the effect of which is to make promissory notes payable to order or bearer, and the debts, constituted by them, transferable in the same manner and as effectually as bills of exchange are by the custom of merchants. You will have remarked the reference in this statute to the custom of merchants.

With respect to promissory notes, months are reckoned and days of grace are allowed as in the case of bills of exchange. Many rules are common to both sorts of securities.

You are familiar with the way in which the most common of all promissory notes, bank notes payable to a person named, or bearer, pass from hand to hand as money.

Besides the maker of a promissory note, the person who expressly promises payment, the payee may by in-

(*a*) 3 & 4 Anne, chapter 9.

dorsement make himself responsible for the money in case of the dishonor of the note by the maker. Accommodation notes are not uncommon. In a case of this sort, of the two persons who lend each other their names, one signs the note as the maker of it, the other indorses it to the person who advances money on it. ' What I have said of accommodation bills applies to accommodation notes.

## LECTURE XV.

1. *Trade Usages.*
2. *Liens.*
3. *General Lien.*
4. *Particular Lien.*
5. *Dyers.*
6. *Bankers.*
7. *Attornies.*
8. *Master and Servant.*
9. *Domestic Servants.*

It often happens that a particular trade has usages peculiar to itself. Usages of this sort, when well established, are respected by the courts of justice, and are deemed to be binding on all persons engaged in the trade, and on persons having with them dealings to which the usages are applicable. Perhaps a more correct way of stating the force and effect of trade usages is to say, that of every contract between or with persons engaged in a trade it is an implied term that any usages of the trade applicable to the contract, and not excluded by its expressed terms, are to be observed. Though this consideration serves to prevent these usages from having the character of laws, the usages themselves are of too much importance, and too frequently met with in practice, to be omitted from lectures in which customs and usages have a most prominent place.

When a trade usage is relied on, the party relying on it is, as in the case of a local custom, bound to prove the existence of the usage, and its application to the matter in question. This point might be illustrated by many examples; but one is enough for the present purpose. By the general common law, a workman has a lien upon, that is, he has a right to keep, any goods upon which he works for another person, until the price of his labour is paid. For instance, if cloth is delivered to a tailor to be made into a coat, he may keep the coat until he is paid for making it. His right to keep it is called a lien on it. Now, by the common law, this lien gives the workman a right to keep the goods until he is paid the price of working

on those particular goods only. He cannot keep them as a security for the price of his work upon other goods of the same customer, which he has previously worked upon and parted with the possession of. In the case just supposed, the tailor could not keep the coat as a security for the price of making other clothes for the same customer and previously delivered to him. But it sometimes happens that a particular trade has this peculiar usage, that a person engaged in it has a lien on any goods on which he works, not only for the price of working on those particular goods, but also for the price of previous work on any other goods for the same customer. To entitle a person to the benefit of such an alleged usage, if disputed, he must, by evidence, prove its existence and its application. For instance, dyers have often established by evidence in courts of justice the existence of this usage in their trade. A lien so established is called a general lien, whereas the common law lien, that of the tailors, for instance, it called a particular lien. A packer has a general lien for the whole balance due to him from a customer. A shipwright has only a particular lien on a particular ship in his possession for the price of repairing it. A banker has a general lien on all securities deposited with him by a customer for the whole balance due from the customer, and not a separate and particular lien on each separate security for money advanced at the time of its deposit. An attorney has a general lien on all the papers of a client for all monies due to him from the client, and not a particular lien on each set of papers for his costs in respect of the cause or transaction to which the set of papers relate. It is probable that this privilege of bankers originates in the power which a lender is sure to have over a borrower, and this privilege of attornies in the influence which a lawyer is likely to have over his clients. Thus bankers and attornies may have assumed rights which custom has confirmed.

The relation of masters and servants engaged in a trade is often regulated by usages. A recent instance of effect

being given to such a usage is the case of *Packer* v. *Ibbetson*, in the Court of Common Pleas (*a*). In that case, the plaintiff had, by a written agreement, become the servant of the defendants in the trade of makers of woollen and mohair cloths, at a salary of 150*l.* a year. In an action for discharging the plaintiff before the end of a year, it appeared to be the custom of the particular trade that either party, master or servant, might determine the service by giving the other a calendar month's notice for that purpose. The court decided that the custom was consistent with the general hiring by the year, with no express stipulation in respect of determining the service; and that the custom ought to prevail in the same way as in the case with which every one is familiar, that of a domestic servant who, being hired generally without any stipulation in respect of the duration of the service, is, by the common law, founded on general usage, deemed to serve by the year until the service is determined by a month's notice, given by either party, master or servant.

The difference between the case of a domestic servant and that of any other servant is this: It is a part of the general law that either party may, by notice, determine the service of a domestic servant: it requires, in any trade, a special usage to give effect to such a notice. Of the general custom in respect of domestic servants, a court takes notice as of a part of the common law: the usage of a particular trade giving effect to a notice must, if disputed, be proved as a matter of fact. In the case I have just referred to, the existence of the custom was ascertained by the verdict of a jury and prevailed, because it was not excluded by any express term of the contract.

(*a*) 27 Law Journal, New Series, Common Pleas, 236, 1858.

## LECTURE XVI.

1. *Agriculture.*
2. *Custom of the Country.*
3. *East Riding of Yorkshire.*
4. *Outgoing Tenants.*
5. *Rights of Incoming Tenants.*
6. *Hay, Straw, Fodder, Manure.*
7. *Repairs.*
8. *Usages. Certainty essential.*

THE great and constant improvements in modern times in the science and practice of agriculture serve greatly to lessen the importance of my next subject. It is now more usual than ever, and is becoming every day still more common, to specify in written leases of farms, and, when leases are not granted, then in written agreements, the course of husbandry and the succession of crops to be pursued by the tenants, and to bind them very strictly by stipulations on various points. Now in most, if not all, parts of England, there are districts of greater or less extent, and originating in differences of soil and climate and in differences in respect of their containing greater or less proportions of arable, pasture, wood and waste lands and of inclosed and uninclosed lands, and in differences in respect of their being near to or distant from towns and markets, and rivers and sea-coast, in each of which districts prevails a usage called the custom of the country. In the absence of contracts, whether written or verbal, this custom regulates, in the neighbourhood where it exists, the course of husbandry, the succession of crops and fallows, the consumption of straw and hay on farms, the substitution of manure for them if taken away, and various other points important to be ascertained between landlords and tenants of farms. Sometimes a usage exists giving to a tenant leaving a farm what is called a way-going crop, and sometimes outgoing tenants are by usage entitled to other privileges and liable to responsibilities. When land is let without a written lease or written agreement, and the verbal

agreement for letting it is not accompanied by any stipulation inconsistent with the custom of the country, the custom prevails. It prevails also in cases of leases or written agreements not containing stipulations inconsistent with it. When a written lease or a written or verbal agreement does specify terms in respect of husbandry, the custom of the country is to prevail with reference to points not so provided for. Even with respect to points so provided for, there may be cases in which the custom of the country, when not inconsistent with the express stipulation, may prevail.

The analogy between any usage called the custom of the country and the usage of a particular trade, is manifest. When a farm is taken, it is an implied term of the contract, whether written or verbal, that the usage of the country is to be observed with reference to all points in respect of which the parties do not stipulate to the contrary: and when either party, landlord or tenant, relies on an alleged custom of the country, it is for him to prove by evidence its existence, and its application to the matter in question.

A usage to be binding, as a custom of the country, must be a usage of a district. It is not sufficient that it is the usage of an estate however large (*a*).

For the purposes of this lecture I have been supplied with information relative to some of the agricultural customs of the East Riding of Yorkshire.

Throughout the riding farms are usually so let, that tenancies begin and end at Lady Day, and in every such case the outgoing tenant has invariably a right to a way-going crop, that is, he may so till a portion of the land that he may have for his own benefit a crop from it in the harvest next after the end of his tenancy. The proportion of arable land which the outgoing tenant may select varies in different parts of the riding. On the heavy soils of Holderness, and of some other districts, he may thus crop one-

(*a*) *Wommersley* v. *Dalley*, 26 Law Journal, New Series, Exchequer, 219, 1857.

third of the arable land, but it is said, that he is limited in his choice to land which in the preceding year has been bare-fallowed, or on which in that year green crops have been eaten or sown grass has been grazed. Whether he may select land on which green crops have been grown, but which have been eaten on other parts of the farm, or on which clover has been mown, is not quite a settled point. When the question is left to arbitrators, it is usually decided in favor of the outgoing tenant. With regard to green crops there is no sense in limiting the right in respect of these soils to land on which the crop has been consumed, as it is generally better for the estate and much more to the advantage of the incoming tenant, that the roots and vegetables which these soils produce should be consumed with the straw in the houses and yards.

On the wolds and on some other turnip soils, where the four-course system of cropping is, or has been, all but universal, one-fourth of the arable land of a farm is the proportion allowed for a way-going crop, land being taken for the purpose on which roots have been consumed or sown grass has been grazed.

Though the outgoing tenant has doubtless the right to reap and dispose of his way-going crop, it is often taken by the new tenant at a valuation made when the crop is ready for reaping.

An outgoing tenant, if in his last year he has sown more land than he is entitled to for his way-going crop, is entitled to be paid for seed and labour in respect of the excess. He is also entitled to be paid for clover and grass seeds sown in the preceding spring, if not injured by grazing.

It is common for an incoming tenant to enter and plough stubbles at Candlemas or earlier, but whether custom gives him a right to do so does not appear clear.

By custom all hay, straw and fodder, the produce of a farm, must be consumed on it; and if, when a tenant enters on a farm, he pays for manure then on it, he is en-

titled to be paid for the manure he leaves at the end of his tenancy.

By custom, also, the tenant must keep in tenantable repair all farm buildings, gates, fences and watercourses, the landlord finding materials.

Like most young men who live in the country you take an interest in the management of farms; but I wish you to take an interest of another sort in these details of some of the agricultural usages of the East Riding: I wish you as law students to look at them as accumulated instances of the force of ancient usage, and moreover at some of them as probable instances of ancient customs and usages in a state of progress. With reference to two points there seems to be uncertainty. Now it is, as I shall have occasion to repeat, of the nature of every alleged custom or usage to be invalidated by any uncertainty. To be valid, a custom or usage must have the quality of certainty. Now it may well be supposed probable that repeated decisions by arbitrators in favor of outgoing tenants, taking their way-going crops from land on which green crops have been grown though not eaten, may in time establish their right to do so, by giving a certainty to the usage. A custom so established might almost be deemed a sort of Judge-made law.

Again, many repeated instances of incoming tenants entering, at Candlemas, on stubbles and ploughing them, may in time supply the essential quality of certainty, and so give validity to the usage.

The rights and responsibilities of outgoing and ingoing tenants of farms in respect of hay, straw and manure remaining on them at the changes of tenancies, the use of farm buildings, and various other matters, are often the subjects of customs of the country.

It is very commonly the custom of a country that, at a change of tenants of a farm, the incoming tenant pays the outgoing tenant for ploughing, sowing and other acts of

husbandry done by the outgoing tenant at the end of his term, and of which the incoming tenant has the benefit at the beginning of his term. When such a custom exists, and when at the end of a tenancy a farm is not again let, and therefore there is not an incoming tenant, the landlord is bound by the custom, and must make such payments as an incoming tenant would have been bound to make (*a*).

(*a*) *Faviel* v. *Gaskoin*, 21 Law Journal, New Series, Exchequer, 85, 1852; *Wommersley* v. *Dalley*, ubi supra.

## LECTURE XVII.

1. *Husbandry Customs.* | 2. *Way-going Crop.*
3. *Emblements.*

THE customary right to a way-going crop is, especially in the case of a tenant holding under a lease, a most striking instance of the force of usage, and is as such worthy of your especial attention.

A lease usually contains a covenant by the tenant, to the effect that he will at the end of the term for which the farm is leased to him quit and yield up to the landlord the lands demised and every part thereof. Nevertheless a custom may control this covenant, and give the tenant a right to keep a part of the lands for many months after the end of the lease. This effect of a custom to add to a contract an implied term, inconsistent with one of its expressed terms, seems contrary to the principles of the law. It is, however, recognized and established as a part of the law by the decisions of courts of justice.

Before stating the effect of the leading case on this point I will state the substance of a previously expressed judicial opinion to the contrary. In the year 1769, a cause was tried before Mr. Justice Yates, at the Hereford Assizes, the plaintiff asserting a right by the custom of a parish to a way-going crop, on his having quitted at the end of his term a farm holden by him under a lease. The judge held, that the custom could not legally extend to a lease by deed, though it might prevail by implication in the case of a parol agreement. He remarked, that in the case of a lease by deed both parties are bound by express agreements contained in it, as that the term shall expire on such a day, and therefore all implication is taken away. This was a decision of a single judge at the assizes.

The validity of a custom thus questioned was established by a judgment of the Court of King's Bench, delivered

in 1769, by Lord Mansfield, one of our chief judicial law-givers (*a*).

That you may properly appreciate this decision, as showing how greatly the common law of the land may be controlled and altered by local usage, it is right before I quote Lord Mansfield's judgment to explain to you shortly one word used by him, the word emblements.

If, after a person holding land for the life of another has sown the land, and before the harvest the person for whose life the land is holden dies, the tenant for his life is entitled to emblements, that is, he has a right to reap the crop for his own use. So, if a tenant for his own life sows land and dies before the harvest, his executors have a like right to emblements for the benefit of his estate. But if a tenant for a certain number of years sows land in the last year so that his term ends before the harvest, he is not entitled to emblements, and the crop becomes the property of the landlord or of the succeeding tenant. A tenant for his own life or the life of another loses his land by reason of a death, of the time of which he cannot have any certainty. It is for the benefit of the community to encourage him to till his land to the last. A tenant for years knows the duration of his term, and it is his own folly if he sows land which will not be his at harvest time.

More might be said of the law of emblements, but I have said enough for my present purpose, that of making plain to you how inconsistent is the custom for a way-going crop with the common law of the land. Yet the custom is a very common one. Instances of it are found in many parts of the country.

The judgment of the Court of King's Bench, delivered by Lord Mansfield, is in these words:—

"We have thought of this case, and we are all of opinion "that the custom is good. It is just, for he who sows "ought to reap, and it is for the benefit and encouragement "of agriculture. It is, indeed, against the general law

(*a*) *Wigglesworth* v. *Dallison*, Douglas, 206.

" concerning emblements, which are not allowed to tenants " who know when their term is to cease, because it is " held to be their fault or folly to have sown, when they " knew their interest would expire before they could reap. " But the custom of a particular place may rectify what " otherwise would be imprudence or folly. The lease " being by deed does not vary the case. The custom does " not alter or contradict the agreement in the lease; it only " superadds a right which is consequential to the taking, " as a heriot may be due by custom, though not mentioned " in the grant or lease."

This judgment was confirmed in the Exchequer Chamber, being, as will be explained in a future lecture, a Court of Appeal from the King's Bench. This part of the law, thus solemnly established, is an interesting instance of a law formed by the usages of persons interested in the subject matter of it, and in due time receiving judicial sanction.

In a modern case (*a*), in which the question discussed and decided was, whether a custom of the country on which a plaintiff relied was contrary to the terms of a lease under which he had been the tenant of a farm, Mr. Baron Alderson made the following remark on the point treated of in this lecture:—" I certainly should have " thought that the sounder rule was, that where there is a " lease the custom is excluded; but that rule has been " invaded far too long to be disturbed." To make the sense perfect, the word revived should be substituted for the word disturbed. It would appear from his remark, that the learned Baron would, if he had been at liberty to do so, have preferred the opinion of Mr. Justice Yates to that of Lord Mansfield and his brethren.

In the preceding lecture I have spoken of the analogy between a custom of the country and the usage of a trade. The custom of the country is an implied term of a lease of a farm when not contrary to its express terms, as the usage

(*a*) *Muncey* v. *Dennis*, 26 Law Journal, New Series, Exch. 66, 1857.

of a trade is an implied term of a contract to which it is applicable. Doubtless this is so. But I think, moreover, that to justify the decision of Lord Mansfield and the other judges of the King's Bench, the husbandry usages of a district must be regarded in the same light as any other local custom, those, for instance, of gavelkind and borough-English. As those two customs are, within the districts in which they prevail, parts of the law of descent, so a husbandry custom of the country is, within the district in which it prevails, a part of the law of landlord and tenant.

I intend to treat, in a future lecture, of some parts of the general common law observed throughout the kingdom, which appear to me to have originated in husbandry customs, in like manner as the parts of the law merchant applicable to bills of exchange have originated in the usages of traders generally.

## LECTURE XVIII.

1. *Unenclosed Arable Lands.*
2. *Inclosures.*
3. *Agriculture.*
4. *Private Acts of Parliament.*
5. *Private Inclosure Acts.*
6. *General Inclosure Acts.*

Of all modern improvements, the very extensive enclosure of lands has contributed more than any other to displace the ancient husbandry customs of the country.

Throughout England, the most usual mode of tillage was anciently this. The arable lands in a parish were not enclosed. They were commonly divided into several large portions, each called a field, and having a name by which it was known. The lands in each field belonged to various persons, so that usually the owner of every estate in the parish had lands in every field. The lands forming parts of different estates were narrow strips, often intersecting each other, and scattered about in the strangest way. The owner of one estate would often possess a great many strips of land, called lands, scattered in distant parts of each field in the parish. The custom of the country dictated the rotation of crops, so that the whole of each field was always in the same state of cultivation. Thus the arable lands in a parish might, (there were cases of this being so,) be divided into four fields, which we will call Northfield, Eastfield, Southfield, Westfield. In a given year, Northfield would be fallow; Eastfield would have a crop of barley; Southfield, a crop of beans; Westfield, a crop of wheat. In the next year, Eastfield would be fallow; Southfield would have a crop of barley; Westfield, a crop of beans; Northfield, a crop of wheat. In the third year, Southfield would be fallow; Westfield would have barley; Northfield, beans; Eastfield, wheat. In the fourth year, Westfield would be fallow; Northfield, barley; Eastfield, beans; Southfield, wheat: and so on in the same rotation for ever, or as long as the usage should be observed. One

object of this was to make a fallow recur at certain periods for the benefit of the land; and because in the year of fallow, all the owners of land had a right of common over the field fallowed, putting in cattle, which grazed the headlands, the balks dividing the lands, and other pieces of pasture lying about the field, as well as the grass which, in the then imperfect state of tillage, was sure to spring up among the stubble.

It is needless to point out how inconsistent was this state of things with proper cultivation; and how desirable it has been found to get rid of it. This has been done in innumerable instances; the practice having been to procure a special act of parliament, enabling commissioners to divide the unenclosed lands in a parish into portions, so as to give each landowner a compact portion of land instead of his scattered strips of land. The portions thus allotted have been enclosed and fenced, and have been cultivated by the owner or his tenants irrespectively of any rights on the part of other persons.

I cannot forbear now drawing your attention to that part of the third chapter of the first volume of Macaulay's History of England which refers to agriculture, especially the paragraph in which he says: "The number of Enclo-"sure Acts, passed since King George the Second came to "the throne, exceeds four thousand: The area enclosed "under the authority of those acts exceeds on a moderate "calculation ten thousand square miles. How many square "miles which were formerly uncultivated or ill cultivated "have during the same period been fenced and carefully "tilled by the proprietors without any application to the le-"gislature can only be conjectured. But it seems highly "probable that a fourth part of England has been, in the "course of little more than a century, turned from a wild "into a garden."

You are aware of the immense value of a turnip crop and of other green crops according to the modern, instead of a bare fallow according to the ancient, practice of farmers;

and you perceive that any one obstinate farmer might, under the old system, have prevented the substitution of any crop for a fallow.

In point of fact, there have been instances, as Macaulay suggests, of owners of estates, when not numerous, agreeing amongst each other to allot and enclose lands, without an act of parliament, thus avoiding a great expense. This was practicable when the owners were few and the titles to their estates simple. But in the more usual cases of the titles to estates being complicated by different tenures, by settlements creating life estates, entails and reversionary interests, and by incumbrances, acts of parliament were necessary to bind persons not in a position to give direct assent to enclosures. Appropriate enactments made allotted lands subject to the tenures, settlements and incumbrances, to which the lands for which they were substituted were previously subject.

When we arrive at the subject of the statute law, there may be a great deal to say on what is called private legislation, the practice which has long prevailed of obtaining from the parliament, for the benefit of one person or of a limited number of persons, private acts to effect objects not attainable without special laws. Any one of these special laws alters the general law only in the very case provided for. It may provide, for instance, for the enclosure of open lands in a particular parish, and then it usually contains a multitude of enactments the effect of which is to abrogate in this instance, and only for the purpose of the enclosure, and only to the extent requisite for the purpose, all general rules, and all existing rights which might prevent it.

Now, however, there have been many years in force a series of acts of parliament, called the General Inclosure Acts, giving powers by virtue of which many enclosures have been made, and others are in progress, under the superintendence of commissioners styled: "The Inclosure Commissioners for England and Wales." Thus is got rid of the necessity of a separate act of parliament for every enclosure.

## LECTURE XIX.

1. *Customs.*
2. *Customs immemorial.*
3. *Customs certain.*
4. *Customs compulsory.*
5. *Customs reasonable.*
6. *Profit à prendre.*
7. *Alienum solum.*
8. *Common of Pasture.*
9. *Fishery.*
10. *Quarries.*
11. *Sea Shore.*
12. *Sand.*
13. *Clay.*
14. *Turf.*
15. *Trees.*
16. *Grass.*
17. *Water.*

Of several qualities insisted on by Coke and by Blackstone and other commentators as essential to a legal custom, I shall treat of three only, leaving the others for incidental notice. The three I have selected are, the quality of being immemorial, that of being certain, and that of being reasonable.

The rule requiring a custom to be immemorial is greatly impaired by enactments contained in a modern statute (*a*), for shortening in some cases the time of prescription, thus establishing the validity of many customs and prescriptive rights of comparatively recent origin. I think, upon reflection, that the proper occasion for considering this quality will be the lecture in which I shall quote the preamble and detail some of the provisions of the statute. You will then see my reason for this postponement.

As to the certainty essential to a custom you may remember that, in relating the husbandry customs of the East Riding of Yorkshire, I mentioned two supposed usages appearing not to be established with sufficient certainty to be binding. The want of certainty thus referred to may be regarded as an imperfection in the proof of the existence of the usage in point of fact. Thus, in the last of the two given instances the doubt really is, whether incoming tenants do in point of fact so constantly

(*a*) 2 & 3 Will. IV. c. 71.

take possession of portions of arable land to till them before the commencement of their tenancies as to justify an assertion that it is the usage for them to do so. But the quality of certainty to which our attention is now directed means something else than this—and that something else is scarcely capable of definition. Without attempting to define it, Blackstone makes its meaning sufficiently clear by five illustrations. He says (*a*), "Customs "ought to be certain. A custom that lands shall descend "to the most worthy of the owner's blood 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. 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.'"

Experience tells us that the value of land is a matter so capable of being and so often, in fact, proved by skilled witnesses as to make applicable to it the maxim cited. No means could be devised of ascertaining practically the comparative worth of a man's sons, brothers, uncles and cousins. The conclusion to which the consideration of this subject leads is, that the best way of stating the doctrine now treated of is to say, not that certainty is essential, but that want of certainty is fatal, to an alleged custom. In almost every case of an alleged custom, otherwise proved to exist, being void for uncertainty, this uncertainty consists in an impossibility to enforce it.

To be good a custom must be reasonable, or rather it must not be unreasonable. Blackstone well explains this: "A custom may be good, though the particular reason

(*a*) Blackstone, I. 78.

" 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 par- " ticular 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 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" (*a*). So also a custom is void which tends to make the lord of a manor a judge in his own cause (*b*).

To the head of customs being unreasonable, and therefore void, may, I think, be referred a rule of law which prohibits the custom enabling an unlimited number of persons to take away parts of the property of another. In the expression of this rule the barbarous phrase *profit à prendre* is always used. Thus Mr. Justice Wightman says, in one case (*c*): " The reason why a *profit à prendre* can- " not be taken by an unlimited body is, that the whole of " the thing may be destroyed." So in a case (*d*) in which a custom was pleaded for all the inhabitants of a parish to angle for fish in the river Mole, Lord Campbell says: " There is a salutary rule of law, which makes a distinction " between a claim of right, which is an *easement* (*e*), and " that which is considered a *profit à prendre*. A custom " for the inhabitants of a parish to dance upon a particular " close for recreation is a good custom, but the law says, " there cannot be a good custom for the inhabitants of a " parish to take property which is of value to the owner.

(*a*) Blackstone's Commentaries, I. 77.

(*b*) 1 Wilson, 63.

(*c*) *Race* v. *Ward*, 24 Law Journal, New Series, Queen's Bench, 156, 1855.

(*d*) *Bland* v. *Lipscombe*, 24 Law Journal, New Series, Queen's Bench, 155, 1855.

(*e*) For the meaning of the word " easement," see the next lecture.

" The loss in such case would be very great to the owner, " and the value to the public very little. It is quite clear " that the plea in this case sets up a custom of *profit à* " *prendre:* it claims a right to angle, and to catch and " carry away the fish: and such a right, which would soon " destroy the fishery, cannot in law be sustained."

So also in a case (*a*) in which the defendant, as the lord of a manor, asserted a right to grant licences to free miners in the Forest of Dean to work quarries in a certain part of the Forest, the property of the Crown, the right asserted involving a right on the part of the free miners receiving the licences, and paying the defendant for them, to work the quarries, Mr. Justice Byles, assisting the Vice-Chancellor Wood, said: " The right of the free miners is inca- " pable of being established by custom, however ancient, " uniform and clear the exercise of that custom may be. " The alleged custom is a custom to enter the soil of " another and carry away portions of it. The benefit to " be enjoyed is not a mere easement: it is a *profit à* " *prendre.* Now it is an elementary rule of law that a " *profit à prendre* in another's soil cannot be claimed by " custom, for this, among other reasons, that a man's soil " might thus be subject to the most grievous burdens in " favour of successive multitudes of persons, like the inha- " bitants of a parish, or other district, who could not " release the right."

Mr. Justice Byles cites *Gateward's case* (*b*) as repeatedly followed and never overruled, and as a landmark of the law. In this case, in the reign of James the First, the Court of Common Pleas resolved that for several reasons a custom cannot be good for all the inhabitants of a vill to have common of pasture. A custom for the copyholders of a manor to have common of pasture in the demesnes of the lord of the manor is good. In this case the distinction is

(*a*) *Attorney-General* v. *Matthias*, 27 Law Journal, New Series, Chancery, 766, 1858.

(*b*) 6 Coke's Reports, 59, 374.

carefully drawn between *profit à prendre*, such as a right of common, and an easement, such as a right of way. To *profit à prendre* an indefinite class of persons cannot be entitled by custom, to an easement they may.

Mr. Justice Byles cites also the case of *Blewitt* v. *Tregonning* (*a*), in which it was held that the right to take even the adventitious soil, or sand, that had been blown from the shore on to land contiguous to the sea, could not be claimed by custom, though it was urged that to follow this drifted sand was only following a chattel.

The rule avoiding a custom by reason of its being a claim of *profit à prendre* does not apply to water. Water, like air, is so transitory that it is not regarded as a subject of property. Consistently with this notion, a pond is in legal proceedings quaintly spoken of as "land covered with "water." With reference to this point, you should read the judgment delivered by Lord Campbell in one of the cases just cited (*b*). In that case, the defendants, in answer to a charge of having unlawfully broken and entered the plaintiff's close, and trampled and injured his grass, asserted a right, by immemorial custom, for all the inhabitants of the township to take water from a certain well, or spring, in the said close, and to carry it to their dwelling-houses. In the judgment it is said: "The water which the "defendants claim a right to take is not the produce of "the plaintiff's close: it is not his property: it is not the "subject of property. Blackstone, following the elementary "writers, classes water with the elements of light and "air. Afterwards, having stated that a man cannot bring "an action to recover possession of a pool, or other piece of "water, either calculating its capacity, as for so many "cubical yards, or by superficial measure, for twenty acres "of water, gives the reason, 'for water is a moveable, "'wandering thing, and must of necessity continue com-"'mon by the law of nature.' It is not disputed that this

(*a*) 4 Law Journal, New Series, King's Bench, 223.

(*b*) *Race* v. *Ward*, ubi supra.

"would be so with respect to the water of a river or any "open running stream. We think it is equally true as to "the water of a spring when it first issues from the ground. "This is no part of the soil, like sand, or clay, or stones: "nor the produce of the soil, like grass, or turves, or trees. "A right to take these by custom, claimed by all the "inhabitants of a district, would clearly be bad; for they all "come under the category of *profit à prendre*, being part of "the soil, or produce of the soil: and such a claim, which "might leave nothing for the owner of the soil, is wholly "inconsistent with the right of property in the soil. But "the spring of water is supplied and renewed by nature. "It must have flowed from a distance by an underground "channel: and when it issues from the ground, till appro- "priated for use, it flows on by the law of gravitation. "While it remains in the field where it issues forth, in the "absence of any servitude or custom, giving a right to "others, the owner of the field, and he only, has a right to "appropriate it; for no one else can do so without com- "mitting a trespass on the field. But when it has left his "field, he has no more power over it or interest in it than "any stranger. For these reasons it has been considered "that the inhabitants of a district may by custom have a "right to go upon the soil of another to take or use water." Several authorities are cited, and judgment is given for the defendant.

## LECTURE XX.

1. *Customs.*
2. *Easements.*
3. *Ways.*
4. *Highways.*
5. *Sports.*
6. *Rights to dry Nets, &c.*
7. *Water.*
8. *Profit à prendre.*
9. *Common of Pasture.*
10. *Clay.*
11. *Fuel.*

In the last lecture, frequent use was made of the word *easement.* An easement may be thus defined: a right which a person may exercise in respect of the land of another (in alieno solo), tending rather to convenience, as in the case of a right of way, than to profit, as in the case of a right to turn out cattle to feed. The practical distinction between an easement and a right to *profit à prendre* is, as explained in the last lecture, that an easement may exist by custom in favour of an indefinite number of persons; a right to *profit à prendre* cannot so exist. Instances of easements, the existence of which by custom has been judicially recognized, are:

1. A custom for all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in a certain close, at all seasonable times of the year, at their free will and pleasure (*a*). Customary rights of this sort are often exercised over tracts of land called village greens and town greens. The chief General Inclosure Act (*b*) contains a provision for preserving to the inhabitants of villages and towns the use of their ancient greens, and in some cases for adding to their extent. The same act contains also a provision, that when any waste land of any manor on which the tenants of the manor have rights of common, or any land is subject to any rights of common which may be exercised at all times of the year, and is not limited by number or stints, is to be enclosed, the Inclosure Commissioners

(*a*) *Fitch* v. *Rawling*, 2 Henry Blackstone, 393.
(*b*) 8 & 9 Victoria, chapter 118, sections 15, 30.

may require an allotment to be made "for the purposes of exercise and recreation for the inhabitants of the neighbourhood." The quantity of land which may be thus allotted is specified in the act, and depends in each case upon the population of the parish within which the land is situate.

2. A custom for all the fishermen, inhabitants of a particular vill, to dry their nets in a particular close (*a*).

3. A right for the inhabitant householders of a parish to wash and water cattle in a pond, and also to take water from it for domestic purposes (*b*).

I believe there are many instances of the inhabitants of a village having a right to dry clothes on land adjacent to the village: and I have known one singular instance of the inhabitants of a parish exercising a right to winnow their gleaned corn on the top of a knoll within an enclosure.

A custom is not good for the poor householders living in a parish to cut and carry away rotten boughs and branches in a chase (*c*). The description of poor householders is too vague and uncertain to denote persons entitled to take *profit à prendre*.

Again, an easement may exist by custom in favour of an indefinite number of persons, or by prescription in favour of a definite number of persons, or of one person. A right of *profit à prendre* may exist, not by custom, in the proper acceptation of the word, but only by prescription, and only in favour of a definite number of persons, or of one person.

Usually the soil of a highway is the property of the owner of the adjoining land, all the Queen's subjects having by custom a right of way over it. This is an easement. So, also the inhabitants of a parish may, by custom, have a right of way to church, familiarly called a church path. This, also, is an easement. It often happens that the

(*a*) Year-Book, 15 Edward IV.

(*b*) *Manning* v. *Wasdale*, 6 Law Journal, New Series, King's Bench, 59.

(*c*) *Selby* v. *Robinson*, 2 Durnford & East, 758.

occupier of a particular house has, by prescription, an easement; a right of way across the land of another.

Rights of common, of pasture, rights to turn out cattle to feed on land not belonging to the owners of the cattle, are rights to *profit à prendre*, existing by prescription in every part of the country.

There is an instance of a prescriptive right to *profit à prendre* being decided to be void on the same ground on which a custom of that sort is void. This must, I think, be regarded as an exception to the general rule, that there may be by prescription a right to *profit à prendre*, the exception being justified by the alleged right being utterly contrary to reason. The case I refer to is that of *Clayton* v. *Corby* (*a*). Mr. Justice Byles, in the case of the *Attorney-General* v. *Matthias* (*b*), thus refers to this point:—"In "*Clayton* v. *Corby*, though a jury had found a thirty years' "exercise without interruption, as of right, of a claim by "prescription to dig clay in the plaintiff's land for the de-"fendant's brick-kiln, and though the verdict could not be "assailed, yet the Court of Queen's Bench gave judgment "for the plaintiff, *non obstante veredicto*, on the ground "that such a prescription was radically vicious, and in-"capable of being sustained; for that it was an indefinite "claim to take all the clay: in other words, to take the "whole close. That case rests on the soundest rules of "law."

(*a*) 14 Law Journal, New Series, Queen's Bench, 364, 1843.
(*b*) Ubi supra.

## LECTURE XXI.

1. *Prescription.*
2. *Custom.*
3. *Legal Memory.*
4. *Prescription Act.*
5. *Presumed Grants.*
6. *Rights of Common.*
7. *Ways.*
8. *Water.*
9. *Light.*
10. *Infancy and other Disabilities. Prescription.*

STRANGELY enough, having used the very technical word *easement* before expressly telling you its meaning, I have since, in explaining the nature of an easement, used an almost equally technical word, *prescription*, without defining it. Stephen, in his Commentaries, thus defines it:—Prescription is a title by long usage.

You are aware that a very effectual way of teaching the nature of a thing is to explain in what respect it differs from something of the same class with which the person taught is already familiar. With this object I cite a passage from the work (*a*) from which I have just taken a definition of prescription. The commentator thus proceeds: —"Though depending on usage, it (prescription) 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) and prescription "is this: that custom is properly a local usage, and pre-"scription a personal one, attaching to a man and his "ancestors, or those whose estate he has. As, for exam-"ple, 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), 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

(*a*) Stephen's Commentaries, 4th Edit., Vol. I., 683.

" 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." Much of the substance of this quotation is repeated by Stephen from Blackstone.

In one most important particular, in the chief quality essential to each, custom and prescription are exactly alike. By the common law, a custom or a prescription must be immemorial. The long usage which gives this quality, and which constitutes a legal custom or prescription, is, in what Blackstone calls the solemn language of the law, usage for a time whereof the memory of man runneth not to the contrary; so that if the beginning of it can be shown, it is, according to the common law, not a good custom or prescription.

In analogy, however, with a provision of the Statute of Westminster the first (*a*), depriving persons of their right to recover land except upon titles accrued since the beginning of the reign of Richard the First, it became a part of the law that it was sufficient to establish a prescription to show that the usage had existed from that time, or conversely, that it was sufficient to defeat an alleged prescription to show that the alleged usage had not existed at any one period since that time. As a right claimed by prescription is most frequently an easement which the claimant asserts in respect of land of which he is the owner, over the land of another, the rule just stated may be deemed as something more than a rule framed by analogy to the Statute of Westminster. The rule seems a direct consequence from the statute. A right in respect of land, over other land, is of the nature of land regarded as private property. The easement being an accessory, the land of the claimant is the principal, and it is reasonable that the same lapse of time which would deprive a man of the principal should

(*a*) 3 Edward I. chapter 39.

deprive him of the accessory. Again, with reference to the land over which an easement is claimed, it is reasonable that the same lapse of time which would defeat a title to the land itself should defeat a right which might otherwise be exercised over it, and which, while it exists, may be regarded as something taken from its value as property. In this sense a right affecting land is a part of the right of property in the land, and it is convenient that it should be subject to similar rules.

The argument just stated applies with less force to a custom, which being of the nature of a law for the district in which it is observed, one would not expect to be subject to a rule applicable to prescriptive private rights. Nevertheless, by force of the tendency of all usages towards uniformity, it became, as applicable to custom, a part of the law that the time of legal memory meant the beginning of the reign of King Richard the First; so that it was sufficient to establish a custom to show its existence from that time; and conversely it was sufficient to invalidate a custom to show its commencement since that time. In this lecture will be explained the extent to which this is altered by the Prescription Act. In cases not so provided for, the law is unchanged.

But in both cases, that of prescription and that of custom, it was never so strictly, as the words just used might import, necessary to prove the existence of the alleged usage from the time of Richard the First. In the absence of proof of a subsequent commencement, evidence of the observance of a usage for a long period has been regarded as presumptive proof of its having existed during the whole period of legal memory.

Before we proceed to the consideration of the modern statute called the Prescription Act, it is right to premise that it is a theory recognized by lawyers that, very commonly, a prescription for an easement has its origin in a grant, the evidence of which is lost, the loss being made up for by immemorial usage. Thus, when from time

immemorial, the occupier for the time being of a house has exercised a right of way over land, it is supposed that some former owner of the land has granted to some former owner of the house the right so exercised. This may also be true of many customs; such, for instance, as a custom for the inhabitants of a parish to use the village green for exercise and for games and sports.

The statute just referred to was passed in the year 1832, and is entitled, "An Act for shortening the time of Prescription in certain cases" (*a*). The preamble is in these words: "Whereas the expression 'time immemorial,' or 'time "'whereof the memory of man runneth not to the contrary,' "is now, by the law of England, in many cases considered "to include and denote the whole period of time from the "reign of King Richard the First: whereby the title to "matters that have been long enjoyed is sometimes defeated "by showing the commencement of such enjoyment, which "is in many cases productive of inconvenience and in-"justice."

The statute contains in the first section an enactment to this effect:

1. No claim which may be lawfully made at the common law by custom, prescription or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of any person, except such matters and things as are in the statute specially provided for, and except tithes, rent and services, shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed, by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years. Nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated. When such right, profit or benefit shall have

(*a*) 2 & 3 Will. IV. chapter 71.

been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given by deed or writing.* The object of this last provision seems to be to leave a right existing by means of a written grant to be defeasible or not, according to the terms of the grant.

2. The second section contains an enactment in respect of ways and other easements, and watercourses, and the use of water. This enactment is exactly like that contained in the first section in respect of claims to rights of common and other profits and benefits, only substituting the period of twenty years for thirty years, and forty years for sixty years.

3. The third section enacts to the effect, that when the access and use of light to and for any building shall have been actually enjoyed for the full period of twenty years without interruption, the right shall be deemed absolute and indefeasible, unless the same was enjoyed by some consent or agreement made or given by deed or writing.

4. The sixth section enacts, that no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period than for such period mentioned in the act as may be applicable to the case.

For other enactments modifying or giving effect to those I have epitomized, I refer you to the statute itself; especially to the seventh section, providing that the time during which a person otherwise capable of resisting a claim is an infant, an idiot, insane, a married woman or a tenant for life, and the time during which an action or suit relating to it is pending, shall be excluded in the computation of the specified period of limitation, except only in every case in which the right is declared to be absolute and indefeasible.

## LECTURE XXII.

1. *Prescription Act.*
2. *Light and Air.*
3. *Water.*
4. *Streams.*
5. *Springs.*
6. *Wells.*
7. *Percolating Water.*
8. *Irrigation.*
9. *Mills.*
10. *Mines.*
11. *Drains.*
12. *Injuria sine damno.*
13. *Damnum absque Injuriâ.*
14. *Judge-made Law.*

In lectures addressed to students, those of the provisions contained in the Prescription Act, detailed in the preceding lecture, which relate to water and light, need some comment.

You will have read in a former lecture how incapable in theory is flowing water of being the subject of private property. In a greater degree this incapacity exists in respect of light and air, flowing as it were in all directions. Nevertheless water, light and air may be, and often are, so used and enjoyed, that a right, sanctioned and protected by law, may be acquired to use and enjoy them. In this lecture I shall speak of water; in the next of light and air.

In the common instance of a watercourse, the owner of the land over which it flows has, by the common law, such an interest in it for his cattle to drink, and for other useful purposes, that he has by law a remedy against any one who, by diverting it, deprives him of the use of it. Our law regards this as a natural right, and as not depending on usage or prescription. True it is the owners of land through which the stream has flowed before it has reached his have a similar natural and legal right to the use of the water, but their right is, in favour of his, controlled by the precept: Sic utere tuo, ut alienum non lædas—a precept to the benefit of which the owners of land below are equally entitled as against him.

This right may be and often is modified or varied by prescription, as in the case of an ancient water-mill, for

the supply of which a mill pond has, time immemorial, and, since the Prescription Act, for less than time immemorial, been maintained, taking water from land over which it would otherwise flow. In such cases mill-owners have, by prescription, acquired rights, the exercise of which, in some cases, altogether diverts water from lands over which it would otherwise flow, and, in many cases, diminishes the quantity of water which would otherwise flow in the natural course. It is almost needless to add that, as by prescription, exclusive rights to the use of water, by means of mills or otherwise, may be acquired, so, by grant, they may be conferred.

To illustrate our present very interesting subject, I think it right to state the purport of some of the numerous modern authorities on the subject.

In a case (*a*) in the Court of Exchequer in the year 1851, Mr. Baron Parke delivered a very elaborate judgment, in which, and in the previous arguments by counsel, references were made to the Roman civil law, to the law of France, to Bracton, to some American law books, and to many English decided cases. This judgment I shall endeavour to condense.

The right to a reasonable use of water flowing in its natural course for domestic, agricultural, manufacturing and other useful purposes, is an incident to the property of the land through which it flows, and is subject to the similar incidental rights of other owners of land adjacent to the same stream. It is only for an unreasonable and unauthorized use of this common benefit, that an action will lie by one of the landowners against any of the others. Not one of them has a right to use the water, diverting it or diminishing its quantity, to the prejudice of any of the others, unless he has acquired by grant, or by prescription, a right so to use it.

Every use of the water implies the diminution of it to some

(*a*) *Embrey* v. *Owen*, 20 Law Journal, New Series, Exchequer, 212, 1851.

extent. Whether the irrigation of land, or other ordinary use of water, is an infringement of the rights of the owners of land adjacent to the stream below the land so irrigated is a question which depends on the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of porous soil should so irrigate it as to diminish considerably the quantity of water. On the other hand, common sense would be shocked by the supposition that a riparian owner could not dip a watering pot into the stream to water his garden, or allow his family or cattle to drink at it. It is a question of degree; and the limits which separate the reasonable and lawful use of running water, from the unreasonable and wrongful use of it, cannot be defined. In the case in which the judgment was delivered, the dispute was between the plaintiff, a mill-owner, and the defendant, a land-owner, and the court decided that, as the irrigation by the defendant of his land took place, not continuously, but only at periods when the river was full, and no damage was done to the working of the plaintiff's mill, and as the diminution of the water was not perceptible, the irrigation was a reasonable use of the water, and was not an infringement of the plaintiff's right in respect of his mill.

Care is taken in the judgment to show that it is not inconsistent with the law that for an infringement of a right an action is maintainable, though there is no actual damage sustained. To maintain a right an action lies for a wrong, though it be injuria sine damno, as in the celebrated case (*a*) in which the House of Lords, in Queen Anne's reign, decided, according to the opinion of Chief Justice Holt, and contrary to that of the three judges his brethren, that an action may be maintained against the returning officer at an election for refusing to receive the vote of a person entitled to vote, though the persons for whom he offers to use his suffrage are elected and he sustains no actual damage: Ubi jus ibi remedium.

(*a*) *Ashby* v. *White*, Raymond's Reports, 938.

You know the converse of this: that where there is damnum absque injuriâ an action cannot be maintained. In the case we have been considering there was neither injuria nor damnum; the defendant in the exercise of his right to the water did not in any way prejudice the right of the plaintiff or cause him any actual damage in the working his mill. There was neither injuria nor damnum.

The next authority to which I draw your attention is, a decision of the Court of Common Pleas (*a*), delivered in 1857, by Mr. Justice Cresswell It appeared, that the defendant, who possessed a mill on a stream, had, besides exercising a right to detain water for the use of his mill, latterly diverted water for the purpose of irrigating his meadows. The plaintiff had been accustomed to irrigate his meadows adjacent to the stream and below the defendant's mill. By the diversion water flowing to the plaintiff's land was not sensibly diminished, but it arrived later in the day, and the plaintiff was prevented from using it so beneficially as he otherwise might. This is a short, but sufficient, summary of the facts. In the judgment it is said, that the general principle to be deduced from the judgment of the Court of Exchequer and the authorities cited in it is, that every proprietor of land on the banks of a natural stream has a right to use the water, provided he uses it so as not to work material injury to the rights of other proprietors of lands above or below his on the stream. The decision was to the effect, that the defendant had in the irrigation of his meadows detained water for a time, and in a manner necessarily injurious to the natural right of the plaintiff, and that the latter was entitled to maintain his action. In this case there were both injuria and damnum.

Thus you see, the same principles being observed, the facts of two cases led to different conclusions.

In the next (*b*) of my selected cases the Court of Ex-

(*a*) *Sampson* v. *Hoddinot*, 26 Law Journal, New Series, Common Pleas, 148, 1857.

(*b*) *Dudden* v. *The Guardians of the Clutton Union*, 26 Law Journal, New Series, Exchequer, 146, 1857.

chequer decided a point which one wonders to find questioned, that a person has no right so to take water from a spring-head, the spot where it rises from the ground, as to prevent its flowing into its natural stream, to the injury of owners of property on the banks of the stream. The defendants had, by means of tanks placed closed to a spring, diverted it from its natural course, to the injury of the plaintiff, the owner of a mill on the stream. The counsel for the defendants contended to the effect that the action was not maintainable, because it was not diverted from a place where it was flowing in a stream. A case (*a*) is referred to, by which it appears that a person has a right to divert the water which sometimes overflows from his artificial well, and so prevents the flow of it into a natural stream, to which it would otherwise find its way. But the Barons of the Exchequer expressed an opinion, that a stream may be said to begin at the spot where the water rises to the surface, and that a person is not justified in diverting it, as it springs from the ground, and that the action was maintainable.

According to a decision (*b*) of the Court of Exchequer Chamber, from which Mr. Justice Coleridge dissented, an action is not maintainable against a person who by digging a well intercepts from a stream water which would otherwise have flowed into it by percolation through the soil; though such loss of water was a natural effect reasonably to be expected of digging the well.

By this decision of the Exchequer Chamber is overruled a part of a judgment of the Court of Exchequer in 1852 (*c*), the part overruled being to the effect that an action was maintainable for the diversion of water from a stream, the diversion being a consequence of the sinking

(*a*) *Broadbent* v. *Ramsbottom*, 25 Law Journal, New Series, Exchequer, 115, 1856.

(*b*) *Chasemore* v. *Richards*, 26 Law Journal, New Series, Exchequer, 393, 1857.

(*c*) *Dickinson* v. *The Grand Junction Canal Company*, 21 Law Journal, New Series, Exchequer, 241, 1852.

of a well, and the water diverted being underground water, which, but for the well, would have percolated into the stream.

The constitution and high authority of the Exchequer Chamber, as a Court of a Appeal, will be explained in future lectures. It is sufficient now to say, that previously to the decision of the Exchequer Chamber, all tribunals, of authority less than that of the Exchequer, were bound to regard the law as well enunciated by the decision of that court, and it is likely that the two courts of co-ordinate authority, the Queen's Bench and the Common Pleas, would have so treated it. Now the law must be considered as established by the judgment of the Exchequer Chamber. As there is no written law, and as the common law was not previously ascertained, on the subject, you have before you not only one striking example of Judge-made law, but also a second example of Judge-made law repealing the first. Nay, it may hereafter happen that a decision of the House of Lords, a Court of Appeal higher than the Court of Exchequer, indeed our ultimate Court of Appeal, may, by a judgment in some case brought before it, establish a rule, in conformity with that declared by the Exchequer, and different from that established by the Exchequer Chamber. Yet the proper function of each of these three tribunals is to ascertain and declare the law, and not to make law; jus dicere, and not jus dare. Yet it seems very near the truth to say, that of necessity new cases sometimes make legislation a part of the duty of a judge. But he ought to be careful not to go in any case beyond the limits to which this necessity compels him.

I shall find a more appropriate occasion for treating of the powers of the House of Lords as the highest Court of Appeal, as distinguished from its powers as one of the three branches of the legislature.

It seems from the decision of the Exchequer Chamber, that a diversion of water, in respect of which an action can be maintained, must be a diversion of it at the spring-head,

or where it has assumed the form of a natural stream. It is immaterial whether the stream is, as usually, above ground, or, as in the case of the River Mole, in some parts underground.

In support of his opinion, Mr. Justice Coleridge gave expression to some very powerful arguments, and I should prefer the conclusion to which he arrived to the judgment delivered by Mr. Justice Cresswell for himself and the other judges, consisting principally of a review of previous authorities, were it not for one topic, which I do not find sufficiently adverted to, but which serves to justify to my mind the decision of the Exchequer Chamber.

In most cases a person diverting water from a flowing stream, to the injury of another, knows, or has the means of knowing, the effect of what he is doing; he disobeys the moral precept: Sic utere tuo, ut alienum non lædas. But in very few, if any, cases, can a man about to sink a shaft for a mine, or to dig a deep well or sewer, know, or have the means of knowing, that his work will intercept the passage, by percolation, of water in a given direction. He cannot know that he is, at most he can but guess, that he may be infringing the moral precept. If he consults land-surveyors, geologists or other men of science, their anticipations of the probable effect of what he proposes to do can but in few cases be regarded as any thing more than expressions of opinion, which may, or may not, be verified by the result. They may advise him that, in their opinion, percolating water will not be intercepted to the injury of another person; and yet if he acts on this advice, and if they happen to be wrong, he becomes, according to the opinion of the Court of Exchequer, liable to pay damages to persons deprived of water, in a manner not foreseen with any certainty. On the other hand, if any one, lest his work should be injurious to others, by cutting off the percolation of water, forbears to sink a shaft for a mine of coal, or of valuable metal, he may be giving up the most valuable part of his estate, and the community may be

injured by valuable minerals being kept out of use, not by reason of any certainty that injury will be caused to any owners of any adjoining land, but because of the possibility of their being so injured. The mischief consequent on the decision of the Exchequer, if acted on, might be enormous, especially with reference to mineral property. My argument may be thus summed up. A person whose work does in point of fact intercept percolating water, cannot be said to have therefore infringed the moral precept: Sic utere tuo, ut alienum non lædas. He could not, when he began his work, know, with any thing approaching to certainty, the effect of it, and it was not incumbent on him to give up the full enjoyment of his estate, implying as good a natural right to the water and minerals below the surface, as that of any of the owners of adjacent lands, because of the chance that they might be injured. Considering the infinitely various circumstances of different strata, in respect of relative position, extent, form, inclination, interception, disappearance and reappearance and other particulars, the probable results of underground works are so uncertain, and the actual results are sometimes so unexpected, that it would be unjust to make any one responsible for them. It would be contrary to public policy thus to hamper the management of mineral property.

That there is no such responsibility is now established by the decision of the Exchequer Chamber.

It follows from this decision, that for the frequent and great mischief to mill-owners and land-owners, by means of wells, sunk by water companies and manufacturers, intercepting percolating water, there is no remedy. According to law, this mischief is damnum absque injuriâ. The same mischief may in an equal degree be caused by mining, and in a less degree by the draining of land, a frequent modern improvement.

The owner of a well has not the same, or a similar, natural right to the water in it which the owner of land on the bank of a stream has to the use of the flowing water. The

owner of land has a right to dig a well to contain water; but it is not until he has enjoyed the use of the well for a time sufficient to give him a prescriptive right, that time now being, by force of the Prescription Act, twenty years, that he has any remedy against a person who, by digging another well or otherwise, diverts the water. This is a right acquired by possession. After an enjoyment for twenty years, he has a remedy for an actual diversion of water from the well. But if a well should be left dry by the interception of water which would otherwise percolate into it, I should think that he would be without a remedy, for I cannot think his acquired right would be more respected than the natural right to flowing water.

## LECTURE XXIII

1. *Prescription Act.*
2. *Light.*
3. *Air.*
4. *Windows.*
5. *Prospect.*
6. *Water.*
7. *Percolating Water.*
8. *Coal.*
9. *Fuel.*
10. *Manufactures.*
11. *Trade.*
12. *Public Policy.*
13. *Rules of indefinite nature.*
14. *Jury.*
15. *Arbitration.*

Before the Prescription Act a right might exist by prescription to the free access of light to the ancient windows of a dwelling-house, or, indeed, of any building; and, since that statute, such a right may be acquired by enjoyment for twenty years. It may also be conferred by a grant from the owner of adjacent land.

In any case of the existence of such a right, the erection of a wall or other building near enough to impede the access of light, is a wrong for which the law provides a remedy—an action against the wrongdoer.

I think it strange that a right to the access of air to ancient windows is not provided for by the Prescription Act. Such a right may exist by prescription, and it would seem that, the time of prescription in respect of it not being shortened by the statute, a claim to the access of air may still be defeated by showing that the enjoyment of it commenced since the beginning of the reign of Richard the First. True it is that in most cases the access of light to a window is usually accompanied by an access of air, and that which would impede either would impede both; yet in closely built towns there are doubtless cases of windows so placed near walls more ancient than themselves, that there is no existing right to the access of light, but to which windows there may be a beneficial access of air, the obstruction of which might be a serious injury.

Actions are commonly brought for the obstruction of

ancient windows. In such an action the injury usually complained of is, that the access of both light and air is impeded; and it is evident that success in respect of light would be success in respect of air, so that in most cases the shortening the time of prescription in respect of light might substantially apply to air. But it is possible to suppose the case of a window darkened by a wall from ancient times, but useful for ventilation, being now wrongfully obstructed in respect of air.

No action of this sort can be maintained in respect of the obstruction of a prospect by a new building. This inconvenience, often experienced by persons living in houses in the outskirts of towns, is not of a character to entitle them to a remedy at law. The existence of such a remedy would obviously be a most impolitic obstacle to the improvement of many estates, and to the necessary enlargement of towns, where increasing population requires the erection of additional dwellings, not to speak of buildings for the purposes of commerce and manufactures. This should remind you of a similar argument in the last lecture in support of the decision, that if by means of an underground work water is intercepted which would otherwise have percolated into a stream, the loss of the water is not an injury for which the persons entitled to the use of it have any remedy. To permit a remedy for it would be contrary to good policy. It would be to impede the management and working of mineral property in a manner beneficial to the owner, and so diminish the supply of coal and valuable metals. Fuel might remain in the earth, which, if raised, might increase the comforts of the inhabitants of an extensive district. The spread of manufactures and trade might be hindered for want of iron which might remain unworked.

I now refer you to the epitome, contained in my last lecture, of the judgment of the Court of Exchequer delivered in 1851 by Mr. Baron Parke, on the subject of rights to the use of water. The judgment contains what

may be deemed a treatise on those rights, and insists especially on the circumstance of their not being capable of exact definition, and it concludes thus:

"The same law will be found to be applicable to the "corresponding rights of air and light. These also are "bestowed by Providence for the common benefit of man. "So long as the reasonable use by one man of this com- "mon property does not do actual perceptible damage to "the right of another to the similar use of it, no action "would lie. A man cannot occupy a dwelling and con- "sume fuel in it for domestic purposes without, in some "degree, impairing the natural purity of the air. He "cannot erect a building or plant a tree near the house of "another without, in some degree, diminishing the quantity "of light he enjoys; but such small interruptions give no "right of action, for they are necessarily incident to the "common enjoyment by all."

The passage quoted justifies the application to light and air of the tenor of the judgment in respect of water. Whenever, therefore, a building is complained of as obstructing the access of light and air, I think the question, whether there is an injury for which the law gives a remedy, depends on the circumstances of the particular case. On the one hand, it could not be permitted that any person should, by building or otherwise, diminish considerably the accustomed use by another of light or air. On the other, it would be contrary to reason that an accustomed use of either should control to a considerable extent the enjoyment by others of their property. It is a question of degree, and the limits applicable to the rights of owners of adjacent property in respect of light and air are not capable of precise definition. You observe that I have borrowed from the last lecture phrases there used in respect of water, and have in this lecture applied them to light and air. For so doing I have, if authority were needed, that just cited of Mr. Justice Parke.

The rules to which expression have just been given may

appear too vague for rules having the character of laws. There might be real difficulty in so placing them, with reference to the circumstances of any particular case, before a jury, as to lead them to a right conclusion. But a judge without a jury would, in most cases, find the application of these rules an easy task. This partly serves to account for the ordinary practice of referring to arbitrators causes in which are litigated questions relating to water or to light and air.

## LECTURE XXIV.

1. *Water. Pollution.*
2. *Sewers.*
3. *Drains.*
4. *Manufactories.*
5. *Prescriptions.*
6. *Damnum absque Injuriâ.*
7. *Air. Pollution.*
8. *Chimneys.*
9. *Steam Engines, &c.*
10. *Noxious Trades.*
11. *Copper Works, &c.*
12. *Smoke.*
13. *Gases.*
14. *Towns.*
15. *The Potteries.*
16. *Acquiescence.*
17. *Prescription Act.*
18. *Actions.*
19. *Damages.*
20. *Injunction.*
21. *Nuisances.*

Of one wrong for which a remedy is occasionally sought, the pollution of water, little need be said. It is generally true that a person entitled to the use of water has a right of action against any one who pollutes it in a perceptible degree. This is sometimes done by opening sewers into a stream, and sometimes by causing the refuse of a manufactory to flow into it. But the right of any person to have water in a pure state may be modified by rights of others, acquired by prescription or by grant. Thus it often happens that an ancient sewer pollutes a stream, the owner of it having a prescriptive right so to use it, and therefore the owners of property adjacent to the stream not having a remedy for the damage they sustain. This is a case of damnum absque injuriâ. The same thing happens frequently in the case of the refuse of an ancient factory flowing into a watercourse, without any remedy on the part of the land owners for the damage they sustain by the water being thus polluted. You are familiar with an instance of a considerable stream, called Stroudwater, plainly discoloured by the dye it receives from cloth mills. The utter destruction of the fish in a brook is often caused by the noxious refuse of factories.

I think the use of a sewer or drain leading into a water-

course is one form of using the watercourse itself within the meaning of the second section of the Prescription Act, and that therefore the time of prescription is shortened by that statute to twenty years or forty years, as explained in my lecture on the statute; so that, generally speaking, a prescriptive right to the use of a sewer or drain may now be acquired by twenty years' enjoyment, and cannot be acquired in less time.

Of the pollution of a stream it is equally true, as of the diversion of water from it, that in each case the question, whether an injury is sustained for which a remedy exists, is a question of degree depending upon circumstances, the limits to which the right to the use of the water in a state of purity extends, and the limits which control it with reference to the rights of others, being equally incapable of being defined.

What I have just said is, if possible, more applicable to the pollution of air. In a passage cited in the last lecture, from a judgment delivered by Mr. Baron Parke, in the Court of Exchequer, a remark was made to the effect that a fire cannot burn in a chimney without polluting, in some degree, the air of the neighbourhood. This is, perhaps, saying too much of any single chimney used for domestic purposes; but it is manifestly true of many a tall chimney of a manufactory emitting, in some cases, immense volumes of smoke, in others gases injurious to vegetation, and to the health of men and animals. But between the two cases now put, of a single chimney of a dwelling-house doing no perceptible damage, and that of a factory chimney sending out noxious gases, there are chimneys affecting the atmosphere in an infinite variety of degrees. Think of the many steam-engines, forges, glass-houses, sugar-houses, smelting-houses, copper works, and other works from which smoke or injurious gases are sent forth. You know the aspect of the part of Staffordshire called the Potteries, and that of the country round the copper works near Swansea.

As to a large town, the atmosphere of which is loaded

with smoke, none of the inhabitants can complain of the consequences of that which is essential to the comfort, in this climate, to the existence, of every one of them.

As to a district like the Potteries, the owners of many of the works have in the course of time acquired prescriptive rights, in the exercise of which mischief is done to inhabitants of the district for which they might otherwise have a legal remedy. These prescriptive rights have in multitudes of instances originated in the acquiescence of the persons injuriously affected by the carrying on the works in respect of which they now exist. Their acquiescence may be attributed to the advantages they derive from the works, and they submit to inconvenience for the sake of more than compensating benefits.

But I shall now proceed to explain that rights to carry on works of a noxious character may exist, irrespectively of prescription. They may arise at any time. This remarkable part of our law is set forth in a charge of Mr. Justice Byles, approved by the Court of Common Pleas. The public good requires that there should be places in which, what may be called noxious manufactures and trades may be carried on, and therefore a person who is damaged by a manufacture or trade carried on, in a proper place, does not sustain an injury, in respect of which an action may be maintained. But this point, and indeed the whole of the subject now treated of, will be best illustrated by a statement of the purport of the charge just alluded to, so far as it was questioned before the Court of Common Pleas (*a*). The plaintiff alleged, that the defendant erected a brick-kiln in front of the plaintiff's house, and wrongfully and injuriously burnt a large quantity of bricks, and caused a noxious and unwholesome vapour, by means of which the plaintiff's house was rendered uncomfortable, unhealthy, unwholesome and unfit for habitation. The defendant pleaded not guilty. At the trial Mr. Justice Byles

(*a*) *Hole* v. *Barlow*, 28 Law Journal, New Series, Common Pleas, 207, 1858.

summed up to this effect:—In order that an action should lie for an injury of this nature, it is not necessary that it should be injurious to health; it is quite sufficient if it renders the enjoyment of life and property uncomfortable. But this is subject to another observation. It is not everybody whose life and property are rendered uncomfortable by a trade carried on in his neighbourhood that can maintain an action. If so, in the neighbourhoods of Birmingham and Wolverhampton, there would be multitudes of persons bringing actions for noxious trades, and many great manufactories would be stopped. Though a person may be damaged by the carrying on of a trade, he cannot maintain an action if it is a lawful trade, carried on in a convenient and proper place. The questions left to the jury were: firstly, was the place where the bricks were burnt a proper place for the purpose? and secondly, if it was not a proper place, did the burning them make life and property uncomfortable? The verdict was for the defendant.

A new trial moved for, on the ground of the judge's direction to the jury being wrong, was after argument refused, the Court of Common Pleas thinking it right. A passage was cited from Comyns' Digest to this effect: an action does not lie for the reasonable use of a right, though it be to the annoyance of another; as if a butcher or a brewer use his trade in a convenient place, though it be to the annoyance of his neighbour. Mr. Justice Willes expressed his opinion, to the effect that the right of the owner of a house to have air unpolluted is subject to this qualification, that necessities may arise for interfering with the right, for the public good, for purposes necessary to life, provided the thing necessary to be done be done in a reasonable and proper manner, in a reasonable and proper place.

One might wish for the expression of a law, a rule by which men may know what are their relative rights, and according to which their conduct is to be regulated, phrases, if they could be found, less vague than "reasonable and proper manner," and "reasonable and proper place." The

subject does not appear to admit of greater certainty of expression, and doubtless great difficulty must be experienced by juries and arbitrators in determining what is, or is not, reasonable and proper in respect of manner and place. Whenever such a question arises it is not a question of law. It is a question of fact proper for the determination of a jury, and still more fit for the decision of an arbitrator. Whether a noxious trade is carried on in a proper spot, is a point upon which it must often be difficult to anticipate the opinion of a jury, or of an arbitrator.

In the charge of which I have in this lecture made great use, Mr. Justice Byles said, it used to be thought that if a man knew there was a nuisance, and went and lived near it, he could not maintain an action in respect of it. It was said that he went to the nuisance, and the nuisance did not come to him. A hundred years ago that was thought to be the law; but it is not now the law.

The judge might have said that the notion he speaks of was prevailing until within a few years ago. That it is not good law is established by a decision of the Court of Common Pleas (*a*), about twenty-two years ago, that in the case of an action for a nuisance, caused by the trade of a tallow-chandler being carried on by the defendant in a house adjoining the plaintiff's house, it was no answer that the defendant carried on the trade there three years before the plaintiff was possessed of his house.

Nevertheless, it would be found in practice, that if a person complaining of a nuisance had come to it, knowing of its existence, it would be urged in the discussion of the question, whether the thing complained of was done in a proper place, that the plaintiff's own conduct tended to show that he did not regard the place as improper for the purpose. This, combined with other circumstances, might be said to bear fairly on the question of fact, though alone it would not be a defence in point of law. You readily perceive

(*a*) *Bliss* v. *Hall*, 4 Bingham's New Cases, 183.

the great weight this topic would be likely to have with a jury.

The rule, or supposed rule, now disregarded, had at least the merit of simplicity and that of being easily applied, points in which the existing rule, as to the right locality for a noxious trade, is eminently defective.

In these discussions of legal rights to the use of water, light and air, I have been led by a desire to elucidate some of the enactments contained in the Prescription Act; and I have found that I could not say enough, without appearing to say more than enough, to effect my object. Many points of this very extensive subject are reserved for future consideration.

I have made many references to the usual remedy for the infringement of any right to the use of water, light or air, an action for damages. The plaintiff in an action of this sort is, if successful, usually content to recover nominal damages and the costs he incurs, the judgment in his favour operating as a warning to the defendant to discontinue the nuisance. If this object is not gained, repeated actions may be brought for the continuance of the injury; and in such cases real damages are awarded.

Another remedy is of too technical a sort for your attention at this early period of your studies. I refer to an injunction, a process by which a court of justice restrains the commission or continuance of a wrong. This is a process peculiarly effective in the case of injuries such as we have been lately considering.

I do not think this the right place for saying anything of the pollution of air or water, regarded as a species of crime called a nuisance, an injury to the public for which the offender may be indicted and punished. This must be treated of in some future lecture as a branch of the law relating to crimes.

## LECTURE XXV.

1. *Prescription.*
2. *Certainty.*
3. *Prescription. Reasonable.*
4. *Profit à prendre.*
5. *Prescription. Unreasonable.*
6. *Destruction of Property.*
7. *Judge interested.*
8. *Queen's Bench.*
9. *Quarter Sessions.*

In former lectures I have said enough in respect of customs, and what may be regarded their three chief essential qualities; those of being immemorial, certain, and reasonable. In the first place I spoke of the two latter qualities, postponing the first because I could not, in treating of the quality of being immemorial, conveniently distinguish between customs and prescription, and could not treat of prescription until I had made you familiar with the difference between it and custom. This has now been done, and we are arrived at a convenient opportunity for stating distinctly what you might probably otherwise infer, that the two qualities of being certain and reasonable are as essential to a prescriptive claim as to a custom, and for the same reasons.

For the illustration of the quality of certainty I find no materials which enable me, as respects prescription, to add to what was said on this point with reference to custom.

As in the case of a custom, so in the case of a prescription, it is not necessary that the reason of it should be known. The doctrine that it must be reasonable is sufficiently expressed by saying that to be valid a prescription must not be unreasonable.

The most striking instance that I know of an asserted prescription being void for being unreasonable is that which I spoke of in a former lecture: the case in which, on this ground, an alleged right, long exercised, to take clay from another's land, was decided to be bad; notwithstanding the doctrine that a right to *profit à prendre* may, in favour of one person or of a limited number of persons, exist by

prescription. This decision, apparently inconsistent with that doctrine, may be justified by considering the claim to have been one, the exercise of which might lead to the virtual destruction of the property of another; this being something more than a mere *profit à prendre.*

Littleton says (*a*), speaking of a bad prescription of which he gives an instance, "and so such prescription, or any "other prescription used, if it be against reason, this ought "not, nor will not, be allowed before judges, *quia malus* "*usus abolendus est.*" This extract is a specimen of Coke's English for Littleton's law French, the latter being, in this passage, unusually barbarous.

Littleton's instance, also in Coke's words, of a void prescription is this: "But if a man will prescribe that if any "cattle were upon the demesnes of a manor there doing "damage, that the lord of the manor for the time being "hath used to distrain them, and the distress to retain till "fine were made to him for the damages at his will, this "prescription is void because it is against reason that, if "wrong be done any man, that he thereof should be his "own judge: for by such way, if he had damages but to "the value of a halfpenny, he might assess and have "therefore a hundred pounds, which would be against "reason."

Coke (*b*), in his comment on this, cites the maxim *aliquis non debet esse judex in propriâ causâ*, and refers to a case in which a judicial proceeding then in use called a fine (since abolished by act of parliament) was set aside because one of the judges was a party: *quia non potest esse judex et pars.*

The rule of natural justice thus referred to might be considered too obvious to need comment: but the circumstances of the present times have made it important, controlling as it does the powers possessed by courts by virtue of the common law, and conferred upon them by acts of

(*a*) Littleton, 212.
(*b*) Coke upon Littleton, 141 a.

parliament. It is a rule which controls not only local customs and particular prescriptions; it limits the general law, whether written or not written.

Joint stock companies exist for a variety of purposes: the making and continuing railways and canals, the establishment and management of banks, are familiar instances. It sometimes happens that a judge finds himself disabled to act by reason of his having shares in one of these companies. This happened to Lord Cottenham when he was Chancellor, though it was not known that he was a shareholder in the company sued until the suit had proceeded so far that the plaintiff was committed to prison for disobeying an injunction decreed by the Chancellor. The decree was reversed by the House of Lords (*a*) on the ground of Lord Cottenham being, as a shareholder, interested in the suit. In a litigation between the same parties, one of the judges forbore to act as a member of the Court of Exchequer Chamber by reason of his being, as a shareholder, one of the defendants.

When a court consists of several members, the interest of one of them does not affect the jurisdiction of the court as constituted by other members of it. Thus the interest of one of the judges of the Exchequer Chamber did not stand in the way of the ordinary course of justice. But there are courts consisting of only one judge, as in the case by which I shall now proceed to illustrate the subject now before us.

Every poor law union is governed by a corporate body called the guardians of the poor, consisting of all the justices of the peace for the county resident in the district of the union, and of persons elected by the different parishes. In an action in a county court against the guardians of a poor law union it was objected, on behalf of the defendants, that the judge, being a justice of the peace resident in the district, was one of themselves. The

(*a*) *Dimes* v. *The Grand Junction Canal Company*, 3 House of Lords' Cases, 759.

plaintiff wished the cause to proceed, but the judge, though any interest he might have as a guardian could be but nominal, and the interest he might have as a ratepayer was incalculably minute, forebore to proceed; and this was sanctioned by Mr. Justice Talfourd, who directed the cause to be removed into one of the superior courts. This is an instance of a maxim of natural justice prevailing against the provisions of an act of parliament according to which, but for the maxim, the county court judge had a jurisdiction which he would have been bound to exercise.

Since this case occurred an act of parliament (*a*) has provided that when a judge of a county court is interested in the matter of any cause pending in his court, he shall order the cause to be sent for hearing to some convenient county court of which he is not the judge.

Of the court of quarter sessions for a county, all the justices of the peace for the county are members. The practice is, that any magistrate who happens to be present at a trial in which he is interested takes no part in the deliberations of his brethren, and carefully abstains from doing anything that may influence them. Indeed, he usually quits the bench and takes his place among the bye-standers.

In one case (*b*) the Court of Queen's Bench directed a process called a certiorari to be issued to bring before them an order of a court of quarter sessions, in order that it might be quashed by reason of the interference of an interested justice. He had interfered by speaking to the chairman and referring him to some of the documents in evidence, but he had not joined in the decision and had not in any way influenced the other magistrates. Lord Campbell made remarks, to the effect that what took place was greatly to be censured. The magistrate ought to have withdrawn from the court. Lord Campbell added: "that

(*a*) 19 & 20 Victoria, chapter 108, section 22.

(*b*) *The Queen* v. *The Justices of Suffolk*, 21 Law Journal, New Series, Magistrates' Cases, 169, 1852.

" is the example set by judges in Westminster Hall. Lord " Holt, upon the hearing of a question in which he was " personally interested, left the bench and sat by the side " of his counsel, and I did so in the Judicial Committee " of the Privy Council when I was Chancellor of the " Duchy of Lancaster. It was only yesterday that my " brother Crompton retired from the Court during the " hearing of a case in which he had been counsel when at " the bar." Mr. Justice Wightman said: "It is most " essential for the satisfactory administration of justice that " parties who are interested in a decision should not only " take no part in it, but also should give no ground " for believing that they influence others in deciding." Mr. Justice Crompton said: "The only question is, whether " an interested justice interfered in this case. It is said " that he did not influence the decision of the rest of the " magistrates, but that is not what is objected."

That by any interference of any sort on the part of a justice in any way interested, directly or remotely, a decision of the court of quarter sessions is vitiated is very strongly insisted on in another case (*a*) in the Court of Queen's Bench.

The same principle must apply to every court of every rank.

Of the superintendence by the Court of Queen's Bench of courts of quarter sessions, and of several other courts of justice, a great deal will be said in future lectures, in which the constitution and powers of courts will be considered, especially with reference to each other.

(*a*) *The Queen* v. *The Justices of Hertfordshire*, 14 Law Journal, New Series, Magistrates' Cases, 73, 1845.

## LECTURE XXVI.

1. *Trade Usages.*
2. *New Trade Usages.*
3. *New Husbandry Usages.*
4. *Certainty.*
5. *Trade Usages. Reasonable.*
6. *Trade Usages. Unreasonable.*
7. *Railway and Canal Traffic Act.*
8. *Rules just and reasonable.*

THE qualities of being certain and reasonable are essential to a trade usage, which in this respect resembles custom or prescription. But a trade usage differs from these in this respect, that it need not be immemorial Indeed, trade usages are constantly springing up, as well in old existing as in newly-formed trades. In my own opinion even husbandry usages, though of the nature of local customs, are, in the progress of agricultural improvements, in the course of being formed or modified. This remark should remind you of what I have before said, in relation to what I think likely to be yet imperfect usages of the East Riding of Yorkshire.

The certainty, obviously as essential to a usage as to any rule or law, has been sufficiently treated of under the heads of custom and prescription. No illustration could make it plainer.

As in the case of custom or prescription, so in that of a trade usage, to make it good the reason of it need not be shown. It is valid if it is not shown to be unreasonable.

I have taken some pains to find cases by which to illustrate the doctrine in respect of trade usages, that they must not be unreasonable. All that I have met with refer to mercantile transactions more or less complicated, of such a nature as not to be readily understood by the younger portion of students. Not liking, however, to leave this point without some practical illustration, I think it right to make use of a decision of a county court for the purpose. To you I need not explain that I do not use this judgment

as having any degree of intrinsic authority. Of a decision of any of the courts at Westminster it may be said that it declares the law upon the point decided. The judgments of an inferior court cannot be thus regarded: and I am now using one of them as an opinion of counsel is used, as a piece of instruction sufficient for a student in the absence of higher authority.

In an action in a county court, in a large town, the plaintiff claimed 11*l.* 10*s.* as commission on letting a house, and for work and labour. The plaintiff, who was a house agent, was employed by the defendant to let a furnished house. The house was let by the defendant himself, without the assistance of the plaintiff; and the plaintiff was afterwards employed by the defendant to take an inventory of the furniture, and, with the tenant's agent, to compare the inventory with the furniture. This and other services in connection with the house were rendered by the plaintiff to the defendant. The rent for which the house was let was 230*l.* a year.

At the trial the plaintiff and another house agent in extensive business in the town deposed to the effect that, according to the usage of the town, if a house agent is employed to let a furnished house, and if during the continuance of his agency the house is let, whether by his means or not, and even if it is let by the owner, or any other person, without the assistance of the agent, then is the agent entitled to a commission of 5*l.* per cent. on a year's rent. Accordingly, the plaintiff claimed 11*l.* 10*s.*, being at the rate of 5*l.* per cent. on 230*l.* The defendant's attorney did not produce evidence to rebut the alleged usage; but contended to the effect that any such usage could not be binding.

The question was reserved for consideration whether the alleged usage was binding, the judge intimating an opinion, that if he should consider it binding, the judgment would be that the plaintiff should recover 11*l.* 10*s.*, and that otherwise the judgment would be in his favour for five guineas for the services actually rendered.

In his judgment he remarked, that in favour of the usage it might be said that, unless it prevailed an agent might, after every proper exertion on his part to let a house, be disappointed of his reward by the house being let behind his back, and it is not difficult to suppose the case of the exertions of an agent leading to the letting of a house, even though the treaty and the bargain may not be made by him. A case might even be supposed of an artful owner of a house so managing the letting of it, behind the back of his agent, as to take advantage of his services without acknowledging them. In such a case, the usage, if binding, would prevent the agent being deprived of a proper remuneration for his services, and would be a decided obstacle to his being defrauded by his employer. A liberal owner of a house letting it himself, without the immediate assistance of an agent employed by him, might well be disposed to take care that his agent should not be disappointed of his commission. In many a case the owner may well suppose that, though the house is actually let by himself, the publicity given by the agent to the fact of the house being to be let may have led to the letting of the house. Hence may have arisen the existence of the usage in point of fact. On the other hand, it might be remarked that, if the alleged usage was binding, then a house agent might be entitled to receive 10*l.*, or 20*l.*, or even more, for doing absolutely nothing, or for not doing more than putting a notice in his window, or an advertisement in a newspaper. Knowing that his title to commission would depend only on the house being let, whether by himself or by any other person, he might be less likely to exert himself properly than if his title to commission depended upon the house being let by himself. Again, it might be remarked than an unwary owner of a house might find himself subject to the payment of two or more heavy commissions from merely having spoken to two or more house agents to get him a tenant. House agents would be aware of the usage; which in very many instances would

not be likely to come to the knowledge of other persons except by costly experience. This reflection seems to distinguish the case of house agency from the ordinary case of a usage binding on persons engaged in particular pursuits, in the course of which they have necessarily frequent transactions with each other; such, for instance, as the case of merchants and brokers, or the case of clothiers and dyers, or the case of millers and bakers. In the case of house agency the employer must often, especially in a watering place, be a sort of trading letter of furnished houses; but it is equally certain, that many a person not conversant with business, letting a house in one instance, might find himself subject to what he would feel to be an extortionate demand, if the alleged usage should be considered binding. The judge said that the usage would, in his opinion, framed after the most careful consideration, be, if binding, a most ready instrument of extortion, and that to so great an extent as to make it unreasonable and void; while the inconvenience which it might serve to prevent, though those inconveniences are great, are the less to be regarded when it is considered that a house agent, disappointed of commission, must in many cases, as in that which he was then deciding, be entitled to payment for services actually rendered. He thought too, that, in the possible case of an employer's conduct amounting to a fraud, a remedy might be found. In fact, he regarded as unreasonable, and therefore void, a usage which, having apparently for its object the prevention of occasional hardship and fraud, must, in its application, lead to frequent injustice.

I will conclude the subject, of which we have said so much, the necessity, namely, that any custom, prescription or usage must be reasonable, or rather must not be unreasonable, by stating the effect of what must be regarded as a very strange decision of the Court of Common Pleas (*a*).

(*a*) *Simons* v. *The Great Western Railway Company*, 26 Law Journal, New Series, Common Pleas, 25, 1857.

A statute called the Railway and Canal Traffic Act of 1854 (*a*), in its 7th section, prevents railway and canal companies from limiting by notice, condition or declaration, their liability for the safety of goods carried: but contains a proviso giving effect to such special conditions, signed by the consignor, as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable. It is the practice of the Great Western Railway Company, receiving goods to be carried at what are called mileage rates, to require the signature of the consignor to a special contract containing many conditions, one of them being this:—

"15thly. Goods conveyed at special or mileage rates must be loaded and unloaded by the owners or their agents, and the company will not be responsible for any risk of stowage, loss or damage, however caused, nor for discrepancy in the delivery, as to either quantity, number or weight, nor for the condition of articles so carried, nor for detention or delay in the conveying or delivery of them, however caused."

One would think that there could be no hesitation in adjudging this condition not to be just or reasonable. The effect of it seems to be that the company and their servants need not take any care of goods carried at mileage rates. In the interval between their being loaded by the consignor and their being unloaded by the consignee there is to be no responsibility for proper care being taken of them, and the company and their servants may negligently or wilfully detain the goods, or delay their conveyance or delivery, for any length of time. This cannot be either just or reasonable. The Court of Common Pleas, in the case I am citing, decided this condition to be both just and reasonable, on the ground that the mileage rate was in proportion to the risk incurred. By this is apparently meant that a consignor, signing the contract, is willing for

(*a*) 17 & 18 Victoria, chapter 31.

the sake of having his goods carried at a cheap rate, to incur every risk of no care being taken of them, of the delivery of them being indefinitely postponed, and of their being lost, or injured, or destroyed. On this it may be remarked, that the legislature evidently intended to provide for the case of a consignor being induced, by some motive or other, to sign conditions not just and reasonable, and to relieve him from the consequences of so doing. To suggest the object which a consignor may have, the saving of money, for signing the condition in question, is not to give a reason for holding that to be just and reasonable which leads to the mischievous results to which I have drawn attention. Whether the payment to the company be great or small, it is, though not in the same degree, unjust and unreasonable to require a consignor so to stipulate that there shall be no motive on the part of a railway company to have proper care taken of goods.

The rules of so extensive a carrying trade as that of the Great Western Railway Company must, in time, acquire so much the character of trade usages that I think this lecture a fit place for stating and criticising the decision of the Court of Common Pleas to the effect that this 15th rule is reasonable. In several instances railway companies have, virtually, monopolies of the carrying trade in extensive districts, and the intention of the legislature cannot be doubted to restrain them from taking undue advantage of their monopolies to exact from persons who cannot find other means of transmitting merchandize, their signatures to unreasonable conditions, which if there were any competition with the companies would not be thought of. The condition sanctioned by the decision of the Common Pleas relieves the Great Western Railway Company not only from every responsibility, but from every duty in respect of goods to which it applies.

## LECTURE XXVII.

1. *Husbandry Usages.*
2. *Tenancy from Year to Year.*
3. *Tenancy at Will.*
4. *Emblements.*
5. *Notice to quit.*
6. *Quarter Days.*
7. *Judge-made Law.*

As some parts of the general common law have had their origin in the usages of merchants, so other parts of it are, I think, derived from the usages of husbandmen. You perceive that I am not now referring to the usages of particular trades, nor to the husbandry usages of particular districts. In former lectures I have treated of the way in which trade usages have been adopted into the common law, the rules relating to bills of exchange being my chief example. I now propose to deal with what seem to me to be parts of the common law framed out of the general usages of tillers of the land.

When any land or building is let, not for a time certain, as for a year, or seven years, or any specific period, it is said to be let generally; and the tenancy created is called a tenancy from year to year. The tenant holds for one year certain, and afterwards from year to year, until his tenancy is determined by a half-year's notice to quit ending at the same time of the year at which his tenancy began. The notice to quit may be given by either party, landlord or tenant, and may expire at the end of the first or of any subsequent year.

Now I think that this species of tenancy originated in this manner: for the convenient tillage of land it is plainly necessary that the tenant of it should never hold it for less than a year, and that the landlord should never have the power to put an end to the tenancy so as to interfere with the ordinary course of husbandry. Therefore, as you will soon see, a tenancy from year to year, or, as it is called, a yearly tenancy, results from a general letting, as distinguished from

a tenancy at will, which would be a more obvious consequence of such a letting, but which would place the tenants too much in the power of their landlords. True it is that if, in the rare case of a tenancy at will of a farm, the landlord should put an end to the tenancy, the tenant would be entitled to *emblements;* that is, as you know, he would be entitled to reap, after the tenancy, crops sown during its continuance. Still there are many agricultural processes in which a tenant could not safely engage if exposed to the risk of his tenancy being put an end to at any broken time of the year.

Therefore it is that a general demise, being construed into a demise from year to year, may be referred to an ancient practice so to let lands, that a tenant might always be assured of the possession of them for the current year. Thus he might safely have his customary fallows, and safely plough and properly till the rest of his arable land, and exercise his discretion as to making hay on his grass land, or turn his cattle on it to feed.

That the general rule, that a general letting makes a yearly tenancy, now applies to all sorts of property, including dwelling-houses in towns, warehouses, and all sorts of buildings used for a variety of purposes other than agricultural, does not, I think, conflict with my opinion as to the origin of the rule. Found convenient as to farms, the principal original subjects of tenancy, it would gradually be applied to other species of property as we now find it. Laws progressively formed have a tendency to uniformity. You bear in mind that the privilege which traders at first assumed of transferring debts by means of negotiable bills of exchange has gradually extended itself to all classes of men.

In one of the earliest of these lectures I spoke of some flagrant instances of Judge-made law repealing, I might have said so submitted to as to have the effect of repealing, the express words of acts of parliament. I am now come to one of them.

The celebrated Statute of Frauds, made in the reign of Charles II. (*a*), enacts in its 1st and 2nd sections, "that "all leases, estates, interests of freehold, or terms of years, "or any uncertain interest of, into or out of any mes- "suages, manors, lands, tenements or hereditaments, made "or created by livery and seisin only, or by parol, and not "put in writing and signed by the parties so making or "creating the same, or their agents thereunto lawfully "authorized by writing, shall have the force and effect of "leases or estates only *at will:* and shall not either in law "or equity be deemed or taken to have any other or greater "force or effect, any consideration for making any such "parol leases or estates to the contrary notwithstanding. "Except nevertheless all leases not exceeding the term of "three years from the making thereof, whereupon the "rent reserved to the landlord during such term shall "amount unto two-third parts at the least of the full im- "proved value of the thing demised."

Had the courts been content with deciding that a tenancy from year to year, though it might endure for more than three years, was a tenancy for a term certain of only one year, and might, therefore, consistently with the intent of the statute, be created by a general parol demise without writing, some of their decisions would not have been amenable to the strong criticisms inflicted on them by Watkins (*b*) and other writers; but they have gone far beyond this, and have decided that a holding under a parol demise for more than three years, operates as a tenancy from year to year. In the principal case on this point Lord Kenyon says (*c*), "The meaning of the statute was, that such an agreement "should not operate as a term; but what was then con- "sidered as a tenancy at will has since been properly con- "strued to endure as a tenancy from year to year." Lord Kenyon, who appears not to have been an accurate logician,

(*a*) 29 Charles II. chapter 3.

(*b*) Watkins on Conveyancing, p. 5 et seq.

(*c*) *Clayton* v. *Blakey*, 8 Durnford & East, 3.

might have been puzzled if he had been asked if he really meant what his words import, that there could no longer be such a thing as a tenancy at will to give effect to the words of the statute. It might have been as difficult for him to say, how that which the legislature declared to be one thing was properly construed to be something else.

John William Smith, in his comment on this case, says, that though loudly impugned by Watkins, it has never been invalidated by judicial decision (*a*). He might have added, that it has been again and again recognized and confirmed by judicial decisions. He justifies it by what looks like a more rational ground than that given by Lord Kenyon. He suggests that a tenancy at will existing by force of the statute may be enlarged by payment of rent into a yearly tenancy. He thus abandons Lord Kenyon's express reason, and he appears justified by the authorities he cites. But it is those very authorities I controvert, inasmuch as they give to payment of rent expressly reserved at the creation of what the statute makes a tenancy at will, and therefore consistent with the express terms of that tenancy, the effect of enlarging that tenancy into something else inconsistent with the very emphatic and searching words of the statute. So precise and searching are the words that the great lawyers, by whom the Statute of Frauds is said to have been drawn, may be supposed to have selected them for the purpose of excluding possible judicial constructions inconsistent with the known intention of the legislature.

As a tenancy at will can be determined at a moment's notice, the rule which in defiance of the words of an act of parliament is obeyed as law is most convenient; but I agree with Watkins, that the change of the law ought not to have been made by judges usurping legislative power. At the same time, I think that the usurpation may be palliated by the reflection that probably the change adverted to by Lord Kenyon had silently worked its way by

(*a*) 2 Smith's Leading Cases, 72.

repeated instances of landlords and tenants treating as yearly tenancies what were in reality, according to law, only tenancies at will.

The change, however worked, is so complete, that I might, if my only object had been to tell you the law in its present state, have been content to say, that a verbal demise for more than three years now creates a yearly tenancy. But I thought this a convenient opportunity of showing clearly how it is that usage, though not immemorial, may, especially when having judicial sanction, establish a law contrary to an act of parliament.

When, as is most frequently the case, a tenancy begins on any one of the four usual quarter days, the requisite notice to quit must run two quarters, and is never an exact half-year's notice. When a tenancy has begun at Christmas, the 25th of December, a notice expiring on that day must be given on or before the preceding Midsummer-day, the 24th of June, and when a tenancy has begun at Midsummer, a notice expiring on that day must be given on or before the preceding Christmas-day. In each case the requisite notice runs a day less or a day more than a half year. If a tenancy has begun at Michaelmas, the 29th of September, a notice expiring on that day must be given on or before the preceding Lady-day, the 25th of March. The notice requisite is then five days more than half a year. A notice given on Michaelmas-day to quit at Lady-day is five days less than half a year. The inequality of the quarters is accounted for by important Church festivals being selected, as most marked days in the calendar, for the quarter days for payment of rent.

## LECTURE XXVIII.

1. *Servants.*
2. *Husbandry Servants.*
3. *Hiring for a Year.*
4. *Mops. Hiring Fairs.*
5. *Husbandry Servants. Summary Jurisdiction of Magistrates.*
6. *General Hiring.*
7. *Yearly Service.*
8. *Domestic or menial Servants.*
9. *Warning.*
10. *Clerks, &c.*
11. *Trade Usages.*

In my last lecture, speaking of the law deriving, from a general letting, a yearly tenancy, I suggested as the origin of the rule, the necessity that a farmer should always have a certain interest in his farm for at least the current year. Now it happens that the work on a farm, varying greatly in the course of a year, is, taking the whole year together, nearly the same in every successive year: and in former times it was found convenient to both farmers and labourers, that labourers should be hired for a year, during which they should be maintained by their employers, and that they should receive a stipulated sum as wages for the whole year. Thus the farmer secured the services of the labourer in the harvest and at other busy times, and the labourer secured a home and maintenance in winter and at other times when there would be but little for him to do. At all times, men having wives and families were less often thus hired by the year than were unmarried men. The married could not be inmates of the farm-houses, and they needed weekly wages to support their families. Single men are still often hired by the year: but this is becoming less frequent, since it has been found beneficial for much agricultural work to be paid for as piece-work, and not by wages either weekly or yearly. The women servants in farm-houses are still in many parts of the country usually hired for a year certain.

Those only who live in some parts of England know to what extent the system of yearly service has influenced the

habits of the peasantry. I will mention but one example of this. Strangers who happen to visit the districts to which I allude about Michaelmas are surprised at the scenes they witness in market towns, where the mops, as they are called, take place, fairs at which the farmers of the neighbourhood hire servants, men and women, for the year usually beginning on Old Michaelmas-day, the 11th of October. The streets, crowded with farm labourers and servant girls waiting to be hired, have a singular aspect, and there are amusing groups of farmers and their wives and country boys and girls and their parents engaged in earnest conversation.

A mop is the great holiday for the country people, and bringing together, in a large town, great crowds of young persons, and of the vagabonds by whom fairs are frequented, is regarded as a great evil. All the usual amusements of a fair, some of them of a demoralizing tendency, are the characteristics of a mop, a holiday to which the peasantry are greatly attached, and which the clergy and country gentlemen cannot induce them to forego by hiring themselves to the farmers at home. It is considered a great advantage to a town to have a mop, by reason of the profit which it brings to the innkeepers and tradesmen.

As you may readily suppose disputes frequently arise between persons, of various tempers, tied to each other for a year; and the legislature has entrusted the justices of the peace with a summary jurisdiction over husbandry labourers and their employers. In the exercise of this jurisdiction magistrates have powers to enforce payment of wages and protect the servants from ill-treatment, and to punish those of them who are guilty of desertion, disobedience, or other misconduct. Desertion is the offence in respect of which these powers are frequently exercised. This jurisdiction confined to husbandry servants, and not applying to domestic servants, will be treated of in some future lecture as one of the many summary jurisdictions with which justices of the peace are invested.

In the practice of engaging labourers for a year, probably originated a rule of law, that a general hiring, that is, a hiring without any period of service being stipulated, is a hiring for a year. No time being named, the parties are supposed to be acting in conformity with the usual practice. I have before mentioned the tendency to uniformity of laws originating in usage. This is an instance; for the rule making a general hiring a hiring for a year has extended itself to all classes of servants.

Except in farm-houses, domestic servants are not often hired for a year certain, or for any stipulated period. In their case the rule that a general hiring is a hiring for a year has been greatly modified by usage, as I will now proceed to explain.

It often happened that, at the end of a year of service, under a general hiring, a servant continued in the place without any renewed hiring, except that implied in the continuance of the service. Thus originated what was called a yearly hiring, or a hiring by the year; the service lasting for as many successive years as the two parties, master and servant, thought proper. After some time, usage, in the case of domestic servants, engrafted upon this mode of service a right upon the part of either party to put an end to the service at any time by a month's notice, or, as it is usually termed, a month's warning.

It so happens that the idea of hiring for a year, or a yearly hiring is, in our times, as respects domestic servants, quite lost sight of: and the law has come to this; that a general hiring of a domestic servant is a hiring for a time indefinite, each party having a right to put an end to the service at any time by a month's warning, and the master having also the power to dismiss the servant at any time, giving a month's wages instead of warning.

That of domestic servants hired generally is the only case in which the common law gives effect to a warning. Thus it has been decided (*a*), that a clerk to an army agent

(*a*) *Beeston* v. *Collyer*, 5 Law Journal, Common Pleas, 180.

hired generally, and whose service is therefore a yearly service, cannot be dismissed by means of a month's warning, and his service can be determined only at the end of a year.

There are, however, some instances of the usages of particular trades giving validity to notices of this sort. You will find one instance in my fifteenth lecture, in which you will also find this passage, which I repeat as most appropriate to the subject of this lecture :—

The difference between the case of a domestic servant and that of any other servant is this: it is a part of the general law that either party may, by notice, determine the service of a domestic servant: it requires, in any trade, a special usage to give effect to such a notice. Of the general custom in respect of domestic servants, a court takes notice as of a part of the common law: the usage of a particular trade giving effect to a notice must, if disputed, be proved as a matter of fact.

In the expression of the law on the subject of warning, putting an end to a service, the word menial is sometimes used as equivalent for the word domestic, and the question sometimes arises, what is a menial or domestic servant? A head gardener at yearly wages, with a house to live in, rent free, not part of his master's house, has been decided (*a*) to be a menial servant, who could be dismissed by a month's notice.

Delivering a judgment of the Court of Exchequer, that a governess cannot be dismissed by means of a month's warning, Chief Baron Pollock said, "We are of opinion, "that a governess is not within the rule or custom as to "menial or domestic servants. The position in which a "governess is placed, the station which she occupies in a "family, the manner in which such a person is usually "treated in society, certainly place her in a very different "situation from that of domestic or menial servants."

At first sight you may think that in both these two

(*a*) *Gowlan* v. *Ablett*, 4 Law Journal, Exchequer, 155.

judgments, that of the gardener, and that of the governess, the etymology of the words, menial, domestic, is disregarded. On reflection you will perceive this is not so. Though a gardener may not live within the walls (*intra mœnia*) of his master's dwelling, his duties have reference to his master's household. Though a governess may live in the house of the parents of her pupils, her duties have no reference to the household. Quite agreeing with the Barons of the Exchequer in the principles they express, as far as those principles go, I think I have suggested a yet more satisfactory reason for their decision.

Whether a servant is engaged for a definite time, or hired generally, and whether he might or might not be dismissed by means of a month's warning, he may be at any time dismissed without warning for gross misconduct in point of morals, wilful disobedience, or habitual negligence; and, if so dismissed, he forfeits his right to wages for the time he has served, since the last period for payment of his wages. Whether alleged misconduct is such as to justify instant dismissal, with loss of wages, is sometimes a difficult question of fact, or of law, or of both in relation to each other.

## LECTURE XXIX.

1. *Presumptions.*
2. *Boundaries.*
3. *Hedge.*
4. *Ditch.*
5. *Waste Land.*
6. *Highway.*
7. *Medium filum viæ.*
8. *Rivers, Brooks, &c.*
9. *Navigable Rivers.*
10. *Medium filum aquæ.*
11. *Hills.*
12. *Watershed.*
13. *Tide.*
14. *Sea-shore.*
15. *Counties.*
16. *Parishes.*

A RULE of great practical utility is this: in every case of a hedge and ditch lying between two estates, belonging to two different persons, the ditch is presumed to belong to the person on whose land the hedge stands; so that with reference to the rest of his land, his ditch is beyond his fence, and appears, to a person unacquainted with the rule, on a part of the land of another person. This must have originated in the practice of husbandmen making a fence, consisting of both hedge and ditch, to plant the one and dig the other without trespassing on any adjoining land. Indeed, so generally has it been the practice for men, even when they do not make ditches, to plant their hedges well within their own fields, that land surveyors are accustomed to presume, that even when there is no ditch the land of the owner of a hedge extends beyond the hedge three feet, being the usual width of a ditch. Want of direct authority prevents my saying that this presumption has yet attained the rank of a legal presumption.

As, in legal discussions, there is frequent occasion to remark, it is of the nature of every legal presumption to be liable to be rebutted by evidence: and so, any of the presumptions mentioned in the preceding part of this lecture, may be rebutted by proof of the ditch, or three feet of land beyond the hedge, being in point of fact the property of the owner of the close in which it appears to lie. This may be done by proving acts of ownership on his part.

Another presumption of ground lying beyond the apparent limits of land, being part of it, is the common case of waste land adjoining a public highway being presumed to belong to the owner of enclosed land, adjoining the waste land on the other side of it.* Indeed the soil of the highway itself is subject to this presumption *usque medium filum viæ.*

If the land on both sides a highway belongs to one person, it is presumptively his property, subject to the public right of way.

It is a common mistake on the part of lords of manors and others, that all the waste lands within a manor belong to the lord. This is not so in respect of waste land lying between a highway and enclosed land. The presumption of property in waste lands so situate is in favour of the owners of the adjoining enclosed lands; and a lord of a manor, like any stranger, can establish a title to them only by rebutting the presumption by evidence.

Acts of ownership are the usual evidence for this purpose; such as planting or felling trees, or digging stone or gravel, or building cottages, or taking in or demising parts of the waste.

As to other waste lands than those between enclosed lands and a highway, the presumption is, that they are the property of the lord of the manor.

* The bed of a watercourse is the property of the person through whose land it passes: but if it is the boundary of two estates, each estate extends *usque medium filum aquæ.* This presumption is capable of being rebutted by evidence of acts of ownership, or other circumstances establishing the title or the right of one of the owners of the estates to the whole width of the stream. To the general rule there is an exception, that of a navigable stream, the bed of which, as far as the tide flows, presumptively belongs to the Crown.

As in the case of private estates, so in the case of legal districts, such as counties and parishes, if a highway or a river is the boundary between two of them, each district

extends to the middle of the highway or river. If a hill is said to divide two estates, or two counties, or parishes or districts, the boundary, in the absence of proof of something more definite, is the watershed, the line at the top of the hill at which the rain falling there divides, and runs down the hill in opposite directions.

I do not remember a spot where the watershed is more distinct than along the ridge of the Malvern Hills. With reference to most hills the question as to what is to be regarded as the actual watershed, must be a very obscure point.

The Malvern Hills lie between Worcestershire and Herefordshire; but whether the watershed is regarded as the exact boundary between the two counties, or there are facts to rebut the presumption of its being so, I am not informed.

Delivering a judgment (*a*), of the Court of Queen's Bench to the effect, that the parish of Rotherhithe, extends to the middle of the river Thames, though the parish authorities are accustomed to beat the bounds on the edge of the river, and though the authorities of other parishes lying on the river, are accustomed, when beating their bounds, to go along the middle of the river, Lord Campbell said:—

"When the beaters of the boundaries go as near the extremity of the parish as the nature of the land will admit of, what more is necessary? They assume that it is well known that the parish extends to the middle of the river, and so the authorities of Rotherhithe content themselves with keeping along the dry land."

The sea shore between high-water mark and low-water mark is presumptively the property of the Crown, and also presumptively extra-parochial (*b*); but either presumption may be rebutted by evidence of perambulations, known

(*a*) *M'Cannon* v. *Sinclair*, 28 Law Journal, New Series, Magistrates' Cases, 247, 1859.

(*b*) *The Queen* v. *Musson*, 27 Law Journal, New Series, Magistrates' Cases, 108, 1858.

metes and bounds, reputation and the like. The phrase high-water mark has reference to the state of the ordinary tides. Every part of the land not covered by an ordinary tide, though covered by spring tides, is, presumptively, the property of the owner of the adjoining land.

It frequently happens that acts of ownership, reputation and other circumstances, show that the lord of a manor is the owner of the adjacent sea shore.

## LECTURE XXX.

1. *Husbandry Usages.*
2. *Fences.*
3. *Cattle trespassing.*
4. *Prescriptive Duties.*
5. *Prescriptive Rights.*
6. *Special Pleading.*
7. *Parishes.*
8. *Highways.*
9. *Counties.*
10. *Bridges.*
11. *Turnpikes.*

We will now return to the subject of fences, and the laws relating to them, originating in agricultural usages. A prescriptive duty to keep a fence in repair arises from the owners of the fence having been always accustomed to repair it: and if, by reason of a neglect of this duty, a fence is defective and cattle stray through it, the owner of the fence has no right to distrain the cattle, nor has he any other remedy for the damage he sustains. But this is subject to a qualification that the owner of the cattle cannot take advantage of the defective state of the fences unless the cattle had been lawfully in the place from which they strayed through the fence.

Thus, in a case reported in the year 1795, the Court of Common Pleas decided (*a*) to the effect, that the defendant was justified in distraining the cattle of the plaintiff which had strayed from a highway through fences which the defendant was prescriptively bound to repair, and which were out of repair, because it did not appear that the cattle were passing along the highway, or had any right to be there at all. In this case Mr. Justice Heath well explained the law thus:—"if cattle of one man escape into the land "of another, it is no excuse that the fences were out of "repair, if they were trespassers in the place from whence "they came. If it be a close, the owner of the cattle must "show an interest or a right to put them there. If it be "a way, he must show that he was lawfully using the way;

(*a*) *Dovaston* v. *Payne*, 2 Henry Blackstone, 527.

" for the property is in the owner of the soil, subject to an " easement for the benefit of the public. On the plea it " does not appear whether the cattle were passing and re- " passing, or whether they were trespassing on the high- " way : the words used are entirely equivocal."

Having specified to you many prescriptive rights, this is the first instance I have mentioned to you of a prescriptive duty : and I think the nature of a prescriptive duty cannot be better set before you than in the words of the plea in the case just cited, namely, that the defendant and all other owners, tenants and occupiers of the land in which the cattle were distrained, for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and the defendant still of right ought to repair and amend, the hedges and fences between the said place and the said highway, when and so often as need or occasion hath been or required, or shall or may be or require, to prevent cattle being in the said highway from erring and escaping thereout into the said place, through the defects and defaults of the said hedges and fences, and doing damage there.

This specimen of special pleading resembles the form in which a prescriptive right was formerly pleaded; that is, until the time of prescription was altered by the Prescription Act; alleging, in similar quaint language, that from time whereof the memory of man is not to the contrary, the alleged right of way, or other right claimed, had been used and enjoyed. Any prescriptive right not affected by the Prescription Act would still be pleaded in the same manner.

I cannot part with this subject without mentioning two or three other instances of prescriptive duties.

By the common law, the inhabitants of a parish are bound to repair all the highways within it; and this is usually done by means of a highway rate. But it often happens that a parish is relieved from this duty, in respect

of a portion of the highways within it, by evidence that the inhabitants of a township have time immemorial kept their own highways in repair.

Again, it frequently happens that the occupiers for the time being of a particular estate are subject to a prescriptive duty to repair certain highways: this being evidenced by their having been always accustomed to repair them.

From the general duty of a parish to repair highways are excepted bridges over running streams, which, according to the common law, must be repaired by the inhabitants of the county. This is one of the charges on the county rate. By an act of parliament passed in the reign of Henry VIII. (*a*), said to be declaratory of the common law, the county is bound to repair the highway at the end of a bridge for the space of three hundred feet.

Occasionally, counties are exempt from the burthen of repairing particular bridges by the existence of prescriptive duties on the part of parishes, townships or the owners of private estates to repair them.

The liability of the county to repair bridges exists in the case of new bridges, by whomsoever erected, even by private persons, provided they are useful to, and actually used by, the public. Such was the common law; but this is to some extent altered by a statute passed in 1803 (*b*), which contains this preamble:—"Whereas the inhabitants "of counties in that part of the United Kingdom called "England are by law bound to repair, support and main- "tain the public bridges, commonly called county bridges, "within such counties respectively, and the roads at each "of the ends thereof for limited distances; but the laws "empowering them so to do are insufficient and defective: "and whereas doubts have arisen how far the said in- "habitants are liable to improve such bridges when they "are not sufficiently commodious for the public." Of the many provisions which this act of parliament contains the

(*a*) 22 Henry VIII. chapter 5, section 9.
(*b*) 43 Geo. III. chapter 59.

only one I need now refer to is the 5th section. That clause, "for the more clearly ascertaining the description "of bridges hereafter to be erected, which inhabitants of "counties shall and may be bound or liable to repair and "maintain," enacts to the effect that no bridge thereafter to be built shall be deemed a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless it shall be erected in a substantial or commodious manner under the direction, or to the satisfaction, of the county surveyor, or a person appointed by the quarter sessions.

A statute called the Highway Act, passed in 1835 (*a*), to consolidate and amend the laws relating to highways, enacts in its 21st section to the effect, that in the case of any bridge thereafter to be built, "which bridge shall be liable "by law to be repaired" by a county, then all highways leading to, passing over and next adjoining the bridge shall be repaired by the parish, person, corporation or turnpike trustees bound before the erection of the bridge to repair the highways. You notice the odd way in which the legislature, meaning to speak of a county being liable to repair a bridge, speaks of a bridge being liable to be repaired by a county.

When a river is the boundary between two counties, one half of a bridge over it is repaired by one county, and the other half by the other. This was formerly actually done in the case of Chepstow bridge: the whole is now repaired at the joint expense of the two counties, Gloucestershire and Monmouthshire; both counties usually employing one contractor.

The remedy against a county or parish for neglect of any duty to repair a bridge or highway is an indictment, and the punishment is a fine.

Turnpike tolls are, by the authority of acts of parliament imposing them, levied for the repair of roads, the great

(*a*) 5 & 6 Will. IV. chapter 50.

traffic over which might make them an intolerable burthen to the parishes through which they pass. Tolls of this sort are intended as a help to the parish, and do not exempt a parish from its common law liability to repair a highway, being a turnpike road, if the tolls should prove inadequate. This may be an important point in the case of a turnpike road, the tolls of which are greatly diminished by the competition of railways.

## LECTURE XXXI.

1. *Rule of the Road.*
2. *Negligence.*
3. *Actions for Negligence.*
4. *Running down Causes.*
5. *Negligence of Person injured.*
6. *Negligence of Servants.*
7. *Manslaughter.*

You will smile at my gravely mentioning as a part of the common law of the land your old acquaintance the rhyming rule of the road: "the paradox quite:" I so mention it because it seems to me to have had its origin in a husbandry usage: that of a waggoner to walk on the left of his team as the most convenient side for guiding his horses. Thus, when two waggons meet, each waggoner walking on the left side of his leading horse can, by dropping the end of his whip over to the right side of the horse's head, and speaking to it the usual words, bring it and the rest of the team with the waggon towards him. The practice serves to give to the left side of the team and the left side of the road the name of the near side; the right being the off side. So a person driving a carriage, holding the reins in his left hand and the whip in his right, finds it most easy by means of the reins and whip to draw to the near side. The usage to pass to the left having become universally prevalent, manifestly to the convenience and safety of everybody, it became a part of the common law that of two carriages meeting, each shall pass on the near side of the road: and added to this there is another usage, that when one carriage, overtaking another, passes it, it must pass it on its off side, going as it were round it, as you see every day. There is a corresponding duty on the part of a carriage overtaken by another; that of keeping to the near side of the road, to leave room on the other side for the carriage overtaking it to pass. The same rules are observed in the case of horsemen passing each other or passing carriages.

It is not the rule of the road that a carriage is bound to keep always on the near side. It may be driven in the middle of the road or on the off side as most convenient. It is when meeting another carriage, or when another is overtaking it, that it must keep to the left.

So engrafted upon the common law is the rule of the road, that a person whose neglect of it is the cause of collision and of damage to another, is liable to an action for the damages sustained.

Actions for damages occasioned by carriages running against each other are very common; and if in any such action either carriage appears to have been on the wrong side of the road, the presumption is against the driver of it, and in favour of the driver of the other carriage. A common defence is, that the collision was caused by the negligence of the plaintiff, or that his negligence was one of the causes of it. The law upon this point, and indeed with reference to other actions for negligence, may be thus stated. A person whose negligence contributes directly, and not merely remotely, to an accident by which he is damaged, cannot maintain an action against a person whose negligence is the immediate cause of the damage, unless the latter could still by the exercise of reasonable care have avoided it.

There are no trials in which conflicting evidence is more usual than in those relating to collisions of carriages, familiarly called running down causes. Each party throws the blame on the other. Both are sometimes in fault; and whether the defendant's negligence was the cause of the accident, and whether the plaintiff's conduct so contributed to it as to excuse the defendant, are questions of infinite nicety, very difficult for judges to present properly to juries, and for juries to decide. In every such trial, the judge referring to the facts in evidence lays down, in his own words, the rule I have just expressed in my own words, guided in the selection of them by my own experience in courts of justice, and by what I have read in text books and reports.

The rule has been stated by different judges in various ways. I think mine an accurate mode of stating it.

A master is liable for the consequences of his servant's negligence, causing damage to another, provided the negligence occurs in the performance of the servant's duty to his master. Thus, if a coachman, a servant, negligently disregarding the rule of the road, drives his master's carriage against another carriage and damages it, his master is liable to an action at the suit of the owner of the damaged carriage. This is a rule of good policy; for in cases of coachmen and other servants for whom their masters are responsible, the servants are seldom persons of sufficient property to be able to pay damages, and the masters being answerable for them, have a strong motive to be careful in the selection and control of them.

To make a master liable for the negligence of his servant, the negligence must occur in the performance of the master's business. Thus, a person would not be responsible in the case of his coachman's negligence while taking a drive for his own pleasure or convenience, with his master's carriage and horses.

A person whose culpable negligence causes the death of another is guilty of manslaughter, and a lawyer may say, that a person whose culpable neglect to observe the rule of the road is the immediate cause of another's death is guilty of manslaughter. How a jury would deal with such a case it would be difficult to anticipate.

## LECTURE XXXII.

1. *Gleaning.*
2. *Levitical Law.*
3. *Christianity.*
4. *Charity.*
5. *Conscience.*
6. *Custom. Profit à prendre.*
7. *Custom. Water.*
8. *Rule. Certain or uncertain.*
9. *Rule. Reasonable or unreasonable.*
10. *Judge-made Law.*
11. *Obiter dicta.*
12. *Policy, &c.*
13. *Local Customs.*
14. *Regulations having the effect of Conditions.*
15. *Theft. Honest Belief of Right.*
16. *Presumption of Innocence.*
17. *Intention.*

THERE is one country practice or usage, all but universal in point of fact, that of the poor to glean corn, which has not established itself as a part of the law of the land.

This is a very curious subject. There is great authority for asserting for the poor a right to glean, grounded on precepts, to be found in the Levitical law, eminently conformable to the spirit of charity, a chief feature of Christianity; but it is now established that this right is not sanctioned by the law of this country.

Whether a farmer ought, in good conscience, to permit the practice of gleaning, or whether his doing so is a mere act of charity, a gift which he may conscientiously withhold, is a point which I do not think this a place for me to deal with.

At a trial in 1668, at the assizes, Sir Matthew Hale (*a*) said :—" The law gives licence to the poor to glean, by " the general custom of England."

Gilbert, in his book on Evidence (*b*), says :—" By the " custom of England the poor are allowed to glean after " the harvest, which custom seems to be built on a part of " the Jewish law that allowed the poor to glean."

(*a*) Trials per Pais, 8th edition, 534; cited in Mr. Justice Gould's judgment, ubi infra.

(*b*) Gilbert on Evidence, 253.

In the Bible (*a*), you may read—"And when ye reap the "harvest of your land, thou shalt not wholly reap the "corners of thy field, neither shalt thou gather the glean- "ings of thy harvest. And thou shalt not glean thy "vineyard, neither shalt thou gather every grape of thy "vineyard: thou shalt leave them for the poor and stran- "ger."

And again (*b*): "And when ye reap the harvest of your "land, thou shalt not make clean riddance of the corners "of thy field when thou reapest, neither shalt thou gather "any gleaning of thy harvest: thou shalt leave them "unto the poor and to the stranger."

And again (*c*): "When thou beatest thine olive tree, "thou shalt not go over the boughs again: it shall be "for the stranger, for the fatherless, and for the widow. "When thou gatherest the grapes of thy vineyard, thou "shalt not glean it afterward: it shall be for the stranger, "the fatherless, and for the widow."

Blackstone (*d*) says:—"It hath been said, that by the "common law and custom of England, the poor are "allowed to enter and glean upon another's ground after "the harvest without being guilty of trespass; which "humane provision seems borrowed from the Mosaical "law."

In the year 1766, the Court of King's Bench sanctioning (*e*) the conduct of a justice of the peace who had committed to prison persons who, under pretence of gleaning, had stolen corn, used language, serving, on the whole, to recognize the right of the poor to glean.

In the year 1788, the Court of Common Pleas decided (*f*) that there is no right to glean. Mr. Justice

(*a*) Leviticus, chapter xix. verses 9, 10.
(*b*) Leviticus, chapter xxiii. verse 22.
(*c*) Deuteronomy, chapter xxiv. verses 20, 21.
(*d*) Blackstone's Commentaries, iii. 212.
(*e*) *The King* v. *Price*, 4 Burrow, 1927.
(*f*) *Steel* v. *Houghton*, 1 Henry Blackstone, 51.

Gould, who differed from the rest of the Court, cited, among other authorities, the passages I have quoted in this lecture from law books and the Bible; his is a powerful argument in favour of the poor.

The other judges argued well against the alleged right. Referring to the dictum of Sir Matthew Hale, Mr. Justice Wilson expressed a sentiment to which more respect ought to be shown in our times, when the casual words (obiter dicta) of judges are too frequently cited as decisive authorities. He says:— "Every one who hears me must "acknowledge the impropriety of construing all the con- "versation which passes between a judge and the counsel "at Nisi Prius as legal decision."

As to the religious bearing of the question the same judge said:—"The law of Moses is not binding on us, "except in so far as we have thought proper to adopt it." And again: "Charity to the poor is a Christian duty; but "it must be voluntary and cannot be compelled."

Referring to the same point Mr. Justice Heath said:— "Every institution which is to be found in the law of "Moses was not enforced by the judge, many being left to "the consciences of men with temporal blessings on those "who observed them."

Lord Loughborough reduces the numerous inconveniences amplified on by the other judges to three heads:—

1. A right to glean is inconsistent with the nature of property, which imports exclusive enjoyment.

2. It is destructive of the peace and good order of society, and amounts to a general vagrancy.

3. It is incapable of enjoyment, since nothing which is not inexhaustible, like a perennial stream, can be capable of universal promiscuous enjoyment.

The first of these three heads should remind you of the rule, that there cannot be a custom for an indefinite number of persons to take part of the property of another. The third should remind you of the doctrine, that water not being the subject of property, an indefinite number of

persons may have a customary right to take it from the close of another.

I recommend to your attention all the arguments of Lord Loughborough and his brethren, especially those pointing out the want of certainty, as to who are the poor, and as to what they are to take, and as to the want of universality of the practice of gleaning, and the variety of regulations to which in different places it is made subject.

Mr. Justice Heath said:—"The inconvenience arising "from this custom being considered as a right by the "poor would be infinite; and in doubtful cases, argu- "ments from inconvenience are of great weight. It would "open a door to fraud, because the labourers would be "tempted to scatter the corn in order to make a better "gleaning for their wives, children and neighbours. It "would encourage endless disputes between the occupiers of "land and the gleaners. It would raise the insolence of "the poor, and leave the farmer without redress. Ex- "perience shows that, during the time of harvest, the "poor employ their time in gleaning to the great detriment "of husbandry. In many places the farmer ploughs the "land while the stacks of corn are upon the ground. Is "the cultivation of the country to stand still while the "labourers are gleaning?"

This interesting decision of the Court of Common Pleas is a singular instance of the application to an alleged, and also disputed, rule of the common law, the same tests which are applied to an alleged and also disputed local custom. Though not using the very words certain and reasonable, the judges discuss the question whether the alleged rule is sufficiently certain, and whether it has the quality of being reasonable, or rather, whether it is not unreasonable. Chiefly upon the ground of a right to glean being inconvenient and unreasonable, it is decided not to be a part of our law.

Nevertheless, you will observe how eminently consistent with the spirit of English law is the passage which I now

quote from Mr. Justice Gould's argument:—"If there be "such a general right it must be by the common law of the "land; and though it should be admitted that in certain "places there may be particular regulations of its exercise "by custom, that will not derogate from the general right "any more than special modes of descent in certain "districts will derogate from the course of descent by the "common law, which will be intended to prevail unless a "custom is shown to the contrary." Of the regulations thus adverted to I shall have more to say before the conclusion of this lecture.

This subject would be one of difficulty, were it necessary to say more than that the law is now regarded as well established, that there is no right to glean. I call this a remarkable instance of judge-made law, and I recommend you to avail yourselves of some opportunity of perusing the reports from which I have made extracts. The judges speak in the debating tone of legislators, as if they were to vote according to their own notions of what should be the law on a given point. The provision made by the poor laws for the poor is even adverted to as a reason for their not having a right to glean.

I do not say that the judges were not in the dearth, as they thought it, of direct authority binding on them, justified in debating in the way they did, the question before them. Theirs was conduct very different from that of the judges who, on grounds of expediency, converted into yearly tenancies what the express words of an act of parliament declared to be tenancies at will.

It is one of the nobler and more useful functions of a lawyer, whether judge or advocate, to discuss and appreciate in the absence of direct authority, the tendency and expediency of an alleged rule; to distinguish on grounds of convenience, policy, morality and religion, between right and wrong; and so to assist in the establishment of a rule where none had before existed or none had been clearly defined.

It is said in our law books that Christianity is part of the laws of England. By this cannot be meant that the law of the land, as the greater, comprehends Christianity, as the less; in the same way that the whole contains each part. What is meant might have been more reverently said. The truth intended to be expressed is, that the law of the land is under the control of Christianity. From remarks made by the judges in expressing their opinions against the supposed right to glean, it is evident that they might have come to a different conclusion, could there have been found in the New Testament precepts like those which one of them quoted from the Old Testament.

The parts of the Mosaic laws, disregarded in this country, are innumerable. As to Christianity itself, its indirect beneficial influence on our laws is more real than apparent. Nevertheless, this influence may everywhere be found by those who take an interest in tracing its effects.

One of our law books (*a*) contains a suggestion repeated in another (*b*), that a right to glean may possibly exist by custom in particular places. But this can hardly be so; at least, it is scarcely possible to suppose that any court of justice would deem such a custom to be valid, inasmuch as the arguments which prevailed against the attempt to establish the right as a part of the general common law are at the least as powerful against any local custom. Those arguments are, as I have pointed out, the same as those which are considered fatal to any alleged custom or usage to which they can be properly applied.

The proper remedy against a person who persists in gleaning against the will of the occupier of the land is an action at law for the trespass.

Many of the poor cherish a belief that they have a right to glean, and if any poor person should be charged with stealing corn which he has gleaned, he ought to be acquitted, if it appears that he honestly believed when he

(*a*) Woodfall's Landlord and Tenant.

(*b*) Russell on Crimes.

picked up the corn, he had a right to take it for his own use. If he honestly believed this, he was free from the felonious intention essential to guilt, and he ought not to be convicted of theft. His unlawful act was a mere trespass; it was not a felony.

That the thing was done openly and in conformity with the practice of the neighbourhood would tend to show the honest belief of the accused. That he gleaned secretly after being warned off the land might tend to prove his guilt. Each case would have its peculiar circumstances, tending to show or negative a felonious intention. To justify a verdict of guilty against a gleaner, the proof ought to be conclusive to a degree difficult to suppose. Yet one writer (*a*) speaks of an instance within his own knowledge, of gleaners being convicted of theft.

The presumption in favour of innocence until guilt is shown is, in such a case as we have now been discussing, greatly strengthened by the general practice of farmers to permit gleaning, and there is in every such case a presumption of the honest belief on the part of the accused, that he had a lawful right to glean. To convict him of theft, the prosecutor ought to rebut this presumption by showing that the accused could not have honestly believed that he had a right to glean.

That part of law of crimes, which refers to the bad intention essential to a felony, will hereafter have a great claim on your attention.

One good consequence of a right to glean, not being sanctioned by law, is, that farmers have it in their power to prescribe regulations as to the times the poor may go into the fields to glean, and as to when they must leave them, and regulations as to their conduct there. Rules are sometimes agreed to by all the farmers in a parish, as the conditions on which leave is given to glean. The disregard of these conditions would make the gleaners trespassers.

(*a*) Woodfall.

In many places, no person is allowed to glean in any field until the last shock is carried from it. This is a very effectual way of preventing theft from the shocks of corn.

In some places the church-bell, at eight o'clock in the morning, gives notice that gleaning may begin, and at an early hour in the evening that it is to cease. One object of this is, that mothers of families, who are busy with their children early in the day and in the evening, may have the same chance as others of going to the fields. The same rule has the effect of excluding the gleaners from the fields at hours when they might not be under the eye of the farmer and his servants, and could the more easily plunder his property, or otherwise misconduct themselves.

In some parishes, inhabitants of other places are forbidden to glean.

In some parishes, permission to glean is given only in respect of wheat, in the tying of which the most careful binders are sure to drop some ears. In the case of barley which is mown into swarths and collected into mows, easily thrown into the waggon, the scattered ears are easily brought together by the rake.

You recollect that in the case in the Common Pleas, of which I have said so much, Mr. Justice Gould treated local regulations in respect of gleaning as local customs qualifying a general rule of law. There being, in the opinion of the majority of the court, no such general rule capable of being so qualified; it follows, that the regulations have the character I attribute to them, that of conditions qualifying the license given to the poor to go on the land to glean.

## LECTURE XXXIII.

1. *Prescriptive Duties.*
2. *Market.*
3. *Fair.*
4. *Grant.*
5. *Prescription.*
6. *Tolls.*
7. *Site.*
8. *Alienum solum.*
9. *Prescription Act.*
10. *Market. Prescription.*
11. *Prescription. Presumption.*
12. *Market. Owners' Duties.*
13. *Market. Clerk.*
14. *Market. Court.*
15. *Market. Remedies for and against Owners.*
16. *Market. New.*
17. *Market. Overt.*
18. *Horses.*
19. *Crown. Prerogative.*
20. *Trade.*
21. *Taxes.*
22. *Treaties.*

In my lecture on fences and boundaries I spoke of prescriptive duties, mentioning some instances of them. I will now speak of more.

It often happens that a person, either as lord of a manor or otherwise, is the owner, or, as it is sometimes expressed, the lord of a market or of a fair. I know of no real difference between markets and fairs, except as to the periods at which they occur. In most cases, what is called a market is holden once a week or oftener. What is called a fair is a species of market, holden less frequently. Sometimes a fair takes place only once or twice a year, sometimes more frequently.

Properly speaking, there cannot be a legal market or fair without a grant from the Crown. But there are markets and fairs which exist by prescription. It is said that in this, and in other instances, prescription is evidence of an ancient grant, the more direct proof of which has in the lapse of time been lost. There are so many of these prescriptive markets and fairs, that I feel quite justified in bringing the duties, in respect of them, to your notice under the head of prescriptive duties.

When a person is the owner or lord of a market or fair, he is usually, though not always, entitled to receive tolls,

sometimes in respect of goods sold, sometimes in respect of the stalls, or the ground occupied by the persons by whom goods are offered for sale. The amount of the tolls is regulated by the terms of the grant, or, in the absence of a grant, by prescriptive usage.

Whether a market or fair exists by force of a grant or by prescription, it is the duty of the owner of it to provide a proper site for it within the limits of the place for which the market or fair is holden. He may for this purpose make use of ground his own property, or it may happen that he may have a prescriptive right to the use of land the property of another person.

In the case of an owner of a market or fair alleging a prescriptive right to hold it on land the property of another, his claim would obviously be within the provisions contained in the first section of the Prescription Act (*a*), which I have before explained, and to which I now refer you. It is a benefit enjoyed upon land of another; and, according to the terms of that section, if it shall have been actually enjoyed by any person claiming right thereto, without interruption, for thirty years, it is not to be defeated by showing only that it was first enjoyed at any time prior to such period of thirty years; and after sixty years' enjoyment the right is indefeasible, unless it originated in a written consent or agreement.

You will observe that in respect of a market or a fair I am careful to apply the provisions of the Prescription Act only to any right, on the part of the owner of the market or fair, to make use of the land of another. In any other point of view, an alleged prescription to hold a market or fair is, I think, not affected by the statute. With reference to a mere right to hold a market or fair, I think that the time of prescription is still the whole time of legal memory, that is, from the beginning of the reign of Richard the First; and I think that an alleged right to hold a market

(*a*) Statute 2 & 3 William IV. c. 71., Lecture XXI.

or fair may still be defeated by its being shown that the usage to hold it had not existed at any one period since that time. In this, as in other cases, in the absence of proof of the time of the commencement of an ancient usage, the existence of it during the whole period of legal memory is presumed.

One of the duties of the owner of a market or fair is to appoint a clerk of the market to hold a court of pie poudre for the punishment of misdemeanors, the settlement of disputes, and the inspection of weights and measures.

In the case of the neglect of the owner of a market or fair to provide a proper site, or of any other breach of his duties, he is liable to be indicted as for a misdemeanor, and punished by fine or imprisonment, or both; but he is not, I think, liable to an action at the suit of any person injured, for that might lead to a multiplicity of suits, which in general the law forbids, as contrary to good policy, when a wrong affecting an indefinite number of persons can be redressed by means of one prosecution.

The owner of a market or fair may maintain actions against persons who refuse payment of the tolls to which he is entitled, or who, as often happens, illegally contrive to evade payment of them, by selling goods in the immediate neighbourhood or otherwise, or against a person who damages his fair or market by setting up, without a grant from the Crown, another fair or market within seven miles of his. If the new market or fair is holden on the same day as the old one, the law assumes damage without proof; if on any other day, there must be proof of actual damage to sustain the action (*a*). In Blackstone's Commentaries you may read of the distance of seven miles being thus fixed on, as being about a third of what was formerly considered a day's journey, twenty miles; it being reasonable that every man should have a market so near him, that he may spend

(*a*) 3 Blackstone's Commentaries, 218.

not more than one-third of a day in going to market, one-third in transacting his business, and one-third in returning home. In our own times this reasoning applies to all who, not having horses, walk to market.

A person whose goods are stolen or otherwise wrongfully taken from him may retake them wherever he finds them, unless they have before he finds them been sold in an open market. Market overt is the more usual phrase. By a sale in market overt the owner's property in the goods is divested, and the buyer has a good title to them, unless the buyer knew when he bought them that they were not the property of the seller, or unless there was some other fraud in the transaction to the knowledge of the buyer.

By one of the customs of London, every retail shop in the city is every day in the week, except Sunday, a market overt. This seems a privilege by means of which the sale of goods by others than their owners might be unreasonably facilitated; and there does not seem any good reason for thus protecting persons, who buy in shops in the city, in preference to those who buy in shops in other parts of the metropolis, or in other towns.

By reason of the facility with which horses are stolen, and taken to distant markets, some old acts of parliament require several circumstances of publicity, and some lapse of time to give complete effect to a sale of a horse in market overt, so as to give a good title to the buyer as against an owner from whom it has been wrongfully taken. Under these statutes the toll-gatherers and book-keepers of markets have certain duties, which buyers of horses may call on them to perform.

The power to establish markets and fairs is a part of the important prerogative, in the exercise of which the Crown superintends and regulates trade and commerce generally, as with reference to the current coin of the realm, and weights and measures.

For many years it has been the practice, when a new market is established, to obtain an act of parliament for the

purpose. The chief reason for this is, that a toll partakes of the nature of a tax, and it is a principle of our constitution, jealously maintained by the people and their representatives, that a tax cannot be levied, except by the authority of parliament. An act for the establishment of a market contains powers and regulations, which, having the sanction of the legislature, are in practice found to be more efficient than any which could be contained in a grant from the Crown.

It is well to illustrate instruction on topics of this sort by a reference to passing events. However great may still be, in theory, the prerogative of the Crown to superintend and regulate trade and commerce, and however absolute may, in remote times, have been its prerogative to bind the whole kingdom by treaties with foreign states, both these prerogatives have now for a long period been subordinate to that part of our constitutional law, one of the chief safeguards of our liberties, which forbids the imposition of taxes by any other authority than that of parliament.

What I have just said brings to mind the tenor of all modern treaties, containing stipulations with reference to the duties payable on the importation and exportation of merchandize. Thus you will find that in the commercial treaty made between this country and France, in January, 1860, the Emperor of the French, whose powers are not subject to restraints like those which apply to the powers of our sovereign, enters into absolute engagements as to the duties to be levied in France on the importation of British goods; while our Queen engages to propose, or to recommend, to parliament certain regulations in respect of the duties to be levied in the United Kingdom on French goods imported. One article in the treaty is to the effect, that the treaty itself shall not be valid, unless the Queen shall be authorized by her parliament to execute her engagements contained in it.

## LECTURE XXXIV.

1. *Ferry.*
2. *Grant.*
3. *Prescription.*
4. *Tolls.*
5. *Highway.*
6. *Prescription.*
7. *Prescription. Presumption.*
8. *Alienum solum.*
9. *Prescription Act.*
10. *Ferry. Owner. Duties.*
11. *Ferry. Remedies for and against Owner.*
12. *Actions. Multiplicity.*
13. *Ferry Tolls. Exemptions.*

A GREAT deal of what was said in my last lecture, of the rights and duties of the lord of an ancient market or fair, applies also to the prescriptive rights and duties of the owner of an ancient ferry over a river, or an inlet of the sea.

Properly speaking, a person cannot be the owner of a ferry without a grant from the Crown. But there are many ferries to which lords of manors, land-owners or others are entitled by prescription. As in other instances, so in this, it is said that prescription is evidence of an ancient grant, the more direct proof of which has, in the lapse of time, been lost.

The owner of a ferry has an exclusive right to carry passengers across the water, in respect of which the ferry exists, and he is entitled to receive from them tolls, the amount of which is regulated by the terms of the grant, or, in the absence of a grant, by prescription.

Whether a ferry exists by force of a grant or by prescription, it is the duty of the owner of it to provide a boat and carry passengers across the water for the proper tolls. For embarking them or landing them he may make use of ground his own property, or it may happen that he may have a prescriptive right to the use of land the property of another person. In point of fact, the spot at each side of a ferry is almost always part of the highway on which the passengers arrive at the boat and depart

from it, and they have a right to use it for that purpose. Whether, or not, it is the property of the owner of the ferry is immaterial. The ferry is itself a highway.

If, as sometimes happens, the possessor of a ferry is not the owner of the bed of the river, his claim is, I think, within the provisions contained in the first section of the Prescription Act (*a*). It is a benefit to be enjoyed upon the land of another; and if it shall have been actually enjoyed by any person claiming right thereto, without interruption for thirty years, it is not to be defeated by showing only that it was first enjoyed at any time prior to such period of thirty years; and after sixty years' enjoyment the right is indefeasible, unless it originated in a written consent or agreement. I may remark it is not possible to suppose a written consent or agreement, other than a grant from the Crown, giving as against the public, though it might as against the owner of the banks of a river, an exclusive right to carry passengers.

In the case of the neglect of the owner of a ferry to provide a boat, or of any other breach of his duties, he is liable to be indicted as for a misdemeanor, and punished by fine and imprisonment, or both; but he is not liable to an action at the suit of any person injured. The reason for this, as explained in my last lecture, is, that the law will not allow a multiplicity of actions in respect of an injury affecting an indefinite number of persons. It is, however, said in law books, that if the inhabitants of a vill have a customary right to pass over in a ferry boat, without paying toll, any one of them from whom the toll is extorted may maintain an action for this wrong. Upon reflection you will perceive that, in this, the policy of the law against a multiplicity of actions is disregarded. When all the inhabitants of an extensive district are injured by the disuse of a market, or fair, or ferry, it is plain that the injury to each is a part of one great injury in-

(*a*) Statute 2 & 3 William IV. c. 71, Lectures XXI., XXXIII.

flicted, not only upon the inhabitants of the neighbourhood, but also upon as many others of the Queen's subjects as, in buying or selling, might have occasion to frequent the market or fair, or, in their journeys, to cross the ferry. In the case of a toll extorted from one person exempt from it, the injury is inflicted on him alone, in respect of his own money, and it would be unjust to withhold from him a remedy, however many may be the persons who sustain a similar injury. It is a like wrong and not the same wrong: nullum simile est idem.

The owner of a ferry may maintain an action against a person who disturbs and injures him in the enjoyment of it and the receipt of the tolls. The last reported action I can find of this sort was tried in 1849. The plaintiffs, the owners of a ferry from the Isle of Dogs, across the Thames to Greenwich, sustained their averment that the defendant carried passengers across the river near the part of it where the plaintiffs had their ferry, and so disturbed and injured them in the enjoyment of it. The Court of Common Pleas (*a*) held, that in such a case it is a question for a jury to determine, whether passengers are carried near enough to a ferry to disturb its owner in the enjoyment of it.

(*a*) *Blacketter* v. *Gillett*, 19 Law Journal, New Series, Common Pleas, 307, 1850.

## LECTURE XXXV.

1. *Highway.*
2. *Repair. Prescription.*
3. *Tolls.*
4. *Toll thorough.*
5. *Toll traverse.*
6. *Town. Streets.*
7. *Bridge. Tolls.*
8. *Port.*
9. *Capstan for Fishing-boats.*
10. *Mills.*
11. *Indictment.*
12. *Action.*
13. *Lien.*
14. *Mill. Manorial.*

In a former lecture I spoke of the prescriptive liability to which the possessors of an estate may be subject to repair a highway which has always been repaired by the owner of that estate. I ought then to have added, that it sometimes happens that a person so burthened with the repairs of a highway is compensated by tolls, which he has a prescriptive right to collect from those by whom the highway is used. This, however, seems a more appropriate place for treating of this right, inasmuch as I have just disposed of the analogous topics of prescriptive rights, duties and emoluments in respect of markets, and also in respect of that species of highway which is called a ferry. In these cases, and in others I shall mention, the idea of duty is so blended with that of profit, that it is difficult to say whether the duty is imposed as a consequence of the profit received, or whether the profit is taken by way of compensation for the performance of the duty.

When a person is entitled to a toll for the use of a highway, he is usually subject to the duty of keeping it in repair; and in general no person, not being the owner of the soil of a highway, can be entitled to such a toll, unless in respect of a duty to repair it. In legal language, the toll is said to be the consideration for the repair of the road, or the repair is the consideration for the toll. A toll received by a person in respect of a highway not crossing his own land is called a toll thorough.

When a person has a prescriptive right to a toll in

respect of a highway of the soil of which he is the owner, the toll is called a toll traverse, and there may or may not be in respect of it a prescriptive duty to repair the highway. If there is not such a duty, the consideration for the toll is presumed to be an ancient dedication of the soil of the highway to the public use.

There may be a toll traverse not continuing to be the property of the present owner of the soil of the highway; the owner of the estate over which the highway passes having sold the toll, retaining the estate, or having sold the estate, retaining the toll. It is the origin of the toll which gives it the character of a toll traverse.

The most usual cases of prescriptive tolls in respect of highways are those which are collected by some municipal corporations, the consideration being the keeping in repair the streets of the town.

In litigations concerning these tolls it is often important to distinguish carefully between the two technical phrases, toll thorough and toll traverse, both as respects the tolls themselves and the highways to be repaired. The distinction is sometimes very obscure, and there is frequently some difficulty in the application of the law to the circumstances under which a toll is claimed. Nevertheless the whole law on the subject may be reduced to this simple form: to justify the exaction of a prescriptive toll in respect of a highway, there must either be the consideration of the repair of the highway, as in the case of a toll thorough, or there must be the consideration of a presumed ancient dedication of the soil of the highway to the use of the public, as in the case of a toll traverse. In the latter case the two considerations may co-exist.

It sometimes happens that a person is entitled to a prescriptive toll, whether thorough or traverse, in respect of a bridge, itself a highway. To such tolls the same principles are applicable as to those which may be due in respect of an ordinary highway.

This law of prescriptive obligations and benefits exist-

ing, each in consideration of the other, is sometimes applied to other subjects than those I have mentioned. Thus there is an instance of a municipal corporation being entitled to tolls on all goods brought into a port belonging to the borough, in consideration of their keeping the port in repair.

There is also an instance of a person having a prescriptive right to take, by way of toll, out of every boat-load of fish landing in a certain cove the second best fish, in consideration of his keeping a capstan and rope for the use of the fishermen.

It sometimes happens that, by the custom of a manor, all the inhabitants are bound to grind at an ancient mill, the property of the lord of the manor, all the corn which, whether grown within the manor or brought into it, is consumed by them in a ground state within the manor, and to pay at the mill a toll for the grinding the corn. In analogy to the law in respect of markets, and ferries and highways, it may be assumed, though I cannot find an authority on the point, that in such a case the owner of the ancient mill is bound to maintain it and to grind corn brought by the inhabitants, and that he may be indicted and punished for a breach of this duty, and moreover that, by reason of the law against a multiplicity of actions, he would not be liable to an action at the suit of any one inhabitant inconvenienced by the mill not being worked for him. For the misdemeanor of extorting more than the toll to which the custom gives him a right, a miller may be indicted. In analogy also to the law, as explained in my last lecture, in respect of a toll extorted at a ferry from a person not liable to pay it, I think that an inhabitant might maintain an action against the miller for extorting more than the customary toll.

A miller has a lien on each lot of corn he grinds for his customary toll in respect of that lot, but not in respect of other corn, before ground, for the same person. This is, as you know, a particular and not general lien.

The possessor of a mill, having a prescriptive right that the inhabitants of a district shall grind corn at it, may maintain an action against any one of them who, by having corn ground elsewhere, deprives him of his tolls.

The privilege of an owner of an ancient mill, of which I have been treating, is a remarkable example of the great force of ancient usage, derogating, as it does, from the right every person otherwise has to select the workmen with whom to entrust valuable property for the purpose of being manufactured. It may be reasonably attributed to an engagement entered into at some former period by the inhabitants of a manor to induce the lord to build or maintain a mill for their convenience.

I have spoken of a mill in respect of which a customary right may exist as being the property of a lord of a manor. I have done so because I do not remember an instance of a mill of this sort not being parcel of a manor; but I see no reason why there should not be a prescriptive right of the sort in respect of a mill not belonging to a manor.

The maintenance of a mill with exclusive rights may have been very beneficial to a thinly populated neighbourhood, but in our times, when a large town may have taken the place of a few farmhouses and cottages, a privileged mill may be a great impediment to the free competition between tradesmen, which is deemed essential to the welfare of the public, and it contravenes the spirit of the laws against monopolies.

## LECTURE XXXVI.

1. *Innkeepers.*
2. *Carriers.*
3. *Duties.*
4. *Custom of England.*
5. *Innkeeper. Property of Guests.*
6. *Precedents. Ancient Writs.*
7. *Law Latin.*
8. *Common Inns.*
9. *Lodging Houses.*
10. *Travellers.*
11. *Lodgers.*
12. *Goods exposed for Sale.*
13. *Goods in Commercial Rooms.*
14. *Money.*
15. *Stable.*
16. *Horses.*
17. *Carriages. Street.*
18. *Theft.*
19. *Negligence. Landlord.*
20. *Negligence. Guest.*
21. *Damage.*
22. *Act of God.*
23. *Enemies.*
24. *Innkeeper. Duty to receive Travellers.*
25. *Innkeeper. Lien.*
26. *Inn. Distress.*

THERE are yet other duties resembling prescriptive duties, except in this, that, instead of being imposed, by reason of ancient usages, only on certain persons, and in respect of certain places, they are imposed by the general law of the land on all persons engaged in certain trades. I am now referring to the trade of an innkeeper, and to that of a common carrier. But even their duties are spoken of as if they were of the nature of prescriptive liabilities. It has been usual to speak of them in legal proceedings as existing by force of the custom of the kingdom of England. This is an expression peculiar to this particular branch of our law. No one ever says of the rule that a man's eldest son is his heir, that it is a custom of the kingdom of England. It is enough to say, it is a part of the law; and so of other parts of the common law. With reference to this point I shall, in my lecture on the duties of common carriers, refer you to some remarks made by Hargrave, in a note to Coke upon Littleton.

Laws of this sort, affecting innkeepers and carriers, are

not peculiar to England. The civil law contained rules to a similar, though less stringent, effect.

One of the chief duties of a person who keeps an inn, a house for the reception of travellers and their supply with lodging and food, is to take care of the goods and chattels of travellers, and to be responsible for their loss. Among our legal authorities are the forms of writs by which, in ancient times, actions were commenced in courts of justice. Thus, in a case reported by Coke (*a*), the writ, running in the name of the king, thus describes the liability of an innkeeper: Cum secundum legem et consuetudinem regni nostri Angliæ hospitatores qui hospitia communia tenent ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo.

You are aware that, formerly, all writs and written pleadings, in English courts of justice, were in Latin. This was altered in 1730. Blackstone, as you may read in his Commentaries, did not approve the change; the incoveniences, as he thought, outweighing the intended good result, that of making the people conversant with the law.

The specimen just given of law Latin, like many others, differing greatly from the Latin with which you are familiar, may serve to give you some amusement.

You will perceive, at the beginning of the writ, a reference, such as I have spoken of, to the custom of England.

Coke, after transcribing the writ, refers to the old books in which the form of it is to be found, and adds:—"By "which original writ, which is in such case the ground of "the common law, all the cases concerning hostlers may "be decided." I need hardly tell you, that in this passage the word "hostlers" means innkeepers.

(*a*) *Calye's Case*, 8 Coke's Reports, 32.

I may say, by the way, that the high authority attributed to legal forms, as showing the law upon any point, was greater formerly than it is now. It has been the practice to study precedents more than principles. It is now the practice to study principles in preference to precedents. In the history of the civil law you will meet with a similar change.

I will now make a subject of comment the writ from which I have quoted a passage, treating it as the text of the law, and imitating, in this way, the comments of some of our law writers on precedents and on acts of parliament.

Hospitatores qui hospitia communia tenent. The duty spoken of is imposed by custom on every person who keeps a common inn, a house for the reception of travellers. The keeper of a lodging-house, not being an inn, is not responsible for the property of any lodger, though he may happen to be a traveller. I may now say, once for all, that none of the duties and advantages, treated of in this lecture, exist in the case of a lodging-house not being an inn.

Homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes. The persons for whose goods an innkeeper is responsible are travellers, transeuntes. An innkeeper is not answerable for the property of a person, not being a traveller, who boards and lodges in the house.

In the case of a guest, who is a traveller, it is not necessary to give him the benefit of the innkeeper's responsibility that he should lodge in the house; it is enough that he is there for refreshment. A question lately arose whether an innkeeper was liable for the loss of the great coat of a person who, living in the same town, went into the inn to sit and drink beer. It is plain that this person was not a traveller, and therefore that the innkeeper was not liable. He was not transeuns per partes ubi hospitium existebat.

Bona et catalla. It is not all the goods and chattels of a guest at an inn for the care of which the innkeeper is answerable. Thus it has been decided, that an innkeeper

was not liable in respect of goods exhibited by a factor for sale in a room assigned to him for that purpose. The circumstances of the case showed the factor had not possession of the room in his character of a guest; but had, as a tradesman, the special charge of it for his own special purposes. In another case, some packages of a commercial traveller were taken, on his arrival at an inn, not, according to the practice of the house, into his bedroom, but, by his desire, into the commercial room, from which they were stolen. In this case the landlord of the inn was decided to be responsible as for the goods of a guest.

An innkeeper is as liable for money as for any other property.

Infra hospitia. The stable of an inn is part of the inn, and the innkeeper is liable for a horse taken from it or from a field into which he turns it for his convenience. He is not responsible for a horse which, at the guest's request, he turns out to graze. He is answerable for a carriage placed by his servant in a part of a street where he is accustomed to place carriages. The street is then regarded as a part of the inn.

Absque subtractione seu amissione custodire. The responsibility, modified as I shall proceed to explain, is for loss by theft, or in any other way.

Pro defectu hospitatorum seu servientium suorum. The faults thus guarded against are dishonesty and want of due care. One of the objects of the rule is to keep innkeepers honest themselves, and also to make them very careful to employ honest and trustworthy servants for the benefit of the public. It also tends to make them look well after travellers to prevent their robbing each other.

From any loss of property arises a presumption of negligence on the part of the innkeeper, and he is responsible unless it appears to have been caused by the gross negligence of the owner, or by the dishonesty of the owner's servant or companion. If, by such circumstances or otherwise, the presumption is rebutted, the innkeeper is free from

liability. Though a guest has possession of the key of his room, the landlord is still responsible for the safety of the goods in it, but he is not answerable for any property stolen from the person of a guest.

In one case (*a*), a commercial traveller kept money in a box which remained in a commercial room of an inn three days, during which he counted it two or three times in the presence of other persons. The lock was bad, and could be opened, without a key, by pushing back the bolt. The money was stolen, and, in an action against the innkeeper, it was decided, that the jury were justified in a verdict that the plaintiff, the traveller, had been guilty of gross negligence.

Damnum non eveniat ullo modo. It is not merely for loss by theft or otherwise that an innkeeper is liable. He is also answerable for damage which, by reason of his negligence or that of his servants, a guest's goods sustain. In one case (*b*), a horse in the stable of an inn, having been kicked by another horse and damaged, it was decided, that the innkeeper was not responsible, there not having been any negligence on the part of himself or his servants. But I think that, as in the case of loss, so in the case of damage, the presumption of negligence is against the innkeeper, unless rebutted by circumstances.

By analogy to the law regarding the responsibility of a common carrier for goods entrusted to him which will be the subject of my next lecture, I think an innkeeper would not be answerable for a loss caused by the act of God, such as lightning or a tempest, or by any act of the Queen's enemies. In such a case, the presumption of negligence is rebutted by proof of irresistible force.

A remarkable duty which the law imposes on an inn-

(*a*) *Armistead* v. *White*, 20 Law Journal, New Series, Queen's Bench, 524, 1851.

(*b*) *Dawson* v. *Cholmeley*, 13 Law Journal, New Series, Queen's Bench, 33, 1844.

keeper is, that of receiving into his house, and supplying with lodging and food, every traveller who requires to be received, and who has money enough to pay his expenses, and for whom there is room in the house. A traveller need not tender money for his expenses, unless a refusal to receive him is put upon the ground of his not being able to pay.

The innkeeper is bound to admit a traveller at any hour of the day or night, and whether on a Sunday or on any other day, and though he refuses to tell his name or place of abode; but not if he is drunk, or if his behaviour is improper.

An innkeeper is not bound to receive with a traveller other goods than such as a person usually travels with.

An innkeeper's duty to receive travellers is so far regarded as matter of public concern, that a breach of it is a misdemeanor, for which he may be indicted and punished. He is also liable to an action at the suit of a traveller injured.

An innkeeper has a lien on goods which a traveller brings to the inn for the money which becomes due for his lodging and refreshments, and the innkeeper may retain them until the money is paid. This lien extends to a traveller's horse or carriage, but not to the clothes he is wearing.

It appears to be the law, that an innkeeper's lien applies only to such goods as he is bound to receive with a traveller; namely, such as persons ordinarily take with them in travelling. The authorities on this subject are rather confused. An instance of this is the modern case (*a*), in which the Court of Exchequer decided that an innkeeper had not a lien on a piano lent to a guest, and which he knew was not the guest's property. Reading the opinions of the Barons of the Exchequer, it is difficult to say whether they ground their judgment on the circumstance that a piano is

(*a*) *Broadwood* v. *Granara*, 24 Law Journal, New Series, Exchequer, 1, 1855.

not such a thing as a traveller commonly takes with him, or on the circumstance of the innkeeper knowing that the piano was not the property of his guest. It is not easy to conjecture what might have been their judgment if the piano had been taken to the inn by the guest and had been his property, or had not been known by the innkeeper to be the property of another person.

In the case of a distress for rent due in respect of an inn, the goods of a guest cannot be taken. This is one of the necessary exceptions to the general rule, that when a distress is made for rent, any goods, whether belonging to the tenant or not, found on the premises, may be taken. Another exception is that of any thing, not the property of the tenant, which he has possession of in the way of his trade, as a horse at a blacksmith's forge to be shoed, or corn at a factor's to be sold.

## LECTURE XXXVII.

1. *Carriers.*
2. *Custom of England.*
3. *Customs. Pleading.*
4. *Carriers. Duties.*
5. *Responsibilities.*
6. *Act of God.*
7. *Enemies.*
8. *Negligence of Owners of Goods.*
9. *Special Contracts.*
10. *Public Notices.*
11. *Land Carriers' Act.*
12. *Servant. Felony.*
13. *Direct Notices.*
14. *Negligence of Carriers.*
15. *Railway and Canal Traffic Act.*
16. *Conditions. Just and Reasonable.*
17. *Carrier's Lien.*

THE rules imposing duties on common carriers, whether by land or water, like those affecting common innkeepers, are distinguished from other parts of the law by being termed customs of the kingdom of England. Hargrave, in a note to Coke upon Littleton, speaking of a carrier's responsibility, says:—"This is, by the common law, a "general custom of the realm; and to recite it in the de- "claration, as is sometimes the practice both with respect "to innkeepers and carriers, seems not only unnecessary "but even rather improper; because it tends to confound "the distinction between special customs which ought to "be pleaded, and the general custom of the realm, of "which the courts are bound to take notice without plead- "ing. Accordingly, it seems admitted in several books, "that describing the defendant to be a common carrier, "without any thing more, is sufficient" (*a*).

A common carrier is bound to receive and carry, within the limits of his accustomed journeys, all goods offered to him for the purpose, provided he has room, and provided the person offering them is able and willing to pay for the carriage of them. His ability and willingness to pay are

(*a*) Coke upon Littleton, 89 a, note 77.

sufficient; and he need not tender the money unless prepayment is required.

A common carrier is also answerable for the safety of the goods he carries. His responsibility differs from that of an innkeeper in respect of the property of his guests. Properly speaking, an innkeeper is answerable only in cases of dishonesty or negligence on the part of himself or his servants. True it is, that, from the fact of loss or damage, negligence is presumed, but the presumption is capable of being rebutted. By the common law, a carrier is absolutely liable for the safety of the goods entrusted to him. Whatever be the cause, other than the act of God or of the Queen's enemies, of their being lost or damaged, the carrier is liable for the injury sustained by the owner. A common carrier is, in effect, an insurer of the goods he carries. For this risk his charges ought to be high enough to compensate him.

By the act of God is meant something natural and irresistible, such as lightning or tempest, being the immediate cause of the loss or damage. Therefore, in one case (*a*), common carriers were decided to be liable for damage done to goods carried in a boat towed by their steamer, the damage being done by the sudden stoppage of the steamer in the proper navigation of her, and there being a boisterous wind and a strong tide, so that when the steamer stopped the sea lifted the boat with great force against the steamer. The immediate cause of the accident was the stoppage of the steamer, and not the state of the wind and tide; the act of man, not the act of God.

So great a responsibility is imposed on common carriers to keep them honest themselves, to make them very careful to employ honest and trustworthy servants, to give them every motive to take care of goods in their custody, to protect them against thieves, to defend them against robbers.

(*a*) *Oakley* v. *The Portsmouth and Ryde Steam Packet Company*, 25 Law Journal, New Series, Exchequer, 99, 1856.

Reasons of this sort are given in the books of civil law for a similar liability, to which, by that law, carriers are subject.

As in the case of an innkeeper, if goods are lost or injured by reason of the gross negligence of the owner of them, a carrier is not answerable.

A common carrier and the sender of goods may limit the carrier's responsibility. This was formerly constantly done by means of notices placed in the offices of carriers, and otherwise given, the assent of the senders of goods to the terms of the notices being presumed from the opportunities given them of reading the notices. The effect of a notice of this sort was commonly that the carriers would not be responsible for goods above a certain value unless booked and paid for accordingly.

Notices of this sort gave rise to many inconveniences, and were a great source of litigation. To remedy these and other inconveniences referred to in its preamble, an act of parliament, which is called the Land Carriers' Act (*a*), was passed in 1830.

The fourth section enacts to the effect that no public notice or declaration shall limit or affect the liability of any common carrier by land in respect of any goods; but that every common carrier shall be liable, as at the common law, to answer for the loss of, or injury to, any goods in respect whereof he may not be entitled to the benefit given by the act, any public notice or declaration to the contrary, or in anywise limiting such liability notwithstanding.

To find the benefit given by the act we recur to the first section, enacting, to the effect, that no common carrier by land shall be liable for the loss of, or injury to, any gold or silver coin, or any gold or silver manufactured or not, or any precious stones, jewellery, watches, clocks, time-pieces, trinkets, bills, bank notes, orders, notes or securities for payment of money, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks manufactured or not, and whether

(*a*) 11 George IV. & 1 William IV. chapter 68.

or not wrought up with other materials, furs or lace, when the value of the property shall exceed 10*l.*, unless at the time of its being delivered for the purpose of being carried, the value and nature of the property shall be declared by the person delivering it, and such increased charge as afterwards in the act mentioned, or an engagement to pay the same, be accepted by the person receiving the property.

The second section provides to the effect that, for any property specified in the first section, a common carrier may demand and receive an increased rate of charge, notified in legible characters, in some conspicuous part of the building where the property is received. For want of such notice, or if the carrier does not, if required, give a receipt for the property, the third section deprives the carrier of the benefit given by the act.

The eighth section provides to the effect, that nothing in the act shall protect a carrier from liability for loss of, or injury to, any property, by the felonious act of any of his servants, or protect any servant from liability for any loss or injury occasioned by his own personal neglect or misconduct. A felony of a carrier's servant makes the carrier subject to his common law liability as an insurer; but for this purpose, it appears from decisions of the Court of Common Pleas (*a*), that the felony must be proved as conclusively as would be necessary to warrant a verdict of guilty against the servant if indicted.

The Land Carriers' Act is so worded as to deprive of effect only public notices, and does not contain anything to prevent a carrier from limiting his liability by stipulations contained in a direct notice to the sender of goods. In a case of a carrier's liability being thus limited, he is nevertheless answerable for a loss caused by his own negligence.

(*a*) *The Great Western Railway Company* v. *Rimell*, 27 Law Journal, New Series, Common Pleas, 201; *Metcalfe* v. *The London, Brighton and South Coast Railway Company*, 27 Law Journal, New Series, Common Pleas, 333, 1858.

With respect however to railway and canal companies only, and not as regards other common carriers, the law has been again altered by an act of parliament, called the Railway and Canal Traffic Act of 1854 (*a*). The eighth section enacts to the effect, that any railway or canal company shall be liable for the loss of, or injury to, property, notwithstanding any notice, condition or declaration in any way limiting their liability; every such notice, condition or declaration being declared to be null and void. Then follows a proviso to the effect, that nothing in the act shall prevent a company from making such conditions as shall be adjudged, by the court or judge, before whom any question relating to the property shall be tried, to be just and reasonable. The section contains regulations as to the damages which may be recovered, and the charges which may be made in respect of animals. In the section is also a proviso to the effect, that no special contract between the company and any person shall be binding on him, unless signed by him or by the person delivering the property. There is another proviso, that nothing in the act shall alter or affect the rights, privileges or liabilities of any company under the Land Carriers' Act with respect to articles mentioned in it.

In thus condensing for you these enactments, I am reminded of the criticism on which I ventured in a former lecture (*b*), to which I now refer you, of a decision of the Court of Common Pleas, sanctioning a condition which, but for that decision, appeared to me not to be just or reasonable. When engaged in the preparation of that lecture I was not aware of a recently reported judgment of the Court of Exchequer Chamber, the principles of which are at variance with the opinion of the Court of Common Pleas.

In the case (*c*) I now refer to, the Court of Exchequer

(*a*) 17 & 18 Victoria, chapter 31.

(*b*) Lecture XXVI.

(*c*) *M'Manus* v. *The Lancashire and Yorkshire Railway Company*, 28 Law Journal, New Series, Exchequer, 201, 1859.

had decided a condition in respect of the carriage of some horses on a railway to be just and reasonable, expressed in these words:—"This ticket is issued subject to the "owner's undertaking all risks of conveyance, loading and "unloading whatsoever, as the company will not be respon- "sible for any injury or damage (however caused) occurring "to live stock of any description travelling upon the Lan- "cashire and Yorkshire Railway, or in their vehicles." A judgment of the Court of Exchequer Chamber, reversing the decision of the Court of Exchequer, contains this passage:—"It remains to consider whether the condition or "special contract in the case before us is just and reason- "able; and we are of opinion that it is not. In order to "bring the defendants within its protection, it is necessary "to construe it as excluding responsibility for loss occa- "sioned, not only by all risks, of whatever kind, directly "incident to the transit, but also for that caused by the "insufficiency of the carriages provided by the defendants, "though occasioned by their own negligence or miscon- "duct. The sufficiency or insufficiency of the vehicles by "which the company are to carry on their business is a "matter, generally speaking, which they, and they alone, "have or ought to have the means of fully ascertaining. "And it would, we think, not only be unreasonable, but "mischievous, if they were to be allowed to absolve them- "selves from the consequences of neglecting to perform "properly that which seems naturally to belong to them "as a duty. It is unreasonable that the company should "stipulate for exemption from liability from the conse- "quence of their own negligence, however gross, or mis- "conduct, however flagrant; and that is what the condition "under consideration professes to do."

From this judgment Chief Justice Erle, then a judge of the Queen's Bench, dissented. The reasoning which I have extracted from the judgment is plainly applicable to the condition which the Court of Common Pleas held to be just and reasonable, and serves to affect the authority of that decision.

A common carrier has a lien on goods in his possession for the money due to him for carrying them, and may keep them until the money is paid.

The enormous carrying trade of the railway companies gives rise to frequent questions, disputes and litigations, and the modern law reports abound in cases in which the responsibilities and rights of railway companies, as common carriers, are discussed and decided. From these I have selected for your instruction the few which could be made useful to young students, upon whose minds the immediate object of this lecture is to impress the common law rule and the leading changes made in it by the legislature.

## LECTURE XXXVIII.

1. *Common Law. Customs. Usages.*
2. *Prescriptions.*
3. *Presumptions.*
4. *Freehold.*
5. *Copyhold.*
6. *Leasehold.*
7. *Fee simple.*
8. *Estate tail.*
9. *Estate tail male.*
10. *Gavelkind.*
11. *Borough-English.*
12. *Copyhold. Customary Descents.*
13. *Copyhold. Timber. Minerals.*
14. *Month.*
15. *Lien.*
16. *Custom. Usage. Prescription. Presumption. Reasonable.*
17. *Simplicity.*
18. *Easement.*
19. *Profit à prendre.*
20. *Water.*
21. *Mill.*
22. *Light.*
23. *Air.*
24. *Masters and Servants.*
25. *Hiring. General.*
26. *Yearly Service.*
27. *Servants.*
28. *Negligence.*

In the preceding lectures I have confined your attention as much as possible to the mere common law, avoiding, whenever I could without inconvenience, those subjects, the law in respect of which could not be stated without reference to statute law. The chief exception has been the title of prescription; an essential branch of the common law, requiring a prominent place in your studies, and which could not be dealt with without reference to the act of parliament shortening the time of prescription, and so amending, rather than altering, the law.

In dealing with the common law, I have been studious to fix your attention on one idea, giving a sort of unity to the various topics which I have selected for consideration; —the one idea being, that the common law originates in the usages and customs of the people. There is yet one other principle serving, though in a less degree, the same purpose of imparting unity to what is otherwise desultory reading. This principle is that which I have sometimes glanced at

by the name of presumption; or, more properly, legal presumption, or presumption of law. By this I mean something different from presumptive evidence, that is, evidence of facts from which certain inferences must, in some cases, and may in others, be drawn, unless the contrary is made to appear.

By legal presumption, I mean that which applies a given rule to a particular subject, unless, by the intervention of other circumstances, the subject is excepted from the rule, or another rule is made applicable to it. Thus, all land in England is presumed to be the freehold of the possessor of it, unless the contrary be shown. This may be done by proof of its having been immemorially holden by copy of court roll, reducing it in the hands of its possessor to a copyhold, the freehold being the property of the lord of the manor. Again, the possessor of land may be shown to hold it by a lease, the freehold being in the person by whom the lease was granted. As respects the same land, on the death of the lord of the manor, the freehold may descend to his heir according to the common law; on the death of the copyholder, his estate may descend to his heir according to the custom of the manor; on the death of the leaseholder, his estate may vest in his executors, as a part of his personal estate.

Presumptions of law are innumerable: and it would be difficult to select any as being more important than others. What I now propose to do, as the course most instructive to yourselves, is to look through my lectures preceding this, and to select for your attention some of the legal presumptions which they serve to bring to one's mind or which they serve to elucidate.

In the case of a person dying possessed of a freehold, he is presumed to be the owner of it in fee simple, the absolute owner of it. But this presumption may be rebutted by the production of an existing settlement, making him tenant in tail. The practical effect of this might be, that his eldest son might, as heir in tail, take the property,

though his father may have attempted to devise it by will, as if he had been entitled to it as tenant in fee simple.

Again, a presumption of a tenancy in fee simple being rebutted by proof that a deceased owner of land had inherited it as tenant in tail male might displace the otherwise apparent title of his daughters as co-parceners, and give the land to his next brother. Instances of this are not unusual, especially in the families of peers and baronets, where property is settled to go with the titles.

All freehold land being subject to the common law of inheritance, this presumption may in any case be rebutted by showing an estate to be situate in Kent. It is then presumed to be subject to the custom of gavelkind: and this presumption may be again rebutted by proof of the land in question having been disgavelled. Thus, presumptions are said to shift: a point with which you will in time be familiar.

The presumption in favour of the common law of inheritance may be rebutted by showing a tenement to be situate in a town in which the custom of Borough-English prevails: and the land then descends to the youngest instead of the eldest son. This custom is presumptively confined to the case of lineal descents: but this again may be rebutted by proof that in a particular borough it extends to collateral descents.

Land being shown to be of copyhold tenure, it is a legal presumption that it descends, according to the common law of inheritance, to the eldest son of a deceased owner, or to all his daughters as co-parceners. But this may be rebutted by showing the customary mode of descent in the particular manor to be to the youngest son, or all the sons, or the eldest daughter, or the youngest daughter.

Again, a peculiar custom is presumed to be confined to lineal descent until it is shown to extend to collateral descents.

You can easily apply what I have now said to the various peculiar customary modes of descent referred to in my lectures on copyholds.

The law which presumptively preserves to the lord of the manor, as the owner of the freehold, a property in the timber and minerals, but withholds from him a right to take them without the assent of the tenant, is equivalent to a legal presumption which may in any manor be rebutted by proof of the existence of a particular custom, that the lord or the copyholder, as the case may be, may cut the timber or dig the minerals.

A minor, but instructive legal presumption is that spoken of under the head of the law merchant, that the word "month," unless a calendar month be specified, means twenty-eight days. This may, in any particular transaction, be rebutted by showing that, by the usage of trade or otherwise, the word happens to mean a calendar month.

A more important presumption is, that a lien in respect of goods in the hands of a workman is only a particular lien; a right to keep the goods until he is paid the price of his labour in respect of those very goods. This, as you may read in a former lecture, may be rebutted by proof that there is, by the usage of a particular trade, that of the dyers, for instance, a general lien; a right to keep the goods until the workman is paid the price for his labour in respect of all the goods belonging to the same customer that have passed through his hands.

Almost every trade usage rebuts a legal presumption: and the same may be said of almost every husbandry usage.

Every custom, prescription and usage proved to exist in point of fact is presumptively reasonable and good. Any person showing it to be invalid, by reason of its being unreasonable, succeeds in rebutting the presumption.

One effect of every legal presumption is to keep as simple, as little complicated as may be, the rights to property. Customs and prescriptions infringing on the mere right of the owner of the soil have a contrary effect: as when custom gives a right of way or other easement, or prescription establishes a profit *à prendre*, such as to pasture

cattle, or even to take away part of the soil, as stone, or clay, or turf. In each of such cases of custom or prescription, the presumptive simplicity of the common law is modified.

The presumptive right of the owner of land to the use of the water of a stream that flows over it, is often restricted by the prescriptive right of a millowner to withhold or divert the water; and the right of the latter may again be subject to a prescriptive right to irrigate land above the mill.

Every man has a right to build when and as he pleases upon his own land; but the presumption of his right to do so may be rebutted by a prescriptive right of a neighbour to the access of light and air to his ancient windows. In such a case he must be careful that his building must not obstruct the light and air, in respect of which the prescriptive right exists.

When the relation of master and servant is proved to exist, there is a presumption in favour of a general hiring, constituting a yearly service. This may be rebutted to some extent by showing that the servant is a menial or domestic servant, liable to be dismissed by a month's warning at any time. The presumption of a yearly hiring may, of course, be rebutted by proof of a contract, containing special terms as to the duration of the service, notices to determine it, and other points.

It would be tedious to go over again the presumption in respect of hedges, ditches, rivers and other boundaries, and waste lands, which have so recently engaged our attention: and I need, therefore, say nothing more of the way in which they can be rebutted.

The presumption is always against a person guilty of negligence, leading to the injury of another, unless it be shown that the negligence of the injured person so directly conduced to the accident, that but for his negligence it would not have occurred. It lies upon the person whose misconduct was the primary cause of the accident to make it clear that the misconduct of the other person so directly conduced to it.

## LECTURE XXXIX.

1. *Presumptions.*
2. *Innocence.*
3. *Guilt.*
4. *Theft.*
5. *Possession.*
6. *Presumption strengthened. Weakened. Rebutted.*
7. *Lapse of Time.*
8. *Character.*
9. *Honest Belief of Right.*
10. *Common-place Arguments.*
11. *Homicide.*
12. *Murder.*
13. *Manslaughter.*
14. *Provocation.*
15. *Fighting.*
16. *Unlawful Act.*
17. *Negligence.*
18. *Homicide excusable.*
19. *Homicide justifiable.*
20. *Self-defence.*
21. *Presumptions in Judicial Investigations.*
22. *Constitutional Law.*

Presumptions, pervading all branches of the law, affect property of every sort, personal rights and duties, personal wrongs, personal relations, the duties, rights and responsibilities of magistrates and other officers, and indeed every subject to which a rule can be made to apply. Throughout my future lectures I must have frequent occasions to recur to the doctrine of presumption in its various aspects.

The subject is inexhaustible. For my present purpose, that of making you very familiar with the nature of legal presumption, I think I have, in former lectures, mentioned a sufficient number of presumptions, affecting private rights. But I think you will feel interested in two of the more prominent presumptions observed in criminal jurisprudence in respect of theft and homicide.

Little need be said of the first principle that every presumption is in favour of innocence: or, as it is commonly expressed, that every man is presumed to be innocent until he is proved to be guilty. This reminds you of what was said in my last lecture, of the presumption in favour of a gleaner, that he is not guilty of stealing the corn he picks

up, unless it appears that he could not have honestly believed he had a right to take it.

It is not inconsistent with this principle to say that, certain facts leading clearly to an inference of guilt being proved, a person is presumed to be guilty of a crime with which he is charged, unless he is cleared by something which rebuts the presumption. Thus you cannot spend a day in the Criminal Court, at the Assizes or at the Quarter Sessions, without hearing the judge or chairman charge the jury to this effect; that whenever property taken without the consent of the owner is found in the possession of another, the latter is presumed to have stolen it, unless he accounts for the possession in a satisfactory manner. This presumption having its origin in common sense, and leading every year to scores of satisfactory verdicts, may be strengthened by various circumstances; such as the concealment of the property, or the fact of the accused having been seen near the place from which it was taken. It may be also weakened by circumstances. The accused may likewise rebut it, either by producing evidence in his favour, or by pointing out circumstances in the evidence against him, having that tendency. A not unusual way of doing this is to rely on any great lapse of time which may have occurred between the loss of the thing stolen, and its being found in the prisoner's possession. Lapse of time is more or less important, according to the nature of the property in question, and according to the other circumstances of the case. Ingenious counsel have at their command, or can readily frame, various arguments, by which to remove or to shift, or to weaken any presumption of guilt. Some of these arguments have become commonplace, to so great a degree that it requires a peculiar skill, derived from experience, to use them with effect. In a case of real doubt, proof that the prisoner bears a good character is a very satisfactory way of rebutting any presumption of his guilt.

Of the crime of murder, the punishment for which is death, I prefer, to any other definition I have seen, that

expressed by the two words: malicious homicide. Now, as a general rule, every homicide is presumed to be malicious, and to be, therefore, murder, until the contrary appears from circumstances of alleviation, excuse, or justification. This was well explained by Chief Justice Tindal (*a*), who said:—"Where it appears that one per-"son's death has been occasioned by the hand of another, "it behoves that other to show by evidence, or by inference "from the circumstances of the case, that the offence is of "a mitigated character, and does not amount to the crime "of murder."

My definition of manslaughter is: criminal, though not malicious, homicide. The punishment is penal servitude for life, or for not less than three years, or imprisonment with or without hard labour for not more than four years, or such fine as the court shall award.

The most easily understood instance of manslaughter is when one person immediately upon sudden and great provocation, in the form of personal violence, and before there is time for the temper to cool, kills the aggressor. Another is if two persons having a sudden quarrel, fight, before the temper has time to cool, and one of them kills the other. In each of these cases the idea of malice is excluded by the circumstances, and the crime is manslaughter.

You may read innumerable instances of manslaughter, being cases of criminal homicide, in which the circumstances rebut the presumption of malice. To make this clear two examples may suffice.

If by an unlawful act a person, not intending to do mischief, kills another, he is guilty of manslaughter. Of this, a person being killed by a stone wantonly thrown over a wall is an instance.

A person whose negligence, in the performance of a lawful act, causes the death of another, is guilty of man-

(*a*) *The King* v. *Greenacre*, 8 Carrington & Payne, 35.

slaughter. Of this, a person being killed by reason of the negligence of another in driving a carriage is an instance.

An infinite variety of manslaughters engage the attention of the courts, the distinctions being very fine between the guilt of some of them and that of murder. The difference is often scarcely perceptible between some cases of manslaughter and some of excusable or justifiable homicide. I have said enough of manslaughter to illustrate this point, that alleviating circumstances, rebutting the presumption of malice, reduces criminal homicide from murder to manslaughter.

But circumstances may more than alleviate; they may excuse or justify, a homicide. In such a case, every presumption of guilt, whether of murder or manslaughter, is removed, and if the person causing the death is tried for either, he ought to be acquitted. Unavoidably killing another in self-defence is an instance of excusable homicide. In an ordinary case of self-defence, the person killing another must, by retreating or otherwise, do all he reasonably can to avoid the necessity for killing the person who attacks him, or he may be guilty of manslaughter or even murder.

If a man in self-defence kills a person who attempts to murder him or rob him with violence, this is one instance of justifiable homicide, and in such a case the person attacked need not do all in his power to avoid the necessity for killing the person who attempts to murder him or rob him with violence. To assure his personal safety, prudence may require him to resort to this extremity.

When you read criminal law you will give great attention to the fine distinctions you will meet with between cases of manslaughter and those of excusable or justifiable homicide.

In nearly every judicial investigation, involving any degree of difficulty, the judge finds his task the easier, the more clearly he keeps in view the legal presumption appli-

cable to the facts as they come before him. In a difficult case, the presumption may sometimes shift from one side to the other, and the last presumption left unrebutted may be decisive.

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I have now arrived at the conclusion of the first series of my lectures, having throughout constantly insisted on the leading principles of the common law, and having made use of detailed rules and examples, chiefly for the purpose of presenting the principles in clear points of view. In the beginning of my next series I shall explain to you some sweeping changes of some of the branches of the common law, effected by modern acts of parliament.

After that I shall make a sudden transition, by which you must not be surprised, from those parts of the common-law which relate to the enjoyment and transmission of private property, the transactions of private persons, and the adjustment of their disputes, and the punishments for their crimes, to some of the grand national usages and customs which make up what is called the constitution or constitutional law. Knowing your familiarity, derived from your study of history, with this branch of the common law, I thought it best to teach you, in the first place, the parts with which you are less acquainted: but I cannot prevail on myself to leave unmentioned what may in some respects be deemed the most important of all.

THE END OF THE FIRST SERIES.

# SUPPLEMENT.

## *Percolating Water.*

SINCE my twenty-second lecture was printed, the Law Journal for March, 1860, has been published, containing a decision of the House of Lords (*a*), in the cause relating to the interception of percolating water, in which the Court of Exchequer Chamber reversed a decision of the Court of Exchequer. The House of Lords affirmed the judgment of the Exchequer Chamber; so the law seems settled, that there is no remedy for damage sustained by the interception of water which would otherwise have percolated into a stream.

Of six judges present assisting the House of Lords with their advice, Mr. Justice Wightman delivered the unanimous opinion in favour of the decision of the Exchequer Chamber. The Law lords who gave their opinions were Lord Chelmsford, Lord Cranworth, Lord Wensleydale and Lord Kingsdown.

Lord Cranworth supplied a defect, in former judicial opinions, adverted to by me in my twenty-second lecture. He made use of an argument which I need not have laboured so greatly, if I had then seen any report of what he had said. He thus stated this argument:—"The right "to running water is a natural right, and there is no diffi- "culty in enforcing that right. No one can interrupt the "enjoyment of that right without knowing whether he is "or is not doing an injury to another. But that is not so "with respect to water merely percolating through the soil; "for then no one, except after scientific examination, can "tell whether there has been any interruption whatever "by the act of any particular man. That is the cause of

(*a*) *Chasemore* v. *Richards*, 29 Law Journal, New Series, Exchequer, 81, 1860.

" the distinction between percolating waters and running " streams."

Lord Wensleydale, who doubted whether the decision of the Exchequer Chamber ought to be affirmed, thus dealt with a suggestion, that the use made of intercepted water was a point to be considered :—" It seems to me that the " question in this case resolves itself into this—whether " the defendant exercised his right of enjoying the sub- " terranean water in a reasonable manner. If he had " made the well and used the water for the benefit of those " living on his own land, there could have been no ques- " tion, even though the number of houses upon his own " property had been increased to any extent. But I doubt " the defendant's right to abstract the water for the pur- " pose of supplying a large district for the use of persons " who would have no right to take it for themselves, and " to the injury of those proprietors who had a right to it. " It might be that each of the persons now supplied by " the defendant would not have had a right to dig a well " and take the water for himself, so that the defendant " might have taken much more than those persons could " of themselves have taken. This objection would not " apply to persons who dwelt on the defendant's land, even " though, as in the instance of breweries, they took more " than could be required for mere domestic purposes; here " the water was abstracted for the use of persons wholly " unconnected with the defendant's land."

Lord Cranworth, who spoke before Lord Wensleydale, thus disposed of the same suggestion :—" The argument " founded on the use to which the defendant applied this " water does not affect my mind at all, because I think " there is no difference in the case whether one owner " sinks a well to supply a thousand other owners, or each " of these sinks a well to supply himself; indeed, the loss " of water in the latter case may be greater than in the " former."

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