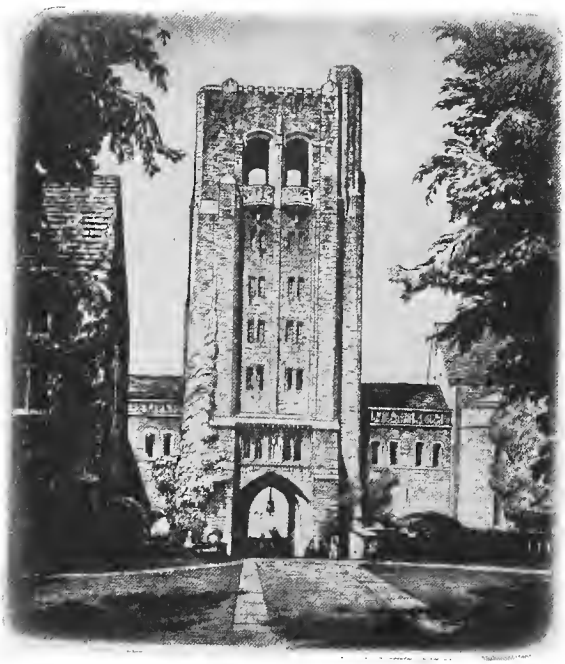
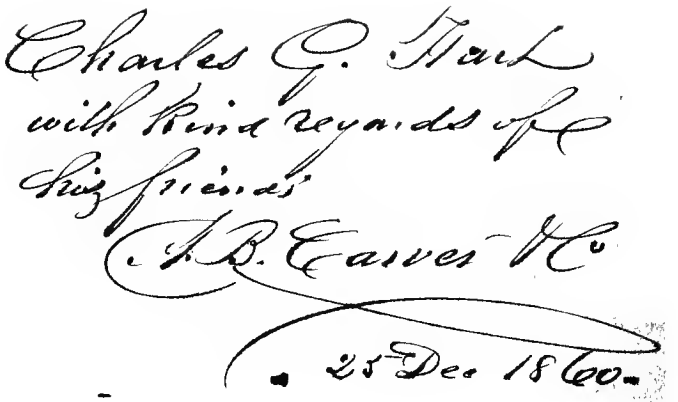



Charles G. Hall
with kind regards of
his friends
A. B. Eaves & Co
25 Dec 1860.

PRINCIPLES

OF THE

LAW OF REAL PROPERTY,

ETC. ETC. ETC.

PRINCIPLES

OF THE

LAW OF REAL PROPERTY.

INTENDED AS

A First Book

FOR

THE USE OF STUDENTS IN CONVEYANCING.

BY

JOSHUA WILLIAMS, ESQ.,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

Second American,

FROM THE

FOURTH ENGLISH EDITION.

WITH

NOTES AND REFERENCES TO AMERICAN DECISIONS,

BY

WILLIAM HENRY RAWLE,

AUTHOR OF "A TREATISE ON COVENANTS FOR TITLE."

PHILADELPHIA:

T. & J. W. JOHNSON & CO.,

LAW BOOKSELLERS AND PUBLISHERS,

197 CHESTNUT STREET.

1857.

Entered, according to Act of Congress, in the year 1856,

BY T. & J. W. JOHNSON & CO.,

In the Clerk's Office of the District Court for the Eastern District of Pennsylvania.

C. SHERMAN & SON, PRINTERS,

19 St. James Street.

ADVERTISEMENT

TO THE PRESENT AMERICAN EDITION.

"Williams on Real Property" amply fulfils its author's design, in supplying "a First Book for the use of students in Conveyancing, as easy and readable as the nature of the subject will allow." In this, the first annotated American edition, I have endeavored to keep in view its original plan, and hence have not attempted to compile the vast body of local statutes in which the law of real property has, on this side of the Atlantic, been made the subject of constant and varied legislation. I have only endeavored to illustrate the general principles of that law as here applied.

Wm. Henry Rawle.

Philadelphia, December, 1856.

ADVERTISEMENT

TO THE FOURTH ENGLISH EDITION.

In this Edition, the alterations which have taken place in the law since the publication of the last Edition have been incorporated in the text.

7 New Square, Lincoln's Inn,
2d May, 1855.

PREFACE

TO THE FIRST EDITION.

The Author had rather that the following pages should speak for themselves, than that he should speak for them. They are intended to supply, what he has long felt to be a desideratum, a First Book for the use of students in conveyancing, as easy and readable as the nature of the subject will allow. In attempting this object he has not always followed the old beaten track, but has pursued the more difficult, yet more interesting, course of original investigation. He has endeavored to lead the student rather to work out his knowledge for himself, than to be content to gather fragments at the hands of authority. If the student wishes to become an adept in the practice of conveyancing, he must first be a master of the science; and if he would master the science, he should first trace out to their sources those great and leading principles, which, when well known, give easy access to innumerable minute details. The object of the present work is not, therefore, to cram the student with learning, but rather to quicken his appetite for a kind of knowledge which seldom appears very palatable at first. It does not profess to present him with so ample and varied an entertainment

as is afforded by Blackstone in his "Commentaries;" neither, on the other hand, is it as sparing and frugal as the "Principles" of Mr. Watkins; nor, it is hoped, so indigestible as the well-packed "Compendium" of Mr. Burton. This work was commenced many years ago; and it may be right to state that the substance of the Introductory chapter has already appeared before the public in the shape of an article, "On the Division of Property into Real and Personal," in the "Jurist" newspaper for 7th September, 1839. The recent Act to simplify the transfer of property has occasioned many parts of the work to be rewritten. But as this Act has so great a tendency to bewilder the student, the Author has since lost no time in committing his manuscript to the press, in hopes that he may be the means of bringing the minds of such beginners as may peruse his pages to that tone of quiet perseverance which alone can enable them to grapple with the increasing difficulties of Real Property Law. From the elder members of his profession he requests, and has no doubt of obtaining, a candid judgment on his performance of a most difficult task. To give to each principle its adequate importance,—from the crowds of illustrations to present the best,—to write a book readable, yet useful for reference,—to avoid plagiarism, and yet abide by authority,—is indeed no easy matter. That in all this he has succeeded he can scarcely hope. How far he has advanced towards it must be left for the profession to decide.

3 New Square, Lincoln's Inn,
29th November, 1844.

TABLE OF CONTENTS.

THE PAGES REFERRED TO ARE THOSE BETWEEN BRACKETS [ ].

INTRODUCTORY CHAPTER.

PART I.

CHAPTER I.

CHAPTER II.

CHAPTER III.

CHAPTER IV.

CHAPTER V.

CHAPTER VI.

PART III.

CHAPTER I.

CHAPTER II.

PART IV.

CHAPTER I.

CHAPTER II.

PART V.

INDEX TO CASES CITED.

THE PAGES REFERRED TO ARE THOSE BETWEEN BRACKETS [ ].

C.

F.

G.

H.

I.

J.

K.

M.

N.

O.

P.

R.

PRINCIPLES

OF THE

LAW OF REAL PROPERTY.

INTRODUCTORY CHAPTER.

OF THE CLASSES OF PROPERTY.

In the early ages of Europe, property was chiefly of a substantial and visible, or what lawyers call, a corporeal kind. Trade was little practised (*a*), and consequently debts were seldom incurred. There were no public funds, and of course no funded property. The public wealth consisted principally of land (*b*), and the houses and buildings erected upon it, of the cattle in the fields, and the goods in the houses. Now land, which is immovable and indestructible, is evidently a different species of property from a cow or a sheep, which may be stolen, killed, and eaten; or from a chair or a table, which may be broken up or burnt. No man, be he ever so feloniously disposed, can run away with an acre of land. The owner may be ejected, but the land remains where it was; and he, who has been wrongfully turned out of possession, may be reinstated into the identical portion of land from which he had been removed. Not *so with movable property; the thief may be discovered and punished; but if he has made away with the goods, no power on earth can restore them to their owner. All he can hope to obtain is a compensation in money, or in some other article of equal value. [*2]

Movable and *immovable* (*c*) is then one of the simplest and most

(*a*) 3 Hallam's Middle Ages, 367–369. (*b*) 1 Hallam's Middle Ages, 158.

(*c*) Quandoque res *mobiles*, ut cattalla, ponuntur in vadium, quandoque res *immobiles* ut terræ, et tenementa, et redditus. Glanville, lib. x. c. 6. See also lib. vii. c. 16, 17.

natural divisions of property in times of but partial civilization.[1] In our law this division has been brought into great prominence by the circumstances of our early history.

By the Norman Conquest, it is well known a vast number of Norman soldiers settled in this country. The new settlers were encouraged by their king and master; and whilst the conquered Saxons found no favor at court, they suffered a more substantial grievance in the confiscation of the lands of such of them as had opposed the Conqueror.(*d*)[2] The lands thus confiscated were granted out by the Conqueror to his followers, nor was their rapacity satisfied till the greater part of the lands in the kingdom had been thus disposed of.(*e*) In these grants the Norman king and his vassals followed the custom of their own country, or what is called the feudal system.(*f*) The lands granted were not given freely and for nothing; but they were given to hold of the king, subject to the performance of certain military duties as the condition of their enjoyment. (*g*) The king [*3] was still considered as in some sense the proprietor, and was called the lord paramount;(*h*) while the services *to be rendered were regarded as incident or annexed to the ownership of the land; in fact, as the rent to be paid for it.

This feudal system of tenures, or holding of the king, was soon afterwards applied to all other lands, although they had not been thus granted out, but remained in the hands of their original Saxon owners. How this change was effected is perhaps a matter of doubt. Sir Martin Wright,(*i*) who is followed by Blackstone,(*k*) supposes

(*d*) Wright's Tenures, 61, 62; 2 Black. Com. 48.
(*e*) 2 Hallam's Middle Ages, 424.
(*g*) 1 Hallam's Middle Ages, 178, 179, note.
(*i*) Wright's Tenures, 64, 65.
(*f*) Wright's Tenures, 63.
(*h*) Coke upon Littleton, 65 a.
(*k*) 2 Black. Com. 49, 50.

[1] Such was also the distinction of the civilians, and it has been preserved in this country in the Code of Louisiana. Art. 453, 464.

[2] And the repeated attempts to throw off the Norman yoke during the twenty years which elapsed between the battle of Hastings and the completion of the survey called Domesday Book (1086), increased this confiscation, until "when Domesday was compiled, all the land in the kingdom, not possessed by the Church, was held by the King in demesne, or of him directly, or of the honors he had seized and retained, as feuds, by comparatively few individuals." 1 Spence's Eq. Jurisd. of the Court of Chancery, 93; to which the student may be referred as containing by far the most recondite and satisfactory account of the early history of the laws of England.

that the introduction of tenures, as to lands of the Saxons, was accomplished at a stroke by a law(*l*) of William the Conqueror, by which he required all free men to swear that they would be faithful to him as their lord. "The terms of this law," says Sir Martin Wright, "are absolutely feudal, and are apt and proper to establish that policy with all its consequences." Mr. Hallam, however, takes a different view of the subject; for while he considers it certain that the tenures of the feudal system were thoroughly established in England under the Conqueror,(*m*) he yet remark that by the transaction in question an oath of fidelity was required, as well from the great landowners themselves as from their tenants, "thus breaking in upon the feudal compact in its most essential attribute, the exclusive dependence of a vassal upon his lord."(*n*) The truth *appears [*4] to be that Norman customs, and their upholders and interpreters, Norman lawyers, were the real introducers of the feudal system of tenures into the law of this country. Before the Conquest, landowners were subject to military duties;(*o*) and to a soldier it would matter little whether he fought by reason of tenure, or for any other reason. The distinction between his services being annexed to his *land*, and their being annexed to the *tenure* of his land, would not strike him as very important. These matters would be left to those whose business it was to attend to them; and the lawyers from Normandy, without being particularly crafty, would, in their fondness for their own profession, naturally adhere to the precedents they were used to, and observe the customs and laws of their own country.(*p*) Perhaps even they, in the time of the Conqueror,

(*l*) The 52d. Statuimus ut omnes liberi homines fœdere et sacramento affirment, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.

(*m*) 2 Hallam's Middle Ages, 429.

(*n*) 2 Hallam's Middle Ages, 430. Mr. Hallam refers to the Saxon Chronicle, which gives the following account:—Postea sic itinera disposuit ut pervenerit in festo Primitiarum ad Searebyrig (Sarum), ubi ei obviam venerunt ejus proceres; *et omnes prædia tenentes, quotquot essent notæ melioris* per totam Angliam, hujus viri servi fuerunt, omnesque se illi subdidere, ejusque facti sunt vassali, ac ei fidelitatis juramenta præstiterunt se contra alios quoscunque illi fidos futuros.—Sax. Chron. anno 1085.

(*o*) Sharon Turner's Anglo-Saxons, vol. ii. app. iv. c. 3, 560; 2 Hallam's Mid. Ages, 410.

(*p*) The Norman French was introduced by the Conqueror as the regular language of the courts of law. See Hume's History of England, vol. ii. 115, appendix ii. on the Feudal and Anglo-Norman government and manners. A specimen of this language, which was often curiously intermixed by our lawyers with scraps of Latin and pure English, will be given in a future note.

troubled themselves but little about the laws of landed property. The statutes of William are principally criminal, as are the laws of all half-civilized nations. Life and limb are of more importance than property; and when the former are in danger, the security of the latter is not much regarded. When the convulsions of the conquest began to subside, the Saxons felt the effects of the Norman laws, and cried out for the restoration of their own; but they were the weaker party, and could not help themselves. By this *time the in- [*5] dustry of the lawyers had woven a net from which there was no escaping.(q) But in what precise manner tenures crept in, was a question perhaps never asked in those days; and if asked, it could not probably, even then, have been minutely answered.[1]

The system of tenure could evidently only exist as to lands and things immovable.(r) Cattle and other movables were things of too perishable and insignificant a nature to be subject to any feudal liabilities, and could therefore only be bestowed as absolute gifts. No duty or service could well be annexed as the condition of their ownership. Hence, a superiority became attached to all *immovable* property, and the distinction between it and *movables* became clearly marked; so that, whilst *lands* were the subject of the disquisitions of lawyers,(s) the decisions of the courts of justice,(t) and the attention of the legislature,(u) *movable* property passed almost unnoticed.(x)

Lands, houses, and immovable property,—things capable of being held in the way above described,—were called *tenements* or *things*

(q) 2 Hallam's Middle Ages, 468. (r) Co. Litt. 191 a, n. (1), II. 2.
(s) See Treatises of Glanville, Bracton, Britton, and Fleta; the Old Tenures, and the old Natura Brevium.
(t) See the Year-Books. (u) See the Statutes. (x) 2 Black. Com. 384.

[1] "Whether the law of feudal tenures," says Mr. Hallam, "can be said to have existed in England before the Conquest, must be left to every reader's determination. Perhaps any attempt to decide it positively would end in a verbal dispute. In tracing the history of every political institution, three things are to be considered, the principle, the form, and the name. The last will probably not be found in any genuine Anglo-Saxon record; of the form, or the peculiar ceremonies and incidents of a regular fief, there is some, but not much appearance. But they who reflect upon the dependence in which free and even noble tenants held their estates of other subjects, and upon the privileges of territorial jurisdiction, will, I think, perceive much of the intrinsic character of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman Conquest." 2 Hallam's Middle Ages, p. 88.

held.(*y*) They were also denominated *hereditaments*, because, on the death of the owner, they devolved by law to his heir.(*z*) So that the phrase, *lands, tenements*, and *hereditaments*, was used by the lawyers of those times to express all sorts of property of the first or immovable class; and the expression is in use to the present day.

*The other, or movable class of property, was known by the name of *goods* or *chattels*. The derivation of the word *chattel* has not been precisely ascertained.(*a*) Both it and the word *goods* are well known to be still in use as technical terms amongst lawyers. [*6]

So great was the influence of the feudal system, and so important was the tenure or holding of lands, whether by the vassals of the crown, or by the vassals of those vassals, that for a long time immovable property was known rather by the name of *tenements* than by any other term more indicative of its fixed and indestructible nature.(*b*) In time, however, from various causes, the feudal system began to give way. The growth of a commercial spirit, the rising power of towns, and the formation of an influential middle class, combined to render the relation of lord and vassal anything but a reciprocal advantage; and at the restoration of King Charles II. a final blow was given to the whole system.(*c*)[1] Its form indeed remained, but its

(*y*) Constitutions of Clarendon, Art. 9; Glanville, lib. ix. cap. 1, 2, 3, passim; Bracton, lib. 2, fol. 26 a; stats. 20 Hen. III. c. 4; 13 Edw. I. c. 1; Co. Litt. 1 b; Shep. Touch. 91.

(*z*) Co. Litt. 6 a; Shep. Touch. 91.

(*a*) See 2 Black. Com. 385.

(*b*) It is the only word used in the important statute De Donis, 13 Edw. I. c. 1; see Co. Litt. 19 b.

(*c*) By statute 12 Car. II. c. 24.

[1] The first eleven sections of this statute abolished tenures by knight service, fines upon alienation, primer seisins, &c., gave to parents the custody of their children, and the management of their estates, and reduced all tenures (except frankalmoigne, grand serjeantry and copyhold, as to which see infra, ch. 5) to free and common socage, by which was meant in its origin, a tenure by any certain conventional services not military. Wright's Tenures, 142. Without now considering the question of the nature of the title to American soil, as between the colonists and the Indian tribes (as to which the student will find the law expressed in the well-known cases of Johnson v. M'Intosh, 8 Wheaton, 543; The Cherokee Nation v. The State of Georgia, 5 Peters 1, and Worcester v. The State of Georgia, 6 Id. 515), it may be observed that the settlement of our colonies occurred about the time of the passage of the 12 Car. 2 (even before which the feudal system had for most practical purposes been superseded), and by the original charters of many of them, such as Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, the Carolinas, and Georgia, the lands were granted to be held in free and common socage, which in them only differs from allodial tenure in recognizing in theory the doctrine of fealty.

spirit was extinguished. The tenures of land then became less burdensome to the owner, and less troublesome to the law student; and the courts of law, instead of being occupied with disputes between lords and tenants, had their attention more directed to controversies between different owners. It became then more obvious that the essential difference between lands and goods was to be found in the remedies for the deprivation of either; that land could always be restored, but goods could not; that, as to the one, the *real* land itself could be recovered; but, as to the other, proceedings must be had against the *person* who had taken them away. The two great classes of property accordingly began to acquire two other names more characteristic of
[*7] their *difference. The remedies for the recovery of lands had long been called *real* actions, and the remedies for loss of goods *personal* actions.(*d*) But it was not until the feudal system had lost its hold, that lands and tenements were called *real property*, and goods and chattels *personal property*.(*e*)

It appears then, that lands and tenements were designated, in later times, *real property*, more from the nature of the legal remedy for their recovery than simply because they are real things; and, on the other hand, goods and chattels were called *personal property* because the remedy for their abstraction was against the person who had taken them away. Personal property has been described as that which may attend the owner's person wherever he thinks proper to go,(*f*) but goods and chattels were not usually called things personal till they had become too numerous and important to attend the persons of their owners.

The terms *real property* and *personal property* are now more com-

(*d*) Glanville, lib. x. c. 13; Bracton, lib. iii. fol. 101 b, par. 1; 102 b, par. 4; Britton, 1 b; Fleta, lib. i. c. 1; Litt. sects. 444, 492; Co. Litt. 284 b, 285 a; 3 Black. Com. 117.

(*e*) The terms *lands and tenements*, *goods and chattels*, are constantly used in Coke upon Littleton and Sheppard's Touchstone, both of them works compiled in the early part of the 17th century. The nearest approximation the writer can find in either of the above books to the now common division into *real* and *personal*, is the expression, "things, whether real, personal or mixed," in Co. Litt. 1 b and 6 a, and in Touchstone, p. 91, an expression which has an obvious reference to the division of actions into the same three classes. In the early part of the last century, the terms *real* and *personal*, as applied to property, were in common use. See 1 P. Wms. 553, 575, anno 1719; Ridout v. Pain, 3 Atkyns, 486, anno 1747.

(*f*) 2 Black. Com. 16, 384; 3 Black. Com. 144.

monly used than the old terms *tenements and hereditaments, goods and chattels.* The old terms *were, indeed, suited only to the feudal times in which they originated; since those times great [*8] changes have taken place, commerce has been widely extended, loans of money at interest have become common,(*g*) and the funds have ingulfed an immense mass of wealth. Both classes of property have accordingly been increased by fresh additions; and within the new names of *real* and *personal* many kinds of property are now included, to which our forefathers were quite strangers; so much so that the simple division into immovable tenements and movable chattels is lost in the many exceptions to which time and altered circumstances have given rise. Thus, shares in canals and railways, which are sufficiently immovable, are generally personal property;(*h*) funded property is personal; whilst a dignity or title of honor, which one would think to be as locomotive as its owner, is not a chattel but a tenement.(*i*) Canal and railway shares and funded property are made personal by the different acts of Parliament under the authority of which they have originated. And titles of honor are real property, because in ancient times such titles were annexed to the ownership of various lands.(*k*)

But the most remarkable exception to the original rule occurs in the case of a lease of lands or houses for a term of years. The interest which the lessee, or person who has taken the lease, possesses, is not his real(*l*) but his personal property; it is but a chattel,(*m*) though the *rent may be only nominal, and the term ninety or even a [*9] thousand years. This seeming anomaly is thus explained. In

(*g*) Such loans were formerly considered unchristian. Glanville, lib. 7, c. 16; lib. 10, c. 3; 1 Reeves's History, 119, 262; [and see, passim, Merchant of Venice, Act I. scene 3,

> "He rails,
> Even there where merchants most do congregate,
> On me, my bargains, and my well-won thrift,
> Which he calls interest."]

(*h*) [Starling v. Parker, 9 Beavan, 450; Walker v. Milne, 11 Id. 507; Ashton v. Langdale, 20 Law J. Rep. (N. S.) Chy. 234.] New River shares are an exception, Drybutter v. Bartholomew, 2 P. Wms. 127 [Davall v. New River Company, 13 Jurist, 761]; see also Buckeridge v. Ingram, 2 Ves. jun. 652 [approved in Earl of Portmore v. Bunn, 1 Barn. and Cress. 703]; Bligh v. Brent, 2 You. & Coll. 268.

(*i*) Co. Litt. 20 a, n. (3); Earl Ferrer's case, 2 Eden, Appendix, p. 373.

(*k*) 1 Hallam's Middle Ages, 158. (*l*) Bracton, lib. 2, fol. 27 a, par. 1.

(*m*) Co. Litt. 46 a; correct Lord Coke's reference at note (*m*), from ass. 82 to ass. 28.

the early times, to which we have before referred, towns and cities were not of any very great and general importance; their influence was local and partial, and their laws and customs were frequently peculiar to themselves.(*n*) Agriculture was then, though sufficiently neglected, yet still of far more importance than commerce; and from the necessities of agriculture arose many of our ancient rules of law. That the most ancient leases must have been principally farming leases, is evident from the specimens of which copies still remain,(*o*) and also from the circumstance that the word *farm* applies as well to anything let on lease, or *let to farm*, as to a farm house, and the lands belonging to it. Thus, we hear of farmers of tolls and taxes, as well as of farmers engaged in agriculture. Farming in those days required but little capital,(*p*) and farmers were regarded more as bailiffs or servants, accountable for the profits of the land at an annual sum, than as having any property of their own.(*q*) If the farmer was ejected from his land by any other person than his landlord, he could not, by any legal process, again obtain possession of it.[1] His only remedy was an action for damages against his landlord,(*r*) who was bound to warrant him quiet possession.(*s*) The farmer could there-

(*n*) See as a specimen, Bac. Abr. tit. Customs of London.

(*o*) See Madox's Formulare Anglicanum, tit. Demise for Years, in which the great majority of leases given are farming leases.

(*p*) See as to the bad state of agriculture, 3 Hallam's Middle Ages, 365; 2 Hume's Hist. Eng. 349.

(*q*) Gilb. Tenures, 39, 40; Watkins on Descents, 108 (113, 4th edit.); 2 Black. Com. 141.

(*r*) 3 Black. Com. 157, 158, 200.

(*s*) Bac. Abr. tit. Leases and Terms for Years, and Covenant, (B.)[2]

---

[1] For although he might bring *ejectione firmæ*, yet it will be remembered that that action was, in its origin, only one to recover damages, and it was not until after courts of equity began to decree the specific restitution of the land, that the modern remedy sought by ejectment was applied.

[2] It was "thought a just construction," says Sir G. Gilbert, to whom that title in Bacon's Abridgment has been attributed, "that he who had divested himself of the profits of his lands for a time by giving them to another, should be obliged to maintain that gift, or be liable to make satisfaction if he did not; and this was the more reasonable, because the lessee was equally bound to answer and make good the rent during the term; and if he did not, the law allowed the lessor to maintain an action of covenant as well as of debt against him for withholding thereof; and as they made this construction for the lessor upon the words 'yielding and paying,' which were no express covenant in themselves, it was but reasonable they should make the like construction for the lessee upon the word 'dimisit,' which in itself no more imported an express covenant on his part; but by making this construction mutual, they did justice to both, and by making of it at all,

fore be scarcely said to be the owner of the land, even for the term of the lease; for his interest wanted the essential incident of real property, the capability of being restored *to its owner. Such an interest in land had, moreover, nothing military or feudal in its [*10] nature, and was, consequently, exempt from the feudal rule of descent to the eldest son as heir-at-law. Being thus neither real property, nor feudal tenement, it could be no more than a chattel; and when leases became longer, more valuable, and more frequent, no change was made; but to this day the owner of an estate for a term of years possesses in law merely a chattel. His leasehold estate is only his personal property, however long may be the term of years, or however great the value of the premises comprised in his lease.(*t*)

There is now perhaps as much personal property in the country as real; possibly there may be more. Real property, however, still retains many of its ancient laws, which invest it with an interest and importance to which personal property has no claim. Of these ancient laws one of the most conspicuous is the feudal rule of descent, under which, as partially modified by the recent act,(*u*) real property goes, when its owner dies intestate, to his *heir*, while personal property is distributed, under the same circumstances, amongst the *next of kin* of the intestate by an administrator appointed for that purpose by the Ecclesiastical Court.

Besides the division of property into real and personal, there is another classification which deserves to be mentioned, namely, that

(*t*) *Quære*, however, whether Lord Coke would have agreed that a lease for years is personal property or personal estate, though it is now clearly considered as such.

(*u*) 3 & 4 Will. IV. c. 106.

---

they plainly showed their opinions of the lease to be no other than a contract or agreement between the parties, and not such an act as transferred any property to the lessee; and this is one reason why leases for years are considered as chattels and go to executors."

Nothing is better settled than that a warranty of quiet possession was implied from the words of leasing, such as demisi, or the like. But in modern times, it seems not to have very exactly settled whether in the absence of such words, as for instance where the lease is by parol, such a result is produced from the mere relation of landlord and tenant. In Granger v. Collins, 6 Mees. & Welsb. 460, and Messent v. Reynolds, 3 Com. Bench, 194, it was held that "no such liability arose from the simple relation of landlord and tenant." And see Baxter v. Ryerss, 13 Barb. S. C. R. 384; but the law was differently held in the recent case in Pennsylvania, of Maule v. Ashmead, 8 Harris, 482. See passim Rawle on Covenants for Title, 475, 477.

of *corporeal* and *incorporeal*. It is evident that all property is either of one of these classes, or of the other; it is either visible and tangible, or it is not.(*v*) Thus a house is corporeal, but the *annual rent payable for its occupation is incorporeal. So an annuity is incorporeal; "for, though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand."(*x*) Corporeal property, on the other hand, is capable of manual transfer; or, as to such as is immovable, possession may actually be given up. Frequently the possession of corporeal property necessarily involves the enjoyment of certain incorporeal rights; thus the lord of a manor, which is corporeal property, may have the advowson or perpetual right of presentation to the parish church; and this advowson, which, being a mere right to present, is an incorporeal kind of property, may be appendant or attached, as it were, to the manor, and constantly belong to every owner. But, in many cases, property of an incorporeal nature exists apart from the ownership of anything corporeal, forming a distinct subject of possession; and, as such, it may frequently be required to be transferred from one person to another. An instance of this separate kind of incorporeal property occurs in the case of an advowson or right of presentation to a church, when not appendant to any manor. In the transfer or conveyance of incorporeal property, when thus alone and self-existent, formerly lay the practical distinction between it and corporeal property. For, in ancient times, the impossibility of actually delivering up anything of a separate incorporeal nature, rendered some other means of conveyance necessary. The most obvious was writing; which was accordingly always employed for the purpose, and was considered indispensable to the separate transfer of everything incorporeal;(*y*)[1] whilst the transfer of corporeal property, together with such incorporeal rights as its possession *involved, was long permitted to take place without any written document.(*z*) *Incorporeal* property, in our present highly artificial

[*11]

[*12]

(*v*) Bract. lib. 1, c. 12, par. 3; lib. 2, c. 5, par. 7; Fleta, lib. 3, c. 1, sec. 4.
(*x*) 2 Black. Com. 20.
(*y*) Co. Litt. 9 a.
(*z*) Co. Litt. 48 b, 121 b, 143 a, 271 b, n. (1).

[1] And things incorporeal were therefore said to "lie in grant," while corporeal hereditaments were said to "lie in livery."

state of society, occupies an important position; and such kinds of incorporeal property as are of a real nature will hereafter be spoken of more at large. But for the present, let us give our undivided attention to property of a *corporeal* kind; and, as to this, the scope of our work embraces one branch only, namely, that which is *real*, and which, as we have seen, being descendible to *heirs*, is known in law by the name of *hereditaments*. Estates or interests in corporeal hereditaments, or what is commonly called landed property, will accordingly form our next subject for consideration.

[*13] *PART I.

OF CORPOREAL HEREDITAMENTS.

BEFORE proceeding to consider the estates which may be held in corporeal hereditaments or landed property, it is desirable that the legal terms made use of to designate such property should be understood; for the nomenclature of the law differs in some respects from that which is ordinarily employed. Thus a house is by lawyers generally called a *messuage;* and the term *messuage* was formerly considered as of more extensive import than the word *house.*(*a*) But such a distinction is not now to be relied on.(*b*) Both the term *messuage* and *house* will comprise adjoining outbuildings, the orchard, and curtilage, or court-yard, and, according to the better opinion, these terms will include the garden also.(*c*) The word *tenement* is often used in law, as in ordinary language, to signify a house: it is indeed the regular synonyme which follows the term *messuage;* a house being usually described in deeds as "all that messuage or tenement." But the more comprehensive meaning of the word *tenement*, to which we have before adverted,(*d*) is still attached to it in legal interpretation, whenever the sense requires.(*e*) Again, the word [*14] *land* comprehends *in law any ground, soil, or earth whatsoever;(*f*) but its strict and primary import is arable land(*g*). It will, however, include castles, houses, and buildings of all kinds; for the ownership of land carries with it everything both above and below the surface,[1] the maxim being *cujus est solum, ejus est*

(*a*) Thomas v. Lane, 3 Cha. Ca. 26; Keilw. 57.
(*b*) Doe d. Clements v. Collins, 2 T. Rep. 498, 502; 1 Jarman on Wills, 709
(*c*) Shep. Touch. 94; Co. Litt. 5 b, n. (1).
(*d*) Ante, p. 5. (*e*) 2 Black. Com. 16, 17, 59.
(*f*) Co. Litt. 4 a; Shep. Touch. 92; 2 Black. Com. 17; Cooke, dem. 4 Bing. 90.
(*g*) Shep. Touch. 92.

[1] Except mines of gold and silver, which by royal prerogative from time immemorial have belonged to the Crown, 1 Inst. 4 a; 2 Id., 577; Case of mines, Plowd. 313. For "the common law," it was there said, "which is founded upon reason, appropriates everything to the persons whom it best suits; as common and trivial things to the com-

usque ad cœlum. A pond of water is accordingly described as *land* covered with water;(*h*) and a grant of lands includes all mines and minerals under the surface.(*i*) This extensive signification of the word *land* may, however, be controlled by the context; as where land is spoken of in plain contradistinction to houses, it will not be held to comprise them.(*k*) So mines lying under a piece of land may be excepted out of a conveyance of such land, and they will then remain the corporeal property of the grantor, with such incidental powers as are necessary to work them,(*l*) and subject to the incidental duty of leaving a sufficient support to the surface to keep it securely at its ancient and natural level.(*m*) In the same manner, chambers may be the subjects of conveyance as corporeal property, independently of the floors above or below them.(*n*) The word *premises* is frequently used in law in its proper etymological sense of that which has been before mentioned.(*o*) Thus, after a recital of various facts in a deed, it frequently proceeds "in consideration of the *premises*," meaning in consideration of the facts before mentioned; and property is seldom spoken of as *premises*, unless a description of it is contained in some *prior part of the deed. Most of the words used in the description of property have however no special technical meaning, but are construed according to their usual sense;(*p*) and, as to such words as have a technical import more comprehensive than their ordinary meaning, it is very seldom that such extensive import is alone relied on; but the meaning of the parties is generally explained by the additional use of ordinary words. [*15]

(*h*) Co. Litt. 4 b. (*i*) 2 Black. Com. 18. (*k*) 1 Jarman on Wills, 707.
(*l*) Earl of Cardigan v. Armitage, 2 Barn. & Cress. 197, 211.
(*m*) Humphries v. Brogden, 12 Q. B. 739. [Harris v. Ryding, 5 Mees. Welsb. 60.]
(*n*) Co. Litt. 48 b; Shep. Touch. 206. See 12 Q. B. 756.
(*o*) Doe d. Biddulph v. Meakin, 1 East, 456; 1 Jarman on Wills, 707.
(*p*) As farm, meadow, pasture, &c.; Shep. Touch. 93, 94.

---

mon people; things of more worth to persons of a higher and superior class, and things most excellent to persons who excel all others; and because gold and silver are the most excellent things which the soil contains, the law has appointed them, as in reason it ought, to the person most excellent, and that is the king." So far was this prerogative carried that it was held in that case by a majority of the twelve judges, that if any admixture of the precious metals were found in mines of copper, lead, or the like, the whole belonged to the king, because the noble metal attracted to it the less valuable, and as the king could not hold jointly with a subject, he therefore took the whole; a doctrine corrected by the act of 1 W. & M. c. 30, & 5 W. & M. c. 6. But in most of the royal charters to the colonies, "all mines" were expressly included, with a reservation in some of them of a fifth or a fourth of all gold and silver ore.

[*16]

*CHAPTER I.

OF AN ESTATE FOR LIFE.

It seldom happens that any subject is brought frequently to a person's notice, without his forming concerning it opinions of some kind. And such opinions carelessly picked up are often carefully retained, though in many cases wrong, and in most inadequate. The subject of property is so generally interesting, that few persons are without some notions as to the legal rights appertaining to its possession. These notions, however, as entertained by unprofessional persons, are mostly of a wrong kind. They consider that what is a man's own is what he may do what he likes with; and with this broad principle they generally set out on such legal adventures as may happen to lie before them. They begin at a point at which the lawyer stops, or at which indeed the law has not yet arrived, nor ever will; but to which it is still continually approximating. Now the student of law must forget for a time that, if he has land, he may let it, or leave it by his will, or mortgage it, or sell it, or settle it. He must humble himself to believe that he knows as yet nothing about it; and he will find that the attainment of the ample power, which is now possessed over real property, has been the work of a long period of time; and that even now a common purchase deed of a piece of freehold land cannot be explained without going back to the reign of Henry VIII.,(*a*)[1] or an ordinary settlement of land without recourse to the laws of Edward I.(*b*) *That such should be the case is certainly a matter of regret. History and antiquities are, no doubt, interesting and delightful studies in their place; but their perpetual intrusion into modern practice, and the absolute necessity of some acquaintance with them, give rise to much of the difficulty experienced in the study of the law, and to many of the errors of its less studious practitioners.

[*17]

The first thing then the student has to do is to get rid of the idea of absolute ownership. Such an idea is quite unknown to the Eng-

(*a*) Stat. 27 Hen. VIII. c. 10, the Statute of Uses.

(*b*) Stat. 13 Edw. I. c. 1, De Donis Conditionalibus, to which estates-tail owe their origin.

[1] As is explained infra, ch. ix.

lish law. No man is in law the absolute owner of lands. He can only hold an estate in them.[1]

The most interesting, and perhaps the most ancient of estates, is an estate for life; and with this we shall begin. Soon after the commencement of the feudal system, to which, as we have seen, our laws of real property owe so much of their character, an estate for life seems to have been the smallest estate in conquered lands which the military tenant was disposed to accept.(*c*) This estate was inalienable, unless his lord's consent could be obtained.(*d*) A grant of lands to A. B. was then a grant to him so long as he could hold them, that is, during his life, and no longer;(*e*) for feudal donations were not extended beyond the precise terms of the gift by any presumed intent, but were taken strictly;(*f*) and, on the tenant's death,

(*c*) Watk. Descents, 107 (113, 4th ed.); 1 Hallam's Middle Ages, 160. There seems no good reason to suppose that feuds were at any time held at will, as stated by Blackstone (2 Black. Com. 55), and by Butler (Co. Litt. 191 a, n. (1), vi. 4).[2]

(*d*) Wright's Tenures, 29; 2 Black. Com. 57. (*e*) Bracton, lib. 2, fol. 92 b, par. 6.

(*f*) Wright's Tenures, 17, 152. Blackstone's reason for the estate being for life—that it shall be construed to be as large an estate as the words of the donation will bear (2 Black. Com. 121)—is quite at variance with this rule of construction.[3]

---

[1] Called in Latin, *status*, as signifying the condition or circumstance in which the owner stands with regard to his property.

[2] It has, however, been long a favorite opinion of text writers, that fees were originally held at the will of the lord, "and rose by degrees, through the stages of leases for years and for life to the dignity of inheritances." Such is the opinion stated in the Book of Feuds (Lib. 1, Tit. 1), and adopted by Wright, Spelman, Cruise, Blackstone, Montesquieu, and others. The more correct opinion seems to be that stated in the text, as is well shown by Mr. Hallam, in the quotation referred to by the author, and Mr. Spence observes, "No doubt the Anglo-Saxon lords, equally as those on the Continent, like the Roman patrons, in some cases granted benefices revocable at pleasure, or for a term short of the life of the beneficiary, or for his life merely, but nothing is to be found in any early documents to show that the continental sovereigns, as well as their Anglo-Saxon brethren, did not, from the very first, make grants of transmissible or hereditary benefices; gradations of preference and regard towards particular persons must have existed at all times, and must have equally influenced lords of every degree." 1 Eq. Jur. of the Court of Chancery, 46.

[3] Blackstone's reason obviously proceeds upon the idea that fees were originally merely granted at will, and it became necessary, therefore, to invoke the principle, *verba cartarum fortius accipiuntur contrà proferentem* (one inapplicable in this relation, as deeds were originally never employed in the transfer of corporeal hereditaments), in order to account for the result that a grant to A. B. was a grant for life. The more simple reason is however that cited in the preceding note.

[*18] the lands reverted to the lord *or grantor. If it was intended that the descendants of the tenant should, at his decease, succeed him in the tenancy, this intention was expressed by additional words of grant; the gift being then to the tenant and his heirs, or with other words expressive of the intention. The heir was thus a nominee in the original grant; he took everything from the grantor, nothing from his ancestor. So that, in such a case, "the ancestor and the heirs took equally as a succession of usufructuaries, each of whom during his life enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property."(*g*) The feudal system, however, had not long been introduced into this country before the restriction on alienation began to be relaxed.(*h*) Subsequently, by a statute of Edward I.,(*i*)[1] the right of every freeman to sell at his own pleasure his lands or tenements, or part thereof, was expressly recognized; at a still later period the power of testamentary alienation was bestowed;(*k*) until, at the present day, the right to dispose of property is not only established, but has become inseparable from its possession.(*l*) Moreover, the old feudal rule of strict construction has long since given way to the contrary maxim, that every grant is to be construed most strongly against the grantor.(*m*) Yet so deeply rooted are the feudal principles of our law of real property, that, in the case before us, the ancient interpretation remains unaltered;[2] and

(*g*) Co. Litt. 191 a, n. (1), vi. 5; Burgess v. Wheate, 1 Wm. Black. 133.

(*h*) Leg. Hen. I. 70; 1 Reeves's Hist. Eng. Law, 43, 44; Co. Litt. 191 a, n. (1), vi. 6.

(*i*) Stat. 18 Edw. I. c. 1.

(*k*) By stat. 32 Hen. VIII. c. 1, as to estates in fee simple, and by stat. 29 Car. II. c. 3, s. 12, as to estates held for the life of another person. See 1 Jarm. on Wills, 54.

(*l*) Litt. sec. 360; Co. Litt. 223 a; Ware v. Cann, 10 Barn. & Cress. 433.

(*m*) Shep. Touch. 88.

---

[1] The well-known statute of Quia Emptores, which abolished subinfeudation, and declared that "from henceforth it shall be lawful to every freeman to sell of his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before."

[2] Although the attention of the student is often directed in text-books to "the *changes* in the common law of England," yet, it is curious to observe, that in the course of many hundred years, the statutes which are said to have effected these changes have been little more than declaratory. In a recent able little volume, "The Theory of the Common Law," the author correctly remarks, "The Normans and their descendants have adhered faithfully to their customs in relation to lands, which they adopted in the middle ages. Their law of Real Estate is altogether customary. No code nor statute establishes our system of

a grant to A. B. simply now confers but an estate for his life,(*n*) which estate, though he may part with it if he pleases, will *terminate at his death, into whosesoever hands it may have come.[1] [*19]

The most remarkable effect of this antiquated rule has been its frequent defeat of the intentions of unlearned testators,(*o*) who, in leaving their lands and houses to the objects of their bounty, were seldom aware that they were conferring only a life interest; though, if they extended the gift to the *heirs* of the parties, or happened to make use of the word *estate*, or some other such technical term, their gifts or devise included the whole extent of the interest they had power to dispose of. "Generally speaking," says Lord Mansfield,(*p*) "no common person has the smallest idea of any difference between giving a horse and a quantity of land. Common sense alone would never teach a man the difference; but the distinction, which is now clearly established, is this: If the words of the testator denote only a *description* of the *specific estate* or *land* devised, in that case, if no words of limitation are added, the devisee has only an estate for *life*. But if the words denote the *quantum* of *interest* or property that the testator has in the lands devised, then the *whole* extent of such his

(*n*) Litt. sec. 283; Co. Litt. 42 a; 2 Black. Com. 121.
(*o*) 2 Jarman on Wills, 170, and the cases there cited.
(*p*) In Hogan v. Jackson, Cowp. 306.

real estate. Yet in the lapse of nine hundred years, diversified by every incident that can befall a people, in prosperous or adverse fortune,—advancing from comparative barbarism to the height of civilization,— changing dynasties,— pendulating from the tyranny of the Tudors to the anarchy of the Barebones Parliament, *indoctissimum genus indoctissimorum hominum*,—not one principle of the law of real estate has been altered. The Justinian of the English law restored the customary law by the statute *de donis*, and the tyrannical Henry the Eighth attempted to lop off that foreign graft in the common law uses. Legislation, with few exceptions, has been confined to the accidental, and has not touched the essentials of the common law. Thus, the Statute of Frauds merely establishes the kind of evidence necessary to prove contracts in certain cases. The Statute of Wills extends the special customary law to the whole realm. The Habeas Corpus act gave another remedy for illegal imprisonment. Nor has legislation altered in a single particular, conveyances at common law, but has increased indirectly their number. So the family relations remain, with their incidents, as they were in the earliest periods." Walker's Theory of the Common Law, p. 10.

[1] This rule has been altered in some of the United States, such as New York, Virginia, Georgia, Kentucky, Alabama, Mississippi, Missouri, and Arkansas, by statutes which, in effect, dispense with words of inheritance, by providing that unless the contrary intent should appear, or be implied in the deed, every conveyance shall pass all the estate of the grantor.

interest passes by the gift to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator." Such questions, as may be imagined, have been sufficiently numerous. Happily by the recent act of Parliament for the amendment of the laws with respect to wills,(*q*) a construction more accordant with the plain intention of testators is in future to be given in such cases.[1]

[*20] If the owner of an estate for his own life should dispose thereof, the new owner will become entitled to an *estate for the life of the former. This, in the Norman French, with which our law still abounds, is called an estate *pur autre vie*;(*r*) and the person for whose life the land is holden is called the *cestui que vie*. In this case, as well as in that of an original grant, the new owner was formerly entitled only so long as he lived to enjoy the property, unless the grant were expressly extended to his heirs; so that, in case of the decease of the new owner, in the lifetime of the *cestui que vie*, the land was left without an occupant so long as the life of the latter continued, for the law would not allow him to re-enter after having parted with his life estate.(*s*) No person having therefore a right to the property, anybody might enter on the land; and he that first entered might lawfully retain possession so long as the *cestui que vie* lived.(*t*) The person who had so entered was called a *general occupant*. If, however, the estate had been granted to a man *and his heirs* during the life of the *cestui que vie*, the heir might, and still may, enter and hold possession, and in such case he is called in law a *special occupant*, having a special right of occupation by the terms of the grant.(*u*) To remedy the evil occasioned by property remaining without an owner, it was provided by a clause in a famous statute passed in the reign of King Charles II.,(*v*) that the owner of an estate *pur autre vie* might dispose thereof by his will; that, if no

(*q*) 7 Will. IV. & 1 Vict. c. 26, s. 28.

(*r*) Litt. sect. 56.

(*s*) In very early times the law was otherwise. Bract. lib. ii. c. 9, fol. 27 a; lib. iv. tr. 3, c. 9, par. 4, fol. 263 a; Fleta, lib. iii. c. 12, s. 6; lib. v. c. 5, s. 15.

(*t*) Co. Litt. 41 b; 2 Black. Com. 258.

(*u*) Atkinson v. Baker, 4 T. Rep. 229.

(*v*) The Statute of Frauds, 29 Car. II. c. 3, s. 12.

[1] Such a provision was inserted in the Pennsylvania Statute of Wills, of 1833; and has found a place in the Revised Statutes of Maine, New Hampshire, Vermont, Massachusetts, New Jersey, the Carolinas, Ohio, Tennessee, Indiana, Missouri, Mississippi, and Michigan.

such disposition should be made, the heir, as occupant, should be charged with the debts of his ancestor; or, in case there should be no special occupant, it should go to his executors or administrators,[1] and be subject to the payment of his debts, of course only *during the residue of the life of the *cestui que vie*. In the construction of this enactment a question arose, whether or not, supposing the owner of an estate *pur autre vie* died without a will, the administrator was to be entitled for his own benefit, after paying the debts of the deceased. An explanatory act was accordingly passed in the reign of King George II.,(*x*) by which the surplus, after payment of debts, was, in case of intestacy, made distributable amongst the next of kin, in the same manner as personal estate.[2] By the recent statute(*y*) for the amendment of the laws with respect to wills, the above enactments have both been repealed, to make way for more comprehensive provisions to the same effect.[3] [*21]

When one person has an estate for the life of another, it is evi-

(*x*) Stat. 14 Geo. II. c. 20, s. 9; see Co. Litt. 41 b, n. (5).
(*y*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3, 6. [Stat. at Large, p. 487].

[1] By the common law there could be no general occupancy of incorporeal hereditaments, inasmuch as they lay in grant and were not capable of actual possession (Co. Litt. 41 b), and until the year 1830, it seems to have been considered doubtful whether the statute of Charles did not apply only to estates *pur autre vie* of which there could be no occupancy at common law. It was admitted that, for the reason just cited, there could be no *general* occupancy of a rentcharge, nor in strictness a *special* occupancy, yet it was held in Bearpark v. Hutchinson, 7 Bing. 178, that as the statute was remedial, it was the soundest construction to include not only such estates *pur autre vie* as were in strictness, but also such as in common parlance were considered to be the subject of special occupany.

[2] The provisions of these statutes have been adopted in many of the United States, such as New York, New Jersey, Virginia, North Carolina, Indiana, Kentucky; and in most, if not all of them, estates *pur autre vie* are regarded as the real estate of a decedent, and are equally liable to the payment of his debts.

[3] The third section of this act, authorized a testator to dispose of an estate *pur autre vie* "whether there shall or shall not be any special occupant thereof;" and its sixth section provided that if no disposition by will should be made of any estate *pur autre vie* of a freehold nature, the same should be chargeable in the hands of the heir, if it should come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there should be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it should go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same should come to the executor or administrator either by virtue of a special occupancy or of the statute in question, it should be assets in his hands and should go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

dently his interest that the *cestui que vie*, or he for whose life the estate is holden, should live as long as possible; and, in the event of his decease, a temptation might occur to a fraudulent owner to conceal his death. In order to prevent any such fraud, it is provided, by an act of Parliament passed in the reign of Queen Anne,(*z*) that any person having any claim in remainder, reversion, or expectancy, may, upon affidavit that he hath cause to believe that the *cestui que vie* is dead, or that his death is concealed, obtain an order from the Lord Chancellor for the production of the *cestui que vie* in the method prescribed by the act; and, if such order be not complied with, then the *cestui que vie* shall be taken to be dead, and any person claiming any interest in remainder, or reversion, or otherwise, may [*22] *enter accordingly. The act, moreover, provides,(*a*) that any person having any estate *pur autre vie*, who, after the determination of such estate, shall continue in possession of any lands, without the express consent of the persons next entitled, shall be adjudged a trespasser, and may be proceeded against accordingly.

The owner of an estate for life is called a tenant for life, for he is only a *holder* of the lands according to the feudal principles of our law. A tenant, either for his own life, or for the life of another (*pur autre vie*), hath an estate of *freehold*, and he that hath a less estate cannot have a freehold.(*b*) Here, again, the reason is feudal. A life estate is such as was considered worthy the acceptance of a *free man;* a less estate was not.(*c*) And it is worthy of remark, that in the early periods of our law an estate for a man's own life was the only life estate considered of sufficient importance to be an estate of freehold: an estate for the life of another person was not then reckoned of equal rank.(*d*) But this distinction has long since disappeared; and there are now some estates which may not even last a lifetime, but are yet considered in law as life estates, and are estates of freehold. Thus, an estate granted to a woman during her widowhood is in law a life estate, though determinable on her marrying

(*z*) Stat. 6 Anne, c. 18. See [for the practice under this Act] Ex parte Grant, 6 Ves. 512; Ex parte Whalley, 4 Russ. 561; Re Isaac, 4 Myl. & Craig, 11; Re Lingen, 12 Sim. 104.

(*a*) Sect. 5. (*b*) Litt. s. 57.

(*c*) Watk. Desc. 108 (113, 4th ed.); 2 Black. Com. 104.

(*d*) Bract. lib. 2, c. 9, fol. 26 b; lib. 4, tr. 3, c. 9, par. 3, fol. 263 a; Fleta, lib. 3, c. 12, s. 6; lib. 5, c. 5, s. 15.

again.(*e*) Every life estate also may be determined by the *civil* death of the party, as well as by his natural death; for which reason in conveyances the grant is usually made for the term of a man's *natural* life.(*f*) Formerly a person, by entering a monastery, and being *professed* in religion, became *dead in law.(*g*) But this doctrine is now inapplicable; for there is no longer any legal establishment for professed persons in England,(*h*) and our law never took notice of foreign professions.(*i*) Civil death may, however, occur by outlawry or attainder for treason or felony;(*j*) in which cases only it appears that the insertion of the words "natural life" can now be of any importance.(*k*) [*23]

Every tenant for life, unless restrained by covenant or agreement, has the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry, and for repairing the house, and the hedges and fences,(*l*) and also a right to cut underwood and lop pollards in due course.(*m*) But he is not allowed to cut timber,[1] or to commit any other kind of *waste*;(*n*) either by voluntary destruction of any part of the premises, which is called *voluntary* waste,[2] or by permitting the buildings to go

(*e*) Co. Litt. 42 a; 2 Black. Com. 121. (*f*) Co. Litt. 132 a; 2 Black. Com. 121.

(*g*) 1 Black. Com. 132.

(*h*) Co. Litt. 3 b, n. (7), 132 b, n (1); 1 Black. Com, 132; stat. 31 Geo. III. c. 32, s. 17; 10 Geo. IV. c. 7, s. 28–37; 2 & 3 Will. IV. c. 115, s. 4. See also Anstey's Guide to the Laws affecting Roman Catholics, p. 24–27.

(*i*) Co. Litt. 132 b. (*j*) 4 Black. Com. 319, 380.

(*k*) Watk. n. 123 to Gilh. Ten.

(*l*) Co. Litt. 41 b; 2 Black. Com. 35, 122.

(*m*) Phillips v. Smith, 14 M. & W. 589. [And also to remove, in the course of good husbandry, dead and decayed trees, to clear the land or give the younger timber a better chance of growth. Keeler v. Eastman, 11 Vermont, 293.]

(*n*) Co. Litt. 53 a; Whitfield v. Bewit, 2 P. Wms. 241; 2 Black. Com. 122, 281; 3 Black. Com. 224.

---

[1] On this side of the Atlantic, in cases where the land is wild and uncultivated, the tenant for life may cut so much timber as will render it fit for cultivation; but he may not cut down all the trees, so as permanently to injure the inheritance; Jackson v. Brownson, 7 Johnson, 233. The question as to this will depend upon the custom of farmers, the situation of the country, and the value of the timber; M'Cullough v. Irvine's Executors, 1 Harris, 443; Morehouse v. Cotheal, 2 New Jersey R. 521.

[2] As to the right of the tenant to remove buildings erected by himself during the term, the student is referred to Mr. Hare's note to the well-known case of Elwes v. Maw, 3 East, 38, in 2 Smith's Leading Cases, 219.

to ruin, which is called *permissive* waste.(*o*) So he cannot plough up ancient meadow land;(*p*) and he is not allowed to dig for gravel, brick, or stone, except in such pits as were open and usually dug when he came in;(*q*) nor can he open new mines for coal or other minerals, nor cut turf for sale on bog lands; for all such acts would *be acts of *waste*. But to continue the working of existing mines, or to cut turf for sale in bogs already used for that purpose, is not *waste;* and the tenant may accordingly carry on such mines and cut turf in such bogs for his own profit.(*r*) By an old statute,(*s*) the committing of any act of waste was a cause of forfeiture of the thing or place wasted, in case a *writ of waste* was issued against the tenant for life. But this writ is now abolished,(*t*) and a tenant for life is now liable only to damages in an action at law for waste already done, or to be restrained by an injunction obtained by a suit in equity from cutting the timber or committing any other act of waste, which he may be known to contemplate.[1] If any of the timber is in such an advanced state that it would take injury by standing, the Court of Chancery will allow it to be cut, on the money being secured for the benefit of the persons entitled on the expiration of the life estate; and the Court will allow the interest of the money to be paid to the tenant during his life.(*u*)[2] If, however, his estate is given him by a written instrument,(*v*) expressly declaring his estate to be *without impeachment of waste*, he is allowed to cut timber in a husbandlike manner for his own benefit, to open mines, and commit other acts of waste

[*24]

(*o*) Co. Litt. 53 a.

(*p*) Simmons v. Norton, 7 Bing. 648. See Duke of St. Albans v. Shipwith, 8 Beav. 354.

(*q*) Co. Litt. 53 b; Viner v. Vaughan, 2 Beav. 466.

(*r*) Co. Litt. 54 b; Coppinger v. Gubbins, 3 Jones & Lat. 397.

(*s*) The Statute of Gloucester, 6 Edw. I. c. 5; 2 Black. Com. 283; Co. Litt. 218 b, n. (2).

(*t*) By stat. 3 & 4 Will. IV. c. 27, s. 36.

(*u*) Tooker v. Annesley, 5 Sim. 235; Waldo v. Waldo, 7 Sim. 261; 12 Sim. 107; Tollemache v. Tollemache, 1 Hare, 456; [Ferrand v. Wilson, 4 Id. 381;] Consett v. Bell, 1 You. & Coll. New Cases, 569.

(*v*) Dowman's case, 9 Rep. 10 b.

[1] In many of the United States this subject is regulated by statute. Thus in Pennsylvania, a writ of *estrepement* may, upon affidavit filed, issue on behalf of a plaintiff in ejectment—a purchaser at sheriff's sale—a mortgagee—a judgment creditor, after the premises shall have been condemned—a remainder-man, or a creditor of a decedent. Purdon's Digest, 836. See *passim* for the statutes in other States, 1 Greenleaf's Cruise on Real Property, 122.

[2] And the capital to be transferred to the first owners of the inheritance, or the first tenant for life without impeachment of waste; Waldo v. Waldo, *supra;* Phillips v. Barlow, 14 Simons, 263.

with impunity(*x*); but so that he does not pull down or deface the family mansion, or fell timber planted and growing for ornament, *or commit other injuries of the like nature; all of which are termed *equitable* waste; for the Court of Chancery, administering *equity*, will restrain such proceeding.(*y*)[1] [*25]

As a tenant for life has merely a limited interest, he cannot of course make any disposition of the lands to take effect after his decease; and, consequently, he can make no leases to endure beyond his own life, unless he be especially empowered so to do by the deed under which he holds. And if, previously to the year 1845, a tenant for his own life should have conveyed the lands by a feoffment (to be hereafter explained) to another person for any greater estate than the life of the tenant for life, such an act would have been a cause of forfeiture to the person next entitled.(*z*)[2] If, however, the tenant for life should sow the lands, and die before harvest, his executors will have a right to the emblements or crop.(*a*)[3] And the same right will also belong to his under-tenant; with this difference, however, that if the life estate should determine by the tenant's *own act*, as by

(*x*) Lewis Bowle's case, 11 Rep. 82 b; 2 Black. Com. 283; Burges v. Lamb, 16 Ves. 185; Cholmeley v. Paxton, 3 Bing. 211; 10 Barn. & Cress. 564; Davies v. Wescomb, 2 Sim. 425; Woolf v. Hill, 2 Swanst. 149; Waldo v. Waldo, 12 Sim. 107.

(*y*) 1 Fonb. Eq. 33, n; Marquis of Downshire v. Lady Sandys, 6 Ves. 107; Burges v. Lamb, 16 Ves. 183; Day v. Merry, 16 Ves. 375 a; Wellesley v. Wellesley, 6 Sim. 497; Duke of Leeds v. Earl of Amherst, 2 Phil. 117; Morris v. Morris, 15 Sim. 505; [Kane v. Vanderburgh, 1 Johnson's Ch. R. 11.]

(*z*) 2 Black. Com. 274. See stat. 7 & 8 Vict. c. 76, s. 7; 8 & 9 Vict. c. 106, s. 4.

(*a*) 2 Black. Com. 122; see Graves v. Weld, 5 Barn. & Adol. 105; [Gee v. Young, 1 Haywood, 17.]

---

[1] For the jurisdiction of equity in cases of waste, the student may profitably refer to the note to Garth v. Sir John Hind Cotton, 1 White's Eq. Cases, 507. See also *passim*, 2 Story's Eq. Jur. § 913, *et seq.*

[2] This was owing to the peculiar efficacy and high character of a feoffment. But deeds taking effect by virtue of the Statute of Uses, such as a lease and a release, or bargain and sale, passed no greater estate than that of the grantor, and therefore worked no forfeiture. Gilbert's Tenures, 119; Seymour's case, 10 Coke, 96; M'Kee v. Phout, 3 Dallas, 486; Preston's Law Tracts, Tract 2. In many of our States it is provided by statute, that no deed of a tenant for life or years, shall work a forfeiture, or operate to pass a greater estate than he can lawfully convey.

[3] And so if a tenancy *pur autre vie* should be terminated by the death of the *cestui que vie*, after sowing of the crop, the tenant will be entitled to emblements, provided the crop is of that species which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed; Graves v. Weld, 5 Barn. & Adolph. 105.

the marriage of a widow holding during her widowhood, the tenant would have no right to emblements; but the under-tenant, being no party to the cesser of the estate, would still be entitled in the same manner as on the expiration of the estate by death.(*b*) And with respect to tenants at rack rent, it is now provided,(*c*) that where the lease or tenancy of any farm or lands held by such a tenant shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any *other uncertain interest, instead of [*26] claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time, or other lawful means, during the continuance of his landlord's estate; and the succeeding owner will be entitled to a fair proportion of the rent from the death or cesser of the estate of his predecessor to the time of the tenant's so quitting. And the succeeding owner and the tenant respectively will, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions to which the preceding landlord and the tenant respectively would have been entitled and subject, in case the lease or tenancy had determined in the manner before mentioned at the expiration of the current year; and no notice to quit shall be necessary from either party to determine such holding.

As a consequence of the determination of the estate of a tenant for life the moment of his death, it was held in old times, that if such a tenant had let the lands reserving rent quarterly or half-yearly, and died between two rent days, no rent was due from the under-tenant to anybody from the last rent day till the time of the decease of the tenant for life. But in modern times a remedy for a proportionate part of the rent, according to the time such tenant for life lived, has been given by act of Parliament to his executors or administrators.(*d*) Formerly, also, when a tenant for life had a power of leasing, and let the lands accordingly, reserving rent periodically, his executors had no right to a proportion *of the rent, in the event of his decease [*27] between two quarter days; and, as rent is not due till mid-

(*b*) 2 Black. Com. 123, 124.

(*c*) Stat. 14 & 15 Vict. c. 25, s. 1.

(*d*) Stat. 11 Geo. II. c. 19, s. 15, explained by stat. 4 & 5 Will. IV. c. 22, s. 1. See Ex parte Smyth, 1 Swanst. 337, and the learned editor's note.

night of the day on which it is made payable, if the tenant for life had died even on the quarter day, but before midnight, his executors lost the quarter's rent, which went to the person next entitled.(*e*) But by a recent act of Parliament,(*f*) the executors and administrators of any tenant for life who has granted a lease since the 16th of June, 1834, the date of the act, may claim an apportionment of the rent from the person next entitled, when it shall become due.[1]

By a recent act of Parliament,(*g*) tenants for life, and some other persons having limited interests, are empowered to apply to the Court of Chancery for leave to make any permanent improvements by *draining* the lands with tiles, stones, or other durable materials, or by warping, irrigation, or embankment in a permanent manner, or by erecting thereon any buildings of a permanent kind incidental or con-

(*e*) Norris v. Harrison, 2 Mad. 268.

(*f*) Stat. 4 & 5 Will. IV. c. 22, s. 2; Lock v. De Burgh, V. C. K. Bruce, 15 Jur. 961.

(*g*) Stat. 8 & 9 Vict. c. 56, repealing a prior act for the same purposes, stat. 3 & 4 Vict. c. 55.

[1] The feudal law regarded rents as partaking solely of the realty, and gave no personal action for their recovery, unless the parties had supplied one by taking a covenant for their payment. Hence the statute of 32 Hen. VIII. c. 37, after reciting that at common law the executors of tenants in fee simple or tail, and tenants for terms of years of rent services, rent charges, rents rack, or fee farms, had no remedy to recover arrearages due their testators in their lifetime, nor could the heirs distrain, therefor, gave an action of debt, and a right of distress to the executor of such tenant, for all arrearages due and unpaid at the time of his death. Then followed the statute of George II., referred to in the text. It will be observed that these two statutes relate solely to the liability of the tenant or party *paying* the rent, and they have been re-enacted in Pennsylvania and most of the United States. Purdon's Digest, 193; 3 Greenleaf's Cruise, 306. The statute of William IV., however, referred to in the text, relates to the rights of the respective parties to *receive* rent. Interest upon bonds and mortgages being due *de die in diem*, was apportionable between the personal representative of a tenant for life, and those in remainder, but rents, which follow the reversion, and annuities, were not apportionable either at law or in equity; Ex parte Smyth, supra; Perry v. Aldrich, 13 N. Hamp. 343. A well-settled exception to this rule, however, has been established with respect to annuities given for the support and maintenance of a widow, a child, or the like, which are, in equity, apportioned, to the date of the death of the recipient, between his or her personal representatives and those in remainder: Hay v. Palmer, 1 P. Wms. 501; Howell v. Haworth, 2 W. Blacks. 1016; note to Ex parte Smyth, supra; Gheen v. Osborn, 17 Serg. & Rawle, 171; Fisher v. Fisher, 1 Amer. Law Jour. 340; and in a recent case in Pennsylvania, where a testator devised certain ground-rents to his widow for life in lieu of dower, they were held to come within the exception, although no such statute as that of William IV. had been enacted in that State. Wister v. Smith, MSS.

sequential to such draining, warping, irrigation or embanking, and immediately connected therewith.(*h*) And if, in the opinion of the Court, such improvements will be beneficial to all persons interested,(*i*) the money expended in making such improvements, or in obtaining the authority of the Court, will be charged on the inheritance of the lands, with interest at such rate as shall be agreed on, not exceeding five per cent. per annum, payable half yearly;(*k*) the principal money to be repaid by equal annual instalments, not less than twelve nor more than eighteen in number; or in the case of buildings, by [*28] equal annual *instalments, not less than fifteen nor more than twenty-five in number.(*l*) And under the provisions of more recent acts of Parliament,(*m*) tenants for life and other owners of land may obtain advances from government for works of drainage, which may be completed within five years;(*n*) such advances to be repaid by a rent-charge on the land, after the rate of 6*l*. 10*s*. rent-charge for every 100*l*. advanced, and to be payable for the term of twenty-two years.(*o*) But in all other respects, improvements which a tenant for life may wish to make must be paid for out of his own pocket.(*p*)

Tenants for life under wills are empowered, by recent acts of Parliament, to convey in certain cases, under the direction of the Court of Chancery, the whole estate in the lands of which they are tenants for life. Such conveyances are made only when the concurrence of the other parties cannot be obtained, and a sale or mortgage of the lands is required, for the payment of the debts of the testator.(*q*) These powers, however, are given to the tenant for life for the sake of making a title to the property; and are more for the benefit of the creditors of the late testator, than for the advantage of the tenant for life, who is, in these cases, merely the instrument for carrying into effect the decree of the Court; and the powers given by these acts will now apparently be in a great measure superseded by the provisions of the recent act to consolidate and amend the laws relating to

(*h*) Sect. 3. (*i*) Sects. 4, 5.

(*k*) Sect. 8. (*l*) Sect. 9.

(*m*) Stat. 9 & 10 Vict. c. 101, explained and amended by stats. 10 & 11 Vict. c. 11, 11 & 12 Vict. c. 119, and 13 & 14 Vict. c. 31.

(*n*) Stat. 10 & 11 Vict. c. 11, s. 7. (*o*) Stat. 9 & 10 Vict. c. 101, s. 34.

(*p*) Nairn v. Majoribanks, 3 Russ. 582; Hibbert v. Cooke, 1 Sim. & Stu. 552; Caldcott v. Brown, 2 Hare, 144.

(*q*) Stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 12; 2 & 3 Vict. c. 60.

the *conveyance and transfer of real and personal property vested in mortgagees and trustees.(r) [*29]

In addition to estates for life expressly created by the acts of the parties, there are certain life interests, created by construction and operation of law, possessed by husbands and wives in each other's land. These interests will be spoken of in a future chapter. There are also certain other life estates held by persons subject to peculiar laws; such as the life estates held by beneficed clergymen. These estates are exceptions from the general law; and a discussion of them, in an elementary work like the present, would tend rather to confuse the student, than to aid him in his grasp of those general principles, which it should be his first object to comprehend.

---

*CHAPTER II. [*30]

OF AN ESTATE TAIL.

THE next estate we shall notice is an estate tail, or an estate given to a man *and the heirs of his body*. This is such an estate as will, if left to itself, descend, on the decease of the first owner to all his lawful issue,[1]—children, grandchildren, and more remote descendants, so long as his posterity endures,—in a regular order and course of descent from one to another; and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine. An estate tail may be either *general*, that is, to the heirs of his body generally, and without restriction, in which case the estate will be descendible to every one of his lawful posterity in due course; *or special*, when it is restrained to certain heirs of his body, and does not go to all of them in general; thus, if an estate be given to a man and the heirs of his body by a particular wife; here none can inherit but such as are his issue by the wife specified. Estates tail may be also in *tail male*, or in *tail female:* an estate in *tail male*

(r) Stat. 13 & 14 Vict. c. 60, s. 29 [extended by Stat. 15 & 16 Vict. c. 55.]

[1] The American student will of course understand this to mean, according to the canons of descent. See *infra*, Chap. IV.

cannot descend to any but males, and male descendants of males; and cannot, consequently, belong to any one who does not bear the surname of his ancestor from whom he inherited: so an estate in *tail female* can only descend to females, and female decendants of females.(*a*) Special estates tail, confined to the issue by a particular wife, are not now common; the most usual kinds of estates tail now given are estates in tail general, and in tail male. Tail female scarcely ever occurs.

[*31] *The owner of an estate tail is called a *donee* in tail, and the person who has given him the estate tail is called the *donor*. And here it may be remarked, that such correlative words as *donor* and *donee*, *lessor* and *lessee*, and many others of a like termination, are used in law to distinguish the person from whom an act proceeds, from the person for or towards whom it is done. The owner of an estate tail is also called a *tenant in tail*, for he is as much a *holder* as a tenant for life. But an estate tail is a larger estate than an estate for life, as it may endure so long as the first owner of the estate has any issue of the kind mentioned in the gift. It is consequently an estate of *freehold*. We shall now proceed to give a short history of this estate; in doing which it will be necessary to advert to the origin and progress of the general right of alienation of lands.

It will readily be supposed that a mere system of life estates, continually granted by feudal lords to their tenants, would not long continue; the son of the tenant would naturally be the first person who would hope to succeed to his father's tenancy: accordingly we find that the holding of lands by feudal tenants soon became hereditary, permission being granted to the heirs of the tenant to succeed on the decease of their ancestor. By the term "heirs" it is said that the issue of the tenant were at first only meant; collateral relations, such as brothers and cousins, being excluded;(*b*) the true feudal reason of this construction is stated by Blackstone to be, that what was given to a man for his personal service and personal merit ought not to descend to any but the heirs of his person.(*c*) But in our own country it appears that, at any rate in the time of Henry II.,(*d*) collateral

(*a*) Litt. ss. 13, 14, 15, 16, 21; 2 Black. Com. 113, 114.
(*b*) Wright's Tenures, 18.
(*c*) 2 Black. Com. 221.
(*d*) 1 Reeves's Hist. Eng. Law, 108.

relations were admitted to succeed as heirs; *so that an estate which had been granted to a man and his heirs descended, on [*32] his decease, not only to his offspring, but also, in default of offspring, to his other relations in a defined order of succession. Hence if it were wished to confine the inheritance to the offspring of the donee, it became necessary to limit the estate expressly to him *and the heirs of his body*,(e) making what was then called a *conditional gift*, by reason of the condition implied in the donation, that if the donee died without such particular heirs, or in case of the failure of such heirs at any future time, the land should revert to the donor.(f) The most usual species of grant appears, however, to have been that to a man *and his heirs* generally: but, as the right of alienation seems to have arisen in the same manner with regard to estates granted in both the above methods, it will be desirable, in considering the origin of this right, to include in our remarks as well an estate granted to a man *and his heirs*, as an estate confined to *the heirs of the body* of the grantee.

In whichever method the estate might have been granted, it is evident that, besides the tenant, there were two other parties interested in the lands; one, the person who was the expectant heir of the tenant, and who had, under the gift, a hope of succeeding his ancestor in the holding of the lands; the other, the lord, who had made the grant, and who had a right to the services reserved during the continuance of the tenancy, and also a possibility of again obtaining the lands on the failure of the heirs mentioned in the gift. An alienation of the lands by the tenant might therefore, it is evident, defeat the rights of one or both of the above parties. Let us, therefore, consider, in the first place, the origin and progress of the right of alienation as it affected the interest of the *expectant heir; [*33] and, secondly, the origin and progress of this right as it affected the interest of the lord.

The right of an ancestor to defeat the expectation of his heir was not fully established at the time of Henry II. For it appears from the treatise of Glanville, written in that reign,(g) that a larger right of alienation was possessed over lands which a man had acquired by

(e) Bracton, lib. 2, cap. 6, fol. 17 b; cap. 19, fol. 47 a; Co. Litt. 290 b, n. (1) V. 1.
(f) 2 Black. Com. 110.
(g) 1 Reeves's Hist. Eng. Law, 223.

purchase,[1] than over those which had descended to him as the heir of some deceased person: and even over purchased lands the right of alienation was not complete, if the tenant had any heir of his own body;(*h*) so that if the lands had been given to a man *and his heirs* generally, he was able to disappoint the expectation of his collateral heirs, but he could not entirely disinherit the heirs sprung of his own body. For certain purposes, however, alienation of part of the lands was allowed to defeat the heirs of his body; thus, part of the lands might be given by the tenant with his daughter on her marriage, and part might also be given for religious uses.(*i*) Such gifts as these were, however, as we shall presently see, almost the only kinds of alienation, in ancient times, which occasioned any serious detriment to the heir; and the allowing of such gifts may accordingly be considered as an important step in the progress of the right of alienation. For, when lands were given to a daughter on her marriage, the daughter and her husband, or the donees in *frank-marriage*, as they were called, held the lands granted, to them and the heirs of their two bodies *free from all manner of service* to the donor or his heirs (a mere oath of fealty or fidelity excepted), until the fourth degree of consanguinity from the donor was passed;(*k*) and when lands were given to religious uses, the grantees in *frank-almoign*, as they [*34] were called, were forever free from *every kind of earthly or temporal service.(*l*)[2] Little or nothing, therefore, in these cases, remained for the heir of the grantor. But the other modes of alienation which then prevailed were very different in their results, as well from such gifts as above described, as from the ordinary sales of landed property which occur in modern times. Ready money was then extremely scarce; large fortunes, acquired by commercial enterprise, were not then expended in the purchase of country seats. The

(*h*) Ibid. 105.
(*i*) Glanville, lib. 7, c. 1; 1 Reeves's Hist. 104.
(*k*) Litt. sects. 17, 19, 20.
(*l*) Ibid. sect. 135.

[1] And which were called *Terra acquietata*, or *de comparato*, as distinguished from the family estate, or *alodis*. At the period spoken of in the text, a feudatory might alien a reasonable portion (one-fourth it is supposed) of the latter, but he could not alienate the former so as to disinherit his eldest son, nor could he even provide an inheritance out of it for his younger children, without the consent of the eldest son. Glanville, vii. c. 1. In Louisiana, at the present day, children cannot be disinherited of their *legitime*, as it is called, unless for some one or more of ten enumerated causes; such as attempting to strike the parent, marrying without his or her consent, &c. Code of Louisiana, § 1609, et seq.

[2] Such lands could, of course, only be held by ecclesiastics, and the grant was not to the tenant and his *heirs*, but his *successors*.

auction mart was not then established; such a thing as an absolute sale for a sum of money paid down was scarcely to be met with. The alienation of lands rather assumed the form of perpetual leases, granted in consideration of certain services or rents to be from time to time performed or paid. This method was, in feudal language, termed *subinfeudation*. In all the old conveyances, almost without exception, the lands are given to the grantee and his heirs, to hold as tenants of the grantor and his heirs, at certain rents or services;(*m*) and when no particular service was reserved, it was understood that the grantee held of the grantor, subject to the same services as the grantor held of his superior lord.(*n*) As, therefore, it cannot be supposed that gifts should be made without some fair equivalent, and as such equivalent, *in the shape of rent or service, would descend to the heir in lieu of the land, we may fairly presume that [*35] alienation, as ordinarily practised in early times, was not so great a disadvantage to the heir as might at first be supposed: and this circumstance may perhaps help to account for that which at any rate is an undoubted fact, that the power of an ancestor to destroy the expectations of his heirs, whether merely collateral or heirs of his body, soon became absolute. In whichever way the grant were made, whether to the ancestor *and his heirs*, or to him and the *heirs of his body*, we find that by the time of Henry III. the heir was completely in his ancestor's power, so far as related to any lands of which the ancestor had possession. Bracton, who wrote in this reign, expressly lays it down, that the heir acquires nothing from the gift made to his ancestor.(*o*) The very circumstance that land was given to a person and his heirs, or to him and the heirs of his body, enabled him to convey an interest in the land, to last as long as his heirs in the one case, or the heirs of his body in the other, continued to exist. And

(*m*) All the forms of feoffments given in Madox's Formulare Anglicanum, with the exception of Nos. 318 and 325, are in this form. No. 318 is a gift in frank-almoign, and was afterwards confirmed by the son of the grantor (see title, Confirmation, No. 119); and No. 325 appears to have been a family transaction between a father and his son. The curious questions mentioned in Glanville (lib. 7, c. 1), as to the descent of lands which had been granted by a father to one of his younger sons, or by a brother to his younger brother, clearly show that grants of land were then made by subinfeudation. Mr. Reeves's observation (1 Hist. Eng. Law, 106, n. *m*), that the reservation of services was *most commonly* made to the feoffor, appears to be scarcely strong enough.

(*n*) Perkins's Profitable Book, sects. 529, 653.

(*o*) Bracton, lib. 2, cap. 6, fol. 17 a. Nihil acquirit ex donatione facta antecessori, quia cum donatorio non est feoffatus.

from the time of Bracton, a gift to a man *and his heirs* generally has enabled the grantee, either entirely to defeat the expectation of his heir by an absolute conveyance,[1] or to prejudice his enjoyment of the descended lands by obliging him to satisfy any debts or demands, to the value of the lands, according to his ancestor's discretion. With respect to lands granted to a man and the *heirs of his body*, the power of the ancestor is not *now* so complete. The means by which this right of alienation was in this case curtailed, will appear in the account we shall now give of the origin and progress of the right of alienation as it affected the interest of the lord.

[*36] The interest of the lord was evidently of two kinds: *his interest in the rent and services during the continuance of the tenancy, and his chance or possibility of again obtaining the land on failure of the heirs of his tenant.

On the former of these interests, the inroad of alienation appears to have been first made. The tenants, by taking upon themselves to make grants of part of their lands to strangers to hold of themselves, prejudiced the security possessed by the lord for the due performance of the services of the original tenure. And accordingly we find it enacted in Magna Charta,(*p*) that no freeman should give or sell any more of his land than so as what remained might be sufficient to answer the services he owed to his lord. The original services reserved on any conveyance were, however, always a charge on the land while in the hands of the undertenants, and could be distrained for by the lord;(*q*) although the enforcement of such services was doubtless rendered less easy by the division of the lands into various ownerships.

The infringement on the lord's interest, expectant on the failure of the heirs of his tenant, appears to have been the last step in the progress of alienation. As the advantages of a free power of disposition became apparent, a new form of grant came into general use. The lands were given not only to the tenant and his heirs, but to him and his heirs, *or to whomsoever he might wish to give or assign the land*,(*r*)

(*p*) Chap. 32.
(*q*) Perkins's Profitable Book, sect. 674.
(*r*) Bract. lib. 2, c. 6, fol. 17 b.

[1] For, as Coke says, "If land be given to a man and his heirs, all his heirs are so totally in him, that he may give the lands to whom he will." Co. Litt. 22 b.

or with other words expressly conferring on the tenant the power of alienation.(*s*) In this case, if the tenant granted, or underlet as it were, part of his land, then, on his decease and failure of his heirs, the tenant's grantee had still a right to continue to hold as tenant of the superior lord; and such superior lord then *took the place of landlord, which the original tenant or his heirs would have occupied had he or they been living.(*t*) [*37] And if the tenant, instead of thus underletting part of his land, chose to dispose of the whole, he was at liberty so to do, by substituting, if he thought fit, a new tenant in his own place.(*u*) Grants of lands with liberty of alienation, as they became more frequent, appear in process of time to have furnished the rule by which all grants were construed. During the long and feeble reign of Henry III. this change to the disadvantage of the lord, appears to have taken place; for at the beginning of the next reign it seems to have been established that, in whatever form the grant were made, the fact of the existence of an expectant heir, enabled the tenant to alienate, not only as against his heirs, but also as against the lord. If therefore lands were given to a man and his heirs, he could at once dispose of them;(*x*) and if lands were granted

(*s*) Madox's Formulare Anglicanum, Preliminary Dissertation, p. 5. The tendency towards the alienation of lands was perhaps fostered by the spirit of crusading; see 1 Watkins on Copyholds, pp. 149, 150.[1]

(*t*) Brac. *ubi sup.*

(*u*) See stat. 4 Edw. 1, c. 6.

(*x*) Perk. sec. 667–670; Co. Litt. 43 a. If a tenant of a conditional fee had a right of alienation on having issue born, surely a tenant in fee simple must have had at least an equal right. See, however, Co. Litt. 43 a, n. [2]; Wright's Tenures, 155, note 3.

[1] Dr. Sullivan, in his Lectures, 149, has no doubt whatever as to this, and says: "These pilgrims who assumed the cross, had no way of defraying the expense, but by the sale of their lands, which their lords, if disinclined, dared not to gainsay, or obstruct so pious a work;" and adds, that the pope and the kings concurred in inflaming this superstition,—the former, from ambition and avarice, the latter, from the hope of lessening the power of their too great and powerful vassals; and that the alienations were so many, that the lord, on payment of a moderate fine, was looked upon as obliged to consent to the alienation.

[2] The passage from Coke Littleton here quoted, has often been controverted. In Wright's Tenures, it is thus referred to: "The Lord Coke (1 Jur. 43, 2 Id. 65, 66, 501) supposes that though a tenant could not, at common law, alien a *part* to hold of the lord, because the lord's seignory was entire, yet the tenant might have made a feoffment of the *whole* to hold of the lord, because then no prejudice ensued; but this supposition is so contrary to the feudal notions of alienation, and so inconsistent with any learned construction of the statute *quia emptores terrarum*, that it is not to be credited." Wright's Tenures, 154. In Dalrymple on Feudal Property, 80, it is said: "Lord Coke founds his opinion on this, that in the latter case the fee was not dismembered, and the lord received the whole

to a man and the heirs of his body, he was able, the moment he had issue born[1]—that is, the moment he had an expectant heir of the kind mentioned in the gift—to alienate the lands.[2] And the alienee and his heirs had a right to hold, not only during the existence of the issue, but also after their failure.(*y*) The original intention of such gifts was therefore in a great measure defeated; originally, on failure of the issue the lands reverted to the donor; but now nothing was requisite but the mere birth of issue to give the donee a complete power of disposition.

[*38] The mere existence of an expectant heir having thus *grown up into a reason for alienation, the barons of the time of Edw. I. began to feel how small was the possibility, that the lands which they had granted by conditional gifts (*z*) to their tenants and the heirs of their bodies, should ever revert to themselves again; whilst at the same time they perceived the power of their own families weakened by successive alienations. To remedy these evils, and to keep up that feudal system, which landlords ever held in high esteem, but on which the necessities of society ever made silent yet sure encroaches, it was enacted in the reign of Edw. I., by the famous statute De Donis Conditionalibus,(*a*)—and no doubt as was then thought finally enacted, —that the will of the donor, according to the form in the deed of gift manifestly expressed, should be from thenceforth observed; so that they, to whom the tenement was given, should have no power to alien it, whereby it should fail to remain unto their own issue after their death, or to revert unto the donor or his heirs, if issue should fail.

(*y*) Fitzherbert's Abr. title Formedon, 62, 65; Britton, 93 b, 94 a; Plowd. Comm. 246; 2 Inst. 333; Co. Litt. 19 a; Year Book, 43 Edw. III. 3 a, pl. 13.

(*z*) Ante, p. 32.

(*a*) Stat. 13 Edw. I. c. 1, called also the Statute of Westminster the Second.

---

of his services; but the mistake arises from attending too much to the interest of the lord, and too little to that of the heir."

[1] He might also have aliened the lands *before* issue born, but the effect of such alienation would only have been to exclude the lord during the life of the tenant, and during that of the issue, if such issue were subsequently born, while if the alienation were *after* the birth of issue, its effect was complete. Plowden, 241.

[2] The effect of the birth of issue was construed to give to the tenant a power to do three things: First, to alienate the land; secondly, to forfeit it for treason or felony; and thirdly, to encumber it. If, however, the tenant should die without issue, or the issue should fail without alienation made by either, the donor's possibility was changed into an actual reversion. Nevil's case, 7 Coke, 34, b.

Since the passing of this statute, an estate given to a man and the heirs of his body has been always called an estate tail, or, more properly, an estate in *fee tail* (*feudum talliatum*). The word *fee* (*feudum*) anciently meant any estate feudally held of another person ;(*b*) but its meaning is now confined to estates of inheritance, that is, to estates which may descend to heirs; so that a *fee* may now be said to mean an inheritance.(*c*) The word *tail* is derived from the French word *tailler*, to cut, the inheritance being, by the statute *De Donis*, cut down and confined to the heirs of the body strictly ;(*d*) but, *though an estate tail still bears a name indicative of a restriction of [*39] the inheritance from any interruption in its course of perpetual descent from father to son, we shall find that in fact the right to establish such exclusive perpetual descent has long since been abolished. When the statute began to operate, the inconvenience of the strict entails, created under its authority, became sensibly felt; children, it is said, grew disobedient when they knew they could not be set aside ; farmers were deprived of their leases ; creditors were defrauded of their debts; and innumerable latent entails were produced, to deprive purchasers of the lands they had fairly bought ; treasons also were encouraged, as estates tail were not liable to forfeitures longer than for the tenant's life.(*e*) The nobility, however, would not consent to a repeal, which was many times attempted by the commons,(*f*) and for about two hundred years the statute remained in force.[1] At length the power of alienation was once more introduced, by means of a quiet decision of the judges, in a case which occurred in the twelfth year of the reign of King Edward IV.(*g*) In this case,

(*b*) Bracton, lib. 4, fol. 263 b, par. 6 ; Selden, Tit. of Honor, part 2, c. 1, s. 23, p. 332 ; Wright's Tenures, p. 5.

(*c*) Litt. s. 1 ; Co. Litt. 1 b, 2 a ; Wright's Tenures, p. 149.

(*d*) Litt. s. 18 ; Co. Litt. 18 b, 327 a, n. (2) ; Wright's Tenures, 187 ; 2 Black. Com. 112.

(*e*) 2 Black. Com. 116. (*f*) Cruise on Recoveries, p. 9.

(*g*) *Taltarum's case*, Year Book, 12 Edw. IV. 19. [Case 25.]

[1] " The statute *De Donis*, by removing the estates of the greater lords beyond the penalties of forfeiture, swelled them to a height which was as unpalatable to the crown as it was galling to the trading and industrious classes. Nor was it less distasteful to the younger sons, who, in consequence of the unalienable nature of the estates in tail which the statute created, were without provision from their fathers, the tenants in tail. All of these saw the mischief when it was too late. In every successive Parliament, from Edward the First to Edward the Fourth, bills were introduced to repeal the statute *De Donis*, but the power of the great lords resisted these attempts with success. There was nothing then left but to elude the statute by every ingenuity which lawyers and judges could devise." Rawle on Covenants for Title, p. 37.

called *Taltarum's case*, the destruction of an entail was accomplished by judicial proceedings collusively taken against a tenant in tail for the recovery of the lands entailed. Such proceedings were not at that period quite unknown to the English law, for the monks had previously hit upon a similar device, for the purpose of evading the Statutes of Mortmain, by which open conveyances of lands to their religious houses had been prohibited; and this device they had practised with considerable success till restrained by act of Parliament.(*h*) In the case of which we are now speaking, the law would not allow the [*40] *entail to be destroyed simply by the recovery of the lands entailed, by a friendly plaintiff on a fictitious title; this would have been too barefaced; and in such a case the issue of the tenant, claiming under the gift to him in tail, might have recovered the lands by means of a writ of *formedon*,(*i*) so called because they claimed *per formam doni*, according to the form of the gift, which the statute had declared should be observed. The alienation of the lands entailed was effected in a more circuitous mode, by judicial sanction being given to the following proceedings, which afterwards came into frequent and open use, and had some little show of justice to the issue, though without any of its reality. The tenant in tail, on the collusive action being brought, was allowed to bring into court some third person, presumed to have been the original grantor of the estate tail. The tenant then alleged that this third person had *warranted* the title; and accordingly begged that he might defend the title which he had so warranted. This third person was accordingly called on; who, in fact, had had nothing to do with the matter; but, being a party in the scheme, he admitted the alleged warranty, and then allowed judgment to go against himself by default. Whereupon judgment was given for the demandant or plaintiff, to recover the lands from the tenant in tail; and the tenant in tail had judgment empowering him to recover a recompense in lands *of equal value* from the defaulter, who had thus cruelly failed in defending his title.(*k*) If any such lands *had* been recovered under the judgment, they would have been held by the tenant for an estate tail, and would have descended to the issue, in lieu of those which were lost by the warrantor's default.(*l*) But the defaulter, on whom the burden was thus cast, was a man who had no lands to give, some man of straw, who could easily be prevailed on to

(*h*) Statute of Westminster the Second, 13 Edw. I. c. 32; 2 Black. Com. 271.
(*i*) Litt. ss. 688, 690.
(*k*) Co. Litt. 361 b; 2 Black. Comm. 358.
(*l*) 2 Black. Comm. 360.

undertake the responsibility; and, in *later times, the crier of the court was usually employed. So that, whilst the issue had [*41] still the judgment of the court in their favor, unfortunately for them it was against the wrong person; and virtually their right was defeated, and the estate tail was said to be *barred*. Not only were the issue barred of their right, but the donor, who had made the grant, and to whom the lands were to revert on failure of issue, had his reversion barred at the same time.(*m*) So also all estates which the donor might have given to other persons, expectant on the decease of the tenant in tail without issue (and which estates are called *remainders* expectant on the estate tail), were equally barred. The demandant, in whose favor judgment was given, became possessed of an estate in fee simple in the lands; an estate the largest allowed by law, and bringing with it the fullest powers of alienation, as will be hereafter explained; and the demandant, being a friend of the tenant in tail, of course disposed of the estate in fee simple according to his wishes.

Such a piece of solemn juggling could not long have held its ground, had it not been supported by its substantial benefit to the community; but, as it was, the progress of events tended only to make that certain, which at first was questionable; and proceedings on the principle of those above related, under the name of suffering *common recoveries*, maintained their ground, and long continued in common use as the undoubted privilege of every tenant in tail. The right to suffer a common recovery was considered as the inseparable incident of an estate tail, and every attempt to restrain this right was held void.(*n*)[1] Complex, however, as the proceedings above related may appear, the ordinary forms of a *common recovery* in later times were more *complicated still. The lands were in the first place [*42] conveyed, by a deed called the recovery deed, to a person against whom the action was to be brought, and who was called the tenant to the *præcipe* or writ.(*o*) The proceedings then took place

(*m*) 2 Black. Com. 360; Cruise on Recoveries, 258.

(*n*) *Mary Partington's case*, 10 Rep. 36; Co. Litt. 224 a; Fearne on Contingent Remainders, 260; 2 Black. Com. 116.

(*o*) By stat. 14 Geo. II. c. 20, commonly called Mr. Pigott's Act, it was sufficient if the

[1] And the power to suffer a common recovery has been repeatedly held to be "a privilege inseparably incident to an estate tail," and which cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. See the argument of Mr. Knowles, in Taylor v. Horde, 1 Burrow, 84; Dewitt v. Eldred, 4 Watts & Serg. 421.

in the Court of Common Pleas, which had an exclusive jurisdiction in all real actions. A regular writ was issued against the tenant to the *præcipe* by another person, called the *demandant;* the tenant in tail was then required by the tenant to the *præcipe* to warrant his title according to a supposed engagement for that purpose; this was called vouching the tenant in tail to warranty. The tenant in tail, on being vouched, then vouched to warranty in the same way the crier of the court, who was called the common vouchee. The demandant then craved leave to imparl or confer with the last vouchee in private, which was granted by the court; and the vouchee, having thus got out of court, did not return; in consequence of which, judgment was given in the manner before mentioned, on which a regular writ was directed to the sheriff to put the demandant into possession.(*p*) The proceedings, as may be supposed, necessarily passed through numerous hands, so that mistakes were not unfrequently made, and great expense was always incurred.(*q*) To remedy this evil, an act of Parliament(*r*) was accordingly passed in the year 1833, on the recommendation of the commissioners on the law of real property. This act, which in the wisdom of its design, and the skill of its execution, [*43] is quite a model of legislative reform, abolished *the whole of the cumbrous and suspicious-looking machinery of common recoveries. It has substituted in their place a simple deed, executed by the tenant in tail, and inrolled in the Court of Chancery :(*s*) by such a deed, a tenant in tail in possession is now enabled to dispose of the lands entailed for an estate in fee simple; thus at once defeating the claims of his issue, and of all persons having any estates in remainder or reversion.[1]

conveyance to the tenant to the *præcipe* appeared to be executed before the end of the term in which the recovery was suffered. 1 Prest. Con. 61, et seq. Recoveries being in form judicial proceedings, could only be suffered in term time.

(*p*) Cruise on Recoveries, ch. 1, p. 12.

(*q*) See 1st Report of Real Property Commissioners, 25.

(*r*) Stat. 3 & 4 Will. IV. c. 74, drawn by Mr. Brodie; 1 Hayne's Conveyancing, 155.

(*s*) The inrolment must be within six calendar months after the execution, sect. 41. See sect. 74.

[1] Instances have not been wanting, on this side of the Atlantic, of the suffering of common recoveries, for the purpose of barring estates tail (see, for example, Lyle v. Richards, 7 Serg. & Rawle, 322); but in general, it may be said that in those States in which entails are not entirely abolished by statute, the tenant in tail is (as in Pennsylvania and at the present day in England) enabled to bar the entail by a simple deed acknowledged in open court for that purpose. Purdon's Dig. 322. For a reference to the statutes in the different States, see 1 Greenleaf's Cruise, 92.

A common recovery was not, in later times, the only way in which an estate tail might be barred. There was another assurance as effectual in defeating the claim of the issue; though it was inoperative as to the remainders and reversion. This assurance was a fine. Fines were in *themselves*, though not in their operation on estates tail, of far higher antiquity than common recoveries.(*t*) They were not, like recoveries, actions at law carried out through every stage of the process; but were fictitious actions, commenced and then compromised by leave of the court, whereby the lands in question were acknowledged to be the right of one of the parties.(*u*) They were called *fines*, from their having anciently put an *end*, as well to the pretended suit, as to all claims not made within a year and a day afterwards,(*w*) a summary method of ending all disputes, grounded on the solemnity and publicity of the proceedings as taking place in open court.[1] This power of barring future claims was taken from fines in the reign of Edward III. ;(*x*) but it was again restored, with an *extension, [*44] however, of the time of claim to five years, by statutes of Richard III.(*y*) and Henry VII. ;(*z*) by which statutes also provision was made for the open proclamation of all fines several times in court, during which proclamation all pleas were to cease; and in order that a fine might operate as a bar after non-claim for five years, it was necessary that it should be *levied*, as it was said, with proclamations. But now, by a recent statute,(*a*) all fines heretofore levied in the Court of Common Pleas, shall be conclusively deemed to have been levied with proclamations, and shall have the force and effect of fines with proclamations. A judicial construction of the statute of Henry

(*t*) Cruise on Fines, chap. 1. (*u*) 2 Black. Com. 348.

(*w*) Stat. 18 Edw. I. stat. 4; 2 Black. Com. 349, 354; Co. Litt. 121 a, n. (1).

(*x*) Stat. 34 Edw. III. c. 16, a curious specimen of the conciseness of ancient acts of Parliament. This is the whole of it: "Also it is accorded, that the plea of non-claim of fines, which from henceforth shall be levied, shall not be taken or holden for any bar in time to come."

(*y*) 1 Rich. III. c. 7. (*z*) 4 Hen. VII. c. 24; see also stat. 31 Eliz. c. 2.

(*a*) Stat. 11 & 12 Vict. c. 70.

[1] Until quite recently, in England, the dower of a married woman could only be passed by the levying of a fine, in order to avoid the trouble and expense of which, "dower uses," as they were termed, were employed by conveyancers, by which the estate, instead of being conveyed to the purchaser and his heirs, which would give the right of dower therein to the wife, would be limited to such uses as the purchaser should appoint, and for want of appointment to himself in fee. This clumsy conveyancing has been superseded by recent legislation. See infra, Ch. XI.

VII.,(*b*) quite apart, as it should seem, from its real intention,(*c*) gave to a fine, by a tenant in tail, the force of a bar to his issue, after non-claim by them for five years after the fine; and this construction was confirmed by a statute of the reign of Henry VIII., which made the bar immediate.(*d*) Since this time the effect of fines in barring an entail, so far as the issue were concerned, remained unquestioned till their abolition; which took place at the same time, and by the same act of Parliament,(*e*) as the abolition of common recoveries. A deed inrolled in the Court of Chancery has now been substituted, as well for a fine, as for a common recovery.

Although strict and continuous entails have long been virtually abolished, their remembrance seems still to linger in many country [*45] places, where the notion of *heir *land*, that must perpetually descend from father to son, is still to be met with. It is needless to say that such a notion is quite incorrect. In families where the estates are kept up from one generation to another, settlements are made every few years for this purpose; thus in the event of a marriage, a life estate merely is given to the husband; the wife has an allowance for pin-money during the marriage, and a rent-charge or annuity by way of jointure for her life, in case she should survive her husband. Subject to this jointure, and to the payment of such sums as may be agreed on for the portions of the daughters and younger sons of the marriage, *the eldest son who may be born of the marriage is made by the settlement tenant in tail.* In case of his decease without issue, it is provided that the second son, and then the third, should in like manner be tenant in tail; and so on to the others; and in default of sons, the estate is usually given to the daughters. By this means the estate is tied up till some tenant in tail attains the age of twenty-one years; when he is able, with the consent of the father, who is tenant for life, to bar the entail with all the remainders. Dominion is thus again acquired over the property, which dominion is usually exercised in a resettlement on the next generation; and thus the property is preserved in the family. Primogeniture, therefore, as it obtains among the landed gentry of England, is a *custom*

(*b*) Bro. Ab. tit. Fine, pl. 1; Dyer, 3 a; Cruise on Fines, 173.

(*c*) 4 Reeves's Hist. Eng. Law, 135, 138; 1 Hallam's Const. Hist. 14, 17. The deep designs attributed by Blackstone (2 Black. Com. 118, 354), and some others, to Henry VII. in procuring the passing of this statute, are shown by the above writers to have most probably had no existence.

(*d*) 32 Hen. VIII. c. 36.

(*e*) 3 & 4 Will. IV. c. 74.

only, and not a *right;*[1] though there can be no doubt that the custom has originated in the right, which was enjoyed by the eldest son, as heir to his father, in those days when estates tail could not be barred. Primogeniture, as a custom, has been the subject of much remark.(*f*) Where family *honors or family estates are to be preserved, [*46] some such device appears necessary. But, in other cases, strict settlements, of the kind referred to, seem fitted rather to maintain the posthumous pride of present owners, than the welfare of future generations. The policy of the law is now in favor of the free disposition of all kinds of property; and as it allows estates tail to be barred, so it will not permit the object of an entail to be accomplished by other means, any further than can be done by giving estates to the unborn children of *living persons.* Thus an estate given to the children of an *unborn child* would be absolutely void.(*g*) The desire of individuals to keep up their name and memory has often been opposed to this rule of law, and many shifts and devices have from time to time been tried, to keep up a perpetual entail, or something that might answer the same end.(*h*) But such contrivances have invariably been defeated; and no plan can be now adopted by which lands can with certainty be tied up, or fixed as to their future destination, for a longer period than the lives of existing persons and a term of twenty-one years after their decease.(*i*)[2]

Whenever an estate tail is not an estate in possession, but is preceded by a life interest to be enjoyed by some other person prior to the possession of the lands by the tenant in tail, the power of such tenant in tail to acquire an estate in fee simple in remainder ex-

(*f*) See 2 Adam Smith's Wealth of Nations, 181, M'Culloch's edition; and M'Culloch's n. xix. vol. 4, p. 441. See also Traités de Legislation Civile et Pénale, ouvrage extrait des Manuscrits de Bentham, par Dumont, tom. 1, p. 307; a work of profound philosophy, except where a hardened scepticism makes it shallow.

(*g*) Hay v. Earl of Coventry, 3 T. Rep. 86; Brudenell v. Elwes, 1 East, 452.

(*h*) See Fearne's Contingent Remainders, 253, et seq. [4th ed. 379 to 390]; [Spencer v. Duke of Marlborough, 5 Bro. P. C. 592;] Manwaring v. Baxter, 5 Ves. 458.

(*i*) Fearne's Contingent Remainders, 430, et seq. The period of gestation is also included, if gestation exist; Cadell v. Palmer, 7 Bligh, N. S. 202; [and see the great case of Thelusson v. Woodford, 4 Vesey, 227; also noticed infra, Part II. ch. 3.]

[1] That is to say, the father can, in his lifetime, convey away his estate from his eldest son, or devise it to any one else; but in cases of intestacy, the estate will descend to the eldest son, as will be shown in Chapter IV.

[2] The law, as thus expressed, applies with equal force on this side of the Atlantic.

pectant on the decease of the tenant for life, is subject to some limitation. In the time when an estate tail, together with the reversion, could only be barred by a recovery, it was *absolutely necessary [*47] that the first tenant for life, who had the possession of the lands, should concur in the proceedings; for no recovery could be suffered, unless on a feigned action brought against the feudal holder of the possession.(*k*) This technical rule of law was also a valuable check on the tenant in tail under every ordinary settlement of landed property; for, when the eldest son (who, as we have seen, is usually made tenant in tail) came of age, he found that, before he could acquire the dominion expectant on the decease of his father, the tenant for life, he must obtain from his father consent for the purpose. Opportunity was thus given for providing that no ill use should be made of the property.(*l*) When recoveries were abolished, the consent formerly required was accordingly still preserved, with some little modification. The act abolishing recoveries has established the office of *protector*, which almost always exists during the continuance of such estates as may precede an estate tail.[1] And the consent of the protector is required to be given, either by the same deed by which the entail is barred, or by a separate deed, to be executed on or before the day of the execution of the former, and to be also inrolled in the Court of Chancery at or previously to the time of the inrolment of the deed which bars the entail.(*m*) Without such consent, the remainders and reversion cannot be barred.(*n*) In ordinary cases the protector is the first tenant for life, in analogy to the old law;(*o*) but a power is given by the act, to any person entailing lands, to appoint, in the place of the tenant for life, any number of persons, not exceeding three, to be together protector of the settlement during the continuance of the preceding estates;(*p*) *and, in such a [*48] case, the consent of such persons only need be obtained in order to effect a complete bar to the estate tail, and the remainders, and reversion. The protector is under no restraint in giving or withholding his consent, but is left entirely to his own discretion.(*q*) If he should refuse to consent, the tenant in tail may still bar his own

(*k*) Cruise on Recoveries, 21. See, however, stat. 14 Geo. II. c. 20.
(*l*) See First Report of Real Property Commissioners, p. 32.
(*m*) Stat. 3 & 4 Will. IV. c. 74, ss. 42–47. (*n*) Sects. 34, 35.
(*o*) Sect. 22. (*p*) Sect. 32. (*q*) Sects. 36, 37.

[1] The student may refer with profit to the remarks of Sir E. Sugden (now Lord St. Leonards), on this act, in 2 Sugden on Vendors, 300.

issue; as he might have done before the act, by levying a fine; but he cannot bar estates in remainder or reversion. The consequence of such a limited bar is, that the tenant acquires a disposable estate in the land for so long as he has any issue or descendants living, and no longer; that is, so long as the estate tail would have lasted, had no bar been placed on it. But, when his issue fail, the persons having estates in remainder or reversion become entitled. When the estate tail is in possession, that is, when there is no previous estate for life or otherwise, there can very seldom be any protector;(*r*) and the tenant in tail may, at any time, by deed duly inrolled, bar the entail, remainders, and reversion, at his own pleasure.

The above mentioned right, of a tenant in tail to bar the entail, is subject to a few exceptions; which, though not of very frequent occurrence, it may be as well to mention. And first, estates tail granted by the crown as the reward of public services, cannot be barred so long as the reversion continues in the crown. This restriction was imposed by an act of Parliament of the reign of Henry VIII.,(*s*) and it has been continued by the act by which fines and recoveries were abolished.(*t*) There are also some cases in which entails have been created by particular acts of Parliament, and cannot be barred.

*Again, an estate tail cannot be barred by any person who is *tenant in tail after possibility of issue extinct.* This can only happen where a person is tenant in *special* tail. For instance, if an estate be given to a man and the heirs of his body by his present wife; in this case, if the wife should die without issue, he would become tenant in tail after possibility of issue extinct;(*u*) the possibility of his having issue who could inherit the estate tail, would have become extinct on the death of his wife. A tenancy of this kind can never arise in an ordinary estate in tail general or tail male; for, so long as a person lives, the law considers that the possibility of issue continues, however improbable it may be from the great age of the party.(*x*) Tenants in tail after possibility of issue extinct were prohibited from suffering common recoveries by a statute of the reign [*49]

(*r*) See Sugd. Vend. and Pur. 593.

(*s*) Stat. 34 & 35 Hen. VIII. c. 20; Cruise on Recoveries, 318.

(*t*) Stat. 3 & 4 Will. IV. c. 74, s. 18; Duke of Grafton's case, 5 New Cases, 27.

(*u*) Litt. sects. 32, 33; 2 Black. Com. 124.

(*x*) Litt sect. 34; Co. Litt. 40 a; 2 Black. Com. 125; Jee v. Audley, 1 Cox, 324.

of Elizabeth,(*y*) and a similar prohibition is contained in the recent act.(*z*) But, as we have before remarked,(*a*) tenancies in special tail are not now common. In modern times, when it is intended to make a provision for the children of a particular marriage, estates are given directly to the unborn children, which take effect as they come into existence; whereas in ancient times, as we shall hereafter see,(*b*) it was not lawful to give any estate directly to an unborn child.

The last exception is one that can only arise in the case of grants and settlements made before the passing of the recent act; for the future it has been abolished. It relates to women who are tenants in tail of lands of their husbands, or lands given by any of his ancestors. [*50] After the decease of the husband, a woman so tenant *in tail *ex provisione viri*, was prohibited by an old statute(*c*) from suffering a recovery without the assent, recorded or inrolled, of the heirs next inheritable to her, or of him or them that next after her death should have an estate of inheritance (that is, in tail or in fee simple), in the lands: she was also prohibited from levying a fine under the same circumstances, by the statute which confirmed to fines their force in other cases.(*d*) This kind of tenancy in tail very rarely occurs in modern practice, having been superseded by the settlements now usually made on the unborn children of the marriage.

It is important to observe, that an estate tail can only be barred by a proper deed, duly inrolled according to the act of Parliament by which a deed was substituted for a common recovery or fine. Thus every attempt by a tenant in tail to leave the lands entailed by his will,(*e*) and every contract to sell them, not completed in his lifetime by the proper bar,(*f*) will be null and void as against his issue claiming under the entail, or as against the remaindermen or reversioners, (that is, the owners of estates in remainder or reversion), should there be no such issue left.

A tenant in tail may cut down timber for his own benefit, and commit what waste he pleases, without the necessity of barring the entail

(*y*) 14 Eliz. c. 8. (*z*) 3 & 4 Will. IV. c. 74, s. 18. (*a*) Ante, p. 30.
(*b*) See the Chapter on a Contingent Remainder. (*c*) 11 Hen. VII. c. 20.
(*d*) Stat. 32 Hen. VIII. c, 36, s. 2.
(*e*) Cro. Eliz. 805; Co. Litt. 111 a; stat. 3 & 4 Will. IV. c. 74, s. 40.
(*f*) Bac. Abr. tit. Estate in Tail (D); stat. 3 & 4 Will. IV. c. 74, s. 40.

for that purpose.(*g*) A tenant in tail is moreover empowered by a statute of Henry VIII.(*h*) to make leases, under certain restrictions, *of such of the lands entailed as have been most commonly let to farm for twenty years before; but such leases are not to [*51] exceed twenty-one years, or three lives, from the day of the making thereof, and the accustomed yearly rent must be reserved. This power is however of little use; for leases under this statute, though binding on the issue, are not binding on the remainderman or reversioner;(*i*) and consequently have not that certainty of enjoyment which is the great inducement to the outlay of capital, and the consequent improvement of landed property. And the Act for the Abolition of Fines and Recoveries now empowers every tenant in tail in possession to make leases by deed, without the necessity of inrolment, for any term not exceeding twenty-one years, to commence from the date of the lease, or from any time not exceeding twelve calendar months from the date of the lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack-rent, or not less than five-sixth parts of a rack-rent.(*k*)

It has been observed that, in ancient times, estates tail were not subject to forfeiture for high treason beyond the life of the tenant in tail.(*l*) This privilege they were deprived of by an act of Parliament passed in the reign of Henry VIII.,(*m*) by which all estates of inheritance (under which general words, estates tail were covertly included) were declared to be forfeited to the king upon any conviction of high treason.(*n*) But the attainder of the ancestor does not of itself prevent the descent of an estate tail to his issue, as they claim from the original donor, *per formam doni*;(*o*) and therefore, *on attainder for murder, an estate tail would still descend to the issue. [*52] By virtue of another statute of the reign of Henry VIII.,(*p*) estates tail are charged, in the hands of the heir, with debts due from his ancestor to the crown, by judgment, recognizance, obligation, or other specialty, although the word *heir* shall not be comprised therein.

(*g*) Co. Litt. 224 a; 2 Black. Com. 115.

(*h*) Stat. 32 Hen. VIII. c. 28; Co. Litt. 44 a; Bac. Abr. tit. Leases and Terms for Years (D), 2.

(*i*) Co. Litt. 45 b; 2 Black. Com. 319.

(*k*) Stat. 3 & 4 Will. IV. c. 74, ss. 15, 40, 41. (*l*) Ante, p. 39.

(*m*) 26 Hen. VIII. c. 13, s. 5; see also 5 & 6 Edw. VI. c. 11, s. 9.

(*n*) 2 Black. Com. 118. (*o*) 3 Rep. 10; 8 Rep. 165 b; Cro. Eliz. 28.

(*p*) Stat. 33 Hen. VIII. c. 39, s. 75.

And all arrears and debts due to the crown, by accountants to the crown, whose yearly or total receipts exceed three hundred pounds, were, by a later statute of the reign of Elizabeth,(*q*) placed on the same footing. But till lately, estates tail, if suffered to descend, were not subject to the debts of the deceased tenant owing to private individuals.(*r*) By a recent act, however, debts, for the payment of which any judgment, decree, order, or rule has been given or made by any court of law or equity, are binding on the lands of the debtor, as against the issue of his body, and also as against all other persons whom he might, without the assent of any other person, cut off and debar from any remainder or reversion.(*s*) An estate tail may also be barred and disposed of on the bankruptcy of a trader tenant in tail, for the benefit of his creditors, to the same extent as he might have barred or disposed of it for his own benefit.(*t*)

In addition to the liabilities above mentioned are the rights which the marriage of a tenant in tail confers on the wife, if the tenant be a man, or on the husband, if the tenant be a woman; an account of which will be contained in a future chapter on the relation of husband and wife. But, subject to these rights and liabilities, an estate [*53] tail, if not duly barred, will descend to the issue *of the donee in due course of law; all of whom will be necessarily tenants in tail, and will enjoy the same powers of disposition as their ancestor, the original donee in tail. The course of descent of an estate tail is similar, so far as it goes, to that of an estate in fee simple, an explanation of which the reader will find in the fourth chapter.

If an estate *pur autre vie* should be given to a person and the heirs of his body, a *quasi entail*, as it is called, will be created, and the estate will descend, during its continuance, in the same manner as an ordinary estate tail. But the owner of such an estate in possession may bar his issue, and all remainders, by an ordinary deed of conveyance,(*u*) without any inrolment under the statute for the abolition of fines and recoveries. If the estate tail be in remainder expectant on an estate for life, the concurrence of the tenant for life is necessary to enable the tenant in tail to defeat the subsequent remainder.(*x*)

(*q*) Stat. 13 Eliz. c. 4; and see 14 Eliz. c. 7; 25 Geo. III, c. 35.
(*r*) Com. Dig. Estates (B), 22. (*s*) Stat. 1 & 2 Vict. c. 110, ss. 13, 18.
(*t*) Stat. 3 & 4 Will. IV. c. 74, ss. 56–73; 12 & 13 Vict. c. 106, s. 208.
(*u*) Fearne, Cont. Rem. 495, *et seq.* (*x*) Allen v. Allen, 2 Dru. & War. 307, 324, 332.

*CHAPTER III. [*54]

OF AN ESTATE IN FEE SIMPLE.

An estate in fee simple (*feudum simplex*) is the greatest estate or interest which the law of England allows any person to possess in landed property.(*a*) A tenant in fee simple is he that holds land or tenements to him *and his heirs*;(*b*) so that the estate is descendible, not merely to the heirs *of his body*, but to *collateral* relations, according to the rules and canons of descent. An estate in fee simple is of course an estate of *freehold*, being a larger estate than either an estate for life, or in tail.(*c*)

It is not, however, the mere descent of an estate in fee simple to collateral heirs, that has given to this estate its present value and importance: the unfettered right of alienation, which is now inseparably incident to this estate, is by far its most valuable quality. This right has been of gradual growth; for, as we have seen,(*d*) estates were at first alienable by tenants, without their lord's consent; and the heir did not derive his title so much from his ancestor as from the lord, who, when he gave to the ancestor, gave also to his heirs. In process of time, however, the ancestor acquired, as we have already seen,(*e*) the right, first of disappointing the expectations of his heir, and then of defeating the interests of his lord. The alienations by which these results were effected, were, as will be remembered, either the subinfeudation of parts of *the land, to be holden of the grantor, or the conveyance of the whole, to [*55] be holden of the superior lord. It was impossible to make a grant of part of the lands to be holden of the superior lord, without his consent; for, the services reserved on any grant were considered as entire and indivisible in their nature.(*f*) The tenant, consequently, if he wished to dispose of part of his lands, was obliged to create a tenure between his grantee and himself, by reserving to himself and his heirs, such services as would remunerate him for the services, which he himself was liable to render to his superior lord. In this

(*a*) Litt. s. 11. (*b*) Litt. s. 1. (*c*) Ante, pp. 22, 31.
(*d*) Ante, pp. 17, 18. (*e*) Ante, pp. 33–37. (*f*) Co. Litt. 43 a.

manner the tenant became a lord in his turn; and the method, which the tenants were thus obliged to adopt, when alienating part of their lands, was usually resorted to by choice, whenever they had occasion to part with the whole; for, the *immediate* lord of the holder of any lands had advantages of a feudal nature,(*g*) which did not belong to the superior lord, when any mesne lordship intervened; it was therefore desirable for every feudal lord, that the *possession* of the lands should always be holden by his own immediate tenants. The barons at the time of Edward I., accordingly perceiving, that, by the continual subinfeudations of their tenants, their privileges as superior lords were gradually encroached on, proceeded to procure an enactment in their own favor with respect to estates in fee simple, as they had then already done with regard to estates tail.(*h*) They did not, however, in this case attempt to restrain the practice of alienation altogether, but simply procured a prohibition of the practice of subinfeudation; and at the same time obtained for their tenants, facility of alienation of parts of their lands, to be holden of the chief lords.

[*56] *The statute by which these objects were effected, is known by the name of the statute of *Quia emptores*;(*i*) so called from the words with which it commences. It enacts, that from thenceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements or part thereof, so nevertheless that the feoffee (or purchaser) shall hold the same lands or tenements of the same chief lord of the fee, and by the same services and customs, as his feoffor held them before. And it further enacts,(*k*) that if he sell any part of such his lands or tenements to any person, the feoffee shall hold that part immediately of the chief lord, and shall be forthwith charged with so much service as pertaineth, or ought to pertain, to the said chief lord, for such part, according to the quantity of the land or tenement so sold. This statute did not extend to those who held of the king as tenants *in capite*, who were kept in restraint for some time longer.(*l*) Free liberty of alienation was however subsequently acquired by them; and the right of disposing of an estate in fee simple, by act *inter vivos*, is now the undisputed privilege of every tenant of such an estate.(*m*)

(*g*) Such as marriage and wardship, to be hereafter explained. See Bract. lib. ii. c. 19, par. 2.

(*h*) By the stat. *De Donis*, 13 Edw. I. c. 1, *ante*, p. 38.

(*i*) Stat. 18 Edw. I. c. 1. (*k*) Chap. 2. (*l*) Wright's Tenures, 162.

(*m*) Wright's Tenures, 172; Co. Litt. 111 b, n. 1.

The alienation of lands by will was not allowed in this country, from the time the feudal system became completely rooted, until many years after alienation *inter vivos* had been sanctioned by the statute of *Quia emptores*. The city of London, and a few other favored places, formed exceptions to the general restraint on the power of testamentary alienation of estates in fee simple;(*n*) for in these places tenements might be devised by will, in virtue of a special custom. In process of time, however, a method of devising lands by will was *covertly adopted by means of conveyances to other parties, *to such uses* as the person conveying should appoint by his will.(*o*) This indirect mode of devising lands was intentionally restrained by the operation of a statute, passed in the reign of King Henry VIII.,(*p*) known by the name of the Statute of Uses, to which we shall hereafter have occasion to make frequent reference. But only five years after the passing of this statute, lands were by a further statute expressly rendered devisable by will. This great change in the law was effected by statutes of the 32d and 34th of Henry VIII.(*q*) But even by these statutes the right to devise was partial only, as to lands of the then prevailing tenure; and it was not till the restoration of King Charles II., when the feudal tenures were abolished,(*r*) that the right of devising freehold lands by will became complete and universal. At the present day, every tenant in fee simple so fully enjoys the right of alienating the lands he holds, either in his lifetime or by his will, that most tenants in fee think themselves to be the lords of their own domains; whereas, in fact, all landowners are merely tenants in the eye of the law, as will hereafter more clearly appear. [*57]

Blackstone's explanation of an estate in fee simple is, that a tenant in fee simple holds to him and his heirs forever, generally, absolutely, and simply, without mentioning *what* heirs, but referring that to his own pleasure, or the disposition of the law.(*s*) But the idea of nominating an heir to succeed to the inheritance has no place in the English law, however it might have obtained in *the Roman jurisprudence. The heir is always appointed by the law, the [*58]

(*n*) Litt. sec. 167; Perk. sects. 528, 537. (*o*) Perk. ubi sup.

(*p*) Stat. 27 Hen. VIII. c. 10, intituled "An Act concerning Uses and Wills."

(*q*) Stat. 32 Hen. VIII. c. 1; 34 & 35 Hen. VIII. c. 5; Co. Litt. 111 b, n. (1.)

(*r*) By stat. 12 Car. II. c. 24.

(*s*) 2 Black. Com. 104. See, however, 3 Black. Com. 224, where the correct account is given.

maxim being *Solus Deus hæredem facere potest, non homo*;(*t*) and all other persons, whom a tenant in fee simple may please to appoint as his successors, are not his *heirs* but his *assigns*. Thus, a purchaser from him in his lifetime, and a devisee under his will, are alike *assigns* in law, claiming in opposition to, and in exclusion of, the *heir*, who would otherwise have become entitled.(*u*)

With respect to certain persons, exceptions occur to the right of alienation. Thus, if an *alien* or foreigner, who is under no allegiance to the crown,(*x*) were to purchase an estate in lands, the crown might at any time assert a right to such estate; unless it were merely a lease taken by a subject of a friendly state for the residence or occupation of himself or his servants, or for the purpose of any business, trade, or manufacture, for a term not exceeding twenty-one years.(*y*) For the conveyance to an alien of any greater estate in lands in this country, is a cause of forfeiture to the Queen, who, after an inquest of office has been held, for the purpose of finding the truth of the facts, may seize the lands accordingly.(*z*) Before office found, that is, before the verdict of any such inquest of office has been given, an alien may make a conveyance to a natural-born subject; and such conveyance will be valid for all purposes,(*a*) except to defeat the prior right of the crown, which will still continue. But almost all the privileges of natural-born subjects may now be obtained by aliens in-
[*59] tending to settle in this country, upon *obtaining the certificate and taking the oath prescribed by the recent act to amend the laws relating to aliens.(*b*)[1]

Infants, or all persons under the age of twenty-one years, and also *idiots* and *lunatics*, though they may hold lands, are incapacitated from making a binding disposition of any estate in them. The con-

(*t*) 1 Reeves's Hist. Eng. Law, 105; Co. Litt. 191 a, n. (1.) vi. 3.
(*u*) Hogan v. Jackson, Cowp. 305; Co. Litt. 191 a, n. (1) vi. 10.
(*x*) Litt. s. 198. (*y*) Stat. 7 & 8 Vict. c. 66, s. 5.
(*z*) Co. Litt. 2 b, 42 b; 1 Black. Com. 371, 372; 2 Black. Com. 249, 274, 293.
(*a*) Shep. Touch. 232; 4 Leo. 84. (*b*) Stat. 7 & 8 Vict. c. 66.

[1] In most of the United States aliens are, by statute, enabled to take, hold and transmit real estate. In some of them this right is unlimited; in others, it is accompanied by restrictions as to residence, quantity of land (as in Pennsylvania to 5000 acres), and the like. See the several statutes referred to in 1 Greenleaf's Cruise, 53.

veyances of infants are generally voidable only,(*c*) and those of lunatics and idiots appear to be absolutely void, unless they were made by feoffment with livery of seisin before the year 1845.(*d*) But, under certain circumstances, for the sake of making a title to lands, infants have been empowered, by recent acts of Parliament, to make conveyances of fee simple and other estates, under the direction of the Court of Chancery.(*e*) And similar powers, with respect to the estates of idiots and lunatics, have been given, for the like purposes, to their *committees*, or the persons who have had committed to them the charge of such idiots and lunatics.(*f*) The powers given by these acts are now, however, in a great measure, superseded by the recent act to consolidate and amend the laws relating to the conveyance and transfer of real and personal property vested in mortgagees and trustees,(*g*) by which power is given to the Court of Chancery in the case of infants,(*h*) and to the Lord Chancellor in the case of idiots and lunatics,(*i*)[1] by a simple order, to vest in any other person the lands of which any infant, idiot, *or lunatic may be seised or possessed upon any trust or by way of mortgage. [*60]

Married women are under a limited incapacity to alienate, as will hereafter appear. And persons attainted for treason or felony cannot, by any conveyance which they may make, defeat the right to their estates, which their attainder gives to the crown, or to the lord, of whom their estates may be holden.(*k*)

(*c*) 2 Black. Com. 291; Bac. Abr. tit. Infancy and Age (I. 3); Zouch v. Parsons, 3 Burr. 1794; Allen v. Allen, 2 Dru. & War. 307, 338.

(*d*) Yates v. Boen, 2 Strange, 1104; 2 Sugd. Pow. 179; Bac. Abr. tit. Idiots and Lunatics (F); stat. 7 & 8 Vict. c. 76, s. 7; 8 & 9 Vict. c. 106, s. 4.

(*e*) See stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 11; 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12, 16, 31; 2 & 3 Vict. c. 60; 11 & 12 Vict. c. 87.

(*f*) See stat. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 13, 19, 23, 24, 27, 31; [and stat. 15 & 16 Vict. c. 48.]

(*g*) Stat. 13 & 14 Vict. c. 60; [extended by stat. 15 & 16 Vict. c. 55.]

(*h*) Sects. 7, 8. (*i*) Sects. 3, 4.

(*k*) Co. Litt. 42 b; 2 Black. Com. 290; Perkins, tit. Grant, sect. 26; Com. Dig. tit. Capacity (D, 6); 2 Shep. Touch. 232; Doe d. Griffith v. Pritchard, 5 Barn. & Adol. 765.

[1] The student will, of course, remember that the Court of Chancery has always had the custody and control of infants, but not so of idiots and lunatics; although such a power has been for so long a time delegated to the Chancellor, that it might well be supposed to have been always exercised by virtue of his office. It is, however, in theory at least, a specially delegated authority from the Crown, and has been, in former times, exercised by other officers than the Chancellor. A recent English statute has provided for permanent Masters in Lunacy.

There are certain objects also in respect of which the alienation of lands is restricted. Thus, no estate or interest of any kind in land can be conveyed for *charitable purposes* (except to a few favored institutions),[1] unless made by deed indented, sealed and delivered in the presence of two or more credible witnesses, and enrolled in the Court of Chancery within six calendar months next after the execution thereof; and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatever, for the benefit of the donor or grantor, or of any person or persons claiming under him. If, moreover, the conveyance is not made really and bonâ fide for a full and valuable consideration, actually paid at or before the making of such conveyance, without fraud or collusion, it will be void in case of the decease of the conveying party within twelve calendar months after the execution of the deed, including the days of execution and death.(*l*) No gift of any estate in land for charitable purposes can therefore be made by will. And indeed the chief object of the act of [*61] Parliament, by which the above provisions *were introduced, and which is commonly called the Mortmain Act, was to prevent improvident alienations or dispositions of landed estates, by languishing or dying persons, to the disherison of their lawful heirs.(*m*) By an act of Parliament, passed on the 25th of July, 1828,(*n*) the title to lands then already purchased for valuable consideration for charitable purposes is rendered valid, notwithstanding the want of an indenture duly attested and enrolled; but the act is retrospective merely.(*o*) An important exception to the Mortmain Act has been introduced by acts of Parliament recently passed, to afford further facilities for the conveyance and endowment of sites for schools,(*p*) by which one witness only is rendered sufficient for such a convey-

(*l*) Stat. 9 Geo. II. c. 36.

(*m*) See Bac. Abr. tit. Charitable Uses and Mortmain (G); Walker v. Richardson, 2 Mees. & Wels. 882; Attorney-General v. Glyn, 12 Sim. 84.

(*n*) Stat. 9 Geo. IV. c. 85. (*o*) Sect. 3.

(*p*) Stat. 4 & 5 Vict. c. 38, explained by stat. 7 & 8 Vict. c. 37, extended and further explained by stat. 12 & 13 Vict. c. 49, and amended by stat. 14 & 15 Vict. c. 24; [extended by stat. 15 & 16 Vict. c. 49.]

[1] Such as the two Universities, their Colleges, and the scholars upon the foundation of the Colleges of Eton, Winchester, and Westminster; the British Museum, Greenwich Hospital, and the Foundling Hospital.

ance,(*q*) and the death of the donor or grantor within twelve calendar months from the execution of the deed will not render it void.(*r*) But the necessity of inrolment does not appear to be dispensed with. These acts contain many other provisions for facilitating the erection of schools for the education of the poor.[1]

(*q*) Stat. 4 & 5 Vict. c. 38, s. 10. (*r*) Stat. 7 & 8 Vict. c. 37, s. 3.

[1] The common law recognized no distinction, as to the right to receive, hold, and convey lands, between corporations, whether sole or aggregate, ecclesiastical or lay, and others. Their right to retain and convey lands has been, however, by a series of statutes, from Magna Charta down to those noticed in the text (and of which a complete list will be found in note *k* to page 98 of Grant on Corporations), at successive periods, restrained,—at first, from jealousy of the accumulation of wealth and power in the *dead hand* of the Church, and subsequently, from a desire that property should more freely pass from hand to hand; and these restrictions were by the 15 Richard II. c. 5, extended to all corporations. These statutes do not, however, mention personal property; and even as to real estate, the title of the corporation is valid until *office found*. Shelford on Mortmain, 8; Runyan v. Coster, 14 Peters, 22.

In Pennsylvania, in the report of the Judges as to the English statutes in force in that State, it is said: "These statutes are in part inapplicable to this country, and in part applicable and in force. They are so far in force, that all conveyances, either by deed or will, of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, are void unless sanctioned by charter or act of Assembly. So, also, are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility." 3 Binney, 626. The incidental expression by Story, J., in the great case of Vidal v. Girard's Executors, 2 Howard, 189, that these statutes did not exist in Pennsylvania, although in accordance with the opinion expressed in Magill v. Brown, Brightly's Rep. 350, and sustained by that in Miller v. Leech, 1 Wallace, Jr., 212, was not in harmony with the decision by the Supreme Court of that State in Leazure v. Hillegas, 7 Sergeant & Rawle, 321, where it was said that the meaning of the report of the Judges was that, according to the statutes cited by them, conveyances to *superstitious* uses are absolutely void, and conveyances to corporations not superstitious, are so far void, that those corporations shall have no capacity to hold the estates for their own benefit, but subject to the right of the Commonwealth, who may appropriate them to its own use at pleasure. Leazure v. Hillegas, 7 Sergeant & Rawle, 321. It is not, however, easy to see, as was said by Gibson, C. J., in Methodist Church v. Remington, 1 Watts, 224, how there can be such a thing as a superstitious use in Pennsylvania, "at least in the acceptation of the word by the British courts, who seem to have extended it to all uses which are not subordinate to the interests and will of the Established Church. So far was this carried in the Attorney-General v. Guise, 2 Vernon, 266, that the charge of an annual sum for the education of Scotchmen to propagate the doctrines of the Church of England in Scotland, was treated as superstitious, because Presbyteries were settled there by act of Parliament." But, whatever may or may not be the force of the statutes of Mortmain in Pennsylvania, it was enacted, in 1833, that all lands held in that State by foreign cor-

Again, no conveyance can be made to any *corporation*, unless a license to take lands has been granted to it by the crown. Formerly, license from the lord, of whom a tenant in fee-simple held his estate, was also necessary to enable him to alienate his lands to any corporation.(*s*) For, this alienation to a body having perpetual existence was an injury to the lord, who was then entitled to many advantages, [*62] to be hereafter detailed, so long as the estate *was in private hands; but in the hands of a corporation these advantages ceased. In modern times, the rights of the lords having become comparatively trifling, the license of the crown alone has been rendered by Parliament sufficient for the purpose.(*t*)

By a statute of the reign of Elizabeth, conveyances of landed estates, and also of goods,[1] made for the purpose of delaying, hinder-

(*s*) 2 Black. Com. 269.

(*t*) Stat. 7 & 8 Will. III. c. 37.

porations, and all lands purchased or held in trust for any corporation, without license from the Commonwealth, should be forfeited to the Commonwealth, as in the case of an escheat for want of heirs. Purdon's Digest, 320. In other States, the statutes of Mortmain are believed not to be in force, and corporations can, in general, hold real estate for purposes not foreign to their institution. See Angell and Ames on Corporations, Chap. V.

[1] As respects the sale and mortgage of chattels without delivery of possession, it has been said that there exists in the United States three classes of cases. "In the first, which includes the courts of the United States, of Kentucky, Illinois, Alabama, and Indiana, the principle established is, that unless possession follow the deed,—that is, if the possession be retained inconsistently with the legal nature and purpose of the transfer,—the conveyance is, by the statutes of Elizabeth, fraudulent in law, and void against creditors and subsequent bonâ fide purchasers; and by these courts it is held, that in case of contingent sales or mortgages, the retaining of possession is not inconsistent with the nature of conveyance. And this was the law of Virginia before the late case of Davis v. Turner. 4 Grattan, 423. The law of New Hampshire and South Carolina may be considered in this connection, as resembling this class more nearly than any other. The second class, which takes in the courts of New York, as they stood before the Revised Statutes, of Pennsylvania, Connecticut, and Vermont, differs from the first, chiefly in holding that delivery of possession is necessary as against creditors, in case of mortgages and contingent transfers, as well as in cases of absolute sales; they hold that all conveyances are fraudulent in law, where possession does not pass with the titles, unless it has been retained for reasons satisfactory to the court. In the third class, the distinction taken in the first, between absolute and contingent sales, is adopted, but it is held, that retaining possession inconsistently with the conveyance, is only evidence of fraud for the jury. This class comprehends the courts of Massachusetts, Maine, Ohio, Tennessee, Missouri, Georgia, Texas, and North Carolina. It is believed that the real difference in principle, between the last and two former classes, is upon the question what, in law, constitutes the fraud which, under these statutes of Elizabeth, avoids conveyances. The definition of

ing, or defrauding creditors, are void as against them; unless made upon *good*, which here means *valuable*, consideration, and *bonâ fide*, to any person not having, at the time of the conveyance, any notice of such fraud.(*u*) And, by a subsequent statute of the same reign, voluntary conveyances of any estate in lands, tenements, or other hereditaments whatsoever, and conveyances of such estates made with any clause of revocation at the will of the grantor, are also void as against subsequent purchasers for money or other valuable consideration.(*x*) The effect of this enactment is, that any person who has made a voluntary settlement of landed property, even on his own children, may afterwards sell the same property to any purchaser; and the purchaser, even though he have full notice of the settlement, will hold the lands without danger of interruption from the persons on whom they had been previously settled.(*y*)[1] But if the settlement

(*u*) Stat. 13 Eliz. c. 5; Twyne's case, 3 Rep. 81 a; 1 Smith's Leading Cases, 1.

(*x*) Stat. 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18, s. 31.

(*y*) Upton v. Basset, Cro. Eliz. 444; 3 Rep. 83 a; Sugd. Vend & Pur. 924, 929; 2 Sugd. Pow. 227.

---

fraud is always matter of law; and the point really in issue in the controversies that have taken place on this subject, appears to be, whether this statutory fraud consists in the debtor's merely reserving to himself a trust out of the property conveyed, or whether, like fraud at common law, it lies solely in an actual design to cheat. It is commonly supposed that the distinction is merely as to the nature and weight of the evidence which retention and possession affords; whether it raises a legal presumption of fraud, of which the court are to take cognizance, or only a natural presumption, with which the jury are to deal. But this distinction appears to be merely a derivative one, flowing necessarily, or reasonably, out of the diversity above mentioned, as to the legal nature and definition of fraud, which is the essential difference at the bottom of the whole affair." (See the late Mr. Wallace's note to Twyne's case, 1 Smith's Leading Cases, 47, where the subject, which is too extended to be condensed in a note to an elementary work like the present, is elaborately examined.)

[1] Although there has been some variety of opinion (Atherly on Marriage Settlements, 187), if not of decision, in England, upon this point, the law may now be considered to be there settled as stated in the text. The notice on the part of the purchaser, it is said, is not of a title, but of a fraud: Buckle v. Mitchell, 18 Vesey, 111; Doe v. James, 16 East, 213; and no matter how meritorious may have been the ground for a voluntary conveyance, those claiming under it are considered to have no equity whatever as against a subsequent purchaser for valuable consideration with full notice; for, as was said in Hill v. The Bishop of Exeter, 2 Taunton, 83, if a man, after marriage, make a most prudent settlement on his wife and children, such as every wise man may approve, yet if he is dishonest enough to sell it for money afterwards, he may. Doe v. Ottley, 9 East, 59; Pulvertoft v. Pulvertoft, 18 Vesey, 84; Metcalf v. Pulvertoft, Ves. & Beames, 180; Butterfield v. Heath, 15 Eng. Law & Eq. Rep. 494. On this side of the Atlantic, it has also been considered, in a few cases, that "the subse-

be founded on any valuable consideration, such as that of an intended marriage, it cannot be defeated.(*z*)

The methods by which a tenant in fee simple can alienate his estate in his lifetime, will be reserved for future consideration; as will also the subject of alienation by testament. As a tenant in fee [*63] simple may *alienate his estate at his pleasure, so he is under no control in his management of the lands, but may open mines, cut timber, and commit waste of all kinds,(*a*) grant leases of any length, and charge the lands with the payment of money to any amount.

Fee simple estates are moreover subject, in the hands of the heir or devisee, to *debts* of all kinds contracted by the deceased tenant. This liability to what may be called an involuntary alienation, has, like the right of voluntary alienation, been established by very slow

(*z*) Colvile v. Parker, Cro. Jac. 158; 2 Sugd. Pow. 228.
(*a*) 3 Black. Com. 223.

quent sale, though a matter *ex post facto* merely, gives character to the transaction *ab origine*, and furnishes, in protection of the purchaser, uncontrollable evidence of an original intention to deceive." Doyle v. Sleeper, 1 Dana, 554; Sterry v. Arden, 1 Johns. Ch. 270, where Kent, Ch., felt himself controlled by the weight of English authority; Marshall v. Booker, 1 Yerger, 15; Cains v. Jones, 5 Id. 250, and in others, that the subsequent conveyance is at least *prima facie* evidence that the first was fraudulent; Lewis v. Love's heirs, 2 B. Monroe, 346. As a general rule, however, the current of American authority has fairly set in opposition to the English doctrine, and in favor of the position that a voluntary conveyance is not void against a subsequent purchaser, *with notice* of it. Sterry v. Arden, 12 Johns. 555, per Spencer, J.; Sanger v. Eastwood, 19 Wendell, 514; Lancaster v. Dolan, 1 Rawle, 231; Foster v. Walton, 5 Watts, 378; Dougherty v. Jack, Id. 456; Speise v. M'Coy, 6 Watts & Serg. 487; Hudnal v. Wilder, 4 M'Cord, 310; Moultrie v. Jennings, 2 M'Mullan, 508; Bank of Alexandria v. Patton, 1 Robinson (Va.), 540; Farmers' Bank v. Douglass, 11 Smedes & Marshall, 548; Cathcart v. Robinson, 5 Peters, 280. Where, however, the purchaser has had *no notice* of the prior voluntary conveyance, the latter is deemed *prima facie* fraudulent, so as to throw upon the grantor the burden of proving its fairness, which is deemed to be impeached from the mere fact of the subsequent conveyance. Cathcart v. Robinson, Hudnal v. Wilder, Bank of Alexandria v. Patton, supra; Caston v. Cunningham, 3 Strobhart, 63; Footman v. Prendergrass, 3 Rich. Eq. 33; Fowler v. Walrip, 10 Georgia, 350, where it was held that registry of the voluntary conveyance was not notice to a subsequent purchaser. And where the voluntary conveyance is actually fraudulent, it is void as against a subsequent purchaser, whether with or without notice. Hudnal v. Wilder, supra; Ricker v. Ham, 14 Mass. 137; Clapp v. Tirrell, 20 Pick. 2807; Elliott v. How, 10 Alab. 352. See *passim*, note to Lenton v. Wheaton, 1 Amer. Lead. Cases, 71.

degrees.(*b*) It appears that in the early periods of our history, the heir of a deceased person was bound, to the extent of the inheritance which descended to him, to pay such of the debts of his ancestor as the goods and chattels of the ancestor were not sufficient to satisfy.(*c*) But the spirit of feudalism, which attained to such a height in the reign of Edward I., appears to have infringed on this ancient doctrine; for we find it laid down by Britton, who wrote in that reign, that no one should be held to pay the debt of his ancestor, whose heir he was, to any other person than the king, unless he were by the deed of his ancestor especially bound to do so.(*d*) On this footing the law of England long continued. It allowed any person, by any deed or writing under seal (called a special contract or specialty) to bind or charge his heirs, as well as himself, with the payment of any debt, or the fulfilment of any contract: in such a case the heir was liable, on the decease of his ancestor, to pay the debt or fulfil the contract, to the value of the lands which had descended to him from the ancestor, but not further.(*e*) The lands so descended were called *assets* *by descent, from the French word *assez*, enough, because the heir was bound only so far as he had lands descended to him [*64] enough or sufficient to answer the debt or contract of his ancestor.(*f*) If, however, the heir was not expressly named in such bond or contract, he was under no liability.(*g*)[1] When the power of testamentary alienation was granted, a debtor, who had thus bound his heirs, became enabled to defeat his creditor, by devising his estate by his will to some other person than his heir; and, in this case, neither heir nor devisee was under any liability to the creditor.(*h*) Some debtors, however, impelled by a sense of justice to their creditors, left their lands to trustees in trust to sell them for the payment of their debts,

(*b*) See Co. Litt. 191 a, n. (1) vi. 9.

(*c*) Glanville, lib. vii. c. 8; Bract. 61 a; 1 Reeves's Hist. Eng. Law, 113. These authorities appear to be express; the contrary doctrine, however, with an account of the reasons for it, will be found in Bac. Abr. tit. Heir and Ancestor (F).

(*d*) Britt. 64 b. [Co. Litt. 209 a.]

(*e*) Bac. Abr. tit. Heir and Ancestor (F); Co. Litt. 376 b. [Buckley v. Nightingale, 1 Strange, 665.]

(*f*) 2 Black. Com. 244; Bac. Abr. tit. Heir and Ancestor (I).

(*g*) Dyer, 271 a, pl. 25; Plow. 457.

(*h*) Bac. Abr. ubi sup. [Plunkel v. Penson, 2 Atkins, 204; Davy v. Pepy, Plowden, 439.]

[1] So that in an action against him as heir, it was necessary that it should be averred that he was named in and bound by the obligation. Brooke's Ab. Guaranties, p. 89.

or, which amounts to the same thing, charged their lands, by their wills, with the payment of their debts. The creditors then obtained payment by the bounty of their debtor; and the Court of Chancery, in distributing this bounty, thought that "equality was equity," and consequently allowed creditors by simple contract to participate equally with those who had obtained bonds binding the heirs of the deceased.(*i*) In such a case the lands were called *equitable assets*.[1] At length an act of William and Mary made void all devises by will, as against creditors by specialty in which the heirs were bound, but not further or otherwise;(*k*) but devises or dispositions of any lands or hereditaments for the payment of any real and just debt or debts were exempted from the operation of the statute.(*l*) Creditors, however, who had no specialty binding the heirs of their debtor, still remained without remedy against either heir or devisee; unless the [*65] debtor *chose of his own accord to charge his lands by his will with the payment of his debts; in which case, as we have seen, all creditors were equally entitled to the benefit. So that, till within the last few years, a landowner might incur as many debts as he pleased, and yet leave behind him an unincumbered estate in fee simple, unless his creditors had taken proceedings in his lifetime, or he had entered into any bond or specialty binding his heirs. At length, in 1807, the fee simple estates of deceased *traders* were rendered liable to the payment, not only of debts in which their heirs were bound, but also of their simple contract debts,(*m*) or debts arising in ordinary business. By a subsequent statute,(*n*) the above enactments were consolidated and amended, and facilities were afforded for the sale of such estates of deceased persons as were liable by law, or by their own wills, to the payment of their debts. But, notwithstanding the efforts of a Romilly were exerted to extend so just a liability, the lands of all deceased persons, not traders at the time of their death, continued exempt from their debts by simple contract, till the year 1833; when a provision, which, but a few years before, had been

(*i*) Parker v. Dee, 2 Cha. Cas. 201; Bailey v. Ekins, 7 Ves. 319; 2 Jarm. Wills, 544.
(*k*) Stat. 3 & 4 Will. & Mary, c. 14, s. 2, made perpetual by stat. 6 & 7 Will. III. c. 14.
(*l*) Sect. 4. (*m*) By stat. 47 Geo. III. c. 74.
(*n*) Stat. 11 Geo. IV. & 1 Will. IV. c. 47.

[1] This principle of equity has, on this side of the Atlantic, lost much of its application, as such, from its adoption into the statute law of most of the States. See Mr. Hare's note to Silk v. Prime, 2 Leading Cases in Equity, 252.

strenuously opposed, was passed without the least difficulty.(*o*)[1] All estates in fee simple, which the owner shall not by his will have

(*o*) Stat. 3 & 4 Will. IV. c. 104.

[1] In tracing the course of legislation in the United States, on the subject of the liability of the lands of a decedent to payment of his debts, they will be found greatly in advance of English legislation on the same subject. The old feudal doctrines, which, to prevent the alienation of real estate, cumbered it with fines and restraints, gave place, there, when a new state of society demanded that the right of alienation should be unfettered, to an immunity of real estate, which protected the purchaser at the expense of the creditors; and the legislative provisions which, until very recently, existed, were inadequate to regulate the equal interest of both; and it was not until the year 1833, that by the statute referred to in the text, freehold estates were made assets for the payment of simple contract debts, as it was thought that "the heir's right to the real property of his ancestor ought not to be disappointed by the claims of creditors." Romilly's Autobiography, vol. ii. p. 389; 7 Campbell's Lives of the Chancellors, 266. On the other hand, from the earliest settlement of some of the American Colonies, the doctrine of the liability of a decedent's lands to the payment of his debts, whether due by matter of record, specialty, or simple contract, has been said to have grown up with the laws. In many of them, the death of the debtor changed his debts into liens, and a purchaser or a devisee stood, in those States, as in Pennsylvania, in no better position than the vendor or the testator. Morris's Lessee v. Smith, 1 Yeates, 244. In a few only of the colonies is this believed to have been otherwise. It has been assumed by authority entitled to respect, that real estate has, in general, from the earliest settlement of the Colonies, been liable for the debts of the ancestor in the hands of his devisees, his heirs, and *bonâ fide* purchasers from them: 4 Kent Com. 420; 2 Hilliard's Abr. 559, Watkins v. Holman, 14 Peters, 63; but in fact the statute 5 Geo. II. c. 7, expressly declared that lands, &c., in all the American Colonies, should be assets for the payment of debts. In Pennsylvania there were many statutes to this effect, prior to the year 1705. See them referred to in Bellas v. M'Carthy, 10 Watts, 31, per Kennedy, J.

However this may be, it may be said that, as a general rule, in the United States, lands are liable for the debts of a decedent, whether due by matter of record, specialty, or simple contract. In the two latter cases, the existence of the debt creates no lien during the debtor's life. By his death, however, its quality is changed, and it becomes a lien upon his real estate, which descends to the heir or passes to the devisee, subject to the payment of all the debts of the ancestor, according to the laws of the State in which the lands are situated, and the right of the creditor can, in most of the States, be enforced against the land in the hands of a *bonâ fide* purchaser, within certain statutory limitations as to time.

In England, however, even at the present day, "neither debts by specialty, by which the heirs are bound, nor simple contract debts since the statute 3 & 4 Will. IV., constitute a lien or charge upon the land, either in the hands of the debtor or of his heir or devisee. Notwithstanding the existence of such debts, the debtor himself may alienate the land. By taking proper proceedings, the creditors, both by specialty and simple contract, may obtain payment out of the descended or devised real estate in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of

charged with, or devised subject to, the payment of his debts, are accordingly now liable to be administered in the Court of Chancery, for the payment of all the just debts of the deceased owner, as well debts due on simple contract as on specialty. But, out of respect to the ancient law, the act provides that all creditors by special contract, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract, or by specialty, in which the heirs are not *bound, shall be paid any part of their demands. If, however, the debtor should by his last will have charged his lands with, or devised them subject to, the payment of his debts, such charge will still be valid, and every creditor, of whatever kind, will have an equal right to participate in the produce. Hence arises this curious result, that a person who has incurred debts, both by simple contract, and by specialty in which he has bound his heirs, may, by merely charging his lands with the payment of his debts, place all his creditors on a level, so far as they may have occasion to resort to such lands; thus depriving the creditors by specialty of that priority to which they would otherwise have been entitled.(*p*)

[*66]

A creditor who has taken legal proceedings against his debtor, for the recovery of his debt, in the debtor's lifetime, and has obtained the *judgment* of a Court of law in his favor, has long had a great advantage over creditors who have waited till the debtor's decease.[1] The first enactment which gave to such a creditor a remedy against the lands of his debtor, was made in the reign of Edward I.,(*q*) shortly before the passing of the statute of *Quia emptores*,(*r*) which sanctioned the full and free alienation of fee simple estates. By this enactment it is provided that, when a debt is recovered or acknowledged in the King's Court, or damages awarded, it shall be thenceforth *in the election* of him that sueth for such debt or damages, to

(*p*) See 2 Jarm. Wills, 510.

(*q*) Stat. 13 Edw. I. c. 18, called the Statute of Westminster the Second.

(*r*) Stat. 18 Edw. I. c. 1.

---

the alienee, whether upon a common purchase or on settlement, even with notice that there are debts unpaid, the land is not liable, though the heir or devisee remains personally liable to the extent of the value of the land alienated. Richardson v. Horton, 7 Beavan, 112, 123; 4 My. & Cr. 268, 269; Sugd. on Vend. 834, 835; Spackman v. Trimbell, 8 Simons, 259, 260;" Note to Silk v. Prime, 2 Lead. Cases in Eq. 85.

[1] See as to this, note 1, to next page.

have a writ of *fieri facias* unto the sheriff of the lands and goods, or that the sheriff deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough), and *the one-half of his land*, until the debt be levied according to a reasonable price or extent. The writ issued by the court to the sheriff, under the authority of this statute, was called *a writ of *elegit;* so named, because it was stated in the writ, that the creditor had elected (*elegit*) to pursue the remedy which the statute had thus provided for him.(*s*) One moiety only of the land was allowed to be taken, because it was necessary, according to the feudal constitution of our law, that whatever were the difficulties of the tenant, enough land should be left him, to enable him to perform the services due to his lord.(*t*) The statute, it will be observed, was passed prior to the time when the alienation of estates in fee simple was sanctioned by Parliament; and there can be no doubt, that long after the passing of this statute the vendors and purchasers of landed property held a far less important place in legal consideration than they do at present.[1] This circumstance may account for the somewhat harsh construction, which was soon placed on this statute, and which continued to be applied to it, until its replacement by an enlarged and amended act of modern date.(*u*) It was held, that if at the time when the judgment of the [*67]

(*s*) Co. Litt. 289 b; Bac. Abr. tit. Execution (C. 2).
(*t*) Wright's Tenures, 170.
(*u*) Stat. 1 & 2 Vict. c. 110.

[1] It is believed that the creditor who had, prior to the late English statute, obtained a judgment against his debtor in the lifetime of the latter, did not, to every extent, possess an advantage over all creditors who had not done so. Although an heir was only bound by the specialties of his ancestor to the extent of the assets by descent, yet a specialty creditor acquired, by the death of his debtor, some advantage over the judgment creditor; for, by the old rule of the common law, no recourse whatever could be had to the lands of the debtor by means of execution, and the statute of Westminster the Second, gave but the right to have one-half of them extended or delivered under a writ of elegit, while upon the death of the debtor, his specialty creditor could maintain an action against the heir, by means whereof, *all* the assets by descent were liable to be taken in execution. Sir William Harbert's case, 3 Coke, 12 a; Davy v. Pepys, Plowd. 441. The result was, that the bond creditor had, after his debtor's death, a greater security than the judgment creditor, for the latter by reason of his judgment charged the heir only as tenant of the land. No personal action could lie against the heir on such judgment, and the only remedy of the creditor was by writ of *scire facias* to have execution of the lands, which, as has been seen, he could, under the statute of Westminster, have had to a limited extent, as the death of the ancestor did not alter the nature of the execution any more than it did the nature of the debt, Stileman v. Ashdown, 2 Atkins, 608; while on the bond debts, the creditor could, by a special judgment, have execution upon all the lands in the possession of the heir.

court was given for the recovery of the debt, or awarding the damages, the debtor had lands, but afterwards sold them, the creditor might still, under the writ with which the statute had furnished him, take a moiety of the lands out of the hands of the purchaser.(*x*) It thus became important for all purchasers of lands to ascertain, that those from whom they purchased had no *judgments* against them. For, if any such existed, one moiety of the lands would still remain liable to be taken out of the hands of the purchaser, to satisfy the judgment debt or damages. It was also held that, if the debtor purchased lands after the date of the judgment, and then sold them again, even these lands would be liable, in the hands of the purchaser, [*68] to satisfy the *claims of the creditor under the writ of *elegit*.(*y*) In consequence of the construction thus put upon the statute, judgment debts became incumbrances upon the title to every estate in fee simple, which it was necessary to discover and remove previously to every purchase. To facilitate purchasers in their search for judgments, an alphabetical docket or index of judgments was provided by an act of William and Mary,(*z*) to be kept in each of the courts, open to public inspection and search. But, by a recent enactment,(*a*) these dockets have now been closed, and the ancient statute is, with respect to purchasers, virtually repealed.

The rights which judgment creditors at present possess, to follow the lands of their debtors in the hands of purchasers, now depend entirely on an act of Parliament of the present reign, passed for the purpose of extending the remedies of creditors against the property of their debtors.(*b*) The old statute extended only to one-half of the lands of the debtor; but by the new act, the whole of the lands, and all other hereditaments of the debtor, can be taken under the writ of *elegit*.(*c*) The power of the judgment creditor to take lands out of the hands of purchasers, is no longer left to depend on a forced construction, such as that applied to the old statute; for the new act expressly extends the remedy of the judgment creditor to lands of which the debtor shall *have been* seised or possessed at the time of

(*x*) Sir John De Moleyn's case, Year Book, 30 Edw. III. 24 a.

(*y*) Brace v. Duchess of Marlborough, 2 P. Wms. 492; Sugd. Vend. & Pur. 660; 3 Prest. Abst. 323, 331, 332.

(*z*) Stat. 4 & 5 Will. & Mary, c. 20, made perpetual by stat. 7 & 8 Will. III. c. 36.

(*a*) Stat. 2 & 3 Vict. c. 11, ss. 1, 2.

(*b*) Stat. 1 & 2 Vict. c. 110. (*c*) Sect. 11.

entering up the judgment *or at any time afterwards.* The judgment creditor is now also expressly provided with a remedy in equity, that is, in the Court of Chancery, as *well as at law.(*d*) And the remedies provided by the act are extended, in their application, to all decrees, orders, and rules made by the courts of equity and of common law, and by the Lord Chancellor or the Lords Justices in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy, for the payment to any person of any money or costs.(*e*) But, before lands in the hands of purchasers can be affected under the provisions of this act, the name, abode, and description of the debtor, with the amount of the debt, damages, costs, or money recovered against him, or ordered by him to be paid, together with the date of registration, and other particulars, are required to be registered in an index, which the act directs to be kept, for the warning of purchasers, at the office of the Court of Common Pleas.(*f*) This registration must be repeated every five years;(*g*) and even if a purchaser should have express notice of any such judgment, decree, order, or rule, he will not be affected, unless and until a minute of such judgment, &c., shall have been left at the office for entry in the above-mentioned index.(*h*) And, by a further important enactment, it has been provided, in favor of purchasers without notice of any such judgments, decrees, orders, or rules, that none of such judgments, &c., shall bind or affect any lands, tenements, or hereditaments, or any interest therein as against such purchasers without notice, further or otherwise, or more extensively in any respect, although duly registered, than a judgment of one of the superior courts would *have bound such purchasers before the last-mentioned act, when it had been duly docketed according to the law then in force.(*i*) [*69] [*70]

Lands in either of the counties palatine of Lancaster or Durham are affected both by judgments of the courts at Westminster, and also by judgments of the Palatine Court.(*k*) These latter judgments have, within the county palatine, the same effect as judgments of the

(*d*) Sect. 13.

(*e*) Sect. 18. See Jones v. Williams, 11 Ad. & Ell. 175; 8 Mees. & Wels. 349; Doe v. Amey, 8 Mees. & Wels. 565; Wells v. Gibbs, 3 Beav. 399; Duke of Beaufort v. Phillips, 1 De Gex & Smale, 321. As to the Lords Justices, see stats. 10 & 11 Vict. c. 102; 14 & 15 Vict. c. 83.

(*f*) Sect. 19; 2 & 3 Vict. c. 11, s. 3; Sugd. Vend. & Pur. 653, *et seq.*

(*g*) Stat. 2 & 3 Vict. c. 11, s. 4.

(*h*) Stat. 3 & 4 Vict. c. 82, s. 2.

(*i*) Stat. 2 & 3 Vict. c. 11, s. 5.

(*k*) 2 Wms. Saund. 194.

courts at Westminster; and an index for their registration has been established in each of the counties palatine, similar to the index of judgments at the Common Pleas.(*l*) But, by a singular oversight, no provision appears to have been made for depriving judgments of the palatine courts, not registered in these indexes, of their effect by virtue of the old law. For no provision was ever made for the docketing of these judgments; and the abolition of the dockets has therefore had no effect upon them. Lands in the county palatine of Chester, and in the principality of Wales, have been placed by a modern statute exclusively within the jurisdiction of the courts at Westminster.(*m*)

Debts due, or which may become due, to the crown, from persons who are accountants to the crown,(*n*) and debts of record, or by bond or specialty, due from other persons to the crown,(*o*) are also binding on their estates in fee simple when sold, as well as when devised [*71] *by will, or suffered to descend to the heir-at-law.[1] But any two(*p*) of the Commissioners of the Treasury are empowered,

(*l*) Stat. 1 & 2 Vict. c. 110, s. 21. (*m*) Stat. 11 Geo. IV. & 1 Will. IV. c. 70, s. 14.

(*n*) Stat. 13 Eliz. c. 4; 25 Geo. III. c. 35; Co. Litt. 191 a, n. (1), vi. 9. See also stat. 1 & 2 Geo. IV. c. 121, s. 10; 2 & 3 Vict. c. 11, ss. 9, 10, 11; Sugd. Vend. & Pur. 673, 1009.

(*o*) Stat. 33 Hen. VIII. c. 39, ss. 50, 75. But simple contract debts due to the crown by the vendor are not binding on the purchaser, unless he has notice of them. King v. Smith, Wightw. 34; Casberd v. Attorney-General, 6 Price, 474.

(*p*) Stat. 12 & 13 Vict. c. 89.

[1] And the king is entitled to first execution, "so always that the king's suit be taken and commenced on process awarded for the said debt at the king's suit, before judgment given for the said other person or persons." Stat. 33 Hen. VIII. c. 39, § 74.

By several acts of Congress (31st July, 1789, ch. 35, § 21, Statutes at Large, p. 42; 4th August, 1790, ch. 35, § 45, Id. p. 169; 2d May, 1792, ch. 27, § 18, Id. p. 263; 3d March, 1797, ch. 20, § 5, Id. p. 515; 2d March, 1799, ch. 22, § 65, Id. p. 676), a priority is given to the United States, as a creditor, over other creditors in case of the debtor's death, without sufficient assets,—his bankruptcy or legal insolvency,—his voluntary assignment for the benefit of creditors, —or of his being absent, concealed, or absconding; and these statutes were, in the cases of Fisher v. Blight, 2 Cranch, 358, United States v. Hooe, 3 Id. 73, Harrison v. Sherry, 5 Id. 289, Prince v. Bartlett, 8 Id. 431, considered, and held to be within that clause of the Constitution (Art. 1, § VIII.), authorizin Congress to make all laws necessary and proper for carrying into execution the power vested by it in the general government. Unlike the English law, however, no lien is created by these statutes: Fisher v. Blight, United States v. Hooe, supra; and if the debtor have made a *bonâ fide* conveyance of his estate, by sale or mortgage, or if it has been seized under an execution, the property is divested from the debtor, and cannot be made liable to the United States. Thelluson v. Smith, 2 Wheaton, 399; Brent v. The Bank of Washington, 10 Peters, 596.

upon such terms as they may think proper, to certify by writing under their hands, that any lands of any crown debtor, or accountant to the crown, shall be held by the purchaser or mortgagee thereof discharged from all further claims of her Majesty, her heirs or successors, in respect of any debt or liability of the debtor or accountant to whom such lands belonged.(*q*) Actions at law and suits in equity, respecting the lands, will also bind a purchaser, as well as the heir or devisee; that is, he must abide by the result, although he may be ignorant that any such proceedings are depending.(*r*) To obviate the dangerous liability of purchasers to crown debts and pending suits, indexes have lately been opened at the Common Pleas of the names of crown debtors, and also of parties to suits; and lands cannot now be charged, in the hands of purchasers, with either of these liabilities, unless the name, abode, and description of the owner, with other particulars, are inserted in the proper index.(*s*) These indexes, together with the index of judgment debts, are accordingly searched previously to every purchase of lands; and, if the name of the vendor should be found in either, the debt or liability must be got rid of, before the purchase can be safely completed.

The liability of estates in the hands of purchasers without notice to judgments and crown debts is practically of little benefit to creditors or to the public; whilst it entails an expense on every transaction respecting landed property, occasioned by the time and trouble employed *in searching the indexes. The abolition of this liability with respect to future judgments would, in the opinion of the author, be a great improvement in the law.[1] [*72]

(*q*) Stat. 2 & 3 Vict. c. 11, s. 10.

(*r*) Co. Litt. 344 b; Anon. 1 Vern. 318; Hiern v. Mill, 13 Ves. 120; 3 Prest. Abst. 354.

(*s*) Stat. 2 & 3 Vict. c. 11, ss. 7, 8. Purchasers are indebted for this protection to Sir E. Sugden, now Lord St. Leonards.

[1] No practical difficulty has been experienced in this country with respect to similar enactments. The search for judgments is, in most of the States, made at a trifling cost by the respective clerks or prothonotaries of the several courts, and a certificate given, under their seal, of the judgments entered within the time inquired of, and should any judgments have been omitted, the officer so certifying is liable on his official bond, and the measure of damages is the actual loss which may have been sustained by the purchaser by reason of the incumbrance so omitted to be certified. In England, however, as in Maryland, and perhaps some other States, there is merely a judgment-index kept, for the information of those who may consult it, and the search must be made by the purchaser's attorney or conveyancer, which increases the expense and diminishes the security.

Another instance of involuntary alienation for the payment of debts, occurs on the bankruptcy of a trader, in which event the whole of his freehold, as well as his personal estate, is vested in his assignees, by virtue of their appointment, in trust for the whole body of his creditors.(*s*)[1] So also, on the insolvency of any person, his whole estate vests in the provisional assignee of the Court for the Relief of Insolvent Debtors, from whom it is transferred to assignees appointed by the Court, vesting in them by virtue of their appointment, and without any conveyance, in trust for the benefit of the creditors of the insolvent, according to the provisions of the act for amending the laws for the relief of insolvent debtors.(*t*) Involuntary alienation of lands also occurs in case of high treason or murder, committed by the owner, as will be hereafter more fully explained.

So inherent is the right of alienation of all estates (except estates tail, in which, as we have seen, the right is only of a modified nature), that it is impossible for any owner, by any means, to divest himself of this right. And in the same manner, the liability of estates to involuntary alienation for payment of debts, cannot by any means be got rid of. So long as any estate is in the hands of any person, so long does his power of disposition continue,(*u*)[2] and so long also continues his liability to have the estate taken from him to satisfy the demands *of his creditors.(*x*) When, however, lands or pro- [*73] perty are given by one person for the benefit of another, it is possible to confine the duration of the gift within the period in which it can be personally enjoyed by the grantee. Thus lands, or any other property, may be given to trustees in trust for A. until he shall dispose of the same, or shall become bankrupt or insolvent, or until any act or event shall occur, whereby the property might belong to

(*s*) Stat. 12 & 13 Vict. c. 106, ss. 141, 142, repealing and consolidating the former statute 6 Geo. IV. c. 16, and subsequent acts. See Schedule (A) at the end of the act.

(*t*) 1 & 2 Vict. c. 110, s. 23, *et seq.* See also 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102.

(*u*) Litt. s. 360; Co. Litt. 206 b, 223 a.

(*x*) Brandon v. Robinson, 18 Ves. 429, 433.

[1] The student will, of course, remember, that since the repeal, in 1843, of the last United States Bankrupt Act of 1841, no such involuntary alienation occurs here.

[2] So that any condition in restraint of its alienation is void. De Peyster v. Michael, 2 Selden (N. Y.), 467; Schermerhorn v. Myers, 1 Denio, 448; Walker v. Vincent, 7 Harris, 369; Reifsnyder v. Hunter, Id. 41; Note to Dumpor's case, 1 Smith's Leading Cases, 5th ed. 101.

any other person or persons;(*y*) and this is frequently done. On the bankruptcy or insolvency of A., or on his attempting to make any disposition of the property, it will in such a case not vest in his assignees, or follow the intended disposition; but the interest which had been given to A. will thenceforth entirely cease; in the same manner as where lands are given to a person for life, his interest terminates on his decease. But, although another person may make such a gift for A.'s benefit, A. would not be allowed to make such a disposition of his own property in trust for himself.(*z*) An exception to this rule of law occurs in the case of a woman, who is permitted by the Court of Chancery to have property settled upon her in such a way, that she cannot when married make any disposition of it during the coverture or marriage; but this mode of settlement is of comparatively modern date.(*a*)[1] There are also certain cases in which

(*y*) Lockyer v. Savage, 2 Str. 947.

(*z*) Lester v. Garland, 5 Sim. 205; Phipps v. Lord Ennismore, 4 Russ. 131.

(*a*) Brandon v. Robinson, 18 Ves. 434; Tullett v. Armstrong, 1 Beav. 1; 4 M. & Cr. 390; Scarborough v. Borman, 1 Beav. 34; 4 M. & Cr. 377.

---

[1] "To allow a donor to impose a restraint on the alienation of a vested interest, coextensive with its duration, is to permit the creation of a right of property apart from its incidents, and to authorize the donee to hold the gift for the purposes of enjoyment, freed from the duty of applying it in discharge of his obligations." Mr. Hare's note to Dumpor's case, 1 Smith's Leading Cases, 5th ed. 103. Hence, the English law is strict in forbidding the existence of a continuing trust for a debtor's benefit, and unless the estate be guarded by such a limitation over, as is noticed in the text, it can be reached by creditors claiming either by voluntary or involuntary alienation—by voluntary alienation, as by an assignment for their benefit—by involuntary alienation, as by sale under execution. Thus in Brandon v. Robinson, 18 Vesey, 429, there was a bequest to trustees to invest money, and pay the dividends from time to time into the proper hands of the testator's son, or upon his own receipt, to the intent the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payments, or of any part thereof, with a remainder to his next of kin, and it was held by Lord Eldon, that his assignees in bankruptcy were entitled to his interest during life. This case was followed by Graves v. Dolphin, 1 Simons, 66; Green v. Spicer, 1 Russell & Mylne, 395, and many others; and its principle has been carried so far that the distinction is well settled, that a limitation over in case of a *charge* or *assignment* will not take effect where the cestui que trust commits an act of *bankruptcy*, as the alienation is not voluntary, but by the act of law. Shee v. Hall, 13 Vesey, 104; Rockford v. Hackman, 9 Hare, 475. So in New York, in the case of Hallet v. Thompson, 5 Paige, 586, where executors were directed to retain a legacy, and pay the annual interest thereof to the legatee, unless he should, by a written instrument, require the payment of the principal to himself, in which case the whole was to be paid to him, upon a bill filed by a creditor, to compel the execution of such an instrument, a demurrer for want of equity was overruled, the chancellor having

the personal enjoyment of property is essential to the performance of certain public duties, and in which no alienation of such property can be made; thus, a benefice with cure of souls cannot be directly

no doubt that, independently of the provisions of the Revised Statutes on the subject, it would be the duty of the court to compel the execution of this beneficial trust power to enable the creditors to obtain payment of the legacy.

So, in Massachusetts, where a testator had devised the use of a farm, not subject to conveyance or attachment, the restriction was held to be repugnant to the estate, and therefore void. Blackstone Bank v. Davis, 21 Pickering, 42; Hall v. Tafts, 18 Id. 455; and it is believed, that in nearly all of the United States, the English doctrine would be recognized and enforced. Dick v. Pitchford, 1 Dev. & Batt. Ch. (N. Car.) 480.

In Pennsylvania, the case of Brandon v. Robinson has been cited with approbation as applied to *voluntary* alienations, and its principle held to be equally operative in the case of an unmarried or a widowed female, as in that of a male adult. Smith v. Starr, 2 Wharton, 62; Harrison v. Brolaskey, 8 Harris, 302. And it has been held, that a trust for the separate use of a married woman ceased on her discoverture, and was not revived on her second marriage, and hence that her trustee under an assignment made by her second husband and herself, was entitled to the estate, as against the trustees under the will of its donor. Hamersly v. Smith, 4 Wharton, 126; Hemphill v. Hurford, 3 Watts & Sergeant, 216; and in the recent unreported case of Savage v. Washington (April, 1854), where a testator premising in his will his apprehension of the danger to his son from the absolute control of his whole estate, devised it to trustees to pay him an annuity until the age of twenty-five, and then to pay him the accumulated interest and accruing income for life, with a general power of appointment, the Supreme Court, upon a bill filed by the son against the trustees for an absolute conveyance of the whole estate, decreed accordingly, upon the authority of the cases just referred to.

But while the English law has thus been recognized in Pennsylvania, as respects *voluntary* alienation, it has, at the same time, been there held, and must be considered as now settled, contrary to the law as elsewhere enforced, and contrary as it would seem, to principle, that an estate may be limited in trust for a debtor, so that it shall be free from *involuntary* alienation at the suit of his creditors, whether the instrument do or do not contain a limitation over, upon such an event. Fisher v. Taylor, 2 Rawle, 33; Ashurst v. Given, 5 Watts & Sergeant, 323; Vaux v. Parke, 7 Id. 19; Norris v. Johnson, 5 Barr, 289; Eyrick v. Heytrick, 1 Harris, 491. Between those cases on the one hand, and those cited in the previous paragraph on the other, it is doubtful what effect would be given to an assignment by such a debtor for the benefit of his creditors. The point was noticed at the close of the decision in Vaux v. Parke, but no opinion pronounced upon it. Whether a man can create such a trust for his own benefit has never been decided in that State. If indebted at the time of the creation of such a trust, it would of course be invalid as to such debts, as it would also be were he engaged in trade. An opinion of counsel, however, in favor of a trust created by a man for his own benefit, unindebted at the time, and not engaged in trade, to protect himself against his own improvidence, will be found in the note to an anonymous case in 1 Wallace, Jr.'s, R. p. 119; and it may not be unworthy of remark, that in practice, the editor has known several cases of similar trusts, which the creditors have never ventured to assail.

charged or incumbered;(*b*) so, offices concerning the *administration of justice, and pensions and salaries given by the state, [*74] for the support of the grantee in the performance of present or future duties, cannot be aliened;(*c*) though pensions for past services are, generally speaking, not within the rule.(*d*)[1]

In addition to the interests which may be created by alienation, either voluntary or involuntary, there are certain rights, conferred by law on husbands and wives, in each other's lands, by means of which the descent of an estate, from an ancestor to his heir, may partially be defeated. These rights will be the subject of a future chapter. If, however, the tenant in fee simple should not have disposed of his

(*b*) Stat. 13 Eliz. c. 20; 57 Geo. III. c. 99, s. 1; 1 & 2 Vict. c. 106, s. 1; Shaw v. Pritchard, 10 Barn. & Cress. 241; Long v. Storie, 3 De Gex & Smale, 308. See, however, Hawkins v. Gathercole, 1 Sim. N. C. 63, and qu.?

(*c*) Flarty v. Odlum, 3 T. Rep. 681; Stat. 5 & 6 Edw. VI. c. 16; 49 Geo. III. c. 126.

(*d*) M'Carthy v. Goold, 1 Ball & Beatty, 387; Tunstall v. Boothby, 10 Sim. 542. But see statute 11 Geo. IV. & 1 Will. IV. c. 20, s. 47.

[1] Thus equity will not give effect to the assignment of the half-pay or full pay of an officer in the army: Stone v. Lidderdale, 2 Anstruther, 533; Priddy v. Rose, 3 Merivale, 102; nor to the salary of a parliamentary counsel for the treasury: Cooper v. Reilly, 2 Simons, 560; and in Davis v. The Duke of Marlborough, 1 Swanston, 74, it was held that the pension granted by Parliament for the more honorable support of the dignities of the Duke of Marlborough and his posterity was inalienable. Greenfell v. Dean and Canons of Windsor, 2 Beavan, 550. Prize-money, however, has been held to be assignable before any interest had vested by grant of the Crown. Alexander v. The Duke of Wellington, 2 Russell & Mylne, 35. So compensation for extra services or for injuries inflicted by vessels of a foreign country, though before the treaty or vote of Congress, necessary for that purpose. Comegys v. Vasse, 7 Peters, 196; Milnor v. Metz, 16 Id. 221; Couch v. Delaplaine, 2 Comstock, 397. And so of a pension granted by government in compensation for the loss of a place in the Customs. Tunstall v. Boothby, 10 Simons, 542. In Brackett v. Blake, 8 Metcalf, 355, it was held that an assignment of the quarter's salary of a city marshal, who was annually appointed by the corporation, made during the current quarter, was valid. "The correct distinction," said Parke, B., in a recent case, "made, in the cases on this subject, is that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life, or merely during the pleasure of others. In such a case, the assignee acquires a title to it, both in equity and at law, and may recover back any sum received in respect of it by the assignor, after the date of the assignment. But where the pension is granted, not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable." Wells v. Foster, 8 Meeson & Welsby, 152.

estate in his lifetime, or by his will; if it should not be swallowed up by his debts; and if he should not have been either traitor or murderer, his lands will descend (subject to any rights of his wife) to the heir at law. The heir, as we have before observed,(*e*) is a person appointed by the law. He is called into existence by his ancestor's decease, for no man during his lifetime can have an heir. *Nemo est hæres viventis.* A man may have an *heir apparent*, or an *heir presumptive*, but until his decease he has no *heir*. The heir *apparent* is the person, who, if he survive the ancestor, must certainly be his heir, as the eldest son in the lifetime of his father. The heir *presumptive* is the person, who, though not certain to be heir at all events should he survive, would yet be the heir in case of the ancestor's immediate decease. Thus an only daughter is the heiress presumptive of her father: if he were now to die, she would at *once be his heir; [*75] but she is not certain of being heir; for her father may have a son, who would supplant her, and become heir apparent during the father's lifetime, and his heir after his decease. An heir-at-law is the only person in whom the law of England vests property, whether he will or not. If I make a conveyance of land to a person in my lifetime, or leave him any property by my will, he may, if he pleases, disclaim taking it, and in such case it will not vest in him against his will.(*f*) But an heir-at-law, immediately on the decease of his ancestor, becomes presumptively possessed, or seised in law, of all his lands.(*g*) No disclaimer that he may make, will have any effect, though of course he may, as soon as he pleases, dispose of the property by an ordinary conveyance. A title as heir-at-law is not nearly so frequent now, as it was in the times when the right of alienation was more restricted. And when it does occur, it is often established with difficulty. This difficulty arises, more from the nature of the facts to be proved, than from any uncertainty in the law. For the rules of descent have now attained an almost mathematical accuracy, so that, if the facts are rightly given, the heir at law can at once be pointed out. This accuracy of the law has arisen by degrees, by the successive determination of disputed points. Thus, we have seen that in the early feudal times, an estate to a man and his heirs simply, which is now an estate in fee simple, was descendible only to his

(*e*) Ante, p. 58.
(*f*) Nicloson v. Wordsworth, 2 Swanst. 365, 372.
(*g*) Watkins on Descents, 25; 26 (4th edit. 34).

offspring,[1] in the same manner as an estate tail at the present day; but in process of time collateral relations were admitted to succeed. When this succession of collaterals first took place, is a question involved in much obscurity; we only know that in the time of Henry II. the law was settled as follows:—In default of lineal descendants, the brothers and sisters came in; and if they *were dead, their children; then the uncles and their children; and then [*76] the aunts and their children; males being always preferred to females.(*h*) Subsequently, about the time of Henry III.,(*i*) the old Saxon rule, which divided the inheritance equally amongst all males of the same degree, and which had hitherto prevailed as to all lands not actually the subjects of feudal tenure,(*k*) gave place to the feudal law, introduced by the Normans, of descent to the eldest son or eldest brother; though among females the estate was still equally divided, as it is at present. And, about the same time, all descendants *in infinitum* of any person, who would have been heir if living, were allowed to inherit by right of representation. Thus, if the eldest son died in the lifetime of his father, and left issue, *that* issue, though a grandson or granddaughter only, was to be preferred in inheritance before any younger son.(*l*) The father, moreover, or any other lineal ancestor, was never allowed to succeed as heir to his son or other descendant; neither were kindred of the half-blood admitted to inherit.(*m*) The rules of descent, thus gradually fixed, long remained unaltered. Lord Hale, in whose time they had continued the same for above 400 years, was the first to reduce them to a series of canons;(*n*) which were afterwards admirably explained and illustrated by Blackstone, in his well-known Commentaries; nor was any alteration made till the enactment of the recent act for the amendment of the law of inheritance,(*o*) A.D. 1833. By this act, amongst other important alterations, the father is heir to his son, supposing the latter

(*h*) 1 Reeves's Hist. Eng. Law, 43.
(*i*) 1 Reeves's Hist. 310; 2 Black. Com. 215; Co. Litt. 191 a, note (1), vi. 4.
(*k*) Clements v. Sandaman, 1 P. Wms. 64; 2 Lord Raymond, 1024; 1 Scriv. Cop. 53.
(*l*) 1 Reeves's Hist. 310. (*m*) 2 Black. Com. c. 14.
(*n*) Hale's Hist. Com. Law, 6th edit. p. 318, *et seq.* (*o*) Stat. 3 & 4 Will. IV. c. 106.

[1] The first notice of the law of primogeniture in England, was in the reign of Henry I. (Leg. Hen. I. c. 70), when it was declared that the capital fief of the father should go to the eldest son. In the reign of Henry II. the eldest son was sole heir of lands held on military tenure; though land held by free socage tenure descended, as before, to all the sons equally. Glanville vii. c. 3.

[*77] to leave no issue; and all lineal ancestors are *rendered capable of being heirs;(p) relations of the half-blood are also admitted to succeed, though only on failure of relations in the same degree of the whole blood.(q) The act has, moreover, settled a doubtful point in the law of descent to distant heirs; but it has also introduced a more serious dispute on a point of more frequent occurrence. The rules of descent, as modified by this act, will be found at large in the next chapter.

[*78]

*CHAPTER IV.

OF THE DESCENT OF AN ESTATE IN FEE SIMPLE.[1]

We shall now proceed to consider the rules of the descent of an estate in fee simple,[1] as altered by the recent act for the amendment of the law of inheritance.(a) This act does not extend to any descent on the decease of any person, who may have died before the first of January, 1834.(b) For the rules of descent prior to that date, the reader is referred to the Commentaries of Blackstone,(c) and to Watkins's Essay on the Law of Descents.

1. The first rule of descent now is, that inheritances shall lineally descend, in the first place, to the issue of the last purchaser *in infini-*

(p) Sect. 6. (q) Sect. 9.
(a) Stat. 3 & 4 Will. IV. c. 106. (b) Sect. 11. (c) 2 Black. Com. c. 14.

[1] The descent of real estate on this side of the Atlantic, is regulated by the local statutes in the different States, which it would be out of place to insert in a work like the present. A collection of them may be found in 3 Greenleaf's Cruise on Real Property, 166. The student, however, who desires to inform himself accurately as to the statute law of any State, upon this or almost any other subject, will resort to those laws themselves, as whatever may be the diligence or fidelity of any text writer upon American law, it is nearly impossible to collect the statutes of over thirty different States, and give briefly their substance and result, with entire accuracy as to all of them,—a difficulty the most freely acknowledged by those who have attempted it most successfully. The laws, moreover, "on this as on many other subjects, are not constant, but exposed to the restless love of change, which seems to be inherent in American policy, both as to constitution and laws." 4 Kent's Commentaries, 406, n.

tum. The word *purchase* has in law a meaning more extended than its ordinary sense: it is possession to which a man cometh not by title of descent;(*d*) a devisee under a will is accordingly a purchaser in law. And, by the recent act, the purchaser from whom descent is to be traced, is defined to be, the last person who had a right to the land, and who cannot be proved to have acquired the land by descent, or by certain means(*e*) which render the land part of, or descendible in the same manner as, other land acquired by descent. This rule is an alteration of the old law, which was, that descent should be traced from the person who last had the feudal possession or *seisin*, as it was called; *the maxim being *seisina facit stipitem.*(*f*)[1] This maxim, a relic of the troublesome times when right without possession was worth but little, sometimes gave occasion to difficulties, owing to the uncertainty of the question, whether possession had or had not been taken by any person entitled as heir; thus, where a man was entering into a house by the window, and when half out and half in, was pulled out again by the heels, it was made a question, whether or no this entry was sufficient, and it was adjudged that it was.(*g*) These difficulties cannot arise under the new act; for now the heir to be sought for, is not the heir of the person *last possessed*, but the heir of the *last person entitled who did not inherit*, whether he did or did not obtain the possession, or the receipt of the rents and profits of the land. The rule, as altered, is not indeed altogether free from objection; for it will be observed that, not content with making a title to the land equivalent to possession, the act has added a new term to the definition, by directing descent to be traced from the last person entitled, *who did not inherit.* So that if a person, who has become entitled as heir to another, should die intestate, the heir to be sought for is not the heir of such last owner, but the heir of the person from whom such last owner inherited. This provision, though made by an act consequent on the report of the Real Property Commissioners, was not proposed by them. The commissioners merely proposed that lands should pass to the heir of the *person last entitled,*(*h*) instead, as before, of the *person last possessed;* thus facili- [*79]

(*d*) Litt. s. 12.
(*e*) Escheat, Partition, and Inclosure, s. 1.
(*f*) 2 Black. Com. 209; Watk. Descent, c. 1, s. 2.
(*g*) Watk. Desc. 45 (4th ed. 53).
(*h*) Thirteenth proposal as to Descents.

[1] A maxim considered to be virtually abrogated in nearly all the United States, and every interest which the intestate may have had is embraced in the Statutes of Descent. 4 Kent's Com. 388; 3 Greenleaf's Cruise, 142.

tating the discovery of the heir, by rendering a mere title to the lands sufficient to make the person entitled the stock of descent, without his obtaining the feudal possession, as before required. Under the old law, as well as under the present, descent was confined within the limits *of the family of the *purchaser;* but now no person who can be shown to have inherited, can be the stock of descent; in every case, descent must be traced from the last *purchaser.*

[*80]

2. The second rule is, that the male issue shall be admitted before the female.(*i*)[1]

3. The third rule is, that where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest only shall inherit; but the females shall inherit altogether.(*k*) The last two rules are the same now as before the recent act; accordingly, if a man has two sons, William and John, and two daughters, Susannah and Catherine;(*l*) William, the eldest son, is the heir-at-law, in exclusion of his younger brother John, according to the third rule, and of his sisters, Susannah and Catherine, according to rule 2, although such sisters should be his seniors in years. If, however, William should die without issue, then John will succeed, by the second rule, in exclusion of his sisters; but if John also should die without issue, the two sisters will succeed in equal shares by the third rule, as being together heir to their father.

Primogeniture, or the right of the eldest among the males to inherit, was a matter of far greater consequence in ancient times, before alienation by will was permitted, than it is at present. Its feudal origin is undisputed; but in this country it appears to have taken deeper root than elsewhere; for a total exclusion of the younger sons appears to be peculiar to England: in other countries, some portion of the inheritance, or some charge upon it, is, in many cases at

(*i*) 2 Black. Com. 212.
(*k*) Ibid. 214.
(*l*) See the table of descents annexed.

[1] In all of the United States, except, it would seem, in Tennessee, all the children, females as well as males, inherit equally together, subject in some of them to the right of the eldest to the family mansion, or the like, paying to the others their respective shares of its value.

least, secured by law to the younger *sons.(*m*) From this ancient right has arisen the modern English custom of setting the family estates on the eldest son;[1] but the right and the custom are quite distinct: the right may be prevented by the owner making his will; and a conformity to the custom is entirely at his option. [*81]

When two or more persons together form an heir, they are called in law *coparceners*, or, more shortly, *parceners*.(*n*) The term is derived, according to Littleton,(*o*) from the circumstance, that the law will constrain them to make partition; that is, any one may oblige all the others so to do. Whatever may be thought of this derivation, it will serve to remind the reader, that coparceners are the only kind of joint owners, to whom the ancient common law granted the power of severing their estates without mutual consent: as the estate in coparcenary was cast on them by the act of the law, and not by their own agreement, it was thought right that the perverseness of one should not prevent the others from obtaining a more beneficial method of enjoying the property. This compulsory partition was formerly effected by a writ of partition,(*p*) a proceeding now abolished.(*q*) The modern method is by a commission issued for the purpose by the Court of Chancery;(*r*) partition, however, is most frequently made by voluntary agreement between the parties, and for this purpose a deed has, by a recent act of Parliament, been rendered essential in every case.(*s*)[2] When partition has been effected, the lands allotted

(*m*) Co. Litt. 191 a, n. (1), vi. 4.
(*n*) Bac. Abr. tit. Coparceners.
(*o*) Sect. 241; 2 Black. Com. 189.
(*p*) Litt. ss. 247, 248.
(*q*) Stat. 3 & 4 Will. IV. c. 27, s. 36.
(*r*) Co. Litt. 169 a, n. (2); 1 Fonb. Eq. 18.
(*s*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.

[1] It may, however, be noticed, that in English settlements, provisos for raising portions for younger sons are almost universal.

[2] Partition by the *breve de partitione facienda* is constantly employed in the United States, regulated in many of them by their local statutes, while partition in equity is enforced in all the States where a general chancery jurisdiction extends. See *passim* note to 2 Greenleaf's Cruise, 413. An important difference between these modes of effecting a partition is, that the approval by the court of the return of the sheriff and inquest to the *breve de partitione facienda*, vests of itself the titles to the different shares or purparts, while in equity, the decree of the court does not pass the title, and conveyances between the different parties are requisite for that purpose; and consequently when any of these were infants, the conveyances were, as to them, respited until their

are said to be held in *severalty;* and each owner is said to have the *entirety* of her own parcel. *After partition, the several par- [*82] cels of land descend in the same manner as the undivided shares, for which they have been substituted;(*t*) the coparceners, therefore, do not by partition become *purchasers*, but still continue to be entitled by descent. The term *coparceners* is not applied to any other joint owners, but only to those who have become entitled as coheirs.(*u*)

4. The fourth rule is, that all the lineal descendants *in infinitum* of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.(*x*) Thus, in the case above-mentioned, on the death of William the eldest son, leaving a son, that son would succeed to the whole by right of representation, in exclusion of his uncle John, and of his two aunts Susannah and Catherine; or had William left a son and daughter, such daughter would, after the decease of her brother without issue, be, in like manner, the heir of her grandfather, in exclusion of her uncle and aunts.

The preceding rules of descent apply as well to the descent of an estate tail, if not duly barred, as to that of an estate in fee simple. The descent of an estate tail is always traced from the purchaser, or donee in tail, that is, from the person to whom the estate tail was at first given. This was the case before the recent act, as well as now;(*y*) for, the person who claims an entailed estate as heir, claims only according to the express terms of the gift, or, as it is said, *per formam doni.* The gift is made to the donee, or purchaser, and the heirs of his body; all persons, therefore, who can become entitled to the estate by descent, must answer the description of *heirs [*83] of the purchaser's body; in other words, must be *his* lineal heirs. The second and third rules also equally apply to estates tail,

(*t*) 2 Prest. Abst. 72; Doe d. Crosthwaite v. Dixon, 5 Adol. & Ellis, 834.
(*u*) Litt. s. 254. (*x*) 2 Black. Com. 216.
(*y*) Doe d. Gregory v. Whichelo, 8 T. Rep. 211.

majority, when they were given a day in court to show cause against the decree. Note to Agar v. Fairfax, *passim*, 2 Leading Cases in Eq. 534. But by a recent English statute (13 & 14 Victoria, c. 60), the court there is authorized to make an order vesting the shares of infants in such persons and for such estates as the Court shall direct. For the form of the decree under this act, see Brown v. Wright, 3 Eng. Law and Eq. Rep. 190.

unless the restriction of the descent to heirs male or female should render unnecessary the second, and either clause of the third rule. The fourth rule completes the canon, so far as estates tail are concerned; for, when the issue of the donee are exhausted, such an estate must necessarily determine. But the descent of an estate in fee simple may extend to many other persons, and accordingly requires for its guidance additional rules, with which we now proceed.

5. The fifth rule is, that on failure of lineal descendants or issue of the purchaser, the inheritance shall descend to his nearest lineal ancestor.[1] This rule is materially different from the rule which prevailed before the passing of the recent act. The former rule was, that on failure of lineal descendants or issue of the person last seised (or feudally possessed), the inheritance should descend to his *collateral* relations, being of the blood of the first purchaser, subject to the three preceding rules.(*z*) The old law never allowed lineal relations in the ascending line (that is, parents or ancestors) to succeed as heirs. But by the new act, descent is to be traced through the ancestor, who is to be heir in preference to any person, who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor. The exclusion of parents and other lineal ancestors from inheriting under the old law, was a hardship of which it is not easy to see the propriety; nor is the explanation usually given of its origin perhaps quite satisfactory. Bracton, who is followed by Lord Coke, finds a reason for this rule in the law of gravitation, and compares the descent of an inheritance to that of a falling body, which *never goes upwards in its course.(*a*)[2] [*84]

(*z*) 2 Black. Com. 220.

(*a*) Bract. lib. 2, c. 29; Co. Litt. 11 a.

[1] This rule, which abrogates the old canon, that "the inheritance lineally descends, but never lineally ascends," has a place in the statutes of all the States, though with a difference in many of them as to the parents taking jointly, or one in preference to the other.

[2] Such was Blackstone's charge against Bracton and Coke, but Chancellor Kent has shown "the reflection to be utterly unmerited and groundless. Bracton, after speaking of the descent of the fee to the lineal and collateral heirs, adds, Descendit itaquæ jus quasi ponderosum quid cadens deorsum recta linea vel transversali, et nunquam reascendit ea via qua descendit. A latere tamen ascendit alicui propter defectum hæredum inferius provenientium. (Bracton, lib. 2, c. 29, sec. 1.) Lord Coke (Co. Litt. 11 a), after quoting the maxim in

The modern explanation is more reasonable; it derives the origin of collateral heirships, in exclusion of lineal ancestors, from gifts of estates (at the time when inheritances were descendible only to issue or lineal heirs), made, by the terms of the gift, to be descendible to the heirs of the donee, in the same manner as an ancient inheritance would have descended. This was called a gift of a *feudum novum*, or new inheritance, to hold *ut feudum antiquum*, as an ancient one. Now, an ancient inheritance,—one derived in a course of descent from some remote lineal ancestor,—would of course be descendible to all the issue or *lineal* heirs of such ancestor, including, after the lapse of many years, numerous families, all *collaterally* related to one another: an estate newly granted, to be descendible *ut feudum antiquum*, would therefore be capable of descending to the collateral relations of the grantee, in the same manner as a really ancient inheritance, descended to him, would have done. But an ancient inheritance could never go to the father of any owner, because it must have come from his father to him, and the father must have died before the son could inherit: in grants of inheritances to be descendible as ancient ones, it followed, therefore, that the father or any lineal ancestor could never inherit.(*b*) So far, therefore, the explanation holds; but it is not consistent with every circumstance; for an elder brother has always been allowed to succeed as heir to his younger brother, contrary to this theory of an ancient lineal inheritance, which would have previously passed by every elder brother, as well as the father. The explanation of the origin of a rule, though ever so clear, is, how-

(*b*) 2 Black. Com. 212, 221, 222; Wright's Tenures, 180. See also Co. Litt. 11 a, n. (1)

Littleton, that inheritances may lineally descend, but not ascend, barely cites the passage in Bracton to prove that lineal ascent, in the right line, is prohibited, and not in the collateral. He also refers to Ratcliffe's case (3 Co. 40), where some reasons are assigned for excluding the lineal ascent, and the law of gravity is not one of them. The words of Glanville (lib. 7, c. 1) are to the same effect: Hæreditas naturaliter descendit, nunquam naturaliter ascendit. This is clearly the course and dictate of nature. It is alluded to in one of the Epistles of St. Paul (2 Cor. 12: 14); and it was frequently and pathetically inculcated in the classical as well as in the juridical compositions of the ancients. (Taylor's Elements of the Civil Law, 540–542.) The ascent to parents is up stream, and against the natural order of succession. Bracton admits the ascent in collateral cases, which shows that he did not consider descent 'regulated' by any dark conceit. The 'laws of gravitation' were unknown when Bracton wrote. He merely alluded to the descent of falling bodies by way of illustration; and it was a beautiful and impressive allusion, worthy of the polished taste of Bracton, and the grave learning of Coke." 4 Kent's Com. 395, n.

ever, a different thing from a valid reason for its continuance; and, at length, the propriety of placing the property of a family [*85] under *the care of its head, is now perceived and acted on; and the father is heir to each of his children, who may die intestate and without issue, as is more clearly pointed out by the next rule.

6. The sixth rule is, that the father and all the male paternal ancestors of the purchaser, and their descendants, shall be admitted, before any of the female paternal ancestors or their heirs; all the female paternal ancestors and their heirs, before the mother or any of the maternal ancestors, or her or their descendants; and the mother and all the male maternal ancestors, and her and their descendants, before any of the female maternal ancestors, or their heirs.(*c*) This rule is a development of the ancient canon, which required that, in collateral inheritances, the male stocks should always be preferred to the female; and it is analogous to the second rule above given, which directs that in lineal inheritances the male issue shall be admitted before the female. This strict and careful preference of the male to the female line, was in full accordance with the spirit of the feudal system, which, being essentially military in its nature, imposed obligations by no means easy for a female to fulfil; and those who were unable to perform the services, could not expect to enjoy the benefits.(*d*) The feudal origin of our laws of descent will not, however, afford a complete explanation of this preference; for, such lands as continued descendible after the Saxon custom of equal division, and not according to the Norman and feudal law of primogeniture, were equally subject to the preference of males to females, and descended in the first place exclusively to the sons, who divided the inheritance between them, leaving nothing at all to their sisters. The true reason of the preference appears to lie in the [*86] *degraded position in society which, in ancient times, was held by females; a position arising from their deficiency in that kind of might, which then too frequently made the right. The rights given by the common law to a husband over his wife's property (rights now generally controlled by proper settlements previous to marriage), show the state of dependence to which, in ancient times, women must have been reduced.(*e*) The preference of males to females has been

(*c*) Stat. 3 & 4 Will. IV. c. 106, s. 7, combined with the definition of "descendants," sect. 1.

(*d*) 2 Black. Com. 214.

(*e*) See *post*, the chapter on Husband and Wife.

left untouched by the recent act for the amendment of the law of descents; and the father and all his most distant relatives have priority over the mother of the purchaser: she cannot succeed as his heir, until all the paternal ancestors of the purchaser, both male and female, and their respective families, have been exhausted. The father, as the nearest male lineal ancestor, of course stands first, supposing the issue of the purchaser to have failed. If the father should be dead, his eldest son, being the brother of the purchaser, will succeed as heir, in the place of his father, according to the fourth rule; unless he be of the half blood to the purchaser, which case is provided for by the next rule, which is:

7. That a kinsman of the half blood shall be capable of being heir; and that such kinsman shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman, when the common ancestor is a male,(*f*) and next after the common ancestor, when such ancestor is a female. This introduction of the half blood is also a new regulation; and, like the introduction of the father and other lineal ancestors, it is certainly an improvement on the old law, which had no other reason in its favor, than the feudal maxims, or *rather fictions, on which it was founded.(*g*) By the old law, a relative of the purchaser of the half blood, that is, a relative connected by one only, and not by both of the parents, or other ancestors, could not possibly be heir; a half brother, for instance, could never enjoy that right, which a cousin of the whole blood, though ever so distant, might claim in his proper turn.[1] The exclusion of the half blood was accounted for in a manner similar to that, by which the exclusion of all lineal ancestors was explained;[2] but a return to practical justice may well compensate a breach in a beautiful theory. Relatives of the half blood now take their proper and natural place in the order of descent. The position of the half blood next after the common ancestor, when such ancestor is a female,

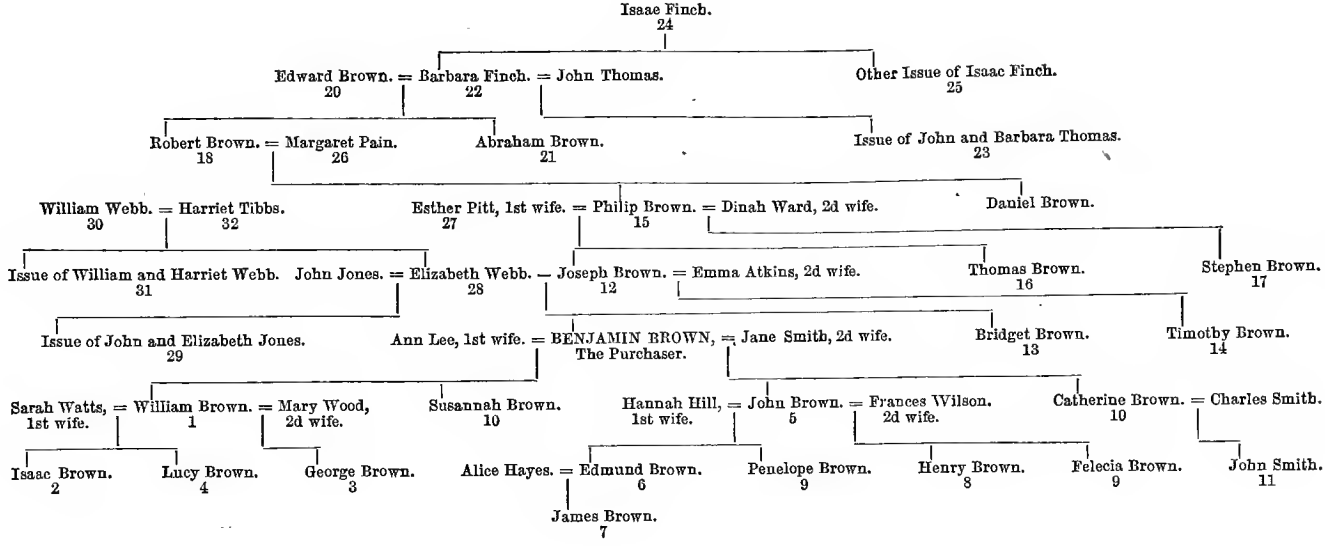
[*87]

(*f*) Stat. 3 & 4 Will. IV. c. 106, s. 9. (*g*) 2 Black. Com. 228.

[1] In many of the United States, the half blood inherit equally with the whole blood. In some of them they are postponed to the whole blood. In none of them is it believed that the half blood are entirely excluded.

[2] Blackstone accounted it not so much a rule of descent as a rule of evidence, viz.: that the person who is of the whole blood affords the best presumptive proof that he is of the blood of the first ancestor. 2 Bl. Com. 228.

TABLE OF DESCENTS.



is rather a result of the sixth rule, than an additional independent regulation, as will appear hereafter.

8th. The eighth rule is, that, in the admission of female paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to the mother of a less remote male paternal ancestor, and her heirs; and, in the admission of female maternal ancestors, the mother of the more remote male maternal ancestor, and her heirs, shall be preferred to the mother of a less remote male maternal ancestor, and her heirs.(*h*) The eighth rule is a settlement of a point in distant heirships, which very seldom occurs, but which has been the subject of a vast deal of learned controversy. The opinion of Blackstone(*i*) and Watkins(*k*) is now declared to be the law.

The rules of descent above given will be better apprehended by a [*88] reference to the table on page 113, taken, with a *little modification, from Mr. Watkins's Essay on the Law of Descents. In this table, Benjamin Brown is the purchaser, from whom the descent is to be traced. On his death, intestate the lands will accordingly descend first to his eldest son, by Ann Lee, William Brown; and from him (2dly) to *his* eldest son, by Sarah Watts, Isaac Brown. Isaac dying without issue, we must now seek the heir of the *purchaser*, and not the heir of Isaac. William, the eldest son of the purchaser, is dead; but William may have had other descendants, besides Isaac his eldest son; and, by the fourth rule, all the lineal descendants *in infinitum* of every person deceased, shall represent their ancestor. We find accordingly that William had a daughter Lucy, by his first wife, and also a second son, George, by Mary Wood, his second wife. But the son, George, though younger than his half-sister Lucy, yet being a male, shall be preferred according to the second rule; and he is therefore (3dly) the next heir. Had Isaac been the purchaser, the case would have been different; for, his half-brother George would then have been postponed, in favor of his sister Lucy of the whole blood, according to the seventh rule. But now Benjamin is the purchaser, and both Isaac and George are equally his grandchildren. George dying without issue, we must again seek the heir of his grandfather Benjamin, who now is undeniably (4thly) Lucy, she being the remain-

(*h*) Stat. 3 & 4 Will. IV, c. 106, s. 8.
(*i*) 2 Black. Com. 238.
(*k*) Watkins on Descent, 130 (146 *et seq.* 4th ed.)

ing descendant of his eldest son. Lucy dying likewise without issue, her father's issue become extinct; and we must still inquire for the heir of Benjamin Brown, the purchaser, whom we now find to be (5thly) John Brown, his only son by his second wife. The land then descends from John to (6thly) *his* eldest son Edmund, and from Edmund (7thly) to *his* only son James. James dying without issue, we must once more seek the heir of the purchaser; whom we find among the yet living issue of John. John leaving a daughter by his first wife, and a son and a daughter by his second wife, the lands *descend [*89] (8thly) to Henry, his son by Frances Wilson, as being of the male sex; but he dying without issue, we again seek the heir of Benjamin, and find that John left two daughters, but by different wives; these daughters, being in the same degree and both equally the children of their common father, whom they represent, shall succeed (9thly) in equal shares. One of these daughters dying without issue in the lifetime of the other, the other shall then succeed to the whole as the only issue of her father. But the surviving sister dying also without issue, we still pursue our old inquiry, and seek again for the heir of Benjamin Brown the purchaser.

The issue of the sons of the purchaser is now extinct; and, as he left two daughters, Susannah and Catherine, by different wives, we shall find, by the second and third rules, that they next inherit (10thly) in equal shares as heirs to him. Catherine Brown, one of the daughters, now marries Charles Smith, and dies, in the lifetime of her sister Susannah, leaving one son, John. The half share of Catherine must then descend to the next heir of her father Benjamin, the purchaser. The next heirs of Benjamin Brown, after the decease of Catherine, are evidently Susannah Brown and John Smith, the son of Catherine. And in the first edition of the present work it was stated that the half share of Catherine would, on her decease, descend to them. This opinion has been very generally entertained.(*l*) On further research, however, the author inclines to the opinion that the share of Catherine will, on her decease, descend entirely to her son by right of representation; and that, as respects his mother's share, he and he only is the right heir of the purchaser. The reasoning which has *led the author to this conclusion will be found [*90] in the Appendix.(*m*)

(*l*) 23 Law Mag. 279; 1 Hayes's Conv. 313; 1 Jarman & Bythewood's Conveyancing, by Sweet, 139.

(*m*) See Appendix (A).

If Susannah Brown and John Smith should die without issue, the descendants of the purchaser will then have become extinct; and Joseph Brown, the father of the purchaser, will then (12thly) if living, be his heir by the fifth and sixth rules. Bridget, the sister of the purchaser, then succeeds (13thly), as representing her father, in preference to her half brother Timothy, who is only of the half blood to the purchaser, and is accordingly postponed to his sister by the seventh rule. But next to Bridget is Timothy (14thly) by the same rule, Bridget being supposed to leave no issue.

On the decease of Timothy without issue, all the descendants of the father will have failed, and the inheritance will next pass to Philip Brown (15thly), the paternal grandfather of the purchaser. But the grandfather being dead, we must next exhaust his issue, who stand in his place, and we find that he had another son, Thomas (16thly), who accordingly is the next heir; and, on his decease without issue Stephen Brown (17thly), though of the half blood to the purchaser, will inherit, by the seventh rule, next after Thomas, a kinsman in the same degree, of the whole blood. Stephen Brown dying without issue, the descendants of the grandfather are exhausted; and we must accordingly still keep, according to the sixth rule, in the male paternal line, and seek the paternal great grandfather of the purchaser, who is (18thly) Robert Brown; and who is represented, on his decease, by (19thly) Daniel Brown, his son. After Daniel and his issue follow, by the same rule, Edward (20thly) and his issue (21stly) Abraham.

[*91] *All the male paternal ancestors of the purchaser, and their descendants, are now supposed to have failed; and by the sixth rule, the female paternal ancestors and their heirs are next admitted. By the eighth rule, in the admission of the female paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to the mother of a less remote male paternal ancestor and her heirs. Barbara Finch (22dly), and her heirs, have therefore priority both over Margaret Pain and her heirs, and over Esther Pitt and her heirs; Barbara Finch being the mother of a more remote male paternal ancestor than either Margaret Pain or Esther Pitt. Barbara Finch being dead, her heirs succeed her; *she* therefore must now be regarded as the stock of descent, and her heirs will be the right heirs of Benjamin Brown the purchaser. In seeking for her heirs, inquiry must first be made for her issue; now her issue by

Edward Brown has already been exhausted in seeking for his descendants; but she might have had issue by another husband; and such issue (23dly) will accordingly next succeed. These issue are evidently of the half blood to the purchaser. But they are the right heirs of Barbara Finch; and they are accordingly entitled to succeed next after her, without the aid they might derive from the position expressly assigned to them by the seventh rule. The common ancestor of the purchaser and of the issue, is Barbara Finch, a female; and, by the united operation of the other rules, these issue of the half blood succeed next after the common ancestor. The latter part of the seventh rule is, therefore, explanatory only, and not absolutely necessary.(*n*) In default of issue of Barbara Finch, the lands will descend to her father Isaac Finch (24thly), and then to his issue (25thly), as representing him. If neither Barbara Finch, nor any *of her heirs, [*92] can be found, Margaret Pain (26thly), or her heirs, will be next entitled, Margaret Pain being the mother of a more remote male paternal ancestor than Esther Pitt; but next to Margaret Pain and her heirs, will be Esther Pitt (27thly), or her heirs, thus closing the list of female paternal ancestors.

Next to the female paternal ancestors and their heirs, comes the mother of the purchaser, Elizabeth Webb (28thly), with respect to whom the same process is to be pursued, as has before been gone over with respect to Joseph Brown, the purchaser's father. On her death, her issue by John Jones (29thly) will accordingly next succeed, as representing her, by the 4th rule, agreeably to the declaration as to the place of the half blood contained in the 7th rule. Such issue becoming extinct, the nearest male maternal ancestor is the purchaser's maternal grandfather, William Webb (30thly), whose issue (31stly) will be entitled to succeed him. Such issue failing, the whole line of male maternal ancestors and their descendants must be exhausted, by the 6th rule, before any of the female maternal ancestors, or their heirs, can find admission; and when the female maternal ancestors are resorted to, the mother of the more remote male maternal ancestor, and her heirs, is to be preferred, by the 8th rule, to the mother of the less remote male maternal ancestor and her heirs. The course to be taken is, accordingly, precisely the same as in pursuing the descent through the paternal ancestors of the purchaser. In the present table, therefore, Harriet Tibbs (32dly), the maternal grandmother of

(*n*) See Jarman & Bythewood's Conveyancing, by Sweet, vol. i, p. 146, note (*a*).

the purchaser, is the person next entitled, no claimants appearing whose title is preferable; and, should she be dead, her heirs will be entitled next after her.

[*93] It should be carefully borne in mind, that the above-mentioned rules of descent apply exclusively to estates *in land, and to that kind of property which is denominated *real*, and have no application to money or other personal estate, which is distributed on intestacy in a manner which the reader will find explained in the author's treatise on the law of personal property.(*o*)

[*94]

*CHAPTER V.

OF THE TENURE OF AN ESTATE IN FEE SIMPLE.

THE most familiar instance of a tenure is given by a common lease of a house or land for a term of years; in this case the person letting is still called the *landlord*, and the person to whom the premises are let is the *tenant;* the terms of the tenure are according to the agreement of the parties, the rent being usually the chief item, and the rest of the terms of tenure being contained in the covenants of the lease; but, if no rent should be paid, the relation of landlord and tenant would still subsist, though of course not with the same advantage to the landlord. This, however, is not a freehold tenure; the lessee has only a chattel interest, as has been before observed;(*a*) but it may serve to explain tenures of a freehold kind, which are not so familiar, though equally important. So, when a lease of lands is made to a man *for his life*, the lessee becomes tenant to the lessor,(*b*) although no rent may be reserved; here again a tenure is created by the transaction, during the life of the lessee, and the terms of the tenure depend on the agreement of the parties. So, if a gift of lands should be made to a man *and the heirs of his body*, the donee in tail, as he is called, and his issue, would be the tenants of the donor so long as the entail lasted,(*c*) and a freehold tenure would thus be created.

(*o*) Page 256, 1st edit.; 275, 2d edit.

(*a*) Ante, p. 8. (*b*) Litt. s. 132; Gilb. Tenures, 90.

(*c*) Litt. s. 19; Kitchen on Courts, 410; Watk. Desc. p. 4, n. (*m*), (pp. 11, 12, 4th ed.)

But if a gift should be made to a man *and his heirs*, or for an estate in fee simple, it would not now be *lawful for the parties to create a tenure between themselves, as in the case of a gift for life, or in tail. [*95] For, by the statute of *Quia emptores*,(*d*) we have seen that it was enacted, that from thenceforth it should be lawful for every free man to sell, at his own pleasure, his lands or tenements, or part thereof, so nevertheless that the feoffee, or purchaser, should hold the same lands or tenements of the same chief lord of the fee, and by the same services and customs as his feoffor, the seller, held them before. The giver or seller of an estate in fee simple, is then himself but a tenant, with liberty of putting another in his own place. He may have under him a tenant for years, or a tenant for life, or even a tenant in tail, but he cannot now, by any kind of conveyance, place under himself a tenant of an estate in fee simple. The statute of *Quia emptores* now forbids any one from making himself the lord of such an estate; all he can do is to transfer his own tenancy; and the purchaser of an estate in fee simple must hold his estate of the same chief lord of the fee, as the seller held before him. The introduction of this doctrine of tenures has been already noticed,(*e*) and it still prevails throughout the kingdom; for it is a fundamental rule, that all the lands within this realm were originally derived from the crown (either by express grant or tacit intendment of law), and therefore the Queen is sovereign lady, or lady paramount, either mediate or immediate, of all and every parcel of land within the realm.(*f*)[1]

(*d*) 18 Ed. I, c. 1, ante, p. 56. (*e*) Ante, pp. 2, 3.
(*f*) Co. Litt. 65 a, 93 a; Year Book, M. 24 Edw. III, 65 b, pl. 60.

[1] The nature of the tenure in the American colonies has already been adverted to, supra, p. 6. By the Charter of Pennsylvania the province was granted by Charles II, to William Penn and his heirs, "as absolute proprietary," to be holden of Charles II, his heirs and successors, kings of England, as of his Castle of Windsor, in free and common socage, by fealty only, for all services, and not *in capite*, or by knights' service, yielding and paying therefor two beaver skins, to be delivered annually at his said castle, and also the fifth part of all gold and silver ore which should from time to time happen to be found within the limits of the province, clear of all charges. The charter further granted to Penn and his heirs, power to alien parts of the province in fee simple, tail, or for life or years, to be held of him as of his said seignory of Windsor, by such services, customs, and rents, as he or they should think fit, and not of the crown, "the statute of *quia emptores terrarum* in any wise notwithstanding," and enable such grantees, with the license of the proprietaries, to erect manors with courts baron, and to make grants to be held of such manors. The divesting act of 1779, 1 Sm. Laws, 479, only substituted the Commonwealth for the Proprietaries, and in all patents of land from the Commonwealth the above reservation of ore is to this day

The rent, services, and other incidents of the tenure of estates in fee simple were, in ancient times, matters of much variety, depending as they did on the mutual agreements which, previously to the statute of *Quia emptores*, *the various lords and tenants made with each other; though still they had their general laws, governing such cases as were not expressly provided for.(*g*) The lord was usually a baron, or other person of power and consequence, to whom had been granted an estate in fee simple in a tract of land. Of this land he retained as much as was necessary for his own use, as his own demesne,(*h*) and usually built upon it a mansion or manor house. Part of this demesne was in the occupation of the villeins of the lord, who held various small parcels at his will, for their own subsistence, and cultivated the residue for their lord's benefit. The rest of the cultivable land was granted out by the lord to various freeholders, subject to certain stipulated rents or services, as "to plough ten acres of arable land, parcel of that which remained in the lord's possession, or to carry his dung unto the land, or to go with him to war against the Scots."(*i*) The barren lands which remained, formed the lord's wastes, over which the cattle of the tenants were allowed to roam in search of pasture.(*j*) In this way manors were created,(*k*) every one of which is of a date prior to the statute of *Quia emptores*,(*l*) except perhaps some, which may have been created by the king's tenants in capite with license from the crown.(*m*) The lands held by the villeins were the origin of copyholds, of which more hereafter.(*n*) Those granted

[*96]

(*g*) Bract. c. 10, fol. 48 b; Britton, c. 66.

(*h*) Attorney-General v. Parsons, 2 Cro. & Jerv. 279, 308.

(*i*) Perkins's Profitable Book, s. 670.

(*j*) In the recent case of Lord Dunraven v. Llewellyn, 15 Q. B. 791, the Court of Exchequer Chamber held that there was no general common law right of tenants of a manor to common on the waste. But, in the humble opinion of the author, the authorities cited by the Court tend to the opposite conclusion.

(*k*) See Scriv. Cop. 1; Watk. Cop. 6, 7; 2 Black. Com. 90.

(*l*) 18 Edw. I, c. 1.

(*m*) 1 Watk. Cop. 15; ante, p. 56.

(*n*) Post, chapter on Copyholds.

---

inserted. The existence of fealty, escheat, and forfeiture are further evidences of the feudal nature of the tenure, as are also the early statutes respecting the transfer of real estate. See, for an able illustration of this, Judge Sharswood's Lecture to the Philadelphia Law Academy, 1855, on "The Common Law of Pennsylvania," Mr. Morris's edition of Smith's Landlord and Tenant, p. 6 note. Express statutes have, in some States, such as Connecticut, New York, New Jersey, South Carolina, and Michigan, declared their lands allodial; and in the others, as in Pennsylvania, it is conceived that "the ownership of land is as absolute and direct as is compatible with the existence of society, where the right of eminent demesne is recognized; and yet it would not be safe to assert that any property is allodial." Mr. Morris's note, supra.

to *the freemen were subject to various burdens, according to the nature of the tenure. In the tenure by knight's service, [*97] then the most universal and honorable species of tenure, the tenant of an estate of inheritance, that is, of an estate of fee simple or fee tail,(*o*) was bound to do *homage* to his lord, kneeling to him, professing to become his man, and receiving from him a kiss.(*p*)[1] The tenant was moreover at first expected, and afterwards obliged, to render to his lord pecuniary *aids*, to ransom his person, if taken prisoner, to help him in the expense of making his eldest son a knight, and in providing a portion for the oldest daughter on her marriage. Again, on the death of a tenant, his heir was bound to pay a fine, called a *relief*, on taking to his ancestor's estate.(*q*) If the heir were under age, the lord had, under the name of *wardship*, the custody of the body and lands of the heir, without account of the profits, till the age of twenty-one years in males, and sixteen in females; when the wards had a right to require possession, or sue out their *livery*, on payment to the lord of half a year's profits of their lands. In addition to this, the lord possessed the right of marriage (*maritagium*), or of disposing of his infant wards in matrimony, at their peril of forfeiting to him, in case of their refusing a suitable match, a sum of money equal to the value of the marriage;[2] that is, what

(*o*) Litt. s. 90.

(*p*) See a description of homage, Litt. ss. 85, 86, 87; 2 Bl. Com. 53.

(*q*) Scriven on Copyholds, 738 et seq.

[1] The importance of homage, as an incident of tenure, was felt both by the lord and vassal—by the former because until he had received homage of the heir, he was not entitled to wardship; and by the latter because it anciently bound the lord to warranty of the fief.

[2] This right of marriage was one of the most onerous of the feudal burdens. It appears to have had its rise upon the continent, where fiefs were descendible to female heirs, but between the times of Glanville and Bracton the right had extended also to male heirs. Wright's Tenures, 95. The penalty at first for marrying without consent was absolute forfeiture, but this rigor was subsequently mitigated to the limited forfeiture mentioned in the text, and the right of marriage of wards of the Crown was constantly purchased by or given to courtiers who made the most out of the estates of the wards by either marrying them to their own relations, or demanding an exorbitant price for their consent. So late as the reign of Charles I, a prolonged litigation having been carried on between the families of Lady Preston and the Earl of Ormond, it had been proposed, by their marriage, to unite the estates, which met the approbation of all the parties interested, as well as the favor of the King, but the Earl of Warwick, who was grantee of the right of marriage of the lady, extorted £10,000 as the price of his consent to the marriage. Sullivan's Lectures, p. 134. This, with the other consequences of tenure by knight service, was abolished at the Restoration by the Act referred to, infra, at page 100.

the suitor was willing to pay down to the lord, as the price of marrying his ward; and double the market value was to be forfeited, if the ward presumed to marry without the lord's consent.(*r*)[1] The king's tenants *in capite* were moreover subject to many burdens and [*98] *restraints, from which the tenants of other lords were exempt.(*s*) Again, every lord, who had two tenants or more, had a right to compel their attendance at the court baron of the manor, to which his grants to them had given existence; this attendance was called *suit of court*, and the tenants were called freesuitors.(*t*) And to every species of lay tenure, as distinguished from clerical, and whether of an estate in fee simple, in tail, or for life, or otherwise, there was inseparably incident a liability for the tenant, whenever called upon, to take an oath of *fealty* or fidelity to his lord.(*u*)

At the present day, however, a much greater simplicity and uniformity will we found in the incidents of the tenure of an estate in fee simple, for there is now only one kind of tenure by which such an estate can be held; and that is the tenure of *free and common socage*.(*x*) The tenure of free and common socage is of great antiquity; so much so, that the meaning of the term *socage* is the subject only of conjecture.(*y*) Comparatively few of the lands in this country were in

(*r*) 2 Black. Com. 63 et seq.; Scriven on Copyholds, 729. Wardship and marriage were no parts of the great feudal system, but were introduced into this country, and perhaps invented, by the Normans. 2 Hall. Midd. Ages, 415.

(*s*) As primer seisin, involuntary knighthood in certain cases, and fines for alienation.

(*t*) Gilb. Ten. 431 et seq.; Scriven on Copyholds, 719 et seq.

(*u*) Litt. ss. 91, 131, 132; Scriv. Cop. 732.

(*x*) 2 Black. Com. 101.

(*y*) See Litt. s. 119; Wright's Tenures, 143; 2 Black. Com. 80; Co. Litt. 86 a, n. (1); 2 Hallam's Middle Ages, 481. The controversy lies between the Saxon word *soc*, which

[1] These incidents of the feudal tenure are thus summed up by Blackstone. "The heir on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin*; and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith very feelingly complains, 'when he came to his own, after he was out of *wardship*, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren,' to reduce him still further, he was yet to pay half a year's profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this the untimely and expensive honor of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that, perhaps, he was obliged to sell his patrimony, he had not even the poor privilege allowed him, without paying an exorbitant fine for a *license of alienation*." 2 Bl. Com. 76.

ancient times the subjects of this tenure: the lands, in which estates in fee simple were thus held, appear to have been among those which escaped the grasp of the Conqueror, and *remained in the possession of their ancient Saxon proprietors.(z) The owners [*99] of fee simple estates, held by this tenure, were not villeins or slaves, but freemen;(a) hence the term *free socage*. No military service was due, as the condition of the enjoyment of the estates. Homage to the lord, the invariable incident of the military tenures,(b) was not often required;(c) but the services, if any, were usually of an agricultural nature: a fixed rent was sometimes reserved; and in process of time the agricultural services appear to have been very generally commuted into such a rent. In all cases of annual rent, the *relief* paid by the heir, on the death of his ancestor, was fixed at one year's rent.(d) Frequently no rent was due; but the owners were simply bound to take, when required, the oath of fealty to the lord of whom they held,(e) to do suit at his court, if he had one, and to give him the customary aids for knighting his eldest son and marrying his eldest daughter.(f) This tenure was accordingly more beneficial than the military tenures, by which fee simple estates, in most other lands in the kingdom, were held. True, the actual military service, in respect of lands, became gradually commuted for an *escuage* or money payment, assessed on the tenants by knights' service from time to time, first at the discretion of the crown, and afterwards by authority of Parliament;(g) and this commutation appears to have generally prevailed, from so early a period as the time of Henry II. But the great superiority of the socage tenure was still felt in its freedom from the burdens of wardship and marriage, and other *exactions, [*100] imposed on the tenants of estates in fee held by the other tenures.(h) The wardship and marriage of an infant tenant of an

signifies a liberty, privilege, or franchise, especially one of jurisdiction, and the French word *soc*, which signifies a ploughshare. In favor of the former is urged the beneficial nature of the tenure, and also the circumstance that socagers were, as now, bound to attend the court baron of the lord, to whose *soc* or right of justice they belonged. In favor of the latter derivation is urged the nature of the employment, as well as the most usual condition of tenure of the lands of sockmen, who were principally engaged in agriculture.

(z) 2 Hallam's Middle Ages, 481.
(a) Ibid.; 2 Black. Com. 60, 61.
(b) Co. Litt. 65 a, 67 b, n. (1).
(c) Co. Litt. 86 a.
(d) Litt. s. 126; 2 Black. Com. 87.
(e) Litt. ss. 117, 118, 131.
(f) Co. Litt. 91 a; 9 Black. Com. 86.
(g) 2 Hallam's Middle Ages, 439, 440; 2 Black. Com. 74; Wright's Tenures, 131; Litt. s. 97; Co. Litt. 72 a.
(h) 2 Hallam's Middle Ages, 481.

estate held in socage devolved on his nearest relation (to whom the inheritance could not descend), who was strictly accountable for the rents and profits.(*i*) As the commerce and wealth of the country increased, and the middle classes began to feel their own power, the burdens of the other tenures became insupportable; and an opportunity was at last seized of throwing them off. Accordingly, at the restoration of King Charles II, an act of Parliament was insisted on and obtained, by which all tenures by knights' service, and the fruits and consequences of tenures in capite,(*j*) were taken away; and all tenures of estates of inheritance in the hands of private persons (except copyhold tenures) were turned into free and common socage; and the same were forever discharged from homage, wardships, values and forfeitures of marriage, and other charges incident to tenure by knights' service, and from aids for marrying the lord's daughter and for making his son a knight.(*k*)[1]

The right of wardship or guardianship of infant tenants having thus been taken away from the lords, the opportunity was embraced of giving to the father a right of appointing guardians to his children. It was accordingly provided by the same act of Parliament,(*l*) that the father of any child under age and not married at the time of his death, may by deed executed in his lifetime, or by his will, in the presence of two or more credible witnesses, in such manner and from time to time as he shall think fit, dispose of the custody and tuition of such child during such time as he shall remain under the age of one-and-
[*101] twenty years, or any lesser time, to any person or *persons in possession or remainder. And this power was given whether the child was born at his father's decease or only *in ventre sa mere* at that time, and whether the father were within the age of one-and-twenty years or of full age. But it seems that the father, if under age, cannot now appoint a guardian by *will;* for the new Wills Act now enacts, that no will made by any person under the age of twenty-one years shall be valid.(*m*) In other respects, however, the father's right to appoint a guardian still continues as originally pro-

(*i*) 2 Black. Com. 87, 88.
(*j*) Co. Litt. 108 a, n. (5).
(*k*) Stat. 12 Car. II, c. 24. The 12th Car. II, A. D. 1660, was the first year of his actual reign.
(*l*) Stat. 12 Car. II, c. 24, s. 8.
(*m*) Stat. 7 Will. IV, and 1 Vict. c. 26, s. 7; 1 Jarm. Wills, 36.

[1] See supra, note to p. 37.

vided by the above-mentioned statute of Charles II. The guardian so appointed has a right to receive the rents of the child's lands, for the use of the child, to whom, like a guardian in socage, he is accountable when the child comes of age. A guardian cannot be appointed by the mother of a child, or by any other relative than the father.(*n*)

A *rent* is not now often paid in respect of the tenure of an estate in fee simple.[1] When it is paid, it is usually called a *quit rent*,(*o*)

(*n*) *Ex parte Edwards*, 3 Atk. 519; Bac. Abr. tit. Guardian (A) 3. See also Mr. Hargrave's Notes to Co. Litt. 88 b.

(*o*) 2 Black. Com. 43; Co. Litt. 85 a, n. (1).

[1] Such rents were, however, quite common in many of our States; and at the present day it is found a convenient way of disposing of unimproved property in the large cities of Pennsylvania to grant it in fee simple, reserving an annual rent, called a ground-rent, as the entire consideration. The burden of payment of a present sum is thus relieved, and the available means of the purchaser employed in the improvement of the property, which is generally required by a covenant to that effect, in order to secure the ground-rent. Until the year 1850, it was also usual to insert in the deed a covenant that the grantee could within a stipulated number of years extinguish the ground-rent by the payment of its principal sum. After that time had expired, the rent became irredeemable, unless at the option of the owner of the rent for the time being. As this gave rise to a perpetual charge or incumbrance upon real estate, the Legislature in that year provided that all ground-rents to be thereafter reserved should be redeemable at any lapse of time after their creation. The rent reserved upon these conveyances in fee is real estate, and subject to all its incidents; and the remedies for its recovery are, first, distress, which is of common right, although such a clause is usually inserted in the deed; secondly, if sufficient distress cannot be had, by re-entry upon the land, to hold as of the grantor's former estate; and thirdly, by a personal action of covenant, which may be maintained, firstly, against the original covenantor, even after he has parted with the land, and the judgment, when thus obtained, may be enforced upon the land in the hands of the purchaser: Brown *v.* Johnson, 4 Rawle, 146; though it has very recently been decided by the Supreme Court, that covenant will not lie against the personal representative of a *deceased* covenantor, except for arrears due in his lifetime; Quain's Appeal, 10 Harris, 512. This decision was contrary to the general practice of the profession (see Scott v. Lunt's Admin. 7 Peters, 605), which, in order to avoid the necessity of deducing the title from the original covenantor to the present owner of the land, had been to sue the former, if living, and his representatives, if dead. Covenant may be maintained, secondly, against the owner of the land in whose time it falls due; in other words, the covenant runs with the land, and binds its owner for the time being. The liability, however, of an assignee to pay ground-rent can only, upon principle, be enforced where there is some privity between the covenantee and the assignee of the covenantor: Milnes v. Branch, 5 Maule & Selw. 411; which privity exists in Pennsylvania, because the statute of *quia emptores* is not in force in that State: Ingersoll *v.* Sergeant, 1 Wharton, 337; and although before that decision such a liability had been enforced (Streaper v. Fisher, 1 Rawle, 155; St. Mary's Church v. Miles, 1 Wharton, 229;) yet it must be presumed to have been supported rather by the common law of that State than by principle or authority. See the note to Spencer's case, 1 Smith's Leading Cases, 131, 135.

and is almost always of a very trifling amount: the change in the value of money in modern times will account for this. The *relief* of one year's quit rent, payable by the heir on the death of his ancestor, in the case of a fixed quit rent, was not abolished by the statute of Charles, and such relief is accordingly still due.(*p*) Suit of court also is still obligatory on tenants of estates in fee simple, held of any manor now existing.(*q*) And the oath of fealty continues an incident of tenure, as well of an estate in fee simple, as of every other estate, down to a tenancy *for a mere term of years; but in practice it is seldom or never exacted.(*r*)

[*102]

There is yet another incident of the tenure of estates in fee simple; an incident, which has existed from the earliest times, and is still occasionally productive of substantial advantage to the lord. As the donor of an estate for life has a certain reversion on his tenant's death, and as the donor of an estate in tail has also a reversion expectant on the decease of his tenant, and failure of his issue, but subject to be defeated by the proper bar, so the lord, of whom an estate in fee simple is held, possesses, in respect of his lordship or seignory, a similar,(*s*) though more uncertain advantage, in his right of *escheat;* by which, if the estate happens to end, the lands revert to the lord, by whose ancestors or predecessors they were anciently granted to the tenant.(*t*) When the tenant of an estate in fee simple dies, without having alienated his estate in his lifetime, or by his will,(*u*) and without leaving any heirs, either lineal or collateral, the lands in which he held his estate *escheat* (as it is called) to the lord of whom he held them.[1] Bastardy is the most usual cause of the failure of heirs; for a bastard is in law *nullius filius;* and, being nobody's son, he can consequently have no brother or sister, or any other heir than an heir

(*p*) Co. Litt. 85 a, n. (1); Scriv. Cop. 738.
(*q*) Scriv. Cop. 736.
(*r*) Co. Litt. 67 b, n. (2), 68 b, n. (5).
(*s*) Watk. Descent, p. 2 (pp. 5, 6, 7, 4th ed.).
(*t*) 2 Black. Com. 72; Scriv. Cop. 757 et seq.
(*u*) Year Book, 49 Edw. III, c. 17; Co. Litt. 236 a, n. (1); Scriv. Cop. 762. But it may perhaps be doubted whether the new Wills Act (7 Will. IV, & 1 Vict. c. 26, s. 3) extends to this case, and whether, therefore, in order to prevent an escheat, three witnessses should not attest the will as under the old law, which still subsists as to wills to which the new act does not extend (see sect. 2.)

[1] A reference to the local statutes of our States, by which, in default of heirs, property escheats to the Commonwealth, will be found in the note at the end of Ch. III, tit. xxix, to Greenleaf's Cruise on Real Property.

of his body;(*v*) nor can his descendants have any heirs, but such as are also descended from him. If such a person, *therefore, [*103] were to purchase lands, that is, to acquire an estate in fee simple in them, and were to die possessed of them without having made a will,(*w*) and without leaving any issue, the lands would escheat to the lord of the fee, for want of heirs.[1] Again, when sentence of death is pronounced on a person convicted of high treason or murder, or of abetting, procuring, or counselling the same,(*x*) his blood is said to be attainted or corrupted, and loses its inheritable quality.[2] In cases of high treason, the crown becomes entitled by for-

(*v*) Co. Litt. 3 b; 2 Black. Com. 347; Bac. Abr. tit. Bastardy (B).

(*w*) See ante, p. 102, n. (*u*).

(*x*) Stat. 54 Geo. III, c. 145; 9 Geo. IV, c. 31, s. 2.

[1] This rigor of the common law is believed to exist at the present day only in the States of New Jersey, Delaware, and South Carolina. The Pennsylvania statute, however, which gives to illegitimates and their mother the right to inherit from each other, was passed only as lately as 1855. In the other States the legislation is various; in some of them, such as Maine, New Hampshire, Vermont, Rhode Island, Connecticut, Virginia, Indiana, Kentucky, Missouri, and Florida, the provisions being substantially the same as in Pennsylvania; in others, as Massachusetts, Ohio, North Carolina, Georgia, Tennessee, Illinois, Michigan, and Arkansas, they succeed to the mother but not to her kindred; they succeed to each other in Vermont, Connecticut, North Carolina, Georgia, and Tennessee. Some of these States have, moreover, adopted the rule of the civil law, by which the subsequent marriage of the parents legitimatizes their previous offspring.

[2] This was formerly the common law, not only as to treason, but every species of felony. The statute of 7 Anne, ch. 22, abolished, after the Pretender's death, forfeiture for treason beyond the life of the offender; but that of 17 Geo. II, c. 29, postponed its operation till the death of the Pretender and his sons; and both of these were repealed by the 39 Geo. III, c. 93; so that in the case of high treason, the law is the same as it was before the statute of Anne.

As to other felonies, however, the statute of 54 Geo. II, c. 145, has provided that no attainder, except for high treason, petit treason, murder, or abetting the same, shall extend to the disinheriting any heir, or to the prejudice of any person except the offender during his life only. As originally introduced by Sir Samuel Romilly into the House of Commons, this bill proposed to do away with all corruption of blood, but it was opposed by Mr. Yorke, whose father, Lord Hardwicke's son, had, in 1744, written the well-known essay called, "Some Considerations on the Laws of Forfeiture for High Treason," which Lord Campbell considers to have been "the finest juridical treatise that had appeared in the English language" (Lives of the Chancellors, vol. 5, p. 298), though Mr. Yorke himself, at a later period, spoke of it as a "very juvenile treatise." 2 Romilly's Autobiography, 307. The result of the opposition to Romilly's bill was its passage as it now stands.

The Constitution of the United States expressly declares that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted," Art. III, Sect. iii, 1; and in none of the States does treason or felony work corruption of blood. The Constitutions of Pennsylvania, Delaware, and Kentucky declare that there shall be no forfeiture for treason, except for the life of the offender; that of Maryland, that there ought to be no forfeiture except in cases of treason or murder;

feiture to the lands of the traitor;(*y*) but in the other cases the lord, of whom the estate was held, becomes entitled by *escheat* to the lands, after the death of the attainted person;(*z*) subject, however, to the Queen's right of possession for a year and a day, and of committing waste, called the Queen's year, day, and waste,—a right now usually compounded for.(*a*) The crown most frequently obtains the lands escheated, in consequence of the before-mentioned rule, that the crown was the original proprietor of all the lands in the kingdom.(*b*) But if there should be any lord of a manor, or other person, who could prove that the estate so terminated was held of him, he, and not the crown, would be entitled. In former times, there were many such mesne or intermediate lords; every baron, according to the feudal system, had his tenants, and they again had theirs. The alienation of lands appears, indeed, as we have seen,(*c*) *to have most [*104] generally, if not universally, proceeded on this system of subinfeudation. But now, the fruits and incidents of tenure of estates in fee simple are so few and rare, that many such estates are considered as held directly of the crown, for want of proof as to who is the intermediate lord; and the difficulty of proof is increased by the fact beforementioned, that, since the statute of *Quia emptores*, passed in the reign of Edward I,(*d*) it has not been lawful to create a tenure of an estate in fee simple; so that every lordship or seignory of an estate in fee simple bears date at least as far back as that reign; to this rule the few seignories, which may have been subsequently created by the king's tenants in capite, form the only exception.(*e*)

(*y*) Stat. 26 Hen. VIII, c. 13, s. 5; 5 & 6 Edw. VI, c. 11, s. 9; 39 Geo. III, c. 93; 4 Black. Com. 381.

(*z*) 2 Black. Com. 245; 4 Black. Com. 380, 381; Swinburne, part 2, sect. 13; Bac. Abr. tit. Wills and Testaments (B).

(*a*) 4 Black. Com. 385.

(*b*) Lands escheated or forfeited to the Crown, are frequently restored to the families of the persons to whom such lands belonged pursuant to stat. 39 & 40 Geo. III, c. 88, s. 12, explained and amended by stat. 47 Geo. III, sess. 2, c. 24, and 59 Geo. III, c. 94, and extended to forfeited leaseholds by stat. 6 Geo. IV, c. 17.

(*c*) Ante, pp. 34, 55. (*d*) 18 Edw. I, c. 1; ante, pp. 56, 95.

(*e*) By a recent statute, 13 & 14 Vict. c. 60, lands vested in any person upon any trust, or by way of mortgage, are exempted from escheat. This act repeals a former statute, 4 & 5 Will. IV, c. 23, to the same effect.

---

in South Carolina, that there shall be no forfeiture of lands for treason of persons who die without having been attainted; and forfeiture for felony is expressly abolished. In other States, forfeiture is believed to be abolished, either expressly or by strong implication.

A small occasional *quit rent*, with its accompanying *relief*,—*suit* of the *Court* Baron, if any such exist, an oath of *fealty* never exacted, —and a right of *escheat* seldom accruing,—are now, it appears, therefore, the ordinary incidents of the tenure of an estate in fee simple. There, are, however, a few varieties in this tenure which are not worth mentioning; they respect either the *persons* to whom the estate was originally granted, or the *places* in which the lands holden are situate. And, first, respecting the persons: The ancient tenure of *grand serjeanty* was where a man held his lands of the king by services to be done in his own proper person to the king, as to carry the banner of the king, or his lance, or to be his marshal, or to carry his sword before him at his coronation, or to do other like services:(*f*) when, by the statute of Charles II,(*g*) this tenure, with the others, was *turned into free and common socage, the honorary services above described were expressly retained. The ancient [*105] tenure of *petit serjeanty* was where a man held his land of the king, "to yield him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a paire of gloves of maile, or a paire of gilt spurs, or an arrow, or divers arrowes, or to yield such other small things belonging to warre:"(*h*) this was but socage in effect,(*i*) because such a tenant was not to do any personal service, but to render and pay yearly certain things to the king. This tenure therefore still remains unaffected by the statute of Charles II.

Next, as to such varieties of tenure as relate to places: These are principally the tenures of gavelkind, borough-English, and ancient demesne. The tenure of gavelkind, or, as it has been more correctly styled,(*k*) socage tenure, subject to the custom of gavelkind, prevails chiefly in the county of Kent, in which county all estates of inheritance in land(*l*) are presumed to be holden by this tenure until the contrary is shown.(*m*) The most remarkable feature of this kind of tenure is the descent of the estate, in case of intestacy, not to the eldest son, but to all the sons in equal shares,(*n*) and so to brothers and other collateral relations, on failure of nearer heirs.(*o*) It is also

(*f*) Litt. s. 153.
(*g*) 12 Car. II, c. 24; ante, p. 100.
(*h*) Litt. s. 159.
(*i*) Litt. s. 160; 2 Black. Com. 81.
(*k*) Third Report of Real Property Commissioners, p. 7.
(*l*) Including estates tail, Litt. s. 265; Robinson on Gavelkind, 51, 94 (64, 119, 3d ed.)
(*m*) Robinson on Gavelkind, 44 (54, 3d ed.)
(*n*) Every son is as great a gentleman as the eldest son is: Litt. s. 210.
(*o*) Rob. Gav. 92; 3d Rep. of Real Property Commissioners, p. 9; Crump d. Woolley v. Norwood, 7 Taunt. 362, in opposition to Bac. Abr. tit. Descent (D), citing Co. Litt. 140 a.

a remarkable peculiarity of this custom, that every tenant of an estate of freehold (except of course an estate tail) is able, at the early age
[*106] of fifteen *years, to dispose of his estate by feoffment,(p) the ancient method of conveyance, to be hereafter explained. There is also no escheat of gavelkind lands upon a conviction of murder;(q) and some other peculiarities of less importance belong to this tenure.(r) The custom of gavelkind is generally supposed to have been a part of the ancient Saxon law, preserved by the struggles of the men of Kent, at the time of the Norman conquest; and it is still held in high esteem by the inhabitants, so that whilst some lands in the county, having been originally held by knights' service, are not within the custom,(s) and others have been disgavelled, or freed from the custom, by various acts of Parliament,(t) any attempt entirely to extinguish the peculiarities of this tenure has uniformly been resisted.(u) There are a few places, in other parts of the kingdom, where the course of descent follows the custom of gavelkind;(x) but it may be doubted whether the tenure of gavelkind, with all its accompanying peculiarities, is to be found elsewhere than in the county of Kent.(y)

[*107] *Tenure subject to the custom of borough-English prevails in several cities and ancient boroughs, and districts adjoining to them; the tenure is socage, but, according to the custom, the estate descends to the *youngest son*, in exclusion of all the other children.(z) The custom does not in general extend to collateral relations; but by special custom it may, so as to admit the youngest

(p) Rob. Gav. 193 (248, 3d ed.), 217 (277, 3d ed.); 2 Black. Com. 84. See stat. 8 & 9 Vict. c. 106, s. 3.

(q) Rob. Gav. 226 (288, 3d edit.)

(r) The husband is tenant by courtesy of a moiety only of his deceased wife's land, until he marries again, whether there were issue born alive or not; the widow also is dowable of a moiety instead of a third, and during widowhood and chastity only; estates in fee simple were devisable by will, before the statute was passed, empowering the devise of such estates; and some other ancient privileges, now obsolete, were attached to this tenure. See Robinson on Gavelkind, passim; 3d Report of Real Property Commissioners, p. 9.

(s) Rob. Gav. 46 (57, 3d edit.) (t) See Rob. Gav. 75 (94, 3d edit.)

(u) An express saving of the custom of gavelkind is inserted in the act for the commutation of certain manorial rights, &c. Stat. 4 & 5 Vict. c. 35, s. 80.

(x) Kitchen on Courts, 200; Co. Litt. 140 a.

(y) See Bac. Abr. tit. Gavelkind (B.) 3.

(z) Litt. s. 165; 2 Black. Com. 83.

brother, instead of the eldest.(*a*) Estates, as well in tail as in fee simple, descend according to this custom.(*b*)

The tenure of ancient demesne exists in those manors, and in those only, which belonged to the crown in the reigns of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated *Terræ Regis Edwardi*, or *Terræ Regis*.(*c*) The tenants are freeholders,(*d*) and possess certain ancient immunities, the chief of which is a right to sue and be sued only in their lord's court. Before the abolition of fines and recoveries, these proceedings, being judicial in their nature, could only take place, as to lands in ancient demesne, in the lord's court; but, as the nature of the tenure was not always known, much inconvenience frequently arose from the proceedings being taken by mistake in the usual Court of Common Pleas at Westminster; and these mistakes have given to the tenure a prominence in practice which it would not otherwise have possessed. Such mistakes, however, have been corrected, as far as possible, by the recent act for the abolition of fines and *recoveries;(*e*) and for the future, the substitution of a simple deed, in the [*108] place of those assurances, renders such mistakes impossible. So that this peculiar kind of socage tenure now possesses but little practical importance.

So much then for the tenure of free and common socage, with its incidents and varieties. There is yet another kind of ancient tenure still subsisting, namely, the tenure of *frankalmoign*, or free alms, already mentioned,(*f*) by which the lands of the church are for the most part held. This tenure is expressly excepted from the statute 12 Car. II, c. 24, by which the other ancient tenures were destroyed. It has no peculiar incidents, the tenants not being bound even to do fealty to the lords, because, as Littleton says,(*g*) the prayers and other divine services of the tenants are better for the lords than any doing of fealty. As the church is a body having perpetual existence, there is moreover no chance of any escheat. This tenure is therefore a very near practical approach to that absolute dominion on the part of the tenant, which yet in theory the law never allows.

(*a*) Comyn's Digest, tit. Borough-English; Watk. Descents, 89 (94, 4th edit.)

(*b*) Rob. Gav. 94 (120, 3d edit.)

(*c*) 2 Scriv. Copyholds, 687.

(*d*) The account given by Blackstone of this tenure as altogether copyhold (2 Black. Com. 100), appears to be erroneous, though no doubt there are copyholds of some of the lands of such manors. 3d Rep. of Real Property Commissioners, p. 13; 2 Scriv. Cop. 691.

(*e*) Stat. 3 & 4 Will. IV, c. 74, ss. 4, 5, 6.

(*f*) Ante, p. 33.

(*g*) Litt. s. 135; Co. Litt. 67 b.

[*109]

*CHAPTER VI.

OF JOINT TENANTS AND TENANTS IN COMMON.

A GIFT of lands to two or more persons in joint tenancy, is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. As between themselves, they must, of course, have separate rights; but such rights are equal in every respect, it not being possible for one of them to have a greater interest than another in the subject of the tenancy. A joint tenancy is accordingly said to be distinguished by unity of *possession*, unity of *interest*, unity of *title*, and unity of *time* of the commencement of such title.(*a*) Any estate may be held in joint tenancy; thus, if lands be given simply to A. and B. without further words, they will become at once joint tenants for life.(*b*) Being regarded, with respect to other persons, as but one individual, their estates will necessarily continue so long as the longer liver of them exists. While they both live, as they must have several rights between themselves, A. will be entitled to one moiety of the rents and profits of the land, and B. to the other; but after the decease of either of them, the survivor will be entitled to the whole during the residue of his life.[1] So, if lands be given to A. and B., and the heirs of their two bodies; here, if A. and B. be persons who may possible intermarry, they will

(*a*) 2 Black. Com. 180.

(*b*) Litt. s. 283; Com. Dig. tit. Estates (K I); see ante, p. 17.

[1] Tenure by joint tenancy was much favored in the old law, which was averse to a division of tenures, and the consequent multiplication of feudal services. When a tenancy in common was therefore to be created by deed, the words usually employed were "to hold as tenants in common and not as joint tenants." In equity, although the common law rule that a conveyance to A. and B. and their heirs created an estate in joint tenancy prevailed, yet there was a strong leaning against such a tenure, and although the mere circumstance of two or more having equally paid the purchase-money would not be deemed sufficient to render the estate a tenancy in common in equity (Rigden v. Vallier, 3 Atkins, 735); yet it has been so construed when the purchase was made with the view of spending large sums in improving the land. Lake v. Craddock, 3 P. Wms. 158; Duncan v. Forrer, 6 Binney, 196; Caines v. Grant's Lessee, 5 Binney, 120; Cuyler v. Bradt, 2 Caines' Cases, 326.

Statutes have, however, in all the United States, abolished the distinguishing feature of joint tenancy, the *jus accrescendi*, with, however, in some of them, certain excepted cases, as to trustees (see infra, p. 111, n.), husband and wife, partners, &c. For a particular reference to these statutes see 2 Greenleaf's Cruise on Real Property, p. 364.

have an estate in special tail, descendible only to the heirs of their two bodies:(*c*) so long as they both live, they will be entitled *to the rents and profits in equal shares; after the decease of either, the survivor will be entitled for life to the whole; and on the decease of such survivor, the heir of their bodies, in case they should have intermarried, will succeed by descent, in the same manner as if both A. and B. had been but one ancestor. If, however, A. and B. be persons who cannot at any time lawfully intermarry, as, if they be brother and sister, or both males, or both females, a gift to them and the heirs of their two bodies will receive a somewhat different construction. So long as it is possible for a unity of interest to continue, the law will carry it into effect: A. and B. will accordingly be regarded as one person, and will be entitled jointly during their lives. While they both live, their rights will be equal; and, on the death of either, the survivor will take the whole, so long as he may live. But, as they cannot intermarry, it is not possible that any one person should be heir of both their bodies; on the decease of the survivor, the law, therefore, in order to conform as nearly as possible to the manifest intent, that the heir of the body of each of them should inherit, is obliged to sever the tenancy, and divide the inheritance between the heir of the body of A., and the heir of the body of B. Each heir will accordingly be entitled to a moiety of the rents and profits, as tenant in tail of such moiety. The heirs will now hold in a manner denominated tenancy in common; instead of both having the whole, each will have an undivided half, and no further right of survivorship will remain.(*d*) [*110]

An estate in fee simple may also be given to two or more persons as joint tenants. The unity of this kind of tenure is remarkably shown by the words which are made use of to create a joint tenancy in fee simple. The lands intended to be given to joint tenants in fee simple *are limited to them *and their heirs*, or to them, *their heirs and assigns*,(*e*) although the heirs of one of them only will succeed to the inheritance, provided the joint tenancy be allowed to continue: thus, if lands be given to A., B. and C. *and their heirs*, A., B. and C. will together be regarded as one person; and, when they are all dead, but not before, the lands will descend to the heirs of the artificial person (so to speak) named in the gift. The [*111]

(*c*) Co. Litt. 20 b, 25 b; Bac. Abr. tit. Joint Tenants (G).
(*d*) Litt. s. 283.
(*e*) Bac. Abr. tit. Joint Tenants (A); Co. Litt. 184 a.

survivor of the three who together compose the tenant, will, after the decease of his companions, become entitled to the whole lands.(*f*) While they all lived each had the whole; when any die, the survivors or survivor can have no more.[1] The heir of the survivor is, therefore, the person who alone will be entitled to inherit, to the entire exclusion of the heirs of those who may have previously died.(*g*) A joint tenancy in fee simple is far more usual than a joint tenancy for life or in tail. Its principal use in practice is for the purpose of vesting estates in trustees,(*h*) who are invariably made joint tenants.[2] On the decease of one of them, the whole estate then vests at once in the survivors or survivor of them, without devolving on the heir at law of the deceased trustee, and without being affected by any disposition which he may have made by his will; for joint tenants are incapable of devising their respective shares by will;(*i*) they are not regarded as having any separate interests, except as between or amongst themselves, whilst two or more of them are living. Trustees, therefore, whose only interest is that of the persons for whom they hold in trust, are properly made joint tenants; and so long as any one of them is living, so long will every other person be excluded from the legal possession of the lands to which the trust

(*f*) Litt. s. 280.
(*g*) Litt. ubi sup.
(*h*) See post, the chapter on Uses and Trusts.
(*i*) Litt. s. 287; Perk. s. 500.

[1] As a consequence of the *jus accrescendi*, all charges made by a joint tenant determine by his death, and do not affect the survivor: Litt. § 286; except in the case of a lease to a stranger by a joint tenant in fee: Co. Litt. 185 a; that being an immediate disposition of the land. Litt. § 289.

[2] In some printed forms of conveyances the estate is conveyed to the trustees, "and the survivor of them and the heirs and assigns of such survivor;" but it is more prudent to convey simply to the trustees, "their heirs and assigns," for, in Vick *v.* Edwards, 3 P. Wms. 372, Lord Talbot considered that the former phrase created a joint tenancy for life, with a contingent remainder to the survivor, the fee resulting to the grantor, or heir at law in case of a devise, until the happening of the contingency.

In case the contingent remainder were barred by a fine levied by the trustees in favor of a purchaser, the title would still be open to objection: 1 Preston's Conveyancing, 301; as their fine might be supposed to work a forfeiture of their own estate, and a consequent destruction of the contingent remainder to the survivor, and gave to the heir, therefore, an immediate right of entry: Butler's Note to Co. Litt. 191, a; and it consequently became the practice of conveyancers to make the heir at law a party to the conveyance, though Mr. Fearne considered that wherever there was a joint trust to sell, the nature of the trust afforded strong ground for construing the fee to pass to the trustees absolutely. Fearne's Cont. Rem. 357. The Pennsylvania statute abolishing survivorship in joint tenancy contains an express reservation as to trust estates.

extends. But on the *decease of the surviving trustee, the lands will devolve on the devisee under his will, or on his heir at law,[1] who will remain trustee till the lands are conveyed to some other trustees duly appointed. [*112]

As joint tenants together compose but one owner, it follows, as we have already observed, that the estate of each must arise at the same time;(*k*) so that if A. and B. are to be joint tenants of lands, A. cannot take his share first, and then B. come in after him. To this rule, however, an exception has been made in favor of conveyances taking effect by virtue of the Statute of Uses, to be hereafter explained; for it has been held that joint tenants under this statute may take their shares at different times;(*l*) and the exception appears also to extend to estates created by will.(*m*) A further consequence of the unity of joint tenants is seen in the fact, that if one of them should wish to dispose of his interest in favor of any of his companions, he may not make use of any mode of disposition operating merely as a conveyance of lands from one stranger to another. The legal possession or seisin of the whole of the lands belongs to each one of the joint tenants of an estate of freehold; no delivery can, therefore, be made to him of that which he already has. The proper form of assurance between joint tenants is, accordingly, a release by deed,(*n*) and this release operates rather as an extinguishment of right than as a conveyance; for the whole estate is already supposed to be vested in each joint *tenant, as well as his own proportion. And in the Norman French, with which our law abounds, two persons holding land in joint tenancy are said to be seised *per mie et per tout.*(*o*)[2] [*113]

(*k*) Co. Litt. 188 a; 2 Black. Com. 181.

(*l*) 13 Rep. 56; Pollexf. 373; Bac. Abr. tit. Joint Tenants (D); Gilb. Uses and Trusts, 71 (135, n. 10, 3d edit.)

(*m*) 2 Jarman on Wills, 161; Oates d. Hatterley v. Jackson, 2 Strange, 1172; Fearne Cont. Rem. 313; Bridge v. Yates, 12 Sim. 645.

(*n*) Co. Litt. 169 a; Bac. Abr. tit. Joint Tenants (1) 3, 2; 2 Prest. Abst. 61. But a grant would operate as a release. Chester v. Willan, 2 Wms. Saund. 96 a.

(*o*) Litt. s. 288.

[1] Notwithstanding the statutory law of descents in Pennsylvania, a trust still descends to the heir at common law of the trustee. Jenks's Lessee *v.* Backhouse, 1 Binney, 91; Baird's Appeal, 3 Watts & Serg. 459.

[2] The real distinction is, joint tenants have the whole for the purpose of tenure and survivorship, while, for the purpose of immediate alienation, each has only a particular part. 1 Preston on Estates, 136.

The incidents of a joint tenancy, above referred to, last only so long as the joint tenancy exists. It is in the power of any one of the joint tenants to *sever* the tenancy; for each joint tenant possesses an absolute power to dispose, in his lifetime, of his own share of the lands, by which means he destroys the joint tenancy.(*p*)[1] Thus, if there be three joint tenants of lands in fee simple, any one of them may, by any of the usual modes of alienation, dispose during his lifetime, though not by will, of an equal undivided third part of the whole inheritance. But should he die without having made such disposition, each one of the remaining two will have a similar right in his lifetime to dispose of an undivided moiety of the whole. From the moment of severance, the unity of interest and title is destroyed, and nothing is left but the unity of possession; the share which has been disposed of is at once discharged from the rights and incidents of joint tenancy, and becomes the subject of a tenancy in common. Thus, if there be three joint tenants, and any one of them should exercise his power of disposition in favor of a stranger, such stranger will then hold one undivided third part of the lands, as tenant in common with the remaining two.

Tenants in common are such as have a unity of possession, but a distinct and several title to their shares.(*q*) The shares in which tenants in common hold, are by no means necessarily equal. Thus, one tenant in common may be entitled to one-third, or one-fifth, or [*114] any *other proportion of the profits of the land, and the other tenant or tenants in common, to the residue. So, one tenant in common may have but a life or other limited interest in his share, another may be seised in fee of his, and the owners of another undivided share may be joint tenants as between themselves, whilst as to the others they are tenants in common. Between a joint tenancy and tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate.

When the rights of parties are distinct, that is, for instance, when

(*p*) Co Litt. 186 a.

(*q*) Litt. s. 292; 2 Black. Com. 191.

[1] But they have not any devisable interest, and a devise by one joint tenant, while the joint tenancy is in force, will be void, Litt. § 287, although he survive his companion. Swift *v.* Roberts, 3 Burrow, 1488.

they are not all trustees for one and the same purpose, both a joint tenancy and a tenancy in common are inconvenient methods for the enjoyment of property. Of the two, a tenancy in common is no doubt preferable; inasmuch as a certain possession of a given share, is preferable to a similar chance of getting or losing the whole, according as the tenant may or may not survive his companions. But the enjoyment of lands in *severalty*(*r*) is far more beneficial than either of the above modes. Accordingly it is in the power of any joint tenant or tenant in common to compel his companions to effect a *partition* between themselves, according to the value of their shares. This partition was formerly enforced by a writ of partition, granted by virtue of statutes passed in the reign of Henry VIII.(*s*) Before this reign, as joint tenants and tenants in common always become such by their own act and agreement, they were without any remedy, unless they all agreed to the partition; whereas we have seen(*t*) that coparceners, who become entitled by act of law, could always compel partition. In modern times, the Court *of Chancery has been found to be the most convenient instrument for compelling the [*115] partition of estates;(*u*) and by a recent statute,(*x*) the old writ of partition, which had already become obsolete, was abolished. Whether the partition be effected through the agency of the Court of Chancery, or by the mere private agreement of the parties, mutual conveyances of their respective undivided shares must be made, in order to carry the partition into complete effect.(*y*) With respect to joint tenants, these conveyances ought, as we have seen, to be in the form of releases; but tenants in common, having separate titles, must make mutual conveyances, as between strangers; and by a recent statute it is provided, that a partition shall be void at law, unless made by deed.(*z*) If any of the parties entitled should be infants under age, and consequently unable to execute a conveyance, the Court of Chancery has now power to carry out its own decree for a partition by making an order, which will vest the shares for the infants in such persons as the court shall direct.(*a*)[1]

(*r*) Ante, p. 81. (*s*) 31 Hen. VIII, c. 1; 32 Hen. VIII, c. 32.
(*t*) Ante, p. 81. (*u*) See Manners v. Charlesworth, 1 Mylne & Keen, 330.
(*x*) Stat. 3 & 4 Will. IV, c. 27, s. 36.
(*y*) Attorney-General v. Hamilton, 1 Madd. 214.
(*z*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.
(*a*) Stat. 13 & 14 Vict. c. 60, ss. 7, 30.

[1] See supra, note to page 81.

[*116]

*CHAPTER VII.

OF A FEOFFMENT.

HAVING now considered the most usual freehold estates which are holden in lands, and the varieties of holding arising from joint tenancies and tenancies in common, we proceed to the means to be employed for the transfer of these estates from one person to another. And here we must premise that, by recent enactments,(*a*) the conveyance of estates has been rendered, for the future, a matter independent of that historical learning which was formerly necessary. But, as the means formerly necessary for the conveyance of freeholds depend on principles, which still continue to exert their influence throughout the whole system of real property law, these means of conveyance and their principles must yet continue objects of the early attention of every student: of these means the most ancient is a *feoffment with livery of seisin*,(*b*) which accordingly forms the subject of our present chapter.

The feudal doctrine explained in the fifth chapter, that all estates in land are holden of some lord, necessarily implies that all lands must always have some feudal holder or tenant. This feudal tenant is the freeholder, or holder of the freehold; he has the feudal possession, called the *seisin*,(*c*)[1] and so long as he is *seised*, nobody else can be. The freehold is said to be *in* him, and till it is taken out of him and given to some other, the land itself is regarded as in his custody or [*117] possession. Now *this legal possession of lands—this seisin of the freehold—is a matter of great importance, and much formerly depended upon its proper transfer from one person to another;[2] thus, we have seen that, before the recent act for the

(*a*) Stat. 8 & 9 Vict. c. 106, repealing stat. 7 & 8 Vict. c. 76.

(*b*) 2 Black. Com. 310.

(*c*) Co. Litt. 153 a; Watkins on Descents, 108 (113, 4th ed.)

[1] Which denoted the completion of that investiture by which the tenant was admitted into the tenure.

[2] The delivery of this possession—the "livery of seisin"—was the essential part of a feudal transfer, and the deed which in later times accompanied it, was the mere authentication of the transaction. Without this delivery, no estate of freehold could be constituted or pass, with the single exception of the case of a fine, which was a judicial acknowledgment, in a feigned action, by the person in possession, that the right was in another. The fine, however, always implied a prior feoffment.

amendment of the law of inheritance, seisin must have been acquired by every heir, before he could himself become the stock of descent.(*d*) The transfer or delivery of the seisin, though it accompanies the transfer of the estate of the holder of the seisin, is yet not the same thing as the transfer of his estate. For a tenant merely for life is as much a feudal holder, and consequently as much in possession, or seised, of the freehold, as a tenant in fee simple can be. If, therefore, a person seised of an estate in fee simple were to grant a lease to another for his life, the lessee must necessarily have the whole seisin given up to him, although he would not acquire the whole estate of his lessor; for an estate for life is manifestly a less estate than an estate in fee simple. In ancient times, however, possession was the great point, and, until recently,(*e*) the conveyance of an estate of freehold was of quite a distinct character from such assurances as were made use of, when it was not intended to affect the freehold or feudal possession. For instance, we have seen that a tenant for a term of years is regarded in law as having merely a chattel interest;(*f*) he has not the feudal possession or freehold in himself, but his possession, like that of a bailiff or servant, is the possession of his landlord. The consequence is, that any expressions in a deed, from which an intention can be gathered to grant the occupation of land for a certain time, have always been sufficient for a lease for a term of years however long;(*g*) but a lease for a single life, which transfers the freehold, has hitherto required technical language to give it effect.

*A feoffment with livery of seisin was then nothing more than a gift of an estate in the land, with *livery*, that is delivery of the *seisin* or feudal possession;(*h*) this livery of seisin was said to be of two kinds, a *livery in deed*, and a *livery in law*. Livery in deed was performed "by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of land, and with these or the like words, the feoffor and feoffee, both holding the deed of feoffment and the ring of the doore, haspe, branch, twigge, or turfe, and the feoffor saying 'Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the forme and effect of this deed,' or by words without any ceremony or act, as, the feoffor being at the house [*118]

(*d*) Ante, pp. 78, 79.
(*e*) Stat. 8 & 9 Vict. c. 106, repealing stat. 7 & 8 Vict. c. 76.
(*f*) Ante, p. 8. (*g*) Bac. Abr. tit. Leases and Terms for Years (K).
(*h*) Co. Litt. 271 b, n. (i).

doore, or within the house, 'Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed.' "(*i*) The feoffee then, if it were a house, entered alone, shut the door, then opened it, and let in the others.(*k*) In performing this ceremony, it was requisite that all persons who had any estate or possession in the house or land, of which seisin was delivered, should either join in or consent to making the livery, or be absent from the premises; for, the object was to give the entire and undisputed possession to the feoffee.(*l*) If the feoffment was made of different lands, lying scattered in one and the same county, livery of seisin of any parcel, in the name of the rest, was sufficient for all, if all were in the complete possession of the same feoffor; but, if they were in several counties, there must have been as many liveries as there were counties.(*m*) For, if the title to these lands should come [*119] *to be disputed, there must have been as many trials as there were counties; and the jury of one county are not considered judges of the notoriety of a fact in another.(*n*) Livery in *law* was not made *on* the land, but *in sight of it* only, the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." If the feoffee entered accordingly in the lifetime of the feoffor, this was a good feoffment; but, if either the feoffor or feoffee died before entry, the livery was void.(*o*) This livery was good, although the land lay in another county;(*p*) but it required always to be made between the parties themselves, and could not be deputed to an attorney, as might livery in deed.(*q*) The word *give* was the apt and technical term to be employed in a feoffment;(*r*) its use arose in those times when gifts from feudal lords to their tenants were the conveyances principally employed.

In addition to the livery of seisin, it was also necessary that the estate, which the feoffee was to take, should be marked out, whether for his own life or for that of another person, or in tail, or in fee simple, or otherwise. This marking out of the estate is as necessary

(*i*) Co. Litt. 48 a.
(*k*) 2 Black. Com. 315; 2 Sand. Uses, 4.
(*l*) Shep. Touch. 213; Doe d. Reed v. Taylor, 5 Barn. & Adol. 575.
(*m*) Litt. s. 61. But a manor, the site of which extended into two counties, appears to have been an exception to this rule; for it was but as one thing for the purpose of a feoffment. Perkins, sect. 227. See, however, Hale's MS. Co. Litt. 50 a, n. (2).
(*n*) Co. Litt. 50 a; 2 Black. Com. 315.
(*o*) Co. Litt. 48 b; 2 Black. Com. 316.
(*p*) Co. Litt. 48 b.
(*q*) Co. Litt. 52 b.
(*r*) Co. Litt. 9 a; 2 Black. Com. 310.

now as formerly, and it is called *limiting* the estate. If the feudal holding is transferred, the estate must necessarily be an estate of freehold; it cannot be an estate at will, or for a fixed term of years merely. Thus, the land may be given to the feoffee, to hold to himself simply; and the estate so limited is, as we have seen,(*s*) but an estate for his life,(*t*) and the feoffee is then generally called a *lessee* *for his life; though, when a mere life interest is intended to be limited, the land is usually expressly given to hold to the [*120] lessee "during the term of his natural life."(*u*) If the land be given to the feoffee *and the heirs of his body*, he has an estate tail, and is called a *donee* in tail.(*x*) And in order to confer an estate tail, it is necessary (except in a will, where greater indulgence is allowed) that words of *procreation*, such as heirs *of his body*, should be made use of; for a gift of lands to a man and his *heirs male* is an estate in fee simple, and not in fee tail, there being no words of procreation to ascertain the body out of which they shall issue;(*y*) and an estate in lands descendible to collateral male heirs only, in entire exclusion of females, is unknown to the English law.(*z*) If the land be given to hold to the feoffee *and his heirs*, he has an estate in fee simple, the largest estate which the law allows. In every conveyance (except by will) of an estate of inheritance, whether in fee tail or fee simple, the word *heirs* is necessary to be used as a word of limitation, to mark out the estate. Thus, if a grant be made to a man *and his seed*, or to a man *and his offspring*, or to a man *and the issue of his body*, all these are insufficient to confer an estate tail, and only give an estate for life, for want of the word *heirs*;(*a*) so, if a man purchase lands, to have and to hold *to him forever*, or to him *and his assigns forever*, he will have but an estate for his life, and not a fee simple.(*b*)[1] Before alienation was permitted, the heirs of the tenant were the only

(*s*) Ante, p. 18. (*t*) Litt. s. 1; Co. Litt. 42 a.

(*u*) Ante, p. 22. (*x*) Litt. s. 57; ante, p. 30.

(*y*) Litt. s. 31; Co. Litt. 27 a; 2 Black. Com. 115; Doe d. Brune v. Martyn, 8 Barn. & Cress. 497.

(*z*) But a grant of arms by the crown to a man and his heirs male, without saying "of the body," is good, and they will descend to his heirs male, lineal or collateral. Co. Litt. 27 a.

(*a*) Co. Litt. 20 b; 2 Black. Com. 115. (*b*) Litt. s. 1; Co. Litt. 20 a.

[1] Thus, in Pennsylvania, a conveyance to three Indian Chiefs "and their generation, to endure as long as the waters of the Delaware shall run," was held to pass but a life estate. In some States, however, it is provided by statute that every deed shall pass to the grantee all the grantor's estate in the premises, unless an intent to create a life estate appear. See 2 Greenl. Cruise, 354.

[*121] persons, besides himself, who *could enjoy the estate; and if they were not mentioned, the tenant could not hold longer than for his own life;(c) hence the necessity of the word *heirs* to create an estate in fee tail or fee simple. At the present day, the free transfer of estates in fee simple is universally allowed; but this liberty, as we have seen,(d) is now given by the law, and not by the particular words by which an estate may happen to be created. So that, though conveyances of estates in fee simple are usually made to hold to the purchaser, *his heirs and assigns forever*, yet the word *heirs* alone gives him a fee simple, of which the law enables him to dispose; and the remaining words, *and assigns forever*, have at the present day no conveyancing virtue at all; but are merely declaratory of that power of alienation, which the purchaser would possess without them.

The formal delivery of the seisin or feudal possession, which always took place in a feoffment, rendered it, till recently, an assurance of great power; so that, if a person should have made a feoffment to another of an estate in fee simple, or of any other estate, not warranted by his own interest in the lands, such a feoffment would have operated *by wrong*, as it is said, and would have conferred on the feoffee the whole estate limited by the feoffment, along with the seisin actually delivered. Thus if a tenant for his own life should have made a feoffment of the lands for an estate in fee simple, the feoffee would not merely have acquired an estate for the life of the feoffor, but would have become seised of an estate in fee simple by wrong; accordingly, such a feoffment by a tenant for life was regarded, as we have seen,(e) as a cause of forfeiture to the person entitled in reversion; such a feoffment being in fact a *conveyance of his re-
[*122] version, without his consent, to another person. In the same manner, feoffments made by idiots and lunatics appear to have been only voidable and not absolutely void;(f) whereas their conveyances made by any other means are void *in toto;* for, if the seisin was actually delivered to a person, though by a lunatic or idiot, the accompanying estate must necessarily have passed to him, until he should have been deprived of it. Again, the formal delivery of the seisin in a feoffment, appears to be the ground of the validity of such a conveyance of gavelkind lands, by an infant of the age of fifteen

(c) Ante, pp. 17, 18.
(d) Ante, p. 37.
(e) Ante, p. 25.
(f) Ante, p. 59.

years ;(*g*) although a conveyance of the same lands by the infant, made by any other means, would be voidable by him, on attaining his majority.(*h*) By the recent act to amend the law of real property,(*i*) it is, however, now provided, that a feoffment shall not have any tortious operation ; but a feoffment made under a custom by an infant is expressly recognized.(*k*)

Down to the time of King Henry VIII, nothing more was requisite to a valid feoffment than has been already mentioned. In the reign of this king, however, an act of Parliament of great importance was passed, known by the name of the Statute of Uses.(*l*) And, since this statute, it has now become further requisite to a feoffment, either that there should be a *consideration* for the gift, or that it should be expressed to be made, not simply *unto*, but *unto and to the use of* the feoffee. The manner in which this result has been brought about by the Statute of Uses will be explained in the next chapter.

If proper words of gift were used in a feoffment, and witnesses were present who could afterwards prove them, *it mattered not, in ancient times, whether or not they were put into writing ;(*m*) though writing, from its greater certainty, was generally employed.(*n*) There was this difference, however, between writing in those days, and writing in our own times. In our own times, almost everybody can write ; in those days very few of the landed gentry of the country were so learned as to be able to sign their own names.(*o*) Accordingly, on every important occasion, when a written document was required, instead of signing their names, they affixed their seals; and this writing, thus sealed, was delivered to the party for whose benefit it was intended. Writing was not then employed for every trivial purpose, but was a matter of some solemnity ; accordingly, it became a rule of law, that every writing under seal imported a consideration :(*p*)— that is, that a step so solemn could not have been taken without some sufficient ground. This custom of sealing re- [*123]

(*g*) Ante, p. 105.
(*h*) Ante, p. 59.
(*i*) Stat. 8 & 9 Vict. c. 196, s. 4.
(*k*) Sect. 3.
(*l*) Stat. 27 Hen. VIII, c. 10.
(*m*) Bracton, lib. 2, fol. 11 b, par. 3, 33 b, par. 1 ; Co. Litt. 48 b, 121 b, 143 a, 271 b, n. (1).
(*n*) Madox's Form. Angl. Dissert. p. 1.
(*o*) 3 Hallam's Middle Ages, 329; 2 Black. Com. 305, 306.
(*p*) Plowden, 308; 3 Burrows, 1639; 1 Fonblanque on Equity, 342; 2 Fonb. Eq. 26.

mained after the occasion for it had passed away, and writing had been generally introduced; so that, in all legal transactions, a seal was affixed to the written document, and the writing so sealed was, when delivered, called a *deed*, in Latin *factum*, a thing done; and, for a long time after writing had come into common use, a written instrument, if unsealed, had in law no superiority over mere words;(*q*) nothing was in fact called a *writing*, but a document under seal.(*r*) And at the present day a *deed*, or a writing sealed and delivered,(*s*) still imports a consideration, and maintains in many respects a superiority in law over a mere unsealed writing. *In modern practice the kind of seal made use of is not regarded, and the mere placing of the finger on a seal already made, is held to be equivalent to sealing;(*t*) and the words "I deliver this as my act and deed," which are spoken at the same time, are held to be equivalent to delivery, even if the party keep the deed himself.(*u*)[1] The sealing and delivery of a deed are termed the *execution* of it. Occasionally a deed is delivered to a third person not a party to it, to be delivered up to the other party or parties, upon the performance of a condition, as the payment of money or the like. It is then said to be delivered as an *escrow* or mere writing (*scriptum*); for it is not a perfect deed until delivered up on the performance of the condition; but when so delivered up, it operates from the time of its execution.(*v*)

[*124]

Every deed, if not charged with any *ad valorem* or other stamp duty, nor expressly exempted from all stamp duty, is liable to a stamp duty of 1*l.* 15*s.*; and if the deed, together with any schedule, receipt, or other matter put or indorsed thereon or annexed thereto, contain

(*q*) See Litt. ss. 250, 252; Co. Litt. 9 a, 49 a, 121 b, 143 a, 169 a; Rann v. Hughes, 7 T. Rep. 350, n.

(*r*) See Litt. ss. 365, 366, 367; Shep. Touch. by Preston, 320, 321; Sugden's Ven. & Pur. 126.

(*s*) Co. Litt. 171 b; Shep. Touch. 50. (*t*) Shep. Touch. 57.

(*u*) Doe d. Garnons v. Knight, 5 Barn. & Cress. 671; Grugeon v. Gerrard, 4 You. & Coll. 119, 130; Exton v. Scott, 6 Sim. 31; Fletcher v. Fletcher, 4 Hare, 67. See also Hall v. Bainbridge, 12 Q. B. 699.

(*v*) See Shep. Touch. 58, 59; Bowker v. Burdekin, 11 Mees. & Wels. 128, 147; Nash v. Flyn, 1 Jones & Lat. 162; Graham v. Graham, 1 Ves. jun. 275.

[1] This is perhaps a little broadly stated. If the deed *has ever been* once delivered, the retention in the party with its possession is an immaterial fact; but upon the question whether there *has* ever been a delivery, the possession of the instrument may have a material bearing. The law as to this is attempted to be explained in Rawle's edition of Smith on Contracts, p. 60, n.

2160 words, or 30 common law folios of 72 words each, or upwards, it is liable to a further progressive duty of 10*s.* for every *entire* quantity of 1080 words, or 15 folios, over and above the first 1080 words. But if the deed was signed or executed by any party thereto, or bears date, before or upon the 10th of October, 1850, when the act to amend the stamp duties took effect, then the progressive duty is 1*l.* 5*s.* for every entire quantity of 1080 words beyond the first 1080.(*w*)

*Deeds are divided into two kinds, *Deeds poll* and *Indentures*, a deed poll being made by one party only, and an indenture being made between two or more parties. Formerly, when deeds were more concise than at present, it was usual, where a deed was made between two parties, to write two copies upon the same piece of parchment, with some word or letters of the alphabet written between them, through which the parchment was cut, often in an indented line, so as to leave half the words on one part, and half on the other, thus serving the purpose of a tally. But at length indenting only came into use ;(*x*) and now every deed, to which there is more than one party, is cut with an indented or waving line at the top, and is called an *indenture ;*(*y*) and, until recently, when a deed assumed the form of an indenture, every person who took any immediate benefit under it, was always named as one of the parties. But now by the act to amend the law of real property it is enacted that, under an indenture, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture; also that a deed, purporting to be an indenture, shall have the effect of an indenture, although not actually indented.(*z*) A deed made by only one party is polled, or shaved even at the top, and is therefore called a *deed poll ;* and, under such a deed, any person may accept a grant, though of course none but the party can make one.[1] All deeds must be written either on paper or parchment.(*a*) [*125]

(*w*) Stats. 55 Geo. III, c. 184; 13 & 14 Vict. c. 97.

(*x*) 2 Black. Com. 295. (*y*) Co. Litt. 143 b.

(*z*) Stat. 8 & 9 Vict. c. 106, s. 5, repealing stat. 7 & 8 Vict. c. 76, s. 11, to the same effect.

(*a*) Shep. Touch. 54; 2 Black. Com. 297.

[1] It had generally been considered by the profession, that covenant would lie against a grantee by deed poll, by reason of his acceptance of the estate; but Mr. Baron Platt, in his treatise on Covenants (p. 10–18), after what he considered to be a

So manifest are the advantages of putting down in writing matters of any permanent importance, that, as commerce and civilization advanced, writings not under *seal must necessarily have [*126] come into frequent use; but, until the reign of King Charles II, the use of writing remained perfectly optional with the parties, in every case which did not require a deed under seal. In this reign, however, an act of Parliament was passed,(*b*) requiring the use of writing in many transactions, which previously might have taken place by mere word of mouth. This act is entitled "An Act for prevention of Frauds and Perjuries," and is now commonly called the Statute of Frauds. It enacts,(*c*) amongst other things, that all leases, estates, interests of freehold, or terms of years, or any uncertain interest, in messuages, manors, lands, tenements, or hereditaments, made or created by livery of 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 at will only, and no greater force and effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding.[1] The only exception to this sweeping enactment is in favor of leases not exceeding three years from the making, and on which a rent of two-thirds at least of the full improved value is reserved to the landlord.(*d*) In consequence of this act, it became necessary that a feoffment should be put into writing, and signed by the party making the same, or his agent lawfully authorized by writing; but a deed

(*b*) Stat. 29 Car. II, c. 3. (*c*) Sect. 1. (*d*) Sect. 2.

careful examination of the Year Books, arrived at a different conclusion, and the law was so held in accordance with his views, in Pennsylvania, in Maule v. Weaver, 7 Barr, 329. A contrary decision was, however, pronounced in New Jersey, after an able argument, in Finley v. Simpson, 2 Zabriskie, 331. In Pennsylvania, the statute of 25th April, 1850 (Purdon's Digest, 412), gives to the owner of a ground-rent (as to which see supra, p. 101) the remedy by action of covenant, whether the premises out of which the rent issues be held by deed poll or otherwise.

[1] It is believed that this section of the Statute of Frauds has been either adopted or re-enacted in all the United States. In Pennsylvania and North Carolina it has, however, been held that the section in question does not apply in those States to trust estates, but that parol evidence is admissible to show that a conveyance absolute on its face, is, in fact, a trust for another. Murphy v. Hubert, 7 Barr, 420; Wetherill v. Hamilton, 3 Harris, 198; Blackwell v. Ovenby, 6 Iredell's Eq. R. 38. In the former of these States this has, in the present year, been remedied by legislation, Act of 22d April, 1856. Of course, trusts arising from implication or construction of law are exempted, as they are by the Statute of Frauds; see infra, p. 139.

or writing *under seal* was not essential,(*e*) if livery of seisin were duly made. But now by the act to amend the law of real property,(*f*) it is provided that a feoffment, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed.(*g*) Where a deed is made use of, it is a matter of much doubt, whether signing, as well as sealing, is absolutely necessary; *previously to the Statute of Frauds, signing was not at all essential to a deed, provided it were only sealed and delivered;(*h*) and the Statute of Frauds seems to be aimed at transactions by parol only, and not to be intended to affect deeds. Of this opinion is Mr. Preston.(*i*) Sir William Blackstone, on the other hand, thinks signing now to be as necessary as sealing.(*k*) And the Court of Queen's Bench has just, if possible, added to the doubt.(*l*) However this may be, it would certainly be most unwise to raise the question by leaving any deed sealed and delivered, but not signed. [*127]

The doubt above-mentioned is just of a class with many others, with which the student must expect to meet. Lying just by the side of the common highway of legal knowledge, it yet remains uncertain ground. The abundance of principles, and the variety of illustrations to be found in legal text-books, are apt to mislead the student into the supposition, that he has obtained a map of the whole country which lies before him. But further research will inform him that this opinion is erroneous, and that, though the ordinary paths are well beaten by author after author again going over the same ground, yet much that lies to the right hand and to the left still continues unexplored, or known only as doubtful and dangerous. The manner in which our laws are formed, is the chief reason for this prevalence of uncertainty. Parliament, the great framer of the laws, seldom undertakes the task of interpreting them, a task indeed which would itself be less onerous, were more care and pains bestowed on the making of them. But as it is, a doubt is left to stand *for years, till the cause of some unlucky suitor raises the point before one of the Courts: till this happens, the judges themselves have no authority to [*128]

(*e*) 3 Prest. Abst. 110. (*f*) Stat. 8 & 9 Vict. c. 106. (*g*) Sect. 3.
(*h*) Shep. Touch. 56. (*i*) Ibid. n. (24), Preston's edit.
(*k*) 2 Black. Com. 306.
(*l*) Cooch v. Goodman, 2 Queen's Bench Rep. 580, 597. See, however, Aveline v. Whisson, 4 Man. & Gran. 801, where the point was given up without argument, and the decision, which seems to be against the necessity of a signature, can therefore scarcely be relied on. [See Smith on Contracts, p. 5, note.]

remove it; and thus it remains a pest to society, till caught in the act of raising a lawsuit. No wonder then, when judges can do so little, that writers should avoid all doubtful points. Cases, which have been decided, are continually cited to illustrate the principles on which the decisions have proceeded; but in the absence of decision, a lawyer becomes timid, and seldom ventures to draw an inference, lest he should be charged with introducing a doubt.

To return: a feoffment, with livery of seisin, though once the usual method of conveyance, has long since ceased to be generally employed. For many years past, another method of conveyance has been resorted to, which could be made use of at any distance from the property; but as this mode derived its effect from the Statute of Uses,(*m*) it will be necessary to explain that statute before proceeding further.

[*129] *CHAPTER VIII.

OF USES AND TRUSTS.

PREVIOUSLY to the reign of Henry VIII, when the Statute of Uses(*a*) was passed, a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee simple in the lands. The courts of law did not deem any consideration necessary; but if a man voluntarily gave lands to another, and put him in possession of them, they held the gift to be complete and irrevocable; just as a gift of money or goods, made without any consideration, is, and has ever been, quite beyond the power of the giver to retract it, if accompanied by delivery of possession.(*b*) In law, therefore, the person to whom a gift of lands was made, and seisin delivered, was considered thenceforth to be the true owner of the lands. In equity, however, this was not always the case; for the Court of Chancery, administering equity, held, that the mere delivery of the possession or seisin by one person to another, was not at all conclusive of the right of the feoffee to enjoy the lands, of which he was enfeoffed. Equity was unable to take from him the

(*m*) 27 Hen. VIII, c. 10. (*a*) Ibid. (*b*) 2 Black. Com. 441.

title which he possessed, and could always assert in the courts of law; but equity could and did compel him to make use of that legal title, for the benefit of any other person, who might have a more righteous claim to the beneficial enjoyment. Thus, if a feoffment was made of lands to one person, for the benefit or to the use of another, such person was bound in conscience to hold the lands, to the use or for the benefit of the other accordingly; so that, while the title of the person enfeoffed *was good in a court of law, yet he derived no bene- [*130] fit from the gift, for the Court of Chancery obliged him to hold entirely for the use of the other, for whose benefit the gift was made. This device was introduced into England about the close of the reign of Edward III, by the foreign ecclesiastics, who contrived by means of it to evade the statutes of mortmain, by which lands were prohibited from being given for religious purposes; for they obtained grants to persons *to the use of* the religious houses; which grants the clerical chancellors of those days held to be binding.(*c*) In process of time, such feoffments to one person to the use of another became very common; for the Court of Chancery allowed the *use* of lands to be disposed of in a variety of ways, amongst others by will,(*d*) in which a disposition could not then be made of the lands themselves.[1] Sometimes persons made feoffments of lands to others to the use of themselves the feoffors; and, when a person made a feoffment to a stranger, without any consideration being given, and without any declaration being made, for whose use the feoffment should be, it was considered in Chancery that it must have been meant by the feoffor to be for his own use.(*e*) So that, though the feoffee became *in law* absolutely seised of the lands, yet *in equity* he was held to be seised of them to the use of the feoffor. The Court of Chancery paid no regard to that implied consideration, which the law affixed to every deed on account of its solemnity, but looked only to what actually passed

(*c*) 2 Black. Com. 328; 1 Sand. Uses, 16 (15, 5th ed.); 2 Fonblanque on Equity, 3.

(*d*) Perkins, ss. 496, 528, 537; Wright's Tenures, 174; 1 Sand. Uses, 65, 68, 69 (64, 67, 68, 5th ed.); 2 Black. Com. 329; ante, p. 56.

(*e*) Perkins, s. 533; 1 Sand. Uses, 61, 5th ed.; Co. Litt. 271 b.

[1] Application to the Court of Chancery for the purpose of enforcing these uses was, however, for a long time limited to the clergy; and it was not until about the reign of Henry V, that bills were filed for this purpose by the laity. Down to the time of Henry VI, moreover, the cestui que use could only proceed against the feoffee himself, and not, it would seem, against his heirs. Afterwards, the remedy was extended to heirs, to alienees with notice of the trust, or without valuable consideration, in which case notice was implied. See 1 Spence's Eq. Jurid. 446, et seq.

between the parties;[1] so that a feoffment accompanied by a deed, if no consideration actually passed, was held to be made *to the use* of the feoffor, just as a feoffment by mere parol or word of [*131] *mouth. If, however, there was any, even the smallest, consideration given by the feoffee,(*f*) such as five shillings, the presumption that the feoffment was for the use of the feoffor was rebutted, and the feoffee was held entitled to his own use.

Transactions of this kind became in time so frequent that most of the lands in the kingdom were conveyed to uses, "to the utter subversion of the ancient common laws of this realm."(*g*) The attention of the legislature was from time to time directed to the public inconvenience to which these uses gave rise; and after several attempts to amend them,(*h*) an act of Parliament was at last passed for their abolition. This act is no other than the Statute of Uses,(*i*) a statute which still remains in force, and exerts at the present day a most important influence over the conveyance of real property. By this statute it was enacted, that where any person or persons shall stand seised of any lands, or other hereditaments, to the use, confidence, or trust of any other person or persons, the persons that *have* any such use, confidence, or trust (by which was meant the persons beneficially entitled), shall be deemed in lawful seisin and possession of the same lands and hereditaments, for such estates as they have in the use, trust, or confidence. This statute was the means of effecting a complete revolution in the system of conveyancing. It is a curious instance of the power of an act of Parliament; it is in fact an enactment that what is given to A. shall, under certain circumstances, not be given to A. at all, but to somebody else. For, suppose a feoffment to be now made to A. and his heirs, and the seisin duly delivered to him; if the feoffment be expressed *to be made to him and his heirs, [*132] *to the use* of some other person, as B. and his heirs, A. (who would, before this statute, have had an estate in fee simple at law) now takes *no permanent estate*, but is made by the statute to be merely a kind of conduit pipe for conveying the estate to B. For B. (who before would have had only a use or trust in equity) shall now, *having the use*, be deemed in lawful seisin and possession; in other words, B.

(*f*) 1 Sand. Uses, 62 (61, 5th ed.) (*g*) Stat. 27 Hen. VIII, c. 10, preamble.

(*h*) See particularly stat. 1 Rich. III, c. 1, enabling the *cestui que use*, or person beneficially entitled, to convey the possession without the concurrence of his trustee.

(*i*) 27 Hen. VIII, c. 10.

[1] See note to p. 13 of Rawle's edition of Smith on Contracts.

now takes, not only the beneficial interest, but also the estate in fee simple at law, which is wrested from A. by force of the statute. Again, suppose a feoffment to be now made simply *to A. and his heirs* without any consideration. We have seen that before the statute, the feoffor would in this case have been held in equity to have the use, for want of any consideration to pass it to the feoffee; now therefore the feoffor, having the use, shall be deemed in lawful seisin and possession; and consequently, by such a feoffment, although livery of seisin be duly made to A., yet no permanent estate will pass to him; for the moment he obtains the estate, he holds it to the use of the feoffor; and the same instant comes the statute, and gives to the feoffor, who has the use, the seisin and possession.(*k*) The feoffor, therefore, instantly gets back all that he gave; and the use is said to *result* to himself. If however the feoffment be made *unto and to the use* of A. and his heirs—as before the statute, A. would have been entitled for his own use, so now he shall be deemed in lawful seisin and possession, and an estate in fee simple will effectually pass to him accordingly. The propriety of inserting, in every feoffment, the words *to the use of*, as well as *to* the feoffee is therefore manifest. It appears also that an estate in fee simple may be effectually conveyed to a person, by making a feoffment to any other person and his heirs, to the use of, or upon confidence or trust for, such former person and his heirs. Thus, if a *feoffment be made to A. and his heirs, to the use of B. and his heirs, an estate in fee simple will now pass to B., as effectually as if the feoffment had been made directly unto and to the use of B. and his heirs in the first instance. The words *to the use of* are now almost universally employed for such a purpose; but "upon confidence," or "upon trust for," would answer as well, since all these expressions are mentioned in the statute. [*133]

The word *trust*, however, is never employed in modern conveyancing, when it is intended to vest an estate in fee simple in any person by force of the Statute of Uses. Such an intention is always carried into effect by the employment of the word *use*;[1] and the word *trust* is re-

(*k*) 1 Sand. Uses, 99, 100 (95, 5th ed.)

[1] A good illustration of the operation of the statute may be found in deeds of partition. These are sometimes made by conveyance of the whole undivided estate to a stranger, who then reconveys it, in ascertained shares, to the several parties respectively entitled thereto. A neater mode, and one now common in England, is to convey the estate to a stranger, and his heirs, "to the use of" the several parties as to their respective shares. Here the statute executes the use at once in those parties, who have thus by force of it the legal estate vested in them.

served to signify a holding by one person for the benefit of another, similar to that,(*l*) which, before the statute, was called a *use*. For, strange as it may appear, with the Statute of Uses remaining unrepealed, lands are still, as everybody knows, frequently vested in trustees, who have the seisin and possession in law, but yet have no beneficial interest, being liable to be brought to account for the rents and profits by means of the Court of Chancery. The Statute of Uses was evidently intended to abolish altogether the jurisdiction of the Court of Chancery over landed estates,(*m*) by giving actual possession at law to every person beneficially entitled in equity. But this object has not been accomplished; for the Court of Chancery soon regained in a curious manner its former ascendency, and has kept it to the present day. So that all that was ultimately effected by the Statute of Uses, was to import into the rules of law some of the then existing doctrines of the Courts of Equity,(*n*) and to add three words, *to the use*, to every conveyance.(*o*)

[*134] *The manner in which the Court of Chancery regained its ascendency was as follows. Soon after the passing of the Statute of Uses, a doctrine was laid down, that there could not be a use upon a use.(*p*) For instance, suppose a feoffment had been made to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs; the doctrine was, that the use to C. and his heirs, was a use upon a use, and was therefore not affected by the Statute of Uses, which could only *execute* or operate on, the use to B. and his heirs. So that B. and not C. became entitled, under such a feoffment, to an estate in fee simple in the lands comprised in the feoffment. This doctrine has much of the subtlety of the scholastic logic which was then prevalent. As Mr. Watkins says,(*q*) it must have surprised every one, who was not sufficiently learned to have lost his common sense. It was however adopted by the courts, and is still law. Even if the first use be to the feoffee himself, no subsequent use will be *executed*, and the feoffee will take the fee simple; thus, under a feoffment unto and to the use of A. and his heirs, to use of C. and his heirs, C. takes no estate in law, for the use to him is a use upon a use; but the fee simple vests in A. to whom the use is first declared.(*r*) Here then was

(*l*) But not the same; 1 Sand. Uses, 266 (278, 5th ed.)
(*m*) Chudleigh's case, 1 Rep. 124, 125. (*n*) 2 Fonb. Eq. 17.
(*o*) See Hopkins v. Hopkins, 1 Atk. 591; 1 Sand. Uses, 265 (277, 5th ed.)
(*p*) 2 Black. Com. 335. (*q*) Principles of Conveyancing, Introduction.
(*r*) Doe d. Lloyd v. Passingham, 6 Barn. & Cress. 305.

at once an opportunity for the Court of Chancery to interfere. It was manifestly inequitable that C., the party to whom the use was last declared, should be deprived of the estate, which was intended solely for his benefit; the Court of Chancery, therefore, interposed on his behalf, and constrained the party, to whom the law had given the estate, to hold in *trust* for him, to whom the use was last declared. Thus arose the modern doctrine of uses and trusts. And hence it is, that if it is now wished to vest a freehold estate in one person as trustee for another, the conveyance is made unto the trustee, or *some other person (it is immaterial which), and his heirs, *to* [*135] *the use* of the trustee and his heirs, *in trust* for the party intended to be benefited (called *cestui que trust*) and his heirs. An estate in fee simple is thus vested in the trustee, by force of the Statute of Uses, and the entire beneficial interest is given over to the cestui que trust by the Court of Chancery. The estate in fee simple, which is vested in the trustee, is called the *legal estate*, being an estate, to which the trustee is entitled, only in the contemplation of a court of *law*, as distinguished from equity. The interest of the cestui que trust is called an *equitable estate*, being an estate, to which he is entitled only in the contemplation of the Court of Chancery, which administers *equity*. In the present instance, the equitable estate being limited to the cestui que trust and his heirs, he has an equitable estate in fee simple. He is the beneficial owner of the property. The trustee, by virtue of his legal estate, has the right and power to receive the rents and profits; but the cestui que trust is able, by virtue of his estate in equity, at any time to oblige his trustee to come to an account, and to hand over the whole of the proceeds.

We have now arrived at a very prevalent and important kind of interest in landed property, namely, an estate in equity merely, and not at law. The owner of such an estate has no title at all in any court of law, but must have recourse exclusively to the Court of Chancery,[1] where he will find himself considered as owner, according to the

[1] It is proper here to notice the peculiar doctrine which has prevailed in Pennsylvania as to this. Until a few years past, for practical purposes, no Court of Equity existed there. One was, indeed, established in 1720, but it can scarcely be said to have gone into operation; it soon fell into disrepute, and in 1736 was abolished. Equity had, however, as a branch of the common law of England, become a part of the law of the province; and the absence of a separate tribunal in which to enforce its principles, soon led to the practice of administering equity through the medium of common law forms. Thus, under a plea of payment, the debtor was allowed such a

equitable estate he may have. Chancery in modern times, though in principle the same as the ancient court which first gave effect to uses, is yet widely different in the application of many of its rules. Thus we have seen(*s*) that a consideration, however trifling, given by a feoffee, was sufficient to entitle him to the *use* of the lands of which he was enfeoffed. But the absence of such a consideration caused the use to remain with, *or more technically to result to, the [*136] feoffor, according to the rules of Chancery in ancient times. And this doctrine has now a practical bearing on the transfer of legal estates; the ancient doctrines of Chancery having, by the Statute of Uses, become the means of determining the owner of the legal estates, whenever USES are mentioned. But the modern Court of Chancery takes a wider scope, and will not withhold or grant its aid, according to the mere payment or non-payment of five shillings; thus, circumstances of fraud, mistake, or the like, may induce the Court of Chancery to require a grantee under a voluntary conveyance to hold merely as a trustee for the grantor; but the mere want of a valuable considera-

(*s*) Ante, p. 131.

---

defence as would discharge him in a Court of Equity, as want of consideration, fraud, mistake or accident, equitable set-off, and the like. A plaintiff might sue on a lost bond, stating in lieu of *profert* the cause which made it impossible, and was not driven to equity to compel a discharge from the debt. A surviving partner was allowed to sue at law the executors of his deceased partner. The specific performance of a contract of sale of real estate was enforced by an action of ejectment brought by the purchaser against his vendor. The specific performance of other contracts was enforced by a verdict for conditional damages, so large in amount that it was for the advantage of the debtor to yield to the equity of the plaintiff. The remedy by the writ of replevin was extended to every case in which chattels in the possession of one man were claimed by another. Strange as much of this may appear to the educated student, and great as has been the ridicule which it excited in the profession in sister States, the system worked very harmoniously for much more than a century, and has latterly attracted much attention from the profession in England, and led to the passage of a statute referred to at the close of this chapter.

In 1836, however, certain equity powers were conferred by the legislature upon some of the Courts of Pennsylvania, and since that time these powers have been from year to year greatly extended, and the number of courts to which they have been given increased, so that, for all practical purposes, there are few heads of equitable jurisdiction under which relief cannot now be obtained. This has not, however, altered the practice of the common law courts, and the jurisdiction is in many instances concurrent. For a very scholar-like sketch of the system which has been briefly alluded to, the student may profitably refer to a little "Essay on Equity in Pennsylvania," written in 1825 by the late Mr. Laussatt, then only a student at law.

tion would not now be considered by that court a sufficient cause for its interference.(*t*)[1]

In the construction and regulation of trusts, equity is said to follow the law, that is, the Court of Chancery generally adopts the rules of law applicable to legal estates;(*u*) thus, a trust for A. for his life, or for him and the heirs of his body, or for him and his heirs, will give him an equitable estate for life, in tail, or in fee simple. An equitable estate tail may also be *barred*, in the same manner as an estate tail at law, and cannot be disposed of by any other means.[2] But the

(*t*) 1 Sand. Uses, 334 (365, 5th ed.)

(*u*) 1 Sand. Uses, 269 (280, 5th ed.)

[1] "In fact," says Mr. Sanders, "if the mere want of a consideration would create a resulting trust, there could be no such thing as a voluntary conveyance, so as to vest a beneficial interest in the grantee. Circumstances of fraud, mistake, or the like, may convert a grantee under a voluntary conveyance into a trustee, but not the mere want of a valuable consideration."

[2] And the rule in Shelley's case applies equally to an equitable as to a legal estate. Garth v. Baldwin, 2 Ves. sen. 655; Jones v. Morgan, 1 Brown's Ch. 216; Fearne on Remainders, 121, 124 to 148; Pratt v. McCawley, 8 Harris, 264. The principle thus alluded to in the text was thus clearly stated by Sir T. Plumer, in The Marquis of Cholmondeley v. Clinton, 2 Jacob & Walker, 148:

"If the absolute owner of the equitable estate were to be considered for every purpose, in a court of equity, as he is in a court of law, viz.: as a mere tenant at will, how could he be allowed to exercise any acts of ownership over it, to alienate or devise it, or transmit it to his heirs? How could any of the rules of property or the common or statute law, by which estates of inheritance are governed, apply, upon this principle, to an equitable estate? The harmony and uniformity of the laws of real property would be destroyed, if it was to depend on the estate being legal or equitable; if the legal estate were governed by one set of rules, and the equitable by another. But the mischief of such a discordance has long been obviated. By allowing the analogy to prevail throughout, the same laws apply equally to both. The equitable estate is the estate at law in a Court of Equity, and is governed by all the same rules in general as all real property is, by limitation. The equitable estate in this court is the same as the land, and the trustee is considered as a mere instrument of conveyance. 'Twenty years ago,' (said Lord Mansfield, in Burgess v. Wheate, 1 Eden, 224), 'I imbibed this principle; everything I have heard, read, or thought of since, has confirmed that principle in my mind.' And after illustrating this doctrine, he concludes with stating, that on clear law and reason, and the great authority of the case of Casborne v. Scarfe (to which I shall hereafter have occasion to refer,) cestui que trust is actually and absolutely seised of the freehold in consideration of this court, and therefore that the legal consequences of actual seisin of a freehold shall, in this court, follow for the benefit of one in the post. Lord Hardwicke explains the analogy, and the necessity there was for establishing it, in part of his judgment in Hopkins v. Hopkins, which has been cited; that part of it which is relied upon as tending to negative the analogy in the instance of the statute of limitations, will be hereafter considered. The same doctrine is stated in Banks v. Sutton, 2 P. W. 713, to have been laid down by Lord

decisions of equity, though given by rule, and not at random, do not follow the law in all its ancient technicalities, but proceed on a liberal system, correspondent with the more modern origin of its power. Thus, equitable estates in tail, or in fee simple, may be conferred without the use of the words *heirs of the body*, or *heirs*, if the intention be clear: for, equity pre-eminently regards the intentions and agreements of parties; accordingly, words which at law would confer an estate tail, are sometimes construed in equity, in order to further the in-
[*137] tention of the parties, as giving *merely an estate for life, followed by separate and independent estates tail to the children of the donee. This construction is frequently adopted by equity in the case of marriage articles, where an intention to provide for the children might otherwise be defeated by vesting an estate tail in one of the parents, who could at once bar the entail, and thus deprive the children of all benefit.(*x*) So if lands be directed to be sold, and the money to arise from the sale be directed to be laid out in the purchase of other lands to be settled on certain persons for life or in tail, or in any other manner, such persons will be regarded in equity as already in possession of the estates they are intended to have; for, whatever is fully agreed to be done, equity considers as actually accomplished. And in the same manner if money, from whatever source arising, be directed to be laid out in the purchase of land to be settled in any manner, equity will regard the persons on whom the lands are to be settled as already in possession of their estates.(*y*) And in both the above cases the estates tail directed to be settled may be barred, before they are actually given, by a disposition duly enrolled, of the lands which are to be sold in the one case, or of the money to be laid out, in the other.(*z*) Again, an equitable estate in fee simple immediately belongs to every purchaser of freehold property, the moment he has signed a contract for purchase, provided the vendor has a good title;(*a*) and it is understood that the whole estate of the vendor is contracted for, unless a smaller estate is expressly mentioned, the employment of the word *heirs* not being essential.(*b*)

(*x*) 1 Sand. Uses, 311 (337, 5th ed.); Watkins on Descents, 168 (214, 4th ed.)

(*y*) 1 Sand. Uses, 300 (324, 5th ed.)

(*z*) Stat. 3 & 4 Will. IV, c. 74, ss. 70, 71, repealing stat. 7 Geo. IV, c. 45, which repealed stat. 39 & 40 Geo. III, c. 56.

(*a*) Sugd. Vend. and Pur. 191, 212.

(*b*) Bower *v.* Cooper, 2 Hare, 408.

Cowper, and is distinctly recognized and adopted by the Master of the Rolls in Phillipps v. Bridges, 3 Ves. 126." The whole of the judgment pronounced in this case is well worthy the attention of the student.

*If, therefore, the purchaser were to die intestate the moment after the contract, the equitable estate in fee simple which he [*138] had just acquired, would descend to his heir at law, who would have a right (to be enforced in equity) to have the estate paid for out of the money and other personal estate of his deceased ancestor; and the vendor would be a trustee for the heir, until he should have made a conveyance of the legal estate, to which the heir would be entitled. Many other examples of equitable or trust estates in fee simple might be furnished.

An equitable estate in fee will not escheat to the lord upon corruption of the blood, or failure of heirs of the *cestui que trust*;(*c*) for a trust is a mere creature of equity, and not a subject of tenure. In such a case, therefore, the trustee will hold the lands discharged from the trust which has so failed; and he will accordingly have a right to receive the rents and profits without being called to account by any one. In other words, the lands will thenceforth be his own.(*d*) But it is the better opinion that in the case of high treason being committed by the *cestui que trust*, his equitable estate will be forfeited to the crown.(*e*) By a recent statute(*f*) both the lord's right of escheat, and the crown's right of forfeiture, have been taken away in the converse case of failure of heirs or corruption of blood of the trustee, except so far as he himself may have any beneficial interest in the lands of which he is seised.(*g*) The descent of an equitable estate on intestacy follows the rules of the descent of legal estates; and, therefore, *in the case of gavelkind and borough-English lands, trusts affecting them will descend according to the descendible [*139] quality of the tenure.(*h*).

Trusts or equitable estates may be created and passed from one person to another, without the use of any particular ceremony or form of words.(*i*) But, by the Statute of Frauds(*k*) it is enacted,(*l*) that no action shall be brought upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or here-

(*c*) 1 Sand. Uses, 288 (302, 5th ed.)

(*d*) Burgess v. Wheate, 1 Wm. Black. 123, 1 Eden, 177; Taylor v. Haygarth, 14 Sim. 8; Davall v. New River Company, 3 De Gex & Smale, 394; Beale v. Symonds, 16 Beav. 406.

(*e*) 1 Hale, P. C. 249.

(*f*) Stat. 13 & 14 Vict. c. 60, repealing stat. 4 & 5 Will. IV, c. 23, to the same effect.

(*g*) Sect. 47. (*h*) 1 Sand. Uses, 270 (282, 5th ed.)

(*i*) 1 Sand. Uses, 315, 316 (343, 344, 5th ed.) (*k*) 29 Car. II, c. 3.

(*l*) Sect. 4 Sug. V. & P. c. 3, pp. 92 et seq.

ditaments, or any interest in or concerning them, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. It is also enacted,(*m*) that all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing; and further,(*n*) that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his last will. Trusts arising or resulting from any conveyance of lands or tenements, by implication or construction of law, and trusts transferred or extinguished by an act or operation of law, are exempted from this statute.(*o*) In the transfer of equitable estates it is usual, in practice, to adopt conveyances applicable to the legal estate; but this is never necessary.(*p*) If writing is used, and duly signed, in order to satisfy the *Statute of [*140] Frauds, and the intention to transfer is clear, any words will answer the purpose.(*q*)

Trust estates, besides being subject to voluntary alienation, are also liable, like estates at law, to involuntary alienation for the payment of the owner's debts.[1] By the Statute of Frauds it is provided, that if any *cestui que trust* shall die, leaving a trust in fee simple to descend to his heir, such trust shall be assets by descent, and the heir shall be chargeable with the obligation of his ancestors for and by reason of such assets, as fully as he might have been if the estate in law had descended to him in possession in like manner as the trust descended.(*r*)[2] And the subsequent statutes to which we have before

(*m*) Sect. 7.

(*n*) Sect. 9.

(*o*) Sect. 8.

(*p*) 1 Sand. Uses, 342 (377, 5th ed.)

(*q*) Agreements, with some exceptions, bear a stamp duty of half-a-crown, if they contain less than 2160 words, or thirty common law folios of seventy-two words each. If they contain 2160 words or upwards, there is a further progressive duty of half-a-crown for every *entire* quantity of 1080 words, or fifteen folios, over and above the first 1080 words; stat. 13 & 14 Vict. c. 97. Declarations of trust made by any writing, not being a will, bear the same duty as ordinary deeds; stat. 55 Geo. III, c. 184; 13 & 14 Vict. c. 97, ante, p. 124.

(*r*) Stat. 29 Car. II, c. 3, s. 10. Before this provision the Court of Chancery had re-

[1] See supra, note to p. 73.

[2] This provision of the Statute of Frauds has been re-enacted in some of our States, but not in others: passim, 1 Greenl. Cruise, 413; but it is conceived that in all of them, in every case in which a trust estate was o

referred, for preventing the debtor from defeating his bond creditor by his will, and for rendering the estates of all persons liable on their decease to the payment of their just debts of every kind, apply as well to equitable or trust estates as to estates at law.(*s*)

The same Statute of Frauds also gave a remedy to the creditor who had obtained a *judgment* against his debtor, *by providing(*t*) that it should be lawful for every sheriff or other officer to [*141] whom any writ should be directed, upon any judgment, to deliver execution unto the party in that behalf suing, of all such lands and hereditaments as any other person or persons should be seised or possessed of *in trust for him against whom execution was sued*, like as the sheriff or other officer might have done if the party against whom execution should be sued had been seised of such lands or hereditaments of such estate as they be seised of in trust for him *at the time of execution sued.* This enactment was evidently copied from a similar provision made by a statute of Henry VII,(*u*) respecting lands of which any other person or persons were seised *to the use* of him against whom execution was sued; and which statute of course became inoperative when uses were, by the Statute of Uses,(*x*) turned into estates at law. The construction placed upon this enactment of the Statute of Frauds was more favorable to purchasers than that placed on the statute of Edward I,(*y*) by which fee simple estates at law were first rendered liable to judgment debts. For it was held that although the trustee might have been seised in trust for the debtor at the time of obtaining the judgment, yet if he had conveyed away the lands to a purchaser before execution was actually sued out on the judgment, the lands could not afterwards be taken; because the trustee was not, in the words of the statute, seised in trust for the debtor *at the time of execution sued.*(*z*) The recent act for extending the

fused to give the bond creditor any relief. Bennet v. Box, 1 Cha. Ca. 12; Prat v. Colt, ib. 128. These decisions, in all probability, gave rise to the above enactment. See 1 Wm. Black. 159; 1 Sand. Uses, 276 (289, 5th ed.)

(*s*) Stat. 3 & 4 Wm. & Mary, c. 14, s. 2; 47 Geo. III, c. 74; 11 Geo. IV, & 1 Will. IV, c. 47; 3 & 4 Will. IV, c. 104. Ante, pp. 64, 65.

(*t*) Stat. 29 Car. II, c. 3, s. 10.

(*u*) Stat. 19 Hen. VII, c. 15.

(*x*) Stat. 27 Hen. VIII, c. 10.

(*y*) Stat. 13 Edw. I, c. 18; ante, p. 66.

(*z*) Hunt v. Coles, Com. 226; Harris v. Pugh, 4 Bing. 335; 12 J. B. Moore, 577.

---

such a character as, in other respects, to be governed by the same rules as a legal estate, it would, equally with it, be made liable for the debts of its owner. Heath v. Bisbop, 4 Richardson's Eq. R. 46.

remedies of creditors against the property of debtors,(*a*) however, deprived purchasers of this advantage, in consideration perhaps of the greater facilities which it afforded in the search for judgments; [*142] *for it provides(*b*) that execution may be delivered, under the writ of elegit, of all such lands and hereditaments as the person against whom execution is sued, *or any person in trust for him, shall have been* seised or possessed of at the time of entering up the judgment, *or at any time afterwards;* and a remedy in equity is also given to the judgment creditor against all lands and hereditaments of or to which the debtor shall at the time of entering up the judgment, or at any time afterwards, be seised, possessed or entitled for any estate or interest whatever at law or in equity.(*c*) But the still more recent enactment,(*d*) to which we have before referred,(*e*) greatly diminishes the effect of these provisions by placing all purchasers without notice of a judgment on the same footing as they previously stood.

Trust estates are subject to debts due to the crown in the same manner and to the same extent as estates at law.(*f*) They are also equally liable to involuntary alienation on the bankruptcy or insolvency of the *cestui que trust.* But on the bankruptcy(*g*) or insolvency(*h*) of the trustee, the legal estate in the premises of which he is trustee remains vested in him, and does not pass to his assignees.[1]

The circumstance of property being vested in trustees sometimes occasions inconvenience. A trustee may become lunatic, or may leave the country, or may refuse to convey, when required, the lands of which he is trustee; or he may die intestate without an heir, or leaving an infant heir, on whom, if he was a sole or a sole surviving trustee, the lands will descend at law. In order to *remedy the incon- [*143] venience thus occasioned to the persons beneficially entitled, it is provided by recent acts of Parliament(*i*) that, in the case of a lunatic trustee, the Lord Chancellor, or the persons intrusted by the

(*a*) Stat. 1 & 2 Vict. c. 110; ante, p. 68. (*b*) Sect. 11.
(*c*) Sect. 13. (*d*) Stat. 2 & 3 Vict. c. 11, s. 5. (*e*) Ante, p. 69.
(*f*) King v. Smith, Sugd. Ven. & Pur. Appendix, No. 15, p. 1098.
(*g*) Ex parte Gennys, Mont. & Mac. 258.
(*h*) Sims v. Thomas, 12 Ad. & El. 536.
(*i*) Stats. 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, repealing and consolidating stats. 11 Geo. IV, & 1 Will. IV, c. 60, 4 & 5 Will. IV, c. 23, and 1 & 2 Vict. c. 69.

[1] The law is the same on both sides of the Atlantic; Wharton's ed. of Hill on Trustees, 530, *n.*

Queen's sign manual with the care of the persons and estates of lunatics, and the Court of Chancery in other cases, may make an order vesting the lands in any other person or persons; and such an order will operate as a valid conveyance of such lands accordingly. It is also provided that whenever it is expedient to appoint a new trustee, and it is inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, that court may make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees,(*k*) or whether there be any existing trustee or not.(*l*) The Court of Chancery is also empowered to appoint a new trustee in the place of any trustee who shall have been convicted of felony.(*m*) And upon making any order appointing a new trustee, the court may direct that any lands subject to the trust shall vest in the person or persons who, upon the appointment, shall be the trustee or trustees for such estate as the court shall direct; and such order will have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances of such lands.(*n*)[1] Property held in trust for charities may also be vested by the court in new trustees without any conveyance.(*o*) But every such order is now chargeable with the like amount of stamp *duty as it would have been chargeable with if it had been a deed executed by the person or persons possessed of the land.(*p*) By another act of Parliament(*q*) provision is made for vesting the property of congregations or societies for purposes of religious worship or education in new trustees from time to time without any conveyance. The provisions of this act have recently been extended to Literary and Scientific Institutions.(*r*) But it is an ill-drawn act, and not likely to be very beneficial. [*144]

The concurrent existence of two distinct systems of jurisprudence, is a peculiar feature of English law. On one side of Westminster Hall a man may succeed in his suit, under circumstances in which he

(*k*) Stat. 13 & 14 Vict. c. 60, s. 32.
(*l*) Stat. 15 & 16 Vict. c. 55, s. 9.
(*m*) Stat. 15 & 16 Vict. c. 55, s. 8.
(*n*) Stat. 13 & 14 Vict. c. 60, s. 34.
(*o*) Sect. 45.
(*p*) Stat. 15 & 16 Vict. c. 55, s. 13.
(*q*) Stat. 13 & 14 Vict. c. 28.
(*r*) Stat. 17 & 18 Vict. c. 112, s. 12.

[1] The student will find a very full reference to the local statutes as to the substitution of trustees, in Mr. H. Wharton's recent edition of Hill on Trustees, p. 190.

would undoubtedly be defeated on the other side ;[1] for, he may have a title in equity, and not at law (being a *cestui que trust*), or a title at law and not in equity (being merely a trustee). In the former case, though he would succeed in a chancery suit, he never would think of bringing an action at law; in the latter case, he would succeed in an action at law, but equity would take care that the fruits should be reaped only by the person beneficially entitled. The equitable title is, therefore, the beneficial one, but, if barely equitable, it may occasion the expense and delay of a chancery suit to maintain it. Every purchaser of landed property has, therefore, a right to a good title both at law and in equity; and, if the legal estate should be vested in a trustee, or any person other than the vendor, the concurrence of such trustee or other person must be obtained, for the purpose of vesting the legal estate in the purchaser, or, if he should please, in a new trustee of his own choosing. When a person has an estate at law, and does not hold it subject to any trust, he has of course the same estate in equity, but without any occasion for *resorting to its aid. To him, therefore, the doctrine of trusts does not apply: his legal title is sufficient; the law declares the nature and incidents of his estate, and equity has no ground for interference.(*s*)

[*145]

A great step[2] has now been taken towards the amalgamation of law and equity by the Common Law Procedure Act, 1854,(*t*) which confers on the Courts of Common Law an extensive equitable jurisdiction. The plaintiff in any action, except replevin and ejectment, may claim

(*s*) See Brydges v. Brydges, 3 Ves. 127.

(*t*) Stat. 17 & 18 Vict. c. 125.

[1] Sir E. Sugden has expressed the same idea in his "Letters to a Man of Property." "It must sound oddly to a foreigner, that on one side of Westminster Hall a man shall recover an estate without argument, on account of the clearness of his title, and that on the other side of the Hall, his adversary shall, with equal facility, recover back the estate. In all other countries the law is tempered with equity; and the same grounds rule the same cases in all the courts of justice. The division of our law into what is termed legal and equitable, arose partly from necessity, and partly from the desire of the ecclesiastics of former times to usurp a control over the common-law courts. Our legal judges heretofore adhered so strictly to technical rules, although frequently subversive of substantial justice, that the chancellors interfered, and moderated the rigor of the law according, as it is termed, to equity and good conscience. The judges in equity soon found it necessary, like the common-law judges, to adhere to the decisions of their predecessors; whence it has inevitably happened, that there are settled and inviolable rules of equity, which require to be moderated by the rules of good conscience, as much as ever the most rigorous and inflexible rule of law did before the chancellors interposed on equitable grounds." P. 4.

[2] This conclusion of the present chapter was not, of course, in the previous editions.

a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested,(*u*) and by the non-performance of which he may sustain damage.(*x*) In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the repetition or continuance of such breach or injury.(*y*) If the defendant would be entitled to relief against the judgment on equitable grounds, he may plead, by way of defence to the action, the facts which entitled him to such relief.(*z*) And the plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea on equitable grounds.(*aa*) Time is required to ascertain the practical effect of these enactments, but it is probable that the change effected may not be so great as might at first sight be supposed[1].

We shall now take leave of equity and equitable estates, and proceed, in the next chapter, to explain a modern conveyance.

---

*CHAPTER IX. [*146]

OF A MODERN CONVEYANCE.

In modern times, down to the year 1841, the kind of conveyance employed, on every ordinary purchase of a freehold estate, was called a lease and release; and, for every such transaction, two deeds were always required. From that time to the year 1845, the ordinary method of conveyance was a release merely, or, more accurately, a release made in pursuance of the act of Parliament,(*a*) intituled, "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties." The object of this act was merely to save the expense of two deeds to every purchase, by rendering the lease unnecessary.

A further alteration was then made, by the act to simplify the transfer of property,(*b*) which enacted,(*c*) that, after the 31st day of

(*u*) Sec. 68. (*x*) Sec. 69. (*y*) Sec. 79.
(*z*) Sec. 83. (*aa*) Sec. 85. (*a*) Stat. 4 & 5 Vict. c. 21.
(*b*) Stat. 7 & 8 Vict. c. 76. (*c*) Sects. 2, 13.

[1] See supra, note to p. 135.

December, 1844, every person might convey by any deed, without livery of seisin, or a prior lease, all such freehold land as he might, before the passing of the act, have conveyed by lease and release, and every such conveyance should take effect, as if it had been made by lease and release; provided always, that every such deed should be chargeable with the same stamp duty as would have been chargeable if such conveyance had been made by lease and release.

This act, however, had not been in operation more than nine months when it was repealed by the act to amend the law of real property,(*d*) which provides, that after *the 1st of October, 1845, [*147] all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. A simple deed of grant is therefore now sufficient to convey the freehold or feudal seisin of all lands.(*e*) But as a lease and release was so long the usual method of conveyance, the nature of a conveyance by lease and release should still form a subject of the student's inquiry; and with this we will accordingly begin.

From the little that has already been said concerning a lease for years,(*f*) the reader will have gathered, that the lessee is put into possession of the premises leased for a definite time, although his possession has nothing feudal in its nature, for the law still recognizes the landlord as retaining the seisin or feudal possession. Entry by the tenant was, however, in ancient times, absolutely necessary to make a complete lease;(*g*) although, in accordance with feudal principles, it was not necessary that the landlord should depart at once and altogether, as he must have done in the case of a feoffment where the feudal seisin was transferred. When the tenant had thus gained a footing on the premises, under an express contract with his landlord, he became, with respect to the feudal possession, in a different position from a mere stranger; for, he was then capable of acquiring such feudal possession, without any formal livery of seisin, by a transfer or conveyance, from his landlord, of all his (the landlord's) estate in the

(*d*) Stat. 8 & 9 Vict. c. 106, s. 2.

(*e*) By the second section of the act, the stamp duty on this single deed was the same as was chargeable on the lease and release, except the progressive duty on the lease. But the duty on the lease for a year is now repealed by stat. 13 & 14 Vict. c. 97, s. 6, so far as relates to any deed or instrument bearing date after the 10th of October, 1850.

(*f*) Ante, pp. 8, 94.

(*g*) Litt. s. 459; Co. Litt. 270 a.

premises. Being already in possession by the act and agreement of his landlord, *and under a tenancy recognized by the law, there was not the same necessity for that open delivery of the [*148] seisin to him, as there would have been to a mere stranger. In his case, indeed, livery of seisin would have been improper, for he was already in possession under his lease ;(*h*) and, as a delivery of the possession of the lands could not, therefore, be made to him, it was necessary that the landlord's interest should be conveyed in some other manner. Now the ancient common law always required that a transfer or gift of every kind relating to real property should be made, either by actual or symbolical delivery of the subject of the transfer, or when this was impossible, by the delivery of a written document.(*i*) But in former times, as we have seen,(*j*) every writing was under seal ; and a writing so sealed and delivered is in fact a deed. In this case, therefore, a deed was required for the conveyance of the landlord's interest ;(*k*) and such conveyance by deed, under the above circumstances, was termed a *release*, so named, perhaps, from being a kind of repetition of the act by which the lease to the tenant was made.(*l*) To a lease and release of this kind, it is obvious that the same objection applies as to a feoffment : the inconvenience of actually going on the premises is not obviated; for, the tenant must enter before he can receive the release. In the very early periods of our history, this kind of circuitous conveyance was, however, occasionally used. A lease was made for one, two, or three years, completed by the actual entry of the lessee, for the express purpose of enabling him to receive a release of the inheritance, which was accordingly made to him a short time afterwards. The lease and release, executed in this manner, transferred the freehold of the releasor as effectually as *if it had been conveyed by feoffment.(*m*) But a lease and release would never have obtained the prevalence they after- [*149] wards acquired, had not a method been found out of making a lease, without the necessity of actual entry by the lessee.

The Statute of Uses(*n*) was the means of accomplishing this desirable object. This statute, it may be remembered, enacts, that when any person is seised of lands to the use of another, he that has the

(*h*) Litt. s. 460; Gilb. Uses and Trusts, 104 (223, 3d ed.)
(*i*) Co. Litt. 9 a; Doe d. Were v. Cole, 7 Barn. & Cress. 243, 248 ; ante, p. 11.
(*j*) Ante, p. 123.
(*k*) Shep. Touch. 320.
(*l*) 2 Prest. Conv. 211.
(*m*) 2 Sand. Uses, 61 (74, 5th ed.)
(*n*) 27 Hen. VIII, c. 10.

use shall be deemed in lawful seisin and possession of the lands, for the same estate he has in the use. Now, besides a feoffment to one person to the use of another, there were, before this statute, other modes by which a use might be raised or created, or in other words, by which a man might become seised of lands to the use of some other person. Thus—if, before the Statute of Uses, a bargain was made for the sale of an estate, and the purchase-money paid, but no feoffment was executed to the purchaser,—the Court of Chancery, in analogy to its modern doctrine on the like occasions,(*o*) considered that the estate ought in conscience immediately to belong to the person who paid the money, and, therefore, held the bargainor or vendor to be immediately seised of the lands in question *to the use* of the purchaser.(*p*) This proper and equitable doctrine of the Court of Chancery had rather a curious effect when the Statute of Uses came into operation; for, as by means of a contract of this kind, the purchaser became entitled to the *use* of the lands, so, after the passing of the statute, he became at once entitled, on payment of his purchase-money, to the lawful seisin and possession; or rather, he was deemed really to have, by force of the statute, such seisin and possession, so far at least as it *was possible to consider a man in possession, who was not.(*q*) It, consequently, came to pass that the seisin was thus transferred from one person to another, by a mere *bargain and sale*, that is, by a contract for sale and payment of money, without the necessity of a feoffment, or even of a deed;(*r*) and, moreover, an estate in fee simple at law was thus duly conveyed from one person to another, without the employment of the technical word *heirs*, which before was necessary to mark out the estate of the purchaser; for, it was presumed that the purchase-money was paid for an estate in fee simple;(*s*) and, as the purchaser had, under his contract, such an estate in the *use*, he of course became entitled, by the very words of the statute, to the same estate in the legal seisin and possession.

[*150]

The mischievous results of the statute, in this particular, were

(*o*) Ante, p. 137.

(*p*) 2 Sand. Uses, 43 (53, 5th ed.); Gilb. Uses and Trusts, 49 (94, 3d ed.)

(*q*) Thus he could not maintain an action of trespass without being actually in possession, for this action is grounded on the disturbance of the actual possession, which is evidently more than the Statute of Uses, or any other statute, can give. Gilb. Uses, 81 (135, 3d ed.); 2 Fonb. on Equity, 12.

(*r*) Dyer, 229 a; Comyn's Digest, tit. Bargain and Sale (B. 1, 4); Gilb. on Uses and Trusts, 87, 271 (197, 475, 3d ed.) (*s*) Gilb. Uses, 62 (116, 3d ed.)

quickly perceived. The notoriety in the transfer of estates, on which the law had always laid so much stress, was at once at an end; and it was perceived to be very undesirable that so important a matter as the title to landed property should depend on a mere verbal bargain and money payment, or *bargain and sale*, as it was termed. Shortly after the passing of the Statute of Uses, it was accordingly required by another act of Parliament,(*t*) passed in the same year, that every bargain and sale of any estate of inheritance or freehold, should be made be deed indented and enrolled, within six months (which means lunar months) from the date, *in one of the courts of record at Westminster, or before the *custos rotulorum* [*151] and two justices of the peace, and the clerk of the peace for the county, in which the lands lay, or two of them at least, whereof the clerk of the peace should be one. A stop was thus put to the secret conveyance of estates by mere contract and payment of money.[1] For, a deed entered on the records of a court, is of course open to public inspection; and the expense of enrolment was, in some degree, a counterbalance to the inconvenience of going to the lands to give livery of seisin. It was not long, however, before a loophole was discovered in this latter statute, through which, after a few had ventured to pass, all the world soon followed. It was perceived that the act spoke only of estates of *inheritance or freehold*, and was silent as to bargains and sales for a mere term of years, which is not a freehold. A bargain and sale of lands for a year only, was not therefore affected by the act,(*u*) but remained still capable of being accomplished by word of mouth and payment of money. The entry on the part of the tenant, required by the law,(*v*) was supplied by the Statute of Uses; which, by its own force, placed him, in legal intendment, in possession, for the same estate as he had in the use, that is, for the term bargained and sold to him.(*x*) And, as any pecuniary payment, however

(*t*) 27 Hen. VIII, c. 16.
(*u*) Gilb. Uses, 98, 296 (214, 502, 3d ed.); 2 Sand. Uses, 63 (75, 5th ed.)
(*v*) Ante, p. 147.
(*x*) Gilb. Uses, 104 (223, 3d ed.)

[1] A bargain and sale without enrolment is, however, in equity, evidence of an agreement to convey, and the conscience is bound to make further assurance, that obligation arising from the payment of the money; Mestaer v. Gillespie, 11 Vesey, 625. When, moreover, land was already in the actual possession of a tenant, neither entry, livery, nor enrolment, were necessary, for the tenant already had the former, and the reversion, which lie in grant, was susceptible of being transferred by any instrument which would operate by way of grant. Doe v. Cole, 7 Barn. & Cress. 243.

small, was considered sufficient to raise a use,(*y*) it followed that if A., a person seised in fee simple, bargained and sold his lands to B. for one year, in consideration of ten shillings paid by B. to A., B. became, in law, at once possessed of an estate in the lands for the term of one year, in the same manner as if he had actually entered on the premises under a regular lease. Here then was an opportunity of [*152] making a conveyance of the whole fee simple, without *livery of seisin, entry, or enrolment. When the bargain and sale for a year was made, A. had simply to release by deed to B. and his heirs, his (A.'s) estate and interest in the premises, and B. became at once seised of the lands for an estate in fee simple. This bargain and sale for a year, followed by a release, is the modern conveyance by *lease and release*,—a method which was first practised by Sir Francis Moore, Serjeant at Law, at the request, it is said, of Lord Norris, in order that some of his relations might not know what conveyance or settlement he should make of his estate.(*z*) And, although the efficiency of this method was at first doubted,(*a*)[1] it was, for more than two centuries, the common means of conveying lands in this country. It will be observed that the bargain and sale (or lease, as it is called) for a year, derived its effect from the Statute of Uses: the release was quite independent of that statute, having existed long before, and being as ancient as the common law itself.(*b*) The Statute of Uses was employed in the conveyance by lease and release only for the purpose of giving to the intended releasee, without his actually

(*y*) 2 Sand. Uses, 47 (57, 5th ed.) A peppercorn was held sufficient in the case of Barker v. Keate, 2 Modern, 249.

(*z*) 2 Prest. Conv. 219.

(*a*) Sugd. note to Gilb. Uses, p. 328; 2 Prest. Conv. 231; 2 Fonb. Eq. 12.

(*b*) Sugd. note to Gilb. Uses, 229.

[1] These doubts arose from confusing the operation of a lease at common law, which required entry to give effect to it, and a lease for a valuable consideration which operated under the statute by way of bargain and sale, and raised a use in the lessee which the statute executed. This was thus explained by Ch. J. North, in Barker v. Keate, 2 Modern, 249. "After the Statute of Uses, it became an opinion that if a lease for years was made upon a valuable consideration, a release might operate upon that without an actual entry of the lessee, because the statute did execute the lease, and raised an use presently to the lessee. . . . . The case put by Littleton, in sect. 459, is put at the common law and not upon the statute, where he saith that if a lease be made for years, and the lessor releaseth all his right to the lessee, entry and release is void, because the lessee had only the right and not the possession, which my Lord Coke, in his comment upon it, calls an *interesse termini*, and that such release shall not enure to enlarge the estate without the possession, which is very true at the common law, but not upon the Statute of Uses."

entering on the lands, such an estate as would enable him to receive the release. When this estate for one year was obtained by the lease, the Statute of Uses had performed its part, and the fee simple was conveyed to the releasee by the release alone. The release would, before the Statute of Uses, have conveyed the fee simple to the releasee, supposing him to have obtained that possession for one year, which, after the statute, was given him by the lease. After the passing of the Statute of Frauds,(*c*) it became necessary that every bargain and sale of lands for a year should be put into writing, as no pecuniary rent was ever reserved, the consideration being usually *five shillings, the receipt of which was acknowledged, though in fact it was never paid. And the bargain and sale, or lease [*153] for a year, was usually made by deed, though this was not absolutely necessary. It was generally dated the day before the date of the release, though executed on the same day as the release, immediately before the execution of the latter.[1]

(*c*) Stat. 29 Car. II, c. 3; ante, p. 126.

[1] The objection in England to the notoriety of the enrolment of deeds of bargain and sale has no force where, as in all the United States, a registry of all deeds is established, which is, moreover, comparatively inexpensive by reason of the entire absence of the system complained of by the author, supra, at page 162, viz., that of remunerating the draftsman according to the number of words in the instrument.

It would seem that the Statute of Enrolments itself, which, on its face, applied exclusively to lands within the realm of England, was not considered to apply to the American colonies. It certainly was not in Massachusetts, Welsh v. Foster, 12 Mass. 96; in Pennsylvania, Report of the Judges on British Statutes, 3 Binney; or in New York, Jackson v. Dunsbagh, 1 Johns. Cases, 97; and probably in none of them. In the latter State, however, conveyance by lease and release was universal until the year 1788, when "the revision of the statute laws of the State at that period, which re-enacted all the English statute law deemed proper and applicable, and which repealed the British statutes in force in New York while it was a colony, removed all apprehension of the necessity of enrolment of deeds of bargain and sale, and left that short, plain, and excellent mode of conveyance to its free operation. The consequence was, that the conveyance by lease and release, which required two deeds, or instruments, instead of one, fell immediately into total disuse:" 4 Kent's Com. 494; but since the Revised Statutes of 1830, the conveyances are made by grant simply. In Pennsylvania, as early as 1715, the act which established a registry of deeds, provided that all deeds or conveyances made, or to be made, and proved, or acknowledged and recorded according to its provisions, should be of the same force and effect for the giving possession and seisin, and making good the title and assurance of the lands, as deeds of feoffment, with livery and seisin, or deeds enrolled in any of the king's courts of record at Westminster were or should be in Great Britain; and statutes of similar import were, it is believed, enacted also in other States. Higbee v. Rice, 5 Mass. 344; Emery v. Chase, 5 Greenleaf, 252; Barrett v. French, 1 Connecticut, 554; Mr. Hare's note to Roe v. Tranmar, 2 Smith's Lead. Cases, 390.

These statutes neither excluded the operation of the Statute of Uses or of the common

This cumbrous contrivance of two deeds to every purchase continued in constant use down to the year 1841, when the act was passed to which we have before referred,(*d*) intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties." This act enacts that every deed or instrument of release of a freehold estate, or purporting or intended to be so, which shall be expressed to be made in pursuance of the act, shall be as effectual, and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects as if the releasing party or parties, who shall have executed the same, had also executed, in due form, a deed or instrument of bargain and sale, or lease for a year, for giving effect to such release, although no such deed or instrument of bargain and sale, or lease for a year, shall be executed. And now by the recent act to amend the law of real property,(*e*) a deed of grant is alone sufficient for the conveyance of all corporeal hereditaments.

The legal seisin being thus capable of being transferred by a deed of grant, there is the same necessity now as there was when a feoffment was employed, that the estate which the purchaser is to take, should be marked out.(*f*) If he has purchased an estate in fee simple,

(*d*) Stat. 4 & 5 Vict. c. 21.

(*e*) Stat. 8 & 9 Vict. c. 106.

(*f*) Shep. Touch, 327; see ante, p. 119.

law. Thus, as in Pennsylvania, the Statute of Enrolments was not in force, and the Statute of Uses was in force, a valid estate of freehold was created by deed of bargain and sale, although not recorded, precisely as it was in England before the Statute of Enrolments was passed; and the principal use of the act of 1715, as of the other local acts referred to, is, as enabling statutes, to give effect to the intention of the parties in cases where, but for their aid, that intention might be defeated. See Mr. Hare's note, supra. It is a familiar principle, and one of equal application on both sides of the Atlantic, that the law looks to the end had in view by the parties, and if the intent appear, the words will be construed in such a sense as to perform that intent rather than in any other sense. Plowden, 154. Thus a conveyance taking effect by virtue of the Statute of Uses, requires a consideration; Ward v. Lambert, Cro. Eliz. 394; where the latter does not appear, it may be supplied by parol evidence: Spring v. Hawkes, 5 Iredell, 30; Jackson v. Pike, 9 Cowen, 69; White v. Weeks, 1 Penn. 486; but where it exists, any words which may denote the intention of the parties will be deemed sufficient to raise a use, which the statute then executes. Thus the words "bargain and sell" are not necessary, but "alien and grant," or "demise and grant:" Fox's Case, 8 Coke, 86; 2 Inst. 672; "remise, release, and quit claim:" Jackson v. Fish, 10 Johns. 456; "make over or grant:" Jackson v. Alexander, 3 Id. 484; "convey:" Patterson v. Carneal, 3 A. K. Marsh. 618; "quit:" Gordon v. Haywood, 2 N. Hamp. 402; or "let:" Krider v. Lafferty, 1 Wharton, 316, are all of them equally effective, provided, of course, proper words of limitation be used to show the quantity of estate intended to be passed, whether a fee, a life estate, or the like.

the conveyance must be expressed to be made to him **and his heirs;* for, the construction of all conveyances, wills only excepted, is in this respect the same; and a conveyance to the purchaser simply, without these words, would merely convey to him an estate for his life, as in the case of a feoffment.(*g*) In this case also, as well as in a feoffment, it is the better opinion that, in order to give permanent validity to the conveyance, it is necessary, either that a consideration should be expressed in the conveyance, or that it should be made *to the use of* the purchaser, as well as *unto* him:(*h*) for, a lease and release was formerly, and a deed of grant is now, as much an established conveyance as a feoffment; and the rule was, before the Statute of Uses, that any *conveyance*, and not a feoffment particularly, made to another without any consideration, or any declaration of uses, should be deemed to be made *to the use* of the party conveying. In order, therefore, to avoid any such construction, and so to prevent the Statute of Uses from immediately undoing all that has been done, it is usual to express, in every conveyance, that the purchaser shall hold, not only unto, but *unto and to the use of* himself and his heirs. [*154]

A conveyance might also have been made by lease and release, as well as by a feoffment, to one person and his heirs, *to the use* of some other person and his heirs; and, in this case, as in a similar feoffment, the latter person took at once the whole fee simple, the former being made, by the Statute of Uses, merely a conduit pipe for conveying the estate to him.(*i*) This extraordinary result of the Statute of Uses is continually relied on in modern conveyancing;[1] and it may now be accomplished by a deed of grant in the same manner as it might have been before effected by a lease and release. It is found *particularly advantageous as a means for avoiding a rule of law, that a man cannot make any conveyance to himself; thus, if it were wished to make a conveyance of lands from A., a person solely seised, to A. and B. jointly, this operation could not, before the Statute of Uses, have been effected by less than two conveyances; for, a conveyance from A. directly to A. and B. would pass the whole estate solely to B.(*k*) It would, therefore, have been requisite for A. to [*155]

(*g*) Shep. Touch. ubi supra.

(*h*) 2 Sand. Uses, 64–69 (77–84, 5th ed.); Sugd. note to Gilb. Uses, 233; see ante, pp. 122, 132.

(*i*) See ante, pp. 131, 132.

(*k*) Perkins, s. 203. So a man cannot covenant to pay money to himself and another on a joint account, Faulkner v. Lowe, 2 Ex. Rep. 595.

[1] Most frequently, perhaps, in deeds of partition, supra, p. 153.

make a conveyance to a third person, and for such person then to reconvey to A. and B. jointly. And this is the method which is still adopted, under similar circumstances, with respect to leasehold estates and personal property, which are not affected by the Statute of Uses. If, however, the estate be freehold, all that is necessary is for A. to convey to B. and his heirs, to the use of A. and B. and their heirs; and a joint estate in fee simple will immediately vest in them both. Suppose, again, a person should wish to convey a freehold estate to another, reserving to himself a life interest,—without the aid of the Statute of Uses he would be unable to accomplish this result by a single deed.(*l*) But, by means of the statute, he may now make a conveyance of the property to the other and his heirs, *to the use* of himself (the conveying party) for his life, and from and immediately after his decease, *to the use* of the other and his heirs and assigns. By this means, the conveying party will at once become seised of an estate only for his life, and, after his decease, an estate in fee simple will remain for the other.

The reader will now be in a situation to understand an ordinary purchase deed of the simplest kind, with a specimen of which he is accordingly presented:—"THIS *INDENTURE(*m*) made [*156] the first day of January 1846 between A. B. of Cheapside in the City of London esquire of the one part and C. D. of Lincoln's Inn in the County of Middlesex esquire of the other part. WHEREAS by indentures of lease and release(*n*) bearing date respectively the first and second days of January 1838 and respectively made between E. F. of the one part and the said A. B. of the other part for the consideration therein mentioned the messuage lands and hereditaments hereinafter described with the appurtenances were conveyed unto and to the use of the said A. B. his heirs and assigns for ever[1] AND WHEREAS the

(*l*) Perk. ss. 704, 705; Youde v. Jones, 13 Mee. & Wels. 534.
(*m*) Ante, p. 125. (*n*) Ante, p. 152.

[1] This recital of the conveyance to the vendor is, it is believed, unusual on this side of the Atlantic, as thus introduced. When the vendor merely claims, as in the form given in the text, under a direct conveyance to himself, this is generally thus recited at the end of the description of the property: "Being the same premises which A. B., by indenture dated, &c., recorded, &c., granted and conveyed to the said (vendor) and his heirs." Where, however, the vendor does not thus claim, as where there have been since the last conveyance, devises, descents, changes of trustees, &c., or alterations of the property, as by the opening of streets, or the like, these are usually recited in well-drawn instruments, with more or less particularity, immediately after the date and the parties. Sometimes the whole title from the original patent is recited.

said A. B. hath contracted with the said C. D. for the absolute sale to him of the inheritance in fee simple(*o*) in possession of and in the said messuage lands and hereditaments with the appurtenances free from all incumbrances for the sum of one thousand pounds[1] Now THIS INDENTURE WITNESSETH that in pursuance of the said contract and in consideration of the sum of one thousand pounds of lawful money of Great Britain to the said A. B. in hand paid by the said C. D. upon or before the execution of these presents (the receipt of which said sum of one thousand pounds in full for the absolute purchase of the inheritance in fee simple in possession of and in the messuage lands and hereditaments hereinbefore referred to and hereinafter described with the appurtenances he the said A. B. doth hereby acknowledge and from the same doth release the said C. D. his heirs executors administrators and assigns) He the said A. B. DOTH by these presents GRANT(*p*) unto the said C. D. and his heirs ALL that messuage or tenement (*here describe the premises*). Together with all outhouses ways watercourses trees commonable rights easements and appurtenances to the said messuage lands hereditaments and premises(*q*) hereby *granted or any of them belonging or herewith used or enjoyed. And all the estate(*r*) and right of the said A. B. in and to the same. [*157] To HAVE and TO HOLD the said messuage lands hereditaments and premises intended to be hereby granted with the appurtenances unto and to the use of(*s*)[2] the said C. D. his heirs and assigns for ever."(*t*) (*Then follow covenants by the vendor with the purchaser for the title; that is, that he has good right to convey the premises, for their quiet enjoyment by the purchaser, and freedom from incumbrances, and that the vendor and his heirs will make all such further conveyances as may be reasonably required.*)[3] "IN WITNESS whereof the said parties to these presents have hereunto set their hands and

(*o*) Ante, p. 54, et seq. (*p*) Ante, pp. 145, 153. (*q*) Ante, p. 14.
(*r*) Ante, p. 17. (*s*) Ante, p. 154. (*t*) Ante, pp. 120, 153.

[1] This recital of the contract between the parties is believed to be unusual in American conveyancing, unless it may be for a particular purpose.

[2] This is rather more clumsily expressed in our deeds, the phrase generally being, "to have and to hold unto the said A. B. his heirs and assigns, to and for the only proper use and behoof of him, the said A. B. his heirs and assigns forever."

[3] These covenants for title thus alluded to, generally occupy more than the half of an ordinary purchase deed in England: see Appendix B.; and as the author says, infra, p. 369, "few conveyancing forms can exceed them in the luxuriant growth to which their verbiage has extended." On this side of the Atlantic not unfrequently only the covenant of warranty is employed, and even where all the covenants for title are introduced, it is with much brevity. This will be more particularly noticed in the last chapter.

seals the day and year first above written."[1] To the foot of the deed are appended the seals and signatures of the parties;(*u*) and, on the back is indorsed a further receipt for the purchase-money,(*v*) and an attestation by the witnesses, of whom it is very desirable that there should be two, though the deed would not be void even without any.(*w*)[2] On the face of the deed will be observed the proper stamps, without which it could not until recently have been admitted as evidence.(*x*) But by the Common Law Procedure Act, 1854,(*y*) it is now provided that upon payment to the proper officer of the Court of the stamp duty, and the penalty required by statute, namely 10*l*.,(*z*) and the additional penalty of 1*l*., any deed or other document shall be admissible in evidence, saving all just exceptions on other grounds. Pur-
[*158] chase deeds are now *subject to *ad valorem* stamps of one half per cent., or ten shillings per hundred pounds on the amount of the purchase-money paid, according to the table below;(*a*) with a further progressive duty of 10*s*. for every *entire* quantity of 1080

(*u*) Ante, p. 126.

(*v*) This practice is of comparatively modern date. See 2 Atkyns, 478; 3 Atk. 112; 2 Sand. Uses, 305, n. A. (118, n. 5th ed.); 3 Preston's Abstracts, 15.

(*w*) 2 Black. Com. 307, 378. (*x*) Ibid. 297.

(*y*) Stat. 17 & 18 Vict. c. 125, s. 29. (*z*) Stat. 13 & 14 Vict. c. 97, s. 12.

(*a*) Where the purchase or consideration-money therein or thereupon expressed shall

not exceed £25, ...					£0	2	6
And shall exceed	£25	and not exceed	£50		0	5	0
"	50	"	75		0	7	6
"	75	"	100		0	10	0

[1] The form of ordinary purchase deeds in the United States differs little from that given in the text, further than has been already noticed. The receipt for the consideration-money is more briefly expressed, generally: "for and in consideration of —— to him paid by the said party of the second part before the sealing and delivery hereof, the receipt whereof is hereby acknowledged," and the operative words are generally, "doth grant, bargain, sell (for the effect of these in the creation of covenants by implication, see the last chapter), alien, enfeoff, release, and confirm unto," &c.

[2] The common law rule which did not *require* attesting witnesses to a deed is recognized in the United States, but is in many of them altered by statute; these are referred to in Greenleaf's Cruise, vol. iv, p. 31, n. An important circumstance in the validity of American deeds is their acknowledgment by the grantor before a magistrate or other person in authority, the effect of which acknowledgment Mr. Greenleaf considers is regarded in three different points of view in different States, viz.: 1. Those in which the acknowledgment is regarded merely as evidence to the register that it is the deed of the party, and therefore entitled to registration as such. 2. Those in which the acknowledgment is received as a solemn admission of the fact of the execution of the deed, so as to dispense with the formality of attesting witnesses to its execution, which is otherwise required in order to render it a valid conveyance, and, 3. Those in which it is received prima facie as a substitution for any other proof of the formal execution of the deed, and entitles it to be read in evidence.

words over and above the first 1080, unless the *ad valorem* duty is less than 10*s*., in which case the progressive duty is equal to the amount of the *ad valorem* duty.(*b*)

If the premises should be situate in either of the counties of Middlesex or York, or in the town and county of Kingston-upon-Hull, a memorandum will or *ought to be found indorsed, to the effect that a memorial of the deed was duly registered on such a [*159] day, in such a book and page of the register, established by act of Parliament, for the county of Middlesex,(*c*) or the ridings of York, or the town of Kingston-upon-Hull.(*d*) Under these acts, all deeds are to be adjudged fraudulent and void, against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such deeds be duly registered before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee shall claim.[1] Wills of lands in the above counties ought also to be regis-

And shall exceed	£100	and not exceed	£125	. . . .	£0	12	6
"	125	"	150	. . . .	0	15	0
"	150	"	175	. . . .	0	17	6
"	175	"	200	. . . .	1	0	0
"	200	"	225	. . . .	1	2	6
"	225	"	250	. . . .	1	5	0
"	250	"	275	. . . .	1	7	6
"	275	"	300	. . . .	1	10	0
"	300	"	350	. . . .	1	15	0
"	350	"	400	. . . .	2	0	0
"	400	"	450	. . . .	2	5	0
"	450	"	500	. . . .	2	10	0
"	500	"	550	. . . .	2	15	0
"	550	"	600	. . . .	3	0	0
And where the purchase or consideration-money shall exceed £600, then for every £100, and also for any fractional part of £100 . .					0	10	0

(*b*) Stat. 13 & 14 Vict. c. 97, repealing the higher rate of duties imposed by the former Statute 55 Geo. III, c. 184, and also repealing the lease for a year stamp, which, upon the abolition of the lease for a year, was imposed on the release or deed of grant by stats. 4 & 5 Vict. c. 21, 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106, ante, pp. 146, 147.

(*c*) Stat. 7 Anne, c. 20.

(*d*) Stat. 2 & 3 Anne, c. 4, 5 Anne, c. 18, for the west riding; stat. 6 Anne, c. 35, for the east riding and Kingston-upon-Hull; and stat. 8 Geo. II, c. 6, for the north riding.

[1] The registry or recording of deeds has been provided for in all the United States by local statutes, of which the effect may in general be said to be that deeds, if unrecorded, though good against the grantor and his heirs and devisees, are void as to subsequent bona fide purchasers without notice, and in some States as to creditors. A reference to the statutes themselves will be found in 4 Greenleaf's Cruise, 445, and their effect as to notice to purchasers is thoroughly discussed in Mr. Hare's note to Le Neve v. Le Neve, 2 Lead. Cases in Equity, Part I, p. 162.

tered, in order to prevail against subsequent purchasers or mortgagees. Conveyances of lands forming part of the great level of the fens, called Bedford Level, are also required to be registered in the Bedford Level Office;(*e*) but the construction which has been put on the statute, by which such registry is required, prevents any priority of interest from being gained by priority of registration.(*f*)

From the specimen before him, the reader will be struck with the stiff and formal style which characterizes legal instruments; but the formality to be found in every properly drawn deed has this advantage, that the reader who is acquainted with the usual order, knows at once where to find any particular portion of the contents; and, in matters of intricacy, which must frequently occur, this facility of reference is of incalculable advantage. The framework of every deed consists but of one, two, or three simple sentences, according to the number of times that the *testatum*, or witnessing part, "Now this Indenture witnesseth," is repeated. This *testatum* is *always written in large letters; and, though there is no limit to its repetition (if circumstances should require it) yet, in the majority of cases, it occurs but once or twice at most. In the example above given, it will be seen that the sentence on which the deed is framed, is as follows:—"This Indenture, made on such a day between such parties, witnesseth, that for so much money A. B. doth grant certain premises unto and to the use of C. D. and his heirs." After the names of the parties have been given, an interruption occurs for the purpose of introducing the recitals; and when the whole of the introductory circumstances have been mentioned, the thread is resumed, and the deed proceeds, "Now this Indenture witnesseth." The receipt for the purchase-money is again a parenthesis; and soon after comes the description of the property, which further impedes the progress of the sentence, till it is taken up in the *habendum*, "To have and to hold," from which it uninterruptedly proceeds to the end. The contents of deeds, embracing as they do all manner of transactions between man and man, must necessarily be infinitely varied; and a simple conveyance, such as that we have given, is rare, compared with the number of those in which special circumstances occur. But in all deeds, as nearly as possible, the same order is preserved. The names of all the *parties* are invariably placed at the beginning; then follow recitals of facts relevant to the matter in hand; then, a preli-

[*160]

(*e*) Stat. 15 Car. II, c. 17, s. 8.

(*f*) Willis v. Brown, 10 Sim. 127.

minary recital, stating shortly what is to be done; then, the *testatum*, containing the *operative words* of the deed, or the words which effect the transaction, of which the deed is the witness or evidence; after this, if the deed relate to property, come the *parcels* or description of the property, either at large, or by reference to some deed already recited; then, the *habendum* showing the estate to be holden; then, the *uses* and *trusts*, if any; and, lastly, such qualifying provisos and covenants, as may be required by the special circumstances *of the case. Throughout all this, not a single stop is to be found, and the sentences are so framed as to be independent [*161] of their aid; for, no one would wish the title to his estates to depend on the insertion of a comma or semicolon. The commencement of sentences, and now and then some few important words, which serve as landmarks, are rendered conspicuous by capitals: by the aid of these, the practised eye at once collects the sense; whilst, at the same time, the absence of stops renders it next to impossible materially to alter the meaning of a deed, without the forgery being discovered.

The adherence of lawyers, by common consent, to the same mode of framing their drafts has given rise to a great similarity in the outward appearance of deeds; and the eye of the reader is continually caught by the same capitals, such as, "THIS INDENTURE," "AND WHEREAS," "NOW THIS INDENTURE WITNESSETH," "TO HAVE AND TO HOLD," &c. This similarity of appearance seems to have been mistaken by some for a sameness of contents,—an error for which any one but a lawyer might perhaps be pardoned. And this mistake, coupled with a laudable anxiety to save expense to the public, appears to have produced a plan for making conveyances by way of schedule. In pursuance of this plan, two acts of Parliament have already passed, one for conveyances,(*g*) the other for leases.(*h*) These acts, however, as might have been expected, are very seldom employed; nor is it possible that any schedule should ever comprehend the multitude of variations to which purchase deeds are continually liable. In the midst of this variety, the adoption, as nearly as possible, of the same framework, is a great saving of trouble, and consequently of expense; but, so long as the power of alienation possessed by the public is exercisable in such a variety of ways, and for such a multitude of

(*g*) Stat. 8 & 9 Vict. c. 119. (*h*) Stat. 8 & 9 Vict. c. 124.

[*162] purposes *as is now permitted, so long will the conveyance of landed property call for the exercise of learning and skill, and so long also will it involve the expense requisite to give to such learning and skill its proper remuneration. The remuneration, however, which is afforded to the profession of the law, is bestowed in a manner which calls for some remark. In a country like England, where every employment is subject to the keenest competition, there can be little doubt but that, whatever method may be taken for the remuneration of professional services, the nature and quantity of the trouble incurred must, on the average and in the long run, be the actual measure of the remuneration paid. The misfortune is, that when a wrong method of remuneration is adopted, the true proportion between service and reward is necessarily obtained by indirect means, and therefore in a more troublesome, and, consequently, more expensive manner, than if a proper scale had been directly used. In the law, unfortunately, this has been the case, and there seems no good reason why any individual connected with the law should be ashamed or afraid of making it known. The labor of a lawyer is very different from that of a copyist or printer; it consists first and chiefly in acquiring a minute acquaintance with the principles of the law, then in obtaining a knowledge of the facts of any particular case which may be brought before him, and lastly in practically applying to such case the principles he has previously learnt. But, for the last and least of these items alone, does he obtain any direct remuneration; for, deeds are now paid for by the length, like printing or copying, without any regard to the principles they involve, or to the intricacy or importance of the facts to which they may relate;(*i*) and, [*163] *more than this, the rate of payment is fixed so low, that no man of education could afford for the sake of it, first to ascertain what sort of an instrument the circumstances may require, and then to draw a deed containing the full measure of ideas of which words are capable. The payment to a solicitor for drawing a deed, is fixed at one shilling for every seventy-two words, denominated a *folio;* and the fees of counsel, though paid in guineas, average about the same.

(*i*) By a recent statute, 6 & 7 Vict. c. 73, s. 37, the charges of a solicitor for business relating entirely to conveyancing are rendered liable to *taxation* or reduction to the established scale, which is regulated only by length. Previously to this statute, the bill of a solicitor relating to conveyancing was not taxable, unless part of the bill was for business transacted in some court of law or equity. But although conveyancing bills were not strictly taxable, they were always drawn up on the same principle of payment by length, which pervades the other branches of the law.

The consequence of this false economy on the part of the public has been, that certain well-known and long-established lengthy forms, full of synonymes and expletives, are current among lawyers as *common forms*, and by the aid of these, ideas are diluted to the proper remunerating strength; not that a lawyer actually inserts nonsense simply for the sake of increasing his fee; but words, sometimes unnecessary in any case, sometimes only in the particular case in which he is engaged, are suffered to remain, sanctioned by the authority of time and usage. The proper amount of verbiage to a common form is well established and understood, and whilst any attempt to exceed it is looked on as disgraceful, it is never likely to be materially diminished till a change is made in the scale of payment. The case of the medical profession is exactly parallel; for, so long as the public think that the medicine supplied is the only thing worth paying for, so long will cures ever be accompanied with the customary abundance of little bottles. In both cases, the system is bad; but the fault is not with the profession, who bear the blame, but with the public, who have fixed the scale of payment, and who, by a little more direct liberality, might save themselves a considerable amount of indirect expense. If physicians' *prescriptions were paid for by their length, does any one suppose that their present conciseness [*164] would long continue?—unless indeed the rate of payment were fixed so high as to leave the average remuneration the same as at present. The acts above mentioned contain a provision that in taxing any bill for preparing and executing any deed under the acts, the taxing officer shall consider, not the length of such deed, but only the skill and labor employed and responsibility incurred in the preparation thereof.(*k*) This, so far, is an effort in the right direction; though it is too partial to be of any benefit. The student must, therefore, make up his mind to find in legal instruments a considerable amount of verbiage; at the same time he should be careful not to confound this with that formal and orderly style, which facilitates the lawyer's perusal of deeds, or with that repetition which is often necessary to exactness without the dangerous aid of stops. The form of a purchase-deed, which has been given above, is disencumbered of the usual verbiage, whilst, at the same time, it preserves the regular and orderly arrangement of its parts. A similar conveyance, by deed of grant, in the old-established common forms, will be found in the Appendix.(*l*)

(*k*) Stat. 8 & 9 Vict. c. 119, s. 4; stat. 8 & 9 Vict. c. 124, s. 3.

(*l*) See Appendix (B).

To return:—A lease and release was said to be an innocent conveyance; for, when by means of the lease and the Statute of Uses, the purchaser had once been put into possession, he obtained the fee simple by the release; and a release never operates by wrong, as a feoffment occasionally did,(*m*) but simply passes that which may lawfully and rightfully be conveyed.(*n*) The same rule is applicable to a deed of grant.(*o*) Thus, if a tenant merely for his own life should, by a lease or release, or by a grant, purport to convey to another an estate in fee *simple, his own life interest only would pass, [*165] and no injury would be done to the reversioner. The word *grant* is the proper and technical term to be employed in a deed of grant,(*p*) but its employment is not absolutely necessary; for it has been held that other words indicating the intention to grant will answer the purpose.(*q*)

In addition to a conveyance by deed of grant, other methods are occasionally employed. Thus, there may be a *bargain and sale* of an estate in fee simple, by deed duly enrolled pursuant to the statute 27 Hen. VIII, c. 16, already mentioned.(*r*) The chief advantage of a bargain and sale is, that by a statute of Anne,(*s*) an office copy of the enrolment of a bargain and sale is made as good evidence as the original deed.[1] In some cities and boroughs the enrolment of bargains and sales is made by the mayors or other officers.(*t*) And in the counties palatine of Lancaster and Durham it may be made in the palatine courts;(*u*) and so the enrolment of bargains and sales of lands in the County of Cheshire might have been made in the palatine courts of that county until their abolition.(*x*) Bargains and sales of lands in the County of York may be enrolled in the register of the riding in which the lands lie.(*y*) When a bargain and sale is employed, the whole legal estate in fee simple passes, as we have seen,(*z*) by means of the Statute of Uses,—the bargainor becoming seised to the use of the bargainee and his heirs. A bargain and sale, therefore, cannot,

(*m*) Ante, p. 121. (*n*) Litt. s. 600. (*o*) Litt. ss. 616, 617.
(*p*) Shep. Touch. 229.
(*q*) Shove v. Pincke, 5 T. Rep. 124; Haggerston v. Hanbury, 5 Barn. & Cres. 101.
(*r*) Ante, p. 150. (*s*) Stat. 10 Anne, c. 18, s. 3.
(*t*) Stat. 27 Hen. VIII, c. 16, s. 2. (*u*) Stat. 5 Eliz. c. 26.
(*x*) By stat. 11 Geo. IV, & 1 Will. IV, c. 70.
(*y*) Stat. 5 & 6 Anne, c. 18; 6 Anne, c. 35, ss. 16, 17, 34; 8 Geo. II, c. 6, s. 21.
(*z*) Ante, p. 149.

[1] This is in general provided for in all the recording acts in force in the United States.

like a lease and release, or a grant, be made to *one person to the use of another; for, the whole force of the Statute of Uses [*166] is already exhausted in transferring the legal estate in fee simple to the bargainee.(*a*)[1] Similar to a bargain and sale, is another method of conveyance occasionally, though very rarely, employed, namely, a *covenant to stand seised* to the use of another, in consideration of blood or marriage.(*b*)[2] In addition to these methods, there may be a con-

(*a*) See ante, p. 149.

(*b*) See Doe d. Daniell v. Woodroffe, 10 Mee. & Wels. 608; Doe d. Starling v. Prince, C. P. 15 Jur. 632.

[1] Because a use cannot be limited upon a use, and there can be no executed use beyond that of the estate of the bargainee; Doe d. Lloyd v. Passingham, 6 Barn. & Cress. 305. But although incapable of taking effect as a use, yet it may clearly be sustained as a trust (Gilbert on Uses, Sugden's note 1; Jackson v. Carey, 16 Johnson, 304; Franciscus v. Reigart, 4 Watts, 108, 118), in all cases in which equity can find anything to bind the conscience of the bargainee. "When the grant of an estate of freehold," says Mr. Hare, "was invalid at law for want of livery of seisin, the grantee could not recover, in equity, without proving a consideration. But when livery was made to a feoffee, for the use of a stranger, no consideration was necessary to support the use. And the only difference between making such a conveyance by feoffment, and by bargain and sale is the real or nominal consideration given by the barainee, which affords room for an argument, that he is entitled to retain that for which he has given value, as against third persons, who are mere volunteers. But this, as well as every similar question, would seem to be one of fact rather than of law. When the grantee, in a deed of bargain and sale, is really a purchaser for full and valuable consideration, and the declaration of trust is introduced solely at his request, and not that of the grantor, there may be room for doubt, whether there is anything in the transaction to bind his conscience, and render him answerable in equity, when he is not at law. For it may be said under these circumstances, with much truth, that equity ought not to take the estate from one who has paid for it, in order to give it to another who has not. But where the trust is the result of an express stipulation between the grantor and grantee, as it must be taken to be, unless the contrary is shown, and forms a part of the contract under which the latter claims, there can be no doubt that it is binding on him, and that he cannot refuse to execute it, when called on subsequently by the cestui que trust." Note to Roe v. Tranmar, 2 Smith's Leading Cases (5th ed), 455.

[2] When uses are raised upon a pecuniary consideration, the conveyance creating them is called a bargain and sale; when raised upon a good consideration, as blood or marriage, it is called a covenant to stand seised which is neither within the words nor the policy of the Statute of Enrolments, the consideration being of a public nature. 2 Sanders on Uses, 79; Jackson v. Dunsbagh, 1 Johns. Cas. 97. The presence of either the one or the other of these considerations is necessary to the validity of a deed which is to take effect under the Statute of Uses. Thus, in Jackson v. Sebring, 16 Johns. 515, a married woman joined with her husband in a deed in which, reciting that she had inherited the premises, which she wished to settle in the manner thereinafter mentioned, "in consideration thereof and of divers other good causes and considerations," they granted the premises to a stranger in trust for certain members of her family. It was held that this deed could not take effect as a bargain and sale, because there was no pecuniary consideration, nor as a covenant

veyance by *appointment* of a use, under a *power of appointment*, of which more will be said in a future chapter.(*cc*) The student, indeed, can never be too careful to avoid supposing that, when he has read and understood a chapter of the present, or any other elementary work, he is therefore acquainted with all that is to be known on the subject. To place him in a position to comprehend more, is all that can be attempted in a first book.

[*167] *CHAPTER X.

OF A WILL OF LANDS.[1]

THE right of testamentary alienation of lands, is a matter depending upon act of Parliament. We have seen, that previously to the reign of Henry VIII an estate in fee simple, if not disposed of in the lifetime of the owner, descended, on his death, to his heir at law.(*a*) To this rule, gavelkind lands, and lands in a few favored boroughs, formed exceptions; and the hardship of the rule was latterly somewhat mitigated by the prevalence of conveyances to *uses;* for the Court of Chancery allowed the *use* to be devised by will.(*b*) But when the Statute of Uses(*c*) came into operation, and all uses were turned into legal estates, the title of the heir again prevailed, and the inconvenience of the want of testamentary power then began to be felt. To remedy this inconvenience, an act of Parliament,(*d*) to which we have before referred,(*e*) was passed six years after the enactment of the Statute of Uses. By this act, every person having any lands or hereditaments holden in socage, or in the nature of socage tenure, was enabled, by his last will and testament in writing, to give and devise the same at his will and pleasure; and those who had estates in fee simple in

(*cc*) See the chapter on Executory Interests.
(*a*) Ante, p. 56. (*b*) Ante, p. 130.
(*c*) Stat. 27 Hen. VIII, c. 10; ante, p. 131.
(*d*) 32 Hen. VIII, c. 1, explained by statute 34 & 35 Hen. VIII, c. 5.
(*e*) Ante, p. 57.

---

to stand seised, because the grantee was a stranger to the grantor, neither related by blood or marriage; and the heirs of the latter were therefore declared to be entitled to recover; and the same view was sustained in Jackson v. Caldwell, 1 Cowen, 622.

[1] For the greater part of the notes to this chapter, the editor is indebted to the pen of a friend.

lands held by knights' service, was enabled, in the same way, to give and devise two third parts thereof. When, by the statute of 12 Car. II, c. 24,(*f*) socage was made the universal tenure, all estates in fee simple became at once devisable, being all then holden by socage. This extensive power of devising lands by a mere *writing unattested, was soon curtailed by the Statute of Frauds,(*g*) [*168] which required that all devises and bequests of any lands or tenements, devisable either by statute, or the custom of Kent, or of any borough, or any other custom, should be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and should be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they should be utterly void and of none effect. And thus the law continued till the year 1837, when an act was passed for the amendment of the laws with respect to wills.(*h*) By this act the original statute of Henry VIII(*i*) was repealed, except as to wills made prior to the 1st of January, 1838, and the law was altered to its present state. This act permits of the devise by will of every kind of estate and interest in real property, which would otherwise devolve to the heir of the testator, or if he became entitled by descent, to the heir of his ancestor;(*j*) but enacts,(*k*) that no will shall be valid, unless it shall be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of *two* or more witnesses, present at the same time; and such witnesses shall attest, and shall subscribe the will in the presence of the testator. One would have thought that this enactment was sufficiently clear, especially that part of it which directs the will to be signed at the foot or end thereof. Some very careless testators, and very clever judges, have, however, contrived to throw upon this clause of the act a discredit, which it does not deserve. And it has accordingly been enacted,(*l*) by way of explanation, that every will shall, so far only as *regards the position of the signature of the testator, or of the person signing for him, be [*169] deemed to be valid, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give

(*f*) Ante, p. 100.
(*g*) 29 Car. II, c. 3, s. 5.
(*h*) Stat. 7 Will. IV, & 1 Vict. c. 26.
(*i*) 32 Hen. VIII, c. 1.
(*j*) Sect. 3.
(*k*) Sect. 9.
(*l*) Stat. 15 & 16 Vict. c. 24.

effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow, or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names, or one of the names, of the subscribing witnesses; or by the circumstance that the signature shall be on a side or page, or other portion of the paper or papers, containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature; and the enumeration of the above circumstances is not to restrict the generality of the above enactment. But no signature is to be operative to give effect to any disposition or direction which is underneath, or which follows it; nor shall it give effect to any disposition or direction inserted after the signature shall be made. The unlearned reader will perhaps be of opinion that there is not one of the positions above so laboriously enumerated, that might not very properly have been considered as at the foot or end of the will within the spirit and meaning of the act; except in the case of a large blank being left before the *signature, apparently for the purpose of [*170] the subsequent insertion of other matter: in which case the fraud to which the will lays itself open, would be a sufficient reason for holding it void.[1]

[1] As the common law had its origin at a period when writing was little known, it permitted most of the essential acts of life to be transacted without writing. Thus a feoffment or lease for years might be made at law, or a bargain and sale of lands in equity, without the aid of the pen; and deeds even, derived their force from the seals, and not from the signatures of the parties. In like manner a will of personal property, and a will of land, where the power of devising land was given by custom, required nothing more to make it valid, than proof that it was really the last will of the testator. Hence not only was any writing, proved to express the final and testamentary purpose of a dead man, a sufficient will, though neither written nor signed by him, but a nuncupative or verbal devise or testament, might be equally valid; Co. Litt. 111. The Statute of Wills rendered a writing essential to the exercise of the testamentary power which it gave, but made no alteration in that which existed previously, and bequests of personalty, and devises of lands devisable by custom, consequently remained as they were at common law before its passage. And the

The Statute of Frauds, it will be observed, required that the witnesses should be credible; and, on the point of credibility, the rules

Statute of Frauds, which surrounded the execution of all wills of land, whether devisable by custom or by the Statute of Wills, with the forms and restrictions mentioned in the text, left wills of personalty without other guard than a restriction on those which were made verbally. Hence, while the power of devising land was surrounded with restraints which defeated the purpose of the testator if he failed to observe them, no precautions were taken against the intervention of fraud, in the testamentary disposition of money, stocks, or other personal assets, or even of leases for years, however large in amount or value.

Whatever may have been the wisdom of this distinction, at a time when personal property was still insignificant in value and importance, as compared with land, it has ceased to be applicable at the present day, when real estate plays a less conspicuous part in the business of the world than personal estate. Accordingly, many of the States of this country, have departed from the provisions of the Statute of Frauds in this respect, and by requiring greater precautions in the execution of wills of personalty, or less in those of realty, have brought both more nearly to the same standard; while others have abrogated the distinction altogether, and require that the testamentary power shall be exercised in the same way, whatever may be the nature of the property devised.

Thus Maine and Massachusetts adhere to the provisions of the statute with little or no variation as it regards lands, but have rendered them obligatory in the case of personal estate. In Pennsylvania, the signature of the testator at the end of the will, without the attestation of witnesses, is necessary and sufficient, for the validity of wills both of real and personal property. Some of the other States require a devise to be attested by witnesses, but make a simple signature enough for a bequest; although there are still some in which the distinction made by the Statute of Frauds between wills of realty and personalty subsists in full force, and personal property may be bequeathed by a writing authenticated by the signature of the testator, on proof that it was written by him or by his direction, and was meant by him as a final and testamentary disposition of his estate.

The alteration in the law, which put wills of land and chattels on the same footing, was made in New York in the year 1827, and in Pennsylvania in 1833, but did not take place in England until 1838, and is therefore one of the many instances, in which the law of England has undergone modifications, previously made here; which would seem to indicate that the law of development is the same in both countries, and that the effect of transplanting a race by colonization, is to hasten the growth of change in laws and institutions, rather than to produce it or vary its character.

The following summary may be made in conclusion.

At common law a writing was not essentially necessary to the validity of a will, either of real or personal property.

It was necessary to the exercise of the power of devise given by the statute of Henry VIII, but customary devises and wills of personal property were unaffected by that statute.

The Statute of Frauds rendered a formal execution necessary to the devise of land, but left bequests of personalty nearly as it found them. The distinction thus made has been abandoned in England, and in many parts of this country.

The statutes of Maine, Vermont, Massachusetts, Rhode Island, New York, Ohio, Illinois, Indiana, Michigan, Missouri, and South Carolina, as well as those of Kentucky, Texas, and Arkansas, make the signature of the testator, and the attestation of witnesses, necessary to the validity of wills of real and personal property, although witnesses may be dispensed with in the three last-mentioned States, when the will is

of law with respect to witnesses have, till recently, been very strict; for the law had so great a dread of the evil influence of the love of

wholly in the handwriting of the testator. The statute of Pennsylvania goes still farther, and holds the unattested signature of the testator sufficient in all cases. In Maryland, Connecticut, and Alahama, the signature of the testator is necessary and sufficient when the will is of personalty, although the presence and attestation of witnesses are necessary in the case of land; while Virginia, Georgia, Florida, North Carolina, and New Hampshire, still adhere in substance to the provisions of the Statute of Frauds as it regards both real and personal property, save that two witnesses are sufficient to give validity to a devise in North Carolina and Virginia, and that attestation is unnecessary when the will is in the handwriting of the testator, and found among his papers, or in the hands of a person to whom he has intrusted it for safe keeping.

To render a will valid under the Statute of Frauds, it must be executed by the testator in the presence of the witnesses, and attested by the witnesses in the presence of the testator. The latter requisition is express, and the former necessarily implied; for the witnesses cannot attest unless they witness; Swift v. Wiley, 1 B. Monroe, 117. It was, however, decided in Grayson v. Atkinson, 2 Vesey, 454; Ellis v. Smith, 1 Vesey, Jr., 11; Wright v. Wright, 7 Bingham, 457; and White v. The Trustees of the British Museum, 6 Id. 310, that in the case of wills, as in that of deeds, acknowledgment is equivalent to execution, and that a declaration by the testator that the instrument is his will in the presence of the witnesses, is sufficient to authorize them to subscribe their attestation, although they do not see him sign or seal it.

Under these decisions, which have been followed in many of the United States: Rosser v. Franklin, 6 Grattan, 1; Dudleys v. Dudleys, 3 Leigh, 436; Hall v. Hall, 17 Pick. 373; Dewey v. Dewey, 1 Metcalf, 349; Adams v. Field, 21 Vermont, 256; Denton v. Franklin, 9 B. Monroe, 28; "it is unnecessary," as was said by Tindal, Ch. J., in White v. The Trustees, supra, "for the testator actually to sign the will in the presence of the witnesses; any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witness complete." "Proof of an acknowledgment of the signature of the testator," said Cabell, J., in Dudleys v. Dudleys, "is as sufficient to prove the signature, as is proof by the witnesses, that they saw the act of signing: Grayson v. Atkinson, 2 Vesey, 454; Ellis v. Smith, supra; and in like manner an acknowledgment that a writing to which a man's name is signed is his will, is proof that he signed the will. Westbeech v. Kennedy, 1 Vesey & Beames, 362." In New Jersey, however, where the Act of 1714 requires that the will shall be signed in the presence of the witnesses, it has been held that the requisition must be literally complied with, and that an acknowledgment of the signature before them is insufficient. Compton v. Mitton, 7 Halsted, 70; Den v. Matlack, 2 Harrison, 87. And in New York, where the Revised Statutes require the testator to sign or acknowledge his signature in the presence of the witnesses, an acknowledgment that the instrument is his will at the time of attestation, is held not to enure as an acknowledgment of the signature; Chaffer v. The Baptist Missionary Convention, 10 Paige, 85; Rutherford v. Rutherford, 1 Denio, 33; Lewis v. Lewis, 13 Barbour, 17. "A party seeking to establish a will," said Brown, J., in the latter case, "takes upon himself the burden of proving the concurrence of all the acts essential to the validity of such an instrument. It is not enough that he proves one or two of them, but he must prove them all in succession. He must show that it is subscribed at the end thereof by the testa-

money, that it would not even listen to any witness, who had the

tor himself, or by some person for him, in his presence and by his direction. He must also show that the subscription was made in the presence of each of the attesting witnesses, or acknowledged by the testator to have been so made in the presence of each of the attesting witnesses. He must also prove that the testator, at the time of making such subscription, or at the time of acknowledging the same, declared the instrument to be his last will and testament. And, in the last place, he must show that each of the attesting witnesses signed his name at the end of the will, at the request of the testator. As I read the statute, there must be proof of each of these four separate acts independent of each other. Evidence that the testator subscribed and that the witnesses subscribed, is not proof that the testator signed in the presence of the witnesses. Evidence that he subscribed in the presence of the witnesses, and that they attested the instrument at his request, is not proof of its publication in conformity with the directions of the third subdivision of the 40th section. Neither is the evidence of its publication in conformity with the third subdivision proof that it was subscribed in the presence of the witnesses, or acknowledged to each of the witnesses to have been so subscribed, so as to satisfy the demand of the second subdivision. Proof of any one of these four separate acts cannot be enlarged by implication or presumption, so as to become proof of any other of the four separate acts. The order in which these several acts are to be performed, is of no moment. In contemplation of the statute they are all to be done at the same time. Neither of the four acts which, united, make a valid execution of the instrument, may be done at a different time from the rest. If the instrument has in fact been signed at a previous time, then the signature must be acknowledged to the subscribing witnesses, which is deemed to be equivalent to a new signing of the instrument. I am clearly of opinion, therefore, that a will is duly executed when the several acts required by the statute have been performed at the same time, whatever the order in which such acts may be severally performed. Doe v. Doe, 2 Barb. S. C. Rep. 205; Seguine v. Seguine, Ib. 394."

Although it is essentially necessary that the witnesses should see that which they are to attest at the time, and may be called upon to prove subsequently, there is no such necessity that the testator should be present during their attestation. When, therefore, as in New York, his presence is not made requisite by express enactment, it may be dispensed with, Lyon v. Smith, 10 Barbour, 124. Most of the States of the Union, however, have followed the Statute of Frauds in this particular, which, as we have seen, required the testator to be present at the signature of the witnesses; probably with a view to prevent the fraudulent substitution of one instrument for another. This provision has been held to be satisfied, if he be so placed that he might see them, although they are in another room, and are not proved to have been actually seen; Shires v. Glascock, 1 Salkeld, 688; Dewey v. Dewey, 1 Metcalf, 349; Bynum v. Bynum, et al., 11 Iredell, 632; Hill v. Barge, 12 Alabama, 687.

But it has also been held, that when his actual position is such, that he could not see them, it is not enough that he might have done so by changing it: Boldry v. Parris, 2 Cushing, 433; or even by sitting up: Reynolds v. Reynolds, 1 Spear, 255; or turning over in his bed: Neil v. Neil, 1 Leigh, 6; while in Graham v. Graham, 10 Iredell, 219, an attestation in another room was held insufficient, because the testator could only see the backs of the witnesses, and might, therefore, have been unable to discern whether the instrument which they attested was that which he had executed. The severe construction adopted in these cases, seems to be inconsistent with the doctrine held in Shires v. Glascock, where it was said that the attestation would be good although the testator's back was turned, or although he was in bed with the curtains

smallest pecuniary interest in the result of his own testimony. Hence, under the Statute of Frauds, a bequest to a witness to a will, or to the wife or husband of a witness, prevented such witness from being heard in support of the will; and, the witness being thus incredible, the will was void for want of three credible witnesses. By an act of Geo. II,(*m*) a witness to whom a gift was made, was rendered credible; and the gift only which was made to the witness, was declared void; but the act did not extend to the case of a gift to the husband or wife

(*m*) Stat. 25 Geo. II, c. 6.

drawn; and, in the recent case of Moore v. Moore, 8 Grattan, 307, the Court of Appeals of Virginia, were divided in opinion on a point nearly similar to that decided in Neil v. Neil. It is certain that under this course of decision, or that followed in New York, under the Revised Statutes, no care or skill in the execution of a will, can secure it from being defeated by a mistake or failure of memory on the part of the subscribing witnesses. Such elaborate precautions against fraud may sometimes produce it, by leading to the suppression or perversion of testimony, and are more likely to defeat honest instruments, than to preclude the authentication of such as are fraudulent. If any attestation be required, it should be the simplest possible, and the course of Pennsylvania in dispensing with it altogether, and requiring nothing more than the signature of the testator, is sustained by experience and the opinion of those best able to judge of its practical results.

It has been held in this country, in accordance with the decisions in England, that writing the name of the testator in the body of the instrument, with the intent to give it validity, is a signature within the meaning of the Statute of Frauds. Several of the States, however (Sarah Mile's Will, 4 Dana, 1; Waller v. Waller, 1 Grattan, 454), have made enactments similar to that recently adopted in England, requiring the signature to be subscribed or written at the end or foot of the will, and it was decided in Hays v. Harden, 6 Barr, 409, that the true construction of such enactments requires, that anything written after the signature shall operate as a cancellation of, and avoid the whole instrument. In Wykoff's Appeal, 3 Harris, 281, the Court receded somewhat from this extreme view of the law, and held that the addition of new matter will not invalidate the execution of a will, unless it is material and testamentary in its nature, and such as to show that the disposing purpose of the testator was not complete and final at the time when the signature was written. The same principle was adopted and carried still further in Tonnele v. Hall, 4 Comstock, 140.

The provisions of the Statute of Frauds, with regard to the revocation of wills, have been very generally re-enacted in this country, and it has been held here, in accordance with the cases in England, that there can be no revocation unless they are actually and literally complied with; and that a mere attempt to comply with them will not be sufficient, although frustrated or defeated by force or fraud. Doe d. Reed v. Harris, 6 Adolp. & Ellis, 209; Boyd v. Cook, 3 Leigh, 32; Hise v. Fincher, 10 Iredell, 139. Implied revocations by marriage, and the birth of a child, have also been regulated in most of the States of this country by legislation which, in some instances, has provided that both, and in others that one, of these events shall enure as an entire revocation, but has more generally declared that a will which fails to make provision for a subsequent wife or child, shall fail of effect only so far as is necessary to give the person thus unprovided for, the share which would have been his had no will been made. See 2 American Leading Cases, 3d ed. 648, 667.

of a witness; such a gift, therefore, still rendered the whole will void.(*n*) Under the new act, however, the incompetency of the witness at the time of the execution of the will, or at any time afterwards, is not sufficient to make the will invalid;(*o*) and if any person shall attest execution of a will, to whom, or to whose wife or husband, any beneficial interest whatsoever shall be given (except a mere charge for payment of debts), the person attesting will be a good witness; but the gift of such beneficial interest to such person, or to the wife or husband of such person, will be void.(*p*) Creditors, also, are good witnesses, *although the will should contain a charge for payment of debts;(*q*) and the mere circumstance of being appointed executor, is no objection to a witness.(*r*) By more recent statutes,(*s*) the rule which excluded the evidence of witnesses in courts of justice, and of parties to actions and suits, on account of interest, has been very properly abolished; and the evidence of interested persons is now received, and its value estimated according to its worth; but the new Wills Act is not affected by these statutes.(*t*) [*171]

So much, then, for the power to make a will of lands, and for the formalities with which it must be accompanied. A will, it is well known, does not take effect until the decease of the testator. In the meantime, it may be revoked in various ways, as, by the marriage of either a man or woman;(*u*)[1] though, before the recent act, the marriage of a man was not sufficient to revoke his will, unless he also had a child born.(*x*) A will may also be revoked by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.(*y*) But the recent act enacts,(*z*) that no obliteration, interlineation, or other alteration, made in any will after its execution, shall have any effect (except so far as the words, or effect of the will, before *such alteration, shall not be apparent), unless such alteration shall be executed in the same [*172]

(*n*) Hatfield v. Thorp, 5 Barn. & Ald. 589; 1 Jarm. on Wills, 65.

(*o*) Stat. 7 Will. IV, & 1 Vict. c. 26, s. 14. (*p*) Sect. 15.

(*q*) Sect. 16. (*r*) Sect. 17.

(*s*) Stat. 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99; amended by stat. 16 & 17 Vict. c. 83.

(*t*) Stat. 6 & 7 Vict. c. 85, s. 1; 14 & 15 Vict. c. 99, s. 5.

(*u*) Stat. 7 Will. IV, & 1 Vict. c. 26, s. 18. "Except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions."

(*x*) 1 Jarm. on Wills, 106. See Marston v. Roe d. Fox, 8 Ad. & Ell. 14.

(*y*) Stat. 7 Will. IV, & 1 Vict. c. 26, s. 20. (*z*) Sect. 21.

[1] See supra, note to p. 170.

manner as a will; but the signature of the testator, and the subscription of the witnesses, may be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of, or opposite to a memorandum referring to such alteration, and written at the end, or some other part of the will. A will may also be revoked by any writing, executed in the same manner as a will, and declaring an intention to revoke, or by a subsequent will or codicil,(*a*) to be executed as before.[1] And where a codicil is added, it is considered as part of the will; and the disposition made by the will is not disturbed further than is absolutely necessary to give effect to the codicil.(*b*)

The above are the only means by which a will can now be revoked; unless, of course, the testator choose afterwards to part with any of the property comprised in his will, which he is at perfect liberty to do. In this case the will is revoked, as to the property parted with, if it does not find its way back to the testator, so as to be his at the time of his death. Under the statute of Hen. VIII, a will of lands was regarded in the light of a *present conveyance*, to come into operation at a future time, namely, on the death of the testator. And if a man, having made a will of his lands, afterwards disposed of them, they would not, on returning to his possession, again become subject to his will, without a subsequent republication or revival of the will.(*c*) But, under the new act, no subsequent conveyance shall prevent the operation of the will, with respect to such devisable estate or interest as the testator shall have at the time of his death.(*d*) In the same manner, the old *statute was not considered as enabling a [*173] person to dispose by will of any lands, except such as he was possessed of at the time of making his will; so that, lands purchased after the date of the will, could not be affected by any of its dispositions, but descended to the heir at law.(*e*) This, also, is altered by the new act, which enacts,(*f*) that every will shall be construed, with reference to the property comprised in it, to speak and take effect, as if it had been executed immediately before the death of the testator,

(*a*) Sect. 20. (*b*) 1 Jarman on Wills, 160. (*c*) Ibid. 130, 180.
(*d*) Stat. 7 Will. IV, & 1 Vict. c. 26, s. 23.
(*e*) 1 Jarman on Wills, 587. (*f*) Sect. 24.

[1] The student will find the subject of the revocation of wills treated in detail in the note to Lawson v. Morrison, 2 Amer. Lead. Cas. 684.

unless a contrary intention shall appear by the will.[1] So that, every man may now dispose, by his will, of all such landed property, or real

[1] A similar change has been made in many parts of this country, and after-acquired lands brought within the reach of a prior devise. Thus in Pennsylvania, the act of 8th April, 1833, provides that land acquired by the testator after making his will, shall pass by a general devise, unless a contrary intention is apparent on the face of the will, while the Revised Statutes of New York declare that every devise of all the testator's real estate, or which denotes an intention to devise it, shall be held to pass all the real estate, which he is entitled to devise at the time of his death.

The effect of these statutes on the rule that a conveyance which works an alteration of the estate is a revocation of a prior devise, is not altogether clear; for such a revocation may result either from the effect of the conveyance, in putting the estate beyond the scope of the testator's purpose, or in showing that his purpose is changed with regard to the estate; being in the one case a pure revocation, and in the other more properly an ademption. An alteration of the estate devised, which amounts to a parting with that held at the execution of the will, and the acquisition of a new interest in the same land, may therefore defeat the will in the former way, even when it can no longer do so in the latter. The legislature of New York accordingly further provided, as Parliament has more recently done in England, that a conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property previously devised or bequeathed, is altered but not wholly divested, shall not be deemed a revocation, but the devise or bequest shall pass the resulting estate or interest, which would otherwise descend to the testator's heirs, or go to his next of kin, unless an opposite intention is declared in the instrument by which the alteration of the estate is made. The doctrine of equity by which a contract for the sale of land, is treated as an equitable revocation of a prior devise, is done away with by a further provision, that a contract for the sale of property previously devised or bequeathed, shall not be deemed a revocation either at law or in equity, but the property shall pass to the devisee, subject to the remedy of the vendee for a specific performance.

Another section of the same law declares, that no charge or incumbrance for the purpose of a security on real or personal property, shall take effect as a revocation. This provision, however, would seem to be, if not superfluous, nothing more than an embodiment of the well-settled doctrine of equity, in the form of law. 2 American Leading Cases, 670, 3d ed.

It was held by the Supreme Court of New York, in the recent case of Beck v. McGillis, 9 Barbour, 35, that the provisions above cited, did not apply where the testator made a conveyance of the land, and took a mortgage for the purchase-money, because the interest arising under the mortgage was in no respect the same with that given by the will, and could not therefore pass under its provisions.

The legislatures of many of the States of this country, have contented themselves with giving the testator power to devise after-acquired lands, and have left the question when, and under what circumstances he shall be held to have exercised it, to be determined by the courts, on general principles of construction. This renders it important to determine, when a will relates prima facie to the state of things which exists at the death of the testator, and when to that which exists when it goes into operation.

Devises of real estate are said to speak from their date, and bequests of personalty, from the death of the testator; or, in other words, devises are construed as referring to the state of things which prevailed at the time when the testator executed them, and bequests to that which exists at his death.

estate, as he may hereafter possess, as well as that which he now has. Again, the result of the old rule, that a will of lands was a present

In accordance with this rule of construction, it is held on the one hand, that a residuary or general bequest of personalty, passes all that the testator has when he dies, which is not otherwise disposed of, whether acquired subsequently to the execution of the will or not; while it has been said, on the other hand, that even if after-purchased lands were within the devising power given by the statute of Henry VIII, they would notwithstanding lie prima facie without the disposing purpose of the devisor. Harwood v. Goodright, Cowper, 90.

It was accordingly decided in Smith v. Edrington, 8 Cranch, 66, and Allen v. Harrison, 3 Call, 264, that a devise will be held, in the absence of expressions to the contrary, to relate solely to that which the devisor has at the time of making his will, and not to what he acquires subsequently. Hence, although the power to devise, was extended by statute in Virginia as early as the year 1785 to lands acquired by the testator after the date of the will, he was still presumed to refer only to those which he had when it was executed, unless he manifested an opposite and more enlarged intention. The same point was decided in Kentucky by the Court of Appeals, under the statute of that State, which is copied from that of Virginia. Warner v. Swearingen, 6 Dana, 194. The opinion delivered in this case, seems to have been in some measure founded on a misapprehension of the distinction between the effect of a specific, and a general or residuary bequest, on leaseholds subsequently devised or assigned to the devisor, but was followed in the Circuit Court in Marshall v. Porter, 10 B. Monroe, 1.

It must, however, be remembered, that the rule which restricts the purpose of a devise, to the period of its execution, as well as that which construes a bequest as referring to the death of the testator, is a mere general presumption, which varies with circumstances, and will yield wholly to proof of an opposite intention. Thus specific legacies of personal property, pass simply the interest held by the donor at the time when they are made, and will not only be defeated by a change in its nature, but fail to take effect on a subsequent interest in the same property; and so far is this carried, that a bequest of a leasehold estate in specific land, will not pass the estate acquired under a subsequent lease of the same property: Slatter v. Noton, 16 Vesey, 197; nor even under a subsequent renewal of the original lease, in pursuance of its covenants, unless such is shown to have been the intention of the testator; James v. Dean, 11 Vesey, 382.

As, however, all wills, whether of real or personal property, are intended not to take effect till death, the real meaning of the testator would no doubt be best answered, by reading them as referring to that period, unless there is something to raise an opposite inference. This was the rule of the civil law, and would seem to be that of sound and general reason; and it was accordingly held in Gold v. Johnson, 21 Conn. 616, and Canfield v. Boswick, Ib. 530, that where, as in Connecticut, the statute law puts real and personal property equally within the reach of a prior will, "it will speak prima facie as to both, from the death of the testator, unless its language indicate the contrary intention. This may be by words of description, or by reference to an actual existing state of things: 1 Jarman on Wills, 277; and hence a devise of personal property generally carries all the testator had at the time of his death. The same would have been true of real estate, had it not been held that in England, a devise of real estate was considered to be in the nature of an appointment, which could not be made in relation to future-acquired estate. The rule was the same here until our late statute was passed, but the rule has

conveyance, was, that a general devise by a testator of the residue of his lands, was, in effect, a specific disposition of such lands and such only as the testator then had, and had not left to any one else.(*g*) A general residuary devisee was a devisee of the lands not otherwise left, exactly as if such lands had been given him by their names. The consequence of this was, that if any other persons, to whom lands were left, died in the lifetime of the testator, the residuary devisee had no claim to such lands, the gift of which thus failed; but the lands descended to the heir at law. This rule is altered by the recent act, under which,(*h*) unless a contrary intention appear by the will,

(*g*) 1 Jarman on Wills, 587. (*h*) Sect. 25.

been abolished here and in England, and there is now no difference between real and personal estate."

But whatever may be the reasonableness of this conclusion, it is at variance with the opinion of the Supreme Court of the United States in Smith v. Edrington, as well as with that of the Court of Appeals in Warner v. Swearingen; and it is, to say the least, doubtful whether the extension of the power of devise to after-acquired lands, has any effect on the rule which interprets the intention of the devisor, as relating solely to that which he has when the will is made. It has been seen that the act of 1 Victoria, provides for the difficulty, by enacting that all wills shall speak as if they had been executed immediately before the death of the testator, unless a contrary intention is apparent. The same rule has also been introduced in Maryland. And the recent legislation of New York and Pennsylvania, fills the gap left by its absence, by providing in the former State, that a devise "of the testator's real estate, or denoting an intention to devise all his real property" shall be construed to pass all the real estate which he has at the time of his death; and in the latter, that after-acquired land shall pass by a general devise, unless a contrary intention be manifest on the face of the will. This latter provision does not meet those cases, in which the testator has specifically devised land in which he has nothing until after the execution of his will, or alters the estate which he has before his death, when the specific devise would necessarily fail, and the land probably descend to the heir, notwithstanding the existence of a general or residuary devise. This contingency is partially provided for in New York, by an enactment that an alteration of estate shall only be a revocation pro tanto, but the effect of a specific devise of land to which the testator has no title, or a defective title, or a title subsequently acquired, would seem to be an open question there, as well as in Pennsylvania, which needs the interposition of the legislature to solve it, and protect the interest of devisees and the purpose of the testator.

The question whether a devise will pass after-acquired land, where the devising power is given by statute after the will is executed, but before the death of the testator, is analogous to that last considered, and like it has received different and inconsistent solutions. It was decided in the negative in Brewster v. McCall, 15 Conn. 274, and Mullock v. Souder, 5 W. & S. 198; but the latter decision has since been questioned by the court which made it, Jack v. Shoenberger, 10 Harris, 416; and the point was decided the other way in Bishop v. Bishop, 4 Hall, 138; Cushing v. Aylison, 12 Metcalf, 169; and Loveren v. Lamprey, 2 Foster, 434, where wills were held to be essentially ambulatory, and to depend for their effect on the intention of the testator at the time of his death, as ascertained and defined by the rules of law then existing.

all real estate comprised in any devise, which shall fail by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will.

[*174] This failure of a devise, by the decease of the devisee *in the testator's lifetime, is called a *lapse;* and this lapse is not prevented by the lands being given to the devisee *and his heirs;* and in the same way, before the recent act, a gift to the devisee and the *heirs of his body*, would not carry the lands to the heir of the body of the devisee, in case of the devisee's decease in the lifetime of the testator.(*i*) For, the terms *heirs* and *heirs of the body*, are words of limitation merely; that is, they merely mark out the estate, which the devisee, if living at the testator's death, would have taken,—in the one case an estate in fee simple, in the other an estate tail; and the heirs are no objects of the testator's bounty, further than as connected with their ancestor.(*k*) Two cases have, however, been introduced by the new act, in which the devise is to remain unaffected by the decease of the devisee in the testator's lifetime. The first case is that of a devise of real estate to any person for an *estate tail;* in which case, if the devisee should die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.(*l*) The other case is that of the devisee being *a child or other issue* of the testator dying in the testator's lifetime and leaving issue, any of whom are living at the testator's death. In this case, unless a mere life estate shall have been left to the devisee, the devise shall not lapse, but shall take effect as in the former case.(*m*)

[*175] The construction of wills is the next object of our *attention. In construing wills, the Courts have always borne in mind, that a testator may not have had the same opportunity of legal advice in drawing his will, as he would have had in executing a deed.

(*i*) Hodgson and wife v. Ambrose, 1 Dougl. 337.

(*k*) Plowd. 345; 1 Rep. 105; 1 Jarm. Wills, 293.

(*l*) Stat. 7 Will. IV & 1 Vict. c. 26, s. 32.

(*m*) Sect. 33. See Johnson v. Johnson, 3 Hare, 157; Griffiths v. Gale 12 Sim. 354.

And the first great maxim of construction accordingly is, that the intention of the testator ought to be observed.(*n*) The decisions of the Courts, in pursuing this maxim, have given rise to a number of subsidiary rules, to be applied in making out the testator's intention; and, when doubts occur, these rules are always made use of to determine the meaning; so that the true legal construction of a will, is occasionally different from that, which would occur to the mind of an unprofessional reader. Certainty cannot be obtained without uniformity, nor uniformity without rule. Rules, therefore, have been found to be absolutely necessary; and the indefinite maxim of observing the intention, is now largely qualified by the numerous decisions, which have been made respecting all manner of doubtful points, each of which decisions forms or confirms a rule of construction, to be attended to whenever any similar difficulty occurs. It is, indeed, very questionable, whether this maxim of observing the intention, reasonable as it may appear, has been of any service to testators; and it has certainly occasioned a great deal of trouble to the Courts. Testators have imagined, that the making of wills, to be so leniently interpreted, is a matter to which anybody is competent; and the consequence has been, an immense amount of litigation, on all sorts of contradictory and nonsensical bequests. An intention, moreover, expressed clearly enough for ordinary apprehensions, has often been defeated by some technical rule, too stubborn to yield to the general maxim, that the intention ought to be *observed. Thus, in one case,(*o*) a testator declared his intention to be, that his [*176] son should not sell or dispose of his estate, for longer time than his life, and to that intent he devised the same to his son for his life, and after his decease, to the heirs of the body of his said son. The Court of King's Bench held, as the reader would no doubt expect, that the son took only an estate for his life; but this decision was reversed by the Court of Exchequer Chamber, and it is now well settled that the decision of the Court of King's Bench was erroneous.(*p*) The testator unwarily made use of technical terms, which always require a technical construction. In giving the estate to the son for life, and after the decease to the heirs of his body, the testator had, in effect, given the estate to the son *and the heirs of his body*. Now such a gift is an estate tail; and one of the inseparable incidents of an estate

(*n*) 30 Ass. 183 a; Year Book, 9 Hen. VI, 24 b; Litt. s. 586; Perkins, s. 555; 2 Black. Com. 381. (*o*) Perrin v. Blake, 4 Burr. 2579; 1 H. Bla. 672; 1 Dougl. 343.

(*p*) Fearn. Cont. Rem. pp. 147 to 172.

tail is, that it may be barred in the manner already described.(*q*) The son was, therefore, properly entitled, not to an estate for life only, but to an estate tail, which would at once enable him to dispose of the lands for an estate in fee simple. In contrast to this case, are those to which we have before adverted, in the chapter on estates for life.(*r*) In those cases, an intention to confer an estate in fee simple was defeated by a construction, which gave only an estate for life; a gift of lands or houses to a person simply, without words to limit or mark out the estate to be taken, was held to confer a mere life interest. But, in such cases, the Courts, conscious of the pure technicality of the rule, were continually striving to avert the hardship of its effect, by laying hold of the most minute variations of phrase, as matter of exception. Doubt thus took the place of direct hardship; till the legislature thought it time to interpose. *A remedy [*177] is now provided by the recent act for the amendment of the laws with respect to wills,(*s*) which enacts,(*t*) that where any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a contrary intention shall appear by the will. In these cases, therefore, the rule of law has been made to give way to the testator's intention; but the case above cited, in which an estate tail was given when a life estate only was intended, is sufficient to show, that rules still remain, which give to certain phrases such a force and effect, as can be properly directed by those only, who are well acquainted with their power.

Another instance of the defeat of intention, arose in the case of a gift of lands to one person, "and in case he shall die without issue," then to another. The Courts interpreted the words, "in case he shall die without issue," to mean "in case of his death, and of the failure of his issue;" so that the estate was to go over to the other, not only in case of the death of the former, leaving no issue *living at his decease*, but also in the event of his leaving issue, and his issue afterwards failing, by the decease of all his descendants. The Courts considered that a man might properly be said to be "dead without issue," if he had died and left issue, all of whom were since

(*q*) Ante, p. 42.
(*r*) Ante, p. 19.
(*s*) 7 Will. IV & 1 Vict. c. 26.
(*t*) Sect. 28.

deceased; quite as much as if he had died, and left no issue behind him. In accordance with this view, they held such a gift as above mentioned to be, by implication, a gift to the first person and his issue, with a remainder over, on such issue failing, to the second. This was, in fact, a gift of an estate tail to the first party;(*u*) for, an estate-tail is just such an estate as *is descendible to the issue of the party, and will cease when he has no longer heirs of his body, [*178] that is, when his issue fails. Had there been no power of barring entails, this would no doubt have been a most effectual way of fulfilling to the utmost the testator's intention. But, as we have seen, every estate-tail in possession is liable to be barred, and turned into a fee simple, at the will of the owner. With this legal incident of such an estate, the Courts considered that they had nothing to do; and, by this construction, they accordingly enabled the first devisee to bar the estate-tail which they adjudged him to possess, and also the remainder over to the other party. He thus was enabled at once to acquire the whole fee simple, contrary to the intention of the testator, who most probably had never heard of estates-tail, or of the means of barring them.[1] This

(*u*) 1 Jarm. Wills, 488; Machell v. Weeding, 8 Sim. 4, 7.

[1] In the case of a devise to A. and his heirs, and if he die without issue, remainder to B., if the terms of the will were strictly followed, A. would take an estate in fee simple, which would render the limitation to B. void as a remainder (because a remainder cannot be created after an estate in fee simple), and void also as an executory devise, because it would transgress the rule against perpetuities, as restricting alienation until after an indefinite failure of issue. But as the testator has shown an intention to benefit the heirs of A., as also the remainder-man, Courts restrict the estate limited to A. to an estate-tail, upon which the limitation to B. in remainder is good, as the failure of issue is the regular limit to an estate tail, and it takes effect *as* a remainder under the operation of the rule that wherever a limitation can take effect as a remainder, it shall never operate as an executory devise, while the rule against perpetuities is, at the same time, observed, because the right to suffer a common recovery is the inseparable incident to an estate tail, and the restriction upon alienation is, therefore, determinable at the option of the tenant in tail. Thus the rule against perpetuities is, in this instance, avoided, by decreasing the estate of the devisee from a fee simple to an estate tail. Doe d. Ellis v. Ellis, 9 East, 382; Tenny d. Agar v. Agar, 12 East, 252; Romilly v. James, 6 Taunton, 263; Mackell v. Weeding, 8 Simons, 4; Middlesworth v. Collins, 8 Leg. Int. 11; Eichelberger v. Barnitz, 9 Watts, 450. On the other hand, an estate to A. for life, and if he die without issue, remainder to B., is, for the same reason, increased to an estate tail, for, as an executory devise, the limitation to B. would be equally void, as in the last case, and for the same reason; Sonday's case, 9 Coke, 127 b; Langley v. Baldwin, 1 P. Wms. 759; Doe d. Bean v. Halley, 8 Term 5; Attorney-General v. Bayley," 2 Brown's Ch. 570; Stanley v. Lennard, 1 Eden, 87; Mackell v. Weeding, 8 Simons, 4; George v. Morgan, 4 Harris, 95. In neither of the cases thus put by way of illustration, is the contingency that A. may not bar the entail by a recovery, allowed to have an effect, for

rule of construction had been so long and firmly established, that nothing but the power of Parliament could effect an alteration. This has now been done by the recent act for the amendment of the laws with respect to wills, which directs(*x*) that, in a will, the words "die without issue," and similar expressions, shall be construed to mean a want or failure of issue in the lifetime, or at the death of the party, and not an indefinite failure of issue; unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a gift of an estate tail to such person or issue, or otherwise.[1]

(*x*) Sect. 29.

---

the circumstance of the estate tail being optionally alienable by means of a common recovery, prevents the ulterior limitation from being a perpetuity.

[1] It is well settled that a devise in fee will be restricted, and a devise for life enlarged to an estate tail, by a gift over in case the devisee die without issue, unless there is something to justify a different construction. Clarke v. Baker, 3 S. & R. 470; Eichelberger v. Barnitz, 9 Watts, 447; Stoever v. Stoever, 9 S. & R. 434; Welsh v. Elliott, 13 Ib. 200; McCarthey v. Dawson, 1 Wharton, 4; Lapsley v. Lapsley, 9 Barr, 130; Eby v. Eby, 5 Barr, 463; Vaughan v. Dickes, 8 Harris, 309; George v. Morgan, 4 Id. 95; Tetor v. Tetor, 4 Barbour's S. C. 419; Jackson v. Billinger, 18 Johnson, 368; Lion v. Burtiss, 20 Id. 483; 2 Cowen, 535; Lilibridge v. Adie, 1 Mason, 224; Ide v. Ide, 5 Mass. 200; Hawley v. Northampton, 8 Id. 3; Hurlbert v. Emerson, 16 Id. 241; Watkins v. Seers, 3 Gill, 492; Moorhouse v. Cotheal, 1 Zabriskie, 480; Den v. Small, 1 Speneer, 151; Waples v. Harman, 1 Harrington, 223; Deboe v. Lowen, 8 B. Monroe, 616. When, however, there is anything in the words of the gift or limitation, or in the context, to rebut this construction, and show that the testator meant a failure of issue in the lifetime of the first taker, instead of an indefinite failure, it will be rejected, and the limitation over construed as an executory devise in defeasance of a fee simple, and not as a remainder sustained by an estate tail. Hauer v. Scheetz, 3 Binney, 532; Holmes v. Holmes, 5 Id. 252; Langley v. Heald, 7 W. & S. 96; Arnold v. Buffum, 2 Mason, 208; Johnson v. Currin, 10 Barr, 498; Williams v. Caston, 1 Strobhart, 130; Hall v. Chaffee, 14 New Hampshire, 215; Doe v. Taylor, 2 Southard, 413; Richardson v. Noyes, 2 Mass. 56; Hill v. Hill, 4 Barbour's S. C. 419; Heerd v. Horton, 1 Denio, 165; De Haas v. Bunn, 2 Barr, 335; Den v. Coxe, 3 Dev. 394; Pells v. Brown, Croke Car. 590; Porter v. Bradley, 3 Term, 143; Roe v. Jeffrey, 7 Id. 489; Tooey v. Bassett, 10 East, 460. Thus, in Langley v. Heald, 7 W. & S. 96, a devise to "my son, and in case he shall die and leave no lawful issue, *then* to my daughter, if she be *then* living, and to her heirs," was construed as an estate in fee to the son, with an executory devise to the daughter, because the use of the word "then" showed that the testator contemplated a failure of issue in the lifetime of the daughter, and not an indefinite failure.

The exceptions to the general rule that a limitation over upon the death of the first taker without issue, means an indefinite failure of issue, were said by Sergeant, J., in Eichelberger v. Barnitz, to be "in the case of personal estate, in which the construction is more liberal in favor of executory devises; or when the time at which the devise over is to take effect, is expressly or impliedly limited to a particular period within a life or lives in being, and twenty-

From what has been said, it will appear that, before the late alteration, an estate tail might be given by will, by the mere implication, arising from the apparent intention of the testator, that the land should not go over to any one else, so long as the first devisee had any issue *of his body. In the particular class of cases to which we have referred, this implication is now excluded by express enactment. But the general principle by which any kind of estates may be given by will, whenever an intention so to do is expressed, or [*179]

one years after; as where the contingency is, if the first taker die without issue before arriving at twenty-one, or if he die unmarried and without issue, or if he die without leaving issue *behind him*, or living at the time of his decease; or if the devise over be of a life estate, which implies, necessarily, that such devisee over may outlive the first estate." Thus where after a devise to the testator's children and their heirs, he went on to declare that if either of them should die intestate, unmarried, without issue, and without having disposed of his share of the estate, it should go to and be divided among the surviving children, it was held that the children took a fee in the first instance, subject to an executory devise over upon the happening of the contingency. Coates' Street, 2 Ashmead, 12. In this case the words "without issue," were directly conjoined with other words, which confined their operation to the lifetime of the first devisee; and this construction will be adopted, notwithstanding the use of a disjunctive conjunction, whenever it is plainly necessary to give effect to the purpose of the testator. When, therefore, the gift over is in the event of the death of the first devisee unmarried or without issue, or "under age, or without issue," the clause will be read conjunctively, and the limitation over regarded as an executory devise depending on the fulfilment of both branches of the contingency. Witsell v. Mitchell, 3 Richardson, 289; Doe v. Roe, 1 Harrington, 475; Rapp v. Rapp, 6 Barr, 45; 6 Exchequer, 61, note.

It is held, moreover, in some of the States of this country, that when the subsequent limitation is to the survivor or survivors, of a class of persons in esse when the will is made, it will take effect as an executory devise, and not as a remainder limited upon an indefinite failure of issue. Fosdick v. Cornell, 1 Johnson, 440; Jackson v. Anderson, 16 Ib. 382; Siddell v. Wills, 1 Spencer, 223; Den v. Allaire, Ib. 6; Mayer v. Wileberger, 2 Georgia, 20; Cutter v. Doughty, 23 Wend. 513; Lovett v Bulsid, 3 Barbour's Ch. 466; Jackson v. Chew, 12 Wheaton, 143; Moore v. Howe, 4 Monroe, 199; Johnson v. Currin, 10 Barr, 498. But this course of decision is contrary to the weight of authority in this country and in England: Caskey v. Brewer, 17 S. & R. 441; Amelong v. Dorneyer, 16 Ib. 323; Lapsley v. Lapsley 9 Barr, 130; Hoxton v. Archer, 3 Gill & Johnson, 199; and was sanctioned by the Court of Errors in Jackson v. Anderson, in opposition to the dissenting opinion of Chancellor Kent, chiefly on the ground that it had become a rule of property in New York, which had been acquiesced in too long to be overruled without injustice.

It has, however, long been admitted, that the interpretation of a gift over upon a failure of issue, as meaning an indefinite failure, tends to defeat the primary and more important purpose of the testator, even when it gives effect to his secondary and more general purpose. It was accordingly abolished by the Revised Statutes of New York and Virginia, which provide that a remainder over, limited upon death without heirs of the body, or issue, shall be construed to mean heirs or issue living at the death of the ancestor. Similar provisions have since been made in Indiana, Michigan, and Missouri, and also in England.

clearly implied, still remains the same. In a deed, technical words are always required: to create an estate tail by a deed, it is necessary, as we have seen,(*y*) that the word *heirs*, coupled with *words of procreation*, such as heirs *of the body*, should be made use of. So, we have seen that, to give an estate in fee simple, it is necessary, in a deed, to use the word *heirs* as a word of limitation, to limit or mark out the estate. But in a will, a devise to a person and his seed,(*z*) or to him and his issue,(*a*) and many other expressions, are sufficient to confer an estate tail; and a devise to a man and his *heirs male*, which, in a deed, would be held to confer a fee simple,(*b*) in a will gives an estate in tail male;(*c*) for, the addition of the word "male," as a qualification of heirs, shows that a class of heirs, less extensive than heirs general, was intended;(*d*) and the gift of an estate in tail male, to which, in a will, words of procreation are unnecessary, is the only gift which at all accords with such an intention. So, even before the late enactment, directing that a devise without words of limitation should be construed to pass a fee simple, an estate in fee simple was often held to be conferred, without the use of the word *heirs*. Thus, such an estate was given by a devise to one in *fee simple*, or to him *forever*, or to him *and his assigns forever*,(*e*) or by a devise of all the testator's *estate*, or of all his *property*, or all his *inheritance*, and by a vast *number of other expressions, by which an intention to give the fee simple could be considered as expressed or implied.(*f*)[1]

[*180]

(*y*) Ante, p. 120.
(*z*) Co. Litt. 9 b; 2 Black. Com. 115.
(*a*) Martin v. Swannell, 2 Beav. 249; 2 Jarm. on Wills, 329.
(*b*) Ante, p. 120.
(*c*) Co. Litt. 27 a; 2 Black. Com. 115.
(*d*) 2 Jarman on Wills, 233.
(*e*) Co. Litt. 9 b; 2 Black. Com. 108.
(*f*) 2 Jarm. Wills, 181 et seq.

[1] Although the intention of the testator must prevail when ascertained, yet in ascertaining it, the words which he uses are to be taken in their natural and proper sense, Hone v. Van Schack, 3 Comstock, 538, which necessarily implies that technical words are to be construed in a technical sense, Campbell v. Jamison, 8 Barr, 498. But a local, accidental, or peculiar meaning will be given to words, if it be clearly apparent that they were used or understood in that sense by the testator, although inconsistent with their proper or technical meaning, Doe v. Tofield, 11 East, 246. Lasher v. Lasher, 13 Barbour, 106; although the presumption in favor of their appropriate meaning, should always prevail unless plainly rebutted, Thelluson v. Woodford, 4 Vesey, 329.

When a will manifests two purposes which are valid separately, but, when taken together, are inconsistent with each other or with legal principle, the law will give effect to the more general. Hence, where the words used by the devisor import that his descendants shall take by descent, and yet be restricted to an estate for life, the devise will be construed as an estate tail; thus

The doctrine of uses and trusts applies as well to a will, as to a conveyance made between living parties. Thus, a devise of lands to

carrying out the more important purpose, and sacrificing the other which is legally inconsistent with it: Jackson v. Delancey, 13 Johnson, 537; Malcolm v. Malcolm, 3 Cushing, 472; Dart v. Dart, 7 Conn. 250; and where the words of the will are such as to give a fee, but are coupled with a restraint on the power of alienation, the fee will pass to the devisee, and the restraint be held simply void, McCullough v. Gilmore, 1 Jones, 370. Thus, in Perrin v. Blake, 4 Burrow, 257–9, the will would have been universally admitted to create an estate tail, had not the testator declared that the devisee should have no power to sell the land for longer than his life, which could only be rendered effectual by restricting him to a life estate, and vesting the fee in his issue, not by descent but by purchase, which would have involved the necessity of overruling the general intention of the testator, and creating different estates from those which he had given, and making a new will instead of construing that which he executed.

The judicial interpretation of particular words or phrases in one devise, has a great, if not decisive influence in the construction of every other which is worded in the same manner: Sisson v. Seabury, 1 Sumner, 239; and long experience has shown that some violence may be done to the expressions of the testator, in order to carry out the objects which he had in view in making his will, and the meaning of certain modes or forms of expression, sought in an interpretation at variance with their literal or grammatical construction or meaning. Thus words in the conjunctive are sometimes construed disjunctively: Mason v. Mason, 2 Sandford, 432; and there is an important class of cases in which words in the disjunctive may be taken conjunctively. Forsyth v. Clark, 1 Foster, 409.

Thus, if a man give an estate of inheritance with a proviso that if the devisee die under twenty-one, *or* without issue, it shall go over, the word "and" will be read instead of "or," because, otherwise, if the first taker should die under age, leaving issue, such issue would be disinherited. Hence the conjunctive effect is given to the word, in direct opposition to its regular import, and the ulterior limitation does not take effect unless upon the happening of the double event, viz., the death of the devisee under age *and* without issue: Soulle v. Guerard, Cro. Eliz. 525, S. C. Moore, 422; Price v. Hunt, Pollexfen, 645; Walsh v. Peterson, 3 Atkins, 193; Frammingham v. Brand, 1 Wilson, 140; Barker v. Suretees, 2 Strange, 1175 (all of which were decided before the Revolution); Fairfield v. Morgan, 5 Bos. & Puller, 38; Morris v. Morris, 21 Eng L. & Eq. R. 153; Ray v. Enslin, 2 Mass. 554; Hauer's Lessee v. Sheetz, 2 Binney, 544; Holmes v. Holmes, 5 Id. 252; Beltzhoover v. Costen, 7 Barr, 13; Jackson v. Blanshaw, 6 Johnson, 54; Arnold v. Buffum, 3 Mason, 208; Parker v. Parker, 5 Metcalf, 134; although Courts depart from the literal sense of the expression used by the testator with reluctance, even for the purpose of effecting what they believe to have been his real intention, and are indisposed to go farther than they are sustained by precedent, Mortimer v. Hartley, 6 Exchequer, 47–61, note.

When deeds and wills were first subjected to legal interpretation, the law followed the usage and understanding of the times, and held that a gift of land meant a gift for life, unless the donor declared his intention to pass the fee. It was, accordingly, well established in England, and afterwards here, that a devise of land gave only a life estate. Franklin v. Harter, 7 Blackford, 488; Wright v. Den, 10 Wheaton, 204; Van Alstyne v. Spraker, 13 Wend. 578; Stille v. Thompson, 14 S. & R. 74; and as this rule of construction became a rule of property, which the Courts could not abrogate without legislative aid, it

A. and his heirs, to the use of B. and his heirs, upon certain trusts to be performed by B., will vest the legal estate in fee simple in B.;

continued to subsist, long after the institutions and customs on which it was founded had passed away, and it had ceased to be a guide to the meaning of wills or of those by whom they were executed.

The legislature has, however, recently remedied the difficulty in England, and in most parts of this country, by providing that a devise of land shall be construed as passing the fee, unless there is something to restrict it to a less estate. The change thus made, is only a change in the interpretation to be put on the words of the will, for it was always held that the devisee would take whatever estate the testator meant to give him, and the Courts were astute in seizing on every circumstance or expression, which tended to show that the gift was meant to embrace the inheritance, and not to be confined to an estate for life. Thus a devise of the estate and not merely of the land, Lambert's Lessee v. Paine, 3 Cranch, 97; Godfrey v. Humphrey, 18 Pick. 537; Tracy v. Kilborn, 3 Cushing, 557; Kellogg v. Blair, 6 Metcalf, 322; Jackson v. Merrill, 6 Johnson, 185; Jackson v. Babcock, 12 Id. 389; Morrison v. Smith, 6 Binney, 94; Vanderwerker v. Vanderwerker, 7 Barbour, 221; or even of "that farm and estate," Barton v. White, 7 Exchequer, 720, passed a fee, and the same result might follow from a preamble expressing an intention to give all the testator's estate, although the subsequent devise spoke only of particular land, Schriver v. Meyer, 7 Harris, 87; if the latter clause were expressly or by implication dependent on or connected with the former: French v. McIlhenney, 3 Binney, 13; McClure v. Douthit, 3 Barr, 446; Miller v. Lynn, 7 Ib. 443; Franklin v. Harter, 7 Blackford, 488; Winchester v. Tilghman, 1 Harris & McHenry, 452; though not, as it would seem, when there was no other connection between them, than that which arose from their being found in the same instrument, Steele v. Thompson, 14 S. & R. 74. But when the word "estate" or other equivalent expression was not employed, the largest descriptive words, as, for instance, "all my lands, tenements, and hereditaments," would not give a fee even when coupled with the phrase, "freely to be possessed and enjoyed." Doe v. Bain, 2 C. & M. 23, 28, note; Page v. Wright, 4 Washington's C. C. R. 194; Wright v. Dunn, 10 Wheaton, 205; although similar words have sometimes turned the scale when otherwise balanced. Campbell v. Carson, 12 S. & R. 54; Doe v. Roberts, 11 A. &. E. 1000. So, when there was a charge upon the devisee in respect of the lands devised he took a fee, because every devise imports a benefit, and he might otherwise be injured, should he die before the profits equal the charge, Jackson v. Budd, 10 Johnson, 148; Jackson v. Martin, 18 Id. 31. But a charge exclusively on the land did not come within this reason, and, consequently, would not enlarge the estate of the devisee. Vanderwerker v. Vanderwerker, 7 Barbour, 221; Alstyne v. Spraker, 13 Wendell, 578, 18 Ib. 200; Doe v. Garlick, 14 M. & W. 698, 710.

A devise for life may also be enlarged into an estate of inheritance, notwithstanding the use of words implying a wish that it should be restricted to the life of the devisee, by words of limitation, showing an intention that the subsequent devisees shall take through the first as his heirs, and not as purchasers; or when the purpose of the subsequent devise cannot be attained without vesting an estate in fee or in tail in the first taker. Malcom v. Malcom, 3 Cushing, 472. Thus a devise to R., his children and grandchildren, and if he shall die without children or grandchildren to the heirs of J., was held to give an estate tail to R., in order to give effect to the devise to the children and grandchildren, and yet reconcile it with the devise over to the heirs of J. Here the immediate purpose of

and the Court of Chancery will compel him to execute the trust; unless, indeed, he disclaim the estate, which he is at perfect liberty to do.(*g*) But, if any trust or duty should be imposed upon A., it will then become a question, on the construction of the will, whether or no A. takes any *legal* estate; and, if any, to what extent. If no trust or duty is imposed on him, he is a mere conduit-pipe for conveying the legal estate to B., filling the same passive office as a person to whom a feoffment or conveyance has been made to the use of another.(*h*) From a want of acquaintance on the part of testators with the Statute of Uses,(*i*) great difficulties have frequently arisen in determining the nature and extent of the estates of trustees under wills. In doubtful cases, the leaning of the Courts was to give to the trustees no greater estate than was absolutely necessary for the purposes of their trust. But this doctrine having frequently been found inconvenient, provision has been made in the recent Wills Act,(*k*) that, under certain circumstances, not always to be easily explained, the fee simple shall pass to the trustees, instead of an estate determinable when the purposes of the trust shall be satisfied.

*The above examples may serve as specimens of the great danger a person incurs, who ventures to commit the destination [*181] of his property to a document framed in ignorance of the rules, by which the effect of such document must be determined. The recent act, by the alterations above-mentioned, has effected some improvement; but no act of Parliament can give skill to the unpractised, or cause everybody to attach the same meaning to doubtful words. The only way, therefore, to avoid doubts on the construction of wills, is to word them in proper technical language,—a task to which those only who have studied such language can be expected to be competent.[1]

If the testator should devise land to the person who is his heir at

(*g*) Nicloson v. Wordsworth, 2 Swanst. 365; Urch v. Walker, 3 Mylne & Craig, 702.
(*h*) 1 Jarm. Will, 198; see ante, p. 132. (*i*) 27 Hen. VIII, c. 10; ante, p. 131.
(*k*) Stat. 7 Will. IV, & 1 Vict. c. 26, ss. 30, 31.

the testator, which was to give an estate for life to R, with a remainder for life to his children, and an ultimate limitation on the extinction of his descendants to those of J., could not be carried out consistently with the rule of law which forbids perpetuities, or the imposition of any restraint on the power of alienation, which endures longer than a life or lives in being, and twenty-one years afterwards (as to which see Ch. III. sect 2), and the only mode in which the devise could be rendered valid was by sacrificing particular details to the general purpose of the testator.

[1] See, passim, Sugden's "Letters to a Man of Property," p. 138.

law, it is provided by the "Act for the Amendment of the Law of Inheritance,"(*l*) that such heir shall be considered to have acquired the land as a devisee, and not by descent. Such heir, thus taking by *purchase*,(*m*) will, therefore, become the stock of descent; and in case of his decease intestate, the lands will descend to *his* heir, and not to the heir of the testator, as they would have done had the lands *descended* on the heir. Before this act, an heir to whom lands were left by his ancestor's will, was considered to take by his prior title of descent, as heir, and not under the will,—unless the testator altered the estate, and limited it in a manner different from that, in which it would have descended to the heir.(*n*)

[*182] *CHAPTER XI.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

THE next subject of our attention will be the mutual rights, in respect of lands, arising from the relation of husband and wife. In pursuing this subject, let us consider, first, the rights of the husband in respect of the lands of his wife; and secondly, the rights of the wife in respect of the lands of her husband.

1. First then, as to the rights of the husband in respect of the lands of his wife. By the act of marriage, the husband and wife become in law one person, and so continue during the coverture or marriage.(*a*) The wife is, as it were, merged in her husband. Accordingly, the husband is entitled to the whole of the rents and profits which may arise from his wife's lands, and acquires a freehold estate therein, during the continuance of the coverture;(*b*) and, in like manner, all the goods and personal chattels of the wife, the property in which passes by mere delivery of possession, belong solely to her husband.(*c*)[1]

(*l*) Stat. 3 & 4 Will. IV, c. 106, s. 3; see Strickland v. Strickland, 10 Sim. 374.
(*m*) Ante, p. 78. (*n*) Watk. Descents, 174, 176 (229, 231, 4th ed.)
(*a*) Litt. s. 168; 1 Black. Com. 442; Gilb. Ten. 108; 1 Roper's Husband and Wife, 1.
(*b*) 1 Rop. Husb. and Wife, 3; Robertson v. Norris, 11 Q. B. 916.
(*c*) 1 Rop. Husb. and Wife, 169.

[1] This rule of the common law has been altered by statutes in Pennsylvania, New York, and some other States, which, in effect, protect from the husband or his creditors property which may have been owned by the wife before marriage, or acquired since. Hurd v. Cass, 9 Barbour, 366; Cummings' Appeal, 1 Jones, 272; Goodyear v. Rumbagh, 1 Harris, 480; Hatton v. Wier, 19 Alabama, 127; Kidd v. Montague, Ib. 619; Eldredge v. Preble, 34 Maine, 148; Selph v. Howland, 23 Mississippi, 264.

For, by the ancient common law, it was impossible that the wife should have any power of disposition over property for her separate benefit, independently of her husband. In modern times, however, a more liberal doctrine has been established by the Court of Chancery; for this court now permits property of every kind to be vested in trustees, in trust to apply the *income for the sole and separate use of a woman during any coverture, present or future.[1] Trusts of this nature are continually enforced by the court; that is, the court will oblige the trustees to hold for the sole benefit of the wife, and will prevent the husband from interfering with her, in the disposal of such income; she will consequently enjoy the same absolute power of disposition over it, as if she were sole or unmarried. And, if the income of property should be given directly to a woman, for her separate use, without the intervention of any trustee, the court will compel her husband himself to hold his marital rights in such income, simply as a trustee for his wife, independently of himself.(*d*)[2] The limitation of property in trust for the separate use of an intended wife, is one of the principal objects of a modern marriage settlement. By means of such a trust, a provision may be secured, which shall be independent of the debts and liabilities of the husband, and thus free from the risk of loss, either by reason of his commercial embarrassments, or of his extravagant expenditure. In order more completely to protect the wife, the Court of Chancery allows property thus settled for the separate use of a woman, to be so tied down for her own personal benefit, that she shall have no power, during her coverture, to anticipate or [*183]

(*d*) 2 Rop. Husb. and Wife, 152, 182; Major v. Lansley, 2 Russ. Mylne, 355.

[1] Unless, however, the property be limited in terms to her "sole and separate" use, or other words be used which denote the intention to exclude the marital right, equity will follow the law, which gives to the husband the power of dealing with the wife's income. Thus in Tidd v. Lister, 17 Eng. Law & Eq. R. 560, S. C. 23 Id. 578, a purchaser for value from the husband of the wife's equitable *life interest*, was, on that ground, protected against the claim of the wife for maintenance. A well-settled distinction exists, however, between the husband's right thus to dispose of his wife's life interest, and that over her absolute interest, in which case both the husband and his assignees take it subject to the equity of making a provision for her. Tidd v. Lister, Browning v. Headley, 2 Robinson's (Va.) Rep. 340.

[2] The rule of equity is, as to this, the same on both sides of the Atlantic. Cochran v. O'Hern, 4 Watts & Serg. 95; Heath v. Knapp, 4 Barr, 228; Fears v. Brooks, 12 Georgia, 195; Trenton Banking Co. v. Woodruff, 1 Greene's Ch. R. 118; Shirley v. Shirley, 9 Paige, 364; Steele v. Steele, 1 Iredell's Eq. R. 452; Long v. White, 5 J. J. Marshall, 226; Knight v. Bell, 22 Alabama, 198; Griffith v. Griffith, 5 B. Monroe, 113.

assign her income; for it is evident that, to place the wife's property beyond the power of her husband, is not a complete protection for her,—it must also be placed beyond the reach of his persuasion.

In this particular instance, therefore, an exception has been allowed to the general rule, which forbids any restraint to be imposed on alienation. When the trust, under which property is held for the separate use of a woman during any coverture, declares that she shall not dispose of the income thereof in any mode of anticipation, every [*184] attempted *disposition by her during such coverture will be deemed absolutely void. (e)[1]

(e) Brandon v. Robinson, 18 Ves. 434; 2 Rop. Husb. & Wife, 230; Tullett v. Armstrong, 1 Beav. 1; 4 Mylne & Cr. 390; Scarborough v. Borman, 1 Beav. 34; 4 M. & Cr. 377; Baggett v. Meux, 1 Collyer, 138; ante, p. 73.

[1] But, although this is so where there is such an express restraint upon anticipation or alienation, yet in the absence of such a clause in the instrument which creates the trust, its subjects are, in England, much at the mercy of the husband through the medium of his persuasion over the wife, for the rule there prevails that a wife is, as respects her separate estate, to be considered as a feme sole. If the subjects of the trust be personal estate, she takes it with all its incidents, and, among others, with an absolute power of alienation, Fettiplace v. Gorges, 1 Ves. p. 46, 3 Brown's Ch: R. 8; either by acts inter vivos, or by will, Grigby v. Cox, 2 Vesey Sen. 517; Rich v. Cockrell, 9 Vesey, 69; Wagstaff v. Smith, Id. 520; and whether it be in possession or reversion: Sturgis v. Corp, 13 Vesey, 190. She can also absolutely dispose of the income of real estate, and her contract to sell or mortgage it will be specifically enforced against her, Power v. Bailey, Ball & Beatty's R. 49; Stead v. Nelson, 2 Beavan, 245; Wainwright v. Hardisty, Id. 363; Major v. Lansley, 2 Russel & Mylne, 337, even without the assent of her trustees, Essex v. Atkins, 14 Vesey, 542. The wife's separate estate has also, since the case of Hulme v. Tenant, 1 Brown's Ch. R. 16, been rendered liable to her general engagements, Murray v. Barlee, 3 Mylne & Keen, 223; Owens v. Dickerson, Craig & Phillips, 53; see notes to Hulme v. Tenant, in 1 Leading Cases in Equity, 361; Hill on Trustees, 421; Spence's Eq. Jur. 513; although no case can be found in which a bill by husband and wife against the trustees for a conveyance of the fee to themselves has been sustained, probably on the ground that although equity will give effect to the contracts of the wife, it will not interfere in favor of volunteers. "In the midst of great perplexity and confusion," says a text writer, "this much may be collected from the cases, that wherever money or the interest of money, or the rents and profits of lands for her life, have been limited to the separate use of a married woman, with a power to appoint, but without a prescribed form of appointment, there she has the complete property in the thing given, to the full extent of her estate in it, and may alienate it and all that arises from it in any manner in which she thinks proper." Clancy on Husband and Wife, 289.

On this side of the Atlantic, however, while the general principle is, with some modifications in its application, recognized and enforced in some States, a different rule prevails in others. The Chancellor of South Carolina had, in 1811, decided the case of Ewing v. Smith, 3 Dessaussure, 417, in accordance with the English authorities,

Whilst provisions for the separate benefit of a married woman have thus arisen in equity, the rule of law, by which husband and wife are

which he elaborately reviewed, but the Court of Appeals reversed the decision and established the contrary principle, that a married woman has no power over her separate estate further than has been expressly given to her by the instrument creating it, and that any such power so given must be strictly pursued. This decision has been adhered to in that State. Magwood v. Johnston, 1 Hill's Ch. R. 228; Reed v. Lamar, 1 Strobhart's Eq. R. 27; Calhoun v. Calhoun, 2 Id. 231. The same principle was ably enforced by Chancellor Kent in Methodist Episcopal Church v. Jaques, 3 Johns, Ch. 78; but this decision was reversed by the Court of Errors, 17 Johnson, 548; and the English rule then as well as subsequently approved: Dyett v. North American Coal Co. 20 Wendell, 570; Powell v. Murray, 2 Edward Ch. 636; though under the Revised Statutes as to trusts, the construction they have received has restricted the wife's power over her separate estate within the narrowest limits. L'Amoureux v. Van Renselaer, 1 Barbour's Ch. 34; Rogers v. Ludlow, 3 Sanford's Ch. 104; Noyen v. Blakemar, Id. 538; Leggett v. Perkins, 2 Comstock, 297. In Pennsylvania, the English rule was disapproved of in one of Ch. J. Gibson's ablest opinions in the case of Lancaster v. Dolan, 1 Rawle, 231; and it was declared to be "the true principle of these settlements, that instead of holding the wife to be a feme sole to all intents as regards her separate estate, she ought to be deemed so only to the extent of the power clearly given in the conveyance, and that instead of maintaining that she has an absolute right of disposition, unless she is expressly restrained, the converse of the proposition ought to be established—that she has no power but what is expressly given." The rule thus established has been consistently followed in that State: Thomas v. Folwell, 2 Wharton, 11; Dorrance v. Scott, 3 Id. 309; Wallace v. Coston, 9 Watts, 137; Rogers v. Smith, 4 Barr, 93; although since the act of 11th April, 1848, it has been decided in the yet unreported case of Haines v. Ellis, that a conveyance directly to a married woman to her separate use, without the intervention of a trustee (as to which, see supra, p. 183, n), gives to her the power of alienation.

The rule thus adopted in South Carolina and Pennsylvania has been received with approbation in some States, such as Tennessee, Morgan v. Elam, 9 Yerger, 375; Marshall v. Stephens, 8 Humphreys, 159; Sutton v. Baldwin, Id. 209; Ware v. Sharp, 1 Swan, 489; Mississippi, Doty v. Mitchell, 9 Smedes & Marshall, 447; Montgomery v. Agricultural Bank, 10 Id. 567; Virginia, Williamson v. Beekham, 8 Leigh, 20; Rhode Island, Metcalf v. Cook, 2 Rb. Island R. 355; but others profess to follow the English rule, such as Connecticut, Imlay v. Huntingdon, 20 Connec. 175; New Jersey, Leaycraft v. Hedden, 3 Green's Ch. R. 551; Kentucky, Coleman v. Wooley, 10 B. Monroe, 320; Alabama, McCroan v. Pope, 17 Alab. 612; Bradford v. Greenway, Id. 805; Collins v. Larenburg, 19 Id. 685, Georgia, Wyly v. Collins, 9 Georg. 223; Fears v. Brooks, 12 Georg. 200. In North Carolina the general principle seems undetermined, but it has been there held that a married woman may charge the profits of her separate estate by any instrument or means which refers to the estate and distinctly denotes an intention to bind it. Frazier v. Brownlow, 3 Iredell's Eq. Rep. 237; Newlin v. Freeman, 4 Id. 312; Mr. Wallace's note to Hulme v. Tenant, supra; Mr. Wharton's note to Hill on Trustees, 421.

In England it is settled that a trust for separate use, though suspended by the cessation of coverture, will reattach on a subsequent marriage: Clark v. Jaques, 1 Beavan, 36; Dixon v. Dixon, Id. 40; Ashton v. McDougall, 5 Id. 56; but it has been decided in Pennsylvania, in Smith v. Starr, 3 Wharton, 62, and Hamersley v. Smith, 4 Id. 126, that the trust was not revived by the

considered as one person, still continues in operation, and is occasionally productive of rather curious consequences. Thus, if lands be given to A. and B. (husband and wife), and C., a third person, and their heirs—here, had A. and B. been distinct persons, each of the three joint tenants would, as we have seen,(*f*) have been entitled, as between themselves, to one-third part of the rents and profits, and would have had a power of disposition also over one-third part of the whole inheritance. But, since A. and B., being husband and wife, are only one person, they will take, under such a gift, a moiety only of the rents and profits, with a power to dispose only of one-half of the inheritance ;(*g*) and C., the third person, will take the other half, as joint tenant with them. Again, if lands be given to A. and B. (husband and wife) and their heirs—here, had they been separate persons, they would have become, under the gift, joint tenants in fee simple, and each would have been enabled, without the consent of the other, to dispose of an undivided moiety of the inheritance. But, as A. and B. are one, they now take, as it is said, by *entireties* ;[1] and, whilst the husband may do what he pleases with the rents and profits during the coverture, he cannot dispose of any part of the inheritance, without his wife's concurrence.[2] Unless they both agree in making a disposition, each one of *them must run the risk of gaining the whole by survivorship, or losing it by dying first.(*h*) Another consequence of the unity of husband and wife, is the inability of either of them to convey to the other. As a man cannot convey to himself, so he cannot convey to his wife, who is part of himself.(*i*) But a man may leave lands to his wife by his will; for the married state does not deprive the husband of that disposing power, which he would possess if single, and a devise by will does not take effect until after his decease.(*k*) And by means of the Statute of Uses, the effect of a conveyance by a man to his wife can be produced ;(*l*) for a man may con-

[*185]

(*f*) Ante, p. 113.

(*g*) Litt. s. 291; Gordon v. Whieldon, 12 Beav. 170; Re Wylde, 2 De Gex, M. & G. 724.

(*h*) Doe d. Freestone v. Parratt, 5 T. Rep. 652.

(*i*) Litt. s. 168.

(*k*) Litt. ubi supra.

(*l*) 1 Rop. Husb. and Wife, 53.

subsequent marriage, and in the latter of these cases the Supreme Court sustained a bill filed by the assignees of the wife and second husband to recover the trust fund from the trustees appointed by her father's will.

[1] Harding v. Springer, 2 Shepley, 407; Fairfield v. Chastelleux, 1 Barr, 176.

[2] Needham v. Bransom, 5 Iredell, 426; Tane v. Campbell, 7 Yerger, 319. The husband, however, can in his own name maintain trespass for cutting timber, Fairchild v. Chastelleux, and has the absolute control of the property, and can convey or mortgage it during his life, Barber v. Harris, 16 Wendell, 15.

vey to another person to the use of his wife, in the same manner as, under the statute, we have seen,(*m*) a man may convey to the use of himself.

If the wife should survive her husband, her estates in fee simple will remain to herself and her heirs, after his death, unaffected by any debts which he may have incurred, or by any alienation which he may have attempted to make;(*n*) for, although the wife, by marriage, is prevented from disposing of her fee simple estates, either by deed or will,[1] yet neither can the husband, without his wife's concurrence, make any disposition of her lands to extend beyond the limits of his own interest. If, however, he should survive his wife, he will, in case he has had issue by her born alive, that may by possibility inherit the estate as her heir, become entitled to an estate for the residue of his life, in such lands and tenements of his wife, as she was solely seised of in fee simple, or fee tail, in possession.(*o*) The husband, while in the *enjoyment of this estate, is called a tenant by the [*186] *curtesy* of England, or, more shortly, tenant by the curtesy. If the wife's estate should be equitable only, that is, if the lands should be vested in trustees for her and her heirs, her husband will still, on surviving, in case he has had issue which might inherit, be entitled to be tenant by the curtesy, in the same manner as if the estate were legal;(*p*) for, equity in this respect follows the law.[2] But, whether legal or

(*m*) Ante, p. 155. (*n*) Stat. 32 Hen. VIII, c. 28, s. 6; 1 Rop. Husb. and Wife, 56.

(*o*) Litt. ss. 35, 52; 2 Black. Com. 126; 1 Rop. Husb. and Wife, 5; Barker v. Barker, 2 Sim. 249. [In this case, an estate was devised to a married woman for life; and if she died leaving issue, then to such issue and their heirs, and it was held that the wife's estate was determined by her dying leaving issue, by which the children took as purchasers by force of the gift, and consequently that the husband was not entitled to curtesy.]

(*p*) 1 Roper's Husb. and Wife, 18.

[1] The student will of course bear in mind, that the common law rule is here referred to; but most or all of the local statutes heretofore referred to (p. 182 n) give to the wife the power of alienation and devise. At common law, however, a wife may be grantee in a deed without the consent of her husband, Co. Litt. 3 a, and though he may divest the estate by his dissent, yet if he neither agree nor disagree, the purchase is good. Baxter v. Smith, 6 Binney, 427.

[2] This has reference, of course, to the simple case of an equitable fee in the wife, which, for the reasons stated supra on p. 136, n., is subject to the same rules as a legal estate. Robinson v. Codman, 1 Sumner, 128. And in some of the United States this right of the husband is expressly given by statute. 1 Greenl. Cruise, 157, 812. But where the estate is limited to the separate use of the wife, free from the control, &c., of her husband, he is not entitled to curtesy. Hearle v. Greenbank, 1 Ves. 298; Cochran v. O'Hern, 4 Watts & Serg. 98; Rigler v. Cloud, 2 Harris, 363.

equitable, the estate must be a several one, or else held under a tenancy in common, and must not be one of which the wife was seised or possessed jointly with any other person or persons.(*q*) The estate must also be an estate in possession; for there can be no curtesy of an estate in reversion expectant on a life interest or other estate of freehold.(*r*) The husband must also have had, by his wife, issue born alive;[1] except in the case of gavelkind lands, where the husband has a right to his curtesy, whether he has had issue or not; but, by the custom of gavelkind, curtesy extends only to a moiety of the wife's lands, and ceases if the husband marries again.(*s*) The issue must also be capable of inheriting as heir to the wife.(*t*) Thus, if the wife be seised of lands in tail male, the birth of a daughter only will not entitle her husband to be tenant by curtesy; for the daughter cannot by possibility inherit such an estate from her mother. And it is necessary that the wife should have acquired an actual seisin of all estates, of which it was possible that an actual seisin could be obtained; for the husband has it in his own power to obtain for his wife an actual seisin; and it is his own fault if he has not done so.(*u*)[2] A tenancy by *the curtesy is not now of very frequent occurrence; the rights of husbands in the lands of their wives are, at the present day, generally ascertained by proper settlements made previously to marriage.

[*187]

(*q*) Co. Litt. 183 a; 1 Roper's Husb. and Wife, 12.

(*r*) 2 Black. Com. 127; Watk. Desc. 111 (121, 4th ed.)

(*s*) Co. Litt. 30 a, n. (1); Bac. Ab. title Gavelkind (A.); Rob. Gavel. book ii, c. 1.

(*t*) Litt. s. 52; 8 Rep. 34 b.

(*u*) 2 Black. Com. 131; Parker v. Carter, 4 Hare, 416, and see Follett v. Tyrer, 14 Simons, 125. In the first edition of this work a doubt is thrown out whether, under the new law of inheritance, a husband can ever become tenant by the curtesy to any estate which his wife has inherited. The reasons which have now induced the author to incline to the contrary opinion will be found in Appendix (C.)

[1] In Pennsylvania, however, the right to curtesy is, by the Act of 8th April, 1833, given to the husband, "although there be no issue of the marriage."

[2] The strictness of the common law, which thus required actual seisin on the part of the wife, is believed not to prevail generally, if at all, in the United States; a right of entry or constructive seisin being held sufficient in cases where there is no actual adverse possession. Bush v. Bradlee, 4 Day, 298; Kline v. Beebe, 6 Connect. 494; Ellsworth v. Cook, 8 Paige, 643; Davis v. Mason, 1 Peters's S. C. R. 507; Stoolfoos v. Jenkins, 8 Serg. and Rawle, 175; McCorry v. King, 3 Humphrey, 267. Where an adverse possession exists, however, the common law rule as stated in the text prevails, Mercer's Lessee v. Selden, 1 Howard's U. S. Rep. 54. Curtesy will not attach, however, to a reversionary interest in the wife, dependent on an estate for life, Stoddard v. Gibbs, 1 Sumner, 263; nor where the wife has a mere naked seisin as trustee. Chew v. Commissioners of Southwark, 5 Rawle, 161.

By a statute of the reign of Henry VIII,(*x*) power is given for all persons of full age, having an estate of inheritance in fee simple or in fee tail, in right of their wives, or jointly with their wives, to make leases, with the concurrence of their wives,(*y*) of such of the lands as have been most commonly let to farm for twenty years before, for any term not exceeding twenty-one years or three lives, under the same restrictions as tenants in tail are by the same act empowered to lease. This statute, so far as it respects tenants in tail, has already been referred to.(*z*) And by the same statute it is provided that no act of the husband only, during the coverture, shall in anywise be prejudicial to the wife or her heirs, or to such as have right to the lands by the death of the wife; but that the wife and her heirs, and such other to whom such right shall appertain after her decease, may lawfully enter into the lands according to their rights and titles therein.(*a*)[1] And by a statute of Anne,(*b*) every husband seised in right of his wife only, who, after the determination of his estate or interest, without the express consent of the persons next immediately entitled after the determination of such estate or interest, shall hold over and continue in possession of any hereditaments, shall be adjudged to be a trespasser; and the full *value of the profits received during such wrongful possession, may be recovered in damages against him or his executors or administrators. [*188]

Hitherto we have seen the extent of the husband's interest, and power of disposition, apart from his wife. If lands should be settled in trust for the separate use of the wife, with a clause restraining alienation, we have seen that neither husband nor wife can make any disposition. But, in all other cases, the husband and wife may together make any such dispositions of the wife's interest in real estate, as she could do if unmarried. The mode in which such dispositions were formerly effected, was by a *fine* duly levied in the Court of Common Pleas. We have already had occasion to advert to fines, in respect to their former operation on estates tail.(*c*) They were, as we have seen, fictitious suits commenced and then compromised by leave of the Court, whereby the lands in question were acknowledged to be the right of one of the parties. Whenever a married woman

(*x*) Stat. 32 Hen. VIII, c. 28.
(*y*) Sect. 3.
(*z*) Ante, p. 50.
(*a*) Sect. 6.
(*b*) Stat. 6 Anne, c. 18, s. 5.
(*c*) Ante, p. 43.

[1] These provisions of this statute were reported by the Judges, in 3 Binney, 619, to be in force in Pennsylvania.

was party to a fine, it was necessary that she should be examined apart from her husband, to ascertain whether she joined in the fine of her own free will, or was compelled to it by the threats and menaces of her husband.(*d*) Having this protection, a fine by husband and wife was an effectual conveyance, as well of the wife's, as of the husband's interests of every kind, in the land comprised in the fine. But without a fine, no conveyance could be made of the wife's lands; thus, she could not leave them by her will, even to her husband; although, by means of the Statute of Uses,(*e*) a testamentary appointment of lands, in the nature of a will, might be made by the wife in favor of her husband, in a manner to be hereafter explained.(*f*) And in this respect the law still remains unaltered, although a change [*189] *has been made in the machinery for effecting conveyances of the lands of married women. The cumbrous and expensive nature of fines having occasioned their abolition, provision has now been made, by the Act for the abolition of Fines and Recoveries,(*g*) for the conveyance by deed merely, of the interests of married women in real estate. Every kind of conveyance of freehold estates which a woman could execute if unmarried, may now be made by her by a deed executed with her husband's concurrence;(*h*) but the separate examination, which was before necessary in the case of a fine, is still retained; and every deed, executed under the provisions of the act must be produced, and *acknowledged* by the wife as her own act and deed, before a judge of one of the superior Courts at Westminster, or a master in Chancery, or two commissioners,(*i*) who must, before they receive the acknowledgment, examine her apart from her husband, touching her knowledge of the deed, and must ascertain whether she freely and voluntarily consents thereto.(*j*) A recent statute(*k*) removes doubts which might arise, in consequence of any person taking the acknowledgment being an interested party.[1]

(*d*) Cruise on Fines, 108, 109. (*e*) 27 Hen. VIII, c. 10; ante, p. 131.
(*f*) See post, the chapter on Executory Interests.
(*g*) Stat. 3 & 4 Will. IV, c. 74; ante, p. 42. (*h*) Sect. 77.
(*i*) Sect. 79. (*j*) Sect. 80. (*k*) Stat. 17 & 18 Vict. c. 75.

[1] Statutes in effect similar to that referred to in the text are in force in all the United States; but it is remarkable that while in England the troublesome and expensive method of levying a fine, in order to pass the estate of a married woman, continued until so recently, the settlers of this country should have adopted a custom, which soon grew into a law, of passing the estate of a married woman, whether in her own property or that of her husband, by a simple acknowledgment, in some colonies with, and in some without the separate examination of the wife. Davey v. Turner, 1 Dallas, 11; Lloyd's Lessees v. Taylor, Id. 17; Fowler v. Shearer, 7 Mass. 20; Jackson v. Gilchrist, 15 Johnson, 109.

2. As to the rights of the wife in the lands of her husband. We have seen that, during the coverture, all the power is possessed by the husband, even when the lands belong to the wife; and of course this is the case when they are the husband's own. After the decease of her husband, the wife however becomes, in some cases, entitled to a life interest in part of her deceased husband's lands. The interest is termed the *dower* of the wife. And by a recent act of Parliament for the amendment of the law relating to dower,(*l*) the dower of women married after the 1st of January, 1834, is placed *on a different footing from that of women who were married previously.[1] But, as the old law of dower still regulates the rights of all women who were married on or before that day, it will be necessary, in the first place, to give some account of the old law before proceeding to the new. [*190]

Dower, as it existed previously to the operation of the recent act, was of very ancient origin, and retained an inconvenient property, which accrued to it in the simple times, when alienation of lands was far less frequent than at present. If, at any time during the coverture, the husband became solely seised of any estate of inheritance, that is, fee simple or fee tail, in lands, to which any issue, which the wife might have had, might by possibility have been heir,(*m*) she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed by her in severalty during the remainder of her life. This right, having once attached to the lands, adhered to them, notwithstanding any sale or devise which the husband might make.[2] It, consequently, became neces-

(*l*) Stat. 3 & 4 Will. IV, c. 105.

(*m*) Litt. ss. 36, 53; 2 Black. Com. 131; 1 Roper's Husband and Wife, 332.

[1] That is to say, by its operation no widow is entitled to dower out of any land which her husband shall have disposed of in his lifetime or devised by his will; she is therefore only entitled to dower as against the heir at law, but not as against the devisee or the purchaser under any deed in which she has not joined. See infra, p. 193. In several of the United States, such as Vermont, New Hampshire, Connecticut, Tennessee, North Carolina, and Georgia, the right of dower is restricted by statute to lands of which the husband dies seised, but as against a devisee it will attach.

[2] By the common law as stated by Coke, it seems that the wife was entitled to admeasurement of dower, as against the *heir*, according to the value of the land at the time of the dower being assigned to her, whether that value was greater or less than in "the time of the husband," and whether occasioned by improvement or not, Co. Litt. 32 a, the reason for which was, that if the husband died seised the heir might assign

sary for the husband, whenever he wished to make a valid conveyance of his lands, to obtain the concurrence of his wife, for the purpose of releasing her right to dower. This release could be effected only by means of a fine, in which the wife was separately examined. And when, as often happened, the wife's concurrence was not obtained, on account of the expense involved in levying a fine, a defect in the title obviously existed so long as the wife lived. As the right to dower was paramount to the alienation of the husband, so it was quite independent of his debts,—even of those owing to the crown.(*n*)[1] It was [*191] necessary, however, that the husband should be *seised of an estate of inheritance at law; for, the Court of Chancery, whilst it allowed to husbands curtesy of their wives' equitable estates, withheld from wives a like privilege of dower out of the equitable estates

(*n*) Co. Litt. 31 a; 1 Roper's Husband and Wife, 411.

the dower when he pleased, and if he neglected it and improved the land by cultivation or improvement, it was his voluntary act with knowledge of his rights, and the widow takes the value as it is at the time of the assignment of dower. But as respects *a purchaser*, the rule was different, and we find in Mr. Hargrave's note that "if feoffee improve by building, yet dower shall be as it was in the seisin of the husband."

On this side of the Atlantic a further distinction is taken in many of the States as regards the case of the purchaser, and though in none of them is the wife allowed to receive any advantage by reason of improvements, yet there are many cases which give her the benefit of the increase of value from improvements near the property, or the general prosperity of that section of country. The leading case is Thompson v. Morrow, 5 Serg. & Rawle, 289, decided in Pennsylvania, in 1819; and the rule there adopted has not only been adhered to in that State, Benner v. Evans, 3 Penns. 456; Shirly v. Shirly, 5 Watts, 328, but approved and followed in many others. Powell v. Monson Man. Co. 3 Mason, 365; Misher v. Misher, 3 Shepley, 372; Greer v. Tenant, 2 Harrington, 336; Smith v. Addleman, 5 Blackford, 406; Taylor v. Broderick, 1 Dana, 348; Dunseth v. Bank of United States, 6 Ohio, 76. In New York, the cases of Humphrey v. Tinney, 2 Johnson, 484; Dorchester v. Coventry, 11 Id. 510, and Shaw v. White, 13 Id. 179 (all decided before Thompson v. Morrow), adhered to the common law rule. Chancellor Kent, however, appeared to consider the question an open one, in Hale v. James, 6 Johns. Ch. R. 258, and in his Commentaries (4 Com. 68), says, "The better and more reasonable American doctrine upon this subject, I apprehend to be, that the improved value of the land from which the widow is to be excluded in the assignment of dower, as against a purchaser of her husband, is that which has arisen from the actual labor and money of the owner, and not from that which has arisen from extrinsic or general causes."

This language, however, was not fully concurred with in Walker v. Schuyler, 10 Wendell, 485, where the law was considered to be fully settled against the widow's right to any increase of value, as against the purchaser, and the law is held the same way in Virginia, Tod v. Baylor, 4 Leigh, 509.

[1] It is believed that the rule is otherwise in nearly all of the United States, and that the right of the widow to dower is subservient to the rights of creditors of every class.

of their husbands.(o)[1] The estate, moreover, must have been held in

(o) 1 Roper's Husband and Wife, 354.

[1] The origin of this distinction was thus explained by Lord Redesdale in D'Arcy v. Blake, 2 Schoales and Lefroy, 388. "The general principle on which Courts of Equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right, and that equity ought not to create the right, where it does not subsist at law. That, therefore, there can be no dower of an equity of redemption reserved upon a mortgage in fee, though there may of an equity of redemption upon a mortgage for a term of years, because, in that case, the law gives dower subject to the term. A Court of Equity will assist a widow by putting a term out of her way, where third persons are not interested. But against a purchaser, a Court of Equity will not give that assistance, as in Lady Radnor v. Vandebendy, Prec. Chan. 65, Show. Parl. Cases, 96. The difficulty in which the Courts of Equity have been involved with respect to dower, I apprehend, originally arose thus: They had assumed, as a principle, in acting upon trusts, to follow the law; and, according to this principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts, and, consequently, to have given dower of an equitable estate. It was found, however, that in cases of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting, on the footing of dower, upon a contrary principle, and had supposed, that by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea, and the country would have been thrown into the utmost confusion, if Courts of Equity had followed their general rule, with respect to trusts in the cases of dower. But the same objection did not apply to tenancy by the curtesy, for no person would purchase an estate subject to tenancy by the curtesy, without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by the curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower, but it was not necessary in the case of tenancy by the curtesy. Pending the coverture, a woman could not alien without her husband, and, therefore, nothing she could do could be understood by a purchaser to affect his interest; but where the husband was seised or entitled in his own right, he had full power of disposing, except so far as the dower might attach; and the general opinion having long been, that dower was a mere legal right, and that, as the existence of a trust-estate previously created prevented the right of dower attaching at law, it would also prevent the property from all claim of dower in equity, and many titles depending on this opinion; it was found that it would be mischievous in this instance to the general principle, that equity should follow the law; and it has been so long and so clearly settled, that a woman should not have dower in equity who is not entitled at law, that it would be shaking everything, to attempt to disturb the will. In point of remedy, a woman claiming dower may be assisted in equity; a Court of Equity will put out of her way a term which prevents her obtaining possession at law; but that is only as against an heir or volunteer, not a purchaser; the heir or volunteer being considered as claiming in no better right than she does. When, therefore, any question of dower has arisen in Courts of Equity, and doubts have been entertained of the title to dower, the constant practice in England has been, to put the widow to bring her writ of dower at law. The courts will assist her in trying her right, and enjoying the benefit of it, if determined at law in her favor, by giving her a discovery of deeds; by ascertaining metes and bounds; and they do not require her to

severalty or in common, and not in joint tenancy; for, the unity of interest which characterizes a joint tenancy, forbids the intrusion into such a tenancy of the husband or wife of any deceased joint tenant; on the decease of any joint tenant, his surviving companions are already entitled, under the original gift, to the whole subject of the tenancy.(*p*)[1] The estate was also required to be an estate of inheritance in possession;[2] although a seisin in law, obtained by the husband, was sufficient to cause his wife's right of dower to attach.(*q*) In no case, also, was any issue required to be actually born; it was sufficient that the wife might have had issue, who might have inherited. The dower of the widow, in gavelkind lands, consisted, and still consists, like the husband's curtesy, of a moiety, and continues only so long as she remains unmarried and chaste.(*r*)[3]

(*p*) Ibid. 366; ante, p. 111, et seq.
(*q*) Co. Litt. 31 a. (*r*) Bac. Abr. tit. Gavelkind (A); Rob. Gav. book 2, c. 2.

---

execute the writ with all the formalities necessary at law; and the right being ascertained by judgment at law, will give her possession according to her right; but still they require that the question of her title to dower, if subject to doubt, should be determined at law."

For the same reason a wife was not dowable at common law of an equity of redemption, the legal title being out of the husband. But by the statute 3 & 4 Will. IV, c. 105, referred to in the text at page 189, the law was altered, and the wife's right of dower is now attached to the equitable as well as to the legal estates of the husband, provided always he has neither conveyed nor devised them; supra, p. 190.

On this side of the Atlantic usage in some States, and legislation in others, has given to the wife a right of dower in the equitable estate of her husband. Shoemaker v. Walker, 2 Sergeant & Rawle, 554; Reed v. Morrison, 12 Id. 18; Smiley v. Wright, 2 Ohio, 507; Crabb v. Pratt, 15 Alabama, 843; Robinson v. Miller, 1 B. Monroe, 91; 1 Greenl. Cruise, 165. As respects the equity of redemption of a mortgagor, as in perhaps all the United States the mortgage is looked upon as a mere security for the payment of the debt, the legal estate is considered as in the mortgagor as to all persons except the mortgagee and his assigns, and the wife may be considered as dowable at law of her husband's estate. Barker v. Parker, 17 Mass. 564; Simonton v. Gray, 34 Maine, 50; Runyan v. Stewart, 12 Barbour, 537.

[1] Where a partition takes place between tenants in common, it is obvious that the dower attaches itself to the ascertained purpart of the husband. Potter v. Wheeler, 13 Mass. 504; Mosher v. Mosher, 32 Maine, 412.

[2] Thus a wife is not entitled to dower out of an estate in remainder expectant on an estate of freehold, because there is no seisin in the husband. Co. Litt. 32 a; Dunham v. Osborn, 1 Paige, 634; Green v. Putnam, 1 Barbour, 500; Otis v. Parshley, 10 New Hamp. 403; Eldredge v. Forestal, 7 Mass. 253; Blood v. Blood, 23 Pickering, 80; but she is dowable of a reversion expectant on a term for years, by reason of the husband being seised of the freehold. Co. Litt. 32 a.

[3] It is not, however, only with respect to the tenure by gavelkind that chastity on the part of the wife is necessary to entitle her to dower. At common law, indeed, it would seem that a divorce on the ground of adultery was no bar to dower. 2 Inst. 435. But the 34th Chapter of the Statute

In order to prevent this inconvenient right from attaching on newly purchased lands, and to enable the purchaser to make a title at a future time, without his wife's concurrence, various devices were resorted to in the framing of purchase-deeds. The old-fashioned method of barring dower, was to take the conveyance to the purchaser and his heirs, to the use of the purchaser and a trustee and the heirs of the purchaser; but, as to the estate of the trustee, it was declared to be in trust only for the purchaser and his heirs. By this means the purchaser and the trustee became joint tenants for life *of the legal estate, and the remainder of the inheritance belonged to the purchaser. If, therefore, the purchaser died during the life of his trustee, the latter acquired in law an estate for life by survivorship; and, as the husband had never been solely seised, the wife's dower never arose; whilst the estate for life, of the trustee, was [*192]

of Westminster the Second (13 Ed. I, St. 1, c. 34) declared that, "if a wife willingly leave her husband, and go away and continue with her advouterer, she shall be barred from every action to demand her dower if she be convict therefrom, except that her husband willingly and without coercion of the Church reconcile her to suffer her to dwell with him, in which case she shall be restored to her action." In his commentary on this statute in his 2d Institutes, Coke says, "Albeit the words of this branch be in the conjunctive, yet if the woman be taken away, not *sponte*, but against her will, and after consent, and remain with the adulterer, without being reconciled, &c., she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation, that is the bar of the dower;" for which he cites "a rare and strange case" which occurred only a few years after the statute was passed, in which John De Comoys by deed delivered and committed his wife Margaret to Lord William Paynel, so that she should be and remain with him according to his will. After her husband's death she demanded her dower, but it was adjudged against her by reason of the adultery; and in accordance with this authority it was held in a somewhat recent case that adultery is a bar though committed after husband and wife have separated by mutual consent. Hethrington v. Graham, 6 Bingham, 135.

The statute has, on this side of the Atlantic, either been substantially re-enacted, or its provisions adopted as part of the common law of the country. Coggswell v. Tibbetts, 3 New Hamp. 41; 4 Kent's Com. 53; Lecompte v. Wash, 9 Missouri, 551. By the Revised Statutes of New York, however, the wife only forfeits her dower in case of a divorce on the ground of adultery, or a conviction of that offence. Reynolds v. Reynolds, 24 Wendell, 193; Cooper v. Whitney, 3 Hill, 95. A wife, however, who has obtained a divorce from her husband on the ground of his adultery, is not, after his death, entitled to dower in his real estate, Wait v. Wait, 4 Barbour, 192, for she is not his wife at the time of his death; so, for the same reason, a woman married to a man who has another wife living at the time, acquires no claim to dower: Smart v. Whaley, 6 Smedes & Marshall, 308; Donnelly v. Donnelly, 8 B. Munroe, 113; even if the first wife die before her husband: Higgins v. Breen, 9 Missouri, 497; for the marriage was, of course, originally void. Riddlesden v. Wogan, Cro. Eliz. 858.

subject in equity to any disposition which the husband might think fit to make by his will. The husband and his trustee might also, at any time during their joint lives, make a valid conveyance to a purchaser, without the wife's concurrence. The defect of the plan was, that if the trustee happened to die during the husband's life, the latter became at once solely seised of an estate in fee simple in possession; and the wife's right to dower accordingly attached. Moreover, the husband could never make any conveyance of an estate in fee simple, without the concurrence of his trustee so long as he lived. This plan, therefore, gave way to another method of framing purchase-deeds, which will be hereafter explained,(*s*) and by means of which the wife's dower is effectually barred, whilst the husband alone, without the concurrence of any other person, can effectually convey the lands.

The right of dower might have been barred altogether by a *jointure*, agreed to be accepted by the intended wife, previously to marriage, in lieu of dower.[1] This jointure was either legal or equitable. A legal jointure was first authorized by the Statute of Uses,(*t*) which, by turning uses into legal estates, of course rendered them liable to dower. Under the provisions of this statute, dower may be barred by the wife's acceptance, previously to marriage, and in satisfaction of her dower, of a competent livelihood of freehold lands and tene-
[*193] ments, *to take effect in profit or possession presently after the death of the husband, for the life of the wife at least.(*u*) If the jointure be made after marriage, the wife may elect between her dower and her jointure.(*v*) A legal jointure, however, has in modern times seldom been resorted to as a method of barring dower: when any jointure has been made, it has usually been merely of an equitable kind; for, if the intended wife be of age, and a party to the settlement, she is competent, in equity, to extinguish her title to dower upon any terms to which she may think proper to agree.(*x*) And if the wife should have accepted an equitable jointure, the Court of Chancery will effectually restrain her from setting up any claim to

(*s*) See post, the chapter on Executory Interests.
(*t*) 27 Henry VIII, c. 10.
(*u*) Co. Litt. 36 b; 2 Black. Com. 137; 1 Roper's Husband and Wife, 462.
(*v*) 1 Roper's Husband and Wife, 468.
(*x*) Ibid. 488; Dyke v. Rendall, 2 De Gex, M. & G. 209.

[1] And this jointure, unlike dower, is not forfeited by adultery. Seagrave v. Seagrave, 13 Vesey, 443.

her dower. But in equity, as well as at law, the jointure, in order to be an absolute bar of dower, must be made before marriage.[1]

[1] This subject would seem to require a somewhat fuller illustration. By the common law, the right to dower could not be barred by any mode of assurance, whether made before or after the marriage, because, first, it was a maxim that no right could be barred until it had accrued, and, second, no right to an estate of freehold could be barred by any manner of collateral satisfaction or recompense, Co. Litt. 36 b, Vernon's case, 4 Coke, 1; and a release made during the marriage was of course void, the wife not being *sui juris*. For this and other reasons referred to in a former chapter (Ch. VIII), it became common for persons to convey their lands to uses, so that "before the making of the statute of 27 H. 8, cap. 10, the greater part of the land in England was conveyed to sundry persons to uses, and forasmuch as a wife was not dowable of uses, her father or friends upon her marriage procured the husband to take an estate from his feoffees, or others seised to his use, to him and to his wife before or after marriage, for their lives, or in tail, for a competent provision for the wife after the husband's death." Vernon's case, supra.

The effect of the Statute of Uses, which turned these equitable into legal estates, would, therefore, have been to give to all women married at that time the right of dower in those estates, while it would not, of course, defeat their right in any lands that had been thus settled upon them by way of jointure. To prevent such a result the 6th section of that statute provided, that "Whereas divers persons have purchased or have estate made and conveyed of and in divers lands, tenements, and hereditaments, unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten; or to the husband and to the wife for term of their lives, or for the term of life of the said wife; or where any such estate or purchase of any lands, &c., hath been, or hereafter shall be, made to any husband and to his wife, in manner and form above expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointure of the wife; then, and in every such case, every woman married having such jointure made, or hereafter to be made, shall not claim nor have title to have any dower of the residue of the lands, &c., that at any time were her said husband's, by whom she hath any such jointure; nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband. But if she have no such jointure, then she shall be admitted and enabled to pursue, have, and demand her dower, by writ of dower after the due course and order of the common laws of the realm."

This provision fell, of course, within the common law rule, that statutes in derogation of it were to be strictly construed, and six requisites were held necessary in order that an estate limited by way of jointure should be a bar to dower, which, as has been already shown, was much favored by the common law. First, it must commence immediately on the death of the husband, else it would not be so beneficial as dower; second, it must be for at least the wife's life; third, it must be limited to herself, and not in trust for her; fourth, it must be in satisfaction of her whole dower, and not for a part only; fifth, it must be expressed or averred, or by necessary implication appear to be so made in satisfaction; and, sixth, it must be made before marriage. Co. Litt. 36 b, Vernon's case, supra. As to the third of these requisites, however, the rigor of the common law was afterwards modified by equity, which considered that a trust estate was equally certain and beneficial as a legal estate, and held even an agreement to settle lands, or even personal

With regard to women married since the 1st of January, 1834, the doctrine of jointures is of very little moment. For, by the recent act

estate (though the statute spoke only of lands), as a jointure, to be a good equitable jointure, and a bar to dower: Hervey v. Hervey, 1 Atkins, 563; Drury v. Drury, 5 Bro. Parl. Cas. 570; Caruthers v. Caruthers, 4 Brown's Chan. 500; Williams v. Chitty, 3 Ves. Jr. 545; McCartee v. Teller, 2 Paige, 511; Shaw v. Boyd, 5 Serg. & Rawle, 309; and this whether the wife were or were not of age at the time of the settlement, provided it received the assent of her parent or guardian, or were in other respects free from legal objection. Drury v. Drury; McCartee v. Teller; Corbit v. Corbit, 1 Simon & Stuart, 612.

The provision of the statute of Henry VIII, before referred to, has been adopted, or substantially re-enacted in many of the United States. Kennedy v. Nedrow, 1 Dallas, 417; Hastings v. Dickinson, 7 Mass. 155; Ambler v. Norton, 4 Hen. and Munf. 23. In Rhode Island, Virginia, Ohio, Kentucky, and Missouri, if the jointure or other estate conveyed in lieu of dower, were made while the woman was an infant or after marriage, she may, after her husband's death, waive it and claim her dower. In Maine, Massachusetts, Indiana, and Arkansas, it is provided that no jointure will bar the dower, unless made before the marriage and with the consent of the wife expressed in the deed, and such are substantially the provisions in Connecticut, Delaware, and it is believed, most of the United States. See passim, 1 Greenleaf's Cruise, 195, 200.

Where, however, the dower has not been thus barred by a jointure, or forfeited by misconduct, it of course attaches as a right to all the real estate of the husband at his death, and cannot against the consent of the wife be defeated or affected by any provision of his will. But where that will contains a provision for her benefit, and the estate of which she is dowable is devised to others, the doctrine of *election* arises; that is to say, in certain cases the wife must elect, whether she will claim her dower in opposition to the will, or accept its provision in place of it. The general principle has been thus clearly stated by the late Mr. Wallace. "As dower is a legal interest vested in the wife by the act of the law, paramount to the will of the husband and beyond his control, of which matters he is presumed to be cognizant, and as every devise or bequest imports a bounty, and does not naturally imply satisfaction of a pre-existing incumbrance, a gift to the wife in the will is to be taken as a cumulative provision, unless the intent that it shall be in lieu and exclusion of dower, be demonstrated by express declaration, or by clear and manifest implication arising from the instrument's containing some provision incompatible with the right of dower. To establish such implied intention, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will. It is not enough that the matter is doubtful, or that the testator did not contemplate that his wife should take both estates: she will not be put to an election, unless it be clear that he distinctly contemplated and designed that she should not enjoy both provisions, or unless he has made such a disposition of his estate that the assertion of dower would do violence to his will." Note to Streatfield v. Streatfield, 1 Lead. Cas. in Equity, 279. Statutory provisions, however, which are there referred to, have regulated this subject in many of the States. Thus in Delaware any devise, and in Pennsylvania any bequest or devise will be taken to be in lieu of dower, unless the testator declare otherwise, the widow still having her election; in New York, New Jersey, North Carolina, and Tennessee, any testamentary provision defeats the dower unless within a certain time the widow dissents, as also in Massachusetts, Ohio, and Alabama, unless it plainly appear by the will that the testator intended she should have both.

for the amendment of the law relating to dower,(*y*) the dower of such women has been placed completely within the power of their husbands. Under the act, no widow is entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.(*z*) And all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts, and engagements, to which his lands may be liable, shall be effectual as against the right of his widow to dower.(*a*) The husband may also, either wholly or partially, *deprive his wife of her right to dower by any declaration for [*194] that purpose made by him, by any deed, or by his will.(*b*) As some small compensation for these sacrifices, the act has granted a right of dower out of lands to which the husband had a right merely, without having had even a legal seisin;(*c*) dower is also extended to equitable as well as legal estates of inheritance in possession, excepting of course estates in joint tenancy.(*d*) The effect of the act is evidently to deprive the wife of her dower, except as against her husband's heir at law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left her for her support,—unless, indeed, the husband should have executed a declaration to the contrary. A declaration of this kind has, unfortunately, found its way, as a sort of common form, into many purchase-deeds. Its insertion seems to have arisen from a remembrance of the troublesome nature of dower under the old law, united possibly with some misapprehension of the effect of the new enactment. But, surely, if the estate be allowed to descend, the claim of the wife is at least equal to that of the heir, supposing him a descendant of the husband; and far superior, if the heir be a lineal ancestor, or remote relation.(*e*) The proper method seems therefore to be, to omit any such declaration against dower, and so to leave to the widow a prospect of sharing in the lands, in case her lord shall not think proper to dispose of them.

(*y*) 3 & 4 Will. IV, c. 105.
(*z*) Sect. 4.
(*a*) Sect. 5.
(*b*) Sects. 6, 7, 8.
(*c*) Sect. 3.
(*d*) Sect. 2.
(*e*) Sugd. Vend. & Pur. 545.

[*195] *PART II.

OF INCORPOREAL HEREDITAMENTS.

Our attention has hitherto been directed to real property of a corporeal kind. We have considered the usual estates which may be held in such property,—the mode of descent of such estates as are inheritable,—the tenure by which estates in fee simple are holden,—and the usual method of the alienation of such estates, whether in the lifetime of the owner, or by his will. We have also noticed the modification in the right and manner of alienation produced by the relation of husband and wife. Besides corporeal property, we have seen(*a*) that there exists also another kind of property, which, not being of a visible and tangible nature, is denominated *incorporeal.* This kind of property, though it may accompany that which is corporeal, yet does not in itself admit of actual delivery. When, therefore, it was required to be transferred as a separate subject of property, it was always conveyed, in ancient times, by writing, that is, by deed; for we have seen,(*b*) that formerly all legal writings were in fact deeds. Property of an incorporeal kind was, therefore, said to lie in *grant*, whilst corporeal property was said to lie in *livery.*(*c*) For, the word *grant*, though it comprehends all kinds of conveyances, yet, more strictly and properly taken, is a conveyance by deed only.(*d*) And *livery*, as we have seen,(*e*) is the technical name for that delivery, which was made of the seisin, or feudal possession, on every feoffment of lands and houses, or corporeal *hereditaments. In this [*196] difference in the ancient mode of transfer, accordingly lay the chief distinction between these two classes of property. But, as we have seen,(*f*) the act to amend the law of real property now provides that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in

(*a*) Ante, p. 10. (*b*) Ante, p. 123. (*c*) Co. Litt. 9 a.
(*d*) Shep. Touch. 228. (*e*) Ante, p. 119. (*f*) Ante, p. 146.

grant as well as in livery.(*g*) There is, accordingly, now no practical difference in this respect between the two classes; and the lease for a year stamp, to which a grant of corporeal hereditaments was previously subject, has been abolished by the recent Stamp Act.(*h*)

---

*CHAPTER I. [*197]

OF A REVERSION AND A VESTED REMAINDER.

THE first kind of incorporeal hereditament which we shall mention is somewhat of a mixed nature, being at one time incorporeal, at another not; and, for this reason, it is not usually classed with those hereditaments which are essentially and entirely of an incorporeal kind. But as this hereditament partakes, during its existence, very strongly of the nature and attributes of other incorporeal hereditaments, particularly in its always permitting, and generally requiring, a deed of grant for its transfer,—it is here classed with such hereditaments. It is called, according to the mode of its creation, a *reversion* or a *vested remainder*.

If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for, in each case, his grantee has a less estate than himself. Accordingly, on the expiration of the term of years, or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will *revert* to himself or his heirs, and he or his heir will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the *particular* estate, being only a part, or *particula*, of the estate in fee.(*a*) And, during the continuance of such particular estate the interest of the tenant in fee simple, which still remains undisposed of—*that [*198] is, his present estate, in virtue of which he is to have again the possession at some future time—is called his *reversion*.(*b*)

(*g*) Stat. 8 & 9 Vict. c. 106, s. 2.
(*h*) Stat. 13 & 14 Vict. c. 97.
(*a*) 2 Black. Com. 165.
(*b*) Co. Litt. 22 b, 142 b.

If, at the same time with the grant of the particular estate, he should also dispose of this remaining interest or *reversion*, or any part thereof, to some other person, it then changes its name, and is termed, not a *reversion*, but a *remainder*.(*c*) Thus, if a grant be made by A., a tenant in fee simple, to B. for life, and after his decease to C. and his heirs, the whole fee simple of A. will be disposed of, and C.'s interest will be termed a *remainder*, expectant on the decease of B. A remainder, therefore, always has its origin in express grant: a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties.(*d*)

1. And, first, of a reversion. If the tenant in fee simple should have made a lease merely for a term of years, his reversion is looked on, in law, precisely as a continuance of his old estate, with respect to himself and his heirs, and to all other persons but the tenant for years. The owner of the fee simple is regarded as having simply placed a bailiff on his property;(*e*) and the consequence is, that, subject to the lease, the owner's rights of alienation remain unimpaired, and may be exercised in the same manner as before. The feudal possession or *seisin* has not been parted with. And a conveyance of the reversion may, therefore, be made by a feoffment, with livery of *seisin*, made with the consent of the tenant for years.(*f*)[1] But, if this [*199] mode of transfer *should not be thought eligible, a grant by deed will be equally efficacious. For, the estate of the grantor is strictly incorporeal, the tenant for years having the actual possession of the lands: so long, therefore, as such actual possession continues, the estate in fee simple is strictly an incorporeal reversion, which together with the *seisin* or feudal possession, may be conveyed by deed of grant.(*g*) But if the tenant in fee simple should have made a lease for life, he must have parted with his *seisin* to the tenant for life; for, an estate for life is an estate of freehold, and such tenant for life will, therefore, during his life, continue to be the freeholder, or holder of the feudal seisin.(*h*) No feoffment can conse-

(*c*) Litt. ss. 215, 217.
(*d*) 2 Black. Com. 163.
(*e*) Watk. Descents, 108 (113, 4th ed.)
(*f*) Co. Litt. 48 b, n. (8).
(*g*) Perkins, s. 221; Doe d. Were v. Cole, 7 Barn. & Cres. 243, 248; ante, p. 147.
(*h*) Watk. Descents, 109 (114, 4th ed.); ante, p. 117.

[1] Because livery of seisin could not be given, unless the feoffor had the actual possession.

quently be made by the tenant in fee simple; for he has no seisin of which to make livery. His reversion is but a fragment of his old estate, and remains purely incorporeal, until, by the dropping of the life of the grantee, it shall again become an estate in possession. Till then, that is, so long as it remains a reversion expectant on an estate of freehold, it can only be conveyed like all other incorporeal hereditaments when apart from what is corporeal, by a deed of grant.(*i*)

We have before mentioned,(*k*) that, in the case of a lease for life or years, a tenure is created between the parties, the lessee becoming tenant to the lessor. To this tenure are usually incident two things, *fealty*(*l*) and *rent*. The oath of fealty is now never exacted; but the rent, which may be reserved, is of practical importance. This rent is called in law *rent-service*,(*m*) in order to distinguish it from other kinds of rent, to be spoken of hereafter, which have nothing to do with the services *anciently rendered by a tenant to his lord. It consists, usually, but not necessarily, of money; for, it may be [*200] rendered in corn, or in anything else.[1] Thus, an annual rent of one peppercorn is sometimes reserved to be paid, when demanded, in cases where it is wished that lands should be holden rent free, and yet that the landlord should be able at any time to obtain from his tenant an acknowledgment of his tenancy. To the reservation of a rent-service, a deed has until recently been not absolutely necessary.(*n*) For, although the rent is an incorporeal hereditament, yet the law considered that the same ceremony, by which the nature and duration of the estate were fixed and evidenced, was sufficient also to ascertain the rent to be paid for it. But, by the recent act to amend the law of real property,(*o*) it is now provided that a lease, required by law to be

(*i*) Shep. Touch. 230.
(*k*) Ante, p. 94. (*l*) Ante, p. 101. (*m*) Co. Litt. 142 a.
(*n*) Litt. s. 214; Co. Litt. 143 a.
(*o*) Stat. 8 & 9 Vict c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 4, to the same effect.

[1] "Nothing is more common in America," says Mr. Morris, in his recent edition of Smith's Law of Landlord and Tenant, "than to make the rent a certain portion of the annual produce of the farm, as, for instance, one-half the grain, to be delivered in the bushel, and one-half the hay and straw, &c. And it has always been held that these are good reservations of rent, in kind, and that they may be distrained for. It is considered the fairest mode of letting, as well for the landlord as the tenant. The landlord has the advantage of a prosperous harvest, and the tenant escapes the heavy loss which a year of scarcity might entail upon him. This is commonly called letting the land on shares, a form of expression which seems to be sufficiently accurate and quite apt for the expression of the idea intended to be conveyed."—Note to p. 91.

in writing, of any tenements or hereditaments shall be void at law, unless made by deed. In every case, therefore, where the Statute of Frauds,(*p*) has required leases to be in writing, they must now be made by deed. But, according to the exception in that statute,(*q*) where the lease does not exceed three years from the making, a rent of two-thirds of the full improved value, or more, may still be reserved by parol merely.[1] Rent service, when created, is considered to be issuing out of every part of the land in respect of which it is paid ;(*r*) one part of the land is as much subject to it as another.[2] For the recovery of rent service, the well-known remedy is by *distress* and sale of the goods of the tenant, found on any part of the premises. This remedy for the recovery of rent service belongs to the landlord of common right, without any express agreement.(*s*) In modern times it [*201] has *been extended and facilitated by various acts of Parliament.(*t*)[3]

In addition to the remedy by distress, there is usually contained in leases a condition of re-entry, empowering the landlord, in default of payment of the rent for a certain time, to re-enter on the premises, and hold them as of his former estate. When such a condition is inserted, the estate of the tenant, whether for life or years, becomes

(*p*) Stat. 29 Car. II. c. 3 ; ante, p. 126.
(*q*) Sect. 2.
(*r*) Co. Litt. 47 a, 142 a.
(*s*) Litt. ss. 213, 214.
(*t*) Stat. 2 Wm. & Mary, c. 5 ; 8 Anne, c. 14 ; 4 Geo. II, c. 28 ; and 11 Geo. II, c. 19 ; Co. Litt. 47 b, n. (7) ; stat. 3 & 4 Will. IV, c. 42, ss. 37, 38 ; 14 & 15 Vict. c. 25, s. 2.

[1] And this provision of the Statute of Frauds, together with its exception, has been re-enacted in nearly all of the United States.

[2] A rent-service, unlike a rent-charge, is apportionable, that is to say, a release of part of the land from the rent, does not operate to free the whole, which is the effect of a release in the case of a rent-charge, as to which, see infra, p. 276. It was this distinction which gave rise to the case of Ingersoll v. Sergeant, 1 Wharton, 337, in which an estate in fee simple had been granted, reserving a perpetual rent, from which the owner of the rent subsequently released a portion of the land. It being admitted that in England, since the Statute of *Quia emptores*, which prohibited subinfeudation (see supra, pages 55, 56), a rent-service could not be reserved out of an estate in fee simple, it was contended that the law was the same in Pennsylvania, and that the rent in question was a rent-charge, and consequently, that by the release of a part, the whole land was discharged from the rent; but it was held by the Court that such a rent was, in all respects, a rent-service, and that by reason of the terms of the charter to William Penn, the Statute of *Quia emptores* had never been in force in that province.

[3] The student will find all these statutes succinctly referred to and explained, as also those in force on this side of the Atlantic, in Mr. Morris's edition of Smith's Landlord and Tenant, p. 146 et seq.

determinable on such re-entry. In former times, before any entry could be made under a proviso or condition for re-entry on non-payment of rent, the landlord was required to make a demand, upon the premises, of the precise rent due, at a convenient time before sunset of the last day when the rent could be paid, according to the condition; thus, if the proviso were for re-entry on non-payment of the rent by the space of thirty days, the demand must have been made on the thirtieth day.(*u*)[1] But now, if half a year's rent is due, and

(*u*) 1 Wms. Saunders, 287; n. (16).

[1] The demand must also be made in the most public part of the premises, and these forms must all be observed, even if there be no person on the land to pay. These provisions of the common law are recognized and enforced on this side of the Atlantic. Sperry v. Sperry, 8 New Hamps. 477; Connor v. Bradley, 1 Howard's S. C. R. 211; Mackubin v. Whetcroft, 4 Harris & M'Henry, 135; Garret v. Scouten, 3 Denio, 334; M'Cormick v. McConnell, 6 Serg. & Rawle, 151. In order that the re-entry should not be liable to be defeated by the absence or failure of proof that it was legally made, it is proper that the evidence that the above requisites were duly complied with should be collected and preserved, which is done by taking the depositions of witnesses upon a bill in equity filed "to perpetuate testimony," of which the student will see the form in Brightley's Eq. Jur. 695.

If the landlord, however, accept rent which becomes due after the breach of the condition, he waives his right to the forfeiture of the estate, because he thereby affirms the lease to have a continuance: Co. Litt. 211, b. But while, by the common law, one could thus regain the possession of an estate for the omission to make a payment of money at a certain time, equity "regarded the condition as intended to enforce the performance of the contract, and held that if this end were substantially attained, there could be no right to use the means for a collateral or ulterior object, highly disadvantageous to the other party to the agreement. Whenever, therefore, the injury occasioned by the breach of a condition admits of admeasurement and compensation, the injured party will be compelled to accept an equivalent for his loss, and restrained from exacting anything further. Beaty v. Harkey, 2 S. & M. 563; 2 Leading Cases in Equity, part 2, 460, 470–3. This, however, can only be done, when the failure to perform the contract, at the time and in the manner prescribed by its terms, can be made good subsequently: Dunklee v. Adams, 20 Vermont, 415; Baxter v. Lansing, 7 Paige, 350; for it would be obviously unjust, to deprive the party entitled to enforce the condition, of his remedy at law without affording him adequate redress in equity. But when the breach consists simply in the non-payment of money at the time when it is due, and the injury is limited to delay, interest is held to be a sufficient compensation, and equity will interfere by injunction on the payment of principal and interest. Atkins v. Chilson, 11 Metcalf, 112; Sanborn v. Woodman, 5 Cushing, 36. Although these principles originated in Chancery, they are now very generally adopted by courts of law, under the express or implied authority of different statutory enactments, beginning as far back as the statutes 8 & 9 William 3, c. 11, sect. 8, and 4 Anne, c. 16, sect. 12, 13, which limited the right to recover, on a bond, to the actual damage sustained by the obligee, and made a payment of principal and interest an answer to an action brought for the penalty, and coming down to the 4 Geo. 2, c. 28, sect. 4, which entitled the tenant to relief in an ejectment founded on

no sufficient distress is found on the premises, the landlord may recover the premises, at the expiration of the period limited by the proviso for re-entry,(*v*) by action of ejectment, without any formal demand or entry;(*w*) but all proceedings are to cease, on payment, by the tenant, of all arrears and costs, at any time before the trial.(*x*) Formerly, also, the tenant might, at an indefinite time after he was ejected, have filed his bill in the Court of Chancery, and he would [*202] have been relieved *by that Court from the forfeiture he had incurred, on his payment to his landlord of all arrears and costs. But now, the right of the tenant to apply for relief in equity, is restricted to six calendar months next after the execution of the judgment on the ejectment.(*y*) In ancient times, also, the benefit of a condition of re-entry could belong only to the landlord and his heirs; for the law would not allow of the transfer of a mere conditional right to put an end to the estate of another.(*z*) A right of re-entry was considered in the same light as a right to bring an action for money due; which right in ancient times was not assignable.[1] This doctrine sometimes occasioned considerable inconvenience; and in the reign of Henry VIII, it was found to press hardly on the grantees, from the crown, of the lands of the dissolved monasteries. For these grantees were of course unable to take advantage of the conditions of re-entry, which the monks had inserted in the leases of their tenants. A parliamentary remedy was, therefore, applied for the benefit of the favorites of the crown; and the opportunity was taken for making the

(*v*) Doe d. Dixon v. Roe, 7 C. B. 134.

(*w*) Stat. 15 & 16 Vict. c. 76, s. 210, re-enacting stat. 4 Geo. II, c. 28, s. 2.

(*x*) Stat. 15 & 16 Vict. c. 76, s. 212, re-enacting stat. 4 Geo. II, c. 28, s. 4. An under tenant has the same privilege, Doe. d. Wyatt v. Byron, 1 C. B. 623.

(*y*) Stat. 15 & 16 Vict. c. 76, s. 210, re-enacting stat. 4 Geo. II, c. 28, s. 2; Bowser v. Colby, 1 Hare, 109.

(*z*) Litt. ss. 347, 348; Co. Litt. 265 a, n. (1).

---

the breach of a condition for the non-payment of rent, on the payment into court of principal, interest, and costs. Even before the passage of the last-mentioned statute, the courts, though still holding that as a subsequent payment is not a performance of the condition, it can be no answer to prior breach in point of strict principle, (Sheppard's Touchstone, Condition, 134, 143; Green's Case, Croke Eliz. 1; 1 Leonard, 262; 3 Salkeld, 3), held, notwithstanding, that if the question arose in an action of ejectment, (where the plaintiff could only proceed through the help of the court; and by the aid of a fiction devised for his benefit), they would put him to terms, and compel a relinquishment of the forfeiture, on the payment of the arrears, with costs and interest. Downes v. Turner, 2 Salkeld, 597."—Judge Hare's note to Dumpor's case, 1 Smith's Leading Cases, 5th ed. p. 95.

[1] The student will find all the law upon this subject carefully analyzed in Mr. Hare's note to Dumpor's case, supra.

same provision for the public at large. A statute was accordingly passed,(*a*) which enacts that as well the grantees of the crown, as all other persons being grantees(*b*) or assignees, their heirs, executors, successors, and assigns, shall have the like advantages against the lessees, by entry for non-payment of rent, or for doing of waste, or other forfeiture, as the lessors or grantors themselves, or their heirs or successors might at any time have had or enjoyed; and this statute is still in force.[1] There exist also further means for the recovery of rent, in certain actions at law, which the landlord may bring against his tenant for obtaining payment.[2]

*Rent-service, being incident to the reversion, passes by a grant of such reversion, without the necessity of any express mention of the rent.(*c*) Formerly, no grant could be made of any reversion, without the consent of the tenant, expressed by what was called his *attornment* to his new landlord.(*d*) It was thought reasonable that [*203]

(*a*) Stat. 32 Hen. VIII, c. 34; Co. Litt. 215 a; Isherwood v. Oldknow, 3 Man. & Selw. 382, 394.

(*b*) A lessee of the reversion is within the act, Wright v. Burroughes, 3 C. B. 685.

(*c*) Litt. ss. 228, 229, 572; Perk. s. 113.

(*d*) Litt. ss. 551, 567, 568, 569; Co. Litt. 309 a, n. (1.)

[1] This statute is in force in Pennsylvania, and it is believed in many of our States. Report of the Judges, 3 Binney; Plumleigh v. Cook, 13 Illinois, 669.

[2] In this connection may properly be noticed the rule which prohibits the tenant from denying the title of the landlord in any proceeding instituted by him either for the recovery of rent, or of the possession of the demised premises. The rule itself has often been supposed to have been feudal in its origin, but a reference to the 58th section of Littleton, where he says, "it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease;" and Coke's commentary upon it, Co. Litt. 47 b, "that if the lessor have nothing in the land, the lessee hath not *quid pro quo*, nor anything for which he should pay any rent," sufficiently shows the rule not to have existed at that day, and this belief is confirmed by the remarks in Doe v. Smythe, 4 Maule & Selwyn, 347. It has therefore been well suggested, that "its origin must be sought in the general principle, that where a party has kept or obtained the possession of land, which he otherwise would not have had, by means of an agreement or understanding, he shall be estopped from setting forth anything in opposition to its terms or intent in a suit brought in order to recover such possession. The principle was, of necessity, called into being by that feature of the action of ejectment which requires an absolute possessory title in the plaintiff, and makes, in its absence, the mere fact of possession decisive in favor of the defendant." Judge Hare's Notes to Doe v. Oliver; 2 Smith's Leading Cases, 541.

But whatever may have been the origin of the rule, it is one now well settled on both sides of the Atlantic (see the cases collected in Mr. Morris's edition of Smith's Landlord and Tenant, 234, note); subject, however, to the exception that the tenant may show that he has been bona fide evicted under a title paramount to that of his landlord, or that his landlord's title has expired. Rawle on Covenants for Title, 275, passim.

a tenant should not have a new landlord imposed upon him without his consent; for, in early times, the relation of lord and tenant was of a much more personal nature than it is at present. The tenant, therefore, was able to prevent his lord from making a conveyance to any person, whom he did not choose to accept as a landlord; for, he could refuse to attorn tenant to the purchaser, and, without attornment, the grant was invalid. The landlord, however, had it always in his power to convey his reversion by the expensive process of a *fine*, duly levied in the Court of Common Pleas; for, this method of conveyance, being judicial in its nature, was carried into effect without the tenant's concurrence; and the attornment of the tenant, which for many purposes was desirable, could in such case be compelled.(*e*) It can easily be imagined, that a doctrine such as this, was found inconvenient, when the rent paid by the tenant became the only service of any benefit rendered to the landlord. The necessity of attornment to the validity of the grant of a reversion, was accordingly abolished by a statute passed in the reign of Queen Anne.(*f*) But the statute very properly provides,(*g*) that no tenant shall be prejudiced or damaged by payment of his rent to the grantor, or by breach of any condition for non-payment of rent, before notice of the grant shall be given to him by the grantee.[1] And, by a more recent statute,(*h*) any *attornment, which may be made by [*204] tenants, without their landlord's consent, to strangers claiming title to the estate of their landlords, is rendered null and void.[2]

(*e*) Shep. Touch. 254.
(*f*) Stat. 4 & 5 Anne, c. 16, s. 9.
(*g*) Sect. 10.
(*h*) Stat. 11 Geo. II, c. 19, s. 11.

[1] This provision of the statute of Anne is considered to be in force in Pennsylvania, 3 Binney, 625, as in other States. Farley v. Thompson, 15 Mass. 26; Burden v. Thayer, 3 Metcalf, 78; New York Revised Statutes, vol. 1, p. 739, § 146; Baldwin v. Walker, 21 Connecticut, 168; Coker v. Pearsall, 6 Alabama, 542.

[2] There is, however, this proviso, "Nothing herein contained shall extend to vacate or affect any attornment made pursuant to, and in consequence of some judgment at law, or decree or order of a court of equity, or made with the privilege and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited." The fairness of this proviso is sufficiently manifest, and the rule it contains has been observed, both where such a statute is (Lunsford v. Turner, 5 J. J. Marshall, 104), and where it is not of binding authority, and is well settled that a fragment of rent by the tenant to a mortgagee, claiming under a mortgage prior to the lease, and who has at that time a right of entry, is a sufficient defence to an action brought to recover the rent by the landlord. Jones v. Clark, 20 Johns. 61; Magill v. Hinsdale, 6 Connecticut, 469; George v. Putney, 4 Cush. 355; Greene v. Munson, 9 Verm. 37; Chambers v. Pleak, 6 Dana, 428; Pope v. Biggs, 9 Barn. & Cress. 245. See Mayor of Poole v. Whitt, 15 Mees. & Welsby, 577; Waddilove v. Barnet, 2 Bing.

Nothing, therefore, is now necessary for the valid conveyance of any rent-service, but a grant by deed of the reversion, to which such rent is incident. When the conveyance is made to the tenant himself, it is called a *release*.(*i*)

The doctrine, that rent-service, being incident to the reversion, always follows such reversion, formerly gave rise to the curious and unpleasant consequence of the rent being sometimes lost, when the reversion was destroyed. For, it is possible, under certain circumstances, that an estate may be destroyed and cease to exist. For instance, suppose A. to be a tenant of lands for a term of years, and B. to be his under-tenant for a less term of years at a certain rent; this rent is an incident of A.'s reversion, that is, of the term of years belonging to A. If, then, A.'s term should by any means be destroyed, the rent paid to him by B. would also, as an incident of such term, have hitherto been destroyed also. Now, by the rules of law, a conveyance of the immediate fee simple to A. would at once destroy his term,—it not being possible that the term of years and the estate in fee simple should subsist together. In legal language, the term of years would be *merged* in the larger estate in fee simple; and, the term being merged and gone, it followed, as a necessary consequence, that all its incidents, of which B.'s rent was one, should cease also.(*k*) This unpleasant result was some time since provided for and obviated, with respect to leases surrendered in order to be renewed,—the owners of the new leases being invested with the same right to the rent of under-tenants, and the same remedy for recovery *thereof, as if the original leases had been kept on foot.(*l*) But, in all [*205] other cases, the inconvenience continued, until a remedy was provided by the act to simplify the transfer of property.(*m*) This act, however, was shortly afterwards repealed by the act to amend the law of real property,(*n*) which provides, in a more efficient though somewhat crabbed clause,(*o*) that, when the reversion expectant on a lease, made either before or after the passing of the act, of any tenements or hereditaments of any tenure, shall, after the first of October, 1845,

(*i*) Ante, p. 148. (*k*) Webb v. Russell, 3 T. R. 393.

(*l*) Stat. 4 Geo. II, c. 28, s. 6; 3 Prest. Conv. 138; extended to crown lands by stat. 8 & 9 Vict. c. 99, s. 7.

(*m*) Stat. 7 & 8 Vict. c. 76, s. 12. (*n*) Stat. 8 & 9 Vict. c. 106. (*o*) Sect. 9.

N. C., 538; Franklin v. Carter, 1 Com. Bench, 760; Graham v. Alsopp, 3 Exchequer, 198; Rawle on Covenants for Title, 277; note to Moss v. Gallimore, 2 Smith's Leading Cases, 604; 5th American edition, 697, passim.

be surrendered or merge, the estate, which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

2. A remainder chiefly differs from a reversion in this,—that, between the owner of the particular estate and the owner of the remainder (called the remainder-man) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple; and one of them has no more right to be lord than the other. But, as all estates must be holden of some person,—in the case of a grant of a particular estate, with a remainder in fee simple, the particular tenant and the remainder-man both hold their estates of the same chief lord, as their grantor held before.(*p*) It consequently follows, that no rent-service is incident to a remainder, as it usually is to a reversion; for, *rent-service is an incident [*206] of tenure, and in this case no tenure exists. The other point of difference between a reversion and a remainder we have already noticed,(*q*) namely, that a reversion arises necessarily from the grant of the particular estate being simply that part of the estate of the grantor which remains undisposed of, but a remainder is always itself created by an express grant.

We have seen that the powers of alienation possessed by a tenant in fee simple, enable him to make a lease for a term of years, or for life, or a gift in tail, as well as to grant an estate in fee simple. But these powers are not simply in the alternative; for he may exercise all these powers of alienation at one and the same moment; provided, of course, that his grantees come in, one at a time, in some prescribed order, the one waiting for liberty to enter, until the estate of the other is determined. In such a case, the ordinary mode of conveyance is alone made use of; and if a feoffment should be employed, there would, until recently, have been no occasion for a *deed* to limit or mark out the estates of those, who could not have immediate possession.(*r*) The seisin would have been delivered to the first person who was to have possession;(*s*) and if such person was to have been

(*p*) Litt. s. 215. (*q*) Ante, p. 198.

(*r*) Litt. s. 60; Co. Litt. 143 a. But see now stat. 8 & 9 Vict. c. 106, s. 3, ante, p. 126.

(*s*) Litt. s, 60; 2 Black. Com. 167.

only a tenant for a term of years, such seisin would have immediately vested in the prescribed owner of the first estate of freehold, whose bailiff the tenant for years is accounted to be. From such first freeholder, on the determination of his estate, the seisin, by whatever means vested in him, will devolve on the other grantees of freehold estates, in the order in which their estates are limited to come into possession. So long as a regular order is thus laid down, in which the possession of the *lands may devolve, it matters not how many kinds of estates are granted, or on how many persons [*207] the same estate is bestowed. Thus a grant may be made at once to fifty different people separately for their lives. In such case the grantee for life who is first to have the possession, is the particular tenant to whom, on a feoffment, seisin would be delivered, and all the rest are remainder-men; whilst the reversion in fee simple, expectant on the decease of them all, remains with the grantor. The second grantee for life has a remainder expectant on the decease of the first, and will be entitled to possession on the determination of the estate of the first, either by his decease, or in case of his forfeiture, or otherwise. The third grantee must wait till the estate both of the first and second shall have determined; and so of the rest. The mode in which such a set of estates would be marked out is as follows:—To A. for his life, and after his decease to B. for his life, and after his decease to C. for his life, and so on. This method of limitation is quite sufficient for the purpose, although it by no means expresses all that is meant. The estates of B. and C. and the rest, are intended to be as immediately and effectually vested in them, as the estate of A.; so that, if A. were to forfeit his estate, B. would have an immediate right to the possession; and so again C. would have a right to enter, whenever the estates both of A. and B. might determine. But, owing to the necessary infirmity of language, all this cannot be expressed in the limitations of every ordinary deed. The words "and after his decease," are, therefore, considered a sufficient expression of an intention to confer a vested remainder after an estate for life. In the case we have selected of numerous estates, every one given only for the life of each grantee, it is manifest that very many of the grantees can derive no benefit; and, should the first grantee survive all the others, and not forfeit his estate, not one of them will take anything. Nevertheless, each *one of these grantees has an estate for [*208] life in remainder, immediately *vested* in him; and each of these remainders is capable of being transferred, both at law and in equity, by a deed of grant in the same manner as a reversion. In the

same way, a grant may be made of a term of years to one person, an estate for life to another, an estate in tail to a third, and last of all an estate in fee simple to a fourth; and these grantees may be entitled to possession in any prescribed order, except as to the grantee of the estate in fee simple, who must necessarily come last; for, his estate, if not literally interminable, yet carries with it an interminable power of alienation, which would keep all the other grantees forever out of possession. But the estate tail may come first into possession, then the estate for life, and then the term of years; or the order may be reversed, and the term of years come first, then the estate for life, then the estate tail, and lastly the estate in fee simple, which, as we have said, must wait for possession till all the others shall have been determined. When a remainder comes after an estate tail, it is liable to be barred by the tenant in tail, as we have already seen. This risk it must run. But, if any estate, be it ever so small, is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine, —it is then a *vested remainder*, and recognized in law as an estate grantable by deed.(*t*) It would be an estate in possession, were it not that other estates have a prior claim; and their priority alone postpones, or perhaps may entirely prevent, possession being taken by the remainder-man. The gift is immediate; but the enjoyment must necessarily depend on the determination of the estates of those, who have a prior right to the possession.

[*209] *In all the cases which we have as yet considered, each of the remainders has belonged to a different person. No one person has had more than one estate. A., B., and C. may each have had estates for life; or, the one may have had a term of years, the other an estate for life, and the last a remainder in tail, or in fee simple. But no one of them has as yet had more than one estate. It is possible, however, that one person may have, under certain circumstances, more than one estate in the same land at the same time,—one of his estates being in possession, and the other in remainder, or perhaps all of them being remainders. The limitation of a remainder in tail, or in fee simple, to a person who has already an estate of freehold as for life, is governed by a rule of law, known by the name of the rule in *Shelley's case*,[1]—so called from a celebrated case in Lord Coke's

(*t*) Fearne, Cont. Rem. 216; 2 Prest. Abst. 113.

[1] The reader of Shelley's case will observe that in the case itself no question arose upon the rule, but the latter is so clearly stated in the argument that it is always called by the name stated in the text.

time, in which the subject was much discussed;(*u*) although the rule itself is of very ancient date.(*x*) As this rule is generally supposed to be highly technical, and founded on principles not easily to be perceived, it may be well to proceed gradually in the attempt to explain it.[1]

(*u*) Shelley's case, 1 Rep. 94, 104.

(*x*) Year Book, 18 Edw. II, 577, translated 7 Man. & Gran. 941, n. (c); 38 Edw. III, 26 b; 40 Edw. III, 9.

[1] The rule itself is this, When the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, in such case "the heirs" are words of limitation of the estate, and not words of purchase.

The different speculative opinions as to the origin of the rule are thus condensed in a very recent work. "It has been supposed by some that the rule is of feudal origin, and was introduced to prevent frauds upon tenure, for if the heir or heirs of the body of the ancestor had been held to take by purchase, they would not, upon the death of the ancestor, have been liable to the burdens imposed upon a descent, or the lord or donor might be prejudiced by the loss of wardship, marriage, and other fruits of tenure. By some it has been said, that the rule had its origin from the prejudice that might happen to the heirs themselves, by the loss of the remainder, if the ancestor should do anything to forfeit or determine his estate for life after the determination of the intermediate estate; for they, not being capable of taking such remainder, when such preceding estates ended, could never after lay claim to it; and so an unwary ancestor might defeat his heir of the purchase; or lastly, from the conformity or parity of reason they bear to a limitation to A. and his heirs, or heirs, male or female, of his body; for as the one gives an estate for life, by implication, and more, so the other gives him the same in express words, and more; and expressio eorum quæ tacite insunt nihil operatur. And the interposition of another estate between them, only breaks the order of the limitation, not the operation of the words; which being the same in both cases, ought to have the same operation and construction, Fearne Cont. Rem. 83, 85. Mr. Justice Blackstone, in Perrin v. Blake, was rather inclined to believe that the rule was established to prevent the inheritance from being in abeyance; and that one principal foundation of it was to obviate the mischief of too frequently putting the inheritance in suspense or abeyance. Another foundation, he said might be, and was probably laid in a principle diametrically opposite to the genius of feudal institutions, namely, a desire to facilitate the alienation of land, and to throw it into the tract of commerce, one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser. The learned Judge refers to what he believes to be the earliest case in which the principle was established (18 Ed. 2, fol. 577), for the purpose of facilitating the alienation of the land by charging it with the debts of the ancestor. Mr. Hargreave considered the rule as one branch of a policy of law adopted to prevent the annexation to a real descent, of the qualities and properties of a purchase; so that in effect the object of the rule was that no man should raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers. 1 Harg. Law Tracts, 572; Fearne, 85, 86.

"The origin of the rule, however plausible may be the suggestions of learned men upon the subject, is lost in obscurity; but whatever that may be, or whether its continuance can be justified upon any rational grounds, it still remains as firmly rooted in

We have already seen, that in ancient times the feudal holding of an estate granted to a vassal, continued only for his life.(*y*) And from the earliest times to the present day, a grant or conveyance of lands, made by any instrument (a will only excepted), to A. B. simply, without further words, will give him an estate for his life, and no longer. If the grant was anciently made to him and his heirs, his heirs, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. *He could [*210] not sell it without the consent of his lord; much less could he then devise it by his will. The ownership of an estate in fee simple was then but little more advantageous than the possession of a life-interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out in different parts of the preceding chapters.(*z*) A tenant in fee simple was, accordingly, a person who held to him and his heirs; that is, the land was given to him, to hold for his life, and to his heirs, to hold after his decease. It cannot, therefore, be wondered at, that a gift, expressly in these terms, "To A. for his life, and after his decease to his heirs," should have been anciently regarded as identical with a gift to A. and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be matter of surprise that the same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple, and the great liability of such an estate to involuntary alienation for the purpose of satisfying the debts of the present tenant, the same rule still holds; and a grant to A. for his life, and after his decease to his heirs, will now convey to him an estate in fee simple, with all its incidents; and, in the same manner, a grant to A. for his life, and after his decease to the heirs of his body, will now convey to him an estate tail, as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well as in ordinary limitations to A. and his heirs, or to A. and the heirs of his body, the words *heirs*, and *heirs of his body*, are said to be *words of limitation*, that is, words which limit or mark

(*y*) Ante, p. 17. (*z*) Ante, pp. 17, 31–37, 54–57.

English jurisprudence as any other rule whose origin is clear, and whose utility is manifest." Tudor's Leading Cases on Real Property, 482.

*out the estate to be taken by the grantee.(*a*) At the present day, when the heir is perhaps the last person likely to get the estate, these words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee—as mere technicalities, and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave the estate to the heirs, or the heirs of the body of the grantee, after his decease, according to the letter of the gift. The circumstance that a man's estate was to go to his heir, was the very thing which, afterwards, enabled him to convey to another an estate in fee simple.(*b*) And the circumstance that it was to go to the heir of his body, was that which alone enabled him, in after times, to bar an estate tail, and dispose of the lands entailed, by means of a common recovery. [*211]

Having proceeded thus far, we have already mastered the first branch of the rule in *Shelley's case*, namely, that which relates to estates in possession. This part of the rule is, in fact, a mere enunciation of the proposition already explained, that, when the ancestor, by any gift or conveyance, takes an estate for life, and in the same gift or conveyance,[1] an estate[2] is immediately limited to his heirs in fee or in tail, the words "the heirs" are words of limitation of the estate of the ancestor. Suppose, however, that it should anciently have been wished to interpose, between the enjoyment of the lands by the ancestor and the enjoyment by the heir, the possession of some other party for some limited estate, as for his own life. Thus, let the estate have been given to A. and his heirs, but with a vested estate to B. for his own life, to take effect in possession next after the decease of A.,—thus, suspending the enjoyment of the

(*a*) See ante, pp. 119, 120; Perrin v. Blake, ante, pp. 176, 177.

(*b*) Ante, p. 37.

[1] It must be by the same gift or conveyance; for, if one by deed give an estate to his son for life, and by his will devise it to the heirs male of his body, the son takes only an estate for life, with remainder in tail to his heirs male, as purchasers. Doe d. Fonnereau v. Fonnereau, Douglass's Rep. 508. A will and schedule, or, it is presumed, a will and codicils, are, however, to be considered, as to this, as one instrument. Hayes d. Foorde v. Foorde, 2 Wm. Blacks. 698.

[2] In noticing the subject of equitable estates being governed by the same rules as legal estates, it has been before (supra, p. 136) noticed that the rule in Shelley's case applies to the former as well as to the latter. It is necessary, however, that both the estates should be legal, or both equitable; for, where one is legal and the other equitable, the rule does not apply, and the heirs take as purchasers. Jones v. Lord Say and Sele, 8 Viner's Abr. 262, pl. 19; Curtis v. Rice, 12 Vesey 89; Adams v. Adams, 6 Queen's Bench, 860; Tallman v. Wood, 26 Wendell, 9.

[*212] lands by *the heir of A., until after the determination of the life estate of B. In such a case, it is evident that B. would have had a vested estate for his life, in remainder, expectant on the decease of A.; and the manner in which such remainder would have been limited, would, as we have seen,(c) have been to A. for his life, and after his decease to B. for his life. The only question then remaining would be, as to the mode of expressing the rest of the intention,—namely, that, subject to B.'s life estate, A. should have an estate in fee simple. To this case the same reasoning applies, as we have already made use of in the case of an estate to A. for his life, and after his decease to his heirs. For, an estate in fee simple is an estate, by its very terms, to a man and his heirs. But, in the present case, A. would have already had *his* estate given him by the first limitation, to himself for his life; nothing, therefore, would remain but to give the estate to his heirs, in order to complete the fee simple. The last remainder would, therefore, be to the heirs of A.; and the limitations would run thus: "To A. for his life, and after his decease to B. for his life, and after his decease to the heirs of A." The heir, in this case, would not have taken any estate independently of his ancestor, any more than in the common limitation to A. and his heirs: the heir could have claimed the estate only by its descent from his ancestor, who had previously enjoyed it during his life; and the interposition of the estate of B. would have merely postponed that enjoyment by the heir, which would otherwise have been immediate. But we have seen that the very circumstance of the man's having an estate which is to go to his heir, will now give him a power of alienation, either by deed or will, and enable him altogether to defeat his heir's expectations. And, in a case like the present, the same privilege will now be enjoyed by [*213] A.; for, *whilst he cannot by any means defeat the vested remainder belonging to B. for his life, he may, subject to B.'s life interest, dispose of the whole fee simple at his own discretion. A. therefore will now have in these lands, so long as B. lives, two estates, one in possession, and the other in remainder. In possession A. has, with regard to B., an estate only for his own life. In remainder, expectant on the decease of B., he has, in consequence of his life interest being followed by a limitation to his heirs, a complete estate in fee simple. The right of B. to the possession, after A.'s decease, is the only thing which keeps the estate apart, and divides it, as it were, in two. If, therefore, B. should die during A.'s life,

(c) Ante, p. 207.

A. will be tenant for his own life, with an immediate remainder to his heirs; in other words, he will be tenant to himself and his heirs, and will enjoy, without any interruption, all the privileges belonging to a tenant in fee simple.

By parity of reasoning, a similar result would follow, if the remainder were to the heirs of the body of A., or for an estate in tail, instead of an estate in fee simple. The limitation to the heirs of the body of A. would coalesce, as it is said, with his life estate, and give him an estate tail in remainder, expectant on the decease of B.; and, if B. were to die during his lifetime, A. would become a complete tenant in tail in possession.

The example we have chosen, of an intermediate estate to B. for life, is founded on a principle evidently applicable to any number of intermediate estates, interposed between the enjoyment of the ancestor and that of his heir. Nor is it at all necessary that all these estates should be for life only; for, some of them may be larger estates, as estates in tail. For instance, suppose lands given to A. for his life, and after his decease to B. and the heirs of his body, and in default of such *issue (which is the method of expressing a remainder after an estate tail), to the heirs of A. In this [*214] case A. will have an estate for life in possession, with an estate in fee simple in remainder, expectant on the determination of B.'s estate tail. An important case of this kind arose in the reign of Edward III.(*d*) Lands were given to one John de Sutton for his life, the remainder, after his decease, to John his son, and Eline, the wife of John the son, and the heirs of their bodies; and in default of such issue, to the right heirs of John the father. John the father died first; then John and Eline entered into possession. John the son then died, and afterwards Eline his wife, without leaving any heir of her body. R., another son, and heir at law of John de Sutton, the father, then entered. And it was decided by all the justices that he was liable to pay a *relief*(*e*) to the chief lord of the fee, on account of the descent of the lands to himself from John the father. Thorpe, who seems to have been a judge, thus explained the reason of the decision:—"You are in as heir to your father, and your brother [father?] had the freehold before; at which time, if John his son

(*d*) Provost of Beverly's case, Year Book, 40 Edw. III, 9. See 1 Prest. Estates, 304.

(*e*) See ante, pp. 97, 99, 101.

and Eline had died [without issue] in his lifetime, he would have been tenant in fee simple."[1]

The same principles will apply where the first estate is an estate in tail, instead of an estate for life. Thus, suppose lands to be given to A. and the heirs male of his body begotten, and in default of such issue, to the heirs female of his body begotten.(*f*) Here in default of male heirs of the body of A., the heirs female will inherit from their ancestor the estate in tail female, which by the gift had vested in him. There is no need to repeat the estate which the ancestor enjoys for his life, and to limit the lands, in default of heirs male, *to* [*215] **him* and to the heirs female of his body begotten. This part of his estate in tail female has been already given to him, in limiting the estate in tail male. The heirs female, being mentioned in the gift, will be supposed to take the lands as heirs, that is, by descent from their ancestor, in whom an estate in tail female must consequently be vested in his lifetime. For, the same rule, founded on the same principle, will apply in every instance; and this rule is no other than the rule in *Shelley's case*, which lays it down for law, that, when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, *either mediately or immediately*, to his heirs in fee or in tail, the words "the heirs" are words of limitation of the estate of the ancestor. The heir, if he should take any interest, must take *as heir* by descent from his ancestor; for he is not constituted, by the words of the gift or conveyance, a *purchaser* of any separate and independent estate for himself.[2]

(*f*) Litt. s. 719; Co. Litt. 376 b.

[1] "Of all the cases particularized in the report" (of Shelley's case), says Mr. Preston, supra, "this alone is intelligible, and it is the only case from which any conclusion to the rule under consideration can be drawn. That case, however, is so clear and precise to the purpose, that it does not leave a doubt of the point decided, and it is material that one of the express grounds of the adjudication was that the ancestor had a *freehold preceding*."

[2] On this side of the Atlantic, the rule in Shelley's case is, in most of the States, adopted as part of the common law. James's claim, 1 Dallas, 47; Findlay v. Riddle, 3 Binney, 152; George v. Morgan, 4 Harris, 95; Dott v. Cunnington, 1 Bay, 453; Carr v. Porter, 1 McCord's Ch. R. 60; Davidson v. Davidson, 1 Hawks, 163; Roy v. Garnett, 2 Washington, 9; Smith v. Chapman, 1 Hen. & Munf. 240; Lyles v. Digge, 6 Har. and Johns. 364; Chilton v. Henderson, 9 Gill, 432; Polk v. Faris, 9 Georgia, 209; McFeeley v. Moore, 5 Hammond, 465. "The rule in Shelley's case," said the late Mr. Ch. J. Gibson, in Hileman v. Bouslaugh, 1 Harris, 351, "ill deserves the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. It is part of a system; an artificial one, it is true, but still a system, and a complete one. The use of

The rule, it will be observed, requires that an estate of freehold merely should be taken by the ancestor, and not necessarily an estate for the whole of his own life or in tail. In the examples we have given, the ancestor has had an estate at least for his own life, and the enjoyment of the lands by other parties has postponed the enjoyment by his heirs. But the ancestor himself, as well as his heirs, may be deprived of possession for a time; and yet an estate in fee simple, or fee tail, may be effectually vested in the ancestor, subject to such deprivation. For instance, suppose lands to be given to A., a widow, during her life, provided she continue a widow and unmarried, and after her marriage, to B. and his heirs during her life, and

it, while fiefs were predominant, was to secure the fruits of the tenure, by preventing the ancestor from passing the estate to the heir, as a purchaser, through a chasm in the descent, disencumbered of the burdens incident to it as an inheritance; but Mr. Hargrave, Mr. Justice Blackstone, Mr. Fearne, Chief Baron Gilbert, Lord Chancellor Parker, and Lord Mansfield, ascribe it to concomitant objects of more or less value at this day; among them, the unfettering of estates, by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it would otherwise be. However that may be, it happily falls in with the current of our policy. By turning a limitation for life, with remainder to heirs of the body, into an estate tail, it is the handmaid, not only of Taltarum's case (as to which, see supra, p. 39), but of our statute for barring entails by a deed acknowledged in court; and where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. In a masterly disquisition on the principles of expounding dispositions of real estate, Mr. Hayes, who had sounded the profoundest depths of the subject, is by no means clear that the rule ought to be abolished even by the legislature; and Mr. Hargrave shows, in one of his tracts, that to engraft purchase on descent, would produce an amphibious species of inheritance, and confound a settled distinction in the law of estates. It is admitted that the rule subverts a particular intention in perhaps every instance; for, as was said in Roe v. Bedford, 4 Maule & Selw. 363, it is proof against even an express declaration that the heirs shall take as purchasers. But it is an intention which the law cannot indulge, consistently with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate tail in the first donee, and to invert the rule of interpretation, by making the general intention subservient to the particular one. A donor is no more competent to make tenancy for life a source of inheritable succession, than he is competent to create a perpetuity, or a new canon of descent. The rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property. It prevails in Maryland, Georgia, Tennessee, as well as, perhaps, in most of the other States, and it prevailed in New York till it was abolished by statute. We have no such statute; and it has always been recognized by this Court as a rule of property."

The rule has, however, been abolished by statute in Maine, Massachusetts, Connecticut, New York, Illinois, Missouri, and Michigan; in Mississippi, as to real estate only, Powell v. Brandson, 24 Miss. 343; and in New Hampshire and New Jersey, in cases of devises only; see Bowers v. Porter, 4 Pickering, 205; Richardson v. Wheatland, 7 Metcalf, 172; Goodrich v. Lambert, 10 Connecticut, 448.

after her decease, to her heirs. Here A. has an estate in fee simple, subject to the remainder to B. for her life, expectant on the event of her *marrying again.(g) For to apply to this case the same reasoning as to the former ones, A. has still an estate to her and to her heirs. She has the freehold or feudal possession, and, after her decease, her heirs are to have the same. It matters not to them that a stranger may take it for a while. The terms of the gift declare, that what was once enjoyed by the ancestor, shall afterwards be enjoyed by the heirs of such ancestor. These very terms then make an estate in fee simple, with all its incidental powers of alienation, controlled only by the rights of B. in respect of the estate conferred on him by the same gift.

[*216]

But, if the ancestor should take no estate of freehold under the gift, but the land should be granted only to his heirs, a very different effect would be produced. In such a case, a most material part of the definition of an estate in fee simple would be wanting. For, an estate in fee simple is an estate given to a man and his heirs, and not merely to the heirs of a man. The ancestor, to whose heirs the lands were granted, would accordingly take no estate or interest by reason of the gift to his heirs. But the gift, if it should ever take effect, would be a future contingent estate for the person, who, at the ancestor's decease, should answer the description of heir to his freehold estates. The gift would, accordingly, fall within the class of future estates, of which an explanation is endeavored to be given in the next chapter.(h)

[*217]

*CHAPTER II.

OF A CONTINGENT REMAINDER.

HITHERTO we have observed a very extensive power of alienation possessed by a tenant in fee simple. He may make an immediate grant, not of one estate merely, or two, but of as many as he may please, provided he ascertain the order in which his grantees are to

(g) Curtis v. Price, 12 Ves. 89.

(h) The most concise account of the rule in Shelley's case, together with the principal distinctions which it involves, is that given by Mr. Watkins in his Essay on the Law of Descents, pp. 154 et seq. (194, 4th ed.)

take possession.(*a*) This power of alienation, it will be observed, may in some degree render less easy the alienation of the land at a future time; for, it is plain, that no sale can in future be made of an unincumbered estate in fee simple, in the lands, unless every owner of each of these estates will concur in the sale, and convey his individual interest, whether he be the particular tenant, or the owner of any one of the estates in remainder. But, if all these owners should concur, a valid conveyance of an estate in fee simple can at any time be made. The exercise of the power of alienation, in the creation of vested remainders, does not, therefore, withdraw the land for a moment from that constant liability to complete alienation, which it has been the sound policy of modern law as much as possible to encourage.

But, great as is the power thus possessed, the law has granted to a tenant in fee simple, and to every other owner to the extent of his estate, a greater power still. For, it enables him, under certain restrictions, to grant estates to commence in interest, and not in possession merely, at a future time. So that during the period which may elapse before the commencement of such estates, the land may be withdrawn from its former *liability to complete alienation, and be tied up for the benefit of those who may become the owners of such future estates. The power of alienation is thus allowed to be exercised in some degree to its own destruction. For, till such future estates come into existence, they may have no owners to convey them. Of these future estates there are two kinds, a contingent remainder, and an executory interest. The former is allowed to be created by any mode of conveyance. The latter can arise only by the instrumentality of a will, or of a *use* executed, or made into an estate, by the Statute of Uses. The nature of an executory interest will be explained in the next chapter. The present will be devoted to contingent remainders, which, though abolished by the act to simplify the transfer of property,(*b*) were revived the next session by the act to amend the law of real property,(*c*) by which the former act, so far as it abolished contingent remainders, was repealed as from the time of its taking effect. [*218]

The simplicity of the common law allowed of the creation of no

(*a*) Ante, pp. 206, 207. (*b*) Stat. 7 & 8 Vict. c. 76, s. 8.
(*c*) Stat. 8 & 9 Vict. c. 10, s. 1.

other estates than particular estates, followed by the vested remainders, which have already occupied our attention. A contingent remainder,—a remainder not vested, and which never might vest,—was long regarded as illegal. Down to the reign of Henry VI, not one instance is to be found of a contingent remainder being held valid.(*d*) The early authorities, on the contrary, are rather opposed to such a conclusion.(*e*) And, at a later period, the authority of [*219] *Littleton is express,(*f*) that every remainder, which beginneth by a deed, must be *in* him to whom it is limited, before livery of seisin is made to him who is to have the immediate freehold. It appears, however, to have been adjudged, in the reign of Henry VI, that if land be given to a man for his life, with remainder to the right heirs of another *who is living*, and who afterwards dies, and then the tenant for life dies, the heir of the stranger shall have this land; and yet it was said that, at the time [*220] of the grant, the remainder was in a *manner void.(*g*) This decision ultimately prevailed. And the same case is accord-

(*d*) The reader should be informed that this assertion is grounded only on the writer's researches. The general opinion appears to be in favor of the antiquity of contingent remainders.

(*e*) Year Book, 11 Hen. IV, 74; in which case a remainder to the right heirs of a man *who was dead before the remainder was limited*, was held to vest by purchase in the person who was heir. But it was said by Hankey, J., that if a gift were made to one for his life, with remainder to the right heirs of a man *who was living*, the remainder would be void, because the fee ought to pass immediately to him to whom it was limited. Note, also, that in Mandeville's case (Co. Litt. 26 b), which is an ancient case of an heir of the body taking by purchase, the ancestor was *dead* at the time of the gift. The cases of rents are not apposite, as a diversity was long taken between a grant of a rent and a conveyance of the freehold. The decision in 7 Hen. IV, 6 b, cited in Archer's case (1 Rep. 66 b), was on a case of a rent-charge. The authority of P. 11 Rich. II, Fitz. Ab. tit. Detinue, 46, which is cited in Archer's case (1 Rep. 67 a), and in Chudleigh's case (1 Rep. 135 b), as well as in the margin of Co. Litt. 378 a, is merely a statement by the Judge of the opinion of the counsel against whom the decision was made. It runs as follows:—"Cherton to Rykhil,—You think (*vous quides*) that inasmuch as A. S. was living at the time of the remainder being limited, that if he was dead at the time of the remainder falling in, and had a right heir at the time of the remainder falling in, that the remainder would be good enough. Rykhil—Yes, sir; and afterwards in Trinity Term, judgment was given in favor of Wad: [the opposite counsel] *quod nota bene*."

It is curious that so much pains should have been taken by modern lawyers to explain the reasons why a remainder to the heirs of a person, who takes a prior estate of freehold, should not have been held to be a contingent remainder (see Fearne, Cont. Rem. 83 et seq.), when the construction adopted (subsequently called the rule in Shelley's case), was decided on before contingent remainders were allowed.

(*f*) Litt. s. 721; see also M. 27 Hen. VIII, 24 a.

(*g*) Year Book, 9 Hen. VI, 24 a; H. 32 Hen. VI, Fitz. Abr. tit. Feoffments and Faits, 99.

ingly put by Perkins, who lays it down, that if land be leased to A. for life, the remainder to the right heirs of J. S., who is alive at the time of the lease, this remainder is good, because there is one named in the lease (namely, A. the lessee for life), who may take immediately in the beginning of the lease.(*h*) This appears to have been the first instance in which a contingent remainder was allowed. In this case J. S. takes no estate at all; A. has a life interest; and, so long as J. S. is living, the remainder in fee does not vest in any person under the gift; for the maxim is *nemo est hæres viventis*, and J. S. being alive, there is no such person living as his heir. Here, accordingly, is a future estate, which will have no existence until the decease of J. S.; if, however, J. S. should die in the lifetime of A., and if he should leave an heir, such heir will then acquire a vested remainder in fee simple, expectant on A.'s life interest. But, until these contingencies happen or fail, the limitation to the right heirs of J. S. confers no present estate on any one, but merely gives rise to the prospect of a future estate, and creates an interest of that kind which is known as a *contingent remainder*.(*i*)[1]

The gift to the *heirs* of J. S. has been determined to be sufficient to confer an estate in fee simple on the person who may be his heir, without any additional limitation to the heirs of such heir.(*k*) If, however, the gift be made after the 31st of December, 1833, or by

(*h*) Perk. s. 52. (*i*) 3 Rep. 20 a, in Boraston's case. (*k*) 2 Jarman on Wills, 2.

[1] In the determination, however, of the question whether a limitation is of a vested or a contingent estate, Courts incline to favor the former, for reasons thus expressed by Best, J., in Duffield v. Duffield, 1 Dow & Clark, 311. "The rights of different members of families not being ascertained, while estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them. If the parents' attaining a certain age be a condition precedent to the vesting of the estates, by the death of their parents before they are of that age children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to. In consideration of these circumstances, the Judges, from the earliest times, were always inclined to decide that estates devised were vested; and it has long been an established rule, for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition, precedent to the vesting, is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning the doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession."

the will of a testator who shall have died after that day, the land will descend, on the decease of the heir intestate, *not to *his* heir, but to the next heir of J. S., in the same manner as if J. S. had first been entitled to the estate.(*l*)

[*221]

When contingent remainders began to be allowed, a question arose, which is yet scarcely settled, what becomes of the inheritance, in such a case as this, during the life of J. S.? A., the tenant for life, has but a life interest; J. S. has nothing, and his heir is not yet in existence. The ancient doctrine, that the remainder must vest at once or not at all, had been broken in upon; but the Judges could not make up their minds also to infringe on the corresponding rule, that the fee simple must, on every feoffment which confers an estate in fee, at once depart out of the feoffor. They, therefore, sagely reconciled the rule which they left standing, to the contingent remainders which they had determined to introduce, by affirming that, during the contingency, the inheritance was either in abeyance, or *in gremio legis*, or else *in nubibus*.(*m*) Modern lawyers, however, venture to assert, that what the grantor has not disposed of, must remain in him, and cannot pass from him until there exists some grantee to receive it.(*n*) And, when the gift is by way of use under the Statute of Uses, there is no doubt that, until the contingency occurs, the use, and with it the inheritance, result to the grantor. So, in the case of a will, the inheritance, until the contingency happens, descends to the heir of the testator.(*o*)

But, whatever difficulties may have beset the departure from ancient rules, the necessities of society required that future estates, to vest in unborn or unascertained persons, should, under certain circumstances, be allowed. *And, in the time of Lord Coke, the validity of a gift in remainder, to become vested on some future contingency, was well established. Since his day the doctrine of contingent remainders has gradually become settled; so that, notwithstanding the uncertainty still remaining with regard to one or two points, the whole system now presents a beautiful specimen of an endless variety of complex cases, all reducible to a few plain and

[*222]

(*l*) Stat. 3 & 4 Will. IV, c. 106, s. 4.

(*m*) Co. Litt. 342 a; 1 P. Wms. 515, 516; Bac. Ab. tit. Remainder and Reversion (c).

(*n*) Fearne, Cont. Rem. 361. See, however, 2 Prest. Abst. 100–107, where the old opinion is maintained.

(*o*) Fearne, Cont. Rem. 351.

simple principles. To this desirable end the masterly treatise of Mr. Fearne on this subject(*p*) has mainly contributed.

Let us now obtain an accurate notion of what a contingent remainder is, and, afterwards, consider the rules, which are required to be observed in its creation. We have already said, that a contingent remainder is a future estate. As distinguished from an executory interest, to be hereafter spoken of, it is a future estate, which waits for and depends on the determination of the estates which precede it. But, as distinguished from a vested remainder, it is an estate in remainder, which is *not* ready, from its commencement to its end, to come into possession at any moment, when the prior estates may happen to determine. For, if any contingent remainder should, at any time, become thus ready to come into immediate possession, whenever the prior estates may determine, it will then be contingent no longer, but will at once become a vested remainder.(*q*) For example, suppose that a gift be made to A., a bachelor, for his life, and after the determination of that estate, by forfeiture or otherwise in his lifetime, to B. and his heirs during the life of A., and after the decease of A., to the eldest son of A. and the heirs of the body of such son. *Here we have two remainders, one of which is vested, and [*223] the other contingent. The estate of B. is vested.(*r*) Why? Because, though it be but a small estate, yet it is ready from the first, and, so long as it lasts, continues ready to come into possession whenever A.'s estate may happen to determine. There may be very little doubt but that A. will commit no forfeiture, but will hold the estate as long as he lives. But, if his estate should determine the moment after the grant, or at any time *whilst B.'s estate lasts*, there is B. quite ready to take possession. B.'s estate, therefore, is vested. But the estate tail to the eldest son of A. is plainly contingent. For A., being a bachelor, has no son; and, if he should die without one, the estate tail in remainder will *not* be ready to come into possession immediately on the determination of the particular estates of A. and B. Indeed, in this case, there will be no estate tail at all. But if A. should marry and have a son, the estate tail will at once become a vested remainder; for, so long as it lasts, that is, so long as the son

(*p*) Fearne's Essay on the Learning of Contingent Remainders and Executory Devises. The last edition of this work has been rendered valuable by an original view of executory interests, contained in a second volume, appended by the learned editor, Mr. Josiah William Smith.

(*q*) See ante, p. 208.

(*r*) Fearne, Cont. Rem. pp. 7 n. 325.

or any of the son's issue may live, the estate tail is ready to come into immediate possession, whenever the prior estates may determine, whether by A.'s death, or by B.'s forfeiture, supposing him to have got possession.(*s*) It will be observed that here there is an estate, which, at the time of the grant, is future in interest, as well as in possession; and till the son is born, or rather till he comes of age, the lands are tied up, and placed beyond the power of complete alienation. This example of a contingent remainder is here given as by far the most usual, being that which occurs every day in the settlement of landed estates.

The rules which are required for the creation of a contingent remainder, may be reduced to two; of which the first and principal is well established; but the latter *has occasioned a good deal [*224] of controversy. The first of these rules is, that the seisin, or feudal possession, must never be without an owner; and this rule is sometimes expressed as follows, that every contingent remainder of an estate of freehold must have a particular estate of freehold to support it.(*t*) The ancient law regarded the feudal possession of lands as a matter, the transfer of which ought to be notorious; and it accordingly forbade the conveyance of any estate of freehold, by any other means than an immediate delivery of the seisin, accompanied by words, either written or openly spoken, by which the owner of the feudal possession might at any time thereafter be known to all the neighborhood. If, on the occasion of any feoffment, such feudal possession was not at once parted with, it remained forever with the grantor. Thus a feoffment, or any other conveyance of a freehold, made to-day to A., to hold from to-morrow, would be absolutely void, as involving a contradiction. For, if A. is not to have the seisin till to-morrow, it must not be given him till then.(*u*) So, if, on any conveyance, the feudal possession were given to accompany any estate or estates less than an estate in fee simple, the moment such estates, or the last of them, determined, such feudal possession would again revert to the grantor, in right of his old estate, and could not be again parted with by him, without a fresh conveyance of the freehold. Accordingly, suppose a feoffment to be made to A. for his life, and after his decease and one day, to B. and his heirs. Here, the moment that A.'s estate determines by his death, the feudal possession, which is not to belong to B. till one day afterwards, reverts to the feoffor, and cannot be taken out

(*s*) See ante, pp. 207, 208. (*t*) 2 Black. Com. 171. (*u*) Ibid. 166.

of him, without a new feoffment. The consequence is, that the gift of the future estate, intended to be made to B., is absolutely void. Had it been held good, the feudal *possession would have been for one day without any owner, or, in other words, there would [*225] have been a so-called remainder of an estate of freehold, without a particular estate of freehold to support it. Let us now take the case we have before referred to, of an estate to A., a bachelor, for his life, and after his decease to his eldest son in tail. In this case it is evident, that the moment A.'s estate determines by his death, his son, if living, must necessarily be ready at once to take the feudal possession in respect of his estate tail. The only case in which the feudal possession could, under such a limitation, ever be without an owner, at the time of A.'s decease, would be that of the mother being then *enceinte* of the son. In such a case, the feudal possession would be evidently without an owner, until the birth of the son; and such posthumous son would accordingly lose his estate, were it not for a special provision which has been made in his favor. In the reign of William III, an act of Parliament(*x*) was passed, to enable posthumous children to take estates, as if born in their father's lifetime. And the law now considers every child *en ventre sa mère* as actually born, for the purpose of taking any benefit, to which, if born, it would be entitled.(*y*)[1]

As a corollary to the rule above laid down, arises another proposition, frequently itself laid down as a distinct rule, namely, that every contingent remainder must vest, or become an actual estate, during the continuance of the particular estate which supports it, or *eo instanti* that such particular estate determines; otherwise such contingent remainder will fail altogether, and can never become an actual estate at all. Thus, suppose lands to be given to A. for his life, and after his decease to such *son of A. as shall first attain the age of twenty-four years. As a contingent remainder, the [*226] estate to the son is well created;(*z*) for, the feudal seisin is not necessarily left without an owner after A.'s decease. If, therefore, A. should, at his decease, have a son who should then be twenty-four years of age or more, such son will at once take the feudal possession,

(*x*) Stat. 10 & 11 Will. III, c. 16.

(*y*) Doe v. Clarke, 2 H. Bl. 399; Blackburn v. Stables, 2 Ves. & Beames, 367; Mogg v. Mogg, 1 Meriv. 654; Trower v. Butts, 1 Sim. & Stu. 181. (*z*) 2 Prest. Abst. 148.

[1] The law is the same as to this on both sides of the Atlantic, even in those States which have no legislation upon the subject, but in many of them the statute of William III has been substantially re-enacted. See 2 Greenl. Cruise, 252; 3 Id. 320.

by reason of the estate in remainder, which vested in him the moment he attained that age. In this case, the contingent remainder has vested during the continuance of the particular estate. But, if there should be no son, or if the son should not have attained the prescribed age at his father's death, the remainder will fail altogether.(*a*) For, the feudal possession will then, immediately on the father's decease, revert, for want of another owner, to the person who made the gift, in right of his reversion. And, having once reverted, it cannot now belong to the son, without the grant to him of some fresh estate by means of some other conveyance.

A contingent remainder cannot be made to vest on any event which is illegal, or *contra bonos mores*. Accordingly, no such remainder can be given to a child who may be hereafter born out of wedlock. But this can scarcely be said to be a rule for the creation of contingent remainders. It is rather a part of the general policy of the law in its discouragement of vice. In the reports of Lord Coke, however, a rule is laid down, of which it may be useful to take some notice, namely, that the event on which a remainder is to depend, must be a common possibility, and not a double possibility, or a possibility *on* a possibility, which the law will not allow.(*b*) This rule, though professed to be founded on former precedents, is not to be found in any [*227] of the *cases to which Lord Coke refers; in none of which do either of the expressions "possibility on a possibility," or "double possibility," occur. It appears to owe its origin to the mischievous scholastic logic, which was then rife in our courts of law, and of which Lord Coke had so high an opinion, that he deemed a knowledge of it necessary to a complete lawyer.(*c*) The doctrine is indeed expressly introduced on the authority of logic:—"as the logician saith, *potentia est duplex, remota et propinqua.*"(*d*) This logic, so

(*a*) Festing v. Allen, 12 Mees. & Wels. 279; 5 Hare, 573.[1] (*b*) 2 Rep. 51 a; 10 Rep. 50 b.
(*c*) Preface to Co. Litt. p. 37. (*d*) 2 Rep. 51 a.

[1] In this case, upon a devise to the use of A. for life, with remainder to the use of all and every the children of A. who should attain the age of twenty-one years, and for want of issue, over, it was held, upon a case sent by the Vice Chancellor to the Court of Exchequer (12 Meeson & Welsb. 279), that upon the death of A. leaving infant children, the estate went to her heir at law, and that the children took nothing, upon the ground that there was no gift to any one who answered the whole of the requisite description. "The gift is not to the children of Mrs. Festing, but to the children who shall attain twenty-one, and no one who has not attained his age of twenty-one years is an object of the testator's bounty, any more than a person who is not a child of Mrs. Festing."

soon afterwards demolished by Lord Bacon, appears to have left behind it many traces of its existence in our law; and perhaps it would be found that some of those artificial and technical rules, which have the most annoyed the Judges of modern times,(*e*) owe their origin to this antiquated system of endless distinctions without solid differences. To show how little of practical benefit could ever be derived from the distinction between a common and a double possibility, let us take one of Lord Coke's examples of each. He tells us, that the chance that a man and a woman, both married *to different persons*, shall themselves marry one another, is but a common possibility.(*f*) But the chance that a married man shall have a son named Geoffrey, is stated to be a double or remote possibility.(*g*) Whereas, it is evident, that the latter event is at least quite as likely to happen as the former. And if the son were to get an estate from being named Geoffrey, as in the case put, there can be very little doubt but that Geoffrey would be the name given to the first son who might be born.(*h*) *Respect to the memory of Lord Coke has long kept on foot, in our law books,(*i*) the rule that a possibility on a possibility is not allowed by law, in the creation of contingent remainders. But the authority of this rule has long been declining;(*j*) and lately, a very learned living Judge(*k*) has declared plainly that it is now abolished.[2] [*228]

(*e*) Such as the rule in Dumpor's case, 4 Rep. 119.[1]

(*f*) 10 Rep. 50 b; Year Book, 15 Hen. VII, 10 b, pl. 16.

(*g*) 2 Rep. 51, b.

(*h*) The true ground of the decision in the old case (10 Edw. III, 45), to which Lord Coke refers, was no doubt, as suggested by Mr. Preston (1 Prest. Abst. 128), that the gift was made to Geoffrey the son, as though he were living, when in fact there was then no such person.

(*i*) 2 Black. Com. 170; Fearne, Cont. Rem. 252.

(*j*) See Third Report of Real Property Commissioners, p. 29; 1 Prest. Abst. 128, 129.

(*k*) Lord St. Leonards, in Cole v. Sewell, 2 Conn. & Laws. 344; S. C. 4 Dru. & War. 1, 32. The decision in this case has been affirmed in the House of Lords, 2 H. of L. Cases, 186.

---

[1] Which decided that a condition not to alien without license was determined by the first license granted, as to which see 1 Smith's Leading Cases, 18, and infra, p. 332.

[2] The language of Mr. Fearne as to this doctrine of a possibility upon a possibility is, "So if there be a lease for life, remainder to the heirs of J. S., though this remainder be good, because by common possibility J. S. may die during the particular estate, yet if there be no such person as J. S. at the time of the limitation, notwithstanding such a person should afterwards be born, and die during the life of the tenant for life, his heir shall not take by virtue of such limitation; because the possibility on which it is to take effect is too remote; for it amounts to the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it, viz. first, that such a person as J. S. should be

But, although the doctrine of Lord Coke, that there can be no possibility on a possibility, has ceased to govern the creation of contingent remainders, there is yet a rule by which these remainders are re-

born, which is very uncertain, and secondly, that he should also die during the particular estate, which is another uncertainty grafted upon the former. This is called a possibility upon a possibility, which Lord Coke tells us is never admitted by intendment of law."

Upon this passage Mr. Butler remarks, that "the expression of a possibility upon a possibility, which in the language of Lord Coke, is never admitted by intendment, must not be understood in too large a sense;" and he refers to the case of Routledge v. Dorril, 2 Ves. Jr. 357, where a trust was held valid, although four contingent events must first have happened,—that a husband and wife should have a child, that such child should have a child, that such last-mentioned child should be alive at the decease of the survivor of his grandfather and grandmother, and that if such child were a grandson, he should attain twenty-one, and if a granddaughter attain that age or marry.

It seems, however, to have been at some time imagined that the alleged rule in question had some connection with the rule against perpetuities (as to which see the next chapter, as also supra, p. 178 n.), but this idea was thus noticed in the Third Report of the Real Property Commissioners, referred to in the text. "It is a mistake to suppose that at the common law, properly so called, there was any rule against perpetuities. Lord Coke observes, 'A possibility which shall make a remainder good, ought to be a common possibility, and potentia propinqua; as death, or death without issue, or coverture, or the like. If a lease be made for life, with remainder to the heirs of J. S., this is good; for, by common possibility, J. S. may die during the life of a tenant for life; but if, at the time of the limitation, there is no such person as J. S., but during the life of the tenant for life, J. S. is born, and dies, his heirs shall never take.' 2 Rep. 51. This amounts to a double possibility; first, that such a person as J. S. shall be born, which is very uncertain; and, secondly, that he shall die during the particular estate, which is another uncertainty grafted upon the former. Now this has nothing restrictive of alienation in it, since both the common and double possibility must have taken effect, if at all, upon the determination of the particular estate. Indeed, the existence of the rule itself may be considered as extremely doubtful. Lord Chancellor Nottingham observed, 'That there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself; but the contrary rule, given as a reason by my Lord Pophham in the Rector of Chedington's case, looks like a reason of art; but, in truth, there is no kind of reason in it,' and I have known that rule often denied in Westminster Hall.' Modern determinations have established his lordship's opinion."

The language used by Lord St. Leonards (then Sir E. Sugden) in Cole v. Sewell, 4 Drury & Warren, 27 (where it is more fully reported than in 2 Connor & Lawson, 344), was very clear in the explanation of this: "It is said that in the present case, this is not a contingent remainder, but a future, or secondary, or springing use, and being to take effect in default of issue generally, it is too remote, and therefore void. Now, if there be one rule of law more sacred than another, it is this, that no limitation shall be construed to be an executory or shifting use, which can by possibility take effect by way of remainder, and the case of Carwadine v. Carwadine, 1 Eden, 27, explained in the note to Gilbert on Uses, p. 173, establishes this position. In that case, Lord Keeper Henley went much out of his way to apply the rule; he transposed the proviso, and put the gift in a regular course of limitation, in order to give effect to it as a contingent remainder; he laid down the general rule in the strongest terms, and with precision, and I consider the rule to be one of universal application.

strained within due bounds, and prevented from keeping the lands, which are subject to them, for too long a period beyond the reach of

As to the question of remoteness, at this time of day, I was very much surprised to hear it pressed upon the Court, because it is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question; for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries, or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event upon which the contingency depends, happen so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as to perpetuity, which is a comparatively modern rule (I mean of recent introduction, when speaking of the laws of this country), was not known, so that, while contingent remainders were the only species of executory estate then known, and uses, and springing, and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavored to avoid remote possibilities; but since the establishment of the rule as to perpetuities, this has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting, or secondary use, not depending on an estate tail, and if it is so limited, that it may go beyond a life or lives in being, and twenty-one years, and a few months, equal to gestation, then it is absolutely void: but if, on the other hand, it is a remainder, it must take effect, if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen, before, or at, the instant the preceding estate is determined, and the limitation will fail, or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder. If the remainder ever had been regularly in default of issue male of the daughters, it would have taken effect, when and if that failure happened. Now the remainder over is in default of issue generally; but it can only take effect, when and if there is a failure of issue male, that is, upon the regular determination of the previous estate: there is no distinction in point of perpetuity between the limitations; either can only take effect at the same period. The simple distinction is, that although the event happen, the latter gift—depending upon the contingency—may never take effect; but that introduces no question of remoteness. What other objection, then, can be taken to this contingent remainder? This limitation appears to me to be one of the most regular, technical, contingent remainders, that can be conceived. The estate is first limited to the daughters for their respective lives, with remainder to their sons in tail male, with remainder to the daughters of the daughters in tail general; and then, if the daughters die without issue, remainder over. What can be more regular? If the remainder over take effect at all, it must take effect immediately upon the natural determination of the preceding estates; for if at the time of failure of issue male of the daughters, there should also be a failure generally of their issue, then the preceding limitations are subsisting up to the time at which the contingent remainder over is limited to take effect, and are only exhausted at that moment; and supposing that as the determination of those preceding limitations, there are other issue of the daughters—issue female of their sons, for instance, who do not take estates under those preceding limitations, then the contingency does not happen, upon which the remainder was to take effect, although thep receding estates are determined, and the remainder over is consequently destroyed. * * * The first instance of Mr. Fearne is taken

alienation. This rule is the second rule, to which we have referred,(*l*) and is as follows:—that an estate cannot be given to an unborn

(*l*) Ante, p. 223.

from Coke Littleton, 378 a; and the passage shows there was then a difficulty about remote possibilities, which does not exist at this moment. Lord Coke, speaking of this, says: 'So it is if a man make a lease for life to A, B, and C, and if B survive C, then the remainder to B and his heirs: here is another exception out of the said rule, for albeit the person be certain, yet inasmuch as it depends upon the dying of B before C, the remainder cannot vest in C, presently; and the reason of both these cases in effect is, because the remainder is to commence upon limitation of time, viz., upon the possibilities of the death of one man before another, which is a common possibilitie.' The concluding words show that in those early times they were looking to the period when the contingency might arise. The effect, however, of the modern rule against perpetuities has been to render this doctrine obsolete, although it has rendered void successive life estates to successive unborn classes of issue. In Nicholls v. Sheffield, 2 Bro. Ch. C. 215, the Court held that a proviso for shifting an estate after an estate tail was valid; and Lord Kenyon, who was then at the Rolls, would not listen to an argument founded on remoteness because the limitation over might at any time be barred by the previous tenant in tail."

When this case came before the House of Lords on appeal (2 Clark & Finnelly's Appeal Cases, 230), Lord Brougham in delivering his judgment said, "On looking at the learned and able arguments in the Court below, as reported, which I have read carefully, I was a good deal surprised to find that there was a question raised about the remoteness of the limitation. Now whatever doubt may have arisen in the earlier periods of the learning of the law of contingent uses, whatever confusion of expression, perhaps, rather than of substance, may be found in the reports, giving rise to an impression that there is in such a case a rule similar to the rule with respect to perpetuities in the case of springing uses and executory devises, which on account of the law respecting perpetuities, may be too remote, whatever difficulty, confusion, or doubt may have arisen in earlier cases as to this, I am quite confident that for upwards of a hundred years the rule has been settled, as will be clearly seen if you search through the authorities. I have been led to do so from the curiosity of the case, and from seeing that the learned gentlemen, particularly Mr. Serjeant Warren, who argued this case below, raised the point, and, therefore we would suppose that there must be some foundation for it; I wished, therefore, to trace what that foundation was, because it opened to my mind a new and a strange view of the law, applying that to contingent remainders which I had always understood must be, from the very nature of the thing, confined to springing uses and executory devises; and why? In the case of a contingent remainder, if the limitation is to operate by way of remainder, it must be supported by a preceding particular estate of freehold, an estate for life, or an estate tail, and it is absolutely useless unless it is to take effect *eo instanti* that the preceding estate determines: that is the very nature of it, the bond of the existence, if I may so speak, of a contingent remainder. But then, if I have an estate limited upon a fee [simple], that is to say, an estate to A, and his heirs, and upon the determination of that estate in fee, that is, when the heirs shall cease, then over; that cannot operate by way of remainder; it is quite clear that that is void as a remainder, and it is quite clear that if that is to take effect by way of executory devise or springing use (the only way in which it can take effect), there is no end of it. It may be a perpetuity to all intents and purposes, because if

person for life, *followed by any estate to any child of such unborn person*;(*m*) for in such a case, the estate given to the child of the unborn person is void. This rule is apparently derived from the old doctrine which prohibited double possibilities. It may not be sufficient to restrain every kind of settlement which ingenuity might suggest; but it is directly opposed to the great motive which usually induces attempts at a perpetuity, namely, the desire of keeping an estate in the same family; and it has accordingly been hitherto found sufficient. An attempt has *been recently made with much ability, to explain away this rule as merely an instance of the rule by which, [*229] as we shall hereafter see, executory interests are restrained.(*n*) But this rule is more stringent than that which confines executory interests; and if there were no other restraint on the creation of contingent remainders than the rule by which executory interests are confined, landed property might in many cases be tied up for at least a generation further than is now possible.(*o*)

(*m*) 2 Cases and Opinions, 432–441; Hay v. Earl of Coventry, 3 T. Rep. 86; Brudenell v. Elwes, 1 East, 452; Fearne's Posthuma, 215; Fearne, Cont. Rem. 502, 565, Butl. note; 2 Prest. Abst. 114; 1 Sugd. Pow. 470; 1 Jarm. Wills, 221; Cole v. Sewell, 2 H. of L. Cases, 186; Monypenny v. Dering, 2 De Gex, M. & G. 145, 170.

(*n*) See Lewis on Perpetuities, p. 408 et seq. (*o*) See Appendix (D).

---

the fee is first limited to A, and his heirs, then, as long as there are heirs, the contingent use, the springing use, or, in the case of a will, the executory devise, cannot come into possession, cannot exist, and cannot be available; consequently, there might be a perpetuity created from the condition of a former use not coming into *esse*, that condition being the general failure of heirs. What is the consequence then? That the law has said, 'to prevent the possibility of this perpetuity, we will fix certain bounds, beyond which the limitation shall not take effect.' Therefore there may be an estate given to A and his heirs; that is a fee; but you cannot limit a remainder upon that. If you give an estate to A, and his heirs, and for want of such issue, or if A shall die without heirs during the life of B, then over, that will do, that will operate by way of springing use or executory devise, because the life of B, limits the period during which that shall be held *in suspenso*, and that is the origin of the rule. In the same way, I will take the ordinary case of a fee limited upon a fee, that is, a fee to come into use, to come into possession upon the determination of the estate of A and his heirs, living B; that prevents the perpetuity, because it limits the period to dying during the life of B. * * * But this is not the case of an executory devise in which any argument against perpetuity on the ground of remoteness can be raised, and the doctrine of remoteness has been therefore, I think, most erroneously imported into this case, with which it can have nothing whatever to do, because it cannot be an executory devise, if it can operate by way of contingent remainder; and there cannot be remoteness created here, because the preceding estates tail are all barrable; at all events, you have the most perfect security against perpetuity ever creeping into it, because if it is a contingent remainder, it must take effect on being barrable, and it is gone forever *eo instanti* that the particular estate arises."

The opinion, which so generally prevails, that every man may make what disposition he pleases of his own estate,—an opinion countenanced by the loose description sometimes given by lawyers of an estate in fee simple,(*p*)—has not unfrequently given rise to attempts made by testators, to settle their property on future generations, beyond the bounds allowed by law; thus, lands have been given, by will, to the unborn son of some living person for his life, and, after the decease of such unborn son, to *his* sons in tail. This last limitation, to the sons of the unborn son in tail, we have observed, is void. The courts of law, however, have been so indulgent to the ignorance of testators, that in the case of a will, they have endeavored to carry the intention of the testator into effect, *as nearly as can possibly be done*, without infringing the rule of law; they, accordingly, take the liberty of altering his will to what they presume he would have done, had he been acquainted with the rule, which prohibits the son of any unborn son from being, in such circumstances, the object of a gift. [*230] This, in Law French, is called the *cy près* doctrine.(*q*)[1] From what has already been said, it will be apparent, that the *utmost that can be legally accomplished towards securing an estate in a family, is to give to the unborn sons of a living person estates in tail; such estates if not barred, will descend on the next generation; but the risk of the entails being barred cannot by any means be prevented. The courts, therefore, when they meet with such a disposition as above described, instead of confining the unborn son of the living person to the mere life estate, given him by the terms of the will, and annulling the subsequent limitations to his offspring, give to such a son an estate in tail, so as to afford to his issue a chance of inheriting, should the entail remain unbarred.[2] But this doctrine being rather a stretch of judicial authority, is only applied where the estates, given by the will to the children of the unborn child, are estates in tail, and not where they are estates for life,(*r*) or in fee simple.(*s*) If, however, the estates be in tail, the rule equally applies, whether the estates tail be

(*p*) 2 Black. Com. 104.

(*q*) Fearne, Cont. Rem. 204, note; 1 Jarman on Wills, 260; 2 Jarman on Wills, 731; Vanderplank v. King, 3 Hare, 1; Monypenny v. Dering, 16 Mees. & Wels. 418.

(*r*) Seward v Willock, 5 East, 198.

(*s*) Bristow v. Warde, 2 Ves. Jun. 336; 1 Jarman on Wills, 264. See, however, Mogg v. Mogg, 1 Meriv. 654; 2 Jarman on Wills, 342, note.

[1] The doctrine, however, has not been extended to limitations, in a deed. See *passim* Third Report of Real Property Commissioners, 30.

[2] Allyn v. Mather, 9 Connect. 114; Jackson v. Brown, 13 Wendell, 437; and see notes to page 178, supra.

given to the sons successively, according to seniority, or to all the children equally as tenants in common.(*t*)

Though a contingent remainder is an estate, which, if it arise, must arise at a future time, and will then belong to some future owner, yet the contingency may be of such a kind, that the future expectant owner may be now living. For instance, suppose that a conveyance be made to A. for his life, and if C. be living at his decease, then to B. and his heirs. Here is a contingent remainder of which the future expectant owner, B., may be now living. The estate of B. is not a present vested estate, kept out of possession only by A.'s prior right thereto. But it is a future estate, not to commence, either in possession or *in interest, till A.'s decease. It is not such an [*231] estate as, according to our definition of a vested remainder, is always ready to come into possession whenever A.'s estate may end; for, if A. should die after C., B. or his heirs can take nothing. Still B., though he has no estate during A.'s life, has yet plainly a chance of obtaining one, in case C. should survive. This chance is called in law a *possibility ;* and a possibility of this kind was long looked upon in much the same light as a condition of re-entry was regarded,(*u*) having been inalienable at law, and not to be conveyed to another by deed of grant. A fine alone, before fines were abolished, could effectually have barred a contingent remainder.(*x*) It might however have been released; that is to say, B. might, by deed of release, have given up his interest for the benefit of the reversioner, in the same manner as if the contingent remainder to him and his heirs had never been limited;(*y*) for the law, whilst it tolerated conditions of re-entry and contingent remainders, always gladly permitted such rights to be got rid of by release, for the sake of preserving unimpaired such vested estates as might happen to be subsisting. A contingent remainder was also devisable by will under the old statutes,(*z*) and is so under the present act for the amendment of the laws with respect to wills.(*a*) And it was the rule in equity, that an assignment intended to be made of a

(*t*) Pitt v. Jackson, 2 Bro. C. C. 51; Vanderplank v. King, 3 Hare, 1.

(*u*) Ante, p. 202.

(*x*) Fearne, Cont. Rem. 365; Helps v. Hereford, 2 Barn. & Ald. 242; Doe d. Christmas v. Oliver, 10 Barn. & Cres. 181; Doe d. Lumley v. Earl of Scarborough, 3 Adol. & Ell. 2.

(*y*) Lampet's case, 10 Rep. 48 a, b; Marks v. Marks, 1 Strange, 132.

(*z*) Roe d. Perry v. Jones, 1 H. Black. 30; Fearne, Cont. Rem. 366, note.

(*a*) Stat. 7 Will. IV, & 1 Vict. c. 26, s. 3.

possibility for a valuable consideration, should be decreed to be car-
[*232] ried into effect.(*b*)[1] But the recent act to amend *the law of real property(*c*) now enacts that a contingent interest and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed. But every such disposition, if made by a married woman, must be made conformably to the provisions of the act for the abolition of fines and recoveries.(*d*)

The circumstance of a contingent remainder having been so long inalienable at law, was a curious relic of the ancient feudal system. This system, the fountain of our jurisprudence as to landed property, was strongly opposed to alienation. Its policy was to unite the lord and tenant by ties of mutual interest and affection; and nothing could so effectually defeat this end, as a constant change in the parties sustaining that relation. The proper method, therefore, of explaining our laws, is not to set out with the notion that every subject of property may be aliened at pleasure; and then to endeavor to explain why certain kinds of property cannot be aliened, or can be aliened only in some modified manner. The law itself began in another way. When, and in what manner, different kinds of property gradually became subject to different modes of alienation, is the matter to be explained; and this explanation we have endeavored, in proceeding, as far as possible to give. But, as to such interests as remained inalienable, the reason of their being so was, that they had not been altered, but remained as they were. The statute of *Quia emptores*(*e*) expressly permitted the alienation of lands and tenements,—an alienation which usage had already authorized; and ever since this statute, the ownership of an *estate* in lands (an estate tail excepted) has in-
[*233] volved in *it an undoubted power of conferring on another person the same, or perhaps more strictly, a similar estate. But a contingent remainder is no estate, it is merely a chance of having one; and the reason why it has so long remained inalienable at law, was simply because it had never been thought worth while to make it alienable.

(*b*) Fearne, Cont. Rem. 550, 551; see, however, Carleton v. Leighton, 3 Meriv. 667, 668, note (*b*).

(*c*) Stat. 8 & 9 Vict. c. 106, s. 6.

(*d*) See ante, p. 189.

(*e*) 18 Edw. I, c. 1, ante, p. 56.

[1] The student will find all the law on the subject of such assignments for valuable consideration being supported in equity in the notes to Row v. Dawson, 2 Lead. Cases in Equity, 573.

One of the most remarkable incidents of a contingent remainder. was its liability to destruction, by the sudden determination of the particular estate, upon which it depended. This liability has now been removed by the recent act to amend the law of real property:(*f*)[1] it was, in effect, no more than a strict application of the general rule, required to be observed in the creation of contingent remainders, that the freehold must never be left without an owner. For if, after the determination of the particular estate, the contingent remainder might still, at some future time, have become a vested estate, the freehold would, until such time, have remained undisposed of, contrary to the principles of the law before explained.(*g*) Thus, suppose lands to have been given to A., a bachelor, for his life, and after his decease to his eldest son and the heirs of his body, and in default of such issue, to B. and his heirs. In this case A. would have had a vested estate for his life in possession. There would have been a contingent remainder in tail to his eldest son, which would have become a vested estate tail in such son, the moment he was born, or rather begotten; and B. would have had a vested estate in fee simple in remainder. Now suppose that, before A. had any son, the particular estate for life belonging to A., which supported the contingent remainder to his eldest son, should suddenly have determined during A.'s life; B.'s estate would then have become an estate in *fee simple in possession. There must be some owner of the freehold; and B., being next entitled, would have taken possession. When his estate once became an estate in possession, the prior remainder to the eldest son of A. was forever excluded. For, by the terms of the gift, if the estate of the eldest son was to come into possession at all, it must have come in before the estate of B. A forfeiture by A. of his life estate, before the birth of a son, would therefore at once have destroyed the contingent remainder, by letting into possession the subsequent estate of B.(*h*) [*234]

The determination of the estate of A. was, however, in order to effect the destruction of the contingent remainder, required to be such a determination as would put an end to his right to the freehold or

(*f*) Stat. 8 & 9 Vict. c. 106, s. 8, repealing stat. 7 & 8 Vict. c. 76, s. 8, to the same effect.
(*g*) Ante, p. 224.
(*h*) Fearne, Cont. Rem. 317; see Doe d. Davies v. Gatacre, 5 Bing. N. C. 609.

[1] Such has also been the effect of the Revised Statutes of Maine, Massachusetts, New York, Indiana, and Missouri, 2 Greenl. Cruise, 270 n.

feudal possession. Thus, if A. had been forcibly ejected from the lands, his right of entry would still have been sufficient to preserve the contingent remainder; and, if he should have died whilst so out of possession, the contingent remainder might still have taken effect. For, so long as A.'s feudal possession, or his right thereto, continues, so long, in the eye of the law, does his estate last.(*i*)

It is a rule of law, that "whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned in the greater."(*k*) From the operation of this rule, an estate tail is preserved by the effect of the statute *De donis*.(*l*) Thus, the same person may have, at the same time, an estate tail, and also the immediate remainder or reversion in *fee simple, expectant on the determination of such estate tail by failure of his own issue. But with regard to other estates, the larger will swallow up the smaller; and the intervention of a contingent remainder, which, while contingent, is not an estate, will not prevent the application of the rule. Accordingly, if in the case above given, A. should have purchased B.'s remainder in fee, and should have obtained a conveyance of it to himself, before the birth of a son, the contingent remainder to his son would have been destroyed. For, in such a case, A. would have had an estate for his own life, and also, by his purchase, an immediate vested estate in fee simple in remainder expectant on his own decease; there being, therefore, no vested estate intervening, a merger would have taken place of the life estate in the remainder in fee. The possession of the estate in fee simple would have been accelerated and would have immediately taken place, and thus a destruction would have been effected of the contingent remainder,(*m*) which could never afterwards have become a vested estate; for, were it to have become vested, it must have taken possession subsequently to the remainder in fee simple; but this it could not do, both by the terms of the gift, and also by the very nature of a remainder in fee simple, which can never have a remainder after it. In the same manner the sale by A. to B. of the life estate of A., called in law a *surrender* of the life estate, before the birth of a son, would have accelerated the possession of the remainder in fee simple, by

[*235]

(*i*) Fearne, Cont. Rem. 286.
(*k*) 2 Black. Com. 177.
(*l*) Stat. 13 Edw. I, c. 1; ante, p. 38.
(*m*) Fearne, Cont. Rem. 340.

giving to B. an uninterrupted estate in fee simple in possession; and the contingent remainder would consequently have been destroyed.(*n*) The same effect would have been produced by A. and B. both conveying their estates to a third person, C., before the birth of a son of A. The only estates then existing *in the land would have been the life estate of A., and the remainder in fee of B. C., therefore, [*236] by acquiring both these estates, would have obtained an estate in fee simple in possession, on which no remainder could depend.(*o*) But now, the recent act to amend the law of real property(*p*) has altered the law in all these cases; for, whilst the principles of law on which they proceeded have not been expressly abolished, it is nevertheless enacted,(*q*) that a contingent remainder shall be, and if created before the passing of the act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

The disastrous consequences which would have resulted from the destruction of the contingent remainder, in such a case as that we have just given, were obviated in practice by means of the interposition of a vested estate between the estates of A. and B. We have seen(*r*) that an estate for the life of A., to take effect in possession after the determination, by forfeiture or otherwise, of A.'s life interest, is not a contingent, but a vested estate in remainder. It is a present existing estate, always ready, so long as it lasts, to come into possession the moment the prior estate determines. The plan, therefore, adopted for the preservation of contingent remainders to the children of a tenant for life, was to give an estate, after the determination by any means of the tenant's life interest, to certain persons and their heirs during his life, as trustees for preserving the contingent remainders; for which purpose they were to *enter on the premises, [*237] should occasion require, but, should such entry be necessary, they were nevertheless to permit the tenant for life to receive the rents and profit during the rest of his life. These trustees were prevented by the Court of Chancery from parting with their estate, or in any way aiding the destruction of the contingent remainders, which

(*n*) Fearne, Cont. Rem. 318. (*o*) Ibid. 322, note; Noel v. Bewley, 3 Sim. 103.
(*p*) Stat. 8 & 9 Vict. c. 106, repealing stat. 7 & 8 Vict. c. 76, s. 8, to the same effect.
(*q*) Sect. 8. (*r*) Ante, p. 222.

their estate supported.(s)[1] And so long as their estate continued, it is evident that there existed, prior to the birth of any son, three vested estates in the land; namely, the estate of A. the tenant for life, the estate in remainder of the trustees during his life, and the

(s) Fearne, Cont. Rem. 326.

[1] In Biscoe v. Perkins, 1 Vesey & Beames, 491, Lord Eldon, in considering the question how far Equity would interfere to regulate the conduct of trustees to preserve contingent remainders, said, "With all these cases upon the duties and liabilities of trustees to preserve contingent remainders, I find myself under circumstances very trying to a Judge; as the task of deducing from them what is the true principle is greater than I have abilities well to execute. The cases are uniform to this extent: that if trustees, before the first tenant in tail is of age, join in destroying the remainders, they are liable for a breach of trust, and so is every purchaser under them with notice; but when we come to the situation of trustees to preserve remainders, who have joined in a recovery, after the first tenant in tail is of age, it is difficult to say more than that no Judge in Equity has gone the length of holding, that he would punish them as for a breach of trust, even in a case, where they would not have been directed to join. The result is, that they seem to have laid down, as the safest rule for trustees, but certainly most inconvenient for the general interests of mankind, that it is better for trustees never to destroy the remainders, even if the tenant in tail of age concurs, without the direction of the Court. The next consideration is, in what cases the Court will direct them to join; and if I am to be governed by what my predecessors have done, and have refused to do, I cannot collect, in what cases trustees would, and would not, be directed to join; as it requires more abilities than I possess to reconcile the different cases with reference to that question. They all however agree, that these trustees are honorary trustees; that they cannot be compelled to join; and all the Judges protect themselves from saying, that, if they had joined, they should be punished; always assuming, that the tenant in tail must be twenty-one.

"If this is to turn upon the settlement afterwards made, it was not improper under all the circumstances, and the very peculiar limitations of this will. Therefore looking at this settlement, and the act having been done, even if, according to my predecessors, I should not have directed them to join, I do not think I can say they are guilty of a breach of trust. This is not the footing upon which it ought to stand. If they are honorary trustees to support contingent remainders for the benefit of the family, the interests of mankind require Courts of Justice to treat them as such; and, unless violation of the trust appears, not to take away all their discretion; and say they are not to join, though their opinion is, that the interests of the family require it, without coming to a Court of Equity; the effect of which is, as I observed in Moody v. Walters, 16 Ves. 283, that the Lord Chancellor and the Master of the Rolls are the trustees of all the estates in the Kingdom."

In some of the United States, as New York, Delaware, South Carolina, Georgia, Illinois, and Kentucky, the necessity of trustees to support contingent remainders in the case of posthumous children is taken away by statute; 2 Greenleaf's Cruise, 285, note; and in Indiana and Mississippi, not alienation by tenant for life is allowed to affect dependent estates. Where no such statutory enactments are in force, it is presumed that a common recovery suffered by the tenant for life will bar contingent remainders, as is the case in Pennsylvania: Dunwoodie v. Reed, 3 Serg. & Rawle, 445; Toman v. Dunlop, 6 Harris, 76, and was in New York before the Revised Statutes; Vanderheyden v. Crandall, 2 Denio, 9.

estate in fee simple in remainder, belonging, in the case we have supposed, to B., and his heirs. This vested estate of the trustees, interposed between the estates of A. and B., prevented their union, and consequently prevented the remainder in fee simple from ever coming into possession, so long as the estate of the trustees endured, that is, if they were faithful to their trust, so long as A. lived. Provision was thus made for the keeping up of the feudal possession, until a son was born to take it; and the destruction of the contingent remainder in his favor was accordingly prevented. But now that contingent remainders can no longer be destroyed, of course there will be no occasion for trustees to preserve them.

The following extract from a modern settlement, of a date previous to the recent act,(*t*) will explain the plan which used to be adopted. The lands were conveyed to the trustees and their heirs, to the uses declared by the settlement; by which conveyance the trustees took no permanent estate at all, as has been explained in the Chapter on Uses and Trusts,(*u*) but the seisin was at once transferred to those, to whose use estates were *limited. Some of these estates were as follows:—"To the use of the said A. and his assigns for [*238] and during the term of his natural life without impeachment of waste and from and immediately after the determination of that estate by forfeiture or otherwise in the lifetime of the said A. To the use of the said (*trustees*) their heirs and assigns during the life of the said A. In trust to preserve the contingent uses and estates hereinafter limited from being defeated or destroyed and for that purpose to make entries and bring actions as occasion may require But nevertheless to permit the said A. and his assigns to receive the rents issues and profits of the said lands hereditaments and premises during his life. And from and immediately after the decease of the said A. To the use of the first son of the said A. and of the heirs of the body of such first son lawfully issuing and in default of such issue To the use of the second third fourth fifth and all and every other son and sons of the said A. severally successively and in remainder one after another as they shall be in seniority of age and priority of birth and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing the elder of such sons and the heirs of his body issuing being always to be preferred to and to take before the younger of such sons and the heirs of his and their

(*t*) 8 & 9 Vict. c. 106. (*u*) Ante, pp. 131, 132.

body and respective bodies issuing And in default of such issue" &c. Then follow the other remainders.

In a former part of this volume we have spoken of equitable or trust estates.(x) In these cases, the whole estate at law belongs to trustees, who are accountable in equity to their *cestui que trusts*, the beneficial owners. As equity follows the law in the limitation of its [*239] estates, *so it permits an equitable or trust estate to be disposed of by way of particular estate and remainder, in the same manner as an estate at law. Contingent remainders may also be limited of trust estates. But between such contingent remainders, and contingent remainders of estates at law, there was always this difference, that whilst the latter were destructible, the former were not.(y) The destruction of a contingent remainder of an estate at law depended, as we have seen, on the ancient feudal rule, which required a continuous and ascertained possession of every piece of land to be vested in some freeholder. But in the case of trust estates, the feudal possession remains with the trustees.(z) And, as the destruction of contingent remainders at law defeated, when it happened, the intention of those who created them, equity did not so far follow the law, as to introduce into its system a similar destruction of contingent remainders of trust estates. It rather compelled the trustees continually to observe the intention of those whose wishes they had undertaken to execute. Accordingly, if a conveyance had been made unto *and to the use of* A. and his heirs, in trust for B. for life, and after his decease, in trust for his first and other sons successively in tail,—here the whole legal estate would have been vested in A., and no act that B. could have done, nor any event which might have happened to his equitable estate, before its natural termination, could have destroyed the contingent remainder directed to be held by A. or his heirs in trust for the eldest son.

It may be proper to mention in this place, that an act has been recently passed for granting duties on succession to property on the death of any person dying after the 19th of May, 1853, the time ap- [*240] pointed for the *commencement of the act.(a) These duties are as follows :—where the successor is the lineal issue or lineal ancestor of the predecessor, the duty is at the rate of one per cent. on the value of the succession ; if a brother or sister, or a descendant of

(x) See the Chapter on Uses and Trusts, ante, p. 136, et seq.

(y) Fearne, Cont. Rem. 321.

(z) See Chapman v. Blissett, Cas. temp. Talbot, 445, 151.

(a) Stat. 16 & 17 Vict. c. 51.

a brother or sister, three per cent.; if a brother or sister of the father or mother, or a descendant of such a brother or sister, five per cent.; if a brother or sister of the grandfather or grandmother of the predecessor, or a descendant of such a brother or sister, six per cent.; and if the successor shall be in any other degree of collateral consanguinity to the predecessor, or shall be a stranger in blood to him, the duty is ten per cent.(*b*) The interest, however, of a successor to real property is considered to be of the value of an annuity equal to the annual value of such property during his life, or for any less period during which he may be entitled; and every such annuity is to be valued, for the purposes of the act, according to the tables set forth in the schedule to the act; and the duty is to be paid by eight equal half-yearly instalments, the first to be paid at the end of twelve months after the successor shall have become entitled to the beneficial enjoyment of the property; and the seven following instalments are to be paid at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become due. But if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be payable; except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest in exoneration of his other property, and shall be payable by the owner for the time of such interest.(*c*)

---

*CHAPTER III. [*241]

OF AN EXECUTORY INTEREST.

CONTINGENT remainders are future estates, which, as we have seen,(*a*) were, until recently, continually liable, in law, until they actually existed *as estates*, to be destroyed altogether,—executory interests, on the other hand, are future estates, which in their nature are indestructible.(*bb*) They arise, when their time comes, as of their own

(*b*) Sect. 10. (*c*) Sect. 21. (*a*) Ante, p. 233 et seq.

(*bb*) Fearne, Cont. Rem. 418. Before fines were abolished, it was a matter of doubt whether a fine would not bar an executory interest in case of non-claim for five years after a right of entry had arisen under the executory interest; Romilly v. James, 6 Taunt. 263; see ante, p. 43. Executory interests subsequent to, or in defeazance of an estate tail, may also be barred in the same manner, and by the same means, as remainders expectant on the determination of the estate tail. Fearne, Cont. Rem. 423.

inherent strength; they depend not for protection on any prior estates, but, on the contrary, they themselves often put an end to any prior estates which may be subsisting. Let us consider, first, the means by which these future estates may be created, and secondly, the time fixed by the law, within which they must arise, and beyond which they cannot be made to commence.

SECTION I.

OF THE MEANS BY WHICH EXECUTORY INTERESTS MAY BE CREATED.

1. Executory interests may now be created in two ways—under the Statute of Uses,(*c*) and by will. *Executory interests created under the Statute of Uses are called *springing or shifting uses.* [*242] We have seen(*d*) that, previously to the passing of this statute, the *use* of lands was under the sole jurisdiction of the Court of Chancery, as trusts are now. In the exercise of this jurisdiction, it would seem that the Court of Chancery, rather than disappoint the intentions of parties, gave validity to such interests of a future or executory nature, as were occasionally created in the disposition of the use.(*e*) For instance, if a feoffment had been made to A. and his heirs, to the use of B. and his heirs from to-morrow, the court would, it seems, have enforced the use in favor of B., notwithstanding that, by the rules of law, the estate of B. would have been void.(*f*) Here we have an instance of an executory interest in the shape of a springing use, giving to B. a future estate arising on the morrow of its own strength, depending on no prior estate, and therefore not liable to be destroyed by its prop falling. When the Statute of Uses(*g*) was passed, the jurisdiction of the Court of Chancery over uses was at once annihilated. But uses in becoming, by virtue of the statute, estates at law, brought with them into the courts of law many of the attributes, which they had before possessed whilst subjects of the Court of Chancery. Amongst others which remained untouched, was this capability of being disposed of in such a way as to create executory interests. The legal seisin or possession of the lands became then, for the first time, disposable without the observance of the formalities previously required;(*h*) and, amongst the dispositions allowed, were these executory interests, in which the legal seisin is shifted about from one person to another, at the mercy of the springing uses, to which the

(*c*) Stat. 27 Hen. VIII, c. 10.
(*d*) Ante, pp. 129, 130.
(*e*) Butl. n. (*a*) to Fearne, Cont. Rem. p. 384.
(*f*) Ante, p. 224.
(*g*) 27 Hen. VIII, c. 10 ante, p. 131.
(*h*) See ante, pp. 150, 151.

seisin has been indissolubly united *by the act of Parliament; accordingly it now happens that, by means of uses, the legal [*243] seisin or possession of lands may be shifted from one person to another in an endless variety of ways. We have seen,(*i*) that a conveyance to B. and his heirs to hold from to-morrow, is absolutely void. But by means of shifting uses, the desired result may be accomplished; for, an estate may be conveyed to A. and his heirs, to the use of the conveying party and his heirs until to-morrow, and then to the use of B. and his heirs. A very common instance of such a shifting use occurs in an ordinary marrriage settlement of lands. Supposing A. to be the settlor, the lands are then conveyed by him, by the settlement executed a day or two before the marriage, to the trustees (say B. and C. and their heirs) "to the use of A. and his heirs until the intended marriage shall be solemnized, and from and immediately after the solemnization thereof," to the uses agreed on; for example, to the use of D., the intended husband, and his assigns for his life, and so on. Here B. and C. take no permanent estate at all, as we have already seen.(*j*) A. continues, as he was, a tenant in fee simple until the marriage; and, if the marriage should never happen, his estate in fee simple will continue with him untouched. But, the moment the marriage takes place,—without any further thought or care of the parties, the seisin or possession of the lands shifts away from A. to vest in D., the intended husband, for his life, according to the disposition made by the settlement. After the execution of the settlement, and until the marriage takes place, the interest of all the parties, except the settlor, is future, and contingent also on the event of the marriage. But the life estate of D., the intended husband, is not an interest of the kind called a contingent remainder. For, the estate which precedes it, namely that of A., is an estate in fee simple, *after which no remainder can be limited.[1] The use to D. for his [*244] life springs up on the marriage taking place, and puts an end at once and forever to the estate in fee simple which belonged to A. Here then is the destruction of one estate, and the substitution of another. The possession of A. is wrested from him by the use to D., instead of D.'s estate waiting till A.'s possession is over, as it must have done, had it been merely a remainder. Another instance of the application of a shifting use, occurs in those cases in which it is wished that any person who shall become entitled under the settlement, should take the

(*i*) Ante, p. 224. (*j*) Ante, pp. 132, 154.

[1] Because, as has been previously shown, a fee cannot be limited upon a fee.

name and arms of the settlor. In such a case, the intention of the settlor is enforced by means of a shifting clause, under which, if the party for the time being entitled should refuse or neglect, within a definite time, to assume the name and bear the arms, the lands will shift away from him, and vest in the person next entitled in remainder.

From the above examples, an idea may be formed of the shifts and devices which can now be effected in settlements of lands, by means of springing and shifting uses. By means of a use, a future estate may be made to spring up with certainty at a given time. It may be thought, therefore, that contingent remainders, having until recently been destructible, would never have been made use of in modern conveyancing, but that everything would have been made to assume the shape of an executory interest. This, however, is not the case. For, in many instances, future estates are necessarily required to wait for the regular expiration of those which precede them; and, when this is the case, no art or device can prevent such estates from being what they are, contingent remainders. The only thing that could formerly be done, was to take care for their preservation by means of trustees for that purpose. For, the law, having been acquainted with remainders long before *uses were introduced into it, will never con- [*245] strue any limitation to be a springing or shifting use, which, by any fair interpretation, can be regarded as a remainder, whether vested or contingent.(*k*)[1]

One of the most convenient and useful applications of springing uses, occurs in the case of *powers*, which are methods of causing a use, with its accompanying estate, to spring up at the will of any given person:(*l*)—Thus, lands may be conveyed to A. and his heirs to such uses as B. shall, by any deed or by his will, appoint, and in default of and until any such appointment to the use of C. and his heirs, or to any other uses. These uses will accordingly confer vested estates on C., or the parties having them, subject to be divested or destroyed at any time by B.'s exercising his *power* of appointment. Here B., though not owner of the property, has yet the power, at any time, at once to dispose of it, by executing a deed; and if he should please to appoint it to the use of himself and his heirs, he is at perfect liberty so to do; or, by virtue of his power, he

(*k*) Fearne, Cont. Rem. 386–395, 526; Doe d. Harris v. Howell, 10 Barn. & Cres. 191, 197; 1 Prest. Abst. 130.

(*l*) See Co. Litt. 271 b, n. (1), VII, 1.

[1] See supra, notes to pages 178 and 228.

may dispose of it by his will. This power of appointment is evidently a privilege of great value; and it is accordingly provided by the bankrupt and insolvent acts that the assignees of any person becoming bankrupt or insolvent may exercise, for the benefit of his creditors, all powers (except the right of nomination to any vacant ecclesiastical benefice) which the bankrupt or insolvent might have exercised for his own benefit.(*m*)[1] If, however, in the case above mentioned, B. should not become bankrupt or insolvent, and should die without having made any appointment by *deed or will, C.'s estate, having escaped destruction, will no longer be in danger. In such a case the only liability incurred by the estate of C. will be from the debts of B. secured by any judgment, decree, order, or rule of any Court of law or equity. These judgment debts, by a recent act of Parliament,(*n*) to which reference has before been made,(*o*) are now made binding on all lands, over which the debtor shall, at the time of the judgment, or at any time afterwards, have any disposing power, which he may, without the assent of any other person, exercise for his own benefit. Before this act was passed, nothing but an appointment by B. or his assignees, in exercise of his power, could have defeated or prejudiced the estate of C. [*246]

Suppose, however, that B. should exercise his power, and appoint the lands by deed to the use of D. and his heirs. In this case, the execution by B. of the instrument required by the power, is the event on which the use is to spring up, and to destroy the estate already existing. The moment, therefore, that B. has duly executed his power of appointment over the use, in favor of D. and his heirs, D. has an estate in fee simple in possession, vested in him, by virtue of the Statute of Uses, in respect of the *use* so appointed in his favor; and the previously existing estate of C. is thenceforth completely at an end. The power of disposition exercised by B. extends, it will be observed, only to the use of the lands; and the fee simple is vested in the ap-

(*m*) Stat. 12 & 13 Vict. c. 106, s. 147, as to bankruptcy, and stats. 1 & 2 Vict. c. 110, s. 49, and 7 & 8 Vict. c. 96, s. 11, as to insolvency.

(*n*) Stat. 1 & 2 Vict. c. 110, ss. 11, 13. (*o*) Ante, p. 66–69.

[1] See passim, note to p. 73, supra. Lord Eldon was of the opinion in Thorp v. Goodall, 17 Vesey, 388, 460, that independently of such special provisions as those referred to in the text, a bankrupt who was tenant for life, with a general power of appointment, could not be compelled by decree in Equity to execute the power for the benefit of his creditors. No such enactments were introduced in the last United States Statute of Bankruptcy, nor is it believed that the insolvent laws of the different States contain such provisions.

pointee, solely by virtue of the operation of the Statute of Uses, which always instantly annexes the legal estate to the use.(*p*)[1] If, therefore, B. were to make an appointment of the lands, in pursuance of his power, to D. and his heirs, *to the use of E. and his heirs*, D. would still have the use, which is all that B. has to dispose of; [*247] *and the use to E. would be a use upon a use, which, as we have seen,(*q*) is not executed, or made into a legal estate, by the Statute of Uses. E., therefore, would obtain no estate at law; although the Court of Chancery would, in accordance with the expressed intention, consider him beneficially entitled, and would treat him as the owner of an equitable estate in fee simple, obliging D. to hold his legal estate merely as a trustee for E. and his heirs.

In the exercise of a power, it is absolutely necessary that the terms of the power, and all the formalities required by it, should be strictly complied with. If the power should require a *deed* only, a *will* will not do; or, if a *will* only, then it cannot be exercised by a *deed*,(*r*) or by any other act, to take effect in the lifetime of a person exercising the power.(*s*) So, if the power is to be exercised by a deed attested by *two* witnesses, then a deed attested by *one* witness only will be insufficient.(*t*) This strict compliance with the terms of the power has been carried to a great length by the courts of law; so much so, that where a power is required to be exercised by a writing *under hand and seal, attested by witnesses*, the exercise of the power will be invalid if the witnesses do not sign a written attestation of the signature of the deed, as well as of the sealing.(*u*)[2] The decision of

(*p*) See ante, pp. 131, 132. (*q*) Ante, p. 134.

(*r*) Marjoribanks v. Hovenden, 1 Drury, 11.

(*s*) 1 Sugd. Pow. 280; 1 Chance on Powers, ch. 9, pp. 273 et seq.

(*t*) 1 Sugd. Pow. 284 et seq.; 1 Chance on Powers, 331.

(*u*) Wright v. Wakeford, 4 Taunt. 213; Doe d. Mansfield v. Peach, 2 Man. and Selw. 576; Wright v. Barlow, 3 Man. & Selw. 512.

[1] Thus in the recent case of Rush v. Lewis, 9 Harris, 72, land having been devised in trust for the separate use of a married woman for life, with remainder to such uses as she should by will appoint, she exercised the power in favor of her husband, who then filed a bill against the trustees for a conveyance by them of the legal estate, to which they demurred, on the ground that the appointment had, by virtue of the Statute of Uses, already vested the legal estate in him, and the demurrer was sustained by the Court.

[2] Thus in Hopkins v. Myall, 2 Russell & Mylne, 86, a married woman having power to appoint a fund, by any writing under her hand, attested by two witnesses, the trustees parted with the fund, upon the joint application of her husband and herself, made by a letter signed by both of them, but not attested, and after her death, a bill was filed against the trustees by the children of

this point was rather a surprise upon the profession, who had been accustomed to attest deeds by an indorsement in the words "sealed and delivered by the within named B. in the presence of," instead of wording the attestation, as in such a case they are now *required, "*Signed*, sealed, and delivered, &c." In order, therefore, to render valid the many deeds, which by this decision were rendered nugatory, an act of Parliament(*v*) was expressly passed, by which the defect thus arising was cured, as to all deeds and instruments, intended to exercise powers, which were executed prior to the 30th of July, 1814, the day of the passing of the act. But as the act has no prospective operation, the words "*signed*, sealed, and delivered," are still necessary to be used in the attestation, in all cases where the power is to be exercised by writing under *hand* and *seal*, *attested* by witnesses.(*x*)[1] [*248]

The strict construction adopted by the Courts of law, in the case of instruments exercising powers, is in some degree counterbalanced by the practice of the Court of Chancery to give relief in certain

(*v*) 54 Geo. III, c. 168; 1 Sugd. Pow. 307.

(*x*) See, however, Vincent v. Bishop of Sodor and Man, 5 Ex. Rep. 683, 693, in which case the Court of Exchequer intimate that they consider the case of Wright v. Wakeford now overruled by the case of Burdett v. Doe d. Spilsbury, 10 Clark and Fin. 340; 6 Man. & Gran. 386.

the marriage, who, in default of appointment, were entitled to the fund, the object of which was to charge them with a breach of trust and compel them to replace the fund, and it was held, that the interests of the children could not be defeated without an adherence to the ceremonies required by the settlement.

[1] Wright v. Wakeford first came before Lord Eldon (17 Vesey, 454), upon a bill for specific performance, in which the point was, whether a power of sale, to be testified "by writing under the hands and seals" of the parties, and attested by two witnesses, was properly executed by an attestation that the instrument was sealed and delivered. The Chancellor thought, that in general "a deed if delivered may be a good deed, whether signed or not," but that in the case before him, he inclined to the opinion that both signature and sealing were required. He however directed a case to the Common Pleas, the majority of the Judges of which certified that the power had not been well executed (4 Taunton, 213), and this opinion was, until very lately, recognized as settled law, Doe v. Peach, 3 Maule and Sel. 581, which gave rise to the statute referred to in the text, known as "Mr. Preston's Act." Vincent v. The Bishop of Sodor and Man, was first sent by Sir James Wigram, Vice Chancellor, to the Common Pleas, which Court certified that the power had been well executed. The Vice Chancellor not conceiving that Wright v. Wakeford had been expressly overruled by Burdett v. Spilsbury in the House of Lords, refused to support the certificate, and sent the case to the Exchequer, which certified the same opinion as the Common Pleas, and the case was finally disposed of by deciding the power to have been well executed. See 15 Jurist, 365; 3 Eng. Law & Eq. Rep. 198.

cases, when a power has been defectively exercised.[1] If the Courts of law have gone to the very limit of strictness, for the benefit of the persons entitled in default of appointment, the Court of Chancery, on the other hand, appears to have overstepped the proper boundaries of its jurisdiction, in favor of the appointee.(*y*) For, if the intended appointee be a purchaser from the person intending to exercise the power, or a creditor of such person, or his wife, or his child, or if the appointment be for a charitable purpose,—in any of these cases, equity will aid the defective execution of the power;(*z*) in other words [*249] the Court of Chancery will compel the person in possession *of the estate, and who was to hold it until the power was duly exercised, to give it up on an undue execution of such power. It is certainly hard, that for want of a little caution, a purchaser should lose his purchase, or a creditor his security, or that a wife or child should be unprovided for; but it may well be doubted whether it be truly equitable, for their sakes, to deprive the person in possession, for the lands were originally given to him, to hold until the happening of an event (the execution of the power), which, if the power be *not* duly executed, has, in fact, never taken place.

The above remarks equally apply to the exercise of a power by will. Till lately, every execution of a power to appoint by will, was obliged to be effected by a will, conformed in the number of its witnesses, and other circumstances of its execution, to the requisitions of the power. But the recent act for the amendment of the laws with respect to wills,(*a*) requires that all wills should be executed and attested in the same uniform way;(*b*) and it accordingly enacts,(*c*) that no appointment made by will in exercise of any power shall be valid, unless the same be executed in the manner required by the act; and that every will executed in the manner thereby required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will, made in exercise of such power, should

(*y*) See 7 Ves. 506; 2 Sugd. Pow. 91 et seq.

(*z*) 2 Sugd. Pow. 93; 2 Chance on Powers, c. 23, p. 488 et seq.; Lucena v. Lucena, 5 Beav. 249.

(*a*) 7 Will. IV, & 1 Viet. c. 26. (*b*) See ante, p. 168. (*c*) Sect. 10.

[1] At the same time it is equally well settled that equity will not interfere in the case of a non execution of a power, Lassels v. Cornwallis, 2 Vernon, 465; Hinton v. Toye, 1 Atkins, 465; Barnton v. Ward, 2 Id. 172; Holmes v. Coggshill, 7 Vesey, 506, S. C. 12 Id. 206.

be executed with some additional or other form of execution or solemnity.

These powers of appointment, viewed in regard to the individuals who are to exercise them, are a species of dominion over property, quite distinct from that free right of alienation, which has now become inseparably *annexed to every estate; except an estate tail, [*250] to which a modified right of alienation only belongs. As alienation by means of powers of appointment, is of a less ancient date than the right of alienation annexed to ownership, so it is free from some of the incumbrances by which that right is still clogged. Thus, a man may exercise a power of appointment in favor of himself, or of his wife;(*d*) although, as we have seen,(*e*) a man cannot directly convey, by virtue of his ownership, either to himself or to his wife. So we have seen,(*f*) that a married woman could not formerly convey her estates without a *fine* levied by her husband and herself, in which she was separately examined; and now, no conveyance of her estates can be made without a deed, in which her husband must concur, and which must be separately acknowledged by her to be her own act and deed. But a power of appointment, either by deed or will, may be given to any woman; and whether given to her when married, or when single, she may exercise such a power without the consent of any husband, to whom she may then or thereafter be married;(*g*) and the power may be exercised in favor of her husband, or of any one else.(*h*)

The power to dispose of property independently of any ownership, though established for some three centuries, is at the present day frequently unknown to those to whom such a power may belong. This ignorance has often given rise to difficulties and the disappointment of intention, in consequence of the execution of powers by instruments of an informal nature, particularly by wills, too often drawn by the parties themselves. A testator would, in general terms, give all his estate or *all his property; and, because, over some of it he [*251] had only a power of appointment, and not any actual ownership, his intention, till lately, was defeated. For, such a general devise was no execution of his power of appointment, but operated only

(*d*) 2 Sugd. Pow. 24. (*e*) Ante, pp. 154, 185. (*f*) Ante, p. 188.
(*g*) 1 Sugd. Pow. 181, 182; Doe d. Blomfield v. Eyre, 3 C. B. 557; 5 C. B. 713.
(*h*) 2 Sugd. Pow. 24.

on the property that was his own. He ought to have given, not only all that he had, but also all of which he had any power to dispose.[1] The recent act for the amendment of the laws with respect to wills,(*i*) has now provided a remedy for such cases, by enacting(*j*) that a general devise of the real estate of a testator, shall be construed to include any real estate, which he may have power to appoint in any manner he may think proper,(*k*) and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A power of appointment may sometimes belong to a person concurrently with the ordinary power of alienation arising from the ownership of an estate in the lands. Thus lands may be limited to such uses as A. shall appoint, and in default of and until appointment, to the use of A. and his heirs.(*l*) And in such a case A. may dispose of the lands either by exercise of his power,(*m*) or by conveyance of his estate.(*n*)[2] If he exercise his power, the estate limited to him in default of appointment is thenceforth defeated and destroyed; and, on the other hand, if he convey his estate, his power is thenceforward

(*i*) Stat. 7 Will. IV, & 1 Vict. c. 26. (*j*) Sect. 27.
(*k*) Cloves v. Awdry, 12 Beav. 604.
(*l*) Sir Edward Clere's case, 6 Rep. 17 b; Maundrell v. Maundrell, 10 Ves. 246.
(*m*) Roach v. Wadham, 6 East, 289.
(*n*) Cox v. Chamberlain, 4 Ves. 631; Wynne v. Griffith, 3 Bing. 179; 10 J. B. Moore, 592; 5 B. & Cres. 923; 1 Russ. 283.

[1] The distinction which runs through the cases is, that where one having a power, possesses also an interest in the subject of the power, a conveyance or devise by him, without reference to the power, will not be deemed to be an execution of it, unless there be evidence of such an intention, and consequently will not pass more than the interest of the party; but where the donee of the power has no estate, and the conveyance or devise can only be made operative by treating it as an execution of the power, it will be so considered. Doe v. Roake, 6 Barn. and Cress. 720; Pepper's Will, 1 Parson's Eq. Cases, 440; Hay v. Mayer, 8 Watts, 203.

[2] Notwithstanding the law had been considered as so settled ever since Sir Edward Clere's case, yet it was nevertheless held by Ch. J. Eyre, in Goodill v. Brigham, 1 Bos. & Pull. 196, that a power was inconsistent with an estate in fee simple, the latter being of so high a nature as to merge and render void any power which might be intended to accompany it, and this was adopted by Sir William Grant, when Master of the Rolls, in the case of Maundrell v. Maundrell. But on the argument of that case before Lord Eldon, he said that Goodill v. Brigham "was not the law," that it had always surprised him, and was contrary to the experience of practical conveyancers, who constantly so limited estates to a purchaser in order to bar the dower of the wife of the latter upon a future sale by him (as to which, see supra, p. 191); and the doctrine as stated in the text is now well settled: Logan v. Bell, 1 Comm. Bench, 884; Wilson v. Troup, 2 Cowen, 195; Pratt v. Mc Cauley, 8 Harris, 269.

extinguished, and cannot be exercised by him in derogation of his own conveyance. So if, instead of conveying his whole estate, he should convey only a *partial interest, his power would be *suspended* as to such interest, although in other respects it would remain in force; that is, he may still exercise his power, so only that he do not defeat his own grant. When the same object may be accomplished either by an exercise of the power, or by a conveyance of the estate, care should be taken to express clearly by which of the two methods the instrument employed is intended to operate. Under such circumstances it is very usual first to exercise the power, and afterwards to convey the estate *by way of further assurance only;* in which case, if the power is valid and subsisting, the subsequent conveyance is of course inoperative;(*o*) but if the power should by any means have been suspended or extinguished, then the conveyance takes effect. [*252]

The doctrine of powers, together with that of vested remainders, is brought into very frequent operation by the usual form of modern purchase deeds, whenever the purchaser was married on or before the first of January, 1834, or whenever, as generally happens, it is wished to render unnecessary any evidence that he was not so married. We have seen(*p*) that the dower of such women as were married on or before the first day of January, 1834, still remains subject to the ancient law; and the inconvenience of taking the conveyance to the purchaser jointly with the trustee, for the purpose of barring dower, has also been pointed out.(*q*) The modern method of effecting this object, and at the same time of conferring on the purchaser full power of disposition over the land, without the concurrence of any other person, is as follows: A general power of appointment by deed is in the first place given to the purchaser, by means of which he is enabled to dispose of the lands, *for any estate, at any time during his life. In default of and until appointment, the land is then given to the purchaser for his life, and after the determination of his life interest by any means in his lifetime, a remainder (which, as we have seen,(*r*) is vested), is limited to a trustee and his heirs, during the purchaser's life. This remainder is then followed by an ultimate remainder to the heirs and assigns of the purchaser forever, or, which is [*253]

(*o*) Ray v. Pung, 5 Mad. 310; 5 B. & Ald. 561; Doe d. Wigan v. Jones, 10 B. & Cress. 459.

(*p*) Ante, p. 190. (*q*) Ante, pp. 191, 192. (*r*) Ante, p. 222.

the same thing, to the purchaser, his heirs and assigns forever.(*s*) These limitations are sufficient to prevent the wife's right of dower from attaching. For, the purchaser has not, at any time during his life, an estate of inheritance in possession, out of which estate only a wife can claim dower:(*t*) he has, during his life, only a life interest, together with a remainder in fee simple, expectant on his own decease. The intermediate vested estate of the trustee prevents, during the whole of the purchaser's lifetime, any union of this life estate and remainder.(*u*) The limitation to the heirs of the purchaser gives him, according to the rule in Shelley's case,(*x*) all the powers of disposition incident to ownership; though subject, as we have seen,(*y*) to the estate intervening between the limitation to the purchaser and that to his heirs. But the estate in the trustee lasts only during the purchaser's life, and during his life, may at any time be defeated by an exercise of his power. A form of these *uses to bar dower*, as they are called, will be found in the Appendix.(*z*)[1]

Besides these general powers of appointment, there exist also powers of a special kind. Thus the *estate* which is to arise on the exercise of the power of appointment may be of a certain limited duration and nature; *of this an example frequently occurs in the power [*254] of leasing, which is given to every tenant for life under a properly drawn settlement.[2] We have seen(*a*) that a tenant for life, by

(*s*) Fearne, Cont. Rem. 347 n.; Co. Litt. 379 b, n. (1).
(*t*) Ante, p. 191.
(*u*) Ante, p. 236.
(*x*) Ante, pp. 211, 215.
(*y*) Ante, p. 211.
(*z*) See Appendix (B).
(*a*) Ante, pp. 24, 25.

[1] It is hardly necessary to observe that by reason of the simplicity by which dower is released on this side of the Atlantic, by means of a separate acknowledgment (see supra, p. 189), such limitations as are referred to in the text, are here wholly unknown.

[2] The obvious benefit of this is thus stated by Mr. Cruise. "As all leases made by tenants for life determine by the death of the lessor, powers are usually inserted in modern settlements enabling the tenants for life to grant leases, to be valid against the persons in remainder and reversion; which are productive of great advantage not only to the persons interested, but also to the public; for tenants for life are thereby enabled to grant a certain term to the lessee. By this means they get a higher rent, which is equally beneficial to the remainder-men and reversioner; and the public is benefited, because the extent and security of the tenant's interest induces him to expend his capital in the cultivation and improvement of the estate." 4 Cruise on Real Property, ch. xv, § 1. See also the remarks of Sir E. Sugden in 2 Sugden on Powers, ch. xvii, § 1. It is usual, however, in England to accompany such powers of leasing given to tenants for life with a restriction upon making leases for a longer term than twenty-one years; and this, together with all other restrictions upon the leasing power, are construed strictly against the tenant for life, and in favor of the remainder-man and reversioner.

virtue of his ownership, has no power to make any disposition of the property to take effect after his decease. He cannot, therefore, grant a lease for any certain term of years, but only contingently on his living so long. But if his life estate should be limited to him in the settlement by way of *use*, as is now always done, a power may be conferred on him of leasing the land for any term of years, and under whatever restrictions may be thought advisable. On the exercise of this power, a *use* will arise to the tenant for the term of years, and with it an estate, for the term granted by the lease, quite independently of the continuance of the life of the tenant for life.(*b*)[1] But if the lease attempted to be granted should exceed the duration authorized by the power, or in any other respect infringe on the restrictions imposed, it will be void altogether as an exercise of the power, and might until recently have been set aside by any person having the remainder or reversion, on the decease of the tenant for life.[2] But by a recent act of Parliament(*c*) it is now provided, that such a lease, if made bonâ fide, and if the lessee have entered thereunder, shall be considered in equity as a contract for a grant, at the request of the lessee, of a valid lease under the power, to the like purport and effect as such invalid lease, save so far as any variation may be necessary in order to comply with the terms of the power. But in case the reversioner is able and willing, during the continuance of the lessee's

(*b*) 10 Ves. 256. (*c*) Stat. 12 & 13 Vict. c. 26, amended by stat. 13 & 14 Vict. c. 17.

[1] Maundrell v. Maundrell, 10 Vesey, 256, supra, in note. This was the case referred to supra p. 251, and Lord Eldon in illustrating that a power of appointment was consistent with an estate in fee said, "Take the ordinary case of a marriage settlement, with a power to the tenants for life of leasing during minority. A power in the tenant for life to lease for twenty-one years, is almost as inconsistent with his interest, as a power to limit the fee with that of a tenant in fee. But, when the tenant for life executes the power, the effect is not technically making a lease; but that lessee in fact stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years, antecedent to the life estate and the subsequent limitations." The whole of the judgment delivered in this case is well worthy the perusal of the student.

[2] It is certain that *at law* a lease for a longer term than is warranted by the power is not good for the period within the power, and void only as to the excess, but is void altogether (Roe d. Brune v. Prideaux, 10 East, 184); but it is, at the same time, equally settled *in equity*, that such a lease will be good *pro tanto*: Powcey v. Bowen, 1 Chanc. Cas. 23; Campbell v. Leach, Ambler, 740; it being a general principle that whenever the boundaries between the valid part and the excess are clearly distinguishable, the execution of the power may be good in part, and this has been enacted by statute in New York. Rev. Stat. vol. 1, p. 732.

possession, to confirm the lease without variation, the lessee is bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the *persons con- [*255] firming and accepting respectively, or some other persons by them respectively thereunto lawfully authorized.(*d*) And the acceptance of rent by the reversioner will be deemed a confirmation of the lease as against him, if upon or before such acceptance any receipt, memorandum, or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized.(*e*)[1]

Other kinds of special powers occur where the *persons* who are to take estates under the powers are limited to a certain class. Powers to jointure a wife, and to appoint estates amongst children, are the most usual powers of this nature. When powers are thus given in favor of particular objects, the estates which arise from the exercise of the power take effect precisely as if such estates had been inserted in the settlement by which the power was given. Each estate, as it arises under the power, takes its place in the settlement in the same manner as it would have done had it been originally limited to the appointee, without the intervention of any power; and, if it would have been invalid in the original settlement, it will be equally invalid as the offspring of the power.(*f*)[2]

It is provided, by the Succession Duty Act, 1853, that where any person shall have a general power of appointment, under any disposition of property taking effect upon the death of any person, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property thereby appointed, as a succession derived from the donor of the

(*d*) Stat. 13 & 14 Vict. c. 17, s. 3. (*e*) Sect. 2. (*f*) Co. Litt. 271 b, n. (1), VII, 2.

[1] See as to this act, Sugden's Essay on the Real Property Statutes, ch. 6.

[2] Thus, for example, where one devised an estate to his daughter for life, with a general power of appointment by will, which was exercised by her in favor of her brothers and sisters, it was held that the estate was not liable in the hands of these appointees for the payment of a collateral inheritance tax to the State, because although they were collateral in blood to the appointor, they were lineal in descent from the father, by whom the power under which they claimed was originally created, Commonweath v. Williams, 1 Harris, 29. See also Roach v. Wadham, 6 East. 289, for a striking illustration of this doctrine.

power; and where any person shall have a limited power of appointment, *under a disposition taking effect upon any such death, any person taking any property by the exercise of such power, [*256] shall be deemed to take the same as a succession derived from the person creating the power as predecessor.(*g*) But where the donee of a general power of appointment shall become chargeable with duty, in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable, any duty he may have already paid in respect of any limited interest taken by him in such property.(*h*)

Powers may generally speaking be destroyed or extinguished by deed of release made by the donee or owner of the power to any person having any estate of freehold in the land; "for it would be strange and unreasonable that a thing, which is created by the act of the parties, should not by their act, with their mutual consent, be dissolved again."(*i*) The exceptions to this rule appear to be all reducible to the simple principle, that if the duty of the donee of the power may require him to exercise it at any future time, then he cannot extinguish it by release.(*j*) By the act for the abolition of fines and recoveries,(*k*) it is provided,(*l*) that every married woman may, with the concurrence of her husband, by deed to be acknowledged by her as her act and deed, according to the provisions of the act,(*m*) release or extinguish any power which may be vested in or limited or reserved to her, in regard to any lands of any tenure, or any money subject to be invested in the purchase of lands,(*n*) or in regard to any estate in any *lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole. [*257]

Our notice of powers must here conclude. On a subject so vast, much must necessarily remain unsaid. The masterly treatise of Sir Edward Sugden (now Lord St. Leonards), and the accurate work of Mr. Chance, on Powers, will supply the student with all the further information he may require.

(*g*) Stat. 16 & 17 Vict. c. 51, s. 4. (*h*) Sect. 33.

(*i*) Albany's case, 1 Rep. 110 b, 113 a; Smith v. Death, 5 Mad. 371; Horner v. Swann, Turn. & Russ. 430.

(*j*) See 2 Chance on Powers, 584; 5 Cruise on Real Property, ch. XIX; 4 Kent's Commentaries, 346, passim.

(*k*) Stat. 3 & 4 Will. IV, c. 74. (*l*) Sect. 77.

(*m*) See ante, p. 189. (*n*) See ante, p. 137.

2. An executory interest may also be created by will. Before the passing of the Statute of Uses,(*o*) wills were employed only in the devising of uses, under the protection of the Court of Chancery; except in some few cities and boroughs, where the legal estate in lands might be devised by special custom.(*p*) In giving effect to these customary devises, the courts, in very early times, showed great indulgence to testators;(*q*) and perhaps the first instance of the creation of an executory interest occurred in directions, given by testators, that their executors should sell their tenements. Such directions were allowed by law in customary devises;(*r*) and, in such cases, it is evident that the sale by the executors, operated as the execution of a power to dispose of that in which they themselves had no kind of [*258] ownership. For executors, *as such, have nothing to do with freeholds. Here, therefore, was a future estate or executory interest created; the fee simple was shifted away from the heir of the testator, to whom it had descended, and became vested in the purchaser, on the event of the sale of the tenement to him. The Court of Chancery also, in permitting the devise of the *use* of such lands as were not themselves devisable, allowed of the creation of executory interests by will, as well as in transactions between living persons.(*s*) And in particular directions given by persons having others seised of lands to their use, that such lands should be sold by their executors, were not only permitted by the Court of Chancery, but were also recognized by the legislature. For, by a statute of the reign of Henry VIII,(*t*) of a date previous to the Statute of Uses, it is provided, that in such cases, where part of the executors refuse to take the administration of the will, and the residue accept the charge of the same will, then all bargains and sales of the lands so willed to be sold by the executors, made by him or them only of the said executors that

(*o*) 27 Hen. VIII, c. 10. (*p*) Ante, p. 167. (*q*) 30 Ass. 183 a; Litt. sec. 586.

(*r*) Year Book, 9 Hen. VI, 24 b, Babington:—"La nature de devis ou terres sont devisables est, que on peut deviser que la terre sera vendu par executors, et ceo est bon, come est dit adevant, et est marveilous ley de raison: mes ceo est le nature d'un devis, et devise ad este use tout temps en tiel forme; et issint on aura loyalment franktenement de cesty qui n'avoit rien, et en meme le maniere come on aura *fire from flint*, et uncore nul *fire* est deins le *flint*: et ceo est pour performer le darrien volonte de le devisor." Paston.—"Une devis est marveilous en lui meme quand il peut prendre effect: car si on devise en Londres que ses executors vendront ses terres, et devie seisi; son heir est eins par descent, et encore par le vend des executors il sera ouste." See also Litt. s. 169.

(*s*) Perk. ss. 507, 528.

(*t*) Stat. 21 Hen. VIII, c. 4. [See as to this statute, Mackintosh v. Barber, 1 Bingham, 50.]

so doth accept the charge of the will, shall be as effectual as if all the residue of the executors, so refusing, had joined with him or them in the making of the bargain and sale.

But, as we have seen,(*u*) the passing of the Statute of Uses abolished for a time all wills of uses, until the Statute of Wills(*v*) restored them. When wills were restored, the uses, of which they had been accustomed to dispose, had been all turned into estates at law: and such estates then generally came, for the first time, within the operation of testamentary instruments. Under these circumstances, the courts of law, in interpreting wills, adopted the same lenient construction which had formerly been employed by themselves in the interpretation *of customary devises, and also by the Court of Chancery in the construction of devises of the ancient use. [*259] The statute which, in the case of wills of *uses*, had given validity to sales made by the executors accepting the charge of the will, was extended, in its construction, to directions (now authorized to be made) for the sale by the executors of the *legal estate*, and also to cases where the legal estate was devised to the executors to be sold.(*x*) Future estates at law were also allowed to be created by will, and were invested with the same important attribute of indestructibility, which belongs to all executory interests. These future estates were called *executory devises*, and in some respects they appear to have been more favorably interpreted than shifting uses contained in deeds,(*y*) though generally speaking their attributes are the same. To take a common instance: a man may, by his will, devise lands to his son A., an infant, and his heirs; but in case A. should die under the age of twenty-one years, then to B., and his heirs. In this case A. has an estate in fee simple in possession, subject to an executory interest in favor of B. If A. should not die under age, his estate in fee simple will con-

(*u*) Ante, p. 167. (*v*) 32 Hen. VIII, c. 1.

(*x*) Bonifaut v. Greenfield, Cro. Eliz. 80; Co. Litt. 113 a; see Mackintosh v. Barber, 1 Bing. 50.

(*y*) In the cases of Adams v. Savage (2 Lord Raym. 855; 2 Salk. 679), and Rawley v. Holland (22 Vin. Abr. 189, pl. 11), limitations which would have been valid in a will by way of executory devise, were held to be void in a deed by way of shifting or springing use. But these cases have been doubted by Mr. Sergeant Hill and Mr. Sanders (1 Sand. Uses, 142, 143; 148, 5th ed.) and denied to be law by Mr. Butler (note (*y*) to Fearne, Cont. Rem. p. 41). Mr. Preston also lays down a doctrine opposed to the above cases (1 Prest. Abst. 114, 130, 131). Sir Edward Sugden, however, supports these cases, and seems sufficiently to answer Mr. Butler's objection. Sugd. Gilb. Uses and Trusts, 35, note).

tinue with him unimpaired. But if he should die under that age, nothing can prevent the estate of B. from immediately arising, and coming into possession, *and displacing for ever the estate of A. and his heirs. Precisely the same effect might have been produced by a conveyance to uses. A conveyance to C. and his heirs, to the use of A. and his heirs, but in case A. should die under age, then to the use of B. and his heirs, would have effected the same result. Not so, however, a direct conveyance independently of the Statute of Uses. A conveyance directly to A. and his heirs, would vest in him an estate in fee simple, after which no limitation could follow. In such a case, therefore, a direction that, if A. should die under age, the land should belong to B. and his heirs would fail to operate on the legal seisin; and the estate in fee simple of A. would, in case of his decease under age, still descend, without any interruption, to his heir at law.

[*260]

The alienation of an executory interest, before its becoming an actually vested estate, was formerly subject to the same rules as governed the alienation of contingent remainders.(*z*) But by the recent act to amend the law of real property, all executory interests may now be disposed of by deed.(*a*) Accordingly, to take our last example, if a man should leave lands, by his will, to A. and his heirs, but in case A. should die under age, then to B. and his heirs,—B. may by deed, during A.'s minority, dispose of his expectancy to another person, who, should A. die under age, will at once stand in the place of B. and obtain the fee simple. But, before the act, this could not have been done; B. might indeed have sold his expectancy; but, *after* the event (the decease of A. under age), B. must have executed a conveyance of the legal estate to the purchaser; for, until the event, B. had no *estate* to convey.(*b*)

*In order to facilitate the payment of debts out of real estate, it is provided, by modern acts of Parliament, that when lands are by law, or by the will of their owner, liable to the payment of his debts, and are by the will vested in any person by way of executory devise; the first executory devisee, even though an infant, may convey the whole fee simple, in order to carry into effect any decree for the sale or mortgage of the estate for payment of such debts.(*c*)

[*261]

(*z*) Ante, p. 231.

(*a*) Stat. 8 & 9 Vict. c. 106, s. 6, repealing stat. 7 & 8 Vict. c. 76, s. 5.

(*b*) Ante, p. 232. (*c*) Stats. 11 Geo. IV, & 1 Will. IV, c. 47, s. 12; 2 & 3 Vict. c. 60.

And this provision, so far as it relates to a sale, has recently been extended to the case of lands having descended to the heir, subject to an executory devise over in favor of a person or persons not existing, or not ascertained.(*d*)[1]

SECTION II.

OF THE TIME WITHIN WHICH EXECUTORY INTERESTS MUST ARISE.

Secondly, as to the time within which an executory estate or interest must arise. It is evident that some limit must be fixed; for, if an unlimited time were allowed for the creation of these future and indestructible estates, the alienation of lands might be henceforward forever prevented, by the innumerable future estates, which the caprice or vanity of some owners would prompt them to create. A limit has, therefore, been fixed on for the creation of executory interests; and every executory interest, which might, under any circumstances, transgress this limit, is void altogether. With regard to future estates of a destructible kind, namely, contingent remainders, we have seen(*e*) that a *limit to their creation is contained in the maxim, that no remainder can be given to the unborn child of a living person for his life, followed by a remainder to any of the issue of such unborn person;—the latter of such remainders being absolutely void.[1] [*262]

(*d*) Stat. 11 & 12 Vict. c. 87.

(*e*) Ante, p. 228.

[1] In addition to the legislation on the subject of subjecting lands to the payment of debts heretofore referred to on p. 65 n., statutory provisions, similar to these referred to in the text, though more extensive in their scope, were recently enacted in Pennsylvania. See Act of 18th April, 1853, Purdon's Dig. 699.

[2] In the note to a preceding chapter, (Ch. X, p. 178 n.) it has been seen that in case of a devise to A. *and his heirs*, and if he die without issue, remainder to B., the estate of A. is cut down by construction from an estate in fee simple to an estate tail, and on the other hand in a devise to A. *for life*, and if he die without issue, remainder to B., the estate of A. is enlarged by construction to an estate tail. The reason of this is, that as alienation would, in either of the above cases, be restricted until after an indefinite failure of issue, the devises would respectively transgress what is termed "the rule against perpetuities" (see passim, the remarks of Lord Brougham in Cole v. Sewell, cited infra, in note to page 228), and hence the estate of the first taker is construed an estate tail, to which the right to suffer a common recovery is its inseparable incident, and the restriction upon alienation determinable, therefore, at the option of the tenant in tail.

Although there had been earlier cases in which the doctrine of perpetuities might be deemed to have been to some extent considered (Pells v. Brown, Cro. Jac. 590, Snow v. Cutler, 1 Lev. 135, T. Raym. 162, Taylor v. Biddal, 2 Modern, 289), yet it was not until the great case of the Duke of Norfolk, 3 Chanc. Cas. 1, 2 Chanc. Rep. 229, Pollexf, 223, decided in 1685, that it can be

This maxim, it is evident, in effect, forbids the tying up of lands for a longer period, than can elapse until the unborn child of some living person shall come of age; that is, for the life of a party now in being, and for twenty-one years after,—with a farther period of a few months during gestation, supposing the child should be of posthumous birth. In analogy, therefore, to the restriction thus imposed on the creation of contingent remainders,(*f*) the law has fixed the following limit to the creation of executory interests;—it will allow any executory estate to commence within the period of any fixed number of now existing lives, and an additional term of twenty-one years; allowing further for the period of gestation should gestation actually exist.(*g*) This additional term of twenty-one years may be independent or not of the minority of any person to be entitled;(*h*)[1] and, if no lives are fixed on, then the term of twenty-one years only is allowed.(*i*) But every executory estate which might, in any event, transgress this limit, will from its commencement be absolutely void. For instance, a gift

(*f*) Per Lord Kenyon, in Long v. Blackall, 7 T. Rep. 102. See also 1 Sand. Uses, 197 (205, 5th ed.). (*g*) Fearne, Cont. Rem. 430 et seq.

(*h*) Cadell v. Palmer, 7 Bligh, N. S. 202.

(*i*) 1 Jarm. Wills, 230; Lewis on Perpetuities, 172.

---

said to have been reduced to definite limits. Since that time, the rule, of which the author has given a brief but very correct summary, has been the subject of more than a thousand adjudged cases, and in the treatise of Mr. Lewis (52 and 66 Law Library), as also in the 8th chapter of Jarman on Wills, the student will find these collected and distinguished with refined elaboration.

The Revised Statutes of New York have restricted the protraction of the period of alienation to two successive estates for life limited to the lives of two persons in being at the creation of the estate: 1. Rev. Stat. 723; Jennings v. Jennings, 3 Selden, 547; and in those of the United States in which the doctrine is not thus the subject of statutory regulation, its rules are the same on both sides of the Atlantic, Hawley v. Northampton, 8 Mass. 37; Nightingale v. Brunell, 15 Pickering, 104, note to p. 178, supra.

[1] Until a comparatively recent time, it was matter of doubt whether, in the creation of an executory interest, the term of twenty-one years after lives in being, could be taken as a term in gross, without reference to the *actual* infancy of the person intended to take. Such a limitation had been held good by the Common Pleas in Beard v. Westcott, 5 Taunton, 394, and bad by the King's Bench, S. C. 5 Barn. & Ald. 801. The question was finally put at rest by the decision, after elaborate argument, of the case of Cadell v. Palmer, in the H. of Lords, in which all the Judges of England attended, and in which such a limitation was unanimously sustained. 7 Bligh, N. S. 202; 1 Clark & Finelly, 372. The decision of the point that although the term of twenty-one years might be taken without reference to the infancy of any person whatever, yet that the period of gestation was to be allowed in those cases only in which gestation exists, was not necessary to the case then under consideration, but was submitted and decided "with a laudable anxiety to close the door to all future discussion."

to the first son of A., a living person, who shall attain the age of twenty-four years, is a void gift.(*k*) For, if A. were to die, leaving a son a few months old, the estate of the son would arise, under such a gift, at a time exceeding the period of twenty-one years from the expiration of *the life of A., which, in this case, is the life fixed on. But a gift to the first son of A. who shall attain the age of twenty-one years, will be valid, as necessarily falling within the allowed period. When a gift is infected with the vice of its possibly[1] exceeding the prescribed limit, it is at once and altogether void, both at law and in equity.[2] And even if, in its actual event, it should [*263]

(*k*) Newman v. Newman, 10 Sim. 51; 1 Jarm. Wills, 227; Griffith v. Blunt, 4 Beav. 248.

[1] That the validity of a devise is to be tested by *possible* and not by *actual* events, is well settled, Newman v. Newman, 10 Simons, 51, 1 Jarman on Wills, 233, while at the same time the state of events at the decease of a testator is a legitimate subject of inquiry, Lord Dungannon v. Smith, 12 Clark & Finelly, 546; Vanderplank v. King, 3 Hare, 1; Williams v. Teale, 6 Id. 239.

[2] That is to say, limitations which tend to a perpetuity are not held valid to the extent of the rule against perpetuities, and void only as to the excess, but are void altogether. Leake v. Robinson, 2 Merivale, 362; Fox v. Porter, 6 Simons, 485; Third Report of Real Property Commissioners; and hence if the rule be transgressed as to the shares of any of the parties entitled to take, the shares of all of them will be affected.

There is, at the same time, a class of cases in which, in order to prevent a testator's dispositive scheme from proving abortive, on account of the remoteness of certain limitations, Courts give effect to such parts of his will as are susceptible of being legally carried into effect, and discard those which are open to objection for remoteness. Thus in Arnold v. Congreve, 1 Russel & Mylne, 269, a testatrix bequeathed certain stocks to her son for life, with remainder as to one moiety, to his eldest male child living at his decease, and as to the other moiety, to his other children. By a codicil, she directed that her grandchildren's shares should be settled upon them for their lives, with remainder to their issue in equal shares. The Master of the Rolls (Sir John Leach) decided that "the bequests to the grandchildren of the testatrix could not be confined to grandchildren living at her death; that the words included every child whom her son might at any time have; and consequently, that as to those bequests, limitations to the children of the grandchildren were void; that the testator having, by the will, given her grandchildren absolute interests, had made a codicil expressing her desire that they should only take life estates, in order that their children might take in succession after their deaths; that her sole object in making the codicil was to let in those children of grandchildren; that that purpose necessarily failed; and that as the great grandchildren could not take, the intention of the testatrix would be best effectuated by holding that the absolute interests given to the grandchildren by the will were not destroyed by the codicil." A similar decision was made in Church v. Kemble, 5 Simons, 522; and the principle has been also obviously applied where the ineffectual qualifying clauses engrafted on the absolute gift are contained in the same paper. In Carver v. Bowles, 2 Russel & Mylne, 306, a testator having, under a marriage settlement, a testamentary power of appointment among his children, appointed the fund to his five children, "equally to be divided

fall greatly within such limit, yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary.

In addition to the limit already mentioned, a further restriction has been imposed, by a modern act of Parliament,(*l*) on attempts to accumulate the income of property for the benefit of some future owner. This act was occasioned by the extraordinary will of the late Mr. Thelluson, who directed the income of his property to be accumulated during the lives of all his children, grandchildren, and great-grandchildren, *who were living at the time of his death*, for the benefit of some future descendants, to be living at the decease of the survivor ;(*m*) thus keeping strictly within the rule, which allowed any number of existing lives to be taken as the period for an executory interest.[1] To prevent the repetition of such a cruel absurdity, the act forbids the accumulation of income for any longer term than the life of the grantor or settlor, *or* twenty-one years from the death of any such grantor, settlor, devisor, or testator, *or* during the minority of any person living, or in *ventre sa mère* at the death of the grantor, devisor, or testator, *or* during the minority only of any person, who, under the settlement or will, would for the time being, if of full age, be entitled [*264] to the income so directed to be *accumulated.(*n*) But the act does not extend(*o*) to any provision for payment of debts, or

(*l*) Stat. 39 & 40 Geo. III, c. 98 ; Fearne, Cont. Rem. 538, n. (*x*)
(*m*) 4 Ves. 227 ; Fearne, Cont. Rem. 436, note.
(*n*) Wilson v. Wilson, 1 Sim. N. S. 288. (*o*) Sect. 3.

share and share alike," and then went on to direct that the shares "of his daughters should be held by his executors to their separate use, and without power of anticipation or alienation, and after their decease, for all and every or any one or more of their children as they should by deed or will appoint, and in default of appointment, for all their children equally, who, being sons, should attain twenty-one, or being daughters, should attain twenty-one or marry," and it was held that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment, but that it *was* competent to the donee of the power to limit the interests which he appointed to his *daughters* to their separate use, and to restrain them from anticipation or alienation; and in the subsequent cases of Kampf v. Jones, 2 Keen, 756, and Ring v. Hardwicke, 2 Beavan, 352, the same principle was applied.

[1] This was the celebrated case of Thelluson v. Woodford, 4 Vesey, 227, 11 Id. 112, in which the validity of the devise was sustained, but with much regret on the part of the Court. Statutory provisions of the same character as those of the 39 & 40 Geo. III, have been enacted in New York, Pennsylvania, and perhaps some other States. 1 Rev. St. 726; Vail v. Vail, 4 Paige, 317; Hawley v. James, 5 id. 322; King v. Rundle, 15 Barbour, 159; Penns. Stat. of 18th April, 1853, Purd. Dig. 701.

for raising portions for children,(*p*) or to any direction touching the produce of timber or wood. Any direction to accumulate income, which may exceed the period thus allowed, is valid to the extent of the time allowed by the act, but void so far as this time may be exceeded.(*q*) And if the direction to accumulate should exceed the limits allowed by law for the creation of executory interests, it will be void altogether, independently of the above act.(*r*)

---

*CHAPTER IV. [*265]

OF HEREDITAMENTS PURELY INCORPOREAL.

We now come to the consideration of incorporeal hereditaments, usually so called, which, unlike a reversion, a remainder, or an executory interest, are ever of an incorporeal nature, and never assume a corporeal shape. Of these purely incorporeal hereditaments there are three kinds, namely, first, such as are *appendant* to corporeal hereditaments; secondly, such as are *appurtenant;* both of which kinds of incorporeal hereditaments are transferred simply by the conveyance, by whatever means, of the corporeal hereditaments to which they may belong; and, thirdly, such as are *in gross*, or exist as separate and independent subjects of property, and which are accordingly said to lie in grant, and have always required a deed for their transfer.(*a*) But almost all purely incorporeal hereditaments may exist in both the above modes, being at one time appendant or appurtenant to corporeal property, and at another time separate and distinct from it.

1. Of incorporeal hereditaments which are *appendant* to such as are corporeal, the first we shall consider is a seignory, or lordship. In a previous part of our work,(*b*) we have noticed the origin of manors. Of such of the lands, belonging to a manor, as the lord granted out in fee simple to his free tenants, nothing remained to him but his

(*p*) See Halford v. Stains, 16 Sim. 488, 496; Barrington v. Liddell, 2 De Gex, M. & G. 480; Edwards v. Tuck, 3 De Gex, M. & G. 40.

(*q*) 1 Jarm. Wills, 269. See Re Lady Rosslyn's Trust, 16 Sim. 391.

(*r*) Lord Southampton v. Marquis of Hertford, 2 Ves. & Bea. 54; Ker v. Lord Dungannon, 1 Dr. & War. 509; Curtis v. Lukin, 5 Beav. 147; Broughton v. James, 1 Coll. 26; Scarisbrick v. Skelmersdale, 17 Sim. 187.

(*a*) Ante, p. 195. (*b*) Ante, p. 96.

seignory, or lordship. By the grant of an estate in fee simple, he necessarily parted with the feudal possession. Thenceforth his interest, accordingly, became incorporeal in its nature. But he *had [*266] no reversion; for no reversion can remain, as we have already seen,(c) after an estate in fee simple. The grantee, however, became his tenant, did to him fealty, and paid to him his rent-service, if any were agreed for. This simply having a free tenant in fee simple was called a seignory. To this seignory the rent and fealty were incident; and the seignory itself was attached or appendant to the manor of the lord, who had made the grant; whilst the land granted out was said to be holden of the manor. Very many grants were thus made, until the passing of the statute of *Quia emptores*(d) put an end to these creations of tenancies in fee simple, by directing that, on every such conveyance, the feoffee should hold of the same chief or lord as his feoffor held before.(e) But such tenancies in fee simple as were then already subsisting, were left untouched; and they still remain, in all cases in which freehold lands are holden of any manor. The incidents of such a tenancy, so far as respects the tenant, have been explained in the chapter on the tenure of an estate in fee simple. The correlative rights belonging to the lord form the incidents of his seignory. The seignory, with all its incidents, is an appendage to the manor of the lord; and a conveyance of the manor simply, without mentioning its appendant seignories, will accordingly comprise the seignories, together with all rents incident to them.(f) In ancient times it was necessary that the tenants should attorn to the feoffee of the manor, before the rents and services could effectually pass to him.(g) For, in this respect, the owner of a seignory was in the same position as the owner of a reversion.(h) But the same statute,(i) which abolished attornment in the one *case, abolished it also [*267] in the other. No attornment, therefore, is now required.

Other kinds of appendant incorporeal hereditaments are rights of *common*, such as *common of turbary*, or a right of cutting turf in another person's land; *common of piscary*, or a right of fishing in another's water; and *common of pasture*, which is the most usual, being a right of depasturing cattle on the land of another. The rights of common now usually met with are of two kinds: one, where the tenants of a manor possess rights of common over the wastes of the

(c) Ante, p. 208. (d) 18 Edw. I, c. I. (e) Ante, pp. 56, 95. (f) Perk. s. 116.
(g) Co. Litt. 310 b. (h) Ante, p. 203. (i) Stat. 4 & 5 Anne, c. 16, s. 9; ante, p. 203.

manor, which belong to the lord of the manor, subject to such rights;(*k*) and the other, where the several owners of strips of land, composing together a common field, have, at certain seasons, a right to put in cattle to range over the whole. The inclosure of commons, so frequent of late years, has rendered much less usual than formerly, the right of common possessed by tenants of manors over the lords' wastes. These inclosures were until recently effected by private acts of Parliament, obtained for the purpose of each particular inclosure, subject to the provisions of the general inclosure act,(*l*) which contained general regulations applicable to all. But by a recent act of Parliament,(*m*) commissioners have been appointed, styled the Inclosure Commissioners for England and Wales, under whose sanction inclosures may now be *more readily effected, several local inclosures being comprised in one act. The same commissioners have also been invested with powers for facilitating the drainage of lands.(*n*) The rights of common possessed by owners of land in common fields, however useful in ancient times, are now found greatly to interfere with the modern practice of husbandry; and acts have accordingly been recently passed, to facilitate the exchange(*o*) and separate inclosure (*p*) of lands in such common fields. Under the provisions of these acts, each owner may now obtain a separate parcel of land, discharged from all rights of common belonging to any other person. The rights of common above spoken of, being appendant to the lands in respect of which they are exercised, belong to the lands of common right,(*q*) by force of the common law alone, and not by virtue of any grant, express or implied. And any conveyance of the lands, to which such rights belong, will comprise such rights of common also.(*r*)

[*268]

(*k*) Ante, p. 96.

(*l*) 41 Geo. III, c. 109; see also Stats. 3 & 4 Will. IV, c. 87; 3 & 4 Vict. c. 31.

(*m*) Stat. 8 & 9 Vict. c. 118, amended by Stat. 9 & 10 Vict. c. 70, extended by Stat. 10 & 11 Vict. c. 111, further extended by Stats. 11 & 12 Vict. c. 99, and 12 & 13 Vict. c. 83, continued by Stat. 14 & 15 Vict. c. 53, amended and further extended by Stat. 15 & 16 Vict. c. 79, continued by Stat. 16 & 17 Vict. c. 124, and amended and extended by Stat 17 & 18 Vict. c. 97. The Stat. 8 & 9 Vict. c. 118, contains (sect. 147) a remarkably useful provision, though rather out of place, authorizing exchanges of lands whether inclosed or not.

(*n*) Stats. 10 & 11 Vict. c. 38; 12 & 13 Vict. c. 100; and 13 & 14 Vict. c. 31.

(*o*) Stat. 4 & 5 Will. IV, c. 30.

(*p*) Stat. 6 & 7 Will. IV, c. 115, extended by Stat. 3 & 4 Vict. c. 31. See also Stats. 8 & 9 Vict. c. 118, 9 & 10 Vict. c. 70, 10 & 11 Vict. c. 111, 11 & 12 Vict. c. 99, 12 & 13 Vict. c. 83, 15 & 16 Vict. c. 79, 17 & 18 Vict. c. 97.

(*q*) Co. Litt. 122 a; Bac. Abr. tit. Extinguishment (C). See, however, Lord Dunraven v. Llewellyn, 15 Q. B. 791; ante, p. 96, n. (*j*).

(*r*) Litt. s. 183; Co. Litt. 121 b.

Another kind of appendant incorporeal hereditament, is an advowson appendant to a manor. But on this head we shall reserve our observations, till we speak of the now more frequent subject of conveyance, an advowson *in gross*, or an advowson unappended to anything corporeal.

2. Incorporeal hereditaments *appurtenant* to corporeal hereditaments are not very often met with. They consist of such incorporeal [*269] hereditaments as are not naturally *and originally appendant to corporeal hereditaments, but have been annexed to them, either by some express deed of grant, or by *prescription* from long enjoyment. Rights of common, and rights of way or passage over the property of another person, are the principal kinds of incorporeal hereditaments usually found appurtenant to lands. When thus annexed, they will pass by a conveyance of the lands, to which they have been annexed, without mention of the appurtenances;(*s*) although these words, "with the appurtenances," are usually inserted in conveyances, for the purpose of distinctly showing an intention to comprise such incorporeal hereditaments of this nature, as may belong to the lands. But, if such rights of common, or of way, though usually enjoyed with the lands, should not be strictly appurtenant to them, a conveyance of the lands merely, with their appurtenances, without mentioning the rights of common or way, will not be sufficient to comprise them.(*t*) It is, therefore, usual in conveyances, to insert, at the end of the "parcels" or description of the property, a number of "general words," in which are comprised, not only all rights of way and common, &c., which may belong to the premises, but also all such as may be therewith used or enjoyed.(*u*)

3. Such incorporeal hereditaments as stand separate and alone, are generally distinguished from those which are appendant or appurtenant, by the appellation *in gross*. Of these, the first we may mention is a seignory *in gross*, which is a seignory that has been severed from the demesne lands of the manor, to which it was anciently ap- [*270] pendant.(*v*) *It has now become quite unconnected with anything corporeal, and, existing as a separate subject of transfer, it must be conveyed by deed of grant.

(*s*) Co. Litt. 121 b.

(*t*) Harding v. Wilson, 2 B. and Cress. 96; Barlow v. Rhodes, 1 Cro. and M. 439. See also James v. Plant, 4 Adol. and Ellis, 749; Hinchliffe v. Earl of Kinnoul, 5 New Cases, 1; Pheysey v. Vicary, 16 Mee. and Wels. 484; Ackroyd v. Smith, 10 C. B. 164.

(*u*) Ante, p. 156.

(*v*) 1 Scriv. Cop. 5.

The next kind of separate incorporeal hereditament is a rent seck (*redditus siccus*), a dry or barren rent; so called, because no distress could formerly be made for it.(*w*) This kind of rent affords a good example of the antipathy of the ancient law to any inroad on the then prevailing system of tenures. If a landlord granted his seignory, or his reversion, the rent service, which was incident to it, passed at the same time. But, if he should have attempted to convey his rent, independently of the seignory or reversion, to which it was incident, the grant would have been effectual to deprive himself of the rent, but not to enable his grantee to distrain for it.(*x*) It would have been a *rent seck*. Rents seck also occasionally arose from grants being made of rent charges, to be hereafter explained, without any clause of distress.(*y*) But now, by an act of George II,(*z*) a remedy by distress is given for rent seck, in the same manner as for rent reserved upon lease.

Another important kind of separate incorporeal hereditament is a rent charge, which arises on a grant by one person to another, of an annual sum of money, payable out of certain lands, in which the grantor may have any estate. The rent charge cannot, of course, continue longer than the estate of the grantor; but supposing the grantor to be seised in fee simple, he may make a grant of a rent charge for any estate he pleases, giving to the grantee a rent charge for a term of years, or for his life, or in tail, or in fee simple.(*a*) For this *purpose, a *deed* is absolutely necessary; for, a rent charge, being a separate incorporeal hereditament, cannot, according [*271] to the general rule, be created or transferred in any other way,(*b*) unless indeed it be given by will. The creation of a rent charge or annuity, for any life or lives, or for any term of years or greater estate determinable on any life or lives, was also, until recently, required, under certain circumstances, to be attended with the inrolment, in the Court of Chancery, of a memorial of certain particulars. These annuities were frequently granted by needy persons to money-lenders, in consideration of the payment of a sum of money, for which the annuity or rent charge served the purpose of an exorbitant rate of interest. In order, therefore, to check these proceedings by giving them publicity, it was provided that, as to all such annuities, granted for pecu-

(*w*) Litt. s. 218.
(*y*) Litt. ss. 217, 218.
(*a*) Litt. ss. 217, 218.
(*x*) Litt. ss. 225, 226, 227, 228, 572.
(*z*) Stat. 4 Geo. II, c. 28, s. 5.
(*b*) Litt. ubi sup.

niary consideration or money's worth,(*c*) (unless secured on lands of equal or greater annual value than the annuity, and of which the grantor was seised in fee simple, or fee tail in possession), a memorial stating the date of the instrument, the names of the parties and witnesses, the persons for whose lives the annuity was granted, the person by whom the same was to be beneficially received, the pecuniary consideration for granting the same, and the annual sum to be paid, should, within thirty days after the execution of the deed, be inrolled in the Court of Chancery; otherwise the same should be null and void to all intents and purposes.(*d*) But as these annuities were only granted for the sake of evading the Usury Laws, the same statute which has repealed those laws(*e*) has *also repealed the statutes by which memorials of such annuities were required to be inrolled.

[*272]

In settlements, where rent charges are often given by way of pin money and jointure, they are usually created under a provision for the purpose contained in the Statute of Uses.(*f*) The statute directs that, where any persons shall stand seised of any lands, tenements, or hereditaments, in fee simple or otherwise, *to the use and intent* that some other person or persons shall have yearly to them and their heirs or to them and their assigns, for term of life, or years, or some other special time, any annual rent; in every such case the same persons, their heirs and assigns, *that have such use* to have any such rent, shall be adjudged and deemed in possession and seisin of the same rent, of such estate as they had in the use of the rent; and they may distrain for nonpayment of the rent in their own names. From this enactment it follows, that if a conveyance of lands be now made to A. and his heirs, *to the use* and intent that B. and his assigns may, during his life, thereout receive a rent charge,—B. will be entitled to the rent charge, in the same manner as if a grant of the rent charge had been duly made to him by deed. The above enactment, it will be seen, is similar to the prior clause of the Statute of Uses relating to uses of estates,(*g*) and is merely a carrying out of the same design; which was, to render every use, then cognizable only in Chancery, an estate or interest within the jurisdiction of the courts of law.(*h*) But,

(*c*) Tetley v. Tetley, 4 Bing. 214; Mestayer v. Biggs, 1 Cro. Mee. & Rosc. 110; Few v. Backhouse, 8 Ad. & Ell. 789; S. C. 1 Per. & Dav. 34; Doe d. Church v. Pontifex, 9 C. B. 229.

(*d*) Stat. 53 Geo. III, c. 141, explained and amended by stats. 3 Geo. IV, c. 92, and 7 Geo. IV, c. 75, which rendered sufficient a memorial of the names of the witnesses as they appeared signed to their attestations.

(*e*) Stat. 17 & 18 Vict. c. 90.

(*f*) Stat. 27 Hen. VIII, c. 10, ss. 4, 5. (*g*) Ante, p. 131. (*h*) Ante, p. 133.

in this case also, as well as in the former, the end of the statute has been defeated. For, a conveyance of land to A. and his heirs, *to the use* that B. and his heirs, may receive a rent charge, *in trust* for C. and his heirs, will now be laid hold of by the Court of Chancery for *C.'s benefit, in the same manner as a trust of an estate in the land itself. The statute vests the *legal estate* in the rent in B.; and C takes nothing in a Court of law, because the trust for him would be a use upon a use.(*i*) But C. has the entire beneficial interest; for he is possessed of the rent charge for an *equitable estate* in fee simple. [*273]

In ancient times it was necessary, on every grant of a rent charge, to give an express power to the grantee to distrain on the premises, out of which the rent charge was to issue.(*j*) If this power were omitted, the rent was merely a *rent seck*. Rent service, being an incident of tenure, might be distrained for by common right; but rent charges were matters, the enforcement of which was left to depend solely on the agreement of the parties. But, since a power of distress has been attached by Parliament(*k*) to rents seck, as well as to rents service, an express power of distress is not necessary for the security of a rent charge.(*l*) Such a power, however, is usually granted in express terms. In addition to the clause of distress, it is also usual, as a further security, to give to the grantee a power to enter on the premises, after default has been made in payment for a certain number of days, and to receive the rents and profits until all the arrears of the rent charge, together with all expenses, have been duly paid.[1]

Incorporeal hereditaments are the subjects of estates, analogous to those which may be holden in corporeal hereditaments. If therefore a rent charge should be granted for the life of the grantee, he will possess an *estate for life in the rent charge. Supposing that he should alienate this life estate to another party, without mentioning in the deed of grant the heirs of such party, the law formerly held that, in the event of the decease of the second grantee in the lifetime of the former, the rent charge became extinct for the benefit of the [*274]

(*i*) Ante, p. 134. (*j*) Litt. s. 218.

(*k*) Stat. 4 Geo. II, c. 28, s. 5. See Johnson v. Faulkner, 2 Q. B. 925, 935; Miller v. Green, 8 Bing. 92; 2 Cro. & Jerv. 142; 2 Tyr. 1.

(*l*) Saward v. Anstey, 2 Bing. 519; Buttery v. Robinson, 3 Bing. 392.

[1] See supra, note to page 101.

owner of the lands, out of which it issued.(*m*) The former grantee was not entitled, because he had parted with his estate; the second grantee was dead, and his heirs were not entitled, because they were not named in the grant. Under similar circumstances, we have seen(*n*) that, in the case of a grant of corporeal hereditaments, the first person that might happen to enter upon the premises, after the decease of the second grantee, had formerly a right to hold possession during the remainder of the life of the former. But rents, and other incorporeal hereditaments, are not in their nature the subjects of occupancy;(*o*) they do not lie exposed to be taken possession of by the first passer by. It was accordingly thought that the statutes, which provided a remedy in the case of lands and other corporeal hereditaments, were not applicable to the case of a rent charge; but that it became extinct as before mentioned.(*p*) By a recent decision, however, the construction of these statutes was extended to this case also;(*q*) and now, the act for the amendment of the laws with respect to wills,(*r*) by which these statutes have been repealed,(*s*) permits every person to dispose by will of estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or an incorporeal hereditament;(*t*) and, in case there shall be no special [*275] *occupant, the estate, whether corporeal or incorporeal, shall go to the executor or administrator of the party; and coming to him, either by reason of a special occupancy, or by virtue of the act, it shall be applied and distributed in the same manner as the personal estate of the testator or intestate.(*u*)

A grant of an estate tail in a rent charge scarcely ever occurs in practice. But grants of rent charges for an estate in fee simple are not uncommon, especially in the towns of Liverpool and Manchester, where it is the usual practice to dispose of an estate in fee simple in lands for building purposes, in consideration of a rent charge in fee simple by way of ground rent, to be granted out of the premises to the original owner. These transactions are accomplished by a conveyance from the vendor to the purchaser and his heirs, *to the use* that the vendor and his heirs may thereout receive the rent charge agreed on, and *to the further use* that, if it be not paid within so many days, the vendor and his heirs may distrain, and *to the further use* that, in case of non-payment within so many more days, the vendor and his heirs

(*m*) Bac. Abr. tit. Estate for Life and Occupancy (B)
(*n*) Ante, p. 20. (*o*) Co. Litt. 41 b, 388 a. (*p*) 2 Black. Com. 260.
(*q*) Bearpark v. Hutchinson, 7 Bing. 178. (*r*) Stat. 7 Will. IV, & 1 Vict. c. 26.
(*s*) Sec. 2. (*t*) Sec. 3. (*u*) Sec. 6.

may enter, and hold possession till all arrears and expenses are paid; and, subject to the rent charge, and to the powers and remedies for securing payment thereof, *to the use* of the purchaser, his heirs and assigns forever. The purchaser thus acquires an estate in fee simple in the lands, subject to a perpetual rent charge payable to the vendor, his heirs and assigns.(*v*) It should, however, *be carefully borne in mind, that transactions of this kind are very different from those [*276] grants of fee simple estates, which were made in ancient times by lords of manors, and from which quit or chief rents have arisen. These latter rents are rents incident to tenure, and may be distrained for of common right, without any express clause for the purpose. But as we have seen,(*w*) since the passing of the statute of *Quia emptores*,(*x*) it has not been lawful for any person to create a tenure in fee simple. The modern rents, of which we are now speaking, are accordingly mere rent charges, and in ancient days would have required express clauses of distress to make them secure.[1] As it is, these rent charges, in common with all others, are subject to many inconveniences. They are considered in law as *against common right*,(*y*) that is, as repugnant to the feudal policy, which encouraged such rents only as were incident to tenure. A rent charge is accordingly regarded as a thing entire and indivisible, unlike rent service, which is capable of apportionment. And from this property of a rent charge, the law, in its hostility to such charges, has drawn the following conclusion: that if

(*v*) By Stat. 17 & 18 Vict. c. 83, conveyances of any kind, in consideration of an annual sum payable in perpetuity, or for any indefinite period, are subject to the following duties:—

Where the yearly sum shall not exceed	£5							£0	6	0
Shall exceed	£5	and not exceed	10					0	12	0
"	10	"	15					0	18	0
"	15	"	20					1	4	0
"	20	"	25					1	10	0
"	25	"	50					3	0	0
"	50	"	75					4	10	0
"	75	"	100					6	0	0
And when the sum shall exceed £100, then for every £50, and also for any fractional part of £50								3	0	0

(*w*) Ante, pp. 56, 95. (*x*) 18 Edw. I, c. 1. (*y*) Co. Litt. 147 b.

[1] It was, however, decided in Pennsylvania, in the case of Ingersoll v. Sergeant, 1 Wharton, 337, that the statute of *Quia emptores* was never in force in that State (see supra, p. 95, note, as also the cases of Franciscus v. Reigart, 4 Watts, 98, and Kenege v. Elliott, 9 Id. 262), and that rents reserved by the grantor upon a conveyance of an estate in fee simple (see supra, in note to p. 101) are rents service, incident to tenure, distrainable of common right, and the subjects of apportionment.

any part of the land, out of which a rent charge issues, be released from the charge by the owner of the rent, either by an express deed of release, or virtually by his purchasing part of the land, all the rest of the land shall enjoy the same benefit and be released also.(*z*) If, however, any portion of the land charged should descend to the owner of the rent, as heir at law, the rent will not thereby be extinguished, as [*277] in the case of a purchase, but will be apportioned *according to the value of the land; because such portion of the land comes to the owner of the rent, not by his own act, but by the course of law.(*a*)

By the recent act to amend and consolidate the laws relating to bankrupts,(*b*) the assignees of any bankrupt having any land under a conveyance to him in fee, or under an agreement for any such conveyance, subject to any perpetual yearly rent, reserved by such conveyance or agreement, may elect to take or to decline the same; and any person entitled to the rent is empowered to oblige them to exercise this option, if they do not do so when required. If they elect to take the land, the bankrupt is discharged from liability to pay any rent accruing after the filing of the petition for adjudication of bankruptcy.[1] If they decline to take the land, the bankrupt will not be liable if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement to the persons then entitled to the rent. This clause seems to have been drawn under a misconception of the nature of these rent charges; for the owner of such a rent has no estate in the land, and in order to acquire any estate therein, he should obtain not merely the delivery up of the old conveyance to the bankrupt, but also a conveyance of the fee simple of the land itself from the bankrupt to him.

Although rent charges and other self-existent incorporeal hereditaments of the like nature, are no favorites with the law, yet, whenever it meets with them, it applies to them, as far as possible, the same

(*z*) Litt. s. 222; Dennett v. Pass, 1 New Cases, 388. (*a*) Litt. s. 224.
(*b*) Stat. 12 & 13 Vict. c. 106, s. 145.

[1] It having been decided, in Mills v. Auriol, 4 Term, 948, and see 1 Smith's Leading Cases, 437, that under the English statutes of bankruptcy then in force, the bankruptcy of the defendant could not be pleaded in bar of an action of covenant for rent. Similar decisions have been made on this side of the Atlantic, under the United States statute of bankruptcy of 1841. Steinmetz v. Ainslie, 4 Denio, 573; Savory v. Stocking, 607; Bosler v. Kuhn, 8 Watts & Serg. 183; Prentiss v. Kingley, 10 Barr, 120.

rules to which corporeal hereditaments are subject. Thus, we have seen that the estates, which may be held in the one, are analogous to those which exist in the other. So estates *in fee simple, both [*278] in the one and in the other, may be aliened by the owner, either in his lifetime or by his will, and, on his intestacy, will descend to the same heir at law. But, in one respect, the analogy fails. Land is essentially the subject of *tenure;* it may belong to a lord, but be holden by his tenant, by whom again it may be sub-let to another; and so long as rent is rent service, a mere incident arising out of the estate of the payer, and belonging to the estate of the receiver, so long may it accompany, as accessory, its principal, the estate to which it belongs. But the receipt of a rent charge is accessory or incident to no other hereditament. True, a rent charge springs from, and is therefore in a manner connected with the land on which it is charged; but the receiver and owner of a rent charge has no shadow of interest beyond the annual payment, and in the abstract right to this payment, his estate in the rent consists. Such an estate, therefore, cannot be subject to any tenure. The owner of an estate in a rent charge, consequently, owes no fealty to any lord, neither can he be subject, in respect of his estate, to any rent as rent service; nor, from the nature of the property, could any distress be made for such rent service, if it were reserved.(*c*) So, if the owner of an estate in fee simple in a rent charge should die intestate, and without leaving any heirs, his estate cannot escheat to his lord; for he has none. It will simply cease to exist; and the lands, out of which it was payable, will thenceforth be discharged from its payment.(*d*)

Another kind of separate incorporeal hereditament, which occasionally occurs, is a right of common *in gross.* *This is, as [*279] the name implies, a right of common over lands belonging to another person, possessed by a man, not as appendant or appurtenant to the ownership of any lands of his own, but as an independent subject of property.(*e*) Such a right of common has therefore always required a deed for its transfer.

Another important kind of separate incorporeal hereditament, is an

(*c*) Co. Litt. 47 a, 144 a; 2 Black. Com. 42. But it is said that the Queen may reserve a rent out of an incorporeal hereditament, for which, by her prerogative, she may distrain on all the lands of the lessee. Co. Litt. 47 a, note (1); Bac. Abr. tit. Rent (B).

(*d*) Co. Litt. 298 a, n. (2).

(*e*) 2 Black. Com. 33, 34.

advowson in gross.[1] An advowson is a perpetual right of presentation to an ecclesiastical benefice. The owner of the advowson is termed the patron of the benefice; but, as such, he has no property or interest in the glebe or tithes, which belong to the incumbent. As patron, he simply enjoys a right of nomination, from time to time, as the living becomes vacant. And this right he exercises by a *presentation* to the bishop of some duly qualified clerk or clergyman, whom the bishop is accordingly bound to *institute* to the benefice, and to cause him to be *inducted* into it.(*f*) When the advowson belongs to the bishop, the forms of presentation and institution are supplied by an act called *collation.*(*g*) And by recent statutes(*h*) the instruments by which presentation and institution in the one case, or collation in the other, are carried into effect, are subjected to an ad valorem duty according to the net yearly value of the benefice.(*i*) In some rare cases of advowsons *donative* the patron's deed of donation is alone sufficient.(*k*) Where the patron is entitled to the advowson as his private property, he is empowered by an act of Parliament of the reign of George IV,(*l*) [*280] to *present any clerk, under a previous agreement with him for his resignation in favor of any one person named, or in favor of one of two(*m*) persons, each of them being by blood or marriage an uncle, son, grandson, brother, nephew, or grand-nephew of the patron, or one of the patrons beneficially entitled. One part of the instrument by which the engagement is made must be deposited within two calendar months in the office of the registrar of the diocese,(*n*) and the resignation must refer to the engagement, and state the name of the person for whose benefit it is made.(*o*)

Advowsons are principally of two kinds,—advowsons of rectories, and advowsons of vicarages. The history of advowsons of rectories is in many respects similar to that of rents, and of rights of common.

(*f*) 1 Black. Com. 190, 191. (*g*) 2 Black. Com. 22.
(*h*) Stats. 5 & 6 Vict. c. 79; 6 & 7 Vict. c. 72.
(*i*) The duty is £7, and when the net yearly value shall amount to £300 or upwards, then for every £100 thereof over and above the first £200, a further duty of £5.
(*k*) 2 Black. Com. 23. (*l*) Stat. 9 Geo. IV, c. 94.
(*m*) The act reads one *or* two, but this is clearly an error.
(*n*) Sect. 4. (*o*) Sect. 5.

[1] It is hardly necessary to mention that, by reason of there being no Established Church in the United States, the remainder of this chapter has no application here; but an excellent summary of the subject here treated of will be found in Smith on Contracts, pp. 174, 183, as also in Sugden's "Letters to a Man of Property," Letter VIII.

In the very early ages of our history, advowsons of rectories appear to have been almost always appendant to some manor. The advowson was part of the manorial property of the lord, who built the church, and endowed it with the glebe, and most part of the tithes. The seignories, in respect of which he received his rents, were another part of his manor; and the remainder principally consisted of the demesne and waste lands, over the latter of which, we have seen that his tenants enjoyed rights of common, as appendant to their estates.(*p*) The incorporeal part of the property, both of the lord and his tenants, was thus strictly appendant or incident to that part which was corporeal; and any conveyance of the corporeal part naturally and necessarily carried with it that part which was incorporeal, unless it were expressly excepted. But, as society advanced, this simple state of things became subject to many innovations, and in various cases the incorporeal portions of property *became severed from the corporeal parts to which they had previously belonged. Thus [*281] we have seen,(*q*) that the seignory of lands was occasionally severed from the corporeal part of the manor, becoming a seignory in gross. So rent was sometimes granted independently of the lordship or reversion, to which it had been incident; by which means it at once became an independent incorporeal hereditament, under the name of a *rent seck*. Or a rent might have been granted to some other person than the lord, under the name of a *rent charge*. In the same way, a *right of common* might have been granted to some other person than a tenant of the manor, by means of which grant, a separate incorporeal hereditament would have arisen, as a *common in gross*, belonging to the grantee. In like manner, there exist, at the present day, two kinds of advowsons of rectories; an advowson *appendant* to a manor, and an advowson *in gross*,(*r*) which is a distinct subject of property, unconnected with anything corporeal. Advowsons in gross appear to have chiefly had their origin from the severance of advowsons appendant from the manors to which they had belonged; and any advowson, now appendant to a manor, may at any time be severed from it, either by a conveyance of the manor with an express exception of the advowson, or by a grant of the advowson alone independently of the manor. And when once severed from its manor, and made an independent incorporeal hereditament, an advowson can never become appendant again. So long as an advowson is appendant to a manor, a conveyance of the manor, even by feoffment, and

(*p*) Ante, pp. 96, 267. (*q*) Ante, p. 269. (*r*) 2 Black. Com. 22; Litt. s. 617.

without mentioning the appurtenances belonging to the manor, will be sufficient to comprise the advowson.(*s*) But, when severed, it [*282] must be conveyed, like *any other separate incorporeal hereditament, by a deed of grant.(*t*)

The advowsons of rectories were not unfrequently granted by the lords of manors in ancient times to monastic houses, bishoprics, and other spiritual corporations.(*u*) When this was the case, the spiritual patrons thus constituted considered themselves to be the most fit persons to be rectors of the parish, so far as the receipt of the tithes and other profits of the rectory was concerned; and they left the duties of the cure to be performed by some poor priest as their vicar or deputy. In order to remedy the abuses thus occasioned, it was provided by statutes of Richard II(*x*) and Henry IV,(*y*) that the vicar should be sufficiently endowed wherever any rectory was thus *appropriated.* This was the origin of vicarages, the advowsons of which belonged in the first instance to the spiritual owners of the appropriate rectories as appendant to such rectories;(*z*) but many of these advowsons have since, by severance from the rectories, been turned into advowsons in gross. And such advowsons of vicarages can only be conveyed by deed, like advowsons of rectories under similar circumstances.

The sale of any advowson will not include the right to the *next presentation*, unless made when the church is full; that is, before the right to present has actually arisen, by the death, resignation, or deprivation of the former incumbent.(*a*) For, the present right to present is regarded as a personal duty of too sacred a character to be bought and sold; and the sale of such a right would fall within the [*283] offence of *simony*,—so called from *Simon Magus,—an offence which consists in the buying or selling of holy orders, or of an ecclesiastical benefice.(*b*) But, before a vacancy has actually occurred, the next presentation, or right of presenting at the next vacancy, may be sold, either together with, or independently of, the future presentations, of which the advowson is composed;(*c*) and this is frequently done. A clergyman, however, is prohibited by a statute

(*s*) Perk. s. 116; Co. Litt. 190 b, 307 a. See Attorney-General v. Sitwell, 1 You. & Coll. 559.

(*t*) Co. Litt. 332 a, 335 b.

(*u*) 1 Black. Com. 384. (*x*) Stat. 15 Rich. II, c. 6. (*y*) Stat. 4 Hen. IV, c. 12.

(*z*) Dyer, 351 a. (*a*) Alston v. Atlay, 7 Adol. & Ellis, 289.

(*b*) Bac. Abr. tit. Simony; stat. 31 Eliz. c. 6. (*c*) Fox v. Bishop of Chester, 6 Bing. 1.

of Anne(*d*) from procuring preferment for himself by the purchase of a next presentation; but this statute is not usually considered as preventing the purchase by a clergyman of an entire advowson with a view of presenting himself to the living. When the next presentation is sold, independently of the rest of the advowson, it is considered as mere personal property, and will devolve, in case of the decease of the purchaser before he has exercised his right, on his executors, and cannot descend to his heir at law.(*e*) The advowson itself, it need scarcely be remarked, will descend, on the decease of its owner intestate, to his heir. The law attributes to it, in common with other separate incorporeal hereditaments, as nearly as possible the same incidents as appertain to the corporeal property to which it once belonged.

Tithes are another species of separate incorporeal hereditaments, also of an ecclesiastical or spiritual kind. In the early ages of our history, and, indeed, down to the time of Henry VIII, tithes were exclusively the property of the church, belonging to the incumbent of the parish, unless they had got into the hands of some monastery, or community of spiritual persons. They never belonged to any layman until the time of the dissolution *of monasteries by King Henry VIII. But this monarch, having procured acts of Parliament [*284] for the dissolution of the monasteries and the confiscation of their property,(*f*) also obtained, by the same acts,(*g*) a confirmation of all grants, made or to be made by his letters-patent, of any of the property of the monasteries. These grants were many of them made to laymen, and comprised the tithes, which the monasteries had possessed, as well as their landed estates. Tithes thus came for the first time into lay hands, as a new species of property. As the grants had been made to the grantees and their heirs, or to them and the heirs of their bodies, or for term of life or years,(*h*) the tithes so granted evidently became hereditaments, in which estates might be holden, similar to those already known to be held in other hereditaments of a separate incorporeal nature; and a necessity at once arose of a law to de-

(*d*) Stat. 12 Anne, stat. 2, c. 12, s. 2.

(*e*) See Bennett v. Bishop of Lincoln, 7 Barn. & Cres. 113; 8 Bing. 490.

(*f*) Stat. 27 Hen. VIII, c. 28, intituled "An Act that all Religious Houses under the yearly Revenue of Two Hundred Pounds shall be dissolved, and given to the King and his Heirs;" stat. 31 Hen. VIII, c. 13, intituled "An Act for the Dissolution of all Monasteries and Abbeys;" and stat. 32 Hen. VIII, c. 24.

(*g*) 27 Hen. VIII, c. 28, s. 2; 31 Hen. VIII, c. 13, ss. 18, 19.

(*h*) Stat. 31 Hen. VIII, c. 13, s. 18; 32 Hen. VIII, c. 7, s. 1.

termine the nature and attributes of these estates. How such estates might be conveyed, and how they should descend, were questions of great importance. The former question was soon settled by an act of Parliament,(*i*) which directed recoveries, fines, and conveyances to be made of tithes in lay hands, according as had been used for assurances of lands, tenements, and other hereditaments. And the analogy of the descent of estates in other hereditaments was followed in tracing the descent of estates of inheritance in tithes. But, as tithes, being of a spiritual origin, are a distinct inheritance from the lands out of which they issue, they have not been considered as [*285] *affected by any particular custom of descent, such as that of gavelkind or borough-English, to which the lands may be subject; but in all cases they descend according to the course of the common law.(*k*) From this separate nature of the land and tithe, it also follows, that the ownership of both by the same person will not have the effect of merging the one in the other. They exist as distinct subjects of property; and a conveyance of the land with its appurtenances, without mentioning the tithes, will leave the tithes in the hands of the conveying party.(*l*) The recent acts which have been passed for the commutation of tithes,(*m*) affect tithes in the hands of laymen, as well as those possessed by the clergy. Under these acts, a rent charge, varying with the price of corn, has now been substituted all over the kingdom, for the inconvenient system of taking tithes in kind; and, in these acts, provision has been properly made for the *merger* of the tithes or rent charge in the land, by which the tithes or rent charge may at once be made to cease, whenever both land and tithes or rent charge belong to the same person.(*n*)

There are other species of incorporeal hereditaments which are scarcely worth particular notice in a work so elementary as the present, especially considering the short notice that has necessarily here been taken of the more important kinds of such property. Thus *titles of honor*, in themselves an important kind of incorporeal heredi-

(*i*) Stat. 32 Hen. VIII, c. 7, s. 7.

(*k*) Doe d. Lushington v. Bishop of Llandaff, 2 New Rep. 491; 1 Eagle on Tithes, 16.

(*l*) Chapman v. Gatcombe, 2 New Cases, 516.

(*m*) Stats. 6 & 7 Will. IV, c. 71; 1 Vict. c. 39; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 Vict. c. 7; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 14 & 15 Vict. c. 53; 16 & 17 Vict. c. 124.

(*n*) Stats. 6 & 7 Will. IV, c. 71, s. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62, s. 1; 9 & 10 Vict. c. 73, s. 19.

tament, are yet, on account of their inalienable *nature, of but little interest to the conveyancer. The same remark also applies to *offices* or places of business and profit. No outline can embrace every feature. Many subjects, which have here occupied but a single paragraph, are of themselves sufficient to fill a volume. Reference to the different works on the separate subjects here treated of, must necessarily be made by those who are desirous of full and particular information. [*286]

[*287]

*PART III.

OF COPYHOLDS.[1]

Our present subject is one peculiarly connected with those olden times of English history, to which we have had occasion to make so frequent reference. Everything relating to copyholds reminds us of the baron of old, with his little territory, in which he was king. Estates in copyhold are, however, essentially distinct, both in their origin and in their nature, from those freehold estates, which have hitherto occupied our attention. Copyhold lands are lands holden by *copy* of court roll; that is, the muniments of the title to such lands are *copies* of the *roll* or book, in which an account is kept of the proceedings in the *Court* of the manor to which the lands belong. For all copyhold lands belong to, and are parcel of, some manor. An estate in copyhold is not a freehold; but, in construction of law, merely an estate *at the will of the lord* of the manor, at whose will copyhold estates are expressed to be holden. Copyholds are also so to be holden *according to the custom* of the manor to which they belong, for custom is the life of copyholds.(*a*)

In former days, a baron or great lord, becoming possessed of a tract of land, granted part of it to freemen, for estates in fee simple, giving rise to the tenure of such estates, as we have seen in the chapter on Tenure.(*b*) Part of the land he reserved to himself, forming the
[*288] *demesnes of the manor, properly so called:(*c*) other parts of the land he granted out to his villeins or slaves, permitting them, as an act of pure grace and favor, to enjoy such lands at his pleasure; but sometimes enjoining, in return for such favor, the performance of certain agricultural services, such as ploughing the demesne, carting the manure, and other servile works. Such lands as remained, gene-

(*a*) Co. Cop. s. 32, Tr. p. 58. (*b*) Ante, pp. 95, 96.
(*c*) Co. Cop. s. 14, Tr. 11; Attorney-General v. Parsons, 2 Cro. & Jerv. 279, 308.

[1] The law of copyholds has no application on this side of the Atlantic, and has, indeed, been altogether omitted by Professor Greenleaf in his edition of Cruise on Real Property. I have, however, preferred to present the present work to the American student in its original form, especially as the curious law which is the subject of this chapter is treated by the author with such clearness.

rally the poorest, were the waste lands of the manor, over which rights of common were enjoyed by the tenants.(*d*) Thus arose a manor, of which the tenants formed two classes, the freeholders and the villeins. For each of these classes a separate Court was held: for the freeholders, a Court Baron;(*e*) for the villeins, another, since called a Customary Court.(*f*) In the former Court the suitors were the judges; in the latter, the lord only, or his steward.(*g*) In some manors the villeins were allowed life interests; but the grants were not extended so as to admit any of their issue, in a mode similar to that in which the heirs of freemen became entitled on their ancestors' decease. Hence arose copyholds for lives. In other manors, a greater degree of liberality was shown by the lords; and on the decease of a tenant, the lord permitted his eldest son, or sometimes all the sons, or sometimes the youngest, and afterwards other relations, to succeed him by way of heirship; for which privilege, however, the payment of a fine was usually required, on the admittance of the heir to the tenancy. Frequently the course of descent of estates of freehold was chosen as the model for such inheritances; but, in many cases, dispositions the most capricious were adopted by the lord, and in time became the custom of the manor. Thus arose copyholds of inheritance. Again, *if a villein wished to part with his own parcel of land to some other of his fellows, the lord would allow him to *surrender* or yield up again the land, and then, on paying a fine, would indulgently *admit* as his tenant, on the same terms, the other, to whose use the surrender had been made. Thus arose the method, now prevalent, of conveying copyholds by *surrender* into the hands of the lord, to the use of the alienee, and the subsequent *admittance* of the latter. But by long custom and continued indulgence, that, which was at first a pure favor, gradually grew up into a right. The will of the lord, which had originated the custom, came at last to be controlled by it.(*h*) [*289]

The rise of the copyholder from a state of uncertainty to certainty of tenure, appears to have been very gradual. Britton, who wrote in the reign of Edward I,(*i*) thus describes this tenure, under the name of villeinage, "Villeinage is to hold part of the demesnes of any lord,

(*d*) 2 Black. Com. 90. (*e*) Ante, p, 98.
(*f*) 2 Watkins on Copyholds, 4, 5; 1 Scriven on Copyholds, 5, 6.
(*g*) Co. Litt. 58 a.
(*h*) 2 Black. Com. 93 et seq. 147; Wright's Tenures, 215 et seq.; 1 Scriv. Cop. 46; Garland v. Jekyll, 2 Bing. 292. (*i*) 2 Reeves's History of Eng. Law, 280.

entrusted to hold at his will by villein services, to improve for the advantage of the lord." And he adds that, "In manors of ancient demesne there were pure villeins of blood and of tenure, who might be ousted of their tenements at the will of their lord."(*k*) In the reign of Edward III, however, a case occurred in which the entry of a lord on his copyholder was adjudged lawful, *because he did not do his services*, by which he broke the custom of the manor,(*l*) which seems to show that the lord could not, at that time, have ejected his tenant [*290] without cause.(*m*) And in the reign of Edward *IV, the Judges gave to copyholders a certainty of tenure, by allowing them an action of trespass, on ejection by their lords without just cause.(*n*) "Now," says Sir Edward Coke,(*o*) "copyholders stand upon a sure ground; now they weigh not their lord's displeasure; they shake not at every sudden blast of wind; they eat, drink, and sleep securely; only having a special care of the main chance, namely, to perform carefully what duties and services soever their tenure doth exact, and custom doth require; then, let lord frown, the copyholder cares not, knowing himself safe." A copyholder, has, accordingly, now, as good a title as a freeholder; in some respects, a better; for all the transactions relating to the conveyance of copyholds, are entered into the court rolls of the manor, and thus a record is preserved of the title of all the tenants.

In pursuing our subject, let us now follow the same course as we have adopted with regard to freeholds, and consider, first, the estates which may be holden in copyhold lands; and secondly, the modes of their alienation.

(*k*) Britton, 165.

(*l*) Year Book, 43 Edw. III, 25 a.

(*m*) 4 Rep. 21 b. Mr. Hallam states that a passage in Britton, which had escaped his search, is said to confirm the doctrine, that, so long as the copyholder did continue to perform the regular stipulations of his tenure, the lord was not at liberty to divest him of his estate. 3 Hallam's Middle Ages, 261. Mr. Hallam was, perhaps, misled in his supposition by a quotation from Britton made by Lord Coke (Co. Litt. 61 a) in which the doctrine laid down by Britton as to *socmen*, is erroneously applied to copyholders. The passage from Britton, cited above, is also subsequently cited by Lord Coke, but with a pointing which spoils the sense.

(*n*) Co. Litt. 61 a.

(*o*) Co. Cop. s. 9, Tr. p. 6.

*CHAPTER I. [*291]

OF ESTATES IN COPYHOLDS.

WITH regard to the estates which may be holden in copyholds, in strict legal intendment a copyholder can but have one estate; and that is an estate at will, the smallest estate known to the law, being determinable at the will of either party. For though custom has now rendered copyholders independent of the will of their lords, yet all copyholds, properly so called, are still expressly stated, in the court rolls of manors, to be holden at the will of the lord;(*a*) and, more than this, estates in copyholds are still liable to some of the incidents of a mere estate at will. We have seen that, in ancient times, the law laid great stress on the feudal possession, or *seisin*, of lands, and that this possession could only be had by the holder of an estate of freehold, that is, an estate sufficiently important to belong to a free man.(*b*) Now copyholders in ancient times belonged to the class of villeins or bondsmen, and held, at the will of the lord, lands of which the lord himself was alone feudally possessed. In other words, the lands held by the copyholders still remained part and parcel of the lord's manor; and the freehold of these lands still continued vested in the lord; and this is the case at the present day with regard to all copyholds. The lord of the manor is actually seised of all the lands in the possession of his copyhold tenants.(*c*) He has not a mere incorporeal seignory over these, as he has over his freehold tenants, or those who hold of him lands, once part of the manor, *but which were anciently granted to freemen and their heirs.(*d*) [*292] Of all the copyholds he is the feudal possessor; and the seisin he thus has, is not without its substantial advantages. The lord having a legal estate in fee simple in the copyhold lands, possesses all the rights incident to such an estate,(*e*) controlled only by the customs of the manor, which is now the tenant's safeguard. Thus he possesses a right to all *mines* and *minerals* under the lands,(*f*) and also to all *timber* growing on the surface, even though planted by the tenant.(*g*) These rights, however, are somewhat interfered with by the rights which custom has given to the copyhold tenants; for, the lord cannot come upon the lands to open his mines, or to cut his timber, without the copyholder's leave. And hence it is that timber is so seldom to

(*a*) 1 Watk. Cop. 44, 45; 1 Scriv. Cop. 605. (*b*) Ante, pp. 22, 116.
(*c*) Watk. Descents, 51 (59, 4th ed.) (*d*) Ante, pp. 265, 266. (*e*) Ante, p. 63.
(*f*) 1 Watk. Cop. 333; 1 Scriv. Cop. 25, 508. (*g*) 1 Watk. Cop. 332; 1 Scriv. Cop. 499.

be seen upon lands subject to copyhold tenure.(*h*) Again, if a copyholder should grant a lease of his copyhold lands, beyond the term of a year, without his lord's consent, such a lease would be the cause of forfeiture to the lord, unless it were authorized by a special custom of the manor.(*i*) For, such an act would be imposing on the lord a tenant of his own lands, without the authority of custom; and custom alone is the life of all copyhold assurances.(*j*) So, a copyholder [*293] *cannot commit any waste, either voluntary, by opening mines, cutting down timber, or pulling down buildings, or permissive, by neglecting to repair. For the land, with all that is under it or on it, belongs to the lord; the tenant has nothing but a customary right to enjoy the occupation; and if he should in any way exceed this right, a cause of forfeiture to his lord would at once accrue.(*k*)

A peculiar species of copyhold tenure prevails in the north of England, and is to be found also in other parts of the kingdom, particularly within manors of the tenure of ancient demesne;(*l*) namely, a tenure by copy of court roll, but not expressed to be at the will of the lord. The lands held by this tenure are denominated customary freeholds. This tenure has been the subject of a great deal of learned discussion;(*m*) but the courts of law have now decided that, as to these lands, as well as to pure copyholds, the freehold is in the lord, and not in the tenant.(*n*) If a conjecture may be hazarded on so doubtful a subject, it would seem that these customary freeholds were originally held at the will of the lords, as well as those proper copyholds, in which the will is still expressed as the condition of tenure;(*o*)

(*h*) There is a common proverb, "The oak scorns to grow except on free land." It is certain that in Sussex and in other parts of England the boundaries of copyholds may be traced by the entire absence of trees on one side of a line, and their luxuriant growth on the other. Third Rep. of Real Property Commissioners, p. 15.

(*i*) 1 Watk. Cop. 327; 1 Scriv. Cop. 544; Doe d. Robinson v. Bonsfield, 6 Q. B. 492.

(*j*) By stat. 17 & 18 Vict. c. 83, a license to demise copyhold lands is subjected to a stamp duty of 10*s.*; but if the clear yearly value of the estate shall be expressed in the license, and shall not exceed £75, the duty is the same only as on a lease at a yearly rent equal to such yearly value under the act of the 13 & 14 Vict. c. 97. See post, "Of a term of years."

(*k*) 1 Watk. Cop. 331; 1 Scriv. Cop. 526. See Doe d. Grubb v. Earl of Burlington, 5 Barn. & Adol. 507.

(*l*) Britt. 164 b, 165 a; see ante, p. 107. (*m*) 2 Scriv. Cop. 665.

(*n*) Stephenson v. Hill, 3 Burr. 1278; Doe d. Reay v. Huntington, 4 East, 271; Doe d. Cook v. Danvers, 7 East, 299; Burrell v. Dodd, 3 Bos. & Pul. 378.

(*o*) See Bract. lib. 4, fol. 208 b, 209 a; Co. Cop. s. 32, Tr. p. 57. In Stevenson v. Hill, 3 Burr. 1278, Lord Mansfield says, that copyholders had acquired a permanent estate in their lands before these persons had done so. But he does not state where he obtained his information.

but that these tenants early acquired, by their lord's indulgence, a right *to hold their lands on performance of certain fixed services as the condition of their tenure; and the compliment [*294] now paid to the lords of other copyholds in expressing the tenure to be at their will, was, consequently, in the case of these customary freeholds, long since dropped. That the tenants have not the fee simple in themselves, appears evident from the fact, that the right to mines and timber, on the lands held by this tenure, belongs to the lord, in the same manner as in other copyholds.(*p*) Neither can the tenants generally grant leases without the lord's consent.(*q*) The lands are, moreover, said to be *parcel* of the manors, of which they are held, denoting that in law they belong, like other copyholds, to the lord of the manor, and are not merely *held of* him, like the estates of the freeholders.(*r*) In law, therefore, the estates of these tenants cannot, in respect of their lords, be regarded as any other than estates at will, though this is not now actually expressed. If there should be any customary freeholds, in which the above characteristics, or most of them, do not exist, such may with good reason be regarded as the actual freehold estates of the tenants. The tenants would then possess the rights of other freeholders in fee simple, subject only to a customary mode of alienation. That such a state of things may, and in some cases does exist, is the opinion of some very eminent lawyers.(*s*) *But a recurrence to first principles seems to show that the question, whether the freehold is in the lord or in the [*295] tenant, is to be answered, not by an appeal to learned *dicta* or conflicting decisions, but by ascertaining in each case, whether the well-known rights of freeholders, such as to cut timber and dig mines, are vested in the lord or in the tenant.

It appears then that, with regard to the lord, a copyholder is only a tenant at will. But a copyholder, who has been admitted tenant on

(*p*) Doe d. Reay v. Huntington, 4 East, 271, 273; Stephenson v. Hill, 3 Burr. 1277, arguendo.

(*q*) Doe v. Danvers, 7 East, 299, 301, 314.

(*r*) Burrell v. Dodd, 3 Bos. & Pul. 378, 381: Doe v. Danvers, 7 East, 320, 321.

(*s*) Sir Edward Coke, Co. Litt. 59 b; Sir Matthew Hale, Co. Litt. 59 b, n. (1); Sir W. Blackstone, Considerations on the Question, &c.; Sir John Leach, Bingham v. Woodgate, 1 Russ. & Mylne, 32; 1 Tamlyn, 138. Tenements within the limits of the ancient borough of Kirkby-in-Kendal, in Westmoreland, appear to be an instance; Busher, app., Thompson, resp., 4 C. B. 48. The freehold is in the tenants, and the customary mode of conveyance has always been by deed of grant or bargain and sale, without livery of seisin, lease for a year, or enrolment. Some of the Judges, however, seemed to doubt the validity of such a custom.

the court rolls of a manor, stands, with respect to other copyholders, in a similar position to a freeholder who has the seisin. The legal estate in the copyholds is said to be *in* such a person, in the same manner as the legal estate of freeholds belongs to the person who is seised. The necessary changes which are constantly occurring, of the persons, who from time to time are tenants on the rolls, form occasionally a source of considerable profit to the lords. For, by the customs of manors, on every change of tenancy, whether by death or alienation, fines of more or less amount, become payable to the lord. By the customs of some manors, the fine payable was anciently arbitrary; but in modern times, fines, even when arbitrary by custom, are restrained to two years' improved value of the land, after deducting quit rents.(*t*) Occasionally a fine is due on the change of the lord; but, in this case, the change must be by the act of God, and not by any act of the party.(*u*) The tenants on the rolls, when once admitted, hold customary estates, analogous to the estates which may be holden in freeholds. These estates of copyholders are only *quasi* freeholds; but, as nearly as the rights of the lord, and the custom of each manor, will allow, such estates possess the *same incidents [*296] as the freehold estates, of which we have already spoken. Thus there may be a copyhold estate for life; and some manors admit of no other estates, the lives being continually renewed as they drop. And in those manors in which estates of inheritance, as in fee simple and fee tail, are allowed, a grant to a man simply, without mentioning his heirs, will confer only a customary estate for his life.(*v*) But as the customs of manors, having frequently originated in mere caprice, are very various, in some manors the words "to him and his," or, "to him and his assigns," or, "to him and his sequels in right," will create a customary estate in fee simple, although the word *heirs* may not be used.(*x*)

It will be remembered that, anciently, if a grant had been made of freehold lands to B. simply, without mentioning his heirs, during the life of A., and B. had died first, the first person who entered after the decease of B., might lawfully hold the lands during the residue of the life of A.(*y*) And this general occupancy was abolished by the Statute of Frauds. But copyhold lands were never subject to any such

(*t*) 1 Scriv. Cop. 384. (*u*) 1 Watk. Cop. 285.
(*v*) Co. Cop. s. 49, Tr. p. 114. See ante, pp. 18, 120.
(*x*) 1 Watk. Cop. 109. (*y*) Ante, p. 20.

law.(z) For, the seisin or feudal possession of all such lands, belongs, as we have seen,(a) to the lord of the manor, subject to the customary rights of occupation, belonging to his tenants. In the case of copyholds, therefore, the lord of the manor after the decease of B., would, until lately, have been entitled to hold the lands during the residue of A.'s life; and the Statute of Frauds had no application to such a case.(b) But now, by the recent act for *the amendment of the laws with respect to wills,(c) the testamentary power is extended to copyhold or customary estates *pur autre vie*,(d) and the same provision, as to the application of the estate by the executors or administrators of the grantee, as is contained with reference to freeholds,(e) is extended also to customary and copyhold estates.(f) The grant of an estate *pur autre vie* in copyholds, may, however, be extended, by express words, to the heirs of the grantee.(g) And, in this event, the heir will, in case of intestacy, be entitled to hold during the residue of the life of the *cestui que vie*, subject to the debts of his ancestor the grantee.(h) [*297]

An estate tail in copyholds stands upon a peculiar footing, and has a history of its own, which we shall now endeavor to give.(i) This estate, it will be remembered, is an estate given to a man and the heirs of his body. With regard to freeholds, we have seen(k) that an estate given to a man and the heirs of his body, was, like all other estates, at first inalienable; so that no act which the tenant could do could bar his issue, or expectant heirs, of their inheritance. But in an early period of our history, a right of alienation appears gradually to have grown up, empowering every freeholder to whose estate there was an expectant heir, to disinherit such heir, by gift or sale of the lands. A man, to whom lands had been granted to hold to him and the heirs of *his body, was accordingly enabled to alien, the moment a child or expectant heir of his body was born to him; and this right of alienation at last extended to the possibility of reverter belonging to the lord, as well as to the expectancy of the heir;(l) [*298]

(z) Doe d. Foster v. Scott, 4 Barn. & Cress. 706; 7 Dow. & Ryl. 190.

(a) Ante, p. 291. (b) 1 Scriv. Cop. 63, 108; 1 Watk. Cop. 302.

(c) Stat. 7 Will. IV, & 1 Vict. c. 26. (d) Sect. 3.

(e) Ante, p. 21. (f) Sect. 6. (g) 1 Scriv. Cop. 64; 1 Watk. Cop. 303.

(h) Stat. 7 Will. IV, & 1 Vict. c. 26, s. 6.

(i) The attempt here made to explain this subject is grounded on the authorities and reasoning of Mr. Serjt. Scriven. (1 Scriv. Cop. 67 et seq.) Mr. Watkins sets out with right principles, but seems strangely to stumble on the wrong conclusion. (1 Watk. Cop. chap. 4.)

(k) Ante, p. 31 et seq. (l) Ante, p. 37.

till at length it was so well established, as to require an act of Parliament for its abolition. The statute *De donis*(*m*) accordingly restrained all alienation, by tenants, of lands which had been granted to themselves and the heirs of their bodies; so that the lands might not fail to descend to their issue after their death, or to revert to the donors or their heirs, if issue should fail. This statute was passed avowedly to restrain that right of alienation, of the prior existence of which, the statute itself is the best proof. And this right, in respect of fee simple estates, was soon afterwards acknowledged and confirmed by the statute of *Quia emptores*.(*n*) But, during all this period, copyholders were in a very different state from the freemen, who were the objects of the above statutes.(*o*) Copyholders were most of them mere slaves, tilling the soil of their lords' demesne, and holding their little tenements at his will. The right of an ancestor to bind his heir,(*p*) with which right, as we have seen,(*q*) the power to alienate freeholds commenced, never belonged to a copyholder.(*r*) And, till very recently, copyhold lands in fee simple descended to the customary heir, quite unaffected by any bond debts of his ancestor, by which the heir of his freehold estates might have been bound.(*s*) It would [*299] be *absurd, therefore, to suppose that the right of alienation of copyhold estates, arose in connection with the rights of freeholders. The two classes were then quite distinct. The one were poor and neglected, the other powerful and consequently protected.(*t*) The one held their tenements at the will of their lords; the other alienated in spite of them. The one were subject to the whims and caprices of their individual masters; the other were governed only by the general laws and customs of the realm.

Now, with regard to an estate given to a copyholder and the heirs of his body, the lords of different manors appear to have acted dif-

(*m*) 13 Edw. I, c. 1, ante, p. 38. (*n*) 18 Edw. I, c. 1.

(*o*) In the preamble of the statute *De donis*, the tenants are spoken of as *feoffees*, and as able by deed and *feoffment* to bar their donors, showing that freeholders only were intended. And in the statute of *Quia emptores* freemen are expressly mentioned.

(*p*) Ante, p. 63. (*q*) Ante, pp. 33–35.

(*r*) Eylet v. Lane and Pers, Cro. Eliz. 380. (*s*) 4 Rep. 22 a.

(*t*) The famous provision of Magna Charta, c. 29,—"Nullus *liber* homo capiatur vel imprisonetur aut dissesiatur de aliquo libero tenemento suo, &c., nisi per legale judicium parium suorum vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum vel justiciam,"—whatever classes of persons it may have been subsequently construed to include—plainly points to a distinction then existing between free and not free. Why else should the word *liber* have been used at all?

ferently,—some of them permitting alienation on issue being born, and others forbidding it altogether. And from this difference appears to have arisen the division of manors, in regard to estates tail, into two classes; namely, those in which there is no custom to entail, and those in which such a custom exists. In manors in which there is no custom to entail, a gift of copyholds to a man and the heirs of his body, will give him an estate analogous to the fee simple conditional, which a freeholder would have acquired under such a gift, before the passing of the statute *De donis.*(*u*) Before he has issue, he will not be able to alien; but after issue are born to him, he may alienate at his pleasure.(*v*) In this case, the right of alienation *appears to be of a very ancient origin, having arisen from the liberality [*300] of the lord in permitting his tenants to stand on the same footing, in this respect, as freeholders then stood.

But, as to those manors in which the alienation of the estate in question was not allowed, the history appears somewhat different. The estate being inalienable, descended, of course, from father to son, according to the customary line of descent. A perpetual entail was thus set up, and a custom to entail established in the manor. But, in process of time, the original strictness of the lord defeated his own end. For, the evils of such an entail, which had been felt, as to freeholds, after the passing of the statute *De donis,*(*x*) became felt also as to copyholds.(*y*) And, as the copyholder advanced in importance, different devices were resorted to for the purpose of effecting a bar to the entail; and, in different manors, different means were held sufficient for this purpose. In some, a customary recovery was suffered, in analogy to the common recovery, by which an entail of freeholds had been cut off.(*z*) In others, the same effect was produced by a preconcerted forfeiture of the lands by the tenant, followed by a regrant from the lord of an estate in fee simple. And in others, a conveyance by surrender, the ordinary means, became sufficient for the purpose; and the presumption was that a surrender would bar the estate tail until a contrary custom was shown.(*a*) Thus it happened that in all manors, in which there existed a custom to entail, a right grew up, empowering the tenant in tail, by some means or other, at

(*u*) Ante, pp. 32, 38; Doe d. Blesard v. Simpson, 4 New Cases, 333; 3 Man. & Gran. 929. (*v*) Doe d. Spencer v. Clark, 5 Barn. & Ald. 458.
(*x*) Ante, p. 38. (*y*) 1 Scriv. Cop. 70. (*z*) Ante, p. 41.
(*a*) Goold v. White, 1 Kay, 683.

once to alienate the lands. He thus ultimately became placed in a better position than the tenant to him and the heirs of his body, in a manor where alienation was originally *permitted. For, such [*301] a tenant can now only alienate, after he has had issue. But a tenant in tail, where the custom to entail exists, need not wait for any issue, but may at once destroy the fetters, by which his estate has been attempted to be bound.

The beneficial enactment before referred to,(*b*) by which fines and common recoveries of freeholds were abolished, also contains provisions applicable to entails of copyholds. Instead of the cumbrous machinery of a customary recovery, or a forfeiture and re-grant, it substitutes, in every case, a simple conveyance by surrender,(*c*) the ordinary means for conveying a customary estate in fee simple. When the estate tail is in remainder, the necessary consent of the protector(*d*) may be given, either by deed, to be entered on the court rolls of the manor,(*e*) or by the concurrence of the protector in the surrender, in which case the memorandum or entry of the surrender must expressly state that such consent has been given.(*f*)

The same free and ample power of alienation, which belongs to an estate in fee simple in freehold lands, appertains also to the like estate in copyholds. The liberty of alienation *inter vivos* appears, as to copyholds, to have had little if any precedence, in point of time, over the liberty of alienation by will. Both were, no doubt, at first an indulgence, which subsequently ripened into a right. And these rights of voluntary alienation long outstripped the liability to involuntary alienation for the payment of the debts of the tenant; for, till the year 1833, copyhold lands of deceased debtors were under no liability to their creditors, even where the *heirs of the debtor [*302] were expressly bound.(*g*) And the crown had no further privilege than any other creditor. But now all estates in fee simple, whether freehold, customary, or copyhold, are rendered liable to the payment of all the just debts of the deceased tenant.(*h*) Creditors who had obtained judgments against their debtors were also, till very recently, unable to take any part of the copyhold lands of their debtors under the writ of *elegit*.(*i*) But the recent act, by which the remedies of judgment creditors have been extended,(*k*) enables the

(*b*) Stat. 3 & 4 Will. IV, c. 74; ante, p. 42.
(*c*) Sect. 50.
(*d*) See ante, p. 47.
(*e*) Sect. 51.
(*f*) Sect. 52.
(*g*) 4 Rep. 22 a; 1 Watk. Copyholds, 140.
(*h*) Stat. 3 & 4 Will. IV, c. 104.
(*i*) See ante, p. 67; 1 Scriv. Copyholds, 60.
(*k*) Stat. 1 & 2 Vict. c. 110, s. 11.

sheriff, under the writ of *elegit*, to deliver execution of copyhold or customary, as well as of freehold lands; and purchasers of copyholds are, accordingly, now bound by all judgments, which have been entered up against their vendors. But if any purchaser should have had no notice of any judgment, it would seem that he is protected by the clause in a subsequent act,(*l*) which provides, that, as to purchasers without notice, no judgment shall bind any lands, otherwise than it would have bound such purchasers under the old law.

Copyholds are equally liable, with freeholds, to involuntary alienation on the bankruptcy or insolvency of the tenant. In bankruptcy, the copyhold estate is disposed of by the Court of Bankruptcy, by deed indented and enrolled on the court rolls of the manor; and by the same deed some person is authorized, on behalf of the court, to surrender the same, for the purpose of any purchaser being admitted thereto.(*m*) In insolvency, a *power of disposition is vested [*303] in the general assignee of the creditors.(*n*) By the exercise of these powers the fine, which would have been payable to the lord had the assignees been admitted tenants on the rolls, is effectually avoided. But the purchaser of course pays a fine on his admittance.

The descent of an estate in fee simple in copyholds, is governed by the custom of descent which may happen to prevail in the manor; but, subject to any such custom, the provisions contained in the recent act for the amendment of the law of inheritance,(*o*) apply to copyhold as well as freehold hereditaments, whatever be the customary course of their descent. As, in the case of freeholds, the lands of a person dying intestate descend at once to his heir,(*p*) so the heir of a copyholder becomes, immediately on the decease of his ancestor, tenant of the lands, and may exercise any act of ownership before the ceremony of his admittance has taken place.(*q*) But as between himself and the lord, he is not completely a tenant till he has been admitted.

The tenure of an estate in fee simple in copyholds involves, like the

(*l*) Stat. 2 & 3 Vict. c. 11, s. 5; ante, pp. 69, 70.

(*m*) Stats. 12 & 13 Vict. c. 106, ss. 209, 210. And as to estates tail of bankrupt copyholders, see stats. 3 & 4 Will. IV, c. 74, ss. 55–66; 12 and 13 Vict. c. 8, 106, 208.

(*n*) Stats. 1 & 2 Vict. c. 110, s. 47. See, however, stats. 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96.

(*o*) Stat. 3 & 4 Will. IV, c. 106. (*p*) Ante, p. 75.

(*q*) 1 Scriv. Cop. 357; Right d. Taylor v. Banks, 3 Bar. & Ad. 664; King v. Turner, 1 My. & K. 456; Doe d. Perry v. Wilson, 5 Ad. & Ell. 321.

tenure of freeholds, an oath of fealty from the tenant,(*r*) together with the suit to the customary court of the manor. Escheat to the lord on failure of heirs, or on corruption of blood by attainder,(*s*) is also an incident of copyhold tenure; but the lord of a copyholder has the advantage over the lord of a freeholder in this respect, that, whilst [*304] freehold lands in fee simple *are forfeited to the crown by the treason of the tenant, the copyholds of a traitor escheat to the lord of the manor of which they are held.(*t*) Rents(*u*) also of small amount are not unfrequent incidents of the tenure of copyhold estates. And reliefs (*x*) may, by special custom, be payable by the heir.(*y*) The other incidents of copyhold tenure depend on the arbitrary customs of each particular manor; for, this tenure, as we have seen,(*z*) escaped the destruction in which the tenures of all freehold lands (except free and common socage, and frankalmoign), were involved by the act of 12 Car. II, c. 24.

A curious incident to be met with in the tenure of some copyhold estates, is the right of the lord, on the death of a tenant, to seize the tenant's best beast, or other chattel, under the name of a heriot.(*a*) Heriots appear to have been introduced into England by the Danes. The heriot of a military tenant were his arms and habiliments of war, which belonged to the lord, for the purpose of equipping his successor. And in analogy to this feudal custom, the lords of manors usually expected that the best beast or other chattel of each tenant, whether he were a freeman or a villein, should on his decease be left to them.(*b*) This legacy to the lord was usually the first bequest in the tenant's will;(*c*) and, when the tenant died intestate, the heriot of the lord was to be taken in the first place out of his effects,(*d*) [*305] unless, indeed, as not unfrequently happened, *the lord seized upon the whole of the goods.(*e*) To the goods of the villein he was indeed entitled, the villein himself being his lord's property. And from the difference between the two classes of freemen and villein, has perhaps arisen the circumstance, that, whilst heriots from free-

(*r*) 2 Scriv. Cop. 732.

(*s*) See ante, pp. 102 et seq.; Rex v. Willes, 3 B. & Ald. 511.

(*t*) Lord Cornwallis's case, 2 Ventr. 38; 1 Watk. Cop. 340; 1 Scriv. Cop. 522.

(*u*) Ante, p. 101. (*x*) Ante, pp. 97, 99, 101. (*y*) 1 Scriv. Cop. 436.

(*z*) Ante, p. 100. (*a*) 1 Scriv. Cop. 437 et seq. (*b*) Bract. 86 a; 2 Black. Com. 423, 424.

(*c*) Bract. 60 a; Fleta, lib. 2, cap. 57. (*d*) Bract. 60 b; Fleta, ubi supra.

(*e*) See Articuli observanda per provisionem episcoporum Angliæ, s. 25, Matth. Paris, 951; Additamenta, p. 201, (Wats's ed. Lond. 1640.)

holders seldom occur,(*f*) heriots from copyholders remain to this day, in many manors, a badge of the ancient servility of the tenure. But the right of the lord is now confined to such a chattel as the custom of the manor, grown into a law, will enable him to take.(*g*) The kind of chattel which may be taken for a heriot varies in different manors, and in some cases the heriot consists merely of a money payment.

All kinds of estates in copyholds, as well as in freeholds, may be held in joint tenancy, or in common; and an illustration of the unity of a joint tenancy occurs in the fact, that the admission, on the court rolls of a manor, of one joint tenant, is the admission of all his companions; and on the decease of any of them, the survivors or survivor, as they take no new estate, require no new admittance.(*h*) The jurisdiction of the Court of Chancery in enforcing partitions between joint tenants and tenants in common, did not formerly extend to copyhold lands.(*i*) But by a recent enactment,(*j*) this *jurisdiction has [*306] been extended to the partition of copyholds as well as freeholds.

The rights of lords of manors to fines and heriots, rents, reliefs, and customary services, together with the lord's interests in the timber growing on copyhold lands, have been found productive of considerable inconvenience to copyhold tenants, without any sufficient corresponding advantage to the lords. An act of Parliament (*k*) was accordingly passed a few years ago, by which the commutation of these rights and interests, together with the lord's rights in mines and minerals if expressly agreed on, has been greatly facilitated. The machinery of the act is, in many respects, similar to that by which the commutation of tithes was effected. The rights and interests of the lord are changed, by the commutation, into a rent charge varying or not, as may be agreed on, with the price of corn, together with a small fixed fine on death or alienation, in no case exceeding the sum of five shillings.(*l*) By the same act, facilities were also afforded for the

(*f*) By the custom of the manor of South Tawton, otherwise Itton, in the county of Devon, heriots are still due from the freeholders of the manor: Damerell v. Protheroe, 10 Q. B. 20; and in Sussex and some parts of Surrey heriots from freeholders are not unfrequent.

(*g*) 2 Watk. Cop. 129. (*h*) 1 Watk. Cop. 272, 277. (*i*) Jope v. Morshead, 6 Beav. 21.

(*j*) Stat. 4 & 5 Vict. c. 35, s. 85. See also stat. 13 & 14 Vict. c. 60, s. 30.

(*k*) Stat. 4 & 5 Vict. c. 35; amended by stat. 6 & 7 Vict. c. 23, further amended and explained by stat. 7 & 8 Vict. c. 55, continued by stats. 10 & 11 Vict. c. 101, and 14 & 15 Vict. c. 53, extended by stat. 15 & 16 Vict. c. 51, explained and amended by stat. 16 & 17 Vict. c. 57, and further continued by stat. 16 & 17 Vict. c. 124.

(*l*) Stats. 4 & 5 Vict. c. 35, s. 14; 15 & 16 Vict. c. 51, s. 41.

enfranchisement of copyhold lands, or the conveyance of the freehold of such lands from the lord to the tenant, whereby the copyhold tenure, with all its incidents, is forever destroyed. The enfranchisement of copyholds was authorized to be made, either in consideration of money to be paid to the lord, or of an annual rent charge varying with the price of corn, issuing out of the lands enfranchised, or in consideration of the conveyance of other lands.(*m*) Provision was also made for [*307] charging the money, paid for the *enfranchisement, on the lands enfranchised, by way of mortgage.(*n*) The principal object of these enactments, was to provide for the case of the lands being in settlement, or vested in parties not otherwise capable of at once entering into a complete arrangement; but no provision was made for compulsory enfranchisement. Recently, however, an act has been passed to make the enfranchisement of copyholds compulsory at the instance either of the tenant or of the lord.(*o*) If the enfranchisement be made at the instance of the tenant, the compensation is to be a gross sum of money, to be paid at the time of the completion of the enfranchisement, or in certain cases to be charged on the land by way of mortgage; and where the enfranchisement is effected at the instance of the lord, the compensation is to be an annual rent charge, to be issuing out of the lands enfranchised, subject to the right of the parties, with the sanction of the commissioners appointed under the act, to agree that the compensation shall be either a gross sum or a yearly rent charge, or a conveyance of land to be settled to the same uses as the manor is settled.(*q*) It is also provided, that in any enfranchisement to be hereafter effected under the before-mentioned act, it shall not be imperative to make the enfranchisement rent charge variable with the price of grain, but the same may, at the option of the parties or at the discretion of the commissioners, as the case may require, be fixed in money or be made variable as aforesaid.(*r*) The act also provides for the extinguishment of heriots due by custom from tenants of freeholds and customary freeholds.(*s*) But no enfranchisement under this act is to affect the estate or rights of any lord or tenant in any mines or minerals within or under the lands enfranchised or any [*308] other lands.(*t*) And nothing *therein contained is to interfere with any enfranchisement which may be made irrespective of

(*m*) Stats. 4 & 5 Vict. c. 35, ss. 56, 59, 73, 74, 75; 6 & 7 Vict. c. 23; 7 & 8 Vict. c. 55, s. 5.

(*n*) Stats. 4 & 5 Vict. c. 35, ss. 70, 71, 72; 7 & 8 Vict. c. 55, s. 4.

(*o*) Stat. 15 & 16 Vict. c. 51. (*q*) Sect. 7. (*r*) Sect. 41. (*s*) Sect. 27.

(*t*) Sect. 48.

the act, where the parties competent to do so shall agree on such enfranchisement.(*u*) Where all parties are *sui juris* and agree to an enfranchisement, it may at any time be made by a simple conveyance of the fee simple from the lord to his tenant.(*x*)

---

*CHAPTER II. [*309]

OF THE ALIENATION OF COPYHOLDS.

THE mode in which the alienation of copyholds is at present effected, so far at least as relates to transactions *inter vivos*, still retains much of the simplicity, as well as the inconvenience, of the original method in which the alienation of these lands was first allowed to take place. The copyholder surrenders the lands into the hands of his lord, who thereupon admits the alienee. For the purpose of effecting these admissions, and of informing the lord of the different events happening within his manor, as well as for settling disputes, it was formerly necessary that his Customary Court, to which all the copyholders were suitors, should from time to time be held. At this Court, the copyholders present were called the homage, on account of the ceremony of *homage* which they were all anciently bound to perform to their lord.(*a*) In order to form a Court, it was formerly necessary that two copyholders at least should be present.(*b*) But, in modern times, the holding of Courts having degenerated into little more than an inconvenient formality, it has been provided by a recent act, that Customary Courts may be holden without the presence of any copyholder; but no proclamation made at any such Court is to affect the title or interest of any person not present, unless notice thereof shall be duly served on him within one month;(*c*) and it is also provided, that where by the custom of any manor, the lord is authorized, with the consent of the homage, to grant any common or waste *lands of the manor, the Court must be duly summoned and holden as before [*310] the act.(*d*) No Court can lawfully be held out of the manor; but by immemorial custom, Courts for several manors may be held together within one of them.(*e*) In order that the transactions at the Customary Court may be preserved, a book is provided, in which a correct account of all the proceedings is entered by a person duly authorized.

(*u*) Sect. 55. (*x*) 1 Watk. Cop. 362; 1 Scriv. Cop. 653.
(*a*) Ante, p. 97. (*b*) 1 Scriv. Cop. 289. (*c*) Stat. 4 & 5 Vict. c. 35, s. 86.
(*d*) Sect. 91. (*e*) 1 Scriv. Cop. 6.

his book, or a series of them, forms the court rolls of the manor. The person who makes the entries is the steward; and the court rolls are kept by him, but subject to the right of the tenants to inspect them.(*f*) This officer also usually presides at the Courts of the manor.

Before adverting to alienation by surrender and admittance, it will be proper to mention, that, whenever any lands, which have been demisable time out of mind by copy of court roll, fall into the lands of the lord, he is at liberty to grant them to be held by copy at his will, according to the custom of the manor, under the usual services.(*g*) These grants may be made by the lord for the time being, whatever be the extent of his interest,(*h*) so only that it be lawful: for instance by a tenant for a term of life or years. But if the lord, instead of granting the lands by copy, should once make any conveyance of them at the common law, though it were only a lease for years, his power to grant by copy would forever be destroyed.(*i*) The steward or his deputy, if duly authorized so to do, may also make grants, as well as the lord, whose servant he is.(*j*) It was formerly doubtful whether the steward or his deputy could make grants of copyholds when out of the manor.(*k*) But *by a recent act,(*l*) to which we have [*311] before had occasion to refer, it is provided that the lord of any manor, or the steward, or deputy steward, may grant at any time, and at any place, either within or out of the manor, any lands parcel of the manor, to be held by copy of court roll, or according to the custom of the manor, which such lord shall for the time being be authorized and empowered to grant out to be held as aforesaid; so that such lands be granted for such estate, and to such person only, as the lord, steward, or deputy, shall be authorized or empowered to grant the same.

When a copyholder is desirous of disposing of his lands, the usual method of alienation is by a surrender of the lands into the hands of the lord (usually through the medium of his steward), to the use of the alienee and his heirs, or for any other customary estate which it may be wished to bestow. This surrender generally takes place by the symbolical delivery of a rod, by the tenant to the steward. It

(*f*) Ibid. 587, 588. (*g*) 1 Watk. Cop. 23; 1 Scriv. Cop. 111.
(*h*) Doe d. Rayer v. Strickland, 2 Q. B. 792. (*i*) 1 Watk. Cop. 37.
(*j*) Ibid. 29. (*k*) Ibid. 30. (*l*) Stat. 4 & 5 Vict. c. 35, s. 87.

may be made either in or out of Court. If made in Court, it is of course entered on the court rolls, together with the other proceedings; and a copy of so much of the roll as relates to such surrender is made by the steward, signed by him, and stamped like a purchase deed; it is then given to the purchaser as a muniment of his title.(*m*) If the surrender should be made out of Court, a memorandum of the transaction, signed by the parties and the steward, is made in writing, and duly stamped as before.(*n*) In *order to give effect to a surrender made out of Court, it was formerly necessary that due [*312] mention, or *presentment*, of the transaction, should be made by the suitors or homage assembled at the next, or, by special custom, at some other subsequent Court.(*o*) And in this manner an entry of the surrender appeared on the court rolls, the steward entering the presentment as part of the business of the Court. But by the recent act, it is now provided that surrenders, copies of which may be delivered to the lord, his steward, or deputy steward, shall be forthwith entered on the court rolls; which entry is to be deemed to be an entry made in pursuance of a presentment by the homage.(*p*) So that in this case, the ceremony of presentment is now dispensed with. When the surrender has been made, the surrenderor still continues tenant to the lord, until the admittance of the surrenderee. The surrenderee acquires by the surrender merely an inchoate right, to be perfected by admittance.(*q*) This right was formerly inalienable at law, even by will, until rendered devisable by the new statute for the amendment of the laws with respect to wills;(*r*) but, like a possibility in the case of freeholds, it may always be released, by deed, to the tenant of the lands.(*s*)

A surrender of copyholds may be made by a man to the use of his wife, for such a surrender is not a direct conveyance, but operates only

(*m*) A form of such a copy of court roll will be found in Appendix (E).

(*n*) By stats. 55 Geo. III, c. 184, and 13 & 14 Vict. c. 97, the stamp duty on the memorandum of a surrender if made out of court, or on the copy of court roll if made in court, is the same as on the sale or mortgage of a freehold estate; but if not made on a sale or mortgage, the duty is 1*l.*, where the clear yearly value exceeds that sum, and 5*s.* when it does not, with a further progressive duty of 10*s.* in the one case, and 5*s.* in the other.

(*o*) 1 Watk. Cop. 79; 1 Scriv. Cop. 277. (*p*) Stat. 4 & 5 Vict. c. 35, s. 89.

(*q*) Doe d. Tofield v. Tofield, 11 East, 246; Rex v. Dame Jane St. John Mildmay, 5 B. & Ad. 254; Doe d. Winder v. Lawes, 7 Ad. & E. 195.

(*r*) 7 Will. IV, & 1 Vict. c. 26, s. 3.

(*s*) Kite and Queinton's case, 4 Rep. 25 a; Co. Litt. 60 a.

through the instrumentality of the lord.(*t*) And a valid surrender may at any time be made of the lands of a married woman, by her [*313] *husband and herself; she being on such surrender separately examined as to her free consent, by the steward or his deputy.(*u*)

When the surrender has been made, the surrenderee has, at any time, a right to procure *admittance* to the lands surrendered to his use; and, on such admittance, he becomes at once tenant to the lord, and is bound to pay him the customary fine. This admittance is usually taken immediately;(*v*) but, if obtained at any future time, it will relate back to the surrender; so that, if the surrenderor should, subsequently to the surrender, have surrendered to any other person, the admittance of the former surrenderee, even though it should be subsequent to the admittance of the latter, will completely displace his estate.(*w*) Formerly a steward was unable to admit tenants out of a manor;(*x*) but, by the recent act, the lord, his steward, or deputy, may admit at any time, and at any place, either within or out of the manor, and without holding a Court; and the admission is rendered valid without any presentment of the surrender, in pursuance of which, admission may have been granted.(*y*)

The alienation of copyholds by will was formerly effected in a similar manner to alienation *inter vivos*. It was necessary that the tenant [*314] who wished to devise his *estate should first make a surrender of it to the use of his will. His will then formed part of the surrender, and no particular form of execution or attestation was necessary. The devisee, on the decease of his testator, was, until admittance, in the same position as a surrenderee.(*z*) By a statute of Geo. III,(*a*) a devise of copyholds, without any surrender to the use of the will, was rendered as valid as if a surrender had been made.(*b*)

(*t*) Co. Cop. s. 35; Tracts, p. 79. (*u*) 1 Watk. Cop. 63. (*v*) See Appendix (E).
(*w*) 1 Watk. Cop. 103. (*x*) Doe d. Leach v. Whittaker, 5 B. & Ad. 409, 435.
(*y*) Stat. 4 & 5 Vict. c. 35, ss. 88, 90. By stat. 13 & 14 Vict. c. 97, the stamp duty on the memorandum of admittance if made out of court, or on the copy of court roll of the admittance if made in court, is now reduced to half-a-crown on a sale or mortgage, with half-a-crown progressive duty; but in other cases the old duty charged by the stat. 55 Geo. III, c. 184, is still payable, namely 1*l.*, when the clear yearly value exceeds that sum, and 5*s.* when it does not, though the progressive duty is now reduced to 10*s.* in the one case, and 5*s.* in the other.
(*z*) Wainewright v. Elwell, 1 Mad. 627; Phillips v. Phillips, 1 My. & K. 649, 664.
(*a*) 55 Geo. III, c. 192, 12th July, 1815.
(*b*) Doe d. Nethercote v. Bartle, 5 B. & Ald. 492.

The recent act for the amendment of the laws with respect to wills, requires that wills of copyhold lands should be executed and attested in the same manner as wills of freeholds.(*c*) But a surrender to the use of the will is still unnecessary; and a surrenderee, or devisee, who has not been admitted, is now empowered to devise his interest.(*d*) Formerly, the devisee under a will was accustomed, at the next Customary Court held after the decease of his testator, to bring the will into Court; and a presentment was then made of the decease of the testator, and of so much of his will as related to the devise. After this presentment the devisee was admitted, according to the tenor of the will. But under the recent act for the improvement of copyhold tenure, the mere delivery to the lord, or his steward, or deputy steward, of a copy of the will, is sufficient to authorize its entry on the court rolls, without the necessity of any presentment; and the lord, or his steward or deputy steward, may admit the devisee at once, without holding any Court for the purpose.(*e*)

Sometimes, on the decease of a tenant, no person comes in to be admitted as his heir or devisee. In this *case the lord, after [*315] making due proclamation at three consecutive Courts of the manor for any person having right to the premises to claim the same and be admitted thereto, is entitled to seize the lands into his own hands *quousque* as it is called, that is, *until* some person claims admittance; (*f*) and by the special custom of some manors, he is entitled to seize the lands absolutely. But as this right of the lord might be very prejudicial to infants, married women, and lunatics or idiots entitled to admittance to any copyhold lands, in consequence of their inability to appear, special provision has been made by act of Parliament in their behalf.(*g*) Such persons are accordingly authorized to appear, either in person, or by their guardian, attorney or committee, as the case may be;(*h*) and in default of such appearance, the lord or his steward is empowered to appoint any fit person to be attorney for that purpose only, and by such attorney to admit every such infant, married woman, lunatic or idiot, and to impose the proper fine.(*i*) If

(*c*) Stat. 7 Will. IV, & 1 Vict. c. 26, ss. 2, 3, 4, 5, 9; see ante, p. 168.

(*d*) Sect. 3. (*e*) Stat. 4 & 5 Vict. c. 35, ss. 88, 89, 90.

(*f*) 1 Watk. Cop. 234; 1 Scriv. Cop. 355; Doe d. Bover v. Trueman, 1 Barn. & Adol. 736.

(*g*) Stats. 11 Geo. IV, & 1 Will. IV, c. 65; and 16 & 17 Vict. c. 70, s. 108 et seq.

(*h*) Stats. 11 Geo. IV, & 1 Will. IV, c. 65, ss, 3, 4; 16 & 17 Vict. c. 70, s. 108.

(*i*) Stats. 11 Geo. IV, & 1 Will. IV, c. 65, s. 5; 16 & 17 Vict. c. 70, ss. 108, 109.

the fine be not paid, the lord may enter and receive the rents till it be satisfied out of them;(*k*) and if the guardian of any infant, the husband of any married woman, or the committee of any lunatic or idiot, should pay the fine, he will be entitled to a like privilege.(*l*) But no absolute forfeiture of the lands is to be incurred by the neglect or refusal of any infant, married woman, lunatic or idiot, to come in and be admitted, or for their omission, denial, or refusal to pay the fine imposed on their admittance.(*m*)

[*316] *Although mention has been made of surrenders *to the use* of the surrenderee, it must not therefore be supposed that the Statute of Uses(*n*) has any application to copyhold lands. This statute relates exclusively to freeholds. The seisin or feudal possession of all copyhold land ever remains, as we have seen,(*o*) vested in the lord of the manor. Notwithstanding that custom has given to the copyholder the enjoyment of the lands, they still remain, in contemplation of law, the lord's freehold. The copyholder cannot, therefore, simply by means of a surrender to his use from a former copyholder, be deemed, in the words of the Statute of Uses, in lawful seisin for such estate as he has in the use; for, the estate of the surrenderor is customary only, and the estate of the surrenderee cannot, consequently, be greater. Custom, however, has now rendered the title of the copyholder quite independent of that of his lord. When a surrender of copyholds is made, into the hands of the lord, *to the use* of any person, the lord is now merely an instrument for carrying the intended alienation into effect; and the title of the lord, so that he be lord *de facto*, is quite immaterial to the validity either of the surrender or of the subsequent admittance of the surrenderee.(*p*) But if a surrender should be made by one person to the use of another, *upon trust* for a third, the Court of Chancery would exercise the same jurisdiction over the surrenderee, in compelling him to perform the trust, as it would in the case of freeholds vested in a trustee. And when copyhold lands form the subject of settlement, the usual plan is to surrender them to the use of trustees, as joint tenants of a customary

(*k*) Stats. 11 Geo. IV, & 1 Will. IV, c. 65, ss. 6, 7; 16 & 17 Vict. c. 70, s. 110.

(*l*) Stats. 11 Geo. IV, & 1 Will. IV, c. 65, s. 8; 16 & 17 Vict. c. 70, s. 111.

(*m*) Stats. 11 Geo. IV, & 1 Will. IV, c. 65, s. 9; 16 & 17 Vict. c. 70, s. 112. See Doe d. Twining v. Muscott, 12 Mee. & Wels. 832, 842; Dimes v. Grand Junction Canal Company, 9 Q. B. 469, 510.

(*n*) Stat. 27 Hen. VIII, c. 10; ante, p. 131.

(*o*) Ante, p. 291.

(*p*) 1 Watk. Cop. 74.

estate in fee simple, upon such trusts as will effect, in equity, the settlement intended. *The trustees thus become the legal copyhold [*317] tenants of the lord, and account for the rents and profits to the persons beneficially entitled. The equitable estates which are thus created, are of a similar nature to the equitable estates in freeholds, of which we have already spoken;(q) and a trust for the separate use of a married woman may be created, as well out of copyhold as out of freehold lands.(r) An equitable estate tail in copyholds may be barred by deed, in the same manner in every respect as if the lands had been of freehold tenure.(s) But the deed, instead of being inrolled in the Court of Chancery,(t) must be entered on the court rolls of the manor.(u) And if there be a protector, and he consent to the disposition by a distinct deed, such deed must be executed by him either on, or any time before the day on which the deed barring the entail is executed; and the deed of consent must also be entered on the court rolls.(x)

As the owner of an equitable estate has from the nature of his estate, no legal right to the lands, he is not himself a copyholder. He is not a tenant to the lord: this position is filled by his trustee. The trustee, therefore, is admitted, and may surrender; but the cestui que trust cannot adopt these means of disposing of his equitable interest.(y) To this general rule, however, there have been admitted, for convenience sake, two exceptions. The first is that of a tenant in tail whose estate is merely equitable: by the act for the abolition of fines and recoveries,(z) the tenant of a merely equitable estate tail is empowered to bar the entail, either by deed in the manner above described, or by surrender in the same *manner as if his estate [*318] were legal.(a) The second exception relates to married women, it being provided by the same act(b) that whenever a husband and wife shall surrender any copyhold lands in which she alone, or she and her husband in her right, may have any equitable estate or interest, the wife shall be separately examined in the same manner as she would have been, had her estate or interest been at law instead of in equity merely;(c) and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders previously made of lands

(q) Ante, p. 135 et seq. (r) See ante, pp. 182, 183. (s) See ante, pp. 43, 46 et seq.
(t) Stat. 3 & 4 Will. IV, c. 74, s. 54. (u) Sect. 53. (x) Ibid.
(y) 1 Scriv. Cop. 262. (z) Stat. 3 & 4 Will. IV, c. 74, s. 50.
(a) See ante, p. 301. (b) Sect. 90. (c) See ante, p. 312.

similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are thereby declared to be good and valid. But these methods of conveyance, though tolerated by the law, are not in accordance with principle; for an equitable estate is, strictly speaking, an estate in the contemplation of equity only, and has no existence anywhere else. As, therefore, an equitable estate tail in copyholds may properly be barred by a deed entered on the court rolls of the manor, so any equitable estate or interest in copyholds belonging to a married woman is more properly conveyed by a deed, executed with her husband's concurrence, and *acknowledged* by her in the same manner as if the lands were freehold.(*d*) And the act for the abolition of fines and recoveries, by which this mode of conveyance is authorized, does not require that such a deed should be entered on the court rolls.

Copyhold estates admit of remainders analogous to those which may be created in estates of freehold.(*e*) And when a surrender or devise is made to the use of any person for life, with remainders over, the admission of the tenant for life, is the admission of all persons [*319] *having estates in remainder, unless there be in the manor a special custom to the contrary.(*f*) A vested estate in remainder is capable of alienation by the usual mode of surrender and admittance. Contingent remainders of copyholds have always had this advantage, that they have never been liable to destruction by the sudden determination of the particular estate on which they depend. The freehold, vested in the lord, is said to be the means of preserving such remainders, until the time when the particular estate would regularly have expired.(*g*) In this respect they resemble contingent remainders of equitable or trust estates of freeholds, as to which we have seen, that the legal seisin, vested in the trustees, preserves the remainders from destruction;(*h*) but if the contingent remainder be not ready to come into possession the moment the particular estate would naturally and regularly have expired, such contingent remainder will fail altogether.(*i*)

Executory devises of copyholds, similar in all respects to executory

(*d*) Stat. 3 & 4 Will. IV, c. 74, s. 77. See ante, p. 189. (*e*) See ante, pp. 205, 217.

(*f*) 1 Watk. Cop. 276; Doe d. Winder v. Lawes, 7 Ad. & E. 195. See, however, as to the reversioner, Reg. v. Lady of Manor of Dallingham, 8 Ad. & E. 858.

(*g*) Fearne, Cont. Rem. 319; 1 Watk. Cop. 196; 1 Scriv. Cop. 477.

(*h*) Ante, p. 238. (*i*) Gilb. Ten. 266; Fearne, Cont. Rem. 320.

devises of freeholds, have long been permitted.(*k*) And directions to executors to sell the copyhold lands to their testator (which directions we have seen,(*l*) give rise to executory interests) are still in common use; for, when such a direction is given, the executors, taking only a power and no estate, have no occasion to be admitted; and if they can sell before the lord has had time to hold his three Customary Courts for making proclamation in order to seize the land *quousque*,(*m*) the purchaser from them will alone *require admittance by virtue of his executory estate which arose on the sale. By this [*320] means the expense of only one admittance is incurred; whereas, had the lands been devised to the executors in trust to sell, they must first have been admitted under the will, and then have surrendered to the purchaser, who again must have been admitted under their surrender. And in a recent case, where a testator devised copyholds to such uses as his trustees should appoint, and subject thereto to the use of his trustees, their heirs and assigns forever, with a direction that they should sell his copyholds, it was decided that the trustees could make a good title without being admitted, even although the lord had in the mean time seized the lands *quousque*, for want of a tenant.(*n*) But it has recently been decided that the lord of a manor is not bound to accept a surrender of copyholds *inter vivos*, to such uses as the surrenderee shall appoint, and in default of appointment, to the use of the surrenderee, his heirs and assigns.(*o*) This decision is in accordance with the old rule, which construed surrenders of copyholds in the same manner as a conveyance of freeholds *inter vivos*, at common law.(*p*) If, however, the lord should accept such a surrender, he will be bound by it, and must admit the appointee under the power of appointment, in case such power should be exercised.(*q*)

With regard to the interest possessed by husband and wife in each other's copyhold lands, although the husband has necessarily the whole income of his wife's *lands during the coverture, yet a special custom appears to be necessary to entitle him to be [*321] tenant by curtesy.(*r*) A special custom also is required to entitle the

(*k*) 1 Watk. Cop. 210. (*l*) Ante, p. 255. (*m*) See ante, p. 314.

(*n*) Glass v. Richardson, 9 Hare, 698; 2 De Gex, M. & G. 658.

(*o*) Flack v. The Master Fellows and Scholars of Downing College, C. P. 17 Jur. 697.

(*p*) 1 Watk. Cop. 108, 110; 1 Scriv. Cop. 178.

(*q*) The King v. The Lord of the Manor of Oundle, 1 Ad. & E. 283; Boddington v. Abernethy, B. & C. 776; 8 Dow. & Ry. 626; 1 Scriv. Cop. 226, 229; Eddleston v. Collins, 3 De Gex, M. & G. 1. (*r*) 2 Watk. Cop. 71. See as to freeholds, ante, p. 185.

wife to any interest in the lands of her husband after his decease. Where such custom exists, the wife's interest is termed her *freebench;* and it generally consists of a life interest in one divided third part of the lands, or sometimes of a life interest in the entirety;(*s*) and, like dower under the old law, freebench is paramount to the husband's debts.(*t*) Freebench, however, usually differs from the ancient right of dower in this important particular, that whereas the widow was entitled to dower of all freehold lands of which her husband was solely seised *at any time* during the coverture,(*u*) the right to freebench does not usually attach until the actual decease of the husband.(*x*) Freebench, therefore, is in general no impediment to the free alienation by the husband of his copyhold lands, without his wife's concurrence. To this rule the important manor of Cheltenham forms an exception; for, by the custom of this manor, as settled by act of Parliament, the freebench of widows attaches, like the ancient right of dower out of freeholds, on all the copyhold lands of inheritance, of which their husbands were tenants at any time during the coverture.(*y*)

(*s*) 1 Scriv. Cop. 89.
(*t*) Spyer v. Hyatt, M. R., Feb. 20, 1855.
(*u*) Ante, p. 190.
(*x*) 2 Watk. Cop. 73.
(*y*) Doe d. Riddell v. Gwinnell, 1 Q. B. 682.

*PART IV. [*322]

OF PERSONAL INTERESTS IN REAL ESTATE.

THE subjects which have hitherto occupied our attention, derive a great interest from the antiquity of their origin. We have seen that the difference between freehold and copyhold tenure has arisen from the distinction which prevailed, in ancient times, between the two classes of freemen and villeins;(*a*) and that estates of freehold in lands and tenements owe their origin to the ancient feudal system.(*b*) The law of real property, in which term both freehold and copyhold interests are included, is full of rules and principles to be explained only by a reference to antiquity; and many of those rules and principles were, it must be confessed, much more reasonable and useful when they were first instituted than they are at present. The subjects, however, on which we are now about to be engaged, possess little of the interest which arises from antiquity; although their present value and importance are unquestionably great. The principal interests of a personal nature, derived from landed property, are a term of years and a mortgage debt. The origin and reason of the personal nature of a term of years in land, have been already attempted to be explained;(*c*) and at the present day, leasehold interests in land, in which amongst other things all building leases are included, form a subject sufficiently important to require a separate consideration. The personal nature of a mortgage debt was not clearly established till long after a term of years was considered *as a chattel.(*d*) But it is now settled that every mortgage, whether [*323] with or without a bond or covenant for the repayment of the money, forms part of the personal estate of the lender or mortgagee.(*e*) And, when it is known that the larger proportion of the lands in this kingdom is at present in mortgage, a fact generally allowed, it is evident that a chapter devoted to mortgages cannot be superfluous.

(*a*) Ante, p. 288. (*b*) Ante, p. 17. (*c*) Ante, p. 8.

(*d*) Thornborough v. Baker, 1 Cha. Ca. 283; 3 Swanst. 628, anno 1675; Tabor v. Tabor, 3 Swanst. 636. (*e*) Co. Litt. 208 a, n. (1).

[*324]

*CHAPTER I.

OF A TERM OF YEARS.[1]

At the present day, one of the most important kinds of chattel or personal interests in landed property, is a term of years, by which is understood, not the time merely for which a lease is granted, but also the interest acquired by the lessee. Terms of years may practically be considered as of two kinds; first, those which are created by ordinary leases, which are subject to a yearly rent, which seldom exceed ninety-nine years, and in respect of which so large a number of the occupiers of lands and houses are entitled to their occupation; and, secondly, those which are created by settlements, wills, or mortgage deeds, in respect of which no rent is usually reserved, which are frequently for one thousand years or more, which are often vested in trustees, and the object of which is usually to secure the payment of money by the owner of the land.[2] But although terms of years of different lengths are thus created for different purposes, it must not, therefore, be supposed that a long term of years is an interest of a different nature from a short one. On the contrary, all terms of years of whatever length possess precisely the same attributes in the eye of the law.

The consideration of terms of the former kind, or those created by ordinary leases, may conveniently be preceded by a short notice of a tenancy at will, and a tenancy by sufferance. A tenancy at will may
[*325] be created by parol,(*a*) or by deed: it arises when a person *lets land to another, to hold at the will of the lessor or person letting.(*b*) The lessee, or person taking the lands, is called a tenant at will; and, as he may be turned out when his landlord pleases, so he may leave when he likes.[3] A tenant at will is not an-

(*a*) Stat. 29 Car. II, c. 3, s. 1.

(*b*) Litt. s. 68; 2 Black. Com. 145.

[1] The law of Landlord and Tenant was made the subject of a course of lectures at the Law Institution in London, by the late Mr. John William Smith, the editor of Smith's Leading Cases, &c., and these have been reprinted in this country, with annotations by Mr. Morris.

[2] These are part of the machinery of English settlements (see supra, p. 238, 243, &c.), by which portions are raised for daughters, younger sons, &c., and are but little in use on this side of the Atlantic.

[3] "For," says Coke, "it is regularly true, that every lease at will must in law be at

swerable for mere permissive waste.(*c*) He is allowed, if turned out by his landlord, to reap what he has sown, or, as it is legally expressed, to take the emblements.(*d*) But, as this kind of letting is very inconvenient to both parties, it is scarcely ever adopted; and, in construction of law, a lease at an annual rent, made generally, without expressly stating it to be at will,(*e*) and without limiting any certain period, is not a lease at will, but a lease from year to year,(*f*)[1] of which we shall presently speak. When property is vested in trustees, the cestui que trust is, as we have seen,(*g*) absolutely entitled to such property in equity. But, as the courts of law do not recognize trusts, they consider the cestui que trust, when in possession, to be merely the tenant at will to his trustee.(*h*) A tenancy by sufferance is when a person who has originally come into possession by a lawful title, holds such possession after his title has determined.[2]

A lease from year to year is a method of letting very commonly

(*c*) Harnett v. Maitland, 15 Mees. & Wels. 257.
(*d*) Litt. s. 68; see Graves v. Weld, 5 B. & Adol. 105.
(*e*) Doe d. Bastow v. Cox, 11 Q. B. 122; Doe d. Dixie v. Davies, 7 Ex. Rep. 89.
(*f*) Right d. Flower v. Darby, 1 T. Rep. 159, 163. (*g*) Ante, p. 135.
(*h*) Earl of Pomfret v. Lord Windsor, 2 Ves. sen. 472, 481.

---

the will of both parties, and, therefore, when the lease is made to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also." Co. Litt. 55 a; Moon v. Drizzle, 3 Devereux, 414. A tenancy at will is determined by the death of the lessee, Cody v. Quarterman, 12 Georgia, 386, or by any act inconsistent with the duration of the tenancy, as by an assignment, Co. Litt. 55 b, 57 a; Cooper v. Adams, 6 Cushing, 87, or any alienation of the estate of the landlord, Kelly v. Waite, 12 Metcalf, 300; Howard v. Morrison, 5 Cushing, 563; but the tenant cannot so determine it against the will of the landlord, except by giving notice to the latter, Carpenter v. Collins, Yelverton, 73; Pinhorn v. Souster, 8 Exchequer, 763, who, in turn, is also obliged to notify the tenant, which may be done either by express notice, or by making a demand of the premises though unaccompanied by express notice, Doe d. Roby v. Maisey, 8 Barn. & Cress. 767, or by doing some act inconsistent with the duration of the tenant's interest, as by making a feoffment with livery of seisin, Ball v. Cullimore, 2 Crompt. Mees. & Rosc. 120; Doe d. Price v. Price, 9 Bing. 356, by entering on the premises and cutting down a tree, Co. Litt. 55 b, carrying off stone, Doe d. Bennett v. Turner, 8 Mees. & Wels. 226, S. C. 9 Id. 643, or the like.

[1] See the cases cited in note to p. 19 of Mr. Morris's edition of Smith's Landlord and Tenant. But the legal construction that a tenancy for an indeterminate period is a tenancy from year to year, and not a tenancy at will, will yield to the intention of the parties; and when it is seen that that intention was to create a tenancy at will, it will be so considered, notwithstanding the reservation of an annual rent, Humphries v. Humphries, 3 Iredell, 363, Stedman v. M'Intosh, 4 Id. 291.

[2] And this is the lowest kind of tenancy known to the law. It cannot be conveyed, nor be enlarged by a release.

adopted: in most cases it is much more advantageous to both landlord and tenant than a lease at will. The advantage consists in this, that both landlord and tenant are entitled to notice before the tenancy can be determined by the other of them. This notice must be given at least half a year before the expiration of the *current year of [*326] the tenancy;(*i*) for the tenancy cannot be determined by one only of the parties, except at the end of any number of whole years from the time it began.[1] So that, if the tenant enter on any quarter

(*i*) Right d. Flower v. Darby, 1 T. Rep. 159, 163; and see Doe d. Lord Bradford v. Watkins, 7 East, 551.

[1] Both the English and the American law, as to the necessity of notice and the length of time required, are thus clearly stated by Mr. Morris in the note to page 235 of Smith's Landlord and Tenant: "There are some peculiarities about the law regarding notices to quit, as held in several adjudged cases, both in this country and in England, which it is difficult to assign to any principle. Thus in Doe d. Robinson v. Dobell, Q. B. 806, the premises, on the 13th of August, 1838, were let 'for one year and six months certain from the date,' and it was further agreed, 'that three calendar months' notice shall be given on either side, previous to the determination of said tenancy.' The tenant entered, and after holding to the end of the term, held over. On May 7th, 1840, the lessor of the plaintiff gave the defendant notice to quit 'on or before the 13th day of August next, or at the expiration of the current year of your tenancy, which shall expire next after the end of three months, from and after your being served with this notice.' The Court held that the notice was right; that the three months' notice must be calculated with reference to the original commencement of the tenancy, and not with reference to the expiration of the term. If a tenancy from year to year exist, it is held, in England, that six months' notice, expiring with the end of the year, is necessary to terminate the tenancy; and that the right to this notice is mutual, *i. e.* if the landlord wishes to terminate the tenancy, he must give his tenant six months' notice, Kingsbury v. Collins, 4 Bing. 202; Izon v. Gorton, 5 Bing. N. C. 501. If the tenant wishes to go, he must give the landlord the full six months' notice of his intention to quit, Johnstone v. Huddlestone, 4 Barnwell & Cress. 923; Bessell v. Landsberg, 7 Adol. & Ellis, 638, [and the notice may be given as well during the first year of a tenancy from year to year as during any subsequent year. 'We are of opinion,' said Denman, Ch. J., in Clark v. Smaridge, 7 Q. B. 957, 'that the tenancy, from year to year, so long as both parties please, is determinable at the end of any year, the first as well as any subsequent year, unless in the creation of the tenancy the parties use expressions showing that they contemplate a tenancy for two years at the least. We are aware that this decision may appear at variance with an impression which has prevailed in Westminster Hall, and has, perhaps, derived some countenance from the words of Lord Tenterden in Bishop v. Howard, 2 B. & C. 100, though they were perfectly unnecessary for that decision. But the authorities, when examined, certainly do not warrant the conclusion that has been drawn from them, for the reason above given; and it would be absurd in prineiple, and even inconsistent with the contract, to hold that the tenancy exists from year to year, determinable by half a year's notice by either party, and yet to hold that neither can give such notice during the first year.']

"The American cases agree as regards the

day, he can quit only on the same quarter day: when once in possession, he has a right to remain for a year; and if no notice to quit be given for half a year after he has had possession, he will have a right to remain two whole years from the time he came in; and so on from year to year. A lease from year to year can be made by parol or word of mouth,(*j*) if the rent reserved amount to two-thirds at least of the full improved value of the lands; for, if the rent reserved do not amount to so much, the Statute of Frauds declares that such parol lease shall have the force and effect of a lease at will only.(*k*)[1] A lease from year to year, reserving a less amount of rent, must be made by deed.(*l*) The best way to create this kind of tenancy, is to let the lands to hold "from year to year" simply, for much litigation has

(*j*) Legg v. Hackett, Bac. Abr. tit. Leases (L. 3); S. C. nom. Legg v. Strudwick, 2 Salk. 414.

(*k*) 29 Car. II, c. 3, ss. 1, 2.

(*l*) Stat. 8 & 9 Vict. c. 106, s. 3.

---

necessity of notice by the landlord to determine the tenancy, though there is a difference in the States as to the length of notice required. Six months is the rule in Vermont, New Jersey, and Kentucky, Hanchet v. Whitney, 1 Verm. 315; Den v. Drake, 2 Green, 523; Den v. Blair, 3 Green, 181; Moorhead v. Watkyns, 5 B. Munroe, 228. Three months is all that is required by the laws of Pennsylvania and South Carolina, Hutchinson v. Potter, 1 Jones, 472; Brown v. Vanhorn, 1 Binney, 334; McCanna v. Johnson, 7 Harris, 434; Godard v. Railroad Co., 2 Rich. 346. The notice must be given, three months before the end of the year. The tenancy cannot be determined at any other time. If the notice is not so given, the moment another year begins, the tenant has a right to hold on to the end of it.

"With regard to notice by the tenant, very few, if any, cases are to be found in the American books. Cooke v. Neilson, in Pennsylvania, is the only one known to the writer. It was there held that the tenant may leave at the end of the year without notice to his landlord. The case originated in the District Court for the City and County of Philadelphia, and is to be found in Brightley's N. P. Cases, 463. The case is remarkable as containing a very able argument by the President of the Court, Judge Sharswood, against the judgment which was entered. The case was taken to the Supreme Court, and in 10 Barr, 41, is said to have been affirmed by a divided Court.

"When there is a demise for a fixed period and the tenant holds over, the rule in New York and Pennsylvania is that he is either a trespasser, or a tenant on the terms of the old lease, at the option of the landlord, and he is bound for a year's rent, Conway v. Starkweather, 1 Denio, 113; Hemphill v. Flynn, 2 Barr, 144. And when a lease is for one year, or other term certain, a notice to quit is not necessary, Den v. Adams, 7 Halst. 99; Bedford v. McElheron, 2 S. & R. 49; Mosheir v. Reding, 3 Fair. 478; Logan v. Herron, 8 S. & R. 459; Clapp v. Paine, 6 Shepley, 264; Dorrell v. Johnson, 17 Pick. 263; Allen v. Jaquish, 21 Wend. 628; Preble v. Hay, 32 Maine, 456; Walker v. Ellis, 12 Ill. 470; Pierson v. Turner, 2 Carter, 123; Lesley v. Randolph, 4 Rawle, 126."

[1] See infra, note to page 327.

arisen from the use of more circuitous methods of saying the same thing.(*m*)

A lease for a fixed number of years may, by the Statute of Frauds, be made by parol, if the term do not exceed three years from the making thereof, and if the rent reserved amount to two-thirds, at least, of the full improved value of the land.(*n*) Leases for a longer term of years, or at a lower rent, were required, by the Statute of [*327] Frauds,(*o*) to be put into writing and signed *by the parties making the same, or their agents thereunto lawfully authorized by writing. But a lease of a separate incorporeal hereditament was always required to be made by deed.(*p*) And the recent act to amend the law of real property now provides that a lease required by law to be in writing, of any tenements or hereditaments, shall be void at law, unless made by deed.(*q*)[1]

(*m*) See Bac. Abr. tit. Leases and Terms for Years (L. 3); Doe d. Clarke v. Smaridge, 7 Q. B. 957.

(*n*) 29 Car. II, c. 3, s. 2; Lord Bolton v. Tomlin, 5 A. & E. 856.

(*o*) 29 Car. II, c. 3, s. 1.

(*p*) Bird v. Higginson, 2 Adol. & Ell. 696; 6 Adol. & Ell. 824; S. C. 4 Nev. & Man. 505. See ante, p. 195.

(*q*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing Stat. 7 & 8 Vict. c. 76, s. 4, to the same effect.

[1] The first section of the English Statute of Frauds declared that all interests in lands, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties, or their agents lawfully authorized in writing, should have the force and effect of leases or estates at will only; "except nevertheless," the second section goes on to say, "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 improved value of the thing demised." These sections of the statute have, it is believed, been adopted with more or less exactness in all of the United States. By the Massachusetts statute, *all* parol leases (without exception as to duration) have the effect of leases at will only, Ellis v. Paige, 1 Pick. 43; Hingham v. Sprague, 15 Id. 102; Hollis v. Paul, 3 Metcalf, 551; Kelly v. Waite, 12 Id. 300. So in Maine, Little v. Pallister, 3 Greenleaf, 15; Davis v. Thompson, 13 Maine, 214. By the New York Revised Statutes (2 Rev. St., p. 194), no estate or interest in land, other than leases, for a term not exceeding one year, can be created, unless by operation of law or by writing. In Connecticut (Statute of 1838) such leases are invalid, except as against the grantor. The Pennsylvania Statute (1772) is, as to this, exactly copied from that of 29 Car. 2, omitting, however, the part as to the reservation of rent. This part, however, it will be perceived, was evidently inserted in the English Statute as a guard against perjury, in supporting a parol lease for three years or less.

"The effect, then, of the Statute of Frauds," said Bayley, J., in Edge v. Stafford, 1 Tyrwhitt, 293, "so far as it applies to parol leases, not exceeding three years from the making, is this, that the leases are valid,

It does not require any formal words to make a lease for years. The words commonly employed are "demise, lease, and to farm let;" but any words indicating an intention to give possession of the lands for a determinate time, will be sufficient.(*r*) Accordingly, it sometimes happened, previously to the recent act, that what was meant by the parties merely as an agreement to execute a lease, was in law construed as itself an actual lease; and very many lawsuits arose out of the question, whether the effect of a memorandum was in law an actual lease, or merely an agreement to make one. Thus, a mere memorandum in writing, that A. agreed to let, and B. agreed to take, a house or farm, for so many years, at such a rent, was, if signed by the parties, as much a lease as if the most formal words had been employed.(*s*) By such a memorandum a term of years was created in the premises, and was vested in the lessee, immediately on his entry, instead of the lessee acquiring, as at present, merely a right to have a lease granted to him, in accordance with the agreement.(*t*)

(*r*) Bac. Abr. tit. Leases and Terms for Years (K); Curling v. Mills, 6 Man. & Gran. 173.

(*s*) Poole v. Bentley, 12 East, 168; Doe d. Walker v. Groves, 15 East, 244; Doe d. Pearson v. Ries, 8 Bing. 178; S. C. 1 Moo. & Scott, 259; Warman v. Faithfull, 5 Barn. & Adol. 1042; Pearce v. Cheslyn, 4 Adol. & Ellis, 225.

(*t*) By stats. 13 & 14 Vict. c. 97, and 17 & 18 Vict. c. 83, leases, with some exceptions, are now subject to an *ad valorem* duty on the rent reserved, as follows:—

---

and that whatever remedy can be had upon them in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession." Although the statute enacts that all leases by parol, for more than three years, shall have the effect of leases at will only, yet it has been held, on both sides of the Atlantic, that occupation and payment of rent, under such a lease, will create a tenancy from year to year, Clayton v. Blakey, 8 Term, 3. And although the parol lease for more than three years is void under the statute, as to the duration of the term, yet the contract will regulate the terms of the holding in other respects, as, for instance, the amount of rent, &c. De Medina v. Poulson, 1 Holt, N. P. R. 47; Richardson v. Gifford, 1 Adol. & Ell. 52; Beale v. Sanders, 5 Scott, 58; Schuyler v. Leggett, 2 Cowen, 660; Edwards v. Coleman, 4 Wendell, 480; Prindle v. Anderson, 19 Id. 391; Hollis v. Paul, 3 Metcalf, 350; McDowell v. Simpson, 3 Watts, 135. But under the statute, as expressed in Maine and Massachusetts, as *all* leases, unless they be written, are leases at will only, it has there been held that a tenancy, created by parol, cannot, by occupation and payment of rent, be subsequently enlarged into a tenancy from year to year, Ellis v. Paige, 1 Pick, 43; Hingham v. Sprague, 15 Id. 102; Kelly v. Waite, 12 Id. 308; Little v. Pallister, 3 Greenleaf, 15; Davis v. Thompson, 13 Id. 214.

Of the recent English statute referred to in the text, Mr. Chitty has remarked (Chitty on Contracts, 283) that it would probably receive the same construction as the section already referred to of the Statute of Frauds, as it would seem not unreasonable to hold that the provisions of the statute would be satisfied by restricting its effect to the avoidance of the lease *as a lease* simply, and such has, indeed, been the course of decision, Tress v. Savage, 4 Ellis & Blackburn, 36; Stratton v. Pettit, 30 Eng. Law & Eq. Rep. 479; Drury v. Macnamara, 33 Id. 126.

[*328] *There is no limit to the number of years for which a lease may be granted; a lease may be made for 99, 100, 1000, or any other number of years; the only requisite on this point is, that there be a definite period of time fixed in the lease, at which the term granted must end;(*u*) and it is this fixed period of ending which distinguishes a *term* from an estate of freehold. Thus, a lease to A. for his life is a conveyance of an estate of freehold, and must be carried into effect by the proper method for conveying the legal seisin; but a lease to A. for ninety-nine years, if he shall so long live, gives him only a term of years, on account of the absolute certainty of the determination of the interest granted at a given time, *fixed in the lease.* Beside the fixed time for the term to end, there must also be a time fixed from which the term is to begin; and this time may, if the [*329] *parties please, be at a future period.(*x*) Thus, a lease may be made for 100 years from next Christmas. For, as leases anciently were contracts between the landlords and their husbandmen, and had nothing to do with the freehold or feudal possession,(*y*) there was no objection to the tenant's right of occupation being deferred to a future time.

When the lease is made, the lessee does not become complete tenant by lease to the lessor, until he has entered on the lands let.(*z*) Be-

	If the Term shall not exceed 35 Years.		Exceeding 35 and not exceeding 100 Years.			Exceeding 100 Years.		
	s.	*d.*	£	*s.*	*d.*	£	*s.*	*d.*
Where the yearly rent shall not exceed £5, . .	0	6	0	3	0	0	6	0
Shall exceed £5 and not exceed £10, ...	1	0	0	6	0	0	12	0
" 10 " 15, ...	1	6	0	9	0	0	18	0
" 15 " 20, ...	2	0	0	12	0	1	4	0
" 20 " 25, ...	2	6	0	15	0	1	10	0
" 25 " 50, ...	5	0	1	10	0	3	0	0
" 50 " 75, ...	7	6	2	5	0	4	10	0
" 75 " 100, ...	10	0	3	0	0	6	0	0
And where the same shall exceed £100, then for every £50, and also for any fractional part of £50, ...	5	0	1	10	0	3	0	0

And any premium which may be paid for the lease is also charged with the same *ad valorem* duty as on a conveyance upon the sale of lands for the same amount, though if the rent be under 20*l.*, and the term do not exceed thirty-five years, the *ad valorem* duty is paid on the premium only. The progressive duty is ten shillings unless the *ad valorem* duty be less, in which case it is the same as the *ad valorem* duty. The counterpart bears a duty of five shillings, with a progressive duty of half-a-crown, unless the duty on the lease is less than five shillings, in which case the counterpart bears the same duty as the lease.

(*u*) Co. Litt. 45 b; 2 Black. Com. 143.

(*x*) 2 Black. Com. 143.

(*y*) See ante, p. 9.

(*z*) Litt. s. 58; Co. Litt. 46, b; Miller v. Green, 8 Bing. 92; ante, p. 147.

fore entry, he has no estate, but only a right to have the lands for the term by force of the lease,(*a*) called in law an *interesse termini*. But if the lease should be made by a bargain and sale, or any other conveyance operating by virtue of the Statute of Uses, the lessee will, as we have seen,(*b*) have the whole term vested in him at once, in the same manner as if he had actually entered.[1]

The circumstance that a lease for years was anciently nothing more than a mere contract, explains a curious point of law relating to the creation of leases for years, which does not hold with respect to the creation of any greater interest in land. If a man should by indenture lease lands, in which he has no legal interest, for a term of years, both lessor and lessee will be *estopped* during the term, or forbidden to deny the validity of the lease. This might have been expected. But the law goes further, and holds, that if the lessor should at any time during the lease acquire the lands he has so let, the lease, which before operated only by estoppel, shall now take effect out of the newly-acquired estate of the lessor, and shall become for all purposes a regular estate for a *term of years.(*c*)[2] If, however, the [*330] lessor has, at the time of making the lease, any interest in the lands he lets, such interest only will pass, and the lease will have no

(*a*) Litt. s. 459; Bac. Abr. tit. Leases and Terms for Years (M).

(*b*) Ante, p. 152.

(*c*) Co. Litt. 47 b; Bac. Abr. tit. Leases and Terms for Years (O); 2 Prest. Abst. 211; Webb v. Austin, 7 Mann. & Gran. 701.

[1] See as to this the note to page 152, supra.

[2] The author is entirely correct when, in speaking of the English law on the subject of an after-acquired estate passing to the lessee, he says, that the doctrine does not hold with respect to the creation of any greater interest in land. Thus if a man grant a rent charge out of the manor of Dale, and in truth he hath nothing in that manor, and after he purchases the same manor, yet he shall hold it discharged, Perkins, tit. Grant, § 65; Wivil's case, Hobart, 45; Touchst. 240; Lampet's case, 10 Coke, 48; and so of a release, Year Book, 49 Edw. 3, 14; Doe d. Lumley v. Scarborough, 3 Adolp. & Ellis, 2; or any conveyance taking effect by virtue of the Statute of Uses, as a bargain and sale, or a lease and release, Right d. Jefferys v. Bucknell, 2 Barn. & Adolp. 378; for as they pass no more than the actual estate of the party, they have no greater effect in this respect than the common law grant or release, Kennedy v. Skeer, 3 Watts, 98. On this side of the Atlantic it has, however, been held, in quite a numerous class of cases, that where such a conveyance contains a general covenant of warranty, an after-acquired estate will pass by estoppel to the purchaser. The student will find these cases in Mr. Hare's note to Doe v. Oliver, 2 Smith's Leading Cases, and Rawle on Covenants for Title, 410, &c., where the reasoning on which they are based is seriously questioned.

further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant.(*d*) Thus, if A., a lessee for the life of B., makes a lease for years by indenture, and afterwards purchases the reversion in fee, and then B. dies, A. may at law avoid his own lease, though several of the years expressed in the lease may be still to come; for, as A. had an interest in the lands for the life of B., a term of years determinable on B.'s life passed to the lessee. But if in such a case the lease was made for valuable consideration, Equity would oblige the lessor to make good the term out of the interest he had acquired.(*e*)

The first kind of leases for years to which we have adverted, namely, those taken for the purpose of occupation, are usually made subject to the payment of a yearly rent,(*f*) and to the observance and performance of certain covenants, amongst which a covenant to pay the rent is always included. The rent and covenants are thus constantly binding on the lessee, during the whole continuance of the term, notwithstanding any assignment which he may make.[1] On assigning leasehold premises, the assignee is therefore bound to enter into a covenant with the assignor, to indemnify him against the payment of the rent reserved, and the observance and performance of the covenants contained in the lease.(*g*) The assignee, as such, is liable [*331] to the *landlord for the rent which may be unpaid, and for the covenants which may be broken during the time that the term remains vested in him, although he may never enter into actual possession,(*h*) provided that such covenants relate to the premises let; and a covenant to do any act upon the premises, as to build a wall, is binding on the assignee, if the lessee has covenanted for himself *and his assigns* to do the act.(*i*) But a covenant to do any act upon premises not comprised in the lease, cannot be made to bind the assignee.(*k*) Covenants which are binding on the assignee are said to *run with the land*, the burden of such covenants passing with the land

(*d*) Co. Litt. 47 b; Hill v. Saunders, 4 Barn. & Cress. 529; Doe d. Strode v. Seaton, 2 Cro. Mee. & Rosc. 728, 730.

(*e*) 2 Prest. Abst. 217.

(*f*) See ante, p. 199 et seq.

(*g*) Sugd. Vend. and Pur. 38.

(*h*) Williams v. Bosanquet, 1 Brod. & Bing. 238; 3 J. B. Moore, 500.

(*i*) Spencer's case, 5 Rep. 16 a; Hemingway v. Fernandes, 13 Sim. 228.

(*k*) Keppel v. Bailey, 2 My. & Keen, 517.

[1] See, *passim*, supra, note to page 101.

to every one to whom the term is from time to time assigned. But when the assignee assigns to another, his liability ceases as to any future breach.(*l*) In the same manner the benefit of covenants relating to the land, entered into by the lessor, will pass to the assignee; for, though no contract has been made between the lessor and the assignee individually, yet as the latter has become the tenant of the former, a *privity of estate* is said to arise between them, by virtue of which the covenants entered into, when the lease was granted, become mutually binding, and may be enforced by the one against the other.(*m*) This mutual right is also confirmed by an express clause of the statute before referred to,(*n*) by which assignees of the reversion were enabled to take advantage of conditions of re-entry contained in leases.(*o*) By the same statute also, the assignee of the reversion is enabled to take advantage of the *covenants entered into by the lessee with the lessor, under whom such assignee claims,(*p*) —an advantage, however, which, in some cases, he is said to have previously possessed.(*q*)[1] [*332]

The payment of the rent, and the observance and performance of the covenants are usually further secured by a proviso or condition for re-entry; which enables the landlord or his heirs (and the statute above mentioned(*r*) enables his assigns), on non-payment of the rent, or on non-observance or non-performance of the covenants, to re-enter on the premises let, and repossess them as if no lease had been made. The proviso for re-entry, so far as it relates to the non-payment of rent, has been already adverted to.(*s*) The proviso for re-entry on breach of covenants is the subject of a curious doctrine; that if an express license be once given by the landlord for the breach of any covenant, or, if the covenant be, not to do a certain act without license, and license be once given by the landlord to perform the act, the right of re-entry is gone forever.(*t*) The ground of this doctrine is, that every condition of re-entry is entire and indivisible; and, as

(*l*) Taylor v. Shum, 1 Bos. & Pul. 21; Rowley v. Adams, 4 M. & Cr. 534.
(*m*) Sugd. Vend. and Pur. 713 et seq.
(*n*) Stat. 32 Hen. VIII, c. 34, s. 2.
(*o*) Ante, p. 202.
(*p*) 1 Wms. Saund. 240, n. (3).
(*q*) Vyvyan v. Arthur, 1 Barn. & Cres. 410, 414.
(*r*) Stat. 32 Hen. VIII, c. 34.
(*s*) Ante, p. 201.
(*t*) Dumpor's case, 4 Rep. 119; Brummell v. Macpherson, 14 Ves. 173.

[1] The student will find the whole law respecting covenants running with the land elaborately considered in Mr. Hare's note to Spencer's case, 1 Smith's Leading Cases. It may be here only necessary to state that the law on the subject as stated in the text, applies equally on both sides of the Atlantic.

the condition has been waived once, it cannot be enforced again.[1] So far as this reason extends to the breach of any covenant, it is certainly intelligible; but its application to a license to perform an act, which was only prohibited when done *without* license, is not very apparent.(*u*) This rule, which is well established, is frequently the occasion of great inconvenience to tenants; for no landlord can venture to give a license to do any act, which may be prohibited by the [*333] lease unless done with license, for *fear of losing the benefit of the proviso for re-entry, in case of any future breach of covenant. The only method to be adopted in such a case is, to create a fresh proviso for re-entry on any future breach of the covenants, a proceeding which is of course attended with expense. The term will then, for the future, be determinable on the new events stated in the proviso; and there is no objection in point of law to such a course; for a term, unlike an estate of freehold, may be made determinable, during its continuance, on events which were not contemplated at the time of its creation.(*v*) By a recent act of Parliament the inconvenient doctrine above mentioned has now ceased to extend to licenses granted to the tenants of crown lands.(*x*)

It was provided by the Statute of Frauds,(*y*) that no leases, estates, or interests, not being copyhold or customary interests, in any lands, tenements, or hereditaments, should be assigned, unless by deed or note in writing, signed by the party so assigning, or his agent thereunto lawfully authorized by writing, or by act or operation of law. And now, by the recent act to amend the law of real property,(*z*) it is enacted that an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, shall be void at law unless made by deed.(*a*)

(*u*) 4 Jarman's Conveyancing, by Sweet, 377, n. (*e*).

(*v*) 2 Prest. Conv. 199.

(*x*) Stat. 8 & 9 Vict. c. 99, s. 5.

(*y*) 29 Car. II, c. 3, s. 3.

(*z*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.

(*a*) By stat. 13 & 14 Vict. c. 97, any assignment of a lease upon any other occasion than a sale or mortgage bears a duty equal to the *ad valorem* duty with which a similar lease would be chargeable under the act, unless such duty would amount to more than £1 15*s.*, in which case the duty on such assignment is £1 15*s.* only.

[1] The whole of this doctrine is so carefully discussed in the note to Dumpor's case, 1 Smith's Leading Cases, that to notice it more fully here, would only be to abridge what is there explained.

Leasehold estates may also be bequeathed by will. As leaseholds are personal property, they devolve in the *first place on the executors of the will, in the same manner as other personal property; or, on the decease of their owner intestate, they will pass to his administrator. An explanation of this part of the subject will be found in the author's treatise on the principles of the law of personal property.(*b*) It was formerly a rule that where a man had lands in fee simple, and also lands held for a term of years, and devised by his will all his lands and tenements, the fee simple lands only passed by the will, and not the leaseholds; but if he had leasehold lands, and none held in fee simple, the leaseholds would then pass, for otherwise the will would be merely void.(*c*) But the act for the amendment of the laws with respect to wills(*d*) now provides, that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold estates of the testator, or his leasehold estates to which such description shall extend, as well as freehold estates, unless a contrary intention shall appear by the will. [*334]

Leasehold estates are also subject to involuntary alienation for the payment of debts. They are now subject, in the same manner as freeholds, to the claims of judgment creditors;(*e*) with this exception, that, as against purchasers without notice of any judgments, such judgments have no further effect than they would have had under the old law.(*f*) And, under the old law, *leasehold estates being goods or chattels merely, were not bound by judgments until a writ of execution was actually in the hands of the sheriff or his officer.(*g*) So that a judgment has no effect as against a purchaser of a leasehold estate without notice, unless a writ of execution on such judgment has actually issued prior to the purchase. [*335]

In the event of the bankruptcy or insolvency of any person entitled

(*b*) Part IV, chaps. 3 and 4.

(*c*) Rose v. Bartlett, Cro. Car. 292.

(*d*) Stat. 7 Will. IV, & 1 Vict. c. 26, s. 26.

(*e*) See ante, p. 68 et seq.

(*f*) Stat. 2 & 3 Vict. c. 11, s. 5; Westbrook v. Blythe, Q. B. 1 Jurist, N. S. 85, [since reported, 3 Ellis & Blackburn, 737.]

(*g*) Stat. 29 Car. II, c. 3, s. 16. See Principles of the Law of Personal Property, p. 46, 1st ed.; 47, 2d ed.

to any lease or agreement for a lease, his assignees may elect to accept or to decline the same; and the lessor is empowered to oblige them to exercise this option, if they do not do so when required.(*h*) If they accept the lease or agreement, the bankrupt or insolvent is discharged from all future liability in respect of the rent and covenants. And in bankruptcy, if the assignees decline to take such lease or agreement, the bankrupt will not be liable if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such lease or agreement to the person then entitled to the rent, or having so agreed to lease, as the case may be.

The tenant for a term of years may, unless restrained by express covenant, make an underlease for any part of his term; and any assignment for less than the whole term is, in effect, an underlease.(*i*) But an underlease which comprises the whole term of the underlessor, gives him no right to distrain for rent reserved, as it leaves in him no reversion to which the rent can be *incident.(*j*) Every under-
[*336] lessee becomes tenant to the lessee who grants the underlease, and not tenant to the original lessor. Between him and the underlessee, no *privity* is said to exist. Thus, the original lessor cannot maintain any action against an underlessee for any breach of the covenants contained in the original lease.(*k*) His remedy is only against the lessee, or any assignee from him of the whole term. The derivative term, which is vested in the underlessee, is not an estate in the interest originally granted to the lessee; it is a new and distinct term, for a different, because a less, period of time. It certainly arises and takes effect out of the original term, and its existence depends on the continuance of such term; but still, when created, it is a distinct chattel, in the same way as a portion of any movable piece of goods becomes, when cut out of it, a separate chattel personal.

If a married woman should be possessed of a term of years, her husband may dispose of it at any time during the coverture, either

(*h*) Stat. 12 & 13 Vict. c. 106, s. 145, repealing stat. 6 Geo. IV, c. 16, s. 75, as to bankruptcy; and see Briggs v. Sowry, 8 Mee. & Wels. 729; stat. 1 & 2 Vict. c. 110, s. 50; 7 & 8 Vict. c. 96, s. 12, as to insolvency. [See supra, note to p. 277.]

(*i*) See Sugd. Concise Vendors, 482; Cottee v. Richardson, 7 Ex. Rep. 143.

(*j*) See Poultney v. Holmes, 1 Strange, 405; Palmer v. Edwards, Dougl. 187, n.; Parmenter v. Webber, 8 Taunt. 593; Pollock v. Stacy, 9 Q. B. 1033.

(*k*) Holford v. Hatch, 1 Dougl. 183.

absolutely or by way of mortgage;(*l*) and in case he should survive her, he will be entitled to it by his marital right. But, if he should die in her lifetime, it will survive to her, and his will alone will not be sufficient to deprive her of it.(*m*)[1]

In many cases, landlords, particularly corporations, are in the habit of granting to their tenants fresh leases, either before or on the expiration of existing ones. In *other cases, a covenant is inserted to renew the lease on payment of a certain fine for renewal, and this covenant may be so worded as to confer on the lessee a perpetual right of renewal from time to time as each successive lease expires.(*mm*) In all these cases the acceptance by the tenant of the new lease operates as a surrender in law of the unexpired residue of the old term; for the tenant, by accepting the new lease, affirms that his lessor has power to grant it; and, as the lessor could not do this during the continuance of the old term, the acceptance of such new lease is a surrender in law of the former. But if the new lease be void, the surrender of the old one will be void also; and if the new lease be voidable, the surrender will be void if the new lease fail.(*n*) There appears to be a difference of opinion, whether or not the granting of a new lease to another person with the consent of the tenant is an implied surrender of the old term;(*o*) in such a case, therefore, an actual surrender of the old term had better be made by deed.(*p*) Whenever a lease, renewable either by favor or of right, is settled in trust for one person for life with remainders over, or in any other manner, the benefit of the expectation or right of renewal belongs to [*337]

(*l*) Hill v. Edmonds, 5 De Gex & S. 603, 607.

(*m*) 2 Black. Com. 434; 1 Rop. Husb. and Wife, 173, 177; Doe d. Shaw v. Steward, 1 Ad. & Ell. 300; as to a trust term, Donne v. Hart, 2 Russ. & Mylne, 360; see also Hanson v. Keating, 4 Hare, 1; Duberly v. Day, Rolls, 16 Jurist, 581; S. C. 16 Beav. 33.

(*mm*) Iggulden v. May, 9 Ves. 325; 7 East, 237.

(*n*) Ive's case, 5 Rep. 11 b; Roe d. Earl of Berkeley v. Archbishop of York, 6 East, 86; Doe d. Earl of Egremont v. Courtenay, 11 Q. B. 702; Doe d. Biddulph v. Poole, 11 Q. B. 713.

(*o*) See Lyon v. Reed, 13 Mee. & Wels. 285, 306; Creagh v. Blood, 3 Jones & Lat. 133, 160; Nickells v. Atherstone, 10 Q. B. 944; M'Donnell v. Pope, 9 Hare, 705.

(*p*) Stat. 8 & 9 Vict. c. 160, s. 3.

[1] A lease made to a married woman during her coverture may be either affirmed or disaffirmed by her upon the death of her husband, Co. Litt. 3 a. As to terms of years of which a married woman may be possessed before coverture, the law, as stated in the text, will not, of course, apply in those States in which the property of married women is by statute secured to them. See supra, p. 182.

the persons from time to time beneficially interested in the lease; and if any other person should obtain a new lease, he will be regarded in equity as a trustee for the persons beneficially interested in the old one;(*q*); so the costs of renewal are apportioned *between the [*338] tenant for life and remainder-men according to their respective periods of actual enjoyment of the new lease.(*r*) Special provisions have been made by Parliament for facilitating the procuring and granting of renewals of leases when any of the parties are infants, idiots, or lunatics.(*s*) And the provision by which the remedies against under-tenants have been preserved, when leases are surrendered in order to be renewed, has been already mentioned.(*t*)

We now come to consider those long terms of years of which frequent use is made in conveyancing, generally for the purpose of securing the payment of money. For this purpose, it is obviously desirable that the person who is to receive the money, should have as much power as possible of realizing his security, whether by receipt of the rents, or by selling or pledging the land; at the same time it is also desirable that the ownership of the land, subject to the payment of the money, should remain as much as possible in the same state as before, and that when the money is paid, the persons to whom it was due should no longer have anything to do with the property. These desirable objects are accomplished by conveyances by means of the creation of a long term of years, say 1000, which is vested (when the parties to be paid are numerous, or other circumstances make such a course desirable), in trustees, upon trust out of the rents and profits of the premises, or by sale or mortgage thereof for the whole or any part of the term, to raise and pay the *money required, as it [*339] may become due, and upon trust to permit the owners of the land to receive the residue of the rents and profits. By this means the parties to be paid have ample security for the payment of their money. Not only have their trustees the right to receive on their behalf (if they think fit), the whole accruing income of the property;

(*q*) Rawe v. Chichester, Ambl. 715; Tanner v. Elworthy, 4 Beav. 487; Clegg v. Fishwick, 1 Mac. & Gord. 294.

(*r*) White v. White, 5 Ves. 554; 9 Ves. 560; Allen v. Backhouse, 2 Ves. & Bea. 65; Jacob, 631; Greenwood v. Evans, 4 Beav. 44; Jones v. Jones, 5 Hare, 440; Hadleston v. Whelpdale, 9 Hare, 775.

(*s*) Stats. 11 Geo. IV, and 1 Will. IV, c. 65, ss. 12, 14–18, 20, 21; 16 & 17 Vict. c. 70, ss. 113–115, 133–135.

(*t*) Stat. 4 Geo. II, c. 28, s. 6; ante, p. 204.

but they have also power at once to dispose of it for 1000 years to come, a power which is evidently almost as effectual as if they were enabled to sell the fee simple. Until the time of payment comes, the owner of the land is entitled, on the other hand, to receive the rents and profits, by virtue of the trust under which the trustees may be compelled to permit him so to do. So, if part of the rents should be required, the residue must be paid over to the owner; but if non-payment by the owner should render a sale necessary, the trustees will be able to assign the property, or any part of it, to any purchaser for 1000 years without any rent. But until these measures may be enforced, the ownership of the land, subject to the payment of the money, remains in the same state as before. The trustees, to whom the term has been granted, have only a chattel interest; the legal seisin of the freehold remains with the owner, and may be conveyed by him, or devised by his will, or will descend to his heir, in the same manner as if no term existed; the term all the while still hanging over the whole, ready to deprive the owners of all substantial enjoyment, if the money should not be paid.

If, however, the money should be paid, or should not ultimately be required, different methods may be employed of depriving the trustees of all power over the property. The first method, and that most usually adopted in modern times, is by inserting in the deed, by which the term is created, a proviso that the term shall cease, not only at its expiration by lapse of time, *but also in the event of the purposes for which it is created being fully performed and satisfied, or becoming unnecessary, or incapable of taking effect.(*u*) This proviso for *cesser*, as it is called, makes the term endure so long only as the purposes of the trust require; and, when these are satisfied, the term expires without any act to be done by the trustees: their title at once ceases, and they cannot, if they would, any longer intermeddle with the property. [*340]

But if a proviso for cesser of the term should not be inserted in the deed by which it is created, there is still a method of getting rid of the term, without disturbing the ownership of the lands which the term overrides. The lands in such cases, it should be observed, may not, and seldom do, belong to one owner for an estate in fee simple. The terms of which we are now speaking, are most frequently created

(*u*) See Sugd. Vend. and Pur. 774.

by marriage settlements, and are the means almost invariably used for securing the portions of the younger children; whilst the lands are settled on the eldest son in tail. But, on the son's coming of age, or on his marriage, the lands are, for the most part, as we have before seen,(*v*) resettled on him for life only, with an estate tail in remainder to his unborn eldest son. The owner of the lands is therefore probably only a tenant for life, or perhaps a tenant in tail. But, whether the estate be a fee simple, or an estate tail, or for life only, each of these estates is, as we have seen, an estate of freehold,(*x*) and as such, is larger, in contemplation of law, than any term of years, however long. The consequence of this legal doctrine is, that if any of these estates should happen to be vested in any person, who at the same time is possessed of a term of years in the same land, and no [*341] *other estate should intervene, the estate of freehold will infallibly swallow up the term, and yet be not a bit the larger. The term will, as it is said, be *merged* in the estate of freehold.(*y*) Thus let A. and B. be tenants for a term of 1000 years, and subject to that term, let C. be tenant for his life; if now A. and B. should assign their term to C. (which assignment under such circumstances is called a *surrender*), C. will still be merely tenant for life as before. The term will be gone forever; yet C. will have no right to make any disposition to endure beyond his own life. He had the legal seisin of the lands before, though A. and B. had the possession by virtue of their term; now he will have both legal seisin and actual possession during his life, and A. and B. will have completely given up all their interest in the premises. Accordingly, if A. and B. should be trustees for the purposes we have mentioned, a surrender by them of their term to the legal owner of the land, will bring back the ownership to the same state as before. The recent act to amend the law of real property(*z*) now provides, that a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, shall be void at law unless made by deed.(*a*)

The merger of a term of years is sometimes occasioned by the acci-

(*v*) Ante, p. 45. (*x*) Ante, pp. 22, 31, 54.

(*y*) 3 Prest. Conv. 219. See ante, pp. 204, 234.

(*z*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 4, to the same effect.

(*a*) By stat. 13 & 14 Vict. c. 97, a surrender of a lease upon any other occasion than a sale or mortgage is charged with the same duty as an assignment. See ante, p. 333, n. (*a*).

dental union of the term and the immediate freehold in one and the same person. Thus, if the trustee of the term should purchase the freehold, or if it should be left to him by the will of the former owner, *or descend to him as heir at law, in each of these cases the term will merge. So, if one of two joint holders of a term [*342] obtain the immediate freehold, his moiety of the term will merge; or conversely, if the sole owner of a term obtain the immediate freehold jointly with another, one moiety of the term will merge, and the joint ownership of the freehold will continue, subject only to the remaining moiety of the term.(*b*) Merger being a *legal* incident of estates, occurs quite irrespective of the trusts on which they may be held; but equity will do its utmost to prevent any injury being sustained by a cestui que trust, the estate of whose trustee may accidentally have merged.(*c*) The law, however, though it does not recognize the trusts of equity, yet takes notice in some few cases of property being held by one person in right of another, or *in autre droit*, as it is called; and in these cases the general rule is, that the union of the term with the immediate freehold will not cause any merger, if such union be occasioned by the act of law, and not by the act of the party. Thus, if a term be held by a person, upon whose wife the immediate freehold afterwards descends, such freehold, coming to the husband in right of his wife, will not cause a merger of the term.(*d*) So, if the owner of a term make the freeholder his executor, the term will not merge,(*e*) for the executor is recognized by the law as usually holding only for the benefit of creditors and legatees; but if the executor himself should be the legatee of the term, it seems that, after all the creditors have been paid, the term will merge.(*f*) And if an executor, whether legatee or not, holding a term as *executor, should *purchase* the immediate freehold, the better opinion is, [*343] that this being his own act, will occasion the merger of the term, except so far as respects the rights of the creditors of the testator.(*g*)

There was until recently another method of disposing of a term when the purposes for which it was created had been accomplished.

(*b*) Sir Ralph Bovey's case, 4 Ventr. 193, 195; Co. Litt. 186 a; Burton's Compendium, pl. 900.

(*c*) See 3 Prest. Con. 320, 321. (*d*) Doe d. Blight v. Pett, 11 Adol. & Ellis, 842.

(*e*) Co. Litt. 338 b.

(*f*) Prest. Conv. 310, 311. See Law v. Urlwin, 16 Sim. 377, and Lord St. Leonards' comments on this case, Concise Vendors, 481, 482.

(*g*) Sugd. Vend. and Pur. 771.

If it were not destroyed by a proviso for cesser, or by a merger in the freehold, it might have been kept on foot for the benefit of the owner of the property for the time being. A term, as we have seen, is an instrument of great power, yet easily managed; and in case of a sale of the property, it might have been a great protection to the purchaser. Suppose, therefore, that, after the creation of such a term as we have spoken of, the whole property had been sold. The purchaser, in this case, often preferred having the term still kept on foot, and assigned by the trustees to a new trustee of his own choosing, in trust for himself, his heirs and assigns; or, as it was technically said, *in trust to attend the inheritance*. The reason for this proceeding was that the former owner might possibly, since the commencement of the term, have created some incumbrance upon the property, of which the purchaser was ignorant, and against which, if existing, he was of course desirous of being protected. Suppose, for instance, that a rent-charge had been granted to be issuing out of the lands, subsequently to the creation of the term: this rent-charge of course could not affect the term itself, but was binding only on the freehold, subject to the term. The purchaser, therefore, if he took no notice of the term, bought an estate, subject not only to the term, but, also, to the rent-charge. Of the existence of the term, however, we suppose him to have been aware. If now he should have procured the term to be surrendered *to himself, the unknown rent-charge, not [*344] being any estate in the land, would not have prevented the union and merger of the term in the freehold. The term would consequently have been destroyed, and the purchaser would have been left without any protection against the rent-charge, of the existence of which he had no knowledge, nor any means of obtaining information. The rent-charge, by this means, became a charge, not only on the legal seisin, but also on the possession of the lands, and was said to be accelerated by the merger of the term.(*h*) The preferable method, therefore, always was to avoid any merger of the term; but, on the contrary, to obtain an assignment of it to a trustee in trust for the purchaser, his heirs and assigns, and to attend the inheritance. The trustee thus became possessed of the lands for the term of 1000 years; but he was bound, by virtue of the trust, to allow the purchaser to receive the rents, and exercise what acts of ownership he might please. If, however, any unknown incumbrance, such as the rent-charge in the case supposed, should have come to light, then was

(*h*) 3 Prest. Conv. 460.

the time to bring the term into action. If the rent-charge should have been claimed, the trustee of the term would at once have interfered, and informed his claimant that, as his rent-charge was made subsequently to the term, he must wait for it till the term was over, which was in effect a postponement *sine die.* In this manner, a term became a valuable protection to any person on whose behalf it was kept on foot, as well as a source of serious injury to any incumbrancer, such as the grantee of the rent-charge, who might have neglected to procure an assignment of it on his own behalf, or to obtain a declaration of trust in his favor from the legal owner of the term. For it will be observed that, if the grantee of the rent-charge had obtained from the persons in whom the term was vested, a declaration *of trust in his behalf, they would have been bound to retain [*345] the term, and could not lawfully have assigned it to a trustee for the purchaser.

If the purchaser, at the time of his purchase, should have had notice of the rent-charge, and should yet have procured an assignment of the term to a trustee for his own benefit, the Court of Chancery would, on the first principles of equity, have prevented his trustee from making any use of the term to the detriment of the grantee of the rent-charge.(*i*) Such a proceeding would evidently be a direct fraud, and not the protection of an innocent purchaser against an unknown incumbrance. To this rule, however, one exception was admitted, which reflects no great credit on the gallantry, to say the least, of those who presided in the Court of Chancery. In the common case of a sale of lands in fee simple from A. to B., it was holden that, if there existed a term in the lands, created prior to the time when A.'s seisin commenced, or prior to his marriage, an assignment of this term to a trustee for B. might be made use of for the purpose of defeating the claim of A.'s wife, after his decease, to her dower out of the premises.(*k*) Here B. evidently had notice that A. was married, and he knew also that, by the law, the widow of A. would, on his decease, be entitled to dower out of the lands. Yet the Court of Chancery permitted him to procure an assignment of the term to a trustee for himself, and to tell the widow that, as her right to dower arose subsequently to the creation of the term, she must wait for her

(*i*) Willoughby v. Willoughby, 1 T. Rep. 763.
(*k*) Sugd. Vend. and Pur. 781; Co. Litt. 208 a, n. (1).

dower till the term was ended. We have already seen(*l*) that, as to all women married after the first of January, 1834, the right to dower has been placed at the disposal of their husbands. Such husbands, [*346] *therefore, had no need to request the concurrence of their wives in a sale of their lands, or to resort to the device of assigning a term, should such concurrence not have been obtained.

When a term had been assigned to attend the inheritance, the owner of such inheritance was not regarded, in consequence of the trust of the term in his favor, as having any interest of a personal nature, even in contemplation of equity; but as, at law, he had a real estate of inheritance in the lands, subject to the term, so, in equity, he had, by virtue of the trust of the term in his favor, a real estate of inheritance, in immediate possession and enjoyment.(*m*) If the term were neither surrendered, nor assigned to a trustee to attend the inheritance, it still was considered attendant on the inheritance by construction of law, for the benefit of all persons interested in the inheritance according to their respective titles and estates.

An act, however, has recently passed "to render the assignment of satisfied terms unnecessary."(*n*) This act provides,(*o*) that every satisfied term of years which, either by express declaration or by construction of law, shall, upon the thirty-first day of December, 1845, be attendant upon the reversion or inheritance of any lands, shall *on that day absolutely cease* and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years, which shall be so attendant as aforesaid by express declaration, although thereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and [*347] demand, as it *would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said thirty-first day of December, 1845, and shall, for the purpose of such protection, *be considered in every court of law* and of equity *to be a subsisting term.* The act further provides(*p*) that every term of years then subsisting, or thereafter to be created, becoming satisfied after the 31st day of December, 1845, and which, either by express

(*l*) Ante, p. 193.
(*m*) Sugd. Vend. and Pur. 790.
(*n*) Stat. 8 & 9 Vict. c. 112.
(*o*) Sect. 1.
(*p*) Sect. 2.

declaration or by construction of law, shall, after that day, become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid. In the two first editions of this work, some remarks on this act were inserted by way of Appendix. These remarks are now omitted, not because the author has changed his opinion on the wording of the act, but because the remarks, being of a controversial nature, seem to him to be scarcely fitted to be continued in every edition of a work intended for the use of students, and also because the act has, upon the whole, conferred a great benefit on the community. Experience has in fact shown that the cases in which purchasers enjoy their property without any molestation, are infinitely more numerous than those in which they are compelled to rely on attendant terms for protection; so that the saving of expense to the generality of purchasers seems greatly to counterbalance the inconvenience to which the very small minority may be put, who have occasion to set up attendant terms as a defence against adverse proceedings. And it is very possible that some of the questions to which this act gives rise, may never be actually litigated in a court of justice. The public generally require that the expense of legal transactions shall *be lessened, whilst they appear very little anxious that titles should be made more secure. It [*348] is notorious that in sales by auction, conditions to accept defective titles have very little effect in deterring purchasers. These considerations seem to affect the question of a general registry of deeds, and to render it doubtful whether the increased certainty of title which such a registry would confer in a few cases, would counterbalance the increase of expense to which every transaction, even the smallest, would inevitably be subject.

---

*CHAPTER II. [*349]

OF A MORTGAGE DEBT.

Our next subject for consideration is a mortgage debt. The term mortgage debt is here employed for want of one which can more precisely express the kind of interest intended to be spoken of. Every

person who borrows money, whether upon mortgage or not, incurs a *debt* or personal obligation to repay out of whatever means he may possess; and this obligation is usually expressed in a mortgage deed in the shape of a covenant by the borrower to repay the lender the money lent, with interest, at the rate agreed on. If, however, the borrower should personally be unable to repay the money lent to him, or if, as occasionally happens, it be expressly stipulated that the borrower shall not be personally liable to repay, then the lender must depend solely upon the property mortgaged; and the nature of his interest in such property, here called his mortgage debt, is now attempted to be explained. In this point of view, a mortgage debt may be defined to be an interest in land of a personal nature, recognized as such only by the Court of Chancery, in its office of administering equity. In equity, a mortgage debt is a sum of money, the payment whereof is secured, with interest, on certain lands; and being money, it is personal property, subject to all the incidents which appertain to such property. The Courts of Law, on the other hand, do not regard a mortgage in the light of a mere security for the repayment of money with interest. A mortgage in law is an absolute conveyance, subject to an agreement for a reconveyance on a certain given event. Thus, let us suppose freehold lands to be conveyed by A., a person [*350] seised in fee, to B. and his heirs, *subject to a proviso, that on repayment on a given future day, by A. to B., of a sum of money then lent by B. to A., with interest until repayment, B. or his heirs will reconvey the lands to A. and his heirs; and with a further proviso, that until default shall be made in payment of the money, A. and his heirs may hold the land, without any interruption from B. or his heirs, Here we have at once a common mortgage of [*351] freehold land.(*a*) A., who conveys the land, is called the *mortgagor; B., who lends the money, and to whom the land

(*a*) By the last Stamp Act, stat. 13 & 14 Vict. c. 97, mortgages are now subject to an ad valorem duty of one-eighth per cent. or half-a-crown per hundred pounds on the amount of the mortgage money, according to the following table :—

								s.	d.
Not exceeding £50,								1	3
Exceeding £50 and not exceeding £100,								2	6
"	100	"	150,					3	9
"	150	"	200,					5	0
"	200	"	250,					6	3
"	250	"	300,					7	6
And where the same shall exceed £300, then for every £100, and also for any fractional part of £100,								2	6

is conveyed, is called the mortgagee. The conveyance of the land from A. to B., gives to B., as is evident, an estate in fee simple at law. He thenceforth becomes, at law, the absolute owner of the premises, subject to the agreement under which A. has a right of enjoyment, until the day named for the payment of the money ;(*b*) on which day, if the money be duly paid, B. has agreed to reconvey the estate to A. If, when the day comes, A. should repay the money with interest, B. of course must reconvey the lands ;[1] but if the money should

And where the same shall be made as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be (other than and except any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage against damage by fire, or to be advanced for the insurance of any life or lives, or for the renewal of any grant or lease upon the dropping of any life or lives, pursuant to any agreement in any deed whereby any estate or interest held upon such life or lives shall be granted, assigned, or assured, or whereby any annuity shall be granted or secured for such life or lives), if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum, the same duty will be payable as on a mortgage for such limited sum. And if the total amount secured or to be ultimately recoverable shall be uncertain and without any limit, the deed will be available as a security or charge for such an amount only as the ad valorem duty denoted by any stamp or stamps thereon will extend to cover. The progressive duty is the same as on purchase deeds. See ante, pp. 157, 158.

(*b*) See as to this, Doe d. Roylance v. Lightfoot, 8 Mee. & W. 553; Doe d. Parsley v. Day, 2 Q. B. 147; Rogers v. Grazebrook, 8 Q. B. 895.

[1] It was formerly thought that not even a strict performance of the condition would revest the legal estate in the mortgagor without a reconveyance, and that when the condition was not strictly performed the case was much stronger. Since, however, a mortgage has become considered as but the security for the payment of the debt, it is believed that a reconveyance is seldom necessary on either side of the Atlantic, when payment has been made either before or after the day appointed therefor, Gray v. Jenks, 3 Mason, 526; Armitage v. Wickliffe, 12 B. Monroe, 488. "The assignment of the debt, or forgiving it," said Lord Mansfield in Martin v. Mowlin, 2 Burrow, 978, "will draw the land after it, though the debt were forgiven only by parol." And in most of the States, provision is made by statute for the discharge of mortgages, by the entry of satisfaction upon the margin of the registry (see 2 Greenleaf's Cruise, 91, note). As now usually drawn, mortgages contain an express provision, that on payment of the money at the appointed time, the mortgage shall be void, and the estate thereby granted cease and determine, and, as the time of the performance is not regarded as of the essence of the contract, the acceptance of the money by the mortgagee is deemed a waiver of the time, Arnott v. Post, 6 Hill, 65; Edwards v. The Farmers' Fire Ins. Co. 21 Wendell, 467, though, in strictness, a tender of the money after the day is neither performance nor payment, and merely lays a ground for the intervention of equity to compel the mortgagee to receive it, Merritt v. Lambert, 7 Paige, 344; Post v. Arnott, 2 Denio, 344; Charter v. Stevens, 3 Id. 33; Mr. Hare's note to Keech v. Hall, 1 Smith's Lead. Cases, 666.

not be repaid punctually on the day fixed, there is evidently nothing on the face of the arrangement to prevent B. from keeping the lands to himself and his heirs forever. But upon this arrangement, a very different construction is placed by a Court of law and by a Court of equity, a construction which well illustrates the difference between the two.

The Courts of law, still adhering, according to their ancient custom, to the strict literal meaning of the terms, hold, that if A. do not pay or tender the money punctually on the day named, he shall lose the land forever; and this, according to Littleton,(*c*) is the origin of the term *mortgage* or *mortuum vadium*, "for that it is doubtful whether the feoffor will pay at the day limited, such sum or not; and if he doth not pay, then the land which is put in pledge, upon condition for the payment of the money, is taken from him forever, and is dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c." Correct, however, as is Littleton's statement of the law, the accuracy of his derivation may be questioned; as the word *mortgage* appears to have been applied, in more early *times, to a feoffment to the creditor and his [*352] heirs, to be held by him until his debtor paid him a given sum; until which time he received the rents without account, so that the estate was unprofitable or dead to the debtor in the mean time;(*d*) the rents being taken in lieu of interest, which, under the name of usury, was anciently regarded as an unchristian abomination.(*e*)[1] This species of mortgage has, however, long been disused, and the form above given is now constantly employed. From the date of the mortgage deed, the legal estate in fee simple belongs, not to the mortgagor, but to the mortgagee. The mortgagor, consequently, is thenceforward unable to create any legal estate or interest in the premises: he cannot even make a valid lease for a term of years,(*f*)[2] a point of law

(*c*) Sect. 332. (*d*) Glanville, lib. 10, cap. 6; Coote on Mortgages, ch. 2.

(*e*) Interest was first allowed by law, by stat. 37 Hen. VIII, c. 9, by which also interest above ten per cent. was forbidden.

(*f*) See Doe d. Barney v. Adams, 2 Cro. & Jerv. 235; Whitton v. Peacock, 2 Bing. N. C. 411; Green v. James, 6 Mee. & Wels. 656; Doe d. Lord Downe v. Thompson, 9 Q. B. 1037.

[1] See supra, p. 8.

[2] That is to say, such a lease will be liable to be defeated by the paramount right of the mortgagee, Notes to Keech v. Hall, 1 Smith's Leading Cases, 662; Evans v. Elliott, 9 Adolph. & Ellis, 342. The old opinion that a lease by a mortgagor amounts to a disseisin of the mortgagee (Mr. Coventry's note to 1 Powell on Mortgages, 160), cannot now be considered as recognized; 4 Kent's Com. 157.

too frequently neglected by those whose necessities have obliged them to mortgage their estates. When the day named for payment is passed, the mortgagee, if not repaid his money, may at any time bring an action of ejectment against the mortgagor, without any notice, and thus turn him out of possession;(*g*) so that, if the debtor had no greater mercy shown to him than a Court of law will allow, the smallest want of punctuality in his payment would cause him forever to lose the estate he had pledged. In modern times, a provision has certainly been made by act of Parliament for staying the proceedings in any action of ejectment brought by the mortgagee, on payment by the mortgagor, being the defendant in the *action,(*h*) of all principal, interest, and costs.(*i*) But at the time of this [*353] enactment, the jurisdiction of equity over mortgages had become fully established; and the act may consequently be regarded as ancillary only to that full relief, which, as we shall see, the Court of Chancery is accustomed to afford to the mortgagor in all such cases.

The relative rights of the mortgagor and mortgagee appear to have long remained on the footing of the strict construction of their bargain, adopted by the Courts of law. It was not till the reign of James I, that the Court of Chancery took upon itself to interfere between the parties.(*j*) But at length, having determined to interpose, it went so far as boldly to lay down as one of its rules, that no agreement of the parties, for the exclusion of its interference, should have any effect.(*k*) This rule, no less benevolent than bold, is a striking instance of that determination to enforce fair dealing between man and man, which has raised the Court of Chancery, notwithstanding the many defects in its system of administration, to its present power and dignity.[1] The Court of Chancery accordingly holds, that after the

(*g*) Keech v. Hall, Dougl. 21; Doe d. Roby v. Maisey, 8 Bar. & Cres. 767; Doe d. Fisher v. Giles, 5 Bing. 421; Coote on Mortgages, book 3, ch. 3.

(*h*) Doe d. Hurst v. Clifton, 4 Adol. & Ell. 814.

(*i*) Stats. 7 Geo. II, c. 20, s. 1; 15 & 16 Vict. c. 76, ss. 219, 220.

(*j*) Coote on Mortgages, book 1, ch. 3.

(*k*) Howard v. Harris, 2 Cha. Ca. 148; Leton v. Slade, 7 Ves. 273.

[1] Chancellor Kent has well expressed this. "In ascending to the view of a mortgage, in the contemplation of a Court of Equity," says he, in 4th Commentaries, p. 157, "we leave all these technical scruples and difficulties behind us. Not only the original severity of the common law, treating the mortgagor's interest as resting upon the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute, by non-payment or tender at the day, is entirely relaxed; but

day fixed for the payment of the money has passed, the mortgagor has still a right to redeem his estate, on payment to the mortgagee of all principal, interest, and costs, due upon the mortgage to the time of actual payment. This right is called the mortgagor's *equity of redemption;* and no agreement with the creditor, expressed in any terms, however stringent, can deprive the debtor of this equitable right, on payment within a reasonable time.[1] If, therefore, after the

---

the narrow and precarious character of the mortgagor at law is changed, under the more enlarged and liberal jurisdiction of the Court of Equity. Their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances, in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received, by their adoption in the courts of law."

[1] In other words, equity will not suffer any agreement in a mortgage to prevail, which will change the latter into an absolute conveyance, upon any condition or event whatever, Howard v. Harris, 1 Vernon, 190; and hence no waiver by the mortgagor of his equity of redemption will be allowed to defeat or impair it, or to hinder its transfer unfettered to a third person, Newcomb v. Bonham, 1 Vernon, 7; Clark v. Henry, 2 Cowen, 324; Johnson v. Gray, 16 Serg. & Rawle, 361; Rankin v. Mortimere, 7 Watts, 372. This is equally so, whether the transaction appears, as it usually does, upon the face of the instrument, to be a mortgage, or whether this is shown by any other instrument, Dey v. Dunham, 2 John's Ch. 182; Palmer v. Guernsey, 7 Wendell, 248; Nugent v. Riley, 1 Metcalf, 117; Heister v. Maderia, 3 Watts & Serg. 384; or even by parol, Kunkle v. Wolfsberger, 6 Watts, 126; Hamit v. Dundas, 4 Barr, 178; Morris v. Nixon, 1 Howard's U. S. Rep. 118; Russel v. Southard, 12 Id. 139; Strong v. Stewart, 4 John's Ch. 467. "The course of decision," says Mr. Hare in his note to Thornborough v. Baker, 1 Lead. Cas. in Equity, 433, to which the student is referred for an elaborate discussion of this branch of the law of mortgage, "which allows the legal effects of a deed, whether absolute or conditional, to be varied by parol evidence of the circumstances under which it was given, or the object which it was designed to fulfil, is not inconsistent either with the Statute of Frauds, or the more general rules of evidence of the common law. If it were so, the equity of redemption of the mortgagor, and the whole system of equity as to mortgages, could have no existence; for nothing can be a greater departure from the terms of an instrument, than to convert a deed, conditioned to be void on the performance of an act by the grantor, on a day certain, which, like all conditions in avoidance, is legally inoperative unless fulfilled to the letter, into a vested equitable estate, exposed to a legal forfeiture against which equity will relieve. Yet such is the long and well-established course adopted in Chancery, in every instance in which it has occasion to pass judgment upon the respective rights of a mortgagor and mortgagee. It is obvious, therefore, that the equity of the mortgagor is paramount to the deed, and that facts and circumstances, establishing its existence, may be given in evidence, not a contradicting the deed, but as controlling its operation. . . . . There is, however, no principle of law or equity, which prohibits a conditional contract for the sale of real or personal property, or forbids a vendor to make an absolute conveyance of the property sold, subject to an agreement, that he shall be entitled to a reconveyance, upon the repayment of the purchase-money, or paying any other sum certain, or capable of being reduced to certainty, on or before a

day fixed in the deed for payment, the mortgagee should, as he still may, eject the *mortgagor by an action of ejectment in a Court of law, the Court of Chancery will nevertheless compel [*354] him to keep a strict account of the rents and profits; and, when he has received so much as will suffice to repay him the principal money lent, together with interest and costs, he will be compelled to reconvey the estate to his former debtor. In equity, the mortgagee is properly considered as having no right to the estate, further than is necessary to secure to himself the due repayment of the money he has advanced, together with the interest for the loan; the equity of redemption which belongs to the mortgagor, renders the interest of the mortgagee merely of a personal nature, namely, a security for so much money. In a Court of law, the mortgagee is absolutely entitled; and the estate mortgaged may be devised by his will,(*l*) or, if he should die intestate, will descend to his heir at law; but in equity he has a security only for the payment of money, the right to which will, in common with his other personal estate, devolve on his executors or administrators, for whom his devisee or heir will be trustee; and, when they are paid, such devisee or heir will be obliged by the Court of Chancery, without receiving a sixpence for himself, to reconvey the estate to the mortgagor.[1]

(*l*) See 1 Jarm. Wills, 638.

period fixed by the terms of the agreement, Conway's Executors v. Alexander, 7 Cranch, 218; Flagg v. Man, 14 Pick. 467; Holmes v. Grant, 8 Paige, 243; Brown v. Dewey, 2 Barbour, 28, 172; Kelly v. Bryan, 6 Iredell's Eq. 283; M'Kinstry v. Conly, 12 Alabama, 678. The principle thus established is that a mortgage is necessarily and essentially a security for a debt; and that when no debt exists, a mortgage is impossible, is too obviously true to require demonstration, Lund v. Lund, 1 New Hamp. 39. Those cases must, undoubtedly, be excepted from this rule, in which the transaction is really a loan, and where the lender takes advantage of the necessities of the borrower to force him into a conditional sale, which is a mere cover to an irredeemable mortgage. And as it is difficult to guard against this danger, without a rigorous rule of construction, Courts of Equity lean, in doubtful cases, in favor of construing defeasible conveyances as mortgages, and not as conditional sales, Poindexter v. M'Cannan, 2 Devereux's Equity, 273. But save in this respect, the doctrine held in Conway's Executors v. Alexander, does not admit of denial or even qualification." It has, however, been held in Pennsylvania, that although parol evidence is admissible to show that what appears on its face to be an absolute sale was intended to be only a security for a debt, yet that an instrument of writing, appearing upon its face to be a mortgage, cannot be converted, by parol evidence, into a conditional sale, Kerr v. Gilmore, 6 Watts, 405; Brown v. Nickle, 6 Barr, 390; Woods v. Wallace, 10 Harris, 176.

[1] For, as Lord Nottingham said, the money first came from the personal estate, and the

Indulgent, however, as the Court of Chancery has shown itself to the debtor, it will not allow him forever to deprive the mortgagee, his creditor, of the money which is his due;[1] and if the mortgagor will not repay him within a reasonable time, equity will allow the mortgagee forever to retain the estate to which he is already entitled at law. For this purpose it will be necessary for the mortgagee to file a bill of *foreclosure* against the mortgagor, praying that an account may be taken of the principal and interest due to him, and that the [*355] mortgagor may be directed to pay the same, with *costs, by a short day, to be appointed by the Court, and that in default thereof he may be foreclosed his equity of redemption.(*m*) A day is then fixed by the Court for payment; which day, however, may, on the application of the mortgagor, good reason being shown,(*n*) be postponed for a time. Or, if the mortgagor should be ready to make repayment, before the cause is brought to a hearing, he may do so at any time previously, on making proper application to the Court, admitting the title of the mortgagee to the money and interest.(*o*) If, however, on the day ultimately fixed by the Court, the money

(*m*) Coote on Mortgages, book 5, ch. 4.
(*n*) Nanny v. Edwards, 4 Russ. 124; Eyre v. Hanson, 2 Beav. 478.
(*o*) Stat. 7 Geo. II, c. 20, s. 2.

---

mortgagor's right to the land was only as a security for the money, Thornborough v. Baker, 3 Swanston, 628; and although ejectment can be brought by the heir of the mortgagee, he will, however, hold the property, when recovered, in trust, first, for the executors of his ancestor, and secondly, subject to their interest, in trust for the mortgagor, Van Duyne v. Thayer, 14 Wendell, 236.

It is familiar that statutes providing for the registry of deeds and mortgages are in force in all of the United States, and in the case of mortgages, the priority of their lien upon the estate of the mortgagor is regulated, as a general rule, by the date of registration, with the exception, in Pennsylvania, and it may be some other States, of mortgages given for the purchase-money of land, which may be recorded within sixty days from their execution, Act of 28 March, 1820, § 1, Purdon's Dig. 231. Upon the subject of the notice to a purchaser, arising from the registry of a mortgage, the student is referred to Mr. Hare's note to the well-known case of Le Neve v. Le Neve, 2 White & Tudor's Lead. Cas. in Equity, part 1, p. 21. See also, upon the general subject of registration, 4 Kent's Com. p. 168, et seq.

[1] Before proceeding to consider the remedy which equity gives to a mortgagee to enforce payment of the mortgage-debt, it may be here noticed that equity will interfere by injunction to prevent the commission of waste upon the mortgaged premises, whether by the mortgagee in possession, for the land is only a security for the debt, which, subject to it, is regarded as the land of the mortgagor, Smith v. Moore, 11 New Hamp. 55; Rawlings v. Stewart, 1 Bland, 22; Irwin v. Davidson, 3 Iredell's Eq. 311, or by the mortgagor, for the latter may not do any act to lessen the security of the mortgagee, Farrant v. Lovell, 3 Atkins, 723; Brady v. Waldron, 2 Johns. Ch. 148; Salmon v. Claggett, 3 Bland, 126.

should not be forthcoming, the debtor will then be absolutely deprived of all right to any further assistance from the Court; in other words, his equity of redemption will be foreclosed, and the mortgagee will be allowed to keep, without further hindrance, the estate which was conveyed to him when the mortgage was first made. By the recent act to amend the practice and course of proceeding in the Court of Chancery, the Court is empowered, in any suit for foreclosure, to direct a sale of the property at the request of either party instead of a foreclosure.(*p*)[1]

In addition to the remedy by foreclosure, which, it will be perceived, involves the necessity of a suit in Chancery, a more simple and less expensive remedy is now usually provided in mortgage transactions; this is nothing more than a power given by the mortgage deed to the mortgagee, without further authority, to sell the premises, in case default should be made in payment. When such a power is exercised, the mortgagee having the whole estate in fee-simple at law, is of course able to convey the same estate to the purchaser; and, as this *remedy would be ineffectual, if the concurrence of the mortgagor were necessary, it has been decided that his concur- [*356]

(*p*) Stat. 15 & 16 Vict. c. 86, s. 48.

[1] This remedy by foreclosure, whereby, on default of payment at the appointed day, the mortgagor loses his equity of redemption, is termed *strict foreclosure*. Its severity is, in England, practically destroyed by the provisions of the recent statute referred to in the text, whereby either party can procure a sale of the mortgaged property. But until that statute, the mortgagee had it in his power to obtain the absolute title to the premises, and such is still the case in a very few of our own States, where the English practice still subsists, Johnson v. Donnell, 15 Illinois, 97. See passim, 2 Greenleaf's Cruise, 197; 4 Kent's Com. 181. It is there shown that the remedies upon a mortgage may, in the United States, be divided into four principal classes: first, by proceedings in equity, such as have been referred to in the text; secondly, by sale under a power for that purpose; and thirdly and fourthly, by entry, either with or without process of law, as regulated by local statutes. In Pennsylvania, the remedy upon a mortgage is regulated by a statute passed as early as 1705, by which, at the expiration of twelve months after default has been made by the mortgagor, the mortgagee can sue out a writ of *scire facias*, requiring the sheriff to make known to the mortgagor, his heirs or executors, to appear and show cause why the mortgaged premises should not be taken in execution for payment of the debt, and, upon judgment being entered in favor of the mortgagee, a writ of *levari facias* issues, whereby the sheriff, without further process, exposes the premises, after advertisement for a certain period, to public sale, the proceeds of which are afterwards applied to the payment of liens and incumbrances, according to their legal priority.

rence cannot be required by the purchaser.(*q*) The mortgagee, therefore, is at any time able to sell; but, having sold, he has no further right to the money produced by the sale, than he had to the lands before they were sold. He is at liberty to retain to himself his principal, interest, and costs; and, having done this, the surplus, if any, must be paid over to the mortgagor.

If, after the day fixed for the payment of the money is passed, the mortgagor should wish to pay off the mortgage, he must give to the mortgagee six calendar months' previous notice in writing of his intention so to do, and must then punctually pay, or tender the money, at the expiration of the notice;(*r*) for, if the money should not be then ready to be paid, the mortgagee will be entitled to fresh notice; as it is only reasonable that he should have time afforded him to look out for a fresh security for his money.

Mortgages of freehold lands are sometimes made for long terms, such as a 1000 years. But this is not now often the case, as the fee simple is more valuable, and therefore preferred as a security. Mortgages for long terms, when they occur, are usually made by trustees, in whom the terms have been vested in trust to raise, by mortgage, money for the portions of the younger children of a family, or other similar purposes. The reasons for vesting such terms in trustees for these purposes, were explained in the last chapter.(*s*)

Copyhold, as well as freehold lands, may be the subjects of mortgage.
[*357] The purchase of copyholds, it will *be remembered, is effected by a surrender of the lands from the vendor, into the hands of the lord of the manor, to the use of the purchaser, followed by the admittance of the latter as tenant to the lord.(*t*) The mortgage of copyholds is effected by surrender, in a similar manner, from the mortgagor to the use of the mortgagee and his heirs, subject to a condition, that on payment by the mortgagor to the mortgagee of the money lent, together with interest, on a given day, the surrender shall be void. If the money should be duly paid on the day fixed, the surrender will be void accordingly, and the mortgagor will con-

(*q*) Corder v. Morgan, 18 Ves. 344; Clay v. Sharpe, Sugd. Vend. and Pur. Appendix, No. XIII, p. 1096.

(*r*) Shrapnell v. Blake, 2 Eq. Ca. Abr. 603, pl. 34.

(*s*) See ante, p. 338.

(*t*) Ante, pp. 311, 313.

tinue entitled to his old estate; but if the money should not be duly paid on that day, the mortgagee will then acquire at law an absolute right to be admitted to the customary estate which was surrendered to him; subject nevertheless to the equitable right of the mortgagor, confining the actual benefit derived by the former to his principal money, interest, and costs. The mortgagee, however, is seldom admitted, unless he should wish to enforce his security, contenting himself with the right to admittance conferred upon him by the surrender; and, if the money should be paid off, all that will then be necessary, will be to procure the steward to insert on the court rolls, a memorandum of acknowledgment by the mortgagee, of satisfaction of the principal money and interest secured by the surrender.(*u*) If the mortgagee should have been admitted tenant, he must of course, on repayment, surrender to the use of the mortgagor, who will then be readmitted.

Leasehold estates also frequently form the subjects of mortgage. The term of years of which the estate consists is assigned by the mortgagor to the mortgagee, subject to a proviso for redemption or reassignment on payment, on a given day, by the mortgagor to the mortgagee, *of the sum of money advanced, with interest; and [*358] with a further proviso for the quiet enjoyment of the premises by the mortgagor until default shall be made in payment. The principles of equity as to redemption apply equally to such a mortgage, as to a mortgage of freeholds; but, as the security, being a term, is always wearing out, payment will not be permitted to be so long deferred. A power of sale also is frequently inserted in a mortgage of leaseholds. From what has been said in the last chapter,(*x*) it will appear that, as the mortgagee is an assignee of the term, he will be liable to the landlord, during the continuance of the mortgage, for the payment of the rent and the performance of the covenants of the lease;[1] against this liability the covenant of the mortgagor is his only security. In order, therefore, to obviate this liability, when the rent or covenants are onerous, mortgages of leaseholds are frequently

(*u*) 1 Scriv. Cop. 242; 1 Watk. Cop. 117, 118.

(*x*) Ante, p. 331.

[1] Even although the mortgagee may not have entered on the premises, Williams v. Bosanquet, 1 Brod. & Bing, 238 (overruling Eaton v. Jaques, Dougl. Rep. 455); M'Murphy v. Minot, 4 New Hamp. 251; Farmers' Bank v. Mutual Ins. Society, 4 Leigh, 69. In New York, however, the case of Eaton v. Jaques, has been approved; Astor v. Miller, 2 Paige, 68; Astor v. Hoyt, 5 Wendell, 603, 2 Greenleaf's Cruise, 86 n.

made by way of demise or underlease: the mortgagee by this means becomes the tenant only of the mortgagor, and consequently a mere stranger with regard to the landlord.(*y*) The security of the mortgagee in this case is obviously not the whole term of the mortgagor, but only the new and derivative term created by the mortgage.

In some cases the exigency of the circumstances will not admit of time to prepare a regular mortgage; a deposit of the title deeds is then made with the mortgagee; and notwithstanding the stringent provision of the Statute of Frauds to the contrary,(*z*) it has been held by the Court of Chancery that such a deposit, even without any writing, operates as an equitable mortgage of the estate of the mortgagor in the lands comprised in the deeds.(*a*)[1] And the same doc-
[*359] trine applies to copies *of court roll relating to copyhold lands,(*b*) for such copies are the title deeds of copyholders.

When lands are sold, but the whole of the purchase-money is not paid to the vendor, he has a lien in equity on the lands for the amount unpaid together with interest at four per cent., the usual rate allowed

(*y*) See ante, p. 336. (*z*) 29 Car. II, c. 3, ss. 1, 3; ante, pp. 126, 333.
(*a*) Russell v. Russell, 1 Bro. C. C. 269. See Ex parte Haigh, 11 Ves. 403.
(*b*) Whitbread v. Jordan, 1 You. & Coll. 303; Lewis v. John, 1 C. P. Coop. 8. See, however, Sugd. Vend. and Pur. 1054; Jones v. Smith, 1 Hare, 56; 1 Phill. 244.

[1] It being considered that the deposit is evidence of an agreement to make a mortgage, which equity will enforce against the mortgagor, and all claiming under him, with notice of the deposit; but as against strangers, it can only occur in cases where the possession of the title deeds can be accounted for in no other manner except from their having been deposited by way of equitable mortgage, or the holder being otherwise a stranger to the title and the lands, Boyer v. Williams, 3 Young & Jerv. 150; Berry v. Mutual Ins. Co., 2 Johns. Ch. 608. Russel v. Russel, cited above, is the leading case on this subject, and has repeatedly been strongly disapproved, particularly by Lord Eldon (see passim, Ex parte Coming, 9 Ves. 115); and the doctrine, though clearly recognized, is limited as far as possible. It has been considered, however, that the English law as to an equitable mortgage being created by deposit of the title deeds has not been adopted in this country; 4 Kent's Com. 151, passim; and Mr. Greenleaf says broadly, "No case is found, in which this doctrine has been actually administered; though in several cases it has been adverted to, as a rule of law, in England." 2 Greenl. Cruise, 60 n. It has certainly been denied to exist in Pennsylvania, Bowers v. Oyster, 3 Penna. Rep. 239; Shitz v. Dieffenbach, 3 Barr, 233, as it has also in Kentucky, Vanmeter v. M'Fadden, 8 B. Monroe, 437; but in a late case in New York, the principle was acted on, Rockwell v. Hobby, 2 Sandford, 9, as also somewhat recently, in Mississippi, Williams v. Stratton, 10 Smedes & Marsh. 418.

in equity.(*c*)[1] And the circumstance of the vendor having taken from the purchaser a bond or a note for the payment of the money will not destroy the lien.(*d*) But if the vendor take a mortgage of part of the estate, or any other independent security, his lien will be gone.[2] If

(*c*) Chapman v. Tanner, 1 Vern. 267; Pollexfen v. Moore, 3 Atk. 272; Mackreth v. Symmons, 15 Ves. 328; Sugd. Vend. and Pur. 856.

(*d*) Grant v. Mills, 2 Ves. & Bea. 306; Winter v. Lord Anson, 3 Russ. 488.

[1] The student will find a valuable note upon this subject, by the late Mr. Wallace, in 1 Leading Cases in Equity, 222 (note to Mackreth v. Symmons), where he premises, "The English Chancery doctrine of the vendor's equitable lien for unpaid purchase-money, upon an absolute conveyance of land, is adopted in several of the States of this country, viz., New York, Maryland, Virginia, Tennessee, Mississippi, Georgia, Alabama, Missouri, Illinois, Indiana, Ohio, and Kentucky, and has been recognized in the Circuit and Supreme Courts of the United States (Sieman v. Brown et al., 1 Mason, 192, 212; S. C. 4 Wheaton, 256; Bayley v. Greenleaf, 7 Wheaton, 46). In some other States it has been condemned and abandoned. In Pennsylvania, the whole principle has been rejected; a vendor, after an absolute conveyance of the legal title, has no implied lien for the purchase-money, Kauffelt v. Bower, 7 Sergeant & Rawle, 64; Semple v. Burd, Id. 286; Megargee v. Save, 3 Wharton, 19; Hepburn v. Snyder, 3 Barr, 72, 78. In North Carolina, after some fluctuation of opinion, the doctrine of an implied lien after an absolute conveyance, is now entirely expelled, Womble v. Balth, 1 Iredell's Eq. 346. In South Carolina also, it appears to be completely rejected, Wragg's Representatives v. Comp. Gen. and others, 2 Desaussure, 509, 520. In Massachusetts, it has no existence; per Story, J., in Gilman v. Brown et al., 1 Mason, 192, 219. In Connecticut, Vermont, and Delaware, its existence remains undecided and doubtful, Atwood v. Vincent, 17 Connecticut, 576, 583; Hutchins et al. v. Olcutt, 4 Vermont, 549, 552; Budd et al. v. Busti & Vanderkemp, 1 Harrington, 69, 74. In several of the Courts in which its existence has been recognized, it has been considered as a dangerous principle, and one opposed to the prevailing policy of this country, which discourages secret liens, and tends to make all matters of title the subject of record evidence. See the remarks of Marshall, C. J., in Bayley v. Greenleaf, 7 Wheaton, 46, 51; of Carr, J., in Moore et al. v. Holcombe et al., 3 Leigh, 597, 600, 601; of Tucker, P., in Brawley v. Catran, &c., 8 Id. 522, 527; and of Trear, J., in Conover v. Warren et al., 1 Gilman, 498, 502."

[2] The English law upon this point seems to depend much upon the circumstances of each case, as to whether it is to be inferred that the lien was intended to be reserved, or that credit was exclusively given to the person from whom the security was taken, and hence Lord Eldon observed, in Mackreth v. Symmons, cited supra, "that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution, or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a Court, in what cases it would, and in what cases it would not exist." In the note cited supra, it is said, "In regard to the effect upon this equitable lien, of the vendor's taking a security, the American cases agree in establishing and applying the following simple and satisfactory rule: that the implied lien will be sustained wherever the vendor has taken the personal security of the vendee only, by whatever kind of instrument it be manifested, and therefore, that any bond, note, or covenant, given by the vendee alone, will be considered as intended only

the sale be made in consideration of an annuity, it appears that a lien will subsist for such aunuity,(*e*) unless a contrary intention can be inferred from the nature of the transaction.(*f*)

A curious illustration of the anxiety of the Court of Chancery to prevent any imposition being practised by the mortgagee upon the mortgagor, occurs in the following doctrine: that, if money be lent at a given rate of interest, with a stipulation that, on failure of punctual payment, such rate shall be increased, this stipulation is held to be void as too great a hardship on the mortgagor; whereas, the very same effect may be effectually accomplished by other words. If the stipulation be, that the higher rate shall be paid, but on punctual payment, a lower rate of interest shall be accepted, such a stipulation, [*360] *being for the benefit of the mortgagor, is valid, and will be allowed to be enforced.(*g*) The highest rate of interest which could be taken upon the mortgage of any lands, tenements, or hereditaments, or any estate or interest therein, was formerly 5*l.* per cent. per annum; and all contracts and assurances, whereby a greater rate of interest was reserved or taken on any such security, were deemed to have been made or executed for an illegal consideration.(*h*) By a

(*e*) Matthew v. Bowler, 6 Hare, 110.

(*f*) Buckland v. Pocknell, 13 Sim. 406.

(*g*) Bonafous v. Ryhot, 3 Burr. 1373; 1 Fonb. Eq. 398.

(*h*) Stat. 12 Anne, st. 2, c. 16; 5 & 6 Will. IV, c. 41; 2 & 3 Vict. c. 37; Thibault v. Gibson, 12 Mee. & Wels. 88; Hodgkinson v. Wyatt, 4 Q. B. 749.

---

to countervail the receipt for the purchase-money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien; and on the other hand, that the lien will be considered as waived whenever any distinct and independent security is taken, whether by mortgage of other land, or pledge of goods, or personal responsibility of a third person, and also when a security is taken upon the land, either for the whole or a part of the unpaid purchase-money, unless there is an express agreement that the implied lien shall be retained. . . . It may accordingly be considered as settled, by the unanimous concurrence of the cases in this country, that, wherever this lien is recognized at all, it will not be affected by the vendor's taking the bond, or bill single, of the vendee; or his negotiable promissory note; or a check drawn on a bank by the vendee, which is not presented or paid; or any instrument, whatever, involving merely the personal liability of the vendee; but that taking a mortgage of other property, or the bond or note of the vendee with a surety; or a negotiable note drawn by the vendee and indorsed by a third person; or drawn by a third person and indorsed by the vendee; will repel the lien presumptively; and in like manner, an express security on the land itself for the whole amount unpaid, as by mortgage or deed of trust, will merge the implied lien and an express security; or an express contract for a lien on the land conveyed, as to part of the amount remaining unpaid, will be an implied waiver of the lien to any greater extent."

modern statute,(*i*) the previous restriction of the interest of all loans to 5*l.* per cent. was removed, with respect to contracts for the loan or forbearance of money above the sum of 10*l.* sterling; but loans upon the security of any lands, tenements, or hereditaments, or any estate or interest therein, were expressly excepted.(*j*) But, by an act of Parliament passed on the 10th of August, 1854,(*k*) all the laws against usury were repealed; so that, now, any rate of interest may be taken on a mortgage of lands, which the mortgagor is willing to pay.

The loan of money on mortgage is an investment frequently resorted to by trustees, when authorized by their trust to make such use of the money committed to their care; in such a case, the fact that they are trustees, and the nature of their trust, are usually omitted in the mortgage deed, in order that the title of the mortgagor or his representatives may not be affected by the trusts.[1] It is, however, a rule of equity that when money is advanced by more persons than one, it shall be deemed, unless the *contrary be expressed, to have [*361] been lent in equal shares by each:(*l*) if this were the case, the executor or administrator of any one of the parties would, on his decease, be entitled to receive his share.(*m*) In order, therefore, to prevent the application of this rule, it is usual to declare, in all mortgages made to trustees, that the money is advanced by them on a joint account, and that, in case of the decease of any of them in the lifetime of the others, the receipts of the survivors or survivor shall be an effectual discharge for the whole of the money.

(*i*) 2 & 3 Vict. c. 37, continued by stat. 13 & 14 Vict. c. 56.

(*j*) See Follett v. Moore, 4 Ex. Rep. 410. (*k*) Stat. 17 & 18 Vict. c. 90.

(*l*) 3 Atk. 734; 2 Ves. sen. 258; 3 Ves. jun. 631.

(*m*) Petty v. Styward, 1 Cha. Rep. 57; 1 Eq. Ca. Ab. 290; Vickers v. Cowell, 1 Beav. 529.

---

[1] The Statute 7 & 8 Vict. c. 70, provides that the *bona fide* payment to any person to whom money should be payable upon any express or implied trust, should discharge the person paying the same from seeing to its application; but this was soon after repealed by the 8 & 9 Vict. c. 106. See infra, p. 372. On this side of the Atlantic, the English law as to the obligation of a purchaser to see to the application of the purchase-money has met with little favor, except where the sale is a breach of trust on the part of the trustee, and the purchaser has, either from the face of the transaction itself or *aliunde*, notice or knowledge of the trustee's violation of duty. See the note to Elliot v. Merryman, 1 Lead. Cas. in Eq. 59. And in England, where the trust has been to reinvest, it has always been considered sufficient for the purchaser to see the reinvestment actually made, without incurring liability as to its possible future misapplication. 2 Sugden on Vendors, 37.

We have already defined a mortgage debt as an interest in land of a personal nature;(*n*) and in accordance with this view, it has recently been held that judgment debts against the mortgagee are a charge upon his interest in the mortgaged lands.(*o*)[1] Whenever therefore any dealing takes place with a mortgagee in respect of his mortgage debt, a search for judgments ought to be made in his name, in the Index at the Common Pleas office.(*p*)

During the continuance of a mortgage, the equity of redemption which belongs to the mortgagor, is regarded by the Court of Chancery as an estate, which is alienable by the mortgagor, and descendible to his heir, in the same manner as any other estate in equity;(*q*) the Court in truth regards the mortgagor as the owner of the same estate as before, subject only to the mortgage. In the event of the decease of the mortgagor, the lands mortgaged will consequently devolve on [*362] the devisee under his will, or if he should have died intestate, on *his heir.[2] And the mortgage debt, to which the lands are subject, was until recently payable in the first place, like all other debts, out of the personal estate of the mortgagor.(*r*) As in equity the lands are only a security to the mortgagee, in case the mortgagor should not pay him, so also in equity the lands still devolved as the real estate of the mortgagor, subject only to be resorted to for payment of the debt, in the event of his personal estate being insufficient for the purpose.[3] But by a recent act of Parliament,(*s*) it is now

(*n*) Ante, p. 349. (*o*) Russell v. M'Culloch, V. C. Wood, 1 Jur. N. S. 157.
(*p*) See ante, p. 69. (*q*) See ante, p. 135, et seq.
(*r*) 2 Jarm. Wills, 554; see Yates v. Aston, 4 Q. B. 182.
(*s*) Stat. 17 & 18 Vict. c. 113.

[1] The contrary is believed to be the law on this side of the Atlantic, and certainly as to Pennsylvania, Rickert v. Madeira, 1 Rawle, 329, that is to say, the interest of the mortgagor is generally held liable to a levy and sale under a judgment, while the interest of the mortgagee cannot be so taken in execution; but being regarded as a mere chose in action, can be proceeded against only by attachment, Blanchard v. Colburn, 16 Mass. 346; Eaton v. Whiting, 3 Pick. 489; Glass v. Elison, 9 New Hamp. 69; Farmers Bank v. Commercial Bank, 10 Ohio, 71; Watkins v. Gregory, 6 Blackford, 113; Dougherty v. Linthicum, 8 Dana, 194.

[2] And it is familiar that this is also the law of this country.

[3] In other words, the fund which has received the benefit, by contracting the debt, shall make satisfaction; and as the personal estate of the ancestor bas been increased by the receipt of the mortgage money, so that personal estate shall be first resorted to for its payment, and this general principle of equity is everywhere recognized. Passim, 1 Story's Eq. § 591, &c. In the case of a devise, however, "the presumption that debts chargeable on both real and personal estate are to be paid out of personalty, is a mere presumption, and not a

provided, that when any person shall, after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum of money by way of mortgage, and such person shall not, by his will, or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person; but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased persons, be primarily liable to the payment of all mortgage debts with which the same shall be charged; every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: provided that nothing therein contained shall affect or diminish any right of the mortgagee to obtain full payment of his mortgage debt, either out of the personal estate of the person so dying as aforesaid or otherwise: provided also that nothing therein contained shall affect the rights of any person claiming under any deed, will, or document made before the 1st of January, 1855.

*The equity of redemption belonging to the mortgagor may again be mortgaged by him, either to the former mortgagee by way of further charge, or to any other person. In order to prevent frauds by clandestine mortgages, it is provided by an act of William and Mary,(*t*) that a person twice mortgaging the same lands, without discovering the former mortgage to the second mortgagee, shall lose his equity of redemption. Unfortunately, however, in such cases the equity of redemption, after payment of both mortgages, is generally worth nothing. And if the mortgagor should again mortgage the lands to a third person, the act will not deprive such third mortgagee of his right to redeem the two former mortgages.(*u*) When lands are mortgaged, as occasionally happens, to several persons, each ignorant of the security granted to the other, the [*363]

(*t*) Stat. 4 & 5 Will. & Mary, c. 16, s. 3. (*u*) Sect. 4.

necessary or inflexible legal principle. It is necessarily subject to the control which the testator may exert over all his property." The subject is one belonging rather more peculiarly to the law of devises, and in Mr. Hare's note to Aldrich v. Cooper, 2 Leading Cas. in Eq. 215, on the subject of "marshalling assets," the student will find the law very clearly explained.

general rule is, that the several mortgages rank as charges on the lands in the order of time in which they were made, according to the maxim *qui prior est tempore, potior est jure.*(*x*) But as the first mortgagee alone obtains the legal estate, he has this advantage over the others, that if he takes a further charge on a subsequent advance to the mortgagor, without notice of any intermediate second mortgage, he will be preferred to an intervening second mortgagee.(*y*)[1] And if a third mortgagee, who has made his advance without notice[2] of a second mortgage, can procure a transfer to himself of the first mortgage, he may *tack*, as it is said, his third mortgage to the first, and so postpone the intermediate incumbrancer.(*z*) For, in a contest between innocent parties, each having equal right to the assistance of a Court of Equity, the one who happens to have the legal estate is preferred to the others; the *maxim being, that [*364] when the equities are equal, the law shall prevail. A mortgage, however, may be made for securing the payment of money which may thereafter become due from the mortgagor to the mortgagee; with this exception, that a solicitor is forbidden to take from his client such a security for future *costs*, lest he should be tempted,

(*x*) Jones v. Jones, 8 Sim. 633; Wiltshire v. Rabbits, 14 Sim. 76; Wilmot v. Pike, 5 Hare, 14. (*y*) Goddard v. Complin, 1 Cha. Ca. 119.

(*z*) Brace v. Duchess of Marlborough, 2 P. Wms. 491.

[1] In other words, as was said by the Master of the Rolls, in Brace v. Duchess of Marlborough, "the mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgagee, and this the Lord Chief Justice Hale called a 'plank' gained by the third mortgagee, or *tabula in naufragio*, which construction is in favor of a purchaser, every mortgagee being such *pro tanto*."

[2] It is absolutely necessary that the third mortgagee be *without notice;* he must be a bona fide purchaser, without notice of the prior incumbrance, when he took his original security, for else he cannot come into equity for protection. Hence it is that inasmuch as the registry acts in force in all of the United States make the registry constructive notice to all persons, the system of tacking loses its application; as is the case also in Ireland, under the registry act in force in that country. Latouche v. Lord Dunsany, 1 Sch. & Lefroy, 157; Bond v. Hopkins, Id. 430. The English doctrine had, indeed, been recognized in New York, in the early case of Grant v. Bissett, 1 Caine's Cases, 112, but the decision was reversed by the Court of Errors, on the ground that it was opposed to the system of our registry acts, and such has been the course of decisions throughout the United States, in none of which it is believed that the doctrine of tacking prevails; Anderson v. Neff, 11 Serg. & Rawle, 223; Osborne v. Carr, 12 Connect. 208; Brazee v. Lancaster Bank, 14 Ohio, 321; Averill v. Guthrie, 8 Dana, 84; Siter v. McClanachan, 2 Grattan, 280; 4 Kent's Com. 476. The student will find a short note on this subject in 1 Lead. Cas. in Eq. 406, Marsh v. Lee.

on the strength of it, to run up a long bill.(*a*)[1] Where a mortgage extends to future advances, it is the better opinion, that the mortgagee may safely make such advances, although he may have notice of an intervening second mortgage.(*b*)[2]

(*a*) Jones v. Tripp, Jac. 322.

(*b*) Gordon v. Graham, 7 Vin. Abr. 52, pl. 3. The case is thus reported: "A. mortgages to B., for a term of years, to recover the sum of ——, already lent to the mortgagor, as also such other sums as should hereafter be lent or advanced to him. Afterwards A. makes a second mortgage to C. for a certain sum, with notice of the first mortgage, and then the first mortgagee, having notice of the second mortgage, lends a further sum. The question was, upon what terms the second mortgagee shall redeem the first mortgage. Per Cowper, C., the second mortgagee shall not redeem the first mortgage, without paying all that is due, as well the money lent after, as that lent before the second mortgage was made; for it was the folly of the second mortgagee with notice to take such a security. But upon the importunity of the counsel, it was ordered that the Master should report what money was lent by the first mortgagee, after he had notice of the second mortgage."

[1] He may, however, in England, take such a security for costs then due; and if it be for costs due and to become due, it has been held valid as to the costs then due only, Williams v. Pigott, Jacob's Rep. 598; Pitcher v. Rigby, 9 Price, 79.

[2] Thus, in the recent case of Moroney's Appeal, 12 Harris, 372, A. sold to B. sundry lots of ground, reserving ground rents from each of them, and, at the same time, to enable him to build thereon, agreed in writing to advance to him $12,000, to be paid in instalments as the houses progressed, and B. executed to A a mortgage for the whole of the sum thus covenanted to be paid. The mortgage was recorded—the agreement was not. A. advanced the $12,000, from time to time, until the buildings were finished, after which they were sold on execution against B., and the proceeds of sale were claimed by A., on the one hand, by virtue of his mortgage, and by sundry creditors, who had filed mechanics' claims against the buildings, on the other, and after elaborate argument, the right of the mortgagee was sustained. It has been said, that where a mortgage was given to secure future advances, that fact should appear upon its face, together with such information as to the extent and certainty of the contract as would enable a prior creditor, by inspection of the record and by common prudence and ordinary diligence, to ascertain the extent of the incumbrance. 4 Kent's Com. 176. But, as was said in the case now cited, "If the owners of these liens trusted B., without examining the state of the records, the law provides no relief from the consequence of their negligence, and morality does not demand that it shall, and even charity will not allow it at the expense of more careful men. If they did examine the records, then they found the lien of A. standing good against B., and honesty forbids them to cut it out for their profit. If they found it, and still trusted B., without inquiry, then they agreed to trust him even with a lien against him of $12,000, and with no apparent means to pay them. If they made inquiries, then they learned that he would have $12,000 in hand to pay for the improvements he was making, and they trusted him that he would appropriate it properly. In no way that we can regard this case, can we perceive that the appellants have any show of equity to demand that their claims shall be preferred to the mortgage." The opinion of the Court below in this case, together with the arguments of counsel, will be found in 3 American Law Register, 169, under the name of Cadwalader v. Montgomery.

[*365]

*PART V.

OF TITLE.

It is evident that the acquisition of property is of little benefit, unless accompanied with a prospect of retaining it without interruption. In ancient times, conveyances were principally made from a superior to an inferior, as from the great baron to his retainer, or from a father to his daughter on her marriage.(*a*) The grantee became the tenant of the grantor; and if any consideration were given for the grant, it more frequently assumed the form of an annual rent, than the immediate payment of a large sum of money.(*b*) Under these circumstances, it may readily be supposed, that, if the grantor were ready to warrant the grantee quiet possession, the title of the former to make the grant would not be very strictly investigated; and this appears to have been the practice in ancient times; every charter or deed of feoffment usually ending with a clause of warranty, by which the feoffor agreed that he and his heirs would warrant, acquit, and forever defend the feoffee and his heirs against all persons.(*c*) Even if this warranty were not expressly inserted, still it would seem that the word *give*, used in a feoffment, had the effect of an implied warranty;[1] but the force of such implied warranty was confined to the

(*a*) See ante, p. 33. (*b*) Ante, p. 34. (*c*) Bract. lib. 2, cap. 6, fol. 17 a.

[1] Long before the introduction of deeds, however, the warranty of the fief was one of the incidents of the feudal relation between the lord and vassal, and enured to the latter as a necessary consequence of, or return for, the homage by which the land was held, so that if the vassal's title were disputed, he might call upon his donor to warrant or insure his gift, which if he failed to do, and the vassal were evicted, the lord was bound to give him another fief of equal value in recompense; in other words, as the feudal system imposed upon the grantee the duties of tenure, it also bound the lord, by a reciprocal obligation, either to protect the tenant in his fief, or to give him another, an obligation which descended upon the heir of the grantee as long as he had any lands to answer it. Co. Litt. 384 b; Butler's note to Co. Litt. 365 a. When, in later times, it became usual to authenticate the transfer of lands by a deed or *charter*,

feoffor only, exclusive of his heirs, whenever a feoffment was made of lands to be holden of the chief lord of the fee.(*d*)[1] Under an express *warranty, the feoffor, and also his heirs, were bound, not only to give up all claim to the lands themselves, but also to give to the feoffee or his heirs other lands of the same value, in case of the eviction of the feoffee or his heirs by any person having a prior title;(*e*) and this warranty was binding on the heir of the feoffor, whether he derived any lands by descent from the feoffor or not,(*f*) except only in the case of the warranty commencing, as it was said, by disseisin; that is, in the case of the feoffor making a feoffment with warranty of lands of which he, by that very act,(*g*) disseised some person,(*h*) in which case it was too palpable a hardship to make the heir answerable for the misdeed of his ancestor. But, even with this [*366]

(*d*) 4 Edw. I, stat. 3, c. 6; 2 Inst. 275; Co. Litt. 384 a, n. (1).
(*e*) Co. Litt. 365 a. (*f*) Litt. s. 712. (*g*) Litt. s. 704; Co. Litt. 371 a.
(*h*) Litt. ss. 697, 698, 699, 700.

as it was termed, the word *give* or *dedi*, had, as is stated in the text, the effect of an implied warranty, but this did not in any way impair or affect the warranty that was implied from tenure. "For," says Coke, "in deeds where is contained *dedi et concessi*, without homage, or without a clause that containeth warranty, and to be holden of the givers and their heirs by a certain service, it is agreed, that the givers and their heirs shall be bound by warranty, and, if even there be an express warranty in the deed, yet that taketh not away the warranty that is wrought by force of the word *dedi*, but the feoffee may take advantage either of the one or the other at his pleasure." 2 Institutes, 275.

[1] This was, however, by virtue of the "Statute de bigamis," passed in the year 1272, 4 Edw. I, ch. 6, which altered the common law, by providing that "where is contained *dedi et concessi*, to be holden of the chief lords of the fief, or of others, and not of feoffors or of their heirs, reserving no service, without homage, or without the foresaid clause, their heirs shall not be bounden to warranty, notwithstanding the feoffor, during his own life, by force of his own gift, shall be bound to warrant;" that is to say, where the gift created no tenure between the grantor and grantee, the word *dedi* implied a warranty merely by the donor during his life, and not one which would impose an obligation on his heirs, and as, a few years after this, the statute of *quia emptores*, 18 Edw. I, c. 1, probibited subinfeudation, by declaring, that it should be lawful for every freeman to sell his lands at his own pleasure, and that the feoffee should hold the lands of the chief lord of the fee by such service and customs as his feoffor was bound to before, it followed that the statute *de bigamis* applied to every case except two, namely, where a gift was made directly from the chief lord of the fee, or where it left a reversion in the donor. Co. Litt. 384 b; Fitz. Nat. Brev. 134. And it was owing to the combined effect of these two statutes that express warranties became thenceforward almost universal, and were termed warranties *in deed*, as distinguished from the others, which were termed warranties *in law*, "because in judgment of law they (that is the words from which warranty was implied) amount to a warranty, without this verb *warrantizo*." Co. Litt. 384 a.

exception, the right to bind the heir by warranty was found to confer on the ancestor too great a power; thus, a husband, whilst tenant by the curtesy of his deceased wife's lands, could, by making a feoffment of such lands with warranty, deprive his son of the inheritance; for the eldest son of the marriage would usually be heir both to his mother and to his father: as heir to his mother, he would be entitled to her lands, but as heir of his father he was bound by his warranty. This particular case was the first in which a restraint was applied by Parliament to the effect of a warranty, it having been enacted,(*i*) that the son should not, in such a case, be barred by the warranty of his father, unless any heritage descended to him of his father's side, and then he was to be barred only to the extent of the value of the heritage so descended. The force of a warranty was afterwards greatly restrained by other statutes, enacted to meet other cases;(*k*)[1] and the [*367] clause of warranty having long been disused in modern *conveyancing, its chief force and effect have now been removed by clauses of two of the recent statutes, passed at the recommendation of the Real Property Commissioners.(*l*)[2]

In addition to an express warranty, there were formerly some words used in conveyancing, which in themselves implied a covenant for quiet enjoyment; and of these words, namely, the word *demise*, still retains this power. Thus, if one man demises and lets land to another for so many years, this word *demise* operates as an absolute covenant for the quiet enjoyment of the lands by the lessee during the term.(*m*)[3]

(*i*) Stat. 6 Edw. I, c. 3, [commonly called "The Statute of Gloucester."]

(*k*) Stat. De donis, 13 Edw. I, c. 1, as construed by the Judges, see Co. Litt. 373 b, n. (2); Vaughan, 375; stat. 11 Hen. VII, c. 20; 4 & 5 Anne, c. 16, s. 21.

(*l*) 3 & 4 Will. IV, c. 27, s. 39; 3 & 4 Will. IV, c. 74, s. 14.

(*m*) Spencer's case, 5 Rep. 17 a; Bac. Ab. tit. Covenant (B).

[1] Thus the statute of 11 Hen. VII, c. 20, provided that a warranty by a tenant in dower, a tenant for life, a tenant in tail jointly with the husband, of lands derived from his ancestor, should be void against the heirs next inheritable, unless done with their consent; and the statute 4 & 5 Anne, c. 16, enacted that all warranties by any tenant for life should be void as against those in remainder and reversion, and all collateral warranties by an ancestor having no estate in possession, should be void as against his heirs.

[2] That is to say, these statutes have swept away all real actions, including, of course, those of *warrantia chartæ* and voucher, which were the ancient remedies on a warranty. See passim, Rawle on Covenants for Title, p. 40, 219, &c.

[3] In other words, on the creation of an estate less than freehold, a covenant for the title is implied from the words of leasing; and such has been the law from very early times, Co. Litt. 45 b; Andrews' case, Cro. Eliz. 214; Stokes' case, 4 Coke, 81; Spencer's case, 5 Id. 16; Style v. Herring, Cro.

But if the lease should contain an express covenant by the lessor for quiet enjoyment, limited to his own acts only, such express covenant, showing clearly what is intended, will nullify the implied covenant, which the word *demise* would otherwise contain.(*n*)[1] So, as we have seen, the word *give* formerly implied a personal warranty; and the word *grant* was supposed to have implied a warranty, unless followed by any express covenant, imposing on the grantor a less liability.(*o*)[2] An exchange and a partition between coparceners have also until recently implied a mutual right of re-entry, on the eviction of either of

(*n*) Noke's case, 4 Rep. 80 b.

(*o*) See Co. Litt. 384 a, n. (1).

Jac. 73, down to the present day, and on both sides of the Atlantic, Merrill v. Frame, 4 Taunton, 329; Williams v. Burrel, 1 Com. Bench, 402; Frost v. Raymond, 2 Caines, 194; Grannis v. Clark, 8 Cowen, 36; Tone v. Brace, 11 Paige, 569; Sumner v. Williams, 8 Mass. 201; Dexter v. Manly, 4 Cushing, 14, and there would seem to be little doubt that such a covenant is implied from any words of leasing, for a lease for years is regarded less as a conveyance of an estate, than as a contract for the possession, Black v. Gilmore, 9 Leigh, 448. But although such words may, in the creation of a lease, imply a covenant, they do not in its assignment, Landydale v. Cheyney, Cro. Eliz. 157; Waldo v. Hall, 14 Mass. 486, for the object of the assignment is, in general, to put the assignee in place of the lessee, and when that is done, the assignor ceases to have any further concern with the contract, unless he has bound himself by express covenants, Blair v. Rankin, 11 Missouri, 442. In the absence of express words of leasing, however, it has been held in England, Granger v. Collins, 6 Mees. & Wels. 460, and in New York, Baxter v. Ryerss, 13 Barbour, 284, that a contract amounting to such a covenant cannot be created or implied from the mere relation of landlord and tenant; but, in a recent case in Pennsylvania, a different view has been taken, Maule v. Ashmead, 8 Harris, 482; Carson v. Godley, 2 Casey, 117. The effect of the words of leasing is not only to create a covenant for the quiet enjoyment of the demised premises, but also a covenant that the lessor *had the power* to demise them, Holden v. Taylor, Hobart's Rep. 12; Line v. Stevenson, 5 Bing. New Cas. 183; Grannis v. Clark, 8 Cowen, 36; Crouche v. Fowle, 9 New Hamp. 219.

[1] In other words, the maxim *expressum facit cessare tacitum* will apply. Thus, where in Noke's case, cited in the text, the lessor, after employing the words *demise and grant*, which imported a warranty for the acts of all persons whomsoever, added a covenant for quiet enjoyment, "without eviction by the lessor, *or any claiming under him*," it was held that "the said express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties, that it should not extend further than the express covenant;" and this doctrine has since been repeatedly recognized, Frontin v. Small, 2 Lord Raym. 419; Merrill v. Frame, 4 Taunton, 329; Schlencker v. Moxsy, 3 Barn. & Cress. 792; Line v. Stevenson, 5 Bing. New Cas. 183.

[2] There was never, however, more than a *supposition* that a warranty was, in the case of a freehold, implied from the word *grant*. There are dicta to that effect in Man v. Ward, 2 Atkins, 238, and Browning v. Wright, 2 Bos. & Pull. 13; but in Frost v. Raymond, 2 Caines' Rep. 188, Mr. Ch. J. Kent showed clearly, that such a doctrine had no foundation in the common law.

the parties from the lands exchanged or partitioned.(*p*)[1] And, by the Registry Acts for Yorkshire, the words *grant*, *bargain and sell*, in a deed of *bargain and sale* of an estate in fee simple, inrolled in the Register Office, imply covenants for the quiet enjoyment of the lands against the bargainor, his heirs and assigns, and all claiming under him, and also, for further assurance thereof, by the bargainor, his heirs and assigns, and all claiming under him, unless restrained by [*368] express *words.(*q*)[2] The word *grant*, by virtue of some other acts of Parliament, also implies covenants for the title.(*r*)

(*p*) Bustard's case, 4 Rep. 121 a.

(*q*) Stat. 6 Anne, c. 35, ss. 30, 34; 8 Geo. II, c. 6, s. 35.

(*r*) As in conveyances *by* companies under the Lands Clauses Consolidation Act, 1845, stat. 8 & 9 Vict. c. 18, s. 132; and in conveyances to the Governors of Queen Anne's Bounty, stat. 1 & 2 Vict. c. 20, s. 22.

[1] By the common law, a warranty was implied in every exchange, "for the word *excambium*, doth imply a warranty," Co. Litt. 384, as also in the case of a partition, and in both of these species of assurance, there was also a condition, which, in case of eviction of either party, gave a right of re-entry upon the other portion. When, however, a coparcener took advantage of the condition, she defeated the partition in the whole; but when she vouched by force of the warranty, she merely recovered recompense for the part that was lost. Bustard's case, 4 Coke, 121. Both the warranty and condition only held, however, in privity of estate; and hence where one parcener aliened, and thus severed the connection between herself and her coparcener, the condition and warranty were lost. The statute of 31 Hen. VIII, c. 1, which first gave to joint tenants and tenants in common the right of partition by writ, gave also the right to the warranty, but makes no mention of the condition, which, therefore, in the cases of partition between joint tenants and tenants in common, neither exists by common law or by statute; and it has been held, that unless the partition be by writ, neither warranty nor condition are implied, Weiser v. Weiser, 5 Watts, 279; though the case of tenants in common *by descent* has, in Pennsylvania, been likened to that of coparceners; and, therefore, in a partition by deed between them, both warranty and condition should be considered as implied, Patterson v. Launing, 10 Watts, 135. The better remedy upon such a warranty has been suggested to be a bill in equity for contribution and reimbursement, Sawyer v. Cator, 8 Humphries, 259. A practical inconvenience of the implied warranty in the case of an exchange is, that it makes what is termed "a double title;" that is to say, upon the sale of either of the exchanged properties, the title to the other must also be examined, Preston on Abstracts, p. 89; in England the Statute of 8 & 9 Victoria, c. 106 (there was a previous and more limited one of 4 & 5 Will. IV, c. 30, § 24, 25), has provided, that deeds of exchange shall prospectively have no longer the effect of creating any warranty, or right of re-entry, or implied covenant by implication.

[2] Within a few years from the passage of the statute of Anne here referred to, one substantially similar, though less carefully drawn, was enacted in Pennsylvania, and has since been copied, with more or less exactness, in the States of Delaware, Virginia, Indiana, Illinois, Alabama, Missouri, Michigan, Mississippi, Iowa, and Arkansas. A more particular reference to these several local statutes, and their effect, will be found in the 10th chapter of Rawle on Covenants for Title.

But the act to amend the law of real property now provides that an exchange or a partition of any tenements or hereditaments made by deed shall not imply any condition in law; and that the word *give* or the word *grant* in a deed shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word *give* or the word *grant* may by force of any act of Parliament imply a covenant.(*s*) The author is not aware of any act of Parliament by force of which the word *give* implies a covenant.

The absence of a warranty is principally supplied in modern times, by a strict investigation of the title of the person who is to convey; although in most cases, covenants for title, as they are termed, are also given to the purchaser. On the sale or mortgage of copyhold lands these covenants are usually contained in a deed of covenant to surrender, by which the surrender itself is immediately preceded,(*t*) the whole being regarded as one transaction.(*u*) By these covenants, the heirs of the vendor are always expressly bound; but, like all other similar contracts, they are binding on the heir or devisee of the covenantor to the extent only of the property which may descend to the one, or be devised to the *other.(*v*) Unlike the simple clause of warranty in ancient days, modern covenants for title are [*369] five in number, and few conveyancing forms can exceed them in the luxuriant growth to which their verbiage has attained.(*w*) The first covenant is, that the vendor is seised in fee simple; the next, that he has good right to convey the lands; the third, that they shall be quietly enjoyed; the fourth, that they are free from incumbrances; and the last, that the vendor and his heirs will make any further assurance for the conveyance of the premises, which may reasonably be required. At the present day, however, the first covenant is usually omitted, the second being evidently quite sufficient without it; and the length of the remaining covenants has of late years somewhat diminished. These covenants for title vary in comprehensiveness, according to the circumstances of the case.[1] A vendor never gives

(*s*) Stat. 8 & 9 Vict. c. 106, s. 4, repealing stat. 7 & 8 Vict. c. 76, s. 6.

(*t*) By the last Stamp Act, stat. 13 & 14 Vict. c. 97, such a deed of covenant is now charged with a duty of 10*s*., and if the ad valorem duty on the sale or mortgage is less than that sum, then a duty of equal amount only is payable, with a progressive duty similar to that on a purchase. See ante, pp. 157, 158.

(*u*) Riddell v. Riddell, 7 Sim. 529. (*v*) Ante, pp. 63, 64.

(*w*) See Appendix (B).

[1] In some of the United States, more particularly the Northern and Middle States,

absolute covenants for the title to the land he sells, but always limits his responsibility to the acts of those who have been in possession since the last sale of the estate ;[1] so that if the land should have been purchased by his father, and so have descended to the vendor, or have been left to him by his father's will, the covenants will extend only to the acts of his father and himself ;(*x*) but, if the vendor should himself have purchased the lands, he will covenant only as to his own acts,(*y*) and the purchaser must ascertain, by an examination of the previous title, that the vendor purchased what he may properly re-sell. A mortgagor, on the other hand, always gives absolute covenants for title ;[2] for those who lend money are accustomed to require every possible security for its repayment: and, notwithstanding these absolute covenants, the title is investigated on every mortgage, with equal and indeed with greater strictness, than on a purchase.[3] When a sale is made by trustees, who have no beneficial interest in the property themselves, *they merely covenant that they have respectively done no act to incumber the premises.[4] If the money is to be

[*370]

(*x*) Sugd. Vend. and Pur. 703.

(*y*) See Appendix (B).

with the exception of Pennsylvania, it is believed to be customary to insert most or all of the covenants for title mentioned in the text, though they are much more briefly couched than in English conveyancing. But in Pennsylvania, and the Southern and Western States, the covenant of warranty (which is a sort of adaptation of the old warranty to the form of covenant) is not unfrequently the only one employed. See passim, Rawle on Covenants, ch. i and xi. A usual form of those used at the present day in England will be found, infra, at page 399 of the Appendix to this volume.

[1] Such is certainly the universal practice in England; and it is, perhaps, the usual practice in the United States, wherever the title is carefully examined. In many parts of this country, however, a purchaser generally expects, and a vendor rarely hesitates to give a covenant of general warranty, as it seems to be sometimes thought that if the latter is only willing to covenant against his own acts, he must know there is something defective about the prior title. But, on the other hand, it might be said, that unless there were something wrong about the title, the purchaser would not have required a general covenant; and it is believed that no presumption of notice of a defect in the title can properly arise either from the presence or the absence of general covenants.

[2] So, also, it has been said, that in common leases, as the title is not inspected, the lessor should covenant against all persons whomsoever. Barton's Conveyancing, 75; Calvert v. Sebright, 15 Eng. Law & Eq Rep. 125.

[3] In the case, however, of a mortgage given for the purchase-money of land, the covenants, no matter how general, are always held to be restrained to the acts of the mortgagor, Rawle on Covenants, p. 454, as otherwise he would be prevented or estopped from availing himself of the covenants he had himself received from his vendor upon the sale.

[4] And such is the usual covenant employed in such cases on this side of the Atlantic. It is the practice, however, in England to insist in such cases on covenants from the parties beneficially interested.

paid over to A. or B., or any persons in fixed amounts, the persons who take the money are expected to covenant for the title ;(*z*) but, if the money belongs to infants, or other persons who cannot covenant, or is to be applied in payment of debts or for any similar purpose, the purchaser must rely for the security of the title solely on the accuracy of his own investigation.(*a*)

The period for which the title is investigated is the last sixty years ;(*b*) and every vendor of freehold property is bound to furnish the intended purchaser with an abstract of all the deeds, wills, and other instruments which have been executed, with respect to the lands in question, during that period: and also to give him an opportunity of examining such abstract with the original deeds, and with the probates or office copies of the wills ; for, in every agreement to sell, is implied by law an agreement to make a good title to the property to be sold.(*c*) The proper length of title to an advowson is, however, 100 years,(*d*) as the presentations, which are the only fruits of the advowson, and, consequently, the only occasions when the title is likely to be contested, occur only at long intervals. On a purchase of copyhold lands, an abstract of the copies of court roll, relating to the property for the last sixty years, is delivered to the purchaser. And even on a purchase of leasehold property, the purchaser is strictly entitled to a sixty years' title ;(*e*) that is, supposing the lease to have been granted within the last sixty years, so much of the title of the lessor must be produced, as, with the title to the term *since its commencement will make up the full period of sixty years.[1] [*371]

It is not easy to say how the precise term of sixty years came to be fixed on, as the time for which an abstract of the title should be required.[2] It is true, that by a statute of the reign of Hen. VIII,(*f*)

(*z*) Sugd. Vend. and Pur. 704. (*a*) Ibid.
(*b*) Cooper v. Emery, 1 Phill. 388. [Hodgkinson v. Cooper, 9 Beavan, 304.]
(*c*) Sugd. Vend. and Pur. 390. [Rawle on Covenants for Title, 566, &c.]
(*d*) Ibid. 487. (*e*) Purvis v. Rayer, 9 Price, 488 ; Souter v. Drake, 5 B. & Adol. 992.
(*f*) 32 Hen. VIII, c. 2; 3 Black. Com. 196.

[1] And upon the sale of a reversionary interest, the abstract must go back sufficiently far to show its creation, and should also show that the estate has been enjoyed in possession conformably with the instrument which created the reversionary interest. 1 Jarman's Conveyancing, by Sweet, 61.

[2] It cannot be said that there is any settled rule of conveyancing which, in the United States, requires a title of sixty years to be produced. In the older States, the title is

the time within which a writ of right (a proceeding now abolished)(*g*) might be brought for the recovery of lands was limited to sixty years; but still, in the case of remainders after estates for life or in tail, this statute did not prevent the recovery of lands long after the period of sixty years had elapsed from the time of a conveyance by the tenant for life or in tail; for it is evident, that the right of a remainder-man, after an estate for life or in tail, to the possession of the lands, does not accrue until the determination of the particular estate.(*h*) A remainder after an estate tail may, however, be barred by the proper means; but a remainder after a mere life estate cannot. The ordinary duration of human life is therefore, if not the origin of the rule requiring a sixty years' title, at least a good reason for its continuance. For, so long as the law permits of vested remainders after estates for life, and forbids the tenant for life, by any act, to destroy such remainders, so long must it be necessary to carry the title back to such a point as will afford a reasonable presumption that the first person mentioned as having conveyed the property was not a tenant for life merely, but a tenant in fee simple.(*i*)

[*372] The abstract of the title will of course disclose the names of all parties who, besides the vendor, may be *interested in the lands; and the concurrence of these parties must be obtained by him, in order that an unincumbered estate in fee simple may be conveyed to the purchaser. Thus, if the lands be in mortgage, the mortgagee must be paid off out of the purchase-money, and must join to relinquish his security, and convey the legal estate.(*k*)[1] If the wife of the vendor would, on his decease, be entitled to dower out of the lands,(*l*) she must release her right, and separately acknowledge the purchase deed.(*m*) And when lands are sold by trustees, and the money is directed to be paid over by them to certain given persons, it is obligatory on the purchaser to see that such persons are actually paid the money to which they are entitled, unless it be expressly pro-

(*g*) By stat. 3 & 4 Will. IV, c. 27, s. 36.
(*h*) Ante, p. 207. See Sugd. Vend. and Pur. 609.
(*i*) See Mr. Brodie's opinion, 1 Hayes's Conveyancing, 564; Sugd. Vend. and Pur. 487.
(*k*) Ante, p. 352. (*l*) Ante, p. 190. (*m*) Ante, p. 189.

often traced back more than twice that period, to the first grants from the colonial governments; though it is presumed that if a satisfactory title for sixty years could be shown, the purchaser would be compelled to accept it as marketable.

[1] Unless, of course, as often happens, the purchaser agrees to take subject to the incumbrance, in which case its amount is deducted from that of the consideration money.

vided by the instrument creating the trust, that the receipt of the trustees alone shall be an effectual discharge.(*n*) The duty thus imposed being often exceedingly inconvenient, and tending greatly to prejudice a sale, a declaration, that the receipt of the trustees shall be an effectual discharge, is usually inserted, as a common form, in all settlements and trust deeds.[1] The recent act to simplify the transfer of property(*o*) provided that the *bona fide* payment to, and the receipt of, any person, to whom any money should be payable upon any express or implied trust, or for any limited purpose, should effectually discharge the person paying the same, from seeing to the application or being answerable for the misapplication thereof, unless the contrary should be expressly declared by the instrument creating the trust. But this act was shortly afterwards repealed, without, however, any provision being made for such instruments as had been drawn without any receipt clause upon the faith of this enactment.(*p*)

*Supposing, however, that, through carelessness in investigating the title, or from any other cause, a man should happen to become possesssed of lands, to which some other person is rightfully entitled; in this case it is evidently desirable that the person so rightfully entitled to the lands should be limited in the time during which he may bring an action to recover them. To deprive a man of that which he has long enjoyed, and still expects to enjoy, will be generally doing more harm than can arise from forbidding the person rightfully entitled, but who has long been ignorant or negligent as to his rights, to agitate claims which have long lain dormant. Various acts for the limitation of actions and suits relating to real property have accordingly been passed at different times:(*q*) the act now in force(*r*) was passed in the reign of King William IV, at the suggestion of the Real Property Commissioners. By this act, no person can bring any action for the recovery of lands, but within twenty years next after the time at which the right to bring such action shall have first accrued to him, or to some person through whom he claims;(*s*) and, [*373]

(*n*) Sugd. Vend. and Pur. 832, et seq.
(*o*) Stat. 7 & 8 Vict. c. 76, s. 10.
(*p*) Stat. 8 & 9 Vict. c. 106, s. 1.
(*q*) See 3 Black. Com. 196; stat. 21 Jac. I, c. 16; 1 Sugd. Vend. and Pur. 608 et seq.
(*r*) Stat. 3 & 4 Will. IV, c. 27, amended as to mortgagees by stats. 7 Will. IV, & 1 Vict. c. 28.
(*s*) Sect. 2. See Nepean v. Doe, 2 Mee. & Wels. 894.

[1] See, as to this, in the United States, supra, note to p. 360.

as to estates in reversion or remainder, or other future estates, the right shall be deemed to have first accrued at the time at which any such estate became an estate in possession.(*t*) But a written acknowledgment of the title of the person entitled, given to him or his agent, signed by the person in possession, will extend the time of claim to twenty years from such acknowledgment.(*u*) If, however, when the right to bring an action first accrues, the person entitled [*374] should *be under disability to sue by reason of infancy, coverture (if a woman), idiotcy, lunacy, unsoundness of mind, or absence beyond seas, ten years are allowed from the time when the person entitled shall have ceased to be under disability, or shall have died, notwithstanding the period of twenty years above mentioned may have expired,(*x*) yet so that the whole period do not, including the time of disability, exceed forty years ;(*y*) and no further time is allowed on account of the disability of any other person, than the one to whom the right of action first accrues.(*z*)[1] By the same act, whenever a mortgagee has obtained possession of the land comprised in his mortgage, the mortgagor shall not bring a suit to redeem the mortgage, but within twenty years next after the time when the mortgagee obtained possession, or next after any written acknowledgment of the title of the mortgagor, or of his right to redemption, shall have been given to him or his agent, signed by the mortgagee.(*a*) By the same act, the time for bringing an action or suit to enforce the right of presentation to a benefice is limited to three successive incumbencies, all adverse to the right of presentation claimed, or to the period of sixty years, if the three incumbencies do not together amount to that time ;(*b*) but whatever the length of the incumbencies, no such action or suit can be brought after the expiration of 100 years from the time at which adverse possession of the

(*t*) Sect. 3. See Doe d. Johnson v. Liversedge, 11 Mee. & Wels. 517.
(*u*) Sect. 14. See Doe d. Curzon v. Edmonds, 6 Mee. & Wels. 295.
(*x*) Sect. 16. (*y*) Sect. 17. (*z*) Sect. 18.
(*a*) Sect. 28. See Hyde v. Dallaway, 2 Hare, 528; Trulock v. Robey, 12 Sim. 402 Lucas v. Dennison, 13 Sim. 584; Stansfield v. Hobson, 16 Beav. 236. (*b*) Sect. 30.

[1] The student will find the statutes upon the subject of limitation in the United States, collected in the Appendix to Mr. Angell's Treatise on Limitations, and a note on what constitutes adverse possession, in 2 Smith's Lead. Cas. 491, Nepean v. Doe. The general features of these local acts resemble those of the English statutes referred to in the text, and though the period of limitation which they establish is far from uniform, yet the average time is nearer twenty years than any other. In Pennsylvania it is twenty-one years.

benefice shall have been obtained.(*c*) Money secured by mortgage or judgment, or otherwise charged upon land, and also legacies, are to be deemed satisfied at the end of twenty years, if no interest should be paid, or written acknowledgment given in the *meantime.(*d*)[1] The right to rents, whether rents service or rents charge, and [*375] also the right to tithes, when in the hands of laymen,(*e*) is subject to the same period of limitation as the right to land.(*f*) And in every case where the period limited by the act is determined, the right of the person who might have brought any action or suit for the recovery of the land, rent, or advowson in question within the period, is extinguished.(*g*)

The several lengths of uninterrupted enjoyment which will render indefeasible rights of common, ways, and watercourses, and the use of light for buildings, are regulated by another act of Parliament,(*h*) of by no means easy construction, on which a large number of judicial decisions have already taken place.

On any sale or mortgage of lands, all the title-deeds in the hands of the vendor or mortgagor, which relate exclusively to the property

(*c*) Sect. 33.

(*d*) Sect. 40. This section extends to legacies payable out of personal estate, Sheppard v. Duke, 9 Sim. 567.

(*e*) Dean of Ely v. Bliss, 2 De Gex, M. & G. 459.

(*f*) Stat. 3 & 4 Will. IV, c. 27, s. 1. As to the time required to support a claim of *modus decimandi*, or exemption from or discharge of tithes, see stat. 2 & 3 Will. IV, c. 100, amended by stat. 4 & 5 Will. IV, c. 83; Salkeld v. Johnston, 1 Mac. & Gord. 242. The circumstances under which lands may be titbe free, are well explained in Burton's Compendium, ch. 6, sect. 4.

(*g*) Sect. 34. Scott v. Nixon, 3 Dru. & War. 388; De Beauvoir v. Owen, 5 Ex. Rep. 166.

(*h*) Stat. 2 & 3 Wm. IV, c. 71.

[1] It will be remembered that long previous to this statute of Will. IV, Courts had, by analogy to the statutes of limitation as to land, established the artificial presumption that where payment of a bond or other specialty was not demanded for twenty years, and there was no payment of interest or other circumstance to show that it was still in force, payment or release was to be presumed, Hothershell v. Bowes, 6 Modern, 32; Oswald v. Legh, 1 Term, 271; and it is believed that this common law rule still prevails in those of the United States in which there is no such statute as that referred to in the text. In Pennsylvania, by an act passed April 27th, 1855, it is provided that in all cases where no payment, claim or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or knowledge of the existence thereof shall have been made within that period, by the owner of the premises subject to such ground rent, annuity or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge, shall thereafter be irrecoverable.

sold or mortgaged, are handed over to the purchaser or mortgagee. The possession of the deeds is of the greatest importance; for, if the deeds were not required to be delivered, it is evident that property might be sold or mortgaged over and over again, to different persons, without much risk of discovery.[1] The only guarantee, for instance, which a purchaser has that the lands he contracts to purchase have not been mortgaged, is that the deeds are in the possession of [*376] *the vendor. It is true, that in the counties of Middlesex and York, registries have been established, a search in which will lead to the detection of all dealings with the property;(*i*) but these registries, though existing in Scotland and Ireland, do not extend to the remaining counties of England or to Wales. Generally speaking, therefore, the possession of the deeds is all that a purchaser has to depend on; in most cases this protection, coupled with an examination of the title they disclose, is found to be sufficient; but there are certain circumstances in which the possession of the deeds can afford no security. Thus, the possession of the deeds is no safeguard against an annuity or rent-charge payable out of the lands; for the grantee of a rent-charge has no right to the deeds.(*j*) So the possession of the deeds, showing the conveyance to the vendor of an estate in fee simple, is no guarantee that the vendor is not now actually seised only of a life estate; for, since he acquired the property, he may, very possibly, have married; and on his marriage he may have settled the lands on himself for his life, with remainder to his children. Being then tenant for life, he will, like every other tenant for life, be entitled

(*i*) See ante, p. 158.

(*j*) The writer met lately with an instance in which lands were, from pure inadvertence, sold as free from incumbrance, when in fact they were subject to a rent-charge, which had been granted by the vendor on his marriage, to secure the payment of the premiums of a policy of insurance on his life. The marriage settlement was, as usual, prepared by the solicitor for the wife; and the vendor's solicitor, who conducted the sale, but had never seen the settlement, was not aware that any charge had been made on the lands. The vendor, a person of the highest respectability, was, as often happens, ignorant of the legal effect of the settlement he had signed. The charge was fortunately discovered by accident shortly before the completion of the sale.

[1] These and the following observations upon the subject of the possession of title-deeds, have, by reason of the system of registration in force in all of the United States, almost no application here. The importance of such a system can hardly be better exemplified than by the evils shown by the author to attend upon its absence; and the expense of registration, which, in his opinion, would counterbalance these evils, is insignificant, compared to those which hang upon almost every transaction of conveyancing in England.

to the custody of the deeds;(*k*) and, if he should be fraudulent enough to suppress the settlement, he might make a conveyance from himself, as *though seised in fée, deducing a good title, and handing over the deeds; but the purchaser having actually acquired, [*377] by his purchase, nothing more than the life interest of the vendor, would be liable, on his decease, to be turned out of possession by his children; for, as marriage is a valuable consideration, a settlement then made cannot be set aside by a subsequent sale made by the settlor. Against such a fraud as this, the registration of deeds seems the only protection. In some cases, also, persons are entitled to an interest, which they would like to sell, but are prevented, from not having any deeds to hand over. Thus if lands be settled on A. for his life, with remainder to B. in fee, A. during his life will be entitled to the deeds; and B. will find great difficulty in disposing of his reversion at an adequate price; because, having no deeds to give up, he has no means of satisfying a purchaser that the reversion has not previously been sold or mortgaged to some other person. If, therefore, B.'s necessities should oblige him to sell, he will find the want of a registry for deeds the cause of a considerable deduction in the price he can obtain. It seems very questionable, however, whether the certainty attained in these few cases would counterbalance the additional expense in every transaction to which registration would give rise; and with respect to reversions, the circumstance that children have no means of proving the exact amount and nature of their expectancies, is often beneficial in preserving them from the hands of unprincipled money-lenders. It may here be remarked, that as few people would sell a reversion unless they were in difficulties, equity, whenever a reversion is sold, throws upon the purchaser the onus of showing that he gave the fair market price for it.(*l*)

*Where the title-deeds relate to other property, and cannot [*378] consequently be delivered over to the purchaser, he is entitled, at the expense of the vendor, to a covenant for their production,(*m*)

(*k*) Sugd. Vend. and Pur. 468.

(*l*) Lord Aldborough v. Trye, 7 Cl. & Fin. 436; Davies v. Cooper, 5 My. & Cr. 270; Sugd. Vend. & Pur. 323; Edwards v. Burt, 2 De Gex, M. & G. 55.

(*m*) Sugd. Vend. and Pur. 475; Cooper v. Emery, 10 Sim. 609. By the last Stamp Act, stat. 13 & 14 Vict. c. 97, the stamp duty on a separate deed of covenant for the production of title-deeds on a sale or mortgage is 10s., and if the ad valorem duty on the sale or mortgage is less than that sum, then a duty of equal amount only is payable, with a progressive duty similar to that on a purchase. See ante, pp. 157, 158.

and also to attested copies of such of them as are not inrolled in any court of record;(*n*) but, as the expense thus incurred is usually great, it is in general thrown on the purchaser, by express stipulation in the contract. The covenant for the production of the deeds will run, as it is said, with the land; that is, the benefit of such a covenant will belong to every legal owner of the land sold, for the time being;(*o*) and the better opinion is, that the obligation to perform the covenant will also be binding on every legal owner of the land in respect of which the deeds have been retained.(*p*) Accordingly, when a purchase is made without delivery of the title-deeds, the only deeds that can accompany the lands sold are the actual conveyance of the land to the purchaser, and the deed of covenant to produce the former title-deeds. On a future sale, therefore, these deeds will be delivered to the new purchaser, and the covenant, running with the land, will enable him at any time to obtain production of the former deeds, to which the covenant relates.

When the lands sold are situated in either of the counties of Middlesex or York, search is made in the registries established for those counties:(*q*) this search is usually confined to the period which has [*379] elapsed from *the last purchase deed,—the search presumed to have been made on behalf of the former purchaser being generally relied on as a sufficient guarantee against latent incumbrances prior to that time;[1] and a memorial of the purchase deed is of course duly registered as soon as possible after its execution. As to lands in all other counties also, there are certain matters affecting the title, of which every purchaser can readily obtain information. Thus, if any estate tail has existed in the lands, the purchaser can always learn whether or not it has been barred; for, the records of all fines and recoveries, by which the bar was formerly effected,(*r*) are preserved in the offices of the Court of Common Pleas; and now, the deeds which have been substituted for those assurances, are inrolled in the Court of Chancery.(*s*) Conveyances by married women can

(*n*) Sugd. Vend. and Pur. 475. (*o*) Ibid. 479.
(*p*) Ibid. 484. (*q*) Ante, p. 158. (*r*) Ante, pp. 41, 44.
(*s*) Ante, pp. 43, 44. As to fines and recoveries in Wales and Cheshire, see stat. 5 & 6 Vict. c. 32.

[1] This presumption would be far from being a safe guide; and in practice here, unless the prior certificates of search are produced, it is proper and usual to carry the searches back as far as the circumstances of the title may require.

also be discovered by a search in the index, which is kept in the Court of Common Pleas, of the certificates of the acknowledgment of all deeds executed and acknowledged by married women.(*t*) So, we have seen,(*u*) that debts due from the vendor, or any former owner, to the crown, or secured by judgment, together with suits which may be pending, concerning the land, all which are incumbrances on the land, are always sought for in the indexes, now provided for the purpose, in the office of the Court of Common Pleas. Life annuities, also, which may have been charged on the lands for money or money's worth, prior to August, 1854, may generally be discovered by a search in the office of the Court of Chancery, amongst the memorials of such annuities.(*x*) And, lastly, the bankruptcy or insolvency of any vendor or mortgagor may be *discovered by a search in the records of the bankrupt or insolvent courts; and it is the duty of the purchaser's [*380] or mortgagee's solicitor to make such search, if he has any reason to believe that the vendor or mortgagor is or has been in embarrassed circumstances.(*y*)

Such is a very brief and exceedingly imperfect outline of the methods adopted in this country for rendering secure the enjoyment of real property when sold or mortgaged. It may perhaps serve to prepare the student for the course of study which still lies before him in this direction. The valuable treatise of Lord St. Leonards, on the law of vendors and purchasers of estates, will be found to afford nearly all the practical information necessary on this branch of the law. The title to purely personal property depends on other principles, for an explanation of which the reader is referred to the author's treatise on the principles of the law of personal property. From what has been already said, the reader will perceive that the law of England has two different systems of rules for regulating the enjoyment and transfer of property; that the laws of real estate, though venerable for their antiquity, are in the same degree ill adapted to the requirements of modern society; whilst the laws of personal property, being of more recent origin, are proportionably suited to modern times. Over them both has arisen the jurisdiction of the

(*t*) Stat. 3 & 4 Will. IV, c. 74, ss. 77, 78; ante, p. 189. See Jolly v. Handcock, Ex. 16 Jur. 550.

(*u*) Ante, pp. 70, 71.

(*x*) Ante, pp. 271, 360. The lands charged are not, however, necessarily mentioned in the memorial.

(*y*) Cooper v. Stephenson, Q. B. 16 Jur. 424.

Court of Chancery, by means of which the ancient strictness and simplicity of our real property laws have been in a measure rendered subservient to the arrangements and modifications of ownership, which the various necessities of society have required. Added to this have been continual enactments, especially of late years, by which many of the most glaring evils have been remedied, but by which, at the same time, the symmetry of the laws of real property [*381] has been greatly impaired. Those laws cannot indeed *be now said to form a system: their present state is certainly not that in which they can remain. For the future, perhaps the wisest course to be followed would be to aim as far as possible at a uniformity of system in the laws of both kinds of property; and for this purpose, rather to take the laws of personal estate as the model to which the laws of real estate should be made to conform, than on the one hand to preserve untouched all the ancient rules, because they once were useful, or, on the other, to be annually plucking off, by parliamentary enactments, the fruit which such rules must, until eradicated, necessarily produce.

*APPENDIX. [*383]

(A.)

Referred to page 90.

THE point in question is as follows :(*a*) Suppose a man to be the purchaser of freehold land, and to die seised of it intestate, leaving two daughters, say Susannah and Catherine, but no sons. It is clear that the land will then descend to the two daughters, Susannah and Catherine, in equal shares as coparceners. Let us now suppose that the daughter Catherine dies on or after the 1st of January, 1834, intestate, and without having disposed of her moiety in her lifetime, leaving issue one son. Under these circumstances the question arises, to whom shall the inheritance descend? The act to amend the law of inheritance enacts, "that in every case descent shall be traced from the purchaser." In this Catherine is clearly not the purchaser, but her father; and the descent of Catherine's moiety is accordingly to be traced from him. Who, then, as to this moiety, is his heir? Supposing that, instead of the moiety in question, some other land were, after Catherine's decease, to be given to the heir of her father, such heir would clearly be Susannah the surviving daughter, as to one moiety of the land, and the son of Catherine as to the other moiety. It has been argued, then, that the moiety which belonged to Catherine, by descent from her father, must, on her decease, descend to the heir of her *father, in the same manner as other land would have done had she been dead in her father's lifetime; that is to say, that [*384] one moiety of Catherine's moiety will descend to her surviving sister Susannah, and the other moiety of Catherine's moiety will descend to her son. But the

(*a*) The substance of the following observations has already appeared in the "Jurist" newspaper, for February 28, 1846. The point has since been expressly decided in accordance with the opinion for which the author has contended in Cooper v. France, V. C. E., 14 Jur. 214, the authority of which decision is recognized by Lord St. Leonards in his Essay on the Real Property Statutes, p. 282. But as the grounds on which the judgment of the Vice-Chancellor was rested do not appear to the author to be quite conclusive, he has not thought it desirable to omit his remarks.

following reasoning seems to show that, on the decease of Catherine, her moiety will not descend equally between her surviving sister and her own son, but will descend entirely to her son.

In order to arrive at our conclusion it will be necessary to inquire, first, into the course of descent of an estate tail, under the circumstances above described, according to the old law; secondly, into the course of descent of an estate in fee simple, according to the old law, supposing the circumstances as above described, with this qualification, that neither Susannah nor Catherine shall be considered to have obtained any actual seisin of the lands. And, when these two points shall have been satisfactorily ascertained, we shall then be in a better position to place a correct interpretation on the act by which the old law of inheritance has been endeavored to be amended.

1. First, then, as to the course of descent of an estate tail according to the old law. Let us suppose lands to have been given to the purchaser and the heirs of his body. On his decease, his two daughters, Susannah and Catherine, are clearly the heirs of his body, and as such will accordingly have become tenants in tail each of a moiety. Now there is no proposition more frequently asserted in the old books than this: that the descent of an estate tail is *per formam doni* to the heirs of the body of the donee. On the decease of one heir of the body, the estate descends not to the heir of such heir, but to the heir of the body of the original donee *per formam doni*. Suppose, then, that Catherine should die, her moiety would clearly have descended, by the old law, to the heir of the body of her father, the original donee in tail. Whom, then, under the above circumstances, did the old law consider to be the heir of his body quoad this moiety? The Tenures of Littleton, as explained by Lord Coke's Commentary, supply us with an answer. Littleton [*385] says, "Also, *if lands or tenements be given to a man in tail who hath as much land in fee simple, and hath issue two daughters, and die, and his two daughters make partition between them, so as the land in fee simple is allotted to the younger daughter, in allowance for the land and tenements in tail allotted to the elder daughter: if, after such partition made, the younger daughter alieneth her land in fee simple to another fee, and hath issue a son or daughter, and dies, the issue may enter into the lands in tail, and hold and occupy them in purparty with her aunt."(*b*) On this case Lord Coke makes the following comment:—"The eldest coparcener hath, by the partition, and the matter subsequent, barred herself of her right in the fee simple lands, inasmuch as when the youngest sister alieneth the fee simple lands and dieth, and her issue entereth into *half the lands* entailed, yet shall not the eldest sister enter into *half of the lands* in fee simple upon the alienee."(*c*) It is evident, therefore, that Lord Coke, though well acquainted

(*b*) Litt. sect. 260. (*c*) Co. Litt. 172 b.

with the rule that an estate tail should descend *per formam doni*, yet never for a moment supposed that, on the decease of the younger daughter, her moiety would descend half to her sister, and half to her issue; for he presumes, of course, that the issue would enter into *half the lands entailed*, that is, into the whole of the moiety of the lands which had originally belonged to their mother. After the decease of the younger sister, the heirs of the body of her father were no doubt the elder sister and the issue of the younger; but, *as to the moiety which had belonged to the younger sister*, this as clearly was not the case: the heir of the body of the father *to inherit this moiety* was exclusively the issue of such younger daughter, who were entitled to the whole of it in the place of their parent. This incidental allusion of Lord Coke is as strong, if not stronger, than a direct assertion by him of the doctrine; for it seems to show that a doubt on the subject never entered into his mind.

At the end of the section of Littleton, to which we have referred, it is stated that the contrary is holden, M., 10 Hen. VI, *scil.*; that the heir may not enter upon the parcener *who hath the entailed land, but is put to a formedon. On this Lord Coke remarks,(*d*) that it is no part [*386] of Littleton, and is contrary to law; and that the case is not truly vouched, for it is not in 10 Hen. VI, but in 20 Hen. VI, and yet there is but the opinion of Newton, obiter, by the way. On referring to the case in the Year Books, it appears that Yelverton contended, that, if the sister, who had the fee simple, aliened, and had issue, and died, the issue would be barred from the land entailed by the partition, which would be a mischief. To this Newton replied, "No, sir; but he shall have formedon, and shall recover *the half*."(*e*) Newton, therefore, though wrong in supposing that a formedon was necessary, thought equally with Lord Coke, that a *moiety* of the land was the share to be recovered. This appears to be the Newton whom Littleton calls,(*f*) "My master, Sir Richard Newton, late Chief Justice of the Common Pleas."

There is another section in Littleton, which, though not conclusive, yet strongly tends in the same direction; namely, section 255, where it is said, that, if the tenements whereof two parceners make partition "be to them in fee tail, and the part of the one is better in yearly value than the part of the other, albeit they be concluded during their lives to defeat the partition, yet, if the parcener who hath the lesser part in value hath issue and die, the issue may disagree to the partition, and enter and *occupy in common* the other part which was allotted to her aunt, and so the other may enter *and occupy in common* the other part allotted to her sister, &c., as if no partition had been made." Had the law been that, on the decease of one sister, her issue were entitled only to an undivided fourth part, it seems strange that Littleton

(*d*) Co. Litt. 173 a. (*e*) Year Book, 20 Hen. VI, 14 a. (*f*) Sect. 729.

should not have stated that they might enter into a fourth only, and that the other sister might occupy the remaining three-fourths.

In addition to these authorities, there is a modern case, which, when atten-
[*387] tively considered, is an authority on the *same side; namely, Doe d. Gregory and Geere v. Whichelo.(*g*) This case, so far as it relates to the point in question, was as follows: Richard Lemmon was tenant in tail of certain premises, and died, leaving issue by his first wife one son, Richard, and a daughter, Martha; and, by his second wife three daughters, Anne, Elizabeth, and Grace. Richard Lemmon, the son, as heir of the body of his father, was clearly tenant in tail of the whole premises during his life. He died, however, without issue, leaving his sister Martha of the whole blood, and his three sisters of the half blood, him surviving. Martha then intermarried with John Whichelo, and afterwards died, leaving John Whichelo, the defendant, her eldest son and heir of her body. John Whichelo, the defendant, then entered into the whole of the premises, under the impression that, as he was heir to Richard Lemmon, the son, he was entitled to the whole. In this, however, he was clearly mistaken; for the descent of an estate tail is, as we have said, traced from the purchaser, or first donee in tail, *per formam doni*. The heirs of the purchaser, Richard Lemmon, the father, were clearly his four daughters, or their issue; for the daughters by the second wife, though of the half blood to their brother by the former wife, were, equally with their half sister Martha, of the whole blood to their common father. The only question then is, in what shares the daughters or their issue became entitled. At the time of the ejectment all the daughters were dead. Elizabeth was dead, without issue; whereupon her one equal fourth part devolved, without dispute, on her three sisters, Martha, Anne, and Grace: each of these, therefore, became entitled to one equal third part. Martha, as we have seen, died, leaving John Whichelo, the defendant, her eldest son and heir of her body, Anne died, leaving James Gregory, one of the lessors of the plaintiff, her grandson and heir of her body; and Grace died, leaving Diones Geere, the other lessor of the plaintiff, her only son and heir of her body. Under these circumstances, an action of ejectment was brought by James Gregory and Diones Geere; and on a case reserved for the opinion of the Court, a verdict
[*388] was directed to be entered for the plaintiff *for two *thirds*. Neither the counsel engaged in the cause, nor the Court, seem for a moment to have imagined that James Gregory and Diones Geere could have been entitled to any other shares. It is evident, therefore, that the Court supposed that, on the decease of Martha, the heir of the body of the purchaser, *as to her share*, was her son, John Whichelo, the defendant; that, on the decease of Anne, the heir of the body of the purchaser, *as to her share*, was James Gregory, her grandson; and that, on the decease of Grace, the heir of the

(*g*) 8 T. R. 211.

body of the purchaser, *as to her share*, was her son, Diones Geere. On no other supposition can the judgment be accounted for, which awarded one-third of the whole to the defendant, John Whichelo, one other third to James Gregory, and the remaining third to Diones Geere. For let us suppose that, on the decease of each coparcener, her one-third was divided equally amongst the then existing heirs of the body of the purchaser; and the result will be, that the parties, instead of each being entitled to one-third, would have been entitled in fractional shares of a most complicated kind; unless we presume, which is next to impossible, that all the three daughters died at one and the same moment. It is not stated, in the report of the case, in what order the decease of the daughters took place; but according to the principle suggested, it will appear, on working out the fractions, that the heir of the one who died first would have been entitled to the largest share, and the heir of the one who died last would have been entitled to the smallest. Thus, let us suppose, that Martha died first, then Anne, and then Grace. On the decease of Martha, according to the principle suggested, her son, John Whichelo, would have taken only one-third of her share, or one-ninth of the whole, and Anne and Grace, the surviving sisters, would each also have taken one-third of the share of Martha, in addition to their own one-third of the whole. The shares would then have stood thus: John Whichelo $\frac{1}{9}$, Anne $\frac{1}{3}+\frac{1}{9}$, Grace $\frac{1}{3}+\frac{1}{9}$. Anne now dies. Her share, according to the same principle, would be equally divisible amongst her own issue, James Gregory, and the heirs of the body of the purchaser, namely, John Whichelo and Grace. The shares would then stand thus: John Whichelo $\frac{1}{9}+\frac{1}{3}\ (\frac{1}{3}+\frac{1}{9})$; namely, his own share and one-third of *Anne's share, $=\frac{7}{27}$: James Gregory, $\frac{1}{3}\ (\frac{1}{3}+\frac{1}{9})=\frac{4}{27}$; Grace, $\frac{1}{3}+\frac{1}{9}+\frac{1}{3}\ (\frac{1}{3}+\frac{1}{9})$; namely, her own share and one-third of Anne's [*389] share $=\frac{16}{27}$. Lastly, Grace dies, and her share, according to the same principle, would be equally divisible between her own issue, Diones Geere, and John Whichelo and James Gregory, the other coheirs of the body of the purchaser. The shares would then have stood thus: John Whichelo $\frac{7}{27}+(\frac{1}{3}\times\frac{16}{27})$; namely, his own share and one-third of Grace's share, $=\frac{37}{81}$ of the entirety of the land. James Gregory, $\frac{4}{27}+(\frac{1}{3}\times\frac{16}{27})$; namely, his own share and one-third of Grace's share, $=\frac{28}{81}$; Diones Geere, $\frac{1}{3}\times\frac{16}{27}=\frac{16}{81}$. On the principle, therefore, of the descent of the share of each coparcener amongst the coheirs of the body of the purchaser for the time being, the heirs of the body of the one who died first would have been entitled to thirty-seven eighty-first parts of the whole premises; the heir of the body of the one who died next would have been entitled to twenty-eight eighty-first parts; and the heir of the body of the one who died last would have been entitled only to sixteen eighty-first parts. By the judgment of the Court, however, the lessors of the plaintiff were entitled each to one equal third part: thus showing that, although the descent of an estate tail under the old law was always traced from the purchaser (otherwise John Whichelo would have been entitled to

the whole), yet this rule was qualified by another rule of equal force, namely, that all the lineal descendants of any person deceased should represent their ancestors, that is, should stand in the same place, and take the same share, as the ancestors would have done if living.

2. Let us now inquire into the course of descent of an estate in fee simple, according to the old law, in case the purchaser should have died, leaving two daughters, Susannah and Catherine, neither of whom should have obtained any actual seisin of the lands, and that one of them (say Catherine) should afterwards have died, leaving issue one son. In this case, it is admitted on all sides that the share of Catherine would have descended to the heir of the purchaser, and not to her own heir, in the character of heir to her; for the maxim was [*390] *seisina facit stipitem*. Had either of the daughters *obtained actual seisin, her seisin would have been in law the actual seisin of the sister also; and, on the decease of either of them, her share would have descended, not to the heir of her father, but to her own heir, the seisin acquired having made her the stock of descent. In such a case, therefore, the title of the son of Catherine to the whole of his mother's moiety would have been indisputable; for, while he was living, no one else could possibly have been her heir. The supposition, however, on which we are now to proceed is, that neither of the daughters ever obtained any actual seisin; and the question to be solved is, to whom, on the death of Catherine, did her share descend; whether equally between her sister and her son, as being together heir to the purchaser, or whether solely to the son, as being heir to the purchaser, quoad his mother's share. In Mr. Sweet's valuable edition of Messrs. Jarman and Bythewood's Conveyancing,(*h*) it is stated to be "apprehended that the share of the deceased sister would have descended in the same manner as by the recent statute it will now descend in every instance," which manner of descent is explained to be one-half of the share, or a quarter of the whole only, to the son, and the remaining half of the share to the surviving sister, thus giving her three-quarters of the whole. This doctrine, however, the writer submits, is erroneous; and in proof of such error, it might be sufficient simply to call to mind the fact, that the law of England had but one rule for the discovery of the heir. The heirs of a purchaser were, first, the heirs of his body, and then his collateral heirs; and an estate tail was merely an estate restricted in its descent to lineal heirs. If, therefore, the heir of a person has been discovered for the purpose of the descent of an estate tail, it is obvious that the same individual would also be heir of the same person for the purpose of the descent of an estate in fee simple. No distinction between the two is ever mentioned by Lord Coke, or any of the old authorities. Now, we have seen that the heir of the purchaser, under the circumstances above mentioned, for

(*h*) Vol. i, p. 139. This point has, however, since been decided in accordance with the author's opinion in Paterson v. Mills, V. C. K. Bruce, 15 Jur. 1.

the purpose of inheriting an estate tail, was the son of the *deceased daughter solely, *quoad the share which such daughter had held;* and [*391] it would accordingly appear that the heir of the purchaser, to inherit an estate in fee simple, was also the son of the deceased daughter *quoad her share.* That this was in fact the case appears incidentally from a passage in the Year Book,(*i*) where it is stated, that "If there be two coparceners of a reversion, and their tenant for term of life commits waste, and then one of the parceners has issue and dies, and the tenant for term of life commits another waste, and the aunt and niece bring a writ of waste jointly, for they cannot sever, and the writ of waste is general, still their recovery shall be special; for the aunt shall recover treble damages for the waste done, as well in the life of her parcener as afterwards, and the niece shall only recover damages for the waste done after the death of her mother, and the place wasted they shall recover jointly. And the same law is, if a man has issue two daughters, and dies seised of certain land, and a stranger abates, and afterwards one of the daughters has issue two daughters and dies, and the aunt and the two daughters bring assize of mort d'ancestor; here, if the aunt recover the *moiety* of the land and damages from the death of the ancestor, and the nieces recover *each one of them the moiety of the moiety* of the land, and damages from the death of their mother, still the writ is general." Here we have all the circumstances required; the father dies seised, leaving two daughters, neither of whom obtains any actual seisin of the land; for a stranger abates, that is, gets possession before them. One of the daughters then dies, without having had possession, and her share devolves entirely on her issue, not as heirs to her, for she never was seised, but as heirs to her father quoad her share. The surviving sister is entitled only to her original moiety, and the two daughters of her deceased sister take their mother's moiety equally between them.

There is another incidental reference to the same subject in Lord Coke's Commentary upon Littleton:(*k*) "If a man hath issue two daughters, and is disseised, and the daughters have issue and die, the issues shall join in a præcipe, because *one right descends from the ancestor, and *it maketh no difference* whether the common ancestor, being out of [*392] possession, *died before the daughters or after,* for that, in both cases, they must make themselves heirs to the grandfather which was last seised, and when the issues have recovered, they are coparceners, and one præcipe shall lie against them." "It maketh no difference," says Lord Coke, "whether the common ancestor, being out of possession, died before the daughters or after." Lord Coke is certainly not here speaking of the shares which the issue would take; but had any difference in the quantity of their shares been made by the circumstance of the daughters surviving their father, it seems strange that so accurate a writer as Lord Coke should not "herein" have

(*i*) 35 Hen. VI, 23. (*k*) Co. Litt. 164 a.

"noted a diversity." The descent is traced to the issue of the daughters, not from the daughters, but from their father, the common grandfather of the issue. On the decease of one daughter, therefore, on the theory against which we are contending, the right to her share should have devolved, one-half on her own issue, and the other half on her surviving sister; and, on the decease of such surviving sister, her three-quarters should, by the same rule, have been divided, one-half to her own issue, and the other half to the issue of her deceased sister; whereas it is admitted, that had the daughters both died in their father's lifetime, their issue would have inherited in equal shares. Lord Coke, however, remarks no difference whether the father died before or after his daughters. Surely, then, he never could have imagined that so great an inequality in the shares could have been produced by so mere an accident. It should be remembered that the rule of representation for which we are contending is the rule suggested by natural justice, and might well have been passed over without express notice; but had the opposite rule prevailed, the inequality and injustice of its operation could scarcely have failed to elicit some remark. This circumstance may, perhaps, tend to explain the fact that the writer has been unable, after a lengthened search, to find any authority expressly directed to the point; and yet, when we consider that in ancient times the title by descent was the most usual one (testamentary alienation not having been permitted), we cannot doubt but that the point *in question must very frequently have occurred. In what manner, then, can we account for the silence of our ancient writers on this subject, but on the supposition, which is confirmed by every incidental notice, that in tracing descent from a purchaser, the issue of a deceased daughter took the entire share of their parent, whether such daughter should have died in the lifetime of the purchaser or after his decease?

[*393]

Having now ascertained the course of descent among coparceners under the old law, whenever descent was traced from a purchaser, we are in a better situation to place a construction on that clause of the act to amend the law of inheritance, which enacts, "that in every case descent shall be traced from the purchaser."(*l*) What was the nature of the alteration which this act was intended to effect? Was it intended to introduce a course of descent amongst coparceners hitherto unknown to the law, and tending to the most intricate and absurd subdivision of their shares? or did the act intend merely to say that descent from the purchaser, which had hitherto occurred only in the case of an estate tail, and in the case where the heir to a fee simple died without obtaining actual seisin, should now apply to every case? In other words, has the act abolished the rule that, in tracing the descent from the purchaser, the issue of deceased heirs shall stand, quoad their entire shares, in the place of their parents? We have seen, that previously to the act, the

(*l*) Stat. 3 & 4 Will. IV, c. 106, s. 2.

rule that descent should be traced from the purchaser, whenever it applied, was guided and governed by another rule, that the issue of every deceased person should, quoad the entire share of such person, stand in his or her place. Why, then, should not the same rule of representation govern descent, now that the rule tracing descent from the purchaser has become applicable to every case? Had any modification been intended to be made of so important a rule for tracing descent from a purchaser, as the rule that the issue, and the issue alone, represent their ancestor, surely the act would not have been silent on the subject. A rule of law clearly continues in force until it be repealed. No repeal has taken place of the rule *that in tracing descent from a purchaser, the issue shall always stand in the place of their ancestor. [*394] It is submitted, therefore, that this rule is now in full operation; and that, although in every case descent is now traced from the purchaser, yet the tracing of such descent is still governed by the rules to which the tracing of descent from purchasers was in former times invariably subject. If this be so, it is clear then, that, under the circumstances stated at the commencement of this paper, the share of Catherine will descend entirely to her own issue, as heir to the purchaser quoad her share, and will not be divided between such issue and the surviving sister.

It is said, indeed, that by giving to the issue one-half of the share which belonged to their mother, the rule is satisfied, which requires that the issue of a person deceased shall, in all cases, represent their ancestor; for it is argued that the issue still take one-fourth by representation, notwithstanding that the other fourth goes to the surviving sister, who constitutes, together with such issue, one heir to their common ancestor. This, however, is a fallacy; the rule is, "that the lineal descendants in infinitum of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living."(*m*) Now, in what place would the deceased daughter have stood had she been living? Would she have been heir to one-fourth only, or would she not rather have been heir to the entire moiety? Clearly to the entire moiety; for, had she been living, no descent of her moiety would have taken place; if, then, her issue are to stand in the place which she would have occupied if living, they cannot so represent her unless they take the whole of her share.

But it is said, again, that the surviving daughter may have aliened her share; and how can the descent of her deceased sister's share be said to be traced from the purchaser, if the survivor, who constitutes a part of the purchaser's heir, is to take nothing? The descent of the whole, it is argued, cannot *be considered as traced over again on the decease of any daughter, because the other daughter's moiety may, by that time, [*395]

(*m*) 2 Black. Com. 216.

have got into the hands of a perfect stranger. The proper reply to this objection seems to be, that the laws of descent were prior in date to the liberty of alienation. In ancient times, when the rules of descent were settled, the objection could scarcely have occurred. Estates tail were kept from alienation by virtue of the statute De donis, for about 200 years subsequent to its passing. Rights of entry and action were also inalienable for a very much longer period. Reversions expectant on estates of freehold, in the descent of which the same rule of tracing from the purchaser occurred, could alone have afforded an instance of alienation by the heir; and the sale of reversions appears to have been by no means frequent in early times. In addition to other reasons, the attornment then required from the particular tenant on every alienation of a reversion, operated as a check on such transactions. It may, therefore, be safely asserted as a general proposition, that on the decease of any coparcener, the descent of whose share was to be traced from the purchaser, the shares of the other coparceners had not been aliened; and to have given them any part of their deceased sister's share, to the prejudice of her own issue, would have been obviously unfair, and contrary to the natural meaning of the rule, that "every daughter hath a several stock or root."(*n*) If, as we have seen, the rule remained the same with regard to estates tail, notwithstanding the introduction of the right of alienation,(*o*) surely it ought still to continue unimpaired, now that it has become applicable to estates in fee, which enjoy a still more perfect liberty. Rules of law, which have their foundation in natural justice, should ever be upheld, notwithstanding they may become applicable to cases not specifically contemplated at the time of their creation.

[*396] *(B.)

Referred to pp. 164, 253, 361.

A DEED OF GRANT.

THIS INDENTURE made the second day of January(*a*) [in the eleventh year of the reign of our Sovereign Lady Queen Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and] in the year of our Lord 1848 BETWEEN A. B. of Cheapside in the city of London Esquire of the first part C. D. of Lincoln's Inn in the county of Middlesex Esquire of the second part and Y. Z. of Lincoln's Inn aforesaid

(*n*) Co. Litt. 164 b. (*o*) Doe v. Whichelo, 8 T. R. 211; ante, p. 387.

(*a*) The words within brackets are now most frequently omitted.

gentleman of the third part(*b*) WHEREAS by indentures of lease and release bearing date respectively on or about the first and second days of January 1838 and respectively made or expressed to be made between E. F. therein described of the one part and the said A. B. of the other part for the consideration therein mentioned the messuage or tenement lands and hereditaments hereinafter described and intended to be hereby granted with the appurtenances were conveyed and assured by the said E. F. unto and to the use of the said A. B. his heirs and assigns forever. AND WHEREAS the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him of the inheritance in fee simple in possession of and in the said messuage or tenement lands and hereditaments hereinbefore referred to and hereinafter described with the appurtenances free from all incumbrances at or for the price or sum of one thousand pounds NOW THIS INDENTURE WITNESSETH that for carrying the said contract *for sale into effect and in consideration of the sum of one thousand pounds of lawful money of [*397] Great Britain to the said A. B. in hand well and truly paid by the said C. D. upon or immediately before the sealing and delivery of these presents (the receipt of which said sum of one thousand pounds in full for the absolute purchase of the inheritance in fee simple in possession of and in the messuage or tenement lands and hereditaments hereinafter described and intended to be hereby granted with the appurtenances he the said A. B. doth hereby acknowledge and of and from the same and every part thereof doth acquit release and discharge the said C. D. his heirs executors administrators and assigns [and every of them for ever by these presents]) He the said A. B. HATH granted and confirmed and by these presents DOTH grant and confirm unto the said C. D. and his heirs(*c*) ALL that messuage or tenement situate lying and being at &c. commonly called or known by the name of &c. (*here describe the premises*) Together with all and singular the houses outhouses edifices buildings barns dovehouses stables yards gardens orchards lights easements ways paths passages waters watercourses trees woods underwoods commons and commonable rights hedges ditches fences liberties privileges emoluments

(*b*) The reason why Y. Z. is made a party to this deed is, that the widow of C. D. may be barred or deprived of her dower. See ante, pp. 252, 253. If this should not be intended, the deed would be made between A. B. of the one part and C. D. of the other part, as in the specimen given, p. 155.

(*c*) If the deed were dated at any time between the month of May, 1841 (the date of the statute 4 & 5 Vict. c. 21; ante, pp. 146, 153), and the first of January, 1845 (the time of the commencement of the operation of the Transfer of Property Act, ante, p. 146), the form would be as follows:—"He the said A. B. DOTH by these presents (being a deed of release made in pursuance of an Act of Parliament made and passed in the fourth year of the reign of her present Majesty Queen Victoria, intituled An act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties) grant bargain sell alien release and confirm unto the said C. D. and his heirs."

commodities advantages hereditaments and appurtenances whatsoever to the said messuage or tenement lands hereditaments and premises hereby granted or intended so to be or any part thereof belonging or in anywise appertaining or with the same or any part thereof now or at any time heretofore usually held used occupied or enjoyed [or accepted reputed taken or known as part parcel or member thereof] And the reversion and reversions remainder and [*398] remainders *yearly and other rents issues and profits of the same premises and every part thereof And all the estate right title interest use trust inheritance property possession benefit claim and demand whatsoever both at law and in equity of him the said A. B. in to out or upon the said messuage or tenement lands hereditaments and premises hereby granted or intended so to be and every part and parcel of the same with their and every of their appurtenances And all deeds evidences and writings relating to the title of the said A. B. to the said hereditaments and premises hereby granted or intended so to be now in the custody of the said A. B. or which he can procure without suit at law or in equity To HAVE and To HOLD the said messuage or tenement lands and hereditaments hereinbefore described and all and singular other the premises hereby granted or intended so to be with their and every of their rights members and appurtenances unto the said C. D. and his heirs(*d*) To such uses upon and for such trusts intents and purposes and with under and subject to such powers provisos declarations and agreements as the said C. D. shall from time to time by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses direct limit or appoint And in default of and until any such direction limitation or appointment and so far as any such direction limitation or appointment if incomplete shall not extend To the use of the said C. D. and his assigns for and during the term of his natural life without impeachment of waste And from and after the determination of that estate by forfeiture or otherwise in his lifetime To the use of the said Y. Z. and his heirs during the life of the said C. D. In trust nevertheless for him the said C. D. and his assigns and after the decease of the said C. D. to the use of the said C. D. his heirs and assigns forever And the said A. B. doth hereby for himself his heirs(*e*) executors and administrators covenant promise and agree with and to the said C. D. his [*399] appointees heirs and assigns in manner following that is *to say that for and notwithstanding any act deed matter or thing whatsoever by him the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him made done or committed to the contrary(*f*) [he the said A. B. is at the time of the sealing and delivery

(*d*) If the dower of C. D.'s widow should not be intended to be barred, the form would here simply be "To the use of the said C. D. his heirs and assigns forever."

(*e*) See ante, pp. 63, 64.

(*f*) See ante, p. 369.

of these presents lawfully rightfully and absolutely seised of or well and sufficiently entitled to the messuage or tenement lands hereditaments and premises hereby granted or intended so to be with the appurtenances of and in a good sure perfect lawful absolute and indefeasible estate of inheritance in fee simple without any manner of condition contingent proviso power of revocation or limitation of any new or other use or uses or any other matter restraint cause or thing whatsoever to alter change charge revoke make void lessen or determine the same estate And that for and notwithstanding any such act matter or thing as aforesaid] he the said A. B. now hath in himself good right full power and lawful and absolute authority to grant and confirm the said messuage or tenement lands hereditaments and premises hereinbefore granted or intended so to be with their appurtenances unto the said C. D. and his heirs to the uses and in manner aforesaid and according to the true intent and meaning of these presents And that the same messuage or tenement lands hereditaments and premises with the appurtenances shall and lawfully may accordingly from time to time and at all times hereinafter be held and enjoyed and the rents issues and profits thereof received and taken by the said C. D. his appointees heirs and assigns to and for his and their own absolute use and benefit without any lawful let suit trouble denial hindrance eviction ejection molestation disturbance or interruption whatsoever of from or by the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him And *that*(*g*) free and clear and freely and clearly acquitted exonerated and discharged or otherwise by him the said A. B. his heirs executors or administrators well and sufficiently saved defended kept harmless and indemnified of from and against all and all manner of former and other [gifts grants bargains *sales leases mortgages joint- [*400]
ures dowers and all right and title of dower uses trusts wills entails statutes merchant and of the staple recognizances judgments extents executions annuities legacies payments rents and arrears of rent forfeitures re-entries cause and causes of forfeiture and re-entry and of from and against all and singular other] estates rights titles charges and incumbrances whatsoever had made done committed executed or willingly suffered by him the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him And moreover that he the said A. B. and his heirs and all and every persons and person having or lawfully claiming or who shall or may have or lawfully claim any estate right title or interest whatsoever at law or in equity in to or out of the said messuage or tenement lands hereditaments and premises hereinbefore granted or intended so to be with their appurtenances by from through under or in trust for him or them shall and will from time to time and at all times hereafter upon every reasonable request and at the costs and charges of the said C. D. his appointees heirs and assigns

(*g*) The word *that* is here a pronoun.

make do and execute or cause or procure to be made done and executed all and every or any such further and other lawful and reasonable acts deeds things grants conveyances and assurances in the law whatsoever for further better more perfectly and effectually granting conveying and assuring the said messuage or tenement lands hereditaments and premises hereinbefore granted or intended so to be with their appurtenances unto the said C. D. and his heirs to the uses and in the manner aforesaid and according to the true intent and meaning of these presents as by him the said C. D. his appointees heirs or assigns or his or their counsel in the law shall or may be reasonably advised or devised and required [so that no such further assurance or assurances contain or imply any further or any other warranty or covenant than against the person or persons who shall make and execute the same and his her or their heirs executors and administrators acts and deeds only and so that the person or persons who shall be required to make and execute any such further assurance or assurances be not compelled or compellable for making or doing thereof to go or travel from his her or their dwelling or respective [*401] *dwellings or usual place or places of abode or residence] IN WITNESS, &c.

On the back is indorsed the attestation and further receipt as follows:—

Signed sealed and delivered by the within-named A. B. C. D. and Y. Z. in the presence of

JOHN DOE of London Gent.
RICHARD ROE Clerk to Mr. Doe.

Received the day and year first within written of and from the within-named C. D. the sum of One Thousand Pounds being the consideration within mentioned to be paid by him to me. } £1000.

(Signed) A. B.

Witness JOHN DOE,
RICHARD ROE.

[*402] *(C.)

Referred to p. 187. (*a*)

On the decease of a woman entitled by descent to an estate in fee simple, is her husband, having had issue by her, entitled, according to the present law, to an estate for life, by the curtesy of England, in the whole or any part of her share?

(*a*) The substance of the following observations has already appeared in the "Jurist" newspaper for March 14, 1846.

In order to answer this question satisfactorily, it will be necessary, first, to examine into the principles of the ancient law, and then to apply those principles, when ascertained, to the law as at present existing. Unfortunately the authorities whence the principles of the old law ought to be derived do not appear to be quite consistent with one another; and the consequence is, that some uncertainty seems unavoidably to hang over the question above propounded. Let us, however, weigh carefully the opposing authorities, and endeavor to ascertain on which side the scale preponderates.

Littleton, "not the name of the author only, but of the law itself," thus defines curtesy: "Tenant by the curtesie of England is where a man taketh a wife seised in fee simple or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme, but in England only."(*b*) And, in a subsequent section, he adds, "Memorandum, that, in every case where a man taketh a wife seised of such an estate of tenements, &c., as the issue which he hath by his *wife may by possibility inherit the same tenements of such an estate as the wife hath, *as heir to the wife;* in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, *but otherwise not.*"(*c*) "Memorandum," says Lord Coke, in his Commentary,(*d*) "this word doth ever betoken some excellent point of learning." Again, *As heir to the wife.* "This doth imply a secret of law; for, except the wife be actually seised, the heir shall not (as hath been said) make himself heir to the wife; *and this is the reason,* that a man shall not be tenant by the curtesie of a seisin in law." Here, we find it asserted by Littleton, that the husband shall not be tenant by the curtesy, unless he has had issue by his wife capable of inheriting the land *as her heir;* and this is explained by Lord Coke to be such issue as would have traced their descent from the wife, as the stock of descent, according to the maxim, "*seisina facit stipitem.*" Unless an actual seisin had been obtained by the wife, she could not have been the stock of descent; for the descent of a fee simple was traced from the person last actually seised; "and *this is the reason,*" says Lord Coke, "that a man shall not be tenant by the curtesy of a mere seisin in law." The same rule, with the same reason for it, will also be found in *Paine's case,*(*e*) where it is said, "And when Littleton saith, *as heir to the wife,* these words are very material; for that is *the true reason* that a man shall not be tenant by the curtesy of a seisin in law; for, in such case, the issue ought to make himself heir to him who was last actually seised." The same doctrine again appears in Blackstone.(*f*) "And this seems to be [*403]

(*b*) Litt. s. 35. (*c*) Litt. s. 52. (*d*) Co. Litt. 40 a.
(*e*) 8 Rep. 36 a. (*f*) 2 Black. Comm. 128.

the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and, therefore, as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. And hence," continues Blackstone, in his usual laudatory *strain, "we may observe with how much [*404] nicety and consideration the old rules of law were framed, and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another." Here we have, indeed, a formidable array of authorities, all to the point, that, in order to entitle the husband to his curtesy, his wife must have been the stock from whom descent should have been traced to her issue; for the principal and true reason that there could not be any curtesy of a seisin in law is stated to be, that the issue could not, in such a case, make himself heir to the wife, because his descent was then required to be traced from the person last actually seised.

Let us, then, endeavor to apply this principle to the present law. The act for the amendment of the law of inheritance(*g*) enacts,(*h*) that, in every case, descent shall be traced from the purchaser. On the decease of a woman entitled by descent, the descent of her share is, therefore, to be now traced, not from herself, but from her ancestor, the purchaser, from whom she inherited. With respect to the persons to become entitled, as heir to the purchaser on this descent, if the woman be a coparcener, the question arises, which has already been discussed,(*i*) whether the surviving sister equally with the issue of the deceased, or whether such issue solely, are now entitled to inherit? And the conclusion at which we arrived was, that the issue solely succeeded to their mother's share. But, whether this be so or not, nothing is clearer than that, on the decease of a woman, entitled by descent, the persons who next inherit take as heir to the purchaser, and not to her; for, from the purchaser alone can descent now be traced; and the mere circumstance of having obtained an actual seisin does not now make the heir the stock of descent. How, then, can her husband be entitled to hold her lands as tenant by the curtesy? If tenancy by the curtesy was allowed of those lands only of which the wife had obtained actual seisin, because it was a necessary condition of curtesy that the wife should be the stock of descent, [*405] and because an actual seisin alone made the wife the stock of *descent, how can the husband obtain his curtesy in any case where the stock of descent is confessedly not the wife, but the wife's ancestor? Amongst all the recent alterations of the law, the doctrine of curtesy has been left untouched; there seems, therefore, to be no means of determining any question respecting

(*g*) 3 & 4 Will. IV, c. 106. (*h*) Sect. 2. (*i*) Appendix (A.), ante, p. 383.

it, but by applying the old principles to the new enactments, by which, indirectly, it may be effected. So far, then, as the present appears, it seems a fair and proper deduction from the authorities, that, whenever a woman has become entitled to lands by descent, her husband cannot claim his curtesy, because the descent of such lands, on her decease, is not to be traced from her.

But, by carrying our investigations a little further, we may be disposed to doubt, if not deny, that such is the law; not that the conclusion drawn is unwarranted by the authorities, but the authorities themselves may, perhaps, be found to be erroneous. Let us now compare the law of curtesy of an estate tail with the law of curtesy of an estate in fee simple.

In the section of Littleton, which we have already quoted,(*l*) it is laid down, that, if a man taketh a wife *seised as heir* in tail especial, and hath issue by her, born alive, he shall, on her decease, be tenant by the curtesy. And on this Lord Coke makes the following commentary: "And here Littleton intendeth a seisin in deed, if it may be attained unto. As if a man dieth seised of lands in fee simple or *fee tail* general, and these lands descend to his daughter, and she taketh a husband and hath issue, *and dieth before any entry*, the husband shall not be tenant by the curtesy, and yet, in this case, she had a seisin in law; but if she or her husband had, during her life, entered, he should have been tenant by the curtesy."(*m*) Now, it is well known that the descent of an estate tail is always traced from the purchaser or original donee in tail. The actual seisin which might be obtained by the heir to an estate tail never made him the stock of descent. The maxim was, "Possessio fratris *de feudo simplici* *facit sororem esse hæredem." Where, therefore, a [*406] woman who had been seised as heir or coparcener in tail died, leaving issue, such issue made themselves heir not to her, but to her ancestor, the purchaser or donee; and whether the mother did or did not obtain actual seisin was, in this respect, totally immaterial. When actual seisin was obtained, the issue still made themselves heir to the purchaser only, and yet the husband was entitled to his curtesy. When actual seisin was not obtained, the issue were heirs to the purchaser as before; but the husband lost his curtesy. In the case of an estate tail, therefore, it is quite clear that the question of curtesy or no curtesy depended entirely on the husband's obtaining for his wife an actual seisin, and had nothing to do with the circumstance of the wife's being or not being the stock of descent. The reason, therefore, before mentioned given by Lord Coke, and repeated by Blackstone, cannot apply to an estate tail. An actual seisin could not have been required *in order* to make the wife the stock of descent, because the descent could not, under any circumstances, be traced from her, but must have been traced from the original donee to the heir of *his* body *per formam doni*.

(*l*) Sect. 35. (*m*) Co. Litt. 29 a.

Again, if we look to the law respecting curtesy in incorporeal hereditaments, we shall find that the reason above given is inapplicable; for the husband, on having issue born, was entitled to his curtesy out of an advowson and a rent, although no actual seisin had been obtained, in the wife's lifetime, by receipt of the rent or presentation to the advowson.(*n*) And yet, in order to make the wife the stock of descent as to such hereditaments, it was necessary that an actual seisin should be obtained by her.(*o*) The husband, therefore, was entitled to his curtesy where the descent to the issue was traced from the ancestor of his wife, as well as where traced from the wife herself. In this case, also, the right to curtesy was, accordingly, independent of the wife's being or not being the stock from which the descent was to be traced.

[*407] *We are driven, therefore, to search for another and more satisfactory reason why an actual seisin should have been required to be obtained by the wife, in order to entitle her husband to his curtesy out of her lands; and such a reason is furnished by Lord Coke himself, and also by Blackstone. Lord Coke says,(*p*) "Where lands or tenements descend to the husband, before entry he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin, *as the husband may do of his wife's land when he is to be tenant by curtesy*, which is worthy the observation." It would seem from this, therefore, that the reason why an actual seisin was required to entitle the husband to his curtesy was, that his wife might not suffer by his neglect to take possession of her lands; and, in order to induce him to do so, the law allowed him curtesy of all lands of which an actual seisin had been obtained, but refused him his curtesy out of such lands as he had taken no pains to obtain possession of. This reason also is adopted by Blackstone from Coke: "A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; *which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself in her right, was actually seised in deed.*"(*q*) The more we investigate the rules and principles of the ancient law, the greater will appear the probability that this reason was indeed the true one. In the troublous times of old, an actual seisin was not always easily acquired. The doctrine of continual claim shows that peril was not unfrequently incurred in entering on lands for the sake of asserting a title; for, in order to obtain an actual seisin, any person entitled, if unable to approach the premises, was bound to come as near as he dare.(*r*) And "it is to be observed," says Lord Coke, "that

(*n*) Watk. Descents, 39 (47, 4th ed.) (*o*) Watk. Descents, 60 (67, 4th ed.)
(*p*) Co. Litt. 31 a. (*q*) 2 Black. Com. 131. (*r*) Litt. ss. 419, 421.

every doubt or fear is not sufficient, for it must concern the safety of the person of a man, and not his houses or goods; for if he fear the burning of his *houses or the taking away or spoiling his goods, this is not sufficient."(s) That actual seisin should be obtained was obviously most desirable, and [*408] nothing could be more natural or reasonable than that the husband should have no curtesy where he had failed to obtain it. Perkins seems to think that this was the reason of the rule; for in his Profitable Book he answers an objection to it, founded on an extreme case. "But if possession in law of lands or tenements in fee descend unto a married woman, which lands are in the county of York, and the husband and his wife are dwelling in the county of Essex, and the wife dieth within one day after the descent, so as the husband could not enter during the coverture, for the shortness of the time, yet he shall not be tenant by the curtesy, &c.; and yet, according to common pretence, there is no *default in the husband.* But it may be said that the husband of the woman, before the death of the ancestor of the woman, might have spoken unto a man dwelling near unto the place where the lands lay, to enter for the woman, as in her right, immediately after the death of her ancestor," &c.(t) This reason for the rule is also quite consistent with the circumstances that the husband was entitled to his curtesy out of incorporeal hereditaments, notwithstanding his failure to obtain an actual seisin. For if the advowson were not void, or the rent did not become payable during the wife's life, it was obviously impossible for the husband to present to the one or receive the other: and it would have been unreasonable that he should suffer for not doing an impossibility, the maxim being "impotentia excusat legem." This is the reason, indeed, usually given to explain this circumstance; and it will be found both in Lord Coke(u) and Blackstone.(x) This reason, however, is plainly at variance with that mentioned in the former part of this paper, and adduced by them to explain the necessity of an actual seisin, in order to entitle the husband to his curtesy out of lands in fee simple.

There still remains, however, the section of Littleton to *which we have before referred,(y) as an apparent authority on the other side. [*409] Littleton expressly says, that when the issue may, by possibility, inherit *of such an estate as the wife hath, as heir to the wife,* the husband shall have his curtesy, but *otherwise not;* and we have seen that, according to Lord Coke's interpretation, to inherit *as heir to the wife,* means here to inherit *from the wife as the stock of descent.* But the legitimate mode of interpreting an author certainly is to attend to the context, and to notice in what sense he himself uses the phrase in question on other occasions. If now we turn to the very next section of Littleton, we shall find the very same phrase made

(s) Co. Litt. 253 b. (t) Perk. 470. (u) Co. Litt. 29 a.
(x) 2 Black. Comm. 127. (y) Sect. 52.

use of in a manner which clearly shows that Littleton did *not* mean, by inheriting as heir to a person, inheriting from that person as the stock of descent. For, after having thus laid down the law as to curtesy, Littleton continues: "And, also, in every case where a woman taketh a husband seised of such an estate in tenements, &c., so as, by possibility, it may happen that the wife may have issue by her husband, and that the same issue may, by possibility, inherit the same tenements *of such an estate as the husband hath, as heir to the husband*, of such tenements she shall have her dower, and *otherwise not.*"(*z*) Now, nothing is clearer than that a wife was entitled to dower out of the lands of which her husband had only a seisin in law;(*a*) and nothing, also, is clearer than that a seisin in law only was insufficient to make the husband the stock of descent; for, for this purpose an actual seisin was requisite, according to the rule "seisina facit stipitem." In this case, therefore, it is obvious that Littleton could not mean to say that the husband must have been made *the stock of descent*, by virtue of having obtained an actual seisin; for that would have been to contradict the plainest rules of law. What, then, was his meaning? The subsequent part of the same section affords an explanation: "For, if tenements be given to a man and to the heirs which he shall beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate tail as donee in special tail. [*410] Yet, if the *husband die without issue, the same wife shall be endowed of the same tenements, because the issue which she, by possibility, might have had by the same husband, might have inherited the same tenements. But, if the wife dieth leaving her husband, and after the husband taketh another wife and dieth, his second wife shall not be endowed in this case, *for the reason aforesaid.*" This example shows what was Littleton's true meaning. He was not thinking, either in this section or in the one next before it, of the husband or wife being the stock of descent, instead of some earlier ancestor. He was laying down a general rule, applicable to dower as well as to curtesy; namely, that if the issue that might have been born in the one case, or that were born in the other, of the surviving parent, could not, by possibility, inherit the estate of their deceased parent, by right of representation of such parent, then the surviving parent was not entitled to dower in the one case, or to curtesy in the other. It is plain that, in the example just adduced, the issue of the husband by his second marriage could not possibly inherit his estate, which was given to him and the heirs of his body by his first wife; the second wife, therefore, was excluded from dower out of this estate. And, in the parallel case of a gift to a woman and the heirs of her body by her first husband, it is indisputable that, for a precisely similar reason, her second husband could not claim his curtesy on having issue by her; for such issue could not possibly inherit their mother's estate. All that Littleton then intended to state with respect to curtesy, was the rule laid down by

(*z*) Litt. s. 53. (*a*) Watk. Descents, 32 (42, 4th ed).

the Statute de Donis,(*b*) which provides that, where any person gives lands to a man and his wife and the heirs of their bodies, or where any person gives lands in frankmarriage, the second husband of any such woman shall not have anything in the land so given, after the death of his wife, by the law of England, nor shall the issue of the second husband and wife succeed in the inheritance.(*c*) When the two sections of Littleton are read consecutively, without the introduction of Lord Coke's commentary, their meaning is apparent; and the intervening *commentary not only puts the reader on the wrong clew, but hinders the recovery of the right one, by removing to a distance the explanatory context. [*411]

If our construction of Littleton be the true one, it throws some light on the question discussed in Appendix (A.), on the course of descent amongst coparceners. We there endeavored to show that the issue of a coparcener always stood in the place of their parent, by right of representation, even where descent was traced from some more remote ancestor as the stock. Littleton, with this view of the subject in his mind, and never suspecting that any other could be entertained, might well speak generally of issue inheriting *as heir to* their parent, even though the share of the parent might have descended to the issue as heir to some more remote ancestor. The authorities adduced in Appendix (A.) thus tend further to explain the language of Littleton; whilst the language of Littleton, as above explained, illustrates and confirms the authorities previously adduced.

Having at length arrived at the true principles of the old law, the application of them to the state of circumstances produced by the new law of inheritance will be very easy. A coparcener dies leaving a husband who has had issue by her, and leaving one or more sisters surviving her. The descent of her share is now traced from their common parent, the purchaser. But, in tracing this descent, we have seen, in Appendix (A.), that the issue of the deceased coparcener would inherit her entire share by representation of her. And the condition which will entitle her husband to curtesy out of her share appears to be, that his issue might possibly inherit the estate by right of representation of their deceased mother. This condition, therefore, is obviously fulfilled, and our conclusion consequently is, that the husband of a deceased coparcener, who has had issue by her, is entitled to curtesy out of the whole of her share. But, in order to arrive at this conclusion, it seems that we must admit, first, that Lord Coke has endeavored to support the law by one reason too many; and, secondly, that one laudatory flourish of Blackstone has been made without occasion.

(*b*) 13 Edw. I, c. 1. (*c*) See Bac. Abr. tit. Curtesy of England (C), 1.

[*412] *(D.)

Referred to page 229.

If the rule of perpetuity, which restrains executory interests within a life or lives in being, and twenty-one years afterwards, be, as is sometimes contended,(a) the only limit to the settlement of real estate by way of remainder, the following limitations would be clearly unobjectionable:—To the use of A., a living unmarried person, for life, with remainder to the use of his first son for life, with remainder to the use of the first son of such first son, born in the lifetime of A., or within twenty-one years after his decease, for life, with remainder to the use of the first and other sons of such first son of such first son of A., born in the lifetime of A., or within twenty-one years after his decease, successively in tail male, with remainder to the use of the first son of the first son of A., born in his lifetime, or within twenty-one years after his decease, in tail male, with remainder to the use of the second son of such first son of A., born in the lifetime of A., or within twenty-one years after his decease, for life, with remainder to the use of his first and other sons, born in the lifetime of A., or within twenty-one years after his decease, successively in tail male, with remainder to the use of the second son of the first son of A., born in his lifetime, or within twenty-one years after his decease, in tail male, with remainder to the use of the third son of such first son of A., born in the lifetime of A., or within twenty-one years after his decease, for life, with remainder to the use of his first and other sons, born as before, successively in tail male, with remainder to the use of such third son of the first son of A., born as before, in tail male, with like remainders to the use of the fourth and every other son of such first son of A., born as before, for life respectively, [*413] followed *by like remainder to the use of their respective first and other sons, born as before, successively in tail male, followed by like remainders to the use of themselves in tail male; with remainder to the use of the first son of A. in tail male; with remainder to the use of the second son of A. for life; with similar remainders to the use of his sons, and sons' sons, born as before; with remainder to the use of such second son of A. in tail male, and so on.

It is evident that every one of the estates here limited must necessarily arise within a life in being (namely, that of A.) and twenty-one years afterwards. And yet here is a settlement which will in all probability tie up the estate for three generations; for the eldest son of a man's eldest son is very frequently born in his lifetime, or, if not, will most probably be born within twenty-one

(a) Lewis on Perpetuity, p. 408, et seq.

years after his decease. And great-grandchildren, though not often born in the lifetime of their great-grandfather, are yet not unusually born within twenty-one years of his death. Now, if a settlement such as this were legal, it would, we may fairly presume, have been adopted before now; for conveyancers are frequently instructed to draw settlements containing as strict an entail as possible; and the Court of Chancery has also sometimes had occasion to carry into effect executory trusts for making strict settlements. In these cases it would be the duty of the draftsman, or of the court, to go to the limit of the law in fettering the property in question. But it may be safely asserted, that in no single case has a settlement, such as the one suggested, been drawn by any conveyancer, much less sanctioned by the Court of Chancery. The utmost that on these occasions is ever done is to give life estates to all living persons, with remainder to their first and other sons successively in tail male. As, therefore, the best evidence of a man's having had no lawful issue is that none of his family ever heard of any, so the best evidence that such a settlement is illegal is that no conveyancer ever heard of such a draft being drawn.

---

*(E.) [*414]

Referred to pp. 311, 313.

The Manor of Fairfield in the County of Middlesex.

A General Court Baron of John Freeman Esq. Lord of the said Manor holden in and for the said Manor on the 1st day of January in the third year of the reign of our Sovereign Lady Queen Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and in the year of our Lord 1840 Before John Doe Steward of the said Manor.

At this Court comes A. B. one of the customary tenants of this manor and in consideration of the sum of £1000 of lawful money of Great Britain to him in hand well and truly paid by C. D. of Lincoln's Inn in the County of Middlesex Esq. in open court surrenders into the hands of the lord of this manor by the hands and acceptance of the said steward by the rod according to the custom of this manor All that messuage &c. (*here describe the premises*) with their appurtenances (and to which same premises the said A. B. was admitted at the general Court holden for this manor on this 12th day of October 1838) And the reversion and reversions remainder and remainders rents

issues and profits thereof And all the estate right title interest trust benefit property claim and demand whatsoever of the said A. B. in to or out of the same premises and every part thereof To the use of the said C. D. his heirs and assigns forever according to the custom of this manor.

Now at this Court comes the said C. D. and prays to be admitted to all and singular the said customary or copyhold hereditaments and premises so surrendered to his use at this Court as aforesaid to whom the lord of this manor [*415] by the said *steward grants seisin thereof by the rod To HAVE and To HOLD the said messuage hereditaments and premises with their appurtenances unto the said C. D. and his heirs to be holden of the lord by copy of court roll at the will of the lord according to the custom of this manor by fealty suit of court and the ancient annual rent or rents and other duties and services therefore due and of right accustomed And so (saving the right of the lord) the said C. D. is admitted tenant thereof and pays to the lord on such his admittance a fine certain of £50 and his fealty is respited.

(Signed) JOHN DOE Steward.

INDEX.

The pages referred to are those within brackets [ ].

A.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

Q.

R.

S.

T.

U. V.

W.

Y.

THE END.

FIRST SERIES.

SMITH'S LEADING CASES.

1855. 2 VOLS. GREATLY ENLARGED. $11.00.

A Selection of Leading Cases on various Branches of Law, with Notes, by JOHN WILLIAM SMITH, Esq., from the Third English Edition, by H. S. KEATING and J. S. WILLIS, Esqrs. Fifth American Edition, with additional Notes and References to American Decisions, by J. I. CLARK HARE, H. B. WALLACE, and JNO. WM. WALLACE, Esqs.

The following are a few among the important subjects treated in the American Notes to Smith's Leading Cases.

ON FRAUD, as inferred from retaining possession of chattels after a sale or mortgage. (Twyne's Case.)

"The notes added to Twyne's Case, in Smith's Selection of Leading Cases, in the American edition, contain a full view of the decisions, and especially of the American cases in the Federal and State Courts, on the great doctrines of Twyne's Case, which is perhaps the most elaborate case in the English law, and has given rise to the most protracted and animated discussions."
CHANCELLOR KENT, 2 Commentaries, 532, note.

"Those who are curious to explore this question, will find it critically and ably discussed in the notes of the American editors to Twyne's Case; 1 Smith's Leading Cases, 29 to 60."—*Opinion of the Court*, 6 Georgia, 105.

THE LAW OF COMMON CARRIERS. The Liability of Paid and Unpaid Agents. (Coggs *v.* Bernard.)

"In a note to the case of Coggs *v.* Bernard, in the American edition of Smith's Leading Cases, the American decisions are collected and reviewed, and a definition given to the expression, 'Act of God,' which expresses, I think, with precision, its true meaning."—*Opinion of the Court*, 6 Grattan, 195.

"This definition (of a common carrier) is the one substantially given in the notes to the case of Coggs *v.* Bernard, of the English and American editions of Smith's Leading Cases." "In the notes of the American editors of Smith's Leading Cases, p. 178, the subject," &c.—*Opinion of the Court*, 2 Texas, 117, 118.

Of the ADMISSIBILITY in EVIDENCE of ENTRIES in the Course of Business, made by a servant or the party himself. Of Book Entries, and of Memoranda used to refresh memory. (Price *v.* The Earl of Torrington.)

"The subject of the admission of the party's own entries, with his suppletory oath, in the several American States, is very elaborately and fully treated in a note to the American edition of Smith's Leading Cases, vol. 1, p. 142." GREENLEAF, on Evidence, vol. 1, p. 207, note.

"See 1 Smith's Leading Cases, 228, where the foregoing cases are collected, and the whole question (of the reception of entries when verified by the maker) is presented with great clearness and ability by the American editor."—*Opinion of the Court*, 1 Florida, 323.

"A great many cases (on the admissibility of memoranda, made by a witness who has forgotten the facts) were cited in the argument, which it is unnecessary particularly to review. These with many others are examined in the American note to Price *v.* Lord Torrington, Smith's Leading Cases, and the result of all of them is, that," &c.—*Opinion of the Court*, 4 Harrington, 269.

Of COMMERCIAL USAGES, and their admissibility to explain or vary contracts. (Wigglesworth *v.* Dallison.)

"The cases (on commercial usages) are too numerous to cite in detail, and I will only refer to them as fully collected in the notes to 1 Smith's Leading Cases (Amer. Ed. of 1844), 418."—*Opinion of the Court*, 11 Metcalf, 189.

"For full modern authorities on these heads, see the collection of cases in 1 Smith's Leading Cases, 401."—*Opinion of the Court*, 1 Strobhart, 216.

"The very accurate (American) note in 1 Smith's Leading Cases, 416, to Wigglesworth *v.* Dallison."—*Opinion of the Court*, 5 Law Reporter, 275.

Of GENERAL and SPECIAL ASSUMPSIT. Of SPECIAL CONTRACTS partially performed. (Cutter *v.* Powell.)

"There is a very learned discussion and citation of authorities in Smith's Leading Cases on the vexed question as to the remedy on special contracts remaining in part unperformed. To

the accumulation of English cases, the learned American editors have given also a view of the American cases on the same subject." CHANCELLOR KENT, 2 Comm. 474, note.

"In the second American edition of Smith's Leading Cases, the doctrine in regard to assumpsit on contracts imperfectly performed) recognised in this country, which seems to accord in its principles with that of Westminster Hall, is well stated in the notes of Mr. Wallace." GREENLEAF, on Evidence, vol. ii. 124, note.

"Clark *v.* Maisiglin, 1 Denio, 317, is directly opposed to it; and that decision is sustained by the American notes to Smith's Leading Cases."—*Opinion of the Court*, 21 Vermont, 84.

Of the OWNERSHIP of HIGHWAYS and STREAMS. Of Dedication to the Public Use. (Dovaston *v.* Payne.)

"The American notes to Dovaston *v.* Payne, 2 Smith's Leading Cases, 90, where the cases on the subject are collated and compared."—*Opinion of* REDFIELD, J., 22 Vermont, 495.

"See the notes to the case of Dovaston *v.* Payne, in Smith's Leading Cases, in which the English and especially the American editor, Mr. Wallace, has condensed and classified the principles respecting highways and riparian rights, deduced from numerous cases, with diligence, skill, and usefulness." CHANCELLOR KENT, Comm., 434, note.

"See Dovaston *v.* Payne, 2 Smith's Leading Cases, Am. ed."—*Opinion of the Court*, in Griffin *v.* Martin, 7 Barbour's S. C. R. 308.

"Dovaston *v.* Payne, 2 H. Bl. 527. This case is made the subject of an elaborate note in Smith's Leading Cases, 2d vol., 173, to which the American editors have added a valuable review of the American cases."—*Opinion of the Supreme Court of New York*, vol. xi. American Law J., p. 50.

ON ESTOPPELS. (Doe *v.* Oliver; Duchess of Kingston's Case; Trevivan *v.* Lawrence.)

"In an elaborate note of the learned English editor to the case of the Duchess of Kingston, in 2d vol. Smith's Leading Cases, the law of estoppels is considered, and the cases classified. The American editor, Mr. Hare, has also added an elaborate note on the same subject, confined principally to a critical discussion of American cases." CHANCELLOR KENT, 4 Comm. 261, note.

"As to estoppels, we refer to the American notes to Smith's Leading Cases."—*Opinion of the Court*, 2 Sanford's Superior Court, 109.

"The whole doctrine (of estoppels) is ably discussed by Mr. Smith and by Messrs. Hare and Wallace, in their notes to the case of Trevivan *v.* Lawrence." GREENLEAF, on Evidence, i. p.262, note.

"The law of estoppel is treated with great discrimination and clearness of method in the notes of Mr. Smith and of Mr. Hare to several cases on that subject, ending with Trevivan *v.* Lawrence, in 2 Smith's Leading Cases, to which the student is referred." GREENLEAF, 2 Cruise, 319, note.

Very great additions have been made to the Notes to the following subjects:—

Relief afforded by Equity for Breach of Condition, vol. 1, 93. De Injuria, vol. 1, 212. Liability of Innkeepers, vol. 1, 309. Accord and Satisfaction, vol. 1, 462. Statute of Limitations, vol. 1, 715. Jurisdiction; and when *Notice* is necessary to give Jurisdiction, vol. 1, 819. Duplicity in Pleading, vol. 1, 595. Competency of Witnesses, vol. 2, 105. Fixtures, vol. 2, 254. Set-off in Bankruptcy and Insolvency, vol. 2, 320. Estoppel, and effect of Foreign and Domestic Judgments, vol. 2, 676, 700. Proceedings by Attachment and Estoppel in rem, vol. 2, 680.

SECOND SERIES.

AMERICAN LEADING CASES.

1857. 2 VOLS. $11.00.

Being Select Decisions of American Courts, in several departments of Law; with especial reference to Mercantile Law. With Notes, by J. I. CLARK HARE and H. B. WALLACE. Fourth Edition, enlarged and improved.

This work is upon the plan of Smith's Leading Cases, and applies the same method of research and illustration to various important branches of the law which were not included therein, and is, in effect, a continuation of that work. The cases consist of the most celebrated decisions in the Federal Courts, and the Courts of the several States, upon the subjects discussed, accompanied by elaborate notes, in which the reports of all the States in the Union have been collated; so that the work presents a complete view of American Law, upon the subjects which are examined.

We annex a list of a few from the many subjects treated in the American Leading Cases.

VOLUNTARY and FRAUDULENT CONVEYANCES.

"The American authorities on the subject of voluntary conveyances are collected and very ably reviewed in a valuable work recently published, entitled 'American Leading Cases,' vol. i. pp. 1—69."—*Reporter's Note* to 2 Douglas's Reports, 326.

"See also the American authorities on this point (fraudulent conveyances) collated in 1 Am. Leading Cases, 51 to 69."—*Opinion of the Court*, in Thomas *v.* Degraffenreid, 17 Alabama, 611.

INFANCY.

"See 1 Hare and Wallace's American Leading Cases, pp. 109–145, where the cases on this subject (the contracts of infants) are cited and classified."—2 *Greenleaf on Evidence*, 348, note.

APPLICATION OF PAYMENTS.

"The authorities (on the application of payments) are collected by Messrs. Hare and Wallace, 1 American Leading Cases, 156, who thus state the exception to the general rule."—*Opinion of the Court*, 17 Alabama, 525.

"See the doctrine of application of payments, fully discussed in 1 American Leading Cases, 141–158."—*Reporter's Note* to 4 Georgia Reports, 359.

"As to the application of payments, see particularly 1 Amer. Leading Cases, 2d edit., 373, 309, where the subject seems exhausted by the learning and diligence of Mr. Wallace."—*Editor's* (W. GREEN'S) *Note* to Hill *v.* Gregory, Wythe's Reports, 434.

PRESENTMENT OF BILLS AND NOTES.

"1 Amer. Lead. Cases, 214–219, where most of the American decisions are referred to."—*Opinion of the Court*, in Br. Bank of Decatur *v.* Hodges, 17 Alabama, 44.

FORM OF NOTICE OF DISHONOUR.

"The reader will find a very complete and valuable collection and review of the cases, English and American, on the subject of the form of notice of dishonour, in 1 American Leading Cases, 231–7."—*Reporter's Note* to 2 Douglas, 429.

LIABILITIES of PRINCIPAL and of AGENT, upon Parol Contracts made by an Agent.

"The rule (in regard to the liability of principal and agent) to be extracted from the reported cases, is well expressed in 1 American Leading Cases, 449, &c."—*Opinion of the Court*, in Stanton *v.* Camp, 4 Barbour's S. Ct. Reports, 277.

"A very recent publication, issued since the foregoing opinion was prepared, will be found to contain a collection of the authorities upon the point involved in the present case (the liability of principal and agent), in a note to 1 Am. L. Cas. 453."—*Note of the Opinion of the Chief Justice in the Court of Errors and Appeals*, in Kean *v.* Davis, 1 Zabriskie, 694.

DOMICIL.

"Philimore on Domicil, and the article upon the same subject in 1 Hare and Wallace's American Leading Cases, will furnish all the desired practical learning of the law of domicil down to the present time."—*Pennsylvania Law Journal* for June, 1848.

GENERAL AVERAGE. Wages and Provisions.

"The notes of Mr. Hare to all these subject cannot be too highly commended; they are full, exact, neat, and clear; few volumes could be applied to by the profession where more valuable and practical information could be obtained. The judge or the advocate in a commercial community at the Nisi Prius trials, would find such annotations on cases that must be cited, of incstimable value, as showing how far each case has been recognised, examined, adopted, and acted upon since its promulgation. The subjects discussed, too, are those that present real difficulty and involve large amounts of property, and hence become doubly interesting because litigated with earnestness."—*Pennsylvania Law Journal.*

LICENSE.

"2 Am. Lead. Cases, 514, et seq., where the whole doctrine of licenses, revocable and irrevocable, executory and executed, is ably treated in the learned annotation of Mr. Hare."—*Opinion of the Court*, in Den, ex dem. Richman, et al., *v.* Baldwin, 1 Zabriskie, 404.

JUDGMENTS OF OTHER STATES.

"This note is very satisfactory; the state authorities are all cited and discussed, and the profession will find the entire learning of this question fully developed."—*Pennsylvania Law Journal.*

"We think we may say that in every respect this work, as an American collection of Leading Cases, is as important and useful as Mr. Smith's English Leading Cases, which is quite commendation enough. We recommend these volumes to the careful study of the student, and to the attentive and earnest consideration of the practising lawyer, wherein will he found, for the one, principles stated and applied, and for the other, well considered cases and decisions, which will aid his toil and strengthen and fortify his forensic arguments."—*American Law Journal* for April, 1851.

"The great favour with which Smith's Leading Cases was received by the profession has induced Messrs. Hare and Wallace, who were the American editors of that work, to employ the same method in treating of other points, supposed to possess interest and importance, in the jurisprudence of this country. In the present work they have more than fulfilled the expectations raised by the other."—*Boston Law Reporter.*

"It will be perceived by the enumeration of titles, that the volume comprises subjects of everyday occurrence to the practitioner. In themselves they furnish so many compendious treatises upon the actual state of the law. It is like Mr. Smith's Leading Cases in plan and mode of annotation, and extends this method to other titles not embraced in Mr. Smith's volumes, and is, in effect, a continuation of that work. The tendency of such contributions as we find in the volume before us is to harmonize the law, lighten the labours of the lawyer, and furnish us with a ready solution of many questions which seem, or are in reality, unsettled, or that lie uneasy in the books."—*Pennsylvania Law Journal*, for April, 1848.

THIRD SERIES.

WHITE AND TUDOR'S LEADING CASES IN EQUITY.

3 VOLS. 8vo. 1859. $14.00.

Leading Cases in Equity, with Notes by F. H. WHITE and O. D. TUDOR, Esqs. With Additional Notes, and References to American Cases, by J. I. CLARK HARE and H. B. WALLACE. Third American Edition, with Additional References.

It is upon the plan of Smith's Leading Cases, and is considered by competent judges to present claims to the attention and favour of the Profession, not less striking than those which were offered by Mr. Smith's work. The volumes have been annotated by Messrs. Hare and Wallace in the same elaborate and thorough style which distinguished their commentaries upon Smith's Leading Cases and the American Leading Cases. The American Notes, it is believed, will be found to present an accurate and complete view of the equity jurisprudence of every State in the Union, in respect to the subjects which come under discussion.

The topics discussed in these volumes are of great importance to the practising lawyer, and such as must continually occur in the course of his business. Among others we find—The discharge of sureties; their rights and those of other co-contractors, to contribution, and subrogation: The law of subrogation generally: The marshalling of assets in cases of testacy and intestacy, and inter vivos: The order in which assets are to be applied to the payment of debts; and the doctrine of equitable assets: The rules of equity with regard to mortgages; what will operate as an equitable mortgage, and when a conditional sale will take effect as such, or as a mortgage: The right of the mortgagee to foreclosure, and of the mortgagor to redemption: The rule in Shelley's case as applied to executed and executory trusts, created by will or marriage settlement: What may be assigned, and what will operate as an assignment at law and in equity, and when and on what consideration, an assignment will be good in equity, which would fail at law: The specific performance of agreements for the sale of land and of chattels, and the circumstances under which it will be enforced, or may be resisted: The effect in equity of a contract for the sale of land, the lien of the vendor for the purchase-money, and the duty of the vendee to see that it is properly applied by the vendor: What will enure as a trust by operation of law, or resulting trust, and when words of request or confidence will be construed as a trust: The effect of a purchase for value without notice, in defeating antecedent equities: What will operate as notice, and when a grantee by deed recorded, will be liable to an unrecorded equity: The effect of the registry of deeds and mortgages as notice, and when notice