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EQUITY

AND

THE FORMS OF ACTION

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EQUITY

ALSO

THE FORMS OF ACTION AT COMMON LAW

TWO COURSES OF LECTURES

BY

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IN THE UNIVERSITY OF CAMBRIDGE

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PREFACE

AS the Downing Professor of the Laws of England Maitland lectured on Equity at Cambridge over a period of some eighteen years, and for the last time in the spring and summer of 1906. He said himself, 'The practising lawyer distrusts the professor of law, and rightly.' We venture to hope that these lectures may lessen that distrust. Those who heard them delivered—amongst whom we are—with all Maitland's gaiety, and with all his charm of manner and his power of making dry bones live, will not easily forget either the lectures or the lecturer. Equity, in our minds a formless mystery, became intelligible and interesting; and as for the lecturer, well, there were few things that his hearers would not have done, or attempted, to please F. W. Maitland.

These lectures were written for his students, but when urged to publish them, a few years ago, he said to one of us that although he had no time to do so yet they were in such a form that they could readily be published later on. We think that our successors at Cambridge will be glad to have this book, and that the Common Lawyers, a great and growing body wherever English is spoken, may find here some clear and trustworthy, if brief, account of the famous system of Equity.

Though Maitland had written out these lectures very fully, yet of late years he used the MS. chiefly as a scheme for his oral lecture, making a great many marginal notes, and

comments on later cases. We have to thank Mr Roland Burrows, of the Inner Temple, who heard these lectures delivered in 1906, for the use of his notebooks, which have enabled us in many instances to see how Maitland himself had treated and had expanded these later notes. No doubt in our incorporation of them into his text there must be errors, errors that Maitland would have avoided, and without doubt he would have entirely re-written many passages, but the blame for any mistakes must be ours, and we shall be grateful to those who will point them out in order that they may be corrected in the future.

To the twenty-one lectures on Equity we have added seven lectures upon the Forms of Action at Common Law, in order to present at the same time Maitland's account of the development of the two systems which grew up side by side. Here was the structure upon which rested the whole common law of England, and, as Maitland says, 'the forms of action we have buried but they still rule us from their graves.' The evasion of the burden of archaic procedure and of such barbaric tests of truth as battle, ordeal and wager of law, by the development of new forms and new law out of criminal or quasi criminal procedure and the inquest of neighbour-witnesses has never been described with this truth and clearness. He makes plain a great chapter of legal history which the learners and even the lawyers of to-day have almost abandoned in despair. The text of the chief writs is given after the lectures and a paged analysis of the seven lectures has been printed at the end of the book.

In the editing of these latter lectures Mr E. T. Sandars, of the Inner Temple, also one of Maitland's pupils, has given us much invaluable help, and he has also prepared the Index and the Table of Cases. For him, as for us, the work has been a labour of love.

Amongst the cases given as references in the footnotes Equity lawyers may miss certain authorities to which they frequently refer, but as the lectures were intended, at least primarily, for the student, we have often preferred to give, by way of reference, some modern case reported in the Law Reports series, and for that reason more accessible and more useful to the student. We have referred in the notes to the chief cases decided since Maitland's death upon the points dealt with in the text.

A. H. C.
W. J. W.

LONDON, *August* 1*st*, 1909.

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LIST OF LORD CHANCELLORS AND LORD KEEPERS

(Since Henry VII with dates of taking the seal)

Hen. VIII.	Warham, Abp Canterbury	1509
	Wolsey, Abp York ...	1515
	Sir T. More	1529
	Sir T. Audley	1532
Edw. VI.	Wriothesley	1544
	St John	1547
	Rich	1547
	Goodrich, Bp Ely ...	1551
Mary.	Gardiner, Bp Winchester...	1553
	Heath, Abp York ...	1556
Eliz.	Sir Nic. Bacon	1558
	Sir T. Bromley	1579
	Sir Chris. Hatton... ...	1587
	Burleigh and others ...	1591
	Sir J. Puckering	1592
Jac. I.	Ellesmere	1596
	Bacon	1617
Car. I.	Williams, Bp Lincoln ...	1621
	Coventry	1625
	Finch	1640
	Lyttleton	1641
Car. II.	Clarendon	1660
	Sir Orlando Bridgeman ...	1667
	Shaftesbury	1672
	Nottingham	1673
Jac. II.	Guilford	1682
	Jeffreys	1685
Wm. III.	Somers	1693
Anne.	Sir Nathan Wright ...	1700
	Cowper	1705, 1714
	Harcourt	1708
Geo I.	Macclesfield	1718
	King	1725
Geo. II.	Talbot	1733
	Hardwicke	1737
Geo. III.	Northington	1760
	Camden	1766
	Bathurst	1771
	Thurlow	1778
	Loughborough	1793
Geo. IV.	Eldon	1801, 1807
	Erskine	1806
Will. IV.	Lyndhurst	1827, 1834, 1841
	Brougham	1830
Vict.	Cottenham	1836, 1846
	Truro	1850
	St Leonards	1851
	Cranworth	1852, 1865
	Chelmsford	1858, 1866
	Campbell	1859
	Westbury	1861
	Cairns	1868, 1874
	Hatherley	1868
	Selborne	1872, 1880
	Halsbury	1885, 1886, 1895
	Herschell	1886, 1892
Edw. VII.	Loreburn	1905

LECTURE I.

THE ORIGIN OF EQUITY. (I.)

DURING the present term I intend to give a course of lectures of an elementary character upon some of the main doctrines of Equity. I intend to speak of Equity as of an existing body of rules administered by our courts of justice. But for reasons which you will easily understand a brief historical prelude seems necessary. For suppose that we ask the question—What is Equity? We can only answer it by giving some short account of certain courts of justice which were abolished over thirty years ago. In the year 1875 we might have said 'Equity is that body of rules which is administered only by those Courts which are known as Courts of Equity.' The definition of course would not have been very satisfactory, but now-a-days we are cut off even from this unsatisfactory definition. We have no longer any courts which are merely courts of equity. Thus we are driven to say that Equity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity.

This, you may well say, is but a poor thing to call a definition. Equity is a certain portion of our existing substantive law, and yet in order that we may describe this portion and mark it off from other portions we have to make reference to courts that are no longer in existence. Still I fear that nothing better than this is possible. The only alternative would be to make a list of the equitable rules and say that Equity consists of those rules. This, I say, would be the only alternative, for if we were to inquire what it is that all these rules have in common and what it is that marks them off from all other rules administered by our courts, we

should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity.

Therefore for the mere purpose of understanding the present state of our law, some history becomes necessary. I will try to tell the main story in a few words but you should read it at large in the books that I have just mentioned—Story, Lewin, Ashburner, Strahan, Holdsworth—or in other books such as Spence's *Equitable Jurisdiction*[1].

In Edward I's day, at the end of the thirteenth century, three great courts have come into existence, the King's Bench, the Common Bench or Court of Common Pleas and the Exchequer. Each of these has its own proper sphere, but as time goes on each of them attempts to extend its sphere and before the middle ages are over a plaintiff has often a choice between these three courts and each of them will deal with his case in the same way and by the same rules. The law which these courts administer is in part traditional law, in part statute law. Already in Edward I's day the phrase 'common law' is current. It is a phrase that has been borrowed from the canonists—who used '*jus commune*' to denote the general law of the Catholic Church; it describes that part of the law that is unenacted, non-statutory, that is common to the whole land and to all Englishmen. It is contrasted with statute, with local custom, with royal prerogative. It is not as yet contrasted with equity, for as yet there is no body of rules which bears this name.

One of the three courts, namely, the Exchequer, is more than a court of law. From our modern point of view it is not only a court of law but a 'government office,' an administrative or executive bureau; our modern Treasury is an offshoot from the old Exchequer. What we should call the 'civil service' of the country is transacted by two great offices or 'departments'; there is the Exchequer which is the fiscal department, there is the Chancery which is the secretarial department, while above these there rises the king's permanent Council. At the head of the Chancery stands the Chancellor,

[1] For the titles of these books which had been mentioned before the lecture began see the note at page 11.

usually a bishop; he is we may say the king's secretary of state for all departments, he keeps the king's great seal and all the already great mass of writing that has to be done in the king's name has to be done under his supervision.

He is not as yet a judge, but already he by himself or his subordinates has a great deal of work to do which brings him into a close connexion with the administration of justice. One of the duties of that great staff of clerks over which he presides is to draw up and issue those writs whereby actions are begun in the courts of law—such writs are sealed with the king's seal. A man who wishes to begin an action must go to the Chancery and obtain a writ. Many writs there are which have been formulated long ago; such writs are writs of course (*brevia de cursu*), one obtains them by asking for them of the clerks—called Cursitors—and paying the proper fees. But the Chancery has a certain limited power of inventing new writs to meet new cases as they arise. That power is consecrated by a famous clause of the Second Statute of Westminster authorising writs *in consimili casu*. Thus the Chancellor may often have to consider whether the case is one in which some new and some specially worded writ should be framed. This however is not judicial business. The Chancellor does not hear both sides of the story, he only hears the plaintiff's application, and if he grants a writ the courts of law may afterwards quash that writ as being contrary to the law of the land.

But by another route the Chancellor is brought into still closer contact with the administration of justice. Though these great courts of law have been established there is still a reserve of justice in the king. Those who can not get relief elsewhere present their petitions to the king and his council praying for some remedy. Already by the end of the thirteenth century the number of such petitions presented in every year is very large, and the work of reading them and considering them is very laborious. In practice a great share of this labour falls on the Chancellor. He is the king's prime minister, he is a member of the council, and the specially learned member of the council. It is in dealing with these

petitions that the Chancellor begins to develop his judicial powers.

In course of time his judicial powers are classified as being of two kinds. It begins to be said that the Court of Chancery, 'Curia Cancellariae'—for the phrase is used in the fourteenth century—has two sides, a common law side and an equity side, or a Latin side and an English side. Let us look for a moment at the origin of these two kinds of powers, and first at that which concerns us least.

(1) Many of these petitions of which I have spoken seek for justice not merely from the king but against the king. If anybody is to be called the wrong doer, it is the king himself. For example, he is in possession of land which has been seized by his officers as an escheat while really the late tenant has left an heir. Now the king can not be sued by action—no writ will go against him; the heir if he wants justice must petition for it humbly. Such matters as these are referred to the Chancellor. Proceedings are taken before him; the heir, it may be, proves his case and gets his land. The number of such cases, cases in which the king is concerned, is very large —kings are always seizing land on very slight pretexts—and forcing other people to prove their titles. Gradually a quite regular and ordinary procedure is established for such cases—a procedure very like that of the three courts of law. The proceedings are enrolled in Latin—just as the proceedings of the three courts of law are enrolled in Latin (hence the name 'Latin side' of the Court of Chancery)—and if a question of fact be raised, it is tried by jury. The Chancellor himself does not summon the jury or preside at the trial, he sends the question for trial to the King's Bench. All this is by no means unimportant, but it does not concern us very much at the present time.

(2) Very often the petitioner requires some relief at the expense of some other person. He complains that for some reason or another he can not get a remedy in the ordinary course of justice and yet he is entitled to a remedy. He is poor, he is old, he is sick, his adversary is rich and powerful, will bribe or will intimidate jurors, or has by some trick or some accident acquired an advantage of which the ordinary

courts with their formal procedure will not deprive him. The petition is often couched in piteous terms, the king is asked to find a remedy for the love of God and in the way of charity. Such petitions are referred by the king to the Chancellor. Gradually in the course of the fourteenth century petitioners, instead of going to the king, will go straight to the Chancellor, will address their complaints to him and adjure him to do what is right for the love of God and in the way of charity. Now one thing that the Chancellor may do in such a case is to invent a new writ and so provide the complainant with a means of bringing an action in a court of law. But in the fourteenth century the courts of law have become very conservative and are given to quashing writs which differ in material points from those already in use. But another thing that the Chancellor can do is to send for the complainant's adversary and examine him concerning the charge that has been made against him. Gradually a procedure is established. The Chancellor having considered the petition, or 'bill' as it is called, orders the adversary to come before him and answer the complaint. The writ whereby he does this is called a subpoena—because it orders the man to appear upon pain of forfeiting a sum of money, *e.g. subpoena centum librarum.* It is very different from the old writs whereby actions are begun in the courts of law. They tell the defendant what is the cause of action against him—he is to answer why he assaulted and beat the plaintiff, why he trespassed on the plaintiff's land, why he detains a chattel which belongs to the plaintiff. The subpoena, on the other hand, will tell him merely that he has got to come before the Chancellor and answer complaints made against him by A. B. Then when he comes before the Chancellor he will have to answer on oath, and sentence by sentence, the bill of the plaintiff. This procedure is rather like that of the ecclesiastical courts and the canon law than like that of our old English courts of law. It was in fact borrowed from the ecclesiastical courts, not from their ordinary procedure but from the summary procedure of those courts introduced for the suppression of heresy. The defendant will be examined upon oath and the Chancellor will decide questions of fact as well as questions of law.

I do not think that in the fourteenth century the Chancellors considered that they had to administer any body of substantive rules that differed from the ordinary law of the land. They were administering the law but they were administering it in cases which escaped the meshes of the ordinary courts. The complaints that come before them are in general complaints of indubitable legal wrongs, assaults, batteries, imprisonments, disseisins and so forth—wrongs of which the ordinary courts take cognizance, wrongs which they ought to redress. But then owing to one thing and another such wrongs are not always redressed by courts of law. In this period one of the commonest of all the reasons that complainants will give for coming to the Chancery is that they are poor while their adversaries are rich and influential—too rich, too influential to be left to the clumsy processes of the old courts and the verdicts of juries. However this sort of thing can not well be permitted. The law courts will not have it and parliament will not have it. Complaints against this extraordinary justice grow loud in the fourteenth century. In history and in principle it is closely connected with another kind of extraordinary justice which is yet more objectionable, the extraordinary justice that is done in criminal cases by the king's council. Parliament at one time would gladly be rid of both—of both the Council's interference in criminal matters, and the Chancellor's interference with civil matters. And so the Chancellor is warned off the field of common law—he is not to hear cases which might go to the ordinary courts, he is not to make himself a judge of torts and contracts, of property in lands and goods.

But then just at this time it is becoming plain that the Chancellor is doing some convenient and useful works that could not be done, or could not easily be done by the courts of common law. He has taken to enforcing uses or trusts. Of the origin of uses or trusts you will have read and I shall have something to say about it on another occasion. I don't myself believe that the use came to us as a foreign thing. I don't believe that there is anything Roman about it. I believe that it was a natural outcome of ancient English elements. But at any rate I must ask you not to believe that either the

mass of the nation or the common lawyers of the fourteenth and fifteenth centuries looked with disfavour upon uses. No doubt they were troublesome things, things that might be used for fraudulent purposes, and statutes were passed against those who employed them for the purpose of cheating their creditors or evading the law of mortmain. But I have not a doubt that they were very popular, and I think we may say that had there been no Chancery, the old courts would have discovered some method of enforcing these fiduciary obligations. That method however must have been a clumsy one. A system of law which will never compel, which will never even allow, the defendant to give evidence, a system which sends every question of fact to a jury, is not competent to deal adequately with fiduciary relationships. On the other hand the Chancellor had a procedure which was very well adapted to this end. To this we may add that very possibly the ecclesiastical courts (and the Chancellor you will remember was almost always an ecclesiastic) had for a long time past been punishing breaches of trust by spiritual censures, by penance and excommunication. And so by general consent, we may say, the Chancellor was allowed to enforce uses, trusts or confidences.

Thus one great field of substantive law fell into his hand —a fruitful field, for in the course of the fifteenth century uses became extremely popular. Then, as we all know, Henry VIII—for it was rather the king than his subservient parliament—struck a heavy blow at uses. The king was the one man in the kingdom who had everything to gain and nothing to lose by abolishing uses, and as we all know he merely succeeded in complicating the law, for under the name of 'trusts' the Chancellors still reigned over their old province. And then there were some other matters that were considered to be fairly within his jurisdiction. An old rhyme[1] allows him 'fraud, accident, and breach of confidence'—there were many frauds which the stiff old procedure of the courts of law could not adequately meet, and 'accident,' in particular the accidental loss of a document, was a proper occasion for the

[1] 'These three give place in court of conscience,
Fraud, accident, and breach of confidence.'

Chancellor's interference. No one could set any very strict limits to his power, but the best hint as to its extent that could be given in the sixteenth century was given by the words 'fraud, accident and breach of confidence.' On the other hand he was not to interfere where a court of common law offered an adequate remedy. A bill was 'demurrable for want of equity' on that ground.

In the course of the sixteenth century we begin to learn a little about the rules that the Chancellors are administering in the field that is thus assigned to them. They are known as 'the rules of equity and good conscience.' As to what they have done in remoter times we have to draw inferences from very sparse evidence. One thing seems pretty plain. They had not considered themselves strictly bound by precedent. Remember this, our reports of cases in courts of law go back to Edward I's day—the middle ages are represented to us by the long series of Year Books. On the other hand our reports of cases in the Court of Chancery go back no further than 1557; and the mass of reports which come to us from between that date and the Restoration in 1660 is a light matter. This by itself is enough to show us that the Chancellors have not held themselves very strictly bound by case law, for men have not cared to collect cases. Nor do I believe that to any very large extent the Chancellors had borrowed from the Roman Law—this is a disputed matter, Mr Spence has argued for their Romanism, Mr Justice Holmes against it. No doubt through the medium of the canon law these great ecclesiastics were familiar with some of the great maxims which occur in the *Institutes* or the *Digest*. One of the parts of the *Corpus Juris Canonici*, the Liber Sextus, ends with a bouquet of these high-sounding maxims—*Qui prior est tempore potior est jure*, and so forth, maxims familiar to all readers of equity reports. No doubt the early Chancellors knew these and valued them—but I do not believe that we ought to attribute to them much knowledge of Roman law or any intention to Romanise the law of England. For example, to my mind the comparison sometimes drawn between the so-called double ownership of England, and the so-called double ownership of Roman law can not be carried below the

surface. In their treatment of uses or trusts the Chancellors stick close, marvellously close, to the rules of the common law —they often consulted the judges, and the lawyers who pleaded before them were common lawyers, for there was as yet no 'Chancery Bar.' On the whole my notion is that with the idea of a law of nature in their minds they decided cases without much reference to any written authority, now making use of some analogy drawn from the common law, and now of some great maxim of jurisprudence which they have borrowed from the canonists or the civilians.

In the second half of the sixteenth century the jurisprudence of the court is becoming settled. The day for ecclesiastical Chancellors is passing away. Wolsey is the last of the great ecclesiastical Chancellors, though in Charles I's day we have one more divine in the person of Dr Williams. Ellesmere, Bacon, Coventry, begin to administer an established set of rules which is becoming known to the public in the shape of reports and they begin to publish rules of procedure. In James I's day occurred the great quarrel between Lord Chancellor Ellesmere and Chief Justice Coke which finally decided that the Court of Chancery was to have the upper hand over the courts of law. If the Chancery was to carry out its maxims about trust and fraud it was essential that it should have a power to prevent men from going into the courts of law and to prevent men from putting in execution the judgments that they had obtained in courts of law. In fraud or in breach of trust you obtain a judgment against me in a court of law; I complain to the Chancellor, and he after hearing what you have to say enjoins you not to put in force your judgment, says in effect that if you do put your judgment in force you will be sent to prison. Understand well that the Court of Chancery never asserted that it was superior to the courts of law; it never presumed to send to them such mandates as the Court of King's Bench habitually sent to the inferior courts, telling them that they must do this or must not do that or quashing their proceedings—the Chancellor's injunction was in theory a very different thing from a mandamus, a prohibition, a certiorari, or the like. It was addressed not to the judges, but to the party. You in breach

of trust have obtained a judgment—the Chancellor does not say that this judgment was wrongly granted, he does not annul it, he tells you that for reasons personal to yourself it will be inequitable for you to enforce that judgment, and that you are not to enforce it. For all this, however, it was natural that the judges should take umbrage at this treatment of their judgments. Coke declared that the man who obtained such an injunction was guilty of the offence denounced by the Statutes of Praemunire, that of calling in question the judgments of the king's courts in other courts (these statutes had been aimed at the Papal curia). King James had now a wished-for opportunity of appearing as supreme over all his judges, and all his courts, and acting on the advice of Bacon and other great lawyers he issued a decree in favour of the Chancery. From this time forward the Chancery had the upper hand. It did not claim to be superior to the courts of law, but it could prevent men from going to those courts, whereas those courts could not prevent men from going to it.

Its independence being thus secured, the court became an extremely busy court. Bacon said that he had made 2000 orders in a year, and we are told that as many as 16,000 causes were pending before it at one time: indeed it was hopelessly in arrear of its work. Under the Commonwealth some vigorous attempts were made to reform its procedure. Some were for abolishing it altogether. It was not easily forgotten that the Court of Chancery was the twin sister of the Court of Star Chamber. The projects for reform came to an end with the Restoration. Still it is from the Restoration or thereabouts—of course a precise date can not be fixed—that we may regard the equity administered in the Chancery as a recognised part of the law of the land. Usually, though not always, the great seal is in the keeping of a great lawyer—in 1667 Sir Orlando Bridgman, the great conveyancer, has it; in 1673 Sir Heneage Finch, afterwards Lord Nottingham, who has been called the father of equity; in 1682 Sir Francis North, afterwards Lord Guilford; in 1693 Sir John Somers, afterwards Lord Somers, a great common lawyer. I think that Anthony Ashley, Earl of Shaftesbury, the famous Ashley of the Cabal, was the last non-lawyer who held it, and he held

it for but one year, from 1672 to 1673. Then during the eighteenth century there comes a series of great Chancellors. In 1705 Cowper, in 1713 Harcourt, in 1725 King, in 1733 Talbot, in 1737 Hardwicke, in 1757 Northington, in 1766 Camden, in 1778 Thurlow, in 1793 Loughborough, in 1801 Eldon. In the course of the century the Chancery reports improve; the same care is spent upon reporting the decrees of the Chancellors that has long been spent on reporting the judgments of the judges in the courts of common law. Gradually, too, a Chancery bar forms itself, that is to say, some barristers begin to devote themselves altogether to practising before the Chancellor, and do not seek for work elsewhere. Lastly, equity makes its way into the text-books as a part, and an important part, of the law of the land. By far the greatest text-book of the century is, I need hardly say it, Blackstone's *Commentaries*—it comes to us from the middle of the century—but of Blackstone's view of equity I must speak next time.

Note.—Before beginning this course of lectures Professor Maitland used to recommend various books to his students. The list in 1906 appears to have been the following:—

Story, *Equity Jurisprudence* (1892).
Lewin, *Law of Trusts* (1904).
Ashburner, *Principles of Equity* (1902).
Strahan and Kenrick, *Digest of Equity* (1905).
Holdsworth, *History of English Law*. Vol. I (1903).
Digby, *History of the Law of Real Property* (1898).

LECTURE II.

THE ORIGIN OF EQUITY. (II.)

We have brought down our brief sketch of English Equity to the time of Blackstone. Let us now look at the matter through the eyes of the great commentator. He is concerned to show that the so-called equity of the Court of Chancery is in reality law, and he also considers himself concerned to show that the so-called law of the three old courts is in a sense equity. I shall read a somewhat long excerpt from him because it contains some valuable illustrations. He begins by asserting that every definition or illustration which draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree.

1. 'Thus in the first place it is said that it is the business of a court of equity in England to abate the rigour of the common law. But no such power is contended for. Hard was the case of bond-creditors, whose debtor devised away his real estate; rigorous and unjust the rule which put the devisee in a better condition to the heir: yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or devisor...and that the father shall never immediately succeed to the real estate of the son: but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feudal principles, has long ago entirely ceased.' He gives other instances of hard and antiquated rules, for the rigour of which equity has no mitigation.

2. 'It is said that a court of equity determines according to the spirit of the rule and not according to the strictness of the letter. But so also does a court of law. Both for instance are equally bound and equally profess, to interpret statutes according to the true intent of the legislature'.....

3. 'Again, it hath been said, that fraud, accident and trust are the proper and peculiar objects of a court of equity.' But, he urges, all frauds are equally cognizable by a court of law and some are only cognizable there. Many accidents are relieved against in courts of law. And, though it is true that the courts of law will not take notice of what is technically called a trust—created by a limitation of a second use—still it takes notice of bailments and a bailment, *e.g.* a deposit, is in fact a trust.

4. 'Once more; it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge founded on the circumstances of every particular case. Whereas the system of our courts of equity is a laboured, connected system governed by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing a wife her dower in a trust estate, yet allowing the husband his curtesy' —and he gives several other illustrations of rules which are but questionably just—'all these, and other cases that might be instanced are plainly rules of positive law.'

He sums up: 'The systems of jurisprudence in our courts both of law and equity are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors[1].'

You will see what this comes to. Equity is now, whatever it may have been in past times, a part of the law of our land. What part? That part which is administered by

[1] Blackstone III 429 et seq.

certain courts known as courts of equity. We can give no other general answer. We can give a historical explanation. We can say, for example, that the common law is derived from feudal customs, while equity is derived from Roman and canon law (Blackstone, I think, greatly overrates the influence of Roman and canon law in the history of equity), but in no general terms can we describe either the field of equity or the distinctive character of equitable rules. Of course we can make a catalogue of equitable rules, and we can sometimes point to an institution, such as the trust strictly so called, which is purely equitable, but we can make no generalization.

We will come back to this point by and by. Meanwhile let us carry our hurried sketch to an end. The first three quarters of the nineteenth century saw an enormously rapid development of the equitable jurisdiction. Remember this, that until 1813 there were only two judges in the Court of Chancery. There was the Lord Chancellor, and there was the Master of the Rolls, and it was but by degrees that the latter had become an independent judge; for a long time he appears merely as the Chancellor's assistant. In 1813 a Vice-Chancellor was appointed. In 1841 two more Vice-Chancellors. In 1851 two Lords Justices of Appeal in Chancery. When the Court was abolished in 1875 it had seven judges. Cases in the first instance were taken before the Master of the Rolls, or one of the three Vice-Chancellors, and then there was an appeal Court constituted by the Chancellor and the two Lords Justices; but the Chancellor could sit as a judge of first instance if he pleased and sometimes did so. I need hardly say that every Chancellor has been a great lawyer—some like Brougham, Campbell, Herschell, Halsbury, have been by origin common lawyers, others like St Leonards, Westbury, Hatherley, Selborne, Cairns, equity lawyers. There was a large body of practitioners who never, or only on the rarest occasions, went into courts of law, just as there was another large body of practitioners who never saw the inside of a court of equity, and who would have very frankly admitted that of equity they knew next to nothing.

There came great reforming statutes which recast the procedure of both courts. Some of their provisions we may

now regard as prophetic, that is to say, they paved the way for that fusion of the two procedures which was accomplished in 1875. Thus, for example, the Court of Chancery was enabled in certain cases to give damages[1], and the courts of law were enabled in certain cases to grant injunctions[2]: formerly the injunction had been characteristic of the Court of Chancery, while the judgment for damages had been characteristic of the court of law. Again the statutes which enabled the parties to an action and other interested persons to give evidence in courts of law did something towards bridging over the gulf[3].

At last came the Judicature Acts of 1873 and 1875, which took effect in the latter year. The old courts were abolished, Chancery, Queen's Bench, Common Pleas, Exchequer, also the Court of Probate, the Court of Divorce, and the Court of Admiralty. In their place was put a High Court of Justice with a Court of Appeal above it. This High Court of Justice was divided into five divisions, Chancery, Queen's Bench, Common Pleas, Exchequer—that makes four—the fifth being Probate, Divorce and Admiralty. But you should understand that the divisions of the High Court are utterly different things from the old independent courts. Certain particular business was assigned to each division. Thus for example to the Chancery Division was assigned (among other things) 'the execution of trusts charitable or private,' 'the redemption and foreclosure of mortgages,' and so forth. But this is now to be regarded as a mere matter of convenience: the distribution of business might at any time be changed without any act of parliament merely by rules made by the judges, and even the divisions of the High Court can be abolished or changed without any act of parliament by an order in council, and indeed the Common Pleas and Exchequer Divisions were abolished by an order in council of 16 December, 1880. But this is not all, for in the second place we must note that every judge, to whatever division he may belong, is bound to administer in any case that comes before

[1] The Chancery Amendment Act 1858 (Lord Cairns's Act), s. 2.
[2] The Common Law Procedure Act 1854, ss. 79 and 82.
[3] 6 & 7 Vic. c. 85, s. 1 (1843) (interest); 14 & 15 Vic. c. 99, s. 2 (1851) (parties).

him whatever rules our law—taking the term 'law' in its widest meaning—has for that case; be those rules rules of common law or rules of equity. It is no longer possible for a judge to say to a litigant 'You are relying on a trust and this court can take no notice of a trust,' or 'This is a matter of pure common law and not within the cognizance of a court of equity.' It is no longer necessary for a man to institute a suit in equity in order to obtain evidence that he wants to use in an action at law. It is no longer possible for him to obtain an injunction from equity restraining his adversary from taking proceedings at law.

Then as to procedure there was a great change. Practically we have now what might well be called a Code of Civil Procedure. It is to be found partly in the Judicature Acts, partly in a large body of Rules of Court made by the judges in exercise of rule-making powers given to them by statute. This code of procedure is supposed to combine all the best features of the two old systems, the system of the common law, and the system of equity.

Then as to substantive law the Judicature Act of 1873 took occasion to make certain changes. In its 25th section it laid down certain rules about the administration of insolvent estates, about the application of statutes of limitation, about waste, about merger, about mortgages, about the assignment of choses in action, and so forth, and it ended with these words:

'Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.'

Now it may well seem to you that those are very important words, for perhaps you may have fancied that at all manner of points there was a conflict between the rules of equity and the rules of the common law, or at all events a variance. But the clause that I have just read has been in force now for over thirty years, and if you will look at any good commentary upon it you will find that it has done very little—it has been practically without effect. You may indeed find many cases in which some advocate, at a loss for other

arguments, has appealed to the words of this clause as a last hope; but you will find very few cases indeed in which that appeal has been successful. I shall speak of this more at large at another time, but it is important that even at the very outset of our career we should form some notion of the relation which existed between law and equity in the year 1875. And the first thing that we have to observe is that this relation was not one of conflict. Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needful, something that equity would require. Of course now and again there had been conflicts: there was an open conflict, for example, when Coke was for indicting a man who sued for an injunction. But such conflicts as this belong to old days, and for two centuries before the year 1875 the two systems had been working together harmoniously.

Let me take an instance or two in which something that may for one moment look like a conflict becomes no conflict at all when it is examined. Take the case of a trust. An examiner will sometimes be told that whereas the common law said that the trustee was the owner of the land, equity said that the *cestui que trust* was the owner. Well here in all conscience there seems to be conflict enough. Think what this would mean were it really true. There are two courts of co-ordinate jurisdiction—one says that A is the owner, the other says that B is the owner of Blackacre. That means civil war and utter anarchy. Of course the statement is an extremely crude one, it is a misleading and a dangerous statement—how misleading, how dangerous, we shall see when we come to examine the nature of equitable estates. Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here. Had there been a conflict here the clause of the Judicature Act which I have lately read would have abolished the whole law of trusts. Common law says that A is the owner, equity says that B is the owner, but equity is to prevail, therefore B is

the owner and A has no right or duty of any sort or kind in or about the land. Of course the Judicature Act has not acted in this way; it has left the law of trusts just where it stood, because it found no conflict, no variance even, between the rules of the common law and the rules of equity.

Other instances might easily be taken. As a remedy for a breach of contract a court of law could give damages; as a remedy for a breach of contract a court of equity could grant a decree for specific performance. In many cases it would happen that a man would have his choice between the two remedies—he could go to law for damages, he could ask the Court of Chancery to compel his adversary to do just what he had promised to do. In many other cases he had no choice, the one remedy open to him was an action for damages; equity would give him no help. In yet other cases the converse was true, he had no action for damages, but he could none the less obtain a decree for specific performance. Here again there is no conflict. There is nothing absurd, nothing contradictory in the statement 'You are entitled to damages for the breach of this contract, but no court will compel your adversary to perform it specifically'; nor in the statement 'You can not obtain damages for the breach of this contract, and yet you may have a decree for specific performance.' There is here no room for the play of these words in the Judicature Act about the prevalence of equity.

Or take a case of tort, a case of nuisance. There is no absurdity, no self-contradiction in this statement: 'X by building that wall has done you a wrong for which he can be compelled to pay you damages, but all the same the case is not one in which he ought to be enjoined to pull the work down on pain of going to prison.'

No, we ought to think of equity as supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code, an appendix, a gloss, which used to be administered by courts specially designed for that purpose, but which is now administered by the High Court of Justice as part of the code. The language which equity held to

law, if we may personify the two, was not 'No, that is not so, you make a mistake, your rule is an absurd, an obsolete one'; but 'Yes, of course that is so, but it is not the whole truth. You say that A is the owner of this land; no doubt that is so, but I must add that he is bound by one of those obligations which are known as trusts.'

We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short act saying 'Equity is hereby abolished,' we might still have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been decently protected and contract would have been enforced. On the other hand had the legislature said, 'Common Law is hereby abolished,' this decree if obeyed would have meant anarchy. At every point equity presupposed the existence of common law. Take the case of the trust. It's of no use for Equity to say that A is a trustee of Blackacre for B, unless there be some court that can say that A is the owner of Blackacre. Equity without common law would have been a castle in the air, an impossibility.

For this reason I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connexion. If we suppose all our law put into systematic order, we shall find that some chapters of it have been copiously glossed by equity, while others are quite free from equitable glosses. Since the destruction of the Star Chamber we have had no criminal equity. The Court of Chancery kept very clear of the province of crime, and since the province of crime and the province of tort overlap, it kept very clear of large portions of the province of tort. For example, before 1875 it would grant no injunction to restrain the publication of a libel, for normally the libel which is a tort is also a crime and it was

thought, and rightly thought, that such a matter should not be brought before a court where a judge without any jury tried both fact and law. Indeed if you will look at your books on tort you will find that on the whole—if we except the province of fraud—equity has had little to do with tort, though it has granted injunctions to restrain the commission of nuisances and the like. The law of contract has been more richly provided with equitable appendixes. The power of the Chancery to compel specific performance, and its power to decree the cancellation or rectification of agreements brought numerous cases of contract before it, and then it had special doctrines about mortgages, and penalties, and stipulations concerning time. Property law was yet more richly glossed. One vast appendix was added to it under the title of trusts. The bond which kept these various appendixes together under the head of Equity was the jurisdictional and procedural bond. All these matters were within the cognizance of courts of equity, and they were not within the cognizance of the courts of common law. That bond is now broken by the Judicature Acts. Instead of it we find but a mere historical bond—'these rules used to be dealt with by the Court of Chancery'—and the strength of that bond is being diminished year by year. The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice it that it is a well-established rule administered by the High Court of Justice.

Certainly I should have liked at the outset of my course to have put before you some map, some scheme of equity. But for the reasons that I have endeavoured to state I do not think that such a map, such a scheme can be drawn. Attempts at classification have been made, but they have never been pushed very far and are now of little, if any, service to us. The scheme adopted by the great American judge, Story, and which found very general acceptation, was this—Equity is (1) exclusive, (2) concurrent, (3) auxiliary. You see the basis of this scheme—it is one on which we can no longer build. Equity has an exclusive cognizance of certain subjects, *e.g.* trusts, a cognizance that is exclusive of courts of law. Then it has a concurrent jurisdiction, a jurisdiction that is con-

current with the jurisdiction of courts of law over certain other subjects, *e.g.* fraud. Finally men sometimes go to equity merely in order to obtain its assistance in proceedings which they are taking or are about to take in courts of law, *e.g.* the plaintiff in an action at law goes to the Chancery in order that he may obtain discovery of the documents on which his opponent will rely. Here equity exercises an auxiliary jurisdiction. Then under each of these titles Story and other writers will give a string of sub-titles. Thus the concurrent jurisdiction deals with account, mistake, actual or positive fraud, constructive fraud, administration, legacies, confusion of boundaries, dower, and so forth. But you will at once see that this string is a mere string and not a logical scheme—observe for example the leap from legacies to boundaries, and from boundaries to dower. I am not complaining of Story's procedure; on the contrary it seems to me the only procedure open to him. In my opinion he had to deal not with a single connected system, but with a number of disconnected doctrines, disconnected appendixes to or glosses on the common law. And you will observe that such classification as he could make is no longer useful. It presupposes that there is one set of courts administering law, another set administering equity. That is no longer the case in England. No court, no division of a court, can now say these or those rules are my exclusive property; for every division of the High Court is capable of administering whatever rules are applicable to the case that is before it, whether they be rules of the common law or rules of equity.

When some years ago the new scheme for our Tripos was settled, we said that candidates for the second part were to study the English Law of Real and Personal Property and the English Law of Contract and Tort, with the equitable principles applicable to these subjects. It was a question whether we ought not to have mentioned equity as a separate subject. I have no doubt however that we did the right thing. To have acknowledged the existence of equity as a system distinct from law would in my opinion have been a belated, a reactionary measure. I think, for example, that you ought to learn the many equitable modifications of the

law of contract, not as part of equity, but as part, and a very important part, of our modern English law of contract. And books such as those of Anson and Pollock enable you to do so. I should consider a book on Contract extremely imperfect if it gave no account of the equitable doctrine of part performance, the equitable doctrine of undue influence, the equitable remedy of rectification, and the like. For all this however it has seemed to me possible that certain important provinces of equity, in particular the great province of trust, may not be fully dealt with by other lecturers. Hence these lectures. At the end of my course I hope to speak once more of the modern relation between equity and law and of the prevalence which is assured to equity by the Judicature Act of 1873.

In my view equity has added to our legal system, together with a number of detached doctrines, one novel and fertile institution, namely the trust; and three novel and fertile remedies, namely the decree for specific performance, the injunction, and the judicial administration of estates. Round these, as it seems to me, most of the equitable rules group themselves. Of course I do not intend to speak of all or nearly all equitable rules, but I mean to deal at some length with trusts and then to speak of certain other matters in an order that I shall endeavour to explain from time to time.

LECTURE III.

USES AND TRUSTS.

Of all the exploits of Equity the largest and the most important is the invention and development of the Trust.

It is an 'institute' of great elasticity and generality; as elastic, as general as contract.

This perhaps forms the most distinctive achievement of English lawyers. It seems to us almost essential to civilization, and yet there is nothing quite like it in foreign law. Take up for instance the Bürgerliches Gesetzbuch—the Civil Code of Germany; where is trust? Nowhere. This in the eyes of an English practitioner is a big hole.

Foreigners don't see that there is any hole. 'I can't understand your trust,' said Gierke to me. We must ask why this is so. Well, the trust does not fit easily into what they regard as the necessary scheme of jurisprudence.

Let me explain a little; for this will be of service in practical consideration of the nature of equitable rights.

Jurists have long tried to make a dichotomy of Private Rights: they are either *in rem* or *in personam*. The types of these two classes are, of the former, *dominium*, ownership; of the latter the benefit of contract—a debt.

Now under which head does trust—the right of *cestui que trust*—fall? Not easily under either. It seems to be a little of both. The foreigner asks—where do we place it in our code—under Sachenrecht or under Obligationenrecht?

The best answer may be that in history, and probably in ultimate analysis, it is *jus in personam*; but that it is so treated (and this for many important purposes) that it is very like *jus in rem*. A right primarily good against *certa persona*, viz. the trustee, but so treated as to be almost equivalent to a right good against all—a *dominium*, owner-

ship, which however exists only in equity. And this is so from a remote time.

The modern trust developed from the ancient 'use.' Therefore we must speak briefly of uses and of the famous Statute of Uses, not for antiquarian purposes, but in order to throw light on the juristic nature of the modern trust.

First as to words. The term 'use' is a curious one; it has, if I may say so, mistaken its own origin. You may think that it is the Latin *usus*, but that is not so; it is the Latin *opus*. From remote times—in the seventh and eighth centuries in barbarous or vulgar Latin you find 'ad opus' for 'on his behalf.' It is so in Lombard and Frank legal documents. In Old French (see Godefroy)[1] this becomes *al oes*, *ues*. In English mouths this becomes confused with 'use.' In record Latin it remains *ad opus*. If I hold land *ad opus Johannis*, this of course means that I hold it on behalf of John. Sometimes you get *ad opus et ad usum Johannis*, and sometimes a pedantic re-introduction of the Latin 'p'—'*oeps*' and '*eops*.' If the sheriff seizes land *ad opus domini Regis* this means that he seizes land on behalf of the king, that he is acting as the king's agent. Now this phrase thus used we can trace back far in our legal history—certainly it appears in Domesday Book; one man is constantly doing things, *ad opus* another man. In particular the sheriff is always making seizures *ad opus Regis, as os le Roy*. Thus from 1224 we get this phrase[2], *commisit terram suam custodiendam Wydoni fratri suo ad opus puerorum suorum*—he committed his land to his brother Guy to be kept to the use of his children. So also we can trace back into the thirteenth century the conveyance of villain land by surrender and admittance. The seller comes into court and surrenders the land *ad opus*, to the use (we must say) of the purchaser. There is as yet no law, no equity of 'uses'; but in many cases this term *ad opus* points to a legal relationship. In the fourteenth century (which for us is the important time) it has long been used currently to describe cases of agency and bailment. My agent receives money to my use. This leaves its mark in such phrases as

[1] *Dictionnaire de l'Anc. Langue Française.*

[2] Bracton's Note Book, pl. 999.

'convert to his use'—'goods received to his use.' If I seize land to your use, or to the use of the king, that means that I have acted as your agent or the king's agent. Then again we find the same phrase employed in cases which are more akin to those which beget the law, or rather the equity of uses at a later day. Already in the thirteenth century a landowner will sometimes want to make a settlement. Perhaps he is tenant in fee simple and desires to become tenant in tail. In order that this may be accomplished—for he cannot enfeoff himself—he will enfeoff some friend to the use (*ad opus*) that the friend shall re-enfeoff him in tail. The law will enforce such a bargain for as yet the use, if we may already so call it, can be regarded as a condition: to enfeoff X. Y. to the use that he shall make a feoffment is the same thing as enfeoffing him upon condition that he shall make a feoffment.

So far as I am aware however the first occasion on which we find that land is being permanently held by one man to the use (*ad opus*) of another man, or rather, by one set of men to the use of another set is this. In the second quarter of the thirteenth century came hither the Franciscan friars. The rule of their order prescribes the most perfect poverty: they are not to have any wealth at all. They differ from monks. The individual monk can own nothing, but a community of monks, an abbey, a priory, may own land and will often be very rich. On the other hand, friars' priories are not to have property either individually or collectively. Still, despite this high ideal, it becomes plain that they must have at least some dormitory to sleep in. They have come as missionaries to the towns. The device is adopted of having land conveyed to the borough community to the use of the friars. Thus in a MS. at Oxford Ricardus le Muliner *contulit aream et domum communitati villae Oxoniae ad opus fratrum*[1]. Very soon in various towns in England a good deal of land is held thus. Attention was directed to this case by the outbreak of the great dispute as to Evangelical Poverty, the quarrel between the Franciscans and Pope John XXII.

But in the fourteenth century this old phrase is being used

[1] See *History of English Law*, 2nd edn. vol. II, pp. 237, 238.

to express a substantially new relationship in connexion with the holding of land.

We find the landowner conveying his land to his friends *ad opus suum*. Why? Unquestionably the main reason is in order that he may in effect make a will. He will have the benefit and the profits while he lives, and after his death his friends will convey the land according to his direction.

Remember that as regards freehold land every germ of testamentary power is stamped out in the twelfth century (except as to burgage tenures).

Note in passing that a device of this kind is not new. The power to make a will of chattels was acquired in this way among the Germanic tribes. The institution of an executor was originally a transaction *inter vivos*—a conveyance of goods by a dying man to friends who will execute his wishes. But the revived Roman law (in the eleventh century) plays upon this, and the will of chattels becomes a true testament, revocable, ambulatory—but with the executor keeping his place.

History in some sort is repeating itself. In the fourteenth century (we may say) we see an attempt to do in the case of land what had long ages before been done in the case of chattels.

Why was the power to make a will of land desired? In order to increase the fund applicable for the good of the soul, and in order to provide for daughters and for younger sons.

Further, the law bore hardly on the dying landowner—with its reliefs, wardships, marriages, escheats. Can these be evaded? Yes, by a plurality of feoffees. Here joint tenancy comes to his aid (trustees, as you know, are always joint tenants). There will be no inheritance and no relief, wardship, marriage. By keeping up a wall of joint tenants, by feoffment and refeoffment, he can keep out the lord and can reduce the chances of reliefs and so forth to nothing. During the fourteenth century landowners begin to discover that a great deal can be done by means of this idea. A landowner will convey land to a friend, or rather to a party of friends, for his own use (*ad opus suum*). There is a bargain between them that he is to have the profits and

the enjoyment of the land, while the feoffees are to be the legal owners. Many objects can be gained by such a scheme. (1) One may thus evade the feudal burdens of wardship and marriage. Of course if you had a single feoffee and he left an heir under age, the scheme would break down, for the lord would claim a wardship of this infant heir. But the plan was, as I have said, to enfeoff, not a single friend, but a party of friends —sometimes as many as ten—as joint tenants, and as these feoffees died off fresh feoffees could be put in their places so that the lord's chance of a wardship could be reduced to nil. The lord could not look behind the feoffees; they were his tenants; it was nothing to him that they were allowing another person to enjoy land which by law was theirs. (2) So too the law of forfeiture for treason and escheat for felony could be evaded. The king and the lord could not look behind the feoffees to the feoffor who had no longer any rights in the land, while that every one of seven or eight feoffees should commit treason was hardly to be expected. (3) The Statutes of Mortmain might be evaded. If I choose to allow the members of a religious house to enjoy the proceeds of my land, this is no breach of the Statutes. That house is not the owner of the land for I am the owner. (4) One might defeat one's creditors in this way. I incur debts; my creditors obtain judgment, they obtain a writ of elegit; they come to seize my land; they find that I have not got any land to seize, and you must not seize the land of X, Y and Z, because A owes you a debt. (5) Lastly, by means of this device one could give oneself the power of making something very like a will of lands. My feoffees undertake to carry out any testamentary disposition that I may make of the land which has been conveyed to them. Why should they not do so? I do not attempt to devise land by my will, I merely request certain people to deal in a certain way with land which belongs to them, not to me.

You will see that the success of this scheme would have been marred if the courts of law had compelled the feoffees to fulfil the honourable understanding by virtue of which they had acquired the land. If they had begun to say 'After all this land is the feoffor's land; the feoffees are a mere screen,

or the feoffees are merely the feoffor's agents,' then the whole scheme would have broken down—wardships, marriages, forfeitures, escheats would have followed as a matter of course. But the common law was not prepared to do this. It had no forms of procedure, no forms of thought, which would serve for these cases. They could not extend the law of conditional feoffments to meet these uses, for the uses were too vague. The feoffees are not enfeoffed upon condition that they shall do just some one definite act; a prolonged course of conduct active and passive is required of them. But you may say—Why at all events should not the courts of law treat this bargain as a contract? An agreement there certainly is. In consideration of a conveyance made by A to X, Y, Z, the said X, Y, Z agree that they will hold the land for the behoof of A, will allow him to enjoy it and will convey it as he shall direct. Now I think it very right that we should observe how a use, or in modern terms, a trust generally has its origin in something that we can not but call an agreement. The feoffee to uses did agree, the modern trustee does agree that he will deal with the land or the goods in a certain way. If therefore in the fourteenth century our law of contract had taken its modern form, I think that the courts of law would have been compelled to say 'Yes, here is an agreement; therefore it is a legally enforceable contract, and if it be broken an action for damages will lie against the infringer.' This might well have been done if the feoffee had covenanted by deed to observe the confidence that was reposed in him; and in case there was no deed any difficulty arising from a want of 'consideration' might have been evaded by a little ingenuity. But then we have to remember that in the fourteenth century—and that in the present context is the important century—the common law had not yet begun to enforce 'the simple contract'—it had not yet evolved the action of assumpsit out of the action of trespass. If A conveys land to X, Y and Z and they promise to hold the land for his behoof and to obey his directions, this is as yet an unenforceable promise unless it be made by a document under seal. In the fifteenth century the courts of common law acquired the action of assumpsit and it may be a little difficult

for us to understand why they did not then begin to enforce the agreements—for agreements they are—in which uses have their origin. The answer, I think, is that by this time they had missed their opportunity once and for all—the Chancellor was already in possession, was already enforcing uses by means of a procedure far more efficient and far more flexible than any which the old courts could have employed. Besides, as I have already said, the objects which men were seeking to obtain by means of uses could hardly have been attained if the courts of common law had begun to ascribe any legal effect to the use. Some of those objects may have been discreditable enough—men ought not to defraud their creditors—but others of those objects had the spirit of the time in their favour. Feudalism had ceased to be useful; it had become a system of capricious exactions—it was very natural and not dishonourable that men should attempt to free themselves from the burdens of reliefs and wardships and marriages, from the terribly severe law of forfeiture and escheat for crime, that they should wish to make wills of land or go very near to making them. Do not be persuaded that the common lawyers looked with disfavour upon uses—the great Littleton himself had land held in use for him.

Meanwhile the Chancellor had begun to enforce these bargains. Why should he do so? Why should he not do so? Let me repeat once more—I shall have to come back to this over and over again—that use, trust or confidence originates in an agreement. As to the want of valuable consideration for the trustee's promise, it might, I think, fairly be said that even if there is no benefit to the promisor, the trustee, there is at all events detriment to the promisee, the trustor, since he parts with legal rights, with property and with possession. Men ought to fulfil their promises, their agreements; and they ought to be compelled to do so. That is the principle and surely it is a very simple one. You will say then that the Chancellor begins to enforce a personal right, a *jus in personam*, not a real right, a *jus in rem*—he begins to enforce a right which in truth is a contractual right, a right created by a promise. Yes, that is so, and I think that much depends upon your seeing that it is so. The right of *cestui que use* or

cestui que trust begins by being a right *in personam*. Gradually it begins to look somewhat like a right *in rem*. But it never has become this; no, not even in the present day.

This I hope to explain at length in some future lecture. At present let us notice that during the fifteenth century uses of lands became very common—already in the fourteenth the practice has begun among the great and we find the famous John of Gaunt disposing by his will of lands which are held to his use by feoffees. We find that Henry of Bolingbroke, afterwards Henry IV, is a *cestui que use* and Gascoigne C. J. is one of his feoffees. He provides for Thomas, John and Joan Beaufort, his illegitimate children, with remainder over to his right heirs. About the first will of land purporting to be held to the use of the testator is in 1381 and is that of William, 4th Lord Latimer—the hero of the first parliamentary impeachment[1]. Immediately there was a rapid spread of the new institution, and about the year 1400 the Chancellor has interfered between the *cestui que use* and the feoffees. It is a little strange that he (the prime minister as it were) should interfere. For the king (always lord) is losing on all hands. The interests of the great lords are divided, for they are both lords and tenants. There is need here for further investigation. Perhaps we may suppose a scandalous case; and intervention by the Chancellor without much reflection, urged by a shock to public morality. Henry V had land held to his use[2].

Did the Chancellor ask himself what sort of right he was giving, whether *in rem* or *in personam*; did he ask himself under what rubric this new chapter would stand? Probably not. As between the feoffor (*cestui que use*) and the original foeffees the case is plain—it is scandalous dishonesty if the feoffees disregard the trust.

It might have been regarded as a breach of contract. But this was not done, perhaps because breach of contract was a matter for the common law. At any rate the language of contract was not used—there was no formal promise exacted

[1] The will of Lord Latimer, 1381, Test. Ebor. Surtees Society Publications, vol. IV, p. 113; that of John of Gaunt, *ib.* p. 223—Feb. 3, 1398.

[2] For the earliest known instances of application for the Chancellor's interference see *Select Cases in Chancery*. Selden Society's Publications, vol. X, pp. 48, 69, et al.—between 1396 and 1403.

from the feoffees, no '*obligo me*,' etc. It seems to be felt from the first that contract is not what is wanted—that contract won't do.

There is one strong reason against treating it as a contract, the feoffor (who is *cestui que use*) has then a chose in action and this would be inalienable. But our landowner did not mean to exchange ownership of land for the (inalienable) benefit of a promise.

No, there is no 'obligatory' language: all is done under cover of 'use'; a little later of 'confidence' and 'trust.'

Secondly, we see this at an early time: the remedy is given not to the trustor but to the *destinatory*. In the earliest instances the trustor and the *cestui que trust* (or *use*) are the same person—still it is as destinatory, not as 'author of the trust' that he has the remedy. This marks it off from contract. Refer to John of Gaunt's will; consider the disposition in favour of the Beauforts—it would not do to give the remedy to John of Gaunt's heir: he is the very person who is interested in breaking the will.

This principle runs through our law of equity to the present day—the destinatory, beneficiary, *cestui que trust* has the remedy. (It is an unfortunate term, '*cestui que trust*,' with an obscure history. It suggests a falsehood at this point.)

Thirdly, as regards estates and interests the common law of land is to be the model—*aequitas sequitur legem*—see, *e.g.*, the estates tail with remainders given to the Beauforts by John of Gaunt. We shall have to speak of this afterwards in connexion with the modern law of trusts. The new class of rights is made to look as much like rights *in rem* (estates in land) as the Chancellor can make them look—that is in harmony with the real wish of the parties who are using the device. They also are taking the common law as their model. Thus we get a conversion of the use into an incorporeal thing—in which estates and interests exist—a sort of immaterialized piece of land. This is a perfectly legitimate process of 'thing making' and one that is always going on. For an old example you may take the advowson; new examples are patent right, copyright: goodwill is now in the very process.

But (fourthly) the Chancellor can not create new rights *in rem*. So to do would be not to supplement but to overrule the common law. Besides, if he had made this attempt the whole scheme of obtaining quasi-testamentary power would have broken down. Once say *cestui que trust* is really owner, it follows that he can not make a will, and on his death reliefs, wardships and so forth must follow.

Here perhaps is the reason why the courts of law did nothing for *cestui que use*. If they had allowed *cestui que use* any sort of right the whole scheme might have broken down. A great question of policy would be opened—if wills of land are to be made then the king should be compensated. Men prefer to live from hand to mouth rather than open big questions. The great Littleton had made a will (Litt. sec. 462–3).

Fifthly, the greatest question remains—against whom is a trust enforceable? This is the line of development—as regards purchasers all is to depend on conscience. If you buy with notice, then in conscience it is my land. In the modern sense it depends on notice actual or constructive. We shall come to the actual rules hereafter; in the meanwhile we may contrast statements such as that of Salmond in his *Jurisprudence*, who speaks, at p. 278, of the *cestui que trust* as 'the real owner[1],' and of the right of property of the trustee as 'fictitious,' with the treatment of their respective rights by Professor Langdell in the *Harvard Law Review*, volume 1, at page 59.

Some have thought that this new jurisprudence of uses was borrowed from the Roman law; that the English use or trust is historically connected with the Roman *fidei commissum*. I do not myself believe in the connexion. One reason for this disbelief I will at once state because it leads on to an important point. From the first the Chancellors seem to have treated the rights of the *cestui que use* as very analogous to an estate in land. They brought to bear upon it the rules of the English land law as regards such matters as descent and the like. The *cestui que use* may have an estate in the use, it

[1] Salmond, *Jurisprudence or the Theory of the Law*. The reference is to the 1st edition, 1902. See 2nd edition, 1907, p. 230.

may be an estate in fee simple descendible to heirs general, an estate in fee tail descendible to heirs of the body, an estate for life, or it may be a chattel interest, a term of years in the use. As regards all these matters the maxim was that equity should follow the law. It was not a rule without exceptions, for, as you are aware, it was possible to make certain limitations of the use which could not be made of the legal tenancy of the land—there might be springing uses and shifting uses whereas the common law allowed the creation of no future estate that was not a true remainder. But still the rule was very generally observed. The use came to be conceived as a sort of metaphysical entity in which there might be estates very similar to those which could be created in land, estates in possession, remainder, reversion, estates descendible in this way or in that.

Uses seem to have become so common that the Chancellors were able to introduce even the doctrine of resulting uses. A enfeoffs X and there is no consideration for the feoffment, it is presumed (so common have uses become) that A does not intend that X shall enjoy the land; it is presumed that X is to hold to the use of A. If A really wishes to make a gift of the land to one who is not his kinsman he must declare that the feoffment made to X and his heirs is made to the use of X and his heirs. This I say is so if X be not a kinsman of A. The law of consideration is yet in its infancy. It is being evolved contemporaneously in the courts of common law in connexion with simple contracts, and in the Court of Chancery in connexion with trusts—and the Court of Chancery holds that blood relationship, though not a valuable consideration, is, as the phrase goes, a good consideration to raise a use. That doctrine, as I understand, still holds good in our own day. A makes a grant unto X and his heirs, saying nothing about a use. If there be no valuable consideration, and if X be not a kinsman of A, the use results which, at the present day, means that nothing passes from A to X, but it is otherwise if there is a tie of blood between A and X; for this, though it be not a valuable consideration, though it would not support a parol promise, is a good enough consideration to raise a use.

I shall have more to say of resulting uses by and by; I was led to mention them because the doctrine about them shows that feoffments to uses had become extremely common, insomuch that it is assumed as a general rule that if a man gratuitously parts with his land he intends to keep the use to himself and does not mean that the feoffee should profit by the gift.

More than once the legislature had to take notice of uses. A statute of 15 Ric. II, cap. 5 prevented religious and other corporations from evading the Statutes of Mortmain by means of uses. Other statutes from the first half of the fifteenth century provide that in certain cases a *cestui que use* in possession of land may for certain purposes be treated as the legal owner of it. The practice of enfeoffing to uses, as I have said, spread rapidly downwards among the people. The feoffor in possession had become extremely common, and a statute of Richard III shows both the prevalence of the institution and the difficulties that arose under it. This statute—1 Ric. III, cap. 1—the first act of a king with a shaky title, recited that 'Forasmuch as by privy and unknown feoffments great unsurety, trouble, costs and grievous vexations daily grow among the king's subjects, insomuch that no man that buyeth any lands tenements...&c., nor women that have jointures or dowers in any lands tenements or other hereditaments, nor men's last wills to be performed, nor leases...nor annuities...be in perfect surety nor without great trouble and doubt of the same, because of the said privy and unknown feoffments.' Observe the words favourable to last wills. The statute then in effect enacted that every estate made by any person should be good not only against him but against all persons seised or claiming to the use of him or his heirs. That would prevent the feoffee acquiring merely an estate by wrong or no estate at all. Henceforth both feoffee and *cestui que use* can make an estate. In effect it gave a sort of statutory power of alienating the legal estate.

At last there comes the famous Statute of Uses (1535, 27 Hen. VIII, cap. 10). A long preamble states the evil effects of the system and legal writers of a later day have regarded the words of this preamble as though they stated a

generally admitted evil. As a matter of historical fact this is not true. The Statute of Uses was forced upon an extremely unwilling parliament by an extremely strong-willed king. It was very unpopular and was one of the excuses, if not one of the causes, of the great Catholic Rebellion known as the Pilgrimage of Grace. It was at once seen that it would deprive men of that testamentary power, that power of purchasing the repose of their souls, which they had long enjoyed. The king was the one person who had all to gain and nothing to lose by the abolition of uses.

You may read the Statute of Uses at length in Digby's *History of the Law of Real Property*. The important clause in this statute is the first. It is long and verbose; but when we have rejected what is unnecessary it reads thus—Where any person or persons shall be seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, in every such case such person and persons that shall have any such use confidence or trust in fee simple, fee tail, for term of life or for years or otherwise shall stand and be seised deemed and adjudged in lawful seisin, estate and possession of and in the same lands and hereditaments in such like estates as they had or shall have in the use.

Now I am not going to pronounce an exhaustive commentary on this section, for I only wish to speak of uses in so far as this is absolutely necessary in order that I may speak of the modern law of trusts. But there are a few points which you will of course remember.

1. This statute abolished the power of devising a use which men had heretofore enjoyed. The use was now the legal estate and the legal estate of freehold could not be devised except by special local custom. Then, as you will remember, a statute of 1540, 32 Hen. VIII, cap. 1, which was followed by an explanatory act of 34–5 Hen. VIII, cap. 5, gave a certain power of devising freehold land. It however drew a distinction between lands held by knight's service and land held by socage, which was maintained until the statute 12 Car. II, cap. 24 (1660) abolished the military tenures.

2. It introduced two new methods of conveying freehold; it put the covenant to stand seised and the bargain and sale

by the side of the feoffment. If A, having the legal estate, had covenanted that he would stand seised to the use of B, this before the statute had given B a use in the land. After the statute it passed the legal estate to B. If A for valuable consideration agreed to sell the land to B this mere agreement —there was no need for a deed, there was no need for a writing—had, before the statute, given B the use of the land— the bargainor became seised to the use of the bargainee. After the statute such a bargain and sale would have the effect of conveying the legal estate to B. Then, as you know, in the same year another statute provided that every bargain and sale of an estate of inheritance should be by deed enrolled (27 Hen. VIII, cap. 16). But this Statute of Inrolments did not extend to bargains and sales for terms of years, and then, as you know, the mode of conveyance by lease and release was invented—and men succeeded in conveying freehold without livery of seisin and without an enrolled document which would be open to the eyes of the public.

3. The statute had the effect of enabling men to make certain limitations of the legal estate which they had not previously been able to make. This effect is often described in picturesque language[1]. The use had been more flexible than the legal estate, and now the use imparted its flexibility to the land. The only future estates that a man could create at common law were remainders strictly and properly so called—but as regards the use the Chancellors had disregarded some of the ancient rules—and now the legal estate went along with the use. Executory limitations of the use, and therefore of the legal estate, became possible—legal estates could be made to 'spring' and to 'shift' by means of springing and shifting uses.

But all this lies rather within the province of a lecturer on real property law than in the province of a lecturer on trusts. However, it is absolutely impossible for one to speak of trusts, even at the present day, without speaking first of uses. For one would of course like to answer the question—How can a trust be created?—and this unfortunately we cannot do without touching the learning of uses. A document is put before

[1] The allusion apparently is to *Chudleigh's Case*, 1 Rep. at p. 124 a, and Challis, *Law of Real Property*, 2nd edition, 352.

us. Does it or does it not create a trust? That often is a question which involves an interpretation of the Statute of Uses. Thus—to put a very simple case—a testator says, I devise and bequeath all my freeholds, copyholds and leaseholds, and also all my personal estate unto A in trust for B. Is there here a trust? Must we distinguish the freeholds from the copyholds and the chattels? It is from this point of view that I must say a few words about the statute.

1. The statute has no word about chattels personal, and does not affect the law or the equity which concerns them in any way.

2. The statute does not in any way affect the law, the equity or the customs by which copyholds are governed.

3. It is often said that the statute does not apply to leaseholds, to terms of years. This is true, but it requires explanation. In order that the statute may be applicable it is essential that we should find one person (A) seised to the use of another person (X). Now seisin implies freehold. Therefore, if we find that A has merely a chattel interest in the land, the statute has nothing whatever to say to the case. On the other hand, suppose we find that A is seised to the use of X, then the statute does apply albeit that X has been given a mere term of years in the use. If you will read the statute you will see that it expressly meets this case. If one person (A) be seised to the use of another person (X) then such person (X) as shall have any such use 'in fee simple, fee tail, for term of life, or for years or otherwise' is to be deemed and adjudged in lawful seisin and possession of the land for the same estate that he had in the use. Therefore, suppose that I, being tenant in fee simple, convey land unto A and his heirs to the use of or upon trust for X for the term of 1000 years, here we have a case expressly provided for by the statute: the term of years given to X will be a legal term of years.

But then—for we will go on with the story—suppose that X, having this term of years, assigns it to B to the use of Y,—this case is outside the statute, for X is not seised, B will not be seised, and the statute does not find any person seised to the use of Y. Therefore, it is true to say that the statute does not apply to the conveyance or assignment of a term of years

when once that term has been created. But it may well apply to the creation of a term of years. In settlements of real estate it is common for the settlor to create by means of uses not only freehold estates, but also terms of years. These terms of years are given to trustees in order that they may raise portions for younger children, and the like, and they are legal terms. Thus, on my marriage, I convey land to X and Y and their heirs to the use of myself for life, and after my death to the use of T and T′ for a term of 1000 years, and, subject to that term, to the use of my first and other sons successively in tail male. The Statute of Uses will take effect not only as regards the freehold estates given to me and my sons but also as regards the term of years given to T and T′—it will be a legal term, for X and Y are found seised to the use of T and T′—and wherever one person is seised to the use of another, there the statute steps in. That is the true test. Do you or do you not find one person seised to the use of another?

4. The statute applies wherever one person is seised 'to the use, confidence or trust' of another. These three words are used as synonyms. To convey to A upon trust for X, this has precisely the same effect as conveying to A to the use of X. And no doubt there are other expressions which will do as well. The words 'use' and 'trust' are not sacramental terms. But the statute only applies where there is a simple use, trust or confidence—it does not apply where there is an active trust. I convey land unto A and his heirs, to the use that they shall sell the land and divide the proceeds among my children, or upon trust that they shall so sell and divide. The statute has nothing to say to this case. You do not find one person seised in trust for another person—you find A seised upon trust to make a sale.

The line which divides the simple use, trust or confidence, which is within the statute, from the active trust, which is not within the statute, is often a very fine one. The test seems to be this, Does the instrument before us merely tell A that X is to have the enjoyment of the land, or does it impose upon A some more special duty? Thus I convey unto A and his heirs upon trust to permit X to receive the

profits of the land during his life. This is a simple use, trust or confidence—I am only saying in effect that A is to hold for X's benefit. The statute operates, and X has a legal estate. On the other hand I convey to A and his heirs upon trust to collect the rents and profits of the land and pay them to X during his life. Here I impose an active duty on A, he is to collect rents and pay them to another. Here the statute does not come into play, and the legal estate remains in A.

Very difficult cases have arisen where the formulas have been run together—thus 'in trust to pay the rents and profits to X or to permit him to receive the same,' or 'in trust to permit X to receive the rents or to pay them to him.' Courts of law have attempted to meet these cases by saying that in a deed the first phrase is the important one, while in a will the last phrase prevails. Thus in a deed the words 'in trust to pay the rents and profits to X or permit him to receive the same' will leave the legal estate in A, while in a will these same words will carry the legal estate to X. I do not wish to go into these cases of interpretation—but just note that the statute only applies where you have a use or trust which, either in terms or in effect, is just simply a use or trust for X. If the instrument in question leaves any discretionary power to A—if, for example, he is to divide the income between X, Y and Z in such shares as he shall think proper, that of course is a ground for holding that he is and they are not to have the legal estate.

Let us take as examples two cases, *Baker* v. *White* and *Van Grutten* v. *Foxwell*; and in the latter case you ought all to read Lord Macnaghten's famous judgment on the origin and history of the Rule in Shelley's Case.

In *Baker* v. *White*, L.R. 20 Eq. 166 (1875), there was a devise of freeholds and copyholds to A and B to hold the same to A and B their heirs, executors, administrators and assigns, upon trust, during the life of J, to receive the rents thereof and pay them to J for life or otherwise to permit J to receive them; followed by a devise after J's decease to the use of the heirs of his body. The testator appointed A, B and J executors and declared that the receipt of the trustees

and executors for any money payable under the will should be a sufficient discharge:

It was held by Sir George Jessel, then Master of the Rolls, that J took a legal estate tail in the freeholds and an equitable estate for life in the copyholds.

In *Van Grutten* v. *Foxwell*, 1897, A.C. 658, the limitations —applicable to the case which happened, of an only child— were these: a devise to X and Y in trust to receive the rents and profits for the use and benefit of the testator's daughter, B, and to apply them in the maintenance and education of B while under age, and after majority to permit and suffer B to take the rents and profits for her life and after B's death X and Y are to stand seised in trust for the heirs of the body of B. 'Such lands to be legally conveyed to such heirs.'

The main question was whether the rule in *Shelley's Case* was applicable in this case, since there were abundant expressions in the will which showed that to apply that rule would defeat the testator's intention.

The will might have been read as giving the trustees the legal estate only during the minority and again after the death of the tenant for life. It was held, however, that the legal estate vested in the trustees throughout, that the rule in *Shelley's Case* applied, and that B took an estate tail.

Lord Herschell, at page 662, said 'It is well settled that if the estate taken by the person to whom the lands are devised for a particular estate of freehold and the estate limited to the heirs of that person are not of the same quality, that is to say if the one be legal and the other equitable, the rule in *Shelley's Case* has no application. If they are either both legal or both equitable the rule applies. Although the legal estate is in the present case vested, in the first instance, in the trustees, there is no doubt that the language of the will by which the trustees are to permit and suffer his child to receive the rents and profits for her sole use and benefit is sufficient, if those words stood alone, to pass the legal estate to the testator's child. It is equally clear however that the trusts of the will require that prior to his child attaining twenty-one the legal estate should be in the trustees, and that it should again be in the trustees after his child's death. Where there are such dis-

positions as are to be found in the present case, I think the true view is that the legal estate remains throughout in the trustees and that the estate of the beneficiaries is equitable only.'

Lord Davey, at page 683, said 'It is admitted that during the minorities of the testator's children the purposes of the will require that the trustees shall take the legal estate. It is also admitted that after the death of the children the trustees must take the legal estate in order to enable them to convey to the heirs of the children, at twenty-one, and in the mean time to receive the rents, issues and profits, and provide for the maintenance and education of "such heirs." But it is said that the words of gift to the children after attaining majority are such as to give them the legal estate during their lives. The words applicable, in the event which has happened, are "If I have only one child, then to permit and suffer such one child to have receive and take the said rents &c....during her life." No doubt the words "permit and suffer" are sufficient to pass the legal estate; but it is not an absolute rule and the words are not inconsistent with the legal estate remaining in the trustees, though they have no duties to perform. It is a convenient rule that where there are recurring occasions for the exercise of active duties by the trustees and no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is to be deemed to be vested in them throughout, notwithstanding the duration in the mean time of what would but for the recurring duties be construed as uses executed in the beneficiaries.'

5. It is commonly said that the main result of the Statute of Uses is to add three words to every conveyance. The story is told thus: Shortly after the statute, in *Tyrrell's Case*, 1557[1], a Court of Common Law holds that there can not be a use upon a use. This is often regarded as a purely unreasonable decision for which far-fetched explanations must be sought—*e.g.* that the phrase 'no use upon use' was a well-known phrase importing prohibition of compound interest.

[1] Dyer 155. The case is printed also in Digby's *History of the Law of Real Property*.

This dogma being propounded, it is supposed that the Chancellor at once sees his opportunity, and says in effect 'I will enforce these secondary uses just as I did enforce primary uses before the statute.'

Professor Ames[1] has shown that this story is not true—in two respects: first the decision in *Tyrrell's Case* is not inexplicable; and secondly the interference of the Chancellor in favour of the secondary use did not take place for about a century after the Statute of Uses.

Mr Cyprian Williams in the latest editions of *Williams on Real Property* has adopted Professor Ames's theory and has given a most excellent statement of it—so excellent that I should like you to read it. It is in section iv of chapter 7 at pages 173 to 176 of the 20th edition.

[1] In an article in *The Green Bag* IV 81. His reasons are briefly cited in a note at page 174 of the 20th edition of *Williams on Real Property*.

LECTURE IV.

THE MODERN TRUST.

WE are now to consider the main outline of the modern law of trusts. We call it law and such in the wide sense of that word it is, but remember also that technically it is all equity, and that we constantly have to distinguish the rules of equity from the rules of law.

No doubt we should like to begin our discussion with a definition of a 'trust.' But I know not where to find an authoritative definition. This is how a distinguished writer, Mr Lewin, deals with the matter:

'As the doctrines of trusts are equally applicable to real and personal estate, and the principles that govern the one will be found *mutatis mutandis* to govern the other, we cannot better describe the nature of a trust generally, than by adopting Lord Coke's definition of a use, the term by which before the Statute of Uses a trust of land was designated. A trust, in the words applied to the use, may be said to be "A confidence reposed in some other, not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpoena in the Chancery[1]."'

This definition, if definition it is to be called, comes from Coke upon Littleton 272 b; it is of interest and I shall return to it. But to say that a trust is a confidence is not very useful; for if we go on to ask what is a confidence, we shall probably be told that it is a trust. There is another objection —This definition or description seems to involve the assertion that wherever there is what is technically called a trust, there is what in ordinary speech would be called some trust, some

[1] 11th edition, p. 11.

reliance, or confidence reposed by one person in another. Now that may be true of nine trusts in ten. If I convey land to you as a trustee for me, or as a trustee for my wife and children, there is not merely what our law calls a trust, there really is trust placed by me in you; I do trust you, I do place confidence, faith, reliance in you. In such a case it well may be that the *cestui que trusts* do not place any reliance or confidence in the trustee. I pay over to you a sum of money upon trust for my son, you agree to hold it upon trust for him —here I, the trustor, the author of the trust, do place confidence in you the trustee. But then I am not to be the *cestui que trust*; my son is the *cestui que trust*, and this trust may be perfectly constituted although he knows nothing about it. He perhaps is a baby in arms, or perhaps he is in Australia, or even perhaps he is unborn, for you may have a trust for an unborn person or an unascertained person. Here it can not be said that *cestui que trust* places any trust or reliance in the trustee. But further we may well have a trust although no person has in any ordinary sense of the word placed trust or reliance in the trustee. At this moment I declare to you by word of mouth that I constitute myself a trustee of this watch for my eldest daughter. There is already a perfect trust in the technical sense. So soon as my daughter has heard what has happened she can enforce the trust against me; I am a trustee; she is my *cestui que trust*—yet it is obvious that during the interval, and that interval may be several years, she has not been placing trust in me, or confidence in me; she has known nothing of my declared intention to hold the watch in trust for her.

Where judges and text-writers fear to tread professors of law have to rush in. I should define a trust in some such way as the following—When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for that other or for that purpose and he is called a trustee.

It is a wide vague definition, but the best that I can make. I shall comment on it by distinguishing cases of trust from some other cases.

1. The trustee is bound to use his rights in a certain way, bound to use them for the benefit of another, or for the accomplishment of a certain purpose. One is not made a trustee by being bound *not* to use one's rights in some particular manner. On every owner of lands or goods there lies the duty of not using them in various ways. The law of torts largely consists of rules which limit the general rights of owners. I must not dig a quarry in my land so as to cause the subsidence of my neighbour's land. If I do this I commit a wrong and give my neighbour a cause of action; but of course I am not a trustee of my land for him.

2. A debtor is not a trustee for his creditor. I am heavily indebted. Certainly I ought not to give away my goods and thus prevent my creditors from obtaining payment of what is due to them. If I do so a court with bankruptcy jurisdiction may punish me. What is more, conveyances or assignments of property may be set aside as being frauds against creditors. For all this I am not a trustee for my creditors. No creditor can point to a particular thing or a particular mass of rights and say, 'You were bound to use that or to retain that for me or to hand it over to me.' The creditors, unless they be mortgagees, have merely rights *in personam*; if they be mortgagees they have also rights *in rem*; but in neither case is there any trust.

3. We must distinguish the trust from the bailment. This is not very easy to do, for in some of our classical text-books perplexing language is used about this matter. For example Blackstone defines a bailment thus: 'Bailment, from the French *bailler*, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee' (*Comm.* II 451).

Here a bailment seems to be made a kind of trust. Now of course in one way it is easy enough to distinguish a bailment from those trusts enforced by equity, and only by equity, of which we are speaking. We say that the rights of a bailor against his bailee are legal, are common law rights, while those of a *cestui que trust* against his trustee are never common law rights. But then this seems to be a putting of the cart before the horse; we do not explain why certain

rights are enforced at law while other rights are left to equity.

Let us look at the matter a little more closely. On the one hand we will have a bailment—A lends B a quantity of books—A lets to B a quantity of books in return for a periodical payment—A deposits a lot of books with B for safe custody. In each of these cases B receives rights from A, and in each of these cases B is under an obligation to A; he is bound with more or less rigour to keep the books safely and to return them to A. Still we do not I think conceive that B is bound to use on A's behalf the rights that he, B, has in the books. Such rights as B has in them he has on his own behalf, and those rights he may enjoy as seems best to him. On the other hand, S is making a marriage settlement and the property that he is settling includes a library of books; he vests the whole ownership of these books in T and T′ who are to permit S to enjoy them during his life and then to permit his firstborn son to enjoy them and so forth. Not unfrequently valuable chattels are thus settled so that whoever dwells in a certain mansion during the continuance of the settlement shall have the use of the pictures, books, plate, and so forth. Now here T and T′ are full owners of the chattels. S and the other *cestui que trusts* have no rights in the chattels, but T and T′ are bound to use their rights according to the words of the settlement, words which compel them to allow S and the other *cestui que trusts* to enjoy those things.

You may say the distinction is a fine one, almost a metaphysical one—and very likely I am not stating it well —but there are two tests which will bring out the distinction. The one is afforded by the law of sale, the other by the criminal law.

(*a*) A is the bailor, B is the bailee of goods; B sells the goods to X, the sale not being authorised by the terms of the bailment and not being made in market overt or within the Factor's Acts. X, though he purchases in good faith, and though he has no notice of A's rights, does not get a good title to the goods. A can recover them from him; if he converts them to his use he wrongs A. Why? Because he bought them from one who was not owner of them. Turn to

the other case. T is holding goods as trustee of S's marriage settlement. In breach of trust he sells them to X; X buys in good faith and has no notice of the trust. X gets a good title to the goods. T was the owner of the goods; he passed his rights to X; X became the owner of the goods and S has no right against X—for it is an elementary rule, to which I must often refer hereafter, that trust rights can not be enforced against one who has acquired legal (*i.e.* common law) ownership *bonâ fide*, for value, and without notice of the existence of those trust rights. Here you see one difference between the bailee and the trustee.

(*b*) Then look at the criminal law. Even according to our medieval law a bailee could be capable of the crime of larceny. If before the act of taking he had done some act which, as the phrase went, determined the bailment, if for example the carrier broke bulk and then took the goods—this was larceny. And now-a-days, as you know, by virtue of a statute the bailee can be guilty of larceny though apart from the act of conversion he has done no act determining the bailment. But to the trustee of goods who misappropriated them the common law of crime had nothing whatever to say. How could a court of common law have punished the trustee? It said that he was the owner of the goods, and a man can not steal what he both owns and possesses. Not until 1857 did it become a crime for the trustee to misappropriate goods that he held in trust—and even now the crime that he commits is not larceny and is not a felony. All this you may read at large in Stephen's *History of the Criminal Law*. I refer to it merely in order to show you that despite Blackstone's definition of a bailment there is a great and abiding distinction between a bailee of goods and a true trustee of goods. And the difference I think is this—the bailee though he has rights in the thing—'a special property' or 'special ownership' they are sometimes called—has not the full ownership of the thing; 'the general ownership' or 'the general property' is in the bailor. On the other hand the trustee is the owner, the full owner of the thing, while the *cestui que trust* has no rights in the thing. That statement that *cestui que trust* has no rights in the thing may surprise

you, but I shall justify it hereafter. The specific mark of the trust is I think that the trustee has rights, which rights he is bound to exercise for the benefit of the *cestui que trust* or for the accomplishment of some definite purpose.

Cases can be conceived where it would be difficult to say whether there was a bailment by deposit or a trust. For instance, I go abroad in a hurry and do not know whether I shall return. I send a piano to a friend, and I say to him, 'Take care of my piano and if I don't return give it to my daughter.' This may be construed both ways, as a bailment or as a trust. Perhaps the age of my daughter—a thing strictly irrelevant—would decide which way it would go.

4. An executor or administrator merely as such is not a trustee for the legatees or next of kin. I say that he is not a trustee merely because he is executor or administrator; but he may very easily become a trustee for them and in a given case it may be hard to decide whether a man has been merely an executor or administrator or has also been a trustee. The question may be of great practical importance because the Statutes of Limitation draw a distinction between an action by a legatee against an executor and an action by *cestui que trust* against his trustee. Take two cases to illustrate this. *In re Jane Davis*, 1891, 3 Ch. 119, you will find the Court of Appeal saying that a certain action was an action for a legacy against an executor as such; and then *In re Swain*, 1891, 3 Ch. 233, you will find Romer J. holding that a certain action, though the plaintiff was a legatee and though the defendant was an executor, was not an action brought by a legatee for a legacy against an executor as such, but was an action by *cestui que trust* against a trustee. And see *In re Timmis*, 1902, 1 Ch. 176, and *In re Mackay*, 1906, 1 Ch. 25.

This difficulty can I think be explained only by a piece of history. In the middle ages the proper court for a legatee who wished to sue an executor for a legacy was neither a court of common law, nor the Court of Chancery, but an ecclesiastical court, a court Christian. In course of time the Chancery stole away this jurisdiction from the ecclesiastical courts. But the legatee's action for his legacy is far older than the doctrine of trusts and has never been brought within

that doctrine. I must not go into this matter at any length, but I must admit that my definition of a trust is somewhat too wide. In the case of an executor when debts have been paid we do find one person fully owner of the goods—for undoubtedly the executor is the full owner of the goods—and yet he is bound to use his rights in a particular way, he is bound *e.g.* to hand over the testator's watch to M and his books to N—but for all this he is not a trustee for M and N. I must admit that this is so and at present can only append to my definition the remark that executors and administrators while acting merely as such are not trustees, and add that a historical explanation, though hardly any other explanation, can be given of this.

Observe however the Judicial Trustees Act, 1896. Section 3 of that Act enables the Court to relieve honest trustees from liability for breach of trust, in certain cases; and section 1 sub-section 2 says 'The administration of the property of a deceased person whether a testator or intestate shall be a trust and the executor or administrator a trustee within the meaning of this Act.'

So again says the Land Transfer Act, 1897, when altering the law of inheritance and providing that realty shall pass to the personal representatives. Section 2 provides that subject to the powers and rights relating to administration given by that Act 'the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto.'

The tendency of modern statutes is to equiparate executors and administrators with trustees. Still, especially as regards the Statute of Limitations, it is necessary to say that the executor or administrator in relation to personal estate is not as such a trustee.

Note the difference between these two wills. 'I give my watch to A, the rest of my personal property to B, and I appoint C as my executor'; and 'I give all my personal property to C upon trust as to my watch for A, and as to the residue for B, and I appoint C my executor.'

5. I have spoken of the trustee as having rights which he is bound to exercise on behalf of another. In many cases

those rights will be the legal estate in land or the legal ownership of moveable goods, and these cases indeed are so common that sometimes people speak as though it were essential that a trustee should have 'the legal estate.' But really this is not so. In the first place the subject-matter of the trust may not be a true proprietary right, it may not be the legal estate in land or the legal ownership of goods, it may be a mere personal right, the benefit of a contract or debt. A owes B a sum of money upon a bond or by simple contract; B on his marriage assigns this debt to T and T′ upon certain trusts for himself, his wife and children. That is a not uncommon case and here the right of the trustees, the right that is put into trust, is merely *jus in personam*, the right of a creditor to be paid a certain sum of money. Then again though there may be land in the case the trustees may not have the legal estate in it. Let us say that one set of trustees is holding land upon trust for A during his life with remainder to B in fee; B is going to marry; it is possible that he will convey his rights to another set of trustees upon certain trusts for himself, his wife and children. But the rights that he can convey are themselves merely equitable rights, and the second set of trustees therefore will have merely equitable rights. It not unfrequently happens that you will find one set of trustees standing behind another set. There has been a settlement and then a sub-settlement. So again when an estate which is subject to a mortgage is put into settlement, the settlor having merely equitable rights can (unless he pays off the mortgage) convey none but equitable rights to his trustees.

6. I have said that the trustee is bound to exercise his rights on behalf of some other person or for the accomplishment of some purpose. I think that these last words are necessary. We may of course have a simple trust which merely binds the trustee to hold for another person: thus T holds land in fee in trust for A in fee, or T is entitled to a sum of Consols and the whole equitable right to this sum is vested in A. Here is a simple trust for another person. But very often we cannot say that a trustee holds simply on behalf of another. Take a common case; T and T′ hold land upon trust to sell it and to divide the proceeds between A, B, and C. Here

if A, B, and C are all of full age and otherwise competent legal persons, they may say to the trustee 'No, we will not have the land sold, we prefer to have it kept for us,' and then the trustee must obey. Still unless they all agree in giving such a direction to the trustee, his duty is to sell—that is the purpose or one of the purposes that he is bound to accomplish. And then of course we may have far more elaborate trusts, where the trustee's duty is much rather that of accomplishing a purpose than that of holding on behalf of any ascertained person. For example S transfers a sum of Consols to T and T' upon trust that they shall spend the income in giving prizes for essays on the Law of Trusts according to a scheme of regulations which he has drawn up. Here there is no one who can say 'You are holding this fund on my behalf; in equity it belongs to me.' Of such 'purpose' trusts, chiefly charitable trusts, I shall not here say much. But they are not to be left out of sight. They are often characterized by this—there is no definite *cestui que trust*. I think we may say that there is no *cestui que trust* at all. No private person can enforce them in his own name. They are enforced by means of actions brought in the name of the Attorney-General. If there be any *cestui que trust* it is the public. Their history goes back to the Act 43 Eliz. cap. 4[1].

A very wide sense is given to the word 'charitable.' The highest recent authority is to be found in the judgments delivered in the House of Lords in the case of the *Commissioners of Income Tax* v. *Pemsel*, 1891, A.C. 531. The scope given to the word 'charitable' nearly equals any purpose conceived to be directly beneficial to the public or to some class of the public.

But where is the line to be drawn? It certainly is far from clear.

Take, for instance, *In re Scowcroft*, 1898, 2 Ch. 638. The vicar of a parish devises to the vicar for the time being a building to be used as a village club and reading room to be maintained for the furtherance of conservative principles and religious and mental improvement and to be kept free from

[1] This Act was 'An Act to redress the mis-employment of lands goods and stocks of money heretofore given to certain charitable uses.'

intoxicants and dancing. This was held to be a charitable purpose.

Then take *In re Nottage*, 1895, 2 Ch. 649. That was the gift of a sum of money with a direction that the interest was to be expended in providing a cup to be given for the encouragement of yacht racing. Held to be not a charitable purpose.

But compare *In re Macduff*, 1896, 2 Ch. 451 and *Blair* v. *Duncan*, 1902, A.C. 37. In the former case the Court of Appeal held that 'philanthropic purposes' were not necessarily charitable; and in the latter case the House of Lords held that a gift 'for such charitable or public purposes as my trustee thinks proper' was void for uncertainty. And see *Hunter* v. *Attorney-General*, 1899, A.C. 309. There, Lord Davey, at page 323, said 'Where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as "charitable or benevolent," or "charitable or philanthropic" or "charitable or pious" purposes), or where the description includes purposes which may or may not be charitable (such as "undertakings of public utility") and a discretion is vested in the trustees, the whole gift fails for uncertainty[1].'

Remember that charitable trusts, provided that they are limited to commence within the time allowed by the rule against perpetuities, are valid though their objects are perpetual.

In a few cases 'Purpose' trusts which are not charitable are upheld—*e.g.* trusts for the maintenance of a tombstone. But they must comply with the rule of perpetuities.

Read *In re Dean*, 41 Ch. D. 552, in which there was a trust for the maintenance of dogs and horses. It was held to be valid though not enforceable—there was no *cestui que trust* —but there was no resulting trust for the heirs or the next of kin of the testator.

But it is questionable at present how far this principle goes. In Ireland trusts for masses for the repose of the soul are upheld.

[1] Cf. *Weir* v. *Crum-Brown*, 1908, A.C. 162, where a gift in very large terms was upheld. 'There is no better rule than that a benignant construction will be placed upon charitable bequests,' per Loreburn L.C. at page 167.

On the other hand—if there is a special trust solely for the benefit of one person—a trust that a trustee shall do something for his benefit—then this *cestui que trust* being *sui juris* can put an end to this purpose trust at any moment that he pleases—*e.g.* a gift of £1000 in trust to purchase an annuity for C. D. In this case C. D. can demand that the fund shall be paid over to him instead of being used to buy the annuity[1]. Or take a trust of a fund to accumulate until C. D. attains the age of 24 years and then to pay the accumulated fund to him. Here C. D. on reaching the age of 21 can stop the accumulation and demand that the fund shall be paid over to him forthwith.

It is necessary however as these instances show to take notice of purpose trusts in any definition of a trust.

This I fear is all that I can say at present about the definition of a trust. Some points will become clearer to us as we go along.

Our next question must be How is a trust created? And here we come upon a classification of trusts which turns upon the mode by which they are created. Trusts are created (1) by the act of a party, (2) by the operation of law. I do not think that these terms are unexceptionable, still they are well known and useful. A further classification has been made:

Trusts
- By act of a party
  - Express
  - Implied
- By act of the law
  - Resulting
  - Constructive

Now I should say that the normal means by which a person becomes bound by a trust is a declaration made by him by words or implied in his conduct to the effect that he intends to be so bound. As I have already hinted this morning, the creation of a trust may be a perfectly unilateral act—there may not be more than one party to it—and we

[1] And even where the annuitant dies before the annuity can be purchased his estate is entitled to such a sum as the annuity would have cost. See *In re Robbins*, 1907, 2 Ch. 9.

may fail to find in it any element that could in the ordinary use of words be called trust or confidence. I declare myself a trustee of this watch for my son who is in India. If afterwards I sell that watch, although my son has never heard of the benefit that I had intended for him, I commit a breach of trust and my son has an equitable cause of action against me.

But though this be so the commonest origin of a trust is a transaction between two persons. This we may for a while treat as typical. Here S conveys land, or moveable goods, or Consols, or a debt, to T upon a trust, and T consents to execute that trust. We have here an agreement between S and T, and since that agreement is a binding one—since it can be enforced by that part of our law which is called equity, we well might say that there is a contract between S and T. Indeed I think it impossible so to define a contract that the definition shall not cover at least three quarters of all the trusts that are created. For my own part I think that we ought to confess that we can not define either agreement or contract without including the great majority of trusts and that the reasons why we still treat the law of trusts as something apart from the law of contract are reasons which can be given only by a historical statement. Trusts fell under the equitable jurisdiction of the Court of Chancery and for that very reason the Courts of Law did not enforce them. Just now and again they threatened to give an action for damages against the defaulting trustee—but they soon abandoned this attempt to invade a province which equity had made its own. Therefore for a very long time to come I think that we shall go on treating the law of trusts as something distinct from the law of contracts—we shall find the former in one set of books, the latter in another set. Only let us see that in the common case a trust originates in what we can not but call an agreement. S transfers land or goods or debts to T upon a trust; T promises, expressly or by his conduct, that he will be bound. If you please you can analyse the transaction into a proposal and an acceptance —Will you hold this land, these goods, in trust for my wife and children? Yes, I will.

You will find it laid down as an elementary rule that no one can be compelled to undertake a trust. Until a man has accepted a trust he is not a trustee. You, without my knowledge, convey land unto and to the use of me and my heirs upon trust for X. When I hear of that conveyance I can renounce the rights and the duties that you have attempted to cast upon me. If I am prudent I shall very likely execute a deed saying that I renounce the estate; but now-a-days it is clear that even a freehold estate (there used to be doubt about this) may be renounced by parol. I do not think that in strictness any active renunciation can be expected of me any more than I can be compelled to answer a letter in which you propose to sell me a horse. If, when I hear of the trust I simply do nothing, then I am no trustee, I thereby disclaim the estate. *In re Gordon*, 6 Ch. D. 531, an estate had been devised to E. A. upon certain trusts; three years afterwards he died, and the question was raised whether he had accepted or rejected the legal estate and the trust. Jessel M.R. said 'I think that there was sufficient evidence of disclaimer..... In the first place we have this, that he never acted; that is a very strong circumstance, a man lives three years and does not act at all. It is a strong proof that he does not intend to act. Of course it is not in itself conclusive, but it is evidence that he does not intend to act.' *In re Birchall*, 40 Ch. Div. at p. 439, Lindley L.J. said 'Formerly it was held that the legal estate in freeholds could not be disclaimed except by record; but that doctrine was given up, and it was held that the disclaimer could be by deed. Since that time the law has been carefully considered, and it is now established that a man's assent to a devise is presumed unless he disclaims, which may be by conduct, as well as by record or by deed[1].' Upon principle, as it seems to me, the law cannot throw on a man the burden of either accepting or rejecting the trust: if he does absolutely nothing that can be construed as an acceptance of the trust, this should be enough. But in practice it would not be very safe to rely upon this doctrine,

[1] For an interesting case of disclaimer by a grantee in trust and a decision that the settlement was not rendered inoperative but that the trust was imposed on the settlor see *Mallott* v. *Wilson*, 1903, 2 Ch. 494.

for one may very easily do something or say something that can be regarded as an acceptance of the trust. If in any way one assumes the rights that are to be conferred on the trustee, one thereby assumes also all the duties of the trust, and when once those duties are assumed they cannot be easily got rid of, as we shall see when we speak of the ways in which men cease to be trustees. Therefore if you hear that any one has been conveying property to you as a trustee, and you do not wish to be burdened with a trustee's duties, you will be wise in repudiating in some emphatic manner the rights and the duties which were to have been thrust upon you.

Now as regards the formalities necessary to the constitution of a trust, there is extremely little law—trusts have not been hedged about by formalities. I believe that I may state the matter thus: Subject to one section of the Statute of Frauds and to the Wills Act, a trust can be created without deed, without writing, without formality of any kind by mere word of mouth; and subject to certain established rules of construction no particular words are necessary. This proposition I intend to develop next time.

LECTURE V.

CREATION OF A TRUST.

We ended with this: Subject to a certain section of the Statute of Frauds and to the Wills Act, a trust can be created without deed, without writing, without formality of any kind by mere word of mouth; and subject to certain established rules of construction no particular words are necessary. We will now develop this proposition.

In the old days no deed, no writing, was necessary to create a use, trust or confidence. I enfeoff you, and by word of mouth I declare that you are to hold to the use of X[1]. You must hold to the use of X As to trusts this still is law, except in so far as it has been altered by the Statute of Frauds.

By that Act, 29 Car. II, c. 3, s. 7, 'All declarations of 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, or else they shall be utterly void and of no effect.'

§ 8. 'Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or

[1] The trusts could apparently be declared by signs only. Cf. from the recitals of the Statute of Uses (3) '...the hereditaments of this realm have been conveyed ...by fraudulent feoffments...craftily made to secret uses intents and trusts; (4) and also by wills and testaments sometime made by *nude parolx* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains....'

confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding.'

I will read also the next section in order that you may contrast it: it will come before us at a later time.

§ 9. '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 such last will or devise, or else shall be utterly void and of none effect.'

1. The 7th section speaks of declarations and creations of trusts or confidences, the 9th section of grants and assignments of trusts or confidences.

2. The 7th section relates only to trusts and confidences of lands, tenements and hereditaments. The 9th relates to all grants and assignments of any trust or confidence, whether of hereditaments, of moveable goods, or of choses in action or of what you will.

At this point I may remark that the words 'lands, tenements and hereditaments' in the 7th section include copyholds and chattels real, but they have been held not to include a debt due upon mortgage of real estate[1].

3. The 9th section requires that every grant or assignment of a trust shall *be in* writing, signed by the party granting or assigning the same. The 7th section merely requires that the declaration of trust shall be *manifested and proved* by some writing signed by the party who is by law enabled to declare such a trust. Your attention will have been drawn to a similar point when you were studying the two yet more famous sections of the statute, the 4th and the 17th, which are important in our law of contract. To satisfy the 7th section the writing may be posterior to the creation of the trust. 'The statute will be satisfied if the trust can be manifested and proved by any subsequent acknowledgment by the trustee, as by an express declaration by him or by a memorandum to that effect, or by a letter under his hand, or by a recital in a deed executed by him; and the trust, however late the proof, operates retrospectively from the time of its creation' (Lewin)[2].

[1] *Benbow* v. *Townsend*, 1 M. and K. 506.

[2] 11th edition, p. 56.

Thus if I convey land to you and it is agreed between us that you are to hold it upon trust for X, but nothing about this be said in the conveyance or in any other writing, the trust for X can not be enforced; but should you write and sign a letter admitting that the conveyance was made to you in trust for X, then not only will the trust be enforceable against you for the future, but you will be treated as having been all along a trustee for X, and will be accountable as such.

4. You will observe that neither section requires a deed.

5. You will observe that unlike the two famous sections, the 4th and the 17th, neither of these sections (7th and 9th) says anything about signature by an agent. The one requires the signature of the party who is by law enabled to declare the trust, the other requires the signature of the party granting or assigning the trust.

6. You will observe that a proviso to the 7th section (this proviso constitutes the 8th section) protects the doctrine of trusts which arise or result by the implication or construction of law. The requirement of writing is not to destroy this doctrine. On the other hand the 9th section requires signed writing for the grant or assignment of a trust, no matter whether that trust has arisen by declaration or by the construction of law.

7. Observe that Courts of Equity have dealt boldly with section 7, saying that the Statute of Frauds is not to be made a cover or cloak for fraud. Take this declaration of the Court of Appeal. 'It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself.' *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196. This doctrine deprives the statute of a good deal of its efficacy. In time past Courts of Equity in construing statutes were apt to read into every statute a proviso to the effect that the law was not to serve as a shield for fraudulent people.

This, I think, is the sum and substance of our law relating

to the formalities necessary for the creation of trusts by act *inter vivos*. A trust may also be declared and transferred by will. You will have observed that the 7th and 9th sections of the Statute of Frauds admit and declare this rule. As to the formalities necessary for the execution of a valid will we have now to go to the great Wills Act of 1837, 1 Vic. c. 26. I need say nothing about these formalities save this, that you can not create a trust by any instrument of a testamentary character that is not a valid will—I use the term will so as to include codicil. This may seem a little more obvious to you than really it is, so I will dwell on it for a moment.

Suppose that by my will I devise land to T and his heirs 'upon trust,' but do not specify the particular trust. Then by a paper signed only by one witness I declare my intention to be that T shall hold in trust for X. When I die the beneficial interest in the land that I have devised to T will descend to my heir at law, or if my will contains a residuary devise it will go to my residuary devisee. But you may say 'Granted that paper attested by but one witness is not a valid will or codicil; is it not a valid declaration of trust, for the 7th section of the Statute of Frauds does not require two witnesses; it does not require any witness?' Or put another case. By my will I bequeath a horse to T 'upon trust,' but do not specify the trust, and by word of mouth I declare that T is to be a trustee for X. Is there not here a valid declaration of trust, for the Statute of Frauds does not even require writing where a trust is declared of a personal chattel? The answer in both cases is that I am trying to make what in truth is a testamentary disposition without observing those formalities which the law requires in the case of all testamentary dispositions

If, therefore, I make a devise to T saying nothing of any trust and I then make a declaration that T is to hold in trust for X, but this declaration is not made with the formalities required by the Wills Act, and is not communicated to and assented to by T during my lifetime; then on my death T will take the land beneficially, unburdened by any trust. If on the other hand I devise to T 'upon trust,' but do not mention what trust, and then by some paper which is not

a valid will declare that the trust is for X. then on my death my heir at law, or my residuary devisee, if I have one, will be equitably entitled to the land that I devised to T. X can not establish the trust, and T can not retain the beneficial interest for himself, for I have made clear on the face of my will that I did not intend him to have it. The former of these doctrines, however, undergoes a qualification if during my lifetime I communicate to T my intention that he should hold merely as a trustee for X and T assents to hold in that character. A man, it is said, must not profit by his own fraud, and Courts of Equity have made even the provisions of the Wills Act yield to this maxim. Mr Lewin lays down the rule thus, 'If a testator devise real estate or bequeath personal estate to A, the beneficial owner upon the face of the will, but upon the understanding between the testator and A, that the devisee or legatee will, as to a part or even the entirety of the beneficial interest, hold upon any trust which is lawful in itself in favour of B, the Court, at the instance of B, will affect the conscience of A, and decree him to execute the testator's intention[1].'

Read *In re Boyes* (1884), 26 Ch. D. 531 (Kay J.). A makes a will leaving all to his solicitor B, whom he appoints sole executor. It is agreed between them that B shall dispose of the property as A shall direct. No direction comes to B during A's life. After A's death two letters to B are found among his papers, telling B to hold for X—B must hold in trust for A's next of kin. A could not give himself the power to make an informal will. If the direction had been communicated in A's lifetime, and B had assented to it, there would have been a trust for X.

In re Stead, 1900, 1 Ch. 237, is an interesting case—a gift to A and B jointly. A is told, but B is not told, of the trust. A is bound as to an undivided moiety. Is B bound? Yes, if the trust was told to A before the making of the will; no, if it was only told to A afterwards. This distinction rests on no sound reason, as, indeed, Farwell J. points out. You must accept it as the result of two lines of cases—the one set asserting a rule that no person can claim an interest under a fraud committed by another, whilst the other set was decided

[1] 11th edition, p. 63.

in the opposite way lest otherwise one beneficiary might be enabled to deprive the rest of their benefits by setting up some secret trust communicated to himself alone.

In the quotation just made from Lewin you may have noticed the words 'upon any trust which is lawful in itself.' What Mr Lewin is thinking of is a doctrine which has come into play chiefly in relation to certain trusts which are stigmatized as superstitious, and therefore unlawful. I devise or bequeath property to T as though T were to be the beneficial owner, but T has agreed with me that he will spend the property in paying for masses for my soul. My heir at law, or my residuary devisee, or my next of kin, as the case may be, can go to the Court, and in an action against T can oblige him to say whether or no there was this secret trust, and if the trust be proved against him, then it being plain on the one hand that he was not intended to enjoy the property beneficially, and on the other hand that the trust is one which is unlawful, he will have to hold it for my heir, my residuary devisee or legatee, or my next of kin, as the case may be. So also until 1891[1] one could not leave to a charity realty, or personalty that, as the phrase went, 'savoured of the realty.' If then I devised all my freeholds to T, and there was an arrangement between us that T should convey the land to a charity, my heir at law if he could prove that secret and unlawful trust could compel T to convey to him. The practical moral of this is that if you wish to have masses said for your soul at the cost of your estate, leave your estate to some one who is of your way of thinking, but be extremely careful not to tell him what you want done. If he is a good friend of yours very likely the masses will be duly said—there is nothing unlawful in saying masses, and nothing unlawful in paying for masses—but do not constitute a secret trust unless you are very sure of your kinsfolk[2].

I have been led into this digression by a wish to show you how the law concerning the creation of trusts is affected by the law of wills.

[1] Mortmain and Charitable Uses Act, 1891.

[2] As an illustration of the limits of the doctrine of secret trusts see *In re Pitt-Rivers*, 1902, 1 Ch. 403.

So much as to the formalities necessary when a trust is declared. You will notice that there is little to be said about this matter. Equity has been characterized by a certain disregard for forms. Then as to the necessary words—we can only say that subject to certain rules of construction any words will do which adequately express the intention of creating a trust.

In the first place, however, we must of course pay heed to the Statute of Uses—we must be sure that we have got a trustee and not that mere 'conduit pipe,' as he is often called, a grantee or a devisee to uses. For example, we must give heed to the doctrine of resulting uses, and distinguish it from the analogous doctrine of resulting trusts. If for valuable consideration I convey unto A and his heirs and say nothing about any use or trust, the legal fee simple is vested in A, and the beneficial estate in fee simple also is vested in him; there is neither resulting use nor resulting trust. You know that in practice in the sale of land it is usual for the vendor to convey unto and to the use of the purchaser and his heirs, or unto the purchaser and his heirs to the use of the purchaser and his heirs. This I say is usual, but the words about the use have really no legal effect; the Statute of Uses never comes into play. That statute only comes into play where one person is seised to the use of another person, and in this case there is no talk of any person other than the purchaser. The deed of conveyance takes effect under that section of the Real Property Act of 1845 (8 and 9 Vic. c. 106, sec. 2) which says that 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[1]. The only object, if any, that is secured by the insertion of these words about uses in an ordinary purchase deed is this—Were they not there some future purchaser might possibly give trouble by saying 'I require proof that a valuable consideration was given.' As it is, the words being there, you can reply 'Even if there was no valuable consideration there is no resulting use, because a use is expressly declared for the purchaser.' In a voluntary conveyance on the other hand a declaration of a use, trust or

[1] See *e.g. Savill Bros. Ltd.* v. *Bethell*, C. A. 1902, 2 Ch. 523.

confidence is essential; otherwise the conveyance will be inoperative, for the use will result and with the use the legal estate. Such at all events is the case if the grantee is a stranger to the grantor, but I understand that the old doctrine that near relationship is sufficient to raise a use has never been abolished. Then of course if you have a grant unto A and his heirs, to the use of, or in trust for, B and his heirs, to the use of C and his heirs, you will have to remember that A gets nothing and B gets the legal estate. And there are divers other rules which you will have to remember in order that you may distinguish between those uses which are 'executed by the statute' and those trusts which equity enforces.

You may have heard of the controversy as to whether the Statute of Uses applies to wills. The controversy was possible because the statutes which give power to devise freehold were posterior in time to the Statute of Uses. I think that according to our modern law the controversy is a vain one—for either the Statute of Uses does apply to wills or else the courts in construing wills of real estate have adopted as a rule of construction the rule laid down by the statute. If I simply devise freehold land unto T and his heirs in trust for X and his heirs, or unto T and his heirs in trust for X for life with remainder to Y and his heirs, T takes nothing; the legal estate passes to X, or to X with remainder to Y, as the case may be. But in construing wills the whole instrument may be considered and it may be plain that T the devisee upon trust is to have the legal estate although the land was devised merely unto him, and was not devised 'to his use.' Of course if I devise unto T, upon trust to sell, T gets the legal estate; the trust here is not one of those simple uses, trusts or confidences for another that the Statute of Henry VIII had in view. Even in less obvious cases the Court will hold that T the devisee gets the legal estate if when the whole will is read it appears that he is intended to have it. (See the case of *Van Grutten* v. *Foxwell*, 1897, A.C. 658, which we have previously discussed.) However it is a sound rule of draughtsmanship that if by will you wish to vest the legal estate in trustees you had better make this plain by devising not merely unto them but unto them and to their use.

It is one of the most important and most unyielding rules of construction that technical words will be understood to have their technical meaning. But in this context it is common to introduce a contrast between two classes of trusts. Trusts it is said are either 'executed' or 'executory.' One may regret that no better words have been found to express this distinction, for 'executed' and 'executory' have, as you know, hard enough work to do in connexion with the law of consideration in contract. The distinction becomes important in the construction of wills. A testator may either himself make a settlement or may sketch out a settlement that is to be made after his death. Well, the rule comes to this that in the latter case you will have a little more latitude in considering what the testator really meant than you will have in the former. Often enough the cause of this distinction has been the rule in Shelley's Case. That rule applies to wills as well as to acts, *inter vivos*; it applies to equitable as well as to legal estates. If I devise unto and to the use of T and his heirs in trust for X for life with remainder to the heirs of the body of X, here X has an equitable estate tail. But if I leave money to trustees, direct them to purchase land and settle it upon X for life with remainder to the heirs of his body, then in the case of this executory trust there may be more question as to whether the Shelley rule is to be brought into play. If by some other phrase I show that my real intention is that X shall have but a life estate with remainder to his first and other sons successively in tail—if for example I say that X is to hold without impeachment of waste—the Court may be able to say: 'The testator has not made a settlement, he has only sketched out a settlement; we can see what he really meant, and the sketch being but a sketch, we will not catch at technical phrases and defeat what we believe to be his intention.' If this be so with executory trusts in wills it is still more so with executory trusts in marriage articles. John and Jane are going to marry: they cannot wait for the preparation of an elaborate settlement; they execute a brief agreement and may be they say that all John's freehold land shall hereafter be settled on John for life and then, subject to a jointure of £500 a year for Jane, on the heirs of the body of

John. Here a Court will be somewhat ready to say that the rule in Shelley's Case is not to be applied to this brief and executory instrument. It is pretty evident that if the land be settled in just those terms which were written down in the agreement the intention of the parties will be defeated. Here the Court has this to go upon—the object of the agreement must be that of providing for the children of the marriage, but if the husband is to have an estate tail this will be no provision for the children; the husband could bar the estate tail to-morrow, sell the land and squander the proceeds. No, we must suppose that in this merely executory agreement 'heirs of the body' means 'first and other sons.' Thus in addition to the rules of construction for executed trusts we have another body of rules of construction for executory trusts, or rather two more sets of rules, one for executory trusts in wills, the other for executory trusts in marriage articles. *In re Johnston* (1884), 26 Ch. D. 538.

Even in deeds where the trust is of the executed kind, the Court takes a greater liberty of looking at the whole instrument where merely equitable interests are being dealt with than where the interests are legal; *e.g.* an equitable fee has been held to be given by deed without words of limitation or the words 'in fee simple.' *In re Tringham*, 1904, 2 Ch. 487. *In re Oliver*, 1905, 1 Ch. 191. If you would know more of this matter then I will send you to Lewin chap. viii, but we must not delay long over mere rules of construction.

Technical words are to be technically construed, but a trust can be created by the most untechnical of words. This is seen very clearly in the treatment of wills. In the past the Court of Chancery seems to have been eager to catch at any phrase which could possibly be twisted into an expression of trust. A testator leaves property to T and expresses a wish, a hope, that T will use it in a certain way, or for a certain purpose. If that way, that purpose, be at all definite, the Court will see in this a declaration of trust, to use a phrase often used, a precatory trust. Here are some of the terms which have been held sufficient: 'desire,' 'will,' 'request,' 'entreat,' 'beseech,' 'recommend,' 'hope,' 'do not doubt,' 'am well assured,' 'well know,' 'confide,' 'of course he will,' and so forth.

Often the testator has been leaving his property to his wife, and then he has said 'I hope, I believe that she will maintain our children'—or 'of course she will provide for our children'—here the Court has been very ready, even eager to see a trust. Just of late years there has been a marked reaction against the more extreme applications of this doctrine of precatory trusts. Still it is highly imprudent for a testator to express in his will any sort of wish, or hope, or expectation unless he desires that this should become a binding trust. If ever you have to put into a will any such expression of wish, hope, or expectation and the testator does not intend to create an enforceable duty, you will do well to say in the strongest terms, 'But this is not to be deemed a trust, it is not to be deemed a duty enforceable by the courts.'

In re Williams, 1897, 2 Ch. 12, is a good illustration of the modern limit, as Rigby L.J. differs from Lindley and Smith L.J.J. The testator gives the residue of his estate to his wife, her heirs, executors, administrators and assigns absolutely 'in the fullest trust and confidence that she will carry out my wishes in the following particulars.' She was to keep up a policy on her own life (which policy was her own property) and by her will she was to leave the moneys payable under that policy and also the moneys payable under a policy on the testator's life (which was his property) to his daughter Lucy. Lindley and Smith L.J.J. held that the wife took the residue unfettered by any condition or trust. This case is the high-water mark of the reactionary doctrine. But in the case of *Comiskey* v. *Bowring-Hanbury*, 1905, A.C. 84, the House of Lords held that a precatory trust was established, under a will not easy to distinguish from that in the case that I have last cited.

Of course even before the modern reaction the courts have sometimes had to say 'No, this really is too vague, we can't enforce it.' For example, a testator gives property to his wife and desires her 'to use it for herself and her children and to remember the Church of God and the poor'—that is too vague. Still I think you would be surprised at the looseness of some of the phrases in which the Court of Chancery was able to discover a definite and enforceable trust.

I now come to a rule of very great importance; it draws a line between the trust that is created for valuable consideration and the voluntary trust. Mr Lewin approaches the subject thus: 'Where there is a valuable consideration and a trust is intended to be created, formalities are of minor importance, since if the transaction cannot take place by way of "trust executed," it can be enforced by a Court of Equity as a contract[1].' Let us see what this means. I agree with you that if you marry my daughter I will convey Blackacre Farm to trustees, named or unnamed, upon certain trusts for the benefit of you, her, and the issue of the marriage. This agreement is put into writing, that writing I sign. You marry my daughter. Now we can put the transaction in one of two ways and it matters not very much in which way we put it. (1) Here is a contract and one of which a Court of Equity will enforce the specific performance. (2) Here is already a declaration of trust:—true that the legal estate has not yet been conveyed to those persons who are to be in the end the trustees of it; but there is a fundamental rule of equity that a trust shall never fail for want of a trustee—I myself am already a trustee for you, your wife, the issue of your marriage. I say it does not matter very much in which way we state the case, for it is another rule of equity that the vendor of land so soon as the agreement for sale is signed can for very many purposes be treated as a trustee for the purchaser. In this case now before us you, your wife and the children of the marriage are in very much the same position as that in which you would be had I already conveyed Blackacre to the trustees and made a formal settlement. You can enforce the trusts against me, if I die you can enforce the trusts against my representatives, if I dishonestly give Blackacre to X for no valuable consideration, you can enforce the trusts against X, if I dishonestly sell and convey Blackacre to Y, you can enforce the trusts against Y, unless indeed he purchased without notice express or implied of those trusts. Well, if the estate had been duly conveyed to trustees you would be able to do no more. The chance that the legal estate may come to the hands of a *bonâ fide* purchaser for value without notice of your equitable rights is—as we

[1] 11th edition, p. 68.

shall observe at length hereafter—a chance which every *cestui que trust* must run. I do not say that you ought not to require the execution of a formal settlement. There are several reasons why you ought to do so, for so long as the legal estate is in me and there is no formal conveyance to trustees it is somewhat easy for me to commit a fraud and pass the legal estate to a *bonâ fide* purchaser who having no notice of your equitable rights will laugh at them. Still here there is a trust already created, I am your trustee.

Far otherwise would it be were there no valuable consideration for my promise. In writing I promise to convey certain land to trustees upon trust for you, because you have been a good friend to me, or because you have already married my daughter, though before the marriage I made no promise to do anything for you. Now here of course there is not any enforceable contract, we have but a voluntary promise which is not enforceable either at law or in equity. Let us go one step further, let us suppose that my promise is made by deed, by covenant. Here is a promise enforceable at law by an action for damages, for promises under seal are valid though made without valuable consideration. So if I break my promise you may get damages. But you will not get specific performance, for it is a rule of equity that specific performance of a voluntary promise will not be enforced even though that promise be under seal. You have a bare, personal, contractual right. Equity will do absolutely nothing for you. I have not declared a trust for you, I have merely promised to convey to a trustee for you. You say 'True, but still you have promised' —I reply 'Yes, but the promise, even though it be under seal, is not one which equity will enforce.'

Thus where there is a valuable consideration it is often unnecessary for us to distinguish the promise to constitute a trust from the constitution of a trust. But otherwise is it if the transaction be voluntary, for then this distinction is vital.

In the classical case of *Ellison* v. *Ellison* (6 Ves. 656, and White and Tudor L.C. vol. II. 835) Lord Eldon laid down the rule thus: 'I take the distinction to be, that, if you want the assistance of the court to constitute you *cestui que trust* and the instrument is voluntary, you shall not have the assistance

for the purpose of constituting you *cestui que trust*,—as upon a covenant to transfer stock, &c., if it rests in covenant and is purely voluntary, this court will not execute that voluntary covenant. But if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made the equitable interest will be enforced by this court.'

As regards voluntary transactions therefore we have to distinguish clearly between the promise to constitute a trust, which is unenforceable, and the constitution of a trust. And this as we shall see more fully next time is not always a very easy feat.

LECTURE VI.

TRUSTS IMPLIED, RESULTING AND CONSTRUCTIVE.

I HAVE to-day to add a little to what has been already said about the constitution of voluntary trusts. We have this rule, a voluntary trust if perfectly created is valid and enforceable. Of course, as you know, there are statutes which make important exceptions to this rule, statutes which invalidate certain voluntary transactions. In particular there are the two statutes of Elizabeth—the statute of the 13th year in favour of creditors, the statute of the 27th year in favour of purchasers[1]—also there is the bankruptcy law to be considered. But these invalidating statutes apart, the voluntary trust, if perfectly created, is valid. On the other hand a promise to create a voluntary trust can not be enforced. As Lord Eldon said—if you are a volunteer you shall not have the help of a Court of Equity to make you a *cestui que trust*.

What then is meant by the perfect creation of a voluntary trust? Well, the settlor must intend to do one of two things. Either he must intend that some other person shall hold the property in question upon certain trusts, or he must intend to make himself a trustee, to retain the property in question but to hold it henceforth upon the designated trusts.

We will look first at the former alternative. The settlor does not mean to become a trustee, he means that some other person shall be the trustee. Here the question becomes this —Has he done all that it was in his power to do to transfer the property to that trustee and declare a trust of it? About this matter we have however some subordinate rules.

[1] But see the Voluntary Conveyances Act, 1893, 56 and 57 Vict. c. 21.

1. If the subject-matter of the intended trust be some legal estate or legal rights vested in the settlor, and that estate or those rights be transferable at law, then the settlor must do all that the law requires in order that he may transfer that estate or those rights to the trustee. If for example the settlor be legal tenant in fee simple he must execute a deed transferring his legal estate to the trustee. If he be the legal owner of moveable chattels such as plate or books he must pass the property in them to the trustee, and this he can do by deed or by delivery. If he wishes to settle Government stock now standing in his name, this must be transferred into the name of the trustee. If in any way he fails to perfect the legal transfer, equity will give no help whatever. Thus for example suppose him to be the tenant of a copyhold whose name appears on the rolls of the manor, a mere covenant to surrender it to the trustee is no complete transfer; there must be a surrender and admittance. So long as the matter rests in covenant equity will give no help. The covenant, being a covenant, is valid in a court of law, the trustee may be able to get damages out of the settlor if he will not surrender the copyhold, and if the trustee gets any damages he will have to hold the money upon the trusts—but equity will give no help —it will not compel the specific performance of a voluntary promise even though it be under seal.

2. Until lately it might frequently happen that the rights which the intending settlor proposed to settle were rights of a legal kind, but rights incapable of legal transfer. Some one owed him a debt, either a bond debt or a simple contract debt, and he wished that the benefit of this debt should be held in trust for his wife and children. But the debt being a chose in action could not, as you know, be assigned so as to give the assignee a legal right to sue for it. Here if equity had said—You must execute a legal transfer of your rights—it would have required an impossibility and said in effect—You cannot make a valid voluntary settlement of such rights as these except by constituting yourself a trustee. After some hesitation it conceded that if the settlor made a written assignment of the chose in action to the trustee—this, though inoperative at law, was a sufficient transfer within the meaning of the rule

that we are now considering[1]. However under section 25 sub-sec. 6 of the Judicature Act of 1873 this class of cases has perhaps disappeared, for the person who is entitled to a legal chose in action can now make a legal assignment of it. Then does this case now fall into our first class? We have a man with legal rights capable of legal transfer. Very well, if he wishes to make a valid voluntary settlement, without making himself a trustee, he must, it may be said, execute a legal transfer of his rights to the trustee in the form prescribed by the Judicature Act. But this is at least dubious. In the case of *In re Griffin*, 1899, 1 Ch. 408, Byrne J. seems to have thought that the completed formalities under the Judicature Act were not necessary to validate the voluntary assignment of a chose in action.

3. The subject-matter of the proposed settlement may itself be purely equitable. For example T holds land in trust for S, or he holds stock upon trust for S; S wants to settle his estate or interest. Well, here he has no legal estate to transfer. One mode of effecting his purpose will be to direct the old trustee to hold the land or the stock upon a new trust, another mode will be to execute an assignment of his equitable right to some new trustee T′ upon the new trust. Here, as there is no legal estate in the case, no deed is necessary, an assignment in writing to the new trustee will be enough.

4. We have said that a man intending to make a voluntary settlement may do so by making himself a trustee. If he plainly declares that he holds himself to be a trustee for certain purposes of certain rights legal, or it may be merely equitable, which are vested in him—this is enough. If the rights in question are rights in lands or hereditaments then—because of the Statute of Frauds—the declaration must be proved by signed writing. In other cases word of mouth will be enough. But here we come upon a rule of some importance —An imperfect gift will not be construed as a declaration of trust.

I have a son called Thomas. I write a letter to him saying 'I give you my Blackacre estate, my leasehold house in the

[1] See *e.g. Fortescue* v. *Barnett*, 3 M. and K. 36, *Kekewich* v. *Manning*, 1 De G. M. and G. 187.

High Street, the sum of £1000 Consols standing in my name, the wine in my cellar.' This is ineffectual—I have given nothing—a letter will not convey freehold or leasehold land, it will not transfer Government stock, it will not pass the ownership in goods. Even if, instead of writing a letter, I had executed a deed of covenant—saying not I do convey Blackacre, I do assign the leasehold house and the wine, but I covenant to convey and assign—even this would not have been a perfect gift. It would be an imperfect gift, and being an imperfect gift the Court will not regard it as a declaration of trust. I have made quite clear that I do not intend to make myself a trustee, I meant to give. The two intentions are very different—the giver means to get rid of his rights, the man who is intending to make himself a trustee intends to retain his rights but to come under an onerous obligation. The latter intention is far rarer than the former. Men often mean to give things to their kinsfolk, they do not often mean to constitute themselves trustees. An imperfect gift is no declaration of trust. This is well illustrated by the cases of *Richards* v. *Delbridge*, L.R. 18 Eq. 11, and *Heartley* v. *Nicholson*, L.R. 19 Eq. 233. It may be illustrated by cases in which the rule seemed to act with great hardship. A husband might often wish to make a present to his wife of some chattel, for example a piano. But before the Married Women's Property Act of 1882, there was a great difficulty in his way. He might do one of two things: he might give the piano to a trustee upon trust for his wife's separate use, or he might declare himself to be a trustee of it for his wife's separate use. But one thing he could not do. He could not transfer the legal ownership of the chattel to his wife. Suppose that he said 'I give you this piano, or this brooch,' and let us say he delivered the things into his wife's keeping, and she wore the brooch. Well, some judges, impressed by the hardship of the case, were willing to say that this imperfect gift—a perfect gift being impossible—might be regarded as a declaration of trust; the husband must be taken to have made himself a trustee for his wife's separate use (*Baddeley* v. *Baddeley*, 9 Ch. Div. 113)—but I believe that this charitable doctrine was of doubtful authority (see *Breton* v. *Woollven*, 17 Ch. Div. 416). However the

Married Women's Property Act of 1882 removed this particular difficulty. Still the rule that I have been endeavouring to explain is an important one. Imperfect gifts are not to be construed as declarations of trust. Once more let me remind you that where there is valuable consideration all is otherwise, because the mere promise for value to create a trust is (except where the Statute of Frauds stands in the way) a promise that can be specifically enforced, and thus it is already, in effect, the creation of a trust. Before passing on, notice the curious doctrine that the issue of a marriage are within the marriage consideration—are not volunteers. This may be important upon the question of enforcing an imperfect gift. Take an agreement in consideration of marriage to convey land to be held in trust for the children of the marriage. No conveyance is made. This agreement is enforceable at the suit of a child. Contrast the position of a child of a previous marriage. It is difficult to say that the child of the marriage gives consideration; and the case should be treated as exceptional; a relic of the time when the doctrine of consideration was not fully thought out. Notice also that a voluntary assignment though by deed and absolute in terms is not enforceable either at law or in equity if the subject-matter is a mere expectancy (*spes successionis*)—*In re Ellenborough*, 1903, 1 Ch. 697; a case of voluntary assignment by deed of expectations under the intestacy of relatives of the assignor. But an agreement for value to assign such expectancies is valid and enforceable in equity—see *Tailby* v. *Official Receiver*, 13 Appeal Cases 523, where Lord Macnaghten, at page 543, points out that these, as well as future property and mere possibilities, are assignable for value in equity.

I have said now what I have to say about the creation of trusts by the act of a party. Lewin and other text writers divide trusts thus created into express and implied. It is difficult to draw the line, for since no formal words are necessary for the creation of a trust and since whenever the trust is created by the act of a party there almost of necessity will be some words used—even if a deaf-mute created a trust by 'talking on his fingers' there would be words used—the distinction comes to be one between clear and less clear

words, and clearness is a matter of degree. Thus Lewin, under the head of 'Implied Trusts,' treats of cases in which a testator creates a trust by such words as 'I desire,' 'I request,' 'I hope.' No firm line can be drawn—'I desire' is nearly as strong as 'I trust,' and 'I trust that he will do this' is almost the same as 'Upon trust that he will do this.' I do not therefore think that the distinction is an important one and very often you will find that the term 'Express Trust' is given to all trusts created by act of a party, *i.e.* by declaration while 'Implied Trust' stands for what Lewin calls a trust created by act of the law. When studying the law of contract your attention will have been drawn to a very similar, a parallel, ambiguity—sometimes 'Implied Contract' stands for a true contract constituted rather by acts than by words, sometimes it stands for a 'Contract implied by law,' or '*Quasi* Contract,' an obligation which is no true contract but which is treated for many or most purposes as though it was a contract. Turning now to trusts 'created by operation of law,' we might similarly call them '*Quasi* trusts'; but that term is not in use.

The distinction between Express Trusts and trusts that are not Express, is thrust upon our notice by a rule of equity which is often stated thus, namely that to an action based upon the breach of an Express Trust the Statutes of Limitation are no bar[1]. In this context it seems plain that the term Express Trust is used in a different and a larger sense. The cases touching this rule about the Statutes of Limitation (or the protection given by Courts of Equity on the analogy of the Statutes of Limitation) are however intricate and some of them can hardly be reconciled with others. The main recent authority is to be found in the judgments of the Court of Appeal in *Soar* v. *Ashwell*, 1893, 2 Q.B. 390. There a trust

[1] Compare sec. 25 sub-sec. 2 of the Judicature Act, 1873: 'No claim of a *c. q. t.* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.' But the Trustee Act, 1888, section 8, did give to trustees and persons claiming through them the benefits of the Statutes of Limitation except in certain cases. The exceptions are principally where the claim is for fraudulent breach of trust to which the trustee was party or privy, or where it is to recover trust property or the proceeds thereof still retained by the trustee or received and converted to his own use. See *In re Timmis*, 1902, 1 Ch. 176.

fund was committed by trustees to a solicitor for investment—the solicitor was held not to be entitled to the protection of the Statutes of Limitation—he was held to be an express trustee or for this purpose in the position of an express trustee, either for the trustees of the settlement or for the *cestui que trusts* of the settlement. This is a case worth study if you desire to see the difficulty of drawing the line between express and other trustees. Bowen L.J. in that case said (at page 397) 'It has been established beyond doubt that a person occupying a fiduciary relation who has property deposited with him on the strength of such relation is to be dealt with as an express and not merely a constructive trustee of such property.' And compare *North American Company* v. *Watkins*, 1904, 1 Ch. 242, where the defendant was held to be an 'express trustee,' for this purpose, merely as being an agent with wide discretion to whom the plaintiffs had remitted money to make purchases of prairie lands. The judgment was affirmed in the Court of Appeal, but on another view of the facts,—1904, 2 Ch. 233.

Lewin carries his classification further. Trusts created by operation of law are (1) Resulting, (2) Constructive. 'Resulting trusts may be subdivided thus: (*a*) Where a person being himself both legally and equitably entitled makes a conveyance, devise or bequest of the legal estate and there is no ground for the inference that he meant to dispose of the equitable interest. (*b*) Where a purchaser of property takes a conveyance of the legal estate in the name of a third person, but there is nothing to indicate an intention of not appropriating to himself the beneficial interest[1].'

1. (*a*) Resulting trusts where there is a disposition of the legal but not of the equitable interest. The general rule is that wherever upon a conveyance, devise or bequest it appears that the grantee, devisee or legatee was intended to take the legal estate merely, the equitable interest, or so much thereof as is left undisposed of, will result, if arising out of the settlor's realty, to himself, or his heir, and if out of his personal estate to himself or his personal representatives.

The intention of excluding the person invested with the legal estate from the enjoyment of the property may be

[1] 11th edition, p. 158.

expressed or it may not be expressed. We will deal first with cases in which it is expressed.

I convey land unto and to the use of A and his heirs upon trust, but I declare no trust. Here the use does not result, for a use is declared in favour of A and therefore A gets the legal estate. But I have by the words 'upon trust' declared my intention that A is not to enjoy the land for his own behoof—on the other hand I have not saddled him with any particular trust. Here a trust results for me. So by my will I give all my realty unto and to the use of A and his heirs upon trust and all my personalty unto A upon trust. A trust of the realty will on my death arise for my heir at law, a trust of my personalty for my next of kin. Such cases as these would of course be very rare, for here I am supposing myself to do an extremely foolish thing—to give upon trust, and declare no trust at all. But it is an extremely common thing that I should give upon trust and then declare trusts which do not exhaust all the interest that I have given to my trustee. Thus by will I give all my property to a trustee absolutely upon trust to pay the rents and income to my wife for life and I omit to say what is to be done after my wife's death—here, subject to my wife's life interest, there will be a resulting trust for my heir or next of kin. Still commoner is it that a testator gives his property upon trust, declares trusts which in certain events would exhaust the beneficial interest, but owing to some events that he has not foreseen, premature deaths or the like, some of these trusts fail—then the interest undisposed of will result. So again it is not uncommon that a testator should in declaring trusts contravene some rule of law, attempt to do what the law will not suffer him to do, for example he tries to infringe the rule against perpetuities. Here some of his trusts will fail and the beneficial interest that is thus set free will result —will result to his heir or next of kin, or will pass to other persons under a residuary devise or bequest. At all events a person who has been declared a trustee of the whole interest given him can not—unless indeed he happens himself to be heir or next of kin to the testator—claim any beneficial interest. Lewin lays down the rule thus: 'Where a trust results to the settlor or his representatives not by presumption

of law but by force of the written instrument, the trustee is not at liberty to defeat the resulting trust by the production of extrinsic evidence by parol[1].' I devise land unto and to the use of A and his heirs upon certain trusts. These trusts fail in my lifetime, A will not be allowed to produce witnesses to show that I meant him to enjoy the land in case the trusts failed. I have made A a trustee for somebody, and a trustee he must be—if for no one else then for me or my representatives.

We pass to the cases in which there is no expressed declaration of intention that A, the grantee, devisee, legatee shall be a trustee. Well, if by will I give to A and declare no intention of making him a trustee, then he is not a trustee; and if *inter vivos* and for valuable consideration I convey or assign to A so as to vest the legal estate or interest in him and declare no intention of making him a trustee, then a trustee he is not. But otherwise is it of a voluntary conveyance or assignment *inter vivos*. For no valuable consideration I convey land unto and to the use of A and his heirs. Here the use does not result, for a use has been declared in A's favour, so A gets the legal estate—but in analogy to the law of resulting uses, the Court of Chancery has raised up a doctrine of resulting trusts. If without value by act *inter vivos* I pass the legal estate or legal rights to A and declare no trust, the general presumption is that I do not intend to benefit A and that A is to be a trustee for me. However this is only a presumption in the proper sense of that term and it may be rebutted by evidence of my intention. You see the difference between this case and the one lately put—if I convey to A 'upon trust' and declare no trust, A can not produce evidence that I did not mean to make him trustee—but if there is no talk of trust at all in the instrument which gives A his legal rights, then he may produce evidence to show that I really intended him to enjoy the property.

Such is the general rule—upon a voluntary conveyance *inter vivos* the presumption is that a trust results for the giver. But then we have a sub-rule. Upon a voluntary conveyance to a wife or child the presumption is the other way—the presumption is, to use a common phrase, that there is an

[1] 11th edition, p. 165.

'advancement,' a real benefit intended for wife or child. You will remember the parallel doctrine about resulting uses—blood relationship it is said is consideration enough for a use. In this case however we have merely a presumption. If I convey land unto and to the use of my son, the presumption is that I intend that he shall enjoy the land, and that no trust results in my favour; but this presumption may be rebutted.

1. (*b*) We must now take up the second class of resulting trusts. The cases with which we have as yet been dealing are cases in which there is a gift and the question is whether the donee takes beneficially or merely as a trustee. We now turn to cases in which a person buys something but the conveyance of it is at his instance made not to him but to some one else—cases of 'purchases in the name of third persons.' I buy a fee simple estate, and I say to the vendor 'I want you to convey it not to me but to X'—so he conveys the land unto and to the use of X.

Now here equity has drawn a distinction turning on the relationship which exists between me and X. Briefly stated the rule is this—that if X is my wife or my child the presumption is that I intend a benefit for X and therefore that there is no resulting trust for me, though this presumption may be rebutted by parol evidence—on the other hand if X is a stranger there is a presumption, though a rebuttable presumption, that I do not intend to benefit him but intend that he shall hold as a trustee for me.

As regards strangers, Eyre C.B. stated the rule thus: 'The clear result of all the cases, without a single exception, is that the trust of a legal estate whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser, whether in one name or several, whether jointly or successive, results to the man who advances the purchase money; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration the use results to the feoffor' (*Dyer* v. *Dyer*, 2 Cox. 93)[1].

A special application of this is that if A and B join in

[1] It is well settled that the rule in *Dyer* v. *Dyer* applies also to personalty; see *e.g. The Venture*, 1908 P. 229, in the Court of Appeal, a case as to the purchase of a yacht.

purchasing an estate and the estate is conveyed to them and their heirs (which makes them in law joint tenants of it) then there is no presumption against their being joint tenants in equity as well as at law. It may be shown that they did not intend to become joint tenants of the beneficial interest, and in particular if they be partners buying land for the business of their firm, they are, in the absence of proof to the contrary, accounted to be tenants in common—*jus accrescendi inter mercatores locum non habet.* Still in general if two men pay the purchase money in equal shares there is no presumption that they intend to be other than what the conveyance will make them, namely joint tenants. But suppose that A finds two-thirds and B one-third of the purchase money then, although the conveyance makes them joint tenants in law, a trust arises. A and B as joint tenants hold in trust for A and B as tenants in common, as to two undivided thirds for A, and as to the residue for B.

But the presumption is turned the other way round where a purchase is made in the name of the purchaser's wife or child. Here the presumption is in favour of a benefit, 'an advancement' it is often called. This rule has been extended to the case of an illegitimate child. Apparently it is somewhat wider, but it is usually spoken of as applying only to wife and child[1].

Whichever way the presumption may be it is rebuttable. In the case of the stranger you may prove that a benefit to him was intended; in the case of wife or child you may prove that benefit was not intended, and this by oral evidence of the purchaser's acts and declarations. This is so even in the case of land and other hereditaments. The 7th section of the Statute of Frauds which says that a declaration of trusts of any hereditaments must be manifested and proved by signed writing, is followed by the 8th which says that this is not to apply to trusts which result by implication or construction of law. So no written declaration by the purchaser is necessary

[1] See *In re Policy* 6402 *of the Scottish Life Assurance Co.*, 1902, 1 Ch. 282, where a policy was taken out by a man on his own life but in the name of his wife's sister. It was held, on his death, that her personal representatives were trustees of the proceeds for his estate.

either to prove or to disprove the trusts with which we are now dealing.

2. We turn now to Constructive trusts. Under this head Mr Lewin treats of but one grand rule. It is this: that wherever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as a trustee, he becomes a trustee of the advantage so gained. The common illustration of this is the renewal by a trustee of a lease that he holds on trust. A leaseholder, in the leading case *Keech* v. *Sandford*, White and Tudor, Vol. II. 693 (7th edn.) bequeathed a leasehold to a trustee for an infant. The lease was running out. The trustee, doing his duty, asked that it might be renewed; this application was refused; the landlord did not want an infant tenant. The trustee then obtained a new lease in his own name. It was held that this new lease must be held upon trust for the infant. Lord King said 'I very well see that if a trustee on the refusal to renew might have a lease to himself, few trust estates would be renewed to a *cestui que use*. This may seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued and not in the least relaxed.' You see how far the doctrine goes. The landlord was under no duty to renew this lease and neither the trustee nor his *cestui que trust* had any right to demand its renewal—but an old tenant has, if I may so speak, a sort of goodwill with his landlord. If a trustee has this advantage, even though the trust does not bind him to use it, still if he does use it he must use it for his *cestui que trust* and not for himself. But though this is a good illustration of the rule you must not suppose that it relates only to the renewal of leaseholds—far from it, if by reason of his position that trustee acquires any advantage of a valuable kind, he must hold it upon trust, he is constructively a trustee of it.

The rule includes persons who are not trustees properly so called, but all those who stand in what is called a fiduciary position. My land agent, for instance, is not a trustee for me, for he holds no rights, no property, upon trust for me; but if he takes advantage of his position as my agent to get some

benefit from a third person then he is a trustee of that benefit for me. I am not here speaking of cases of dishonesty which may come within the cognizance even of a court of law and give rise to an action of fraud—but it is a general principle of equity that if an agent acquire any pecuniary advantage to himself from third parties by means of his fiduciary character, he is accountable to his employer as a trustee for the profit that he has made. A good example of this is the following—A was a landowner, B was his attorney and also his heir presumptive; A had made a will in favour of C; A then contracted to sell part of his land; B advised that in order to carry out this contract A should levy a fine of the whole of his land; the effect of levying a fine was to revoke A's will. It was held that after A's death B, who as heir became entitled at law to such part of A's land as had not been sold, must hold it upon trust for C the devisee who had been disappointed by the advice which B had given to A. 'You,' said Lord Eldon, 'whether you meant fraud, whether you knew that you were the heir at law of the testator or not, you who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have been entitled to it if you had known what as an attorney you ought to have known, and not knowing it you shall not take advantage of your own ignorance.' *Bulkley* v. *Wilford*, 2 Cl. and F. 102, at p. 177. And the scope of this doctrine is very fully explained in the judgment of Romer L.J. *In re Biss*, 1903, 2 Ch. 40[1].

But the doctrine of constructive trusts is really a very wide one. It constantly operates in cases which we are apt to think of as being otherwise explained. Put this case—T holds land in fee simple upon trust for S in fee simple; T in breach of trust sells and conveys the land to X; X at the time of the sale knew of the trust. Now of course we hold that S's rights as *cestui que trust* have not been destroyed by this sale and conveyance—they are valid against X. But why? You may perhaps say because S was in equity the owner, tenant in fee

[1] See, for a recent instance, *Griffith* v. *Owen*, 1907, 1 Ch. 195.

simple, of the land. That is one way of putting it, but as we shall see hereafter a somewhat dangerous way, for it may suggest that S's equitable rights are rights *in rem*, rights which cannot possibly be destroyed by any dealing that takes place between T and other persons. The more correct and the safer way of stating the matter is that X having bought and obtained a conveyance of the subject-matter of the trust knowing that the trust exists is made a trustee for S. The result would have been the same if X though he did not actually know of the trust for S ought, in the opinion of a court of equity, to have known about it; in this case also X though he obtains the legal estate by conveyance from T becomes a trustee for S. What is meant by this phrase that X 'ought in the opinion of a court of equity to have known of the trust' I shall endeavour to explain on another occasion. Here I am only concerned to point out that though a trust may have been created expressly and by way of contract, the person, or one of the persons, against whom we see it enforced has never consented to become a trustee. In the cases that I have just put, X does not consent to become a trustee for S; on the contrary his hope has been that he will be allowed to enjoy as beneficial owner the land that he has purchased from T. If then he is made a trustee this is not because he has agreed or consented to become one, but the result is produced by some rule of equity which, will he, nill he, makes him a trustee.

The rules of equity to which I refer might I think be stated thus—Any one who comes to the legal estate or legal ownership as the representative (heir, devisee, executor or administrator) of a trustee, or who comes to it by virtue of a voluntary gift made by a trustee, or who comes to it with notice of the trust, or who comes to it in such circumstances that he ought to have had notice of the trust, is a trustee. It is not usual in such a case to call the trust a constructive one, still I want you to see that the man in question gets bound by a trust without desiring to become a trustee and even although he has every wish to escape such an obligation. Put a simple case, T is trustee in fee simple for A in fee simple; T dies; formerly (as I shall explain next

time) the legal estate would have descended to T's heir or passed under his will to a devisee, now-a-days it will pass to T's executor or administrator, his personal representative. Now the personal representative, Q let us call him, is undoubtedly bound by the trust. Why so? Because he has consented to accept it. No; it is very possible that when he proved T's will or took out letters of administration to T's estate he knew absolutely nothing of the trust. Still he is bound by it. Why is he bound? Because he comes to it as the trustee's representative.

Now it is usual and I think very proper to deal with the rules about this matter in a context other than the present. They come in answer to the question 'What are the nature of the *cestui que trust's* rights—against what persons or classes of persons can these equitable rights be enforced?' Still I want you to see that really they might also be treated from our present point of view. If you are going to enforce the rights of a *cestui que trust* against any person, X, you must be prepared to show that in one way or another X has become a trustee for that *cestui que trust.* That is why you cannot enforce the trust against the *bona fide* purchaser for value who has no notice, express or implied, of the trust, and who obtains the legal estate. Still I must admit that these rules will come in better when we are considering the nature of the rights of the *cestui que trust.* They presuppose that somehow or another a trust has been validly created, and they deal with the question who, when such a trust has once been created, is bound by it. In the present lecture and previous lectures we have been discussing the original nature o. the trust—How does a trust first come into being? The further question 'Who is bound by it?' still remains open.

LECTURE VII.

THE RIGHTS AND DUTIES OF TRUSTEES.

THIS morning we are to speak very briefly of the rights and duties of a trustee.

1. (*a*) Of his rights. It is common to speak of the trustee's rights as though they were always legal rights, but of course this is not always the case. For example S is tenant in fee simple, but his estate is subject to a mortgage; on his marriage he makes a settlement; or conveys what he has to convey unto and to the use of T and T'. Now S had no legal estate—the legal estate is in the mortgagee—what therefore he conveys to trustees cannot be the legal estate, but is a merely equitable estate. So also it is common enough to find, if I may so speak, one settlement behind another. Under the marriage settlement of my father and mother I am entitled to one-third share of certain stocks held by T and T', the trustees of that settlement, but my interest is subject to the life interests of my parents. I am going to marry, I assign what I can assign to U and V upon trusts for myself, my wife and children. Here, of course, the trustees of this second settlement, this sub-settlement, do not at law become entitled to my share of the trust fund. My rights are merely equitable rights, and what I assign to U and V are equitable rights. When my father and mother are both dead then it will be the duty of my trustees, U and V, to make themselves the legal owners of my third share; they must call upon T and T' to pay cash or transfer stock to them to the amount of one-third of the fund; but so long as either my father or my mother lives the rights of my trustees must be merely equitable. Therefore do not say that a trustee holds the legal estate of

land or the legal interest in personalty. This may or may not be the case.

(*b*) Until lately the trustee's rights devolved upon his death just as though they were beneficial rights. Thus, for example, suppose that there was a sole trustee holding in fee simple, holding either at law or merely in equity in fee simple. If he died intestate the trust estate descended to his heir at law—or, if the land was subject to a special custom, as *e.g.* gavelkind or borough english, then to his customary heir. But the trustee had full power to dispose of the estate by his will, and since his heir might be an infant, and it was very undesirable that the trust estate should become vested in an infant, it was generally right and proper that a trustee should devise the freehold trust estates vested in him. It was usual therefore to insert in every well drawn will some such clause as the following: 'I devise all freehold estates vested in me upon trust or by way of mortgage unto A and B and their heirs upon the trusts and subject to the equities affecting the same respectively.' It was also usual that a trustee should select as the devisees of his trust estates the same persons as he appointed executors of his will. If there was no express devise of trust estates as such then a difficult question might arise. A testator would devise 'all my real estate to A,' or, having first made some specific devises of Blackacre, Whiteacre and so forth, he would devise 'all the residue of my real estate to A.' Did this devise include estates vested in him as a trustee? The rule was that a general devise does carry trust estates; but this rule gave way somewhat easily to any indication of a contrary intention. 'My real estate' includes real estate vested in me as a trustee—such was the general rule; but then if I went on to direct that all my real estate should be sold, this would manifest a contrary intention, for a sale of the trust estates would very likely be a breach of trust. Again, if I devised all my real estate to A for life with remainder to B, this would serve to show that I did not intend to include trust estates in my large words, for it would be highly inconvenient that a trust estate should be limited to one for life with remainder to another. Often, however, on ill drawn wills there was a difficult question. But we must pass this matter by very

lightly, for owing to recent alterations in the law it is fast becoming obsolete. Before I speak of those alterations I must say that as to personal estate (including chattels real) held upon trust the case was simpler. If the trustee appointed an executor, then the personalty which he held upon trust like his other personalty passed to his executor; if there was no executor it passed to his administrator.

We come to the modern changes in the law. Passing by a section in the Vendor and Purchaser Act of 1874, which was repealed in the next year, we have section 48 of the Land Transfer Act of 1875, which said that on the death of a bare trustee intestate seised in any hereditament in fee simple, such hereditament should vest like a chattel real in his legal personal representative—*i.e.* his executor or administrator. This section, you will remark, applied only where the trustee died intestate; it did not in any way affect the law as to devises of trust estates; and it applied only to a bare trustee. This term, 'bare trustee,' gave rise to difficulties. Some judges interpreted it to mean a trustee who has no beneficial interest, others a trustee who has no active duty to perform, no duty save that of just holding the land in trust for some other person. I believe that the second of these was the better interpretation. But we may pass by this controversy, for the section is now repealed, and as regards a trustee who dies after the 31st of December, 1881, we have a rule laid down by section 30 of the Conveyancing Act of that year—viz. that an estate or interest of inheritance, or limited to the heir as special occupant in any hereditaments, vested on any trust in any person solely shall on his death devolve to and become vested in his personal representative in like manner as if the same were a chattel real. A devise of a freehold estate held upon trust is therefore an ineffectual thing; despite the devise it now passes to the trustee's executor or administrator. What happens when the trustee has not appointed an executor and no one has as yet applied for letters of administration is not very clear. The goods of an intestate used to belong to the ordinary until administration was granted; after the Probate Court was established they passed to the judge of that Court; they now, I take it, pass either to all the judges of the Supreme Court or

to the judges of the Probate Division. The question can hardly arise unless some one during the interval steals some of the goods. In such a case it would be necessary in the indictment to specify the person whose goods he stole; and I take it that, to use the technical phrase, the property would be laid in the judges of the Probate Division[1]. But the section of the Conveyancing Act says nothing about this interval, which may conceivably be a considerable one, and it is far from clear that during the interval the estate is not in the trustee's heir. *In re Pilling's Trusts*, 26 C.D. 492, Pearson J. raised this question, but did not decide it. The effect of this section on copyholds was somewhat uncertain. The Copyhold Act of 1887, sec. 45 (now replaced by sec. 88 of the Copyhold Act of 1894) provides that section 30 of the Conveyancing Act of 1881 shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor upon trust or by way of mortgage. A question has been raised as to whether or how far the Act of 1887 is retrospective, and as to whether it was necessary. Lindley L.J. has suggested that the 30th section of the Act of 1881 did not, despite its very general language, apply to copyholds at all (*In re Mill's Trusts*, 37 C.D. 312; 40 C.D. 14). However, at any rate as to persons dying after the Act of 1887, the new rule has no application to copyholds. T, tenant in fee simple on the Court Rolls upon trust, dies intestate, his rights pass to his customary heir; also, T has the power to devise his rights. It was, I take it, supposed that the new rule, the rule of the Conveyancing Act, could not be made to apply to copyholds without giving rise to some difficult questions as to the lord's rights to fines. Might he not claim one fine from the heir, and then, an administrator having been appointed, a new fine from the administrator?

As to freeholds the new rule was, I suppose, introduced for two reasons. It prevents the trustee's estate from descending to, at any rate it prevents it from being permanently vested in, an infant—this is one gain. Also it gets rid of the question,

[1] Or possibly in the President of that Division. See per Channell J. *Whitehead* v. *Palmer*, 1908, 1 K.B. at p. 157, but see *John* v. *John*, 1898, 2 Ch. 573 at p. 576.

often a difficult one, whether a trust estate has passed by a general devise.

Then we come to the Act of 1897, the Land Transfer Act of that year.

This is very important as regards the general law of inheritance, but owing to the statutes already mentioned it made no great change in the matter of which we are speaking.

By section 2, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as the persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

These provisions apparently have no effect on the fate of freehold vested in the dead man as a trustee—that already goes to his personal representative—but what happens as to copyholds held upon trust? They are excluded from the operation of the Act by section 1, sub-sec. 4. But equitable interests in copyhold are within the Act: *In re Somerville and Turner's Contract*, 1903, 2 Ch. 583.

(*c*) Whoever comes to the trust estate as representative (heir, devisee, executor or administrator) of a dead trustee, is bound by the trust; but it does not follow from this that he is capable of actively executing the trust. Let us begin with a simple case, T holds land in fee simple, upon trust for S in fee simple. T dies and the trust estate passes to T′, who is his heir, or devisee, or under the new law his executor or administrator. Here T′ is bound by the trust, and since the trust is of the simplest kind he is capable (unless suffering under some personal disability) of executing the trust, and is able to do all that T was bound to do. For what was T's duty? Simply to do nothing until S should call upon him to transfer the trust estate either to him, S, or to some assignee of his. No discretion is required of him, he has not to consider whether this or that act will be a prudent one. S has in equity an absolute right to call upon him to transfer the trust estate as he, S, shall direct. In one of the several senses that have been given to the term 'bare trustee,' T is a bare trustee, he has only to transfer the trust estate according to the direction of

another person who is entitled to direct him in the matter. But put another case. By my will I give all my property to A, B and C upon trust to sell it. Before any sale is made, A dies, B dies, and then C dies; the legal estate passes to D as the representative of C, the last surviving trustee. He is bound by the trust; if he does anything contrary to the trust he renders himself liable to an action. But can he actively exercise the trust, this trust for sale? Suppose he attempts to do so; he agrees to sell the testator's land to X. X examines his title, reads the will and says 'But the testator has not trusted *you* to sell; he chose out three friends of his whom he had reason to believe were able men of business, he has shown no intention whatever of allowing you, whose very name he did not know, to make the sale. In one sense, of course, you are a trustee, that is to say, you have the estate, and must not in any way act contrary to the trust; that is one thing; but to act as though the testator had confided to you the discretionary power which he gave to three chosen friends is quite another.'

In a well drawn instrument the conveyancer will have met such objections in advance. Usually he will have done so by making plain that the representative of the last survivor of the trustees named in the instrument is to have all the powers which are given to them. Thus let us take a good precedent of a will of real and personal estate, where the whole is to be converted into one fund which is to be invested. The testator says 'I give all my real and personal estate unto and to the use of A, B, C, their heirs, executors and administrators respectively upon trust, that they the said A, B, C, or the survivors or survivor of them or the heirs, executors, or administrators respectively of such survivor, shall sell, and shall invest, and shall hold the invested fund, and shall pay the income and so forth'—thus making it clear that whoever gets the trust estate under the will, will be both competent and bound to actively exercise the trusts for sale and so forth. But a badly drawn instrument will often occasion great difficulty. There have been many decisions on the subject. Of late the courts have been strongly inclined to hold, if possible, that the representative of the surviving trustee is able actively

to execute the trust for sale[1]. I am not going into a discussion of ill drawn instruments, but I want you to see that it does not follow that because a trust estate has come to X as the representative of a dead trustee, that therefore X can actively execute the trust. It is quite possible that X's one duty is simply to hold the trust estate until some other trustee has been properly appointed. It is a question of intention, of intention expressed in the instrument that creates the trust.

(*d*) I have been speaking of the devolution of the trust estate on the death of a trustee. But during his lifetime the trustee can pass his rights to another. I shall have much more to say of this matter hereafter when we are considering the nature of the rights of a *cestui que trust*. But let us put a simple case. T holds land in fee simple upon trust for S in fee simple; T has the legal estate. Now T is fully capable of conveying that legal estate *inter vivos*; of doing this voluntarily, or doing it for valuable consideration; of doing this in accordance with the trust, or doing it in breach of the trust. We will suppose that he does it in breach of trust. He conveys the land unto and to the use of X and his heirs either gratuitously or for value. Now this is not a nugatory act. It does pass legal rights to X; the legal rights which T had have passed to X. T has committed a breach of trust, and will be liable for all harm that follows. In many—though in by no means all—cases X will have to hold that land subject to the trust. But still we cannot possibly treat this case as though nothing had been done, or as though T had merely attempted to convey away what did not belong to him. He has conveyed away what did at law belong to him, and this conveyance may have the most important results. Of those results I shall speak at another time. But I want you to distinguish two different questions—(1) Has the trustee conveyed away the estate that was vested in him? (2) Was he committing a breach of trust in so doing? Sometimes we muddle up these two questions by our use of the word 'can.' If T is holding land simply in trust for S, in one sense he *can not* sell and convey it without the consent of S—that is to say by sell-

[1] See *In re Morton and Hallett*, 15 Ch. Div. 143, a case which Professor Maitland had argued both before Jessel M.R. and the Court of Appeal. (Edd.)

ing and conveying it he will be guilty of a breach of trust. But in another and a more exact sense he can sell and convey it, and the sale and conveyance will not be nugatory. A man can do many things that it is unlawful for him to do, and a man can do lawfully (in the narrower sense of that word) many things that equity forbids him to do. At law the trustee has all those powers of alienating *inter vivos*, mortgaging and so forth, that he would have were there no trust in existence[1].

An attempt to speak briefly of the duties of trustees is something like an attempt to speak briefly of the duties of contractors. In the case of contract one has to content oneself with saying very little more than that the contractor must fulfil his contract, or else one must go through all the various kinds of contract, sale, lease, mortgage, loan, bill of lading, charter party and so forth. In the case of trusts the difficulty is almost greater, for imperfect as must be any classification of all the contracts which our English law enables men to make, our classification of trusts is likely to be yet more imperfect. Within very large limits, such as are set by the rule against perpetuities, and the rules laid down by the Thellusson Act, and again by somewhat vaguer rules which condemn immoral trusts and trusts contrary to public policy, a man may create what trusts he pleases. Settlors make a very large use of this liberty, and the consequence is that trusts are almost infinitely various. We can do no more than notice a few very general rules, and notice further that even these few are for the more part but rules of construction, rules which will easily give way if the testator has expressed any intention contrary to them.

In the case of private trusts our law and our equity does not recognize any power in the majority of a body of trustees to bind a minority. Thus suppose that a testator has devised his land to trustees upon trust to sell: they all must join in the conveyance—a majority of them can not pass the estate that is vested in them all. But further, in equity a trustee can not shelter himself by saying that he was outvoted, that though he consented to the sale and took part in the conveyance, he was not satisfied with the price, but gave way to a majority.

[1] See *e.g. Boursot* v. *Savage*, L.R. 2 Eq. 134.

So let the question be about a change in the investment of a trust fund—the change can not be made unless all the trustees consent, and if it be a breach of trust no one of them will be able to say that he was bound by a resolution of the majority. Of course, however, a settlor may give power to a majority, but in the case of private trusts this is but seldom done.

The case of co-trustees is different from the case of co-executors. Each executor taken singly has a very large power of administering the personal estate of his testator, collecting debts, giving valid receipts, selling and assigning portions of the estate. On the other hand, unless the settlor has said something very unusual, one out of several co-trustees has no similar powers. Therefore, *e.g.*, in paying money that is due to trustees you should obtain a receipt from them all.

It is a very general rule that the office of trustee can not be delegated. Trustees can not shift their duties on to the shoulders of others; if they purport to do this they still remain trustees and are liable as such. If a trustee confides the application of a trust fund to another, whether that other be one of his co-trustees or a stranger, he will be personally answerable for any loss that ensues. Of course there is a great difference between attempting to delegate a trust and obtaining professional help in the exercise of a trust, the help for example of a solicitor or counsel or of a broker, banker, land-agent, valuer, auctioneer. As regards the obtaining of such professional assistance the only general rule is that, in the absence of an expressed intention to the contrary, a trustee may obtain such assistance wherever, regard being had to the ordinary course of business, it is reasonably necessary that he should do so. And he may pay for it, what it is reasonably necessary that he should pay, out of the trust property. It is even reasonably necessary in some cases that the trustee should allow trust property to come under the control of agents thus appointed. In this respect, however, the Court of Chancery has not dealt very liberally with trustees; for example, a trustee for sale was not in general justified in directing that the purchase money should be paid to a solicitor. The Trustee Act, 1888, sec. 1, now the Trustee Act, 1893, sec. 17, has made a considerable difference in this respect. In some cases it empowers a trustee to direct that

payment shall be made to a solicitor or to a banker. I must not speak in detail about this matter, but on the whole the rule that a trustee cannot delegate his office, even to a co-trustee, has been rigorously maintained. To justify a partial delegation there must, said Lord Hardwicke, be a case of necessity, physical necessity or moral necessity. 'Moral necessity' he added 'is from the usage of mankind, if the trustee acts as prudently for the trust as he would have done for himself and according to the usage of business.' (*Ex parte Belchier*, Amb. 219.) This matter has been very fully discussed of late in the great case of *Speight* v. *Gaunt* (9 Ap. Cas. 1) before the House of Lords. That house there held that a trustee had been justified in employing a stockbroker and in paying large sums of trust money to him which he was to invest, and which he untruly purported to have invested in the purchase of stock. I will read a few sentences from the judgment to the same effect that was delivered in the Court of Appeal by Bowen L.J., 22 Ch. D. at p. 762.

'Now with regard to the law it is clear that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man of business would conduct his own....A trustee cannot, as everybody admits, delegate his trust. If confidence has been reposed in him by a dead man he cannot throw upon the shoulders of somebody else that which has been placed upon his own shoulders. On the other hand, in the administration of a trust a trustee cannot do everything for himself, he must to a certain extent make use of the arms, legs, eyes and hands of other persons, and the limit within which it seems to me he is confined has been described throughout, both in the cases which have been referred to and the judgments which have preceded me, to be this:—that a trustee may follow the ordinary course of business, provided that he run no needless risk in doing so.' So far Bowen L.J. There should be no needless risk run. Now if a man has to purchase stock he must almost of necessity employ a stockbroker and pay the price to that stockbroker. The Court of Appeal and the House of Lords held that a trustee in doing this was following the ordinary course of business, and was running no needless risk.

Compare the case of *In re De Pothonier*, 1900, 2 Ch. 529, where securities with coupons attached, and payable to bearer, were deposited with a banker in order that he might detach the coupons and thus collect the interest as it fell due, and this was held to be justified.

A trustee is not entitled to any remuneration. He is allowed his expenses out of pocket. He may charge against the trust estate all costs, charges and expenses which have been reasonably incurred; thus, *e.g.*, he may charge his travelling expenses if reasonably incurred. He is generally entitled to employ a solicitor for any legal business, such as that which solicitors usually perform. Costs, charges and expenses, those properly incurred, become as against the *cestui que trust* a first charge on the trust property. On the other hand a trustee is allowed nothing for his trouble unless the creator of the trust has thought fit to say something to the contrary. Even though the trustee be a solicitor he will not be allowed to charge anything for his time and trouble. Of course, however, a settlor may arrange the matter otherwise, and it seems that a person before he accepts the office of trustee may bargain with the *cestui que trust* and say 'I will not be a trustee unless you agree to pay me a salary,' but such bargains are closely scrutinized by the court, and may somewhat easily be brought under the head of undue influence. But normally the trustee can claim nothing for his pains.

A trustee must not profit by the trust. This rule includes that which we have just been stating but it goes much further. If the trustee gets any valuable advantage, any property, by reason of his office, that becomes part of the trust property. We may treat as an offshoot of this general principle the important rule that a trustee is absolutely disqualified from purchasing the trust property—even though it be by public auction. This is an absolute rule, it does not say merely that if the trustee gives less for the property than might otherwise have been obtained, he must pay the full value of what he bought and not merely the price that he agreed to pay for it; it says that however fair, however advantageous to the *cestui que trust* the purchase may be, the *cestui que trust* is at liberty to set it aside and take back the property. The trustee may

not buy the trust property from himself on his own behalf; nor may he buy it as the agent of another person. On the other hand, a trustee may sometimes buy the trust property from his *cestui que trust*—buy that is the beneficial interest. There is no absolute rule against this. But equity requires in this case that the *cestui que trust* should fully understand that he is selling to the trustee and that the trustee should make a full disclosure of all that he knows about matters which affect the value of the property. Purchases by the trustee from the *cestui que trust* are not forbidden; but they are closely watched and the trustee may be called upon to show the utmost good faith. The ground of this rule is obvious—the trustee has had an opportunity of knowing, and it is his duty to know all the circumstances affecting the value of the property.

LECTURE VIII.

THE DUTIES OF TRUSTEES.

I AM speaking of the duties of trustees. So various are trusts that the only general rules that we can lay down about them are few and very general.

(i) A trustee is bound to do anything that he is expressly bidden to do by the instrument creating the trust. (ii) A trustee may safely do anything that he is expressly authorized to do by that instrument. (iii) A trustee is bound to refrain from doing anything that is expressly forbidden by that instrument (of course I am supposing that the provisions of the instrument in question are in no wise invalid or unlawful). Within these limits a trustee must (iv) play the part of a prudent owner and a prudent man of business. That is the standard by which his conduct will be judged. We can say little more without descending to particulars. When we get down to particulars, when we come to trusts of this class or that class, then we are likely to find some more specific rules. You will remember that in the development of equitable rules trial by jury has played no part. Consequently Equity has taken, if I may so speak, a somewhat different shape from that which has been assumed by some portions of our Common Law, notably the law of torts. In the law of torts there is constant reference to an ideal standard of conduct, the conduct of the man of average prudence and intelligence; but this man, we may say, is represented by the jury. Often enough a judge has to say 'Gentlemen it is not for me to say whether the defendant acted negligently or whether he behaved as a prudent man would behave—I must leave that to you.' The verdicts which jurors give in answer to this question are

no precedents. On the other hand a judge in the Court of Chancery sitting alone has had to decide every question whether of fact or of law. He has not been able to escape the duty of deciding that a trustee in doing this or that—let us say in paying trust money to a stockbroker for investment—was or was not acting as a prudent man of business would have acted. His decision is reported and it becomes a precedent. In the next case of a similar kind counsel will argue that the point is covered by authority. And so many rules about the conduct of the prudent man of business get established. Still they are somewhat dependent rules, and you will find that generally they are not hard and fast rules—they will admit of exceptions. A judge will say from time to time 'That is a sound general rule, but after all it must give way before the yet more general one that a trustee acting within the terms of his trust may do what would be done by a prudent man of business, and in the circumstances of this particular case I think that the minor rule might be disregarded.'

As is well observed by Mr Strahan in his Digest:—'To cite authorities, as is often done, to show what amounts to reasonable care, prudence, or intelligence, is, it is submitted, a misleading and dangerous practice. It is an attempt to decide a point of fact, not by evidence but by authority, and tends to the establishment of a doctrine of "constructive" want of care, &c., similar to the venerable but exploded doctrine of "constructive" fraud[1].'

I will try to illustrate this matter by reference to one class of trusts—a very common class—trusts for investment. Almost every settlement throws upon the trustees the duty of investing money. And even if there is no express declaration that money is to be invested still it is a general rule that if trustees have money in their hands and are not bound at once to apply it in some other way, *e.g.* in paying it over to the beneficiaries, they ought to invest it and so make it profitable; if they retain it uninvested for a longer time than is reasonable then this will be a breach of trust.

[1] Strahan and Kenrick, *Digest*, at p. 94.

Now we may start with our paramount rules. A trustee is bound to do what he is expressly bidden to do by the terms of the trust, supposing that to be lawful and possible. He is told to invest the fund in government securities. Subject to the provisions of certain Acts of Parliament which I shall mention by and by, he is bound to do this. He may safely do what he is expressly authorized to do. He is, for example, authorized to make investments of a highly hazardous nature such as prudent men do not ordinarily make—he may do it. He is authorized to lend the trust fund to one of the *cestui que trusts* taking merely a promissory note—well, lending money without taking security is of course hazardous; still he has been told that he may do it, and do it he may. He may not do what he has been expressly forbidden to do. The testator had a capricious and unreasonable dislike to some of the very safest securities, and he expressly prohibited any investment in them. This prohibition binds the trustee; if he invests upon those prohibited securities he will be answerable for any loss that occurs. Within the limits thus laid down, the rule is that the trustee must act like a prudent man of business.

Long ago however the Court of Chancery came to an opinion as to what the prudent investor does. He invests in the three per cent. Consolidated Bank Annuities. This became the rule. In the absence of express powers created by the settlement trustees ought to invest in these Annuities. There was at one time some doubt about mortgages of real estate, but I believe that the better, certainly the safer, opinion was that a trustee not expressly empowered to do so should not invest in these. The one investment open to him was the 3 % Consols. When this doctrine was established the number of possible investments was very small. In course of time many new modes came into being, and almost every will or settlement contained a long clause giving the trustee a choice of investments, sometimes a narrow, sometimes a very wide choice. Then Parliament began to interfere, to say by statute that trustees unless expressly forbidden so to do might invest in this way or in that. I think that we are absolved from discussing these statutes for in 1889 a very comprehensive Act was passed, the Trust Investment Act of 1889, which was made

applicable even to existing trusts. This Act is now replaced by the Trustee Act of 1893. Section 1 of the Act of 1893 says: 'A trustee may, unless expressly forbidden by the instrument (if any) creating the trust invest any trust funds in his hands in'—one of fifteen different ways. I will not read the long list of permissible investments. It is a liberal list and the Colonial Stock Act of 1900 adds yet another class to that list. On the whole I should imagine that prudent settlors will hardly desire to give their trustees a wider choice; indeed I think it possible that they will be concerned rather to restrict than to enlarge the power of selection that the law gives to trustees. And this you will observe they can do; the statute does not interfere with our rule that a trustee must not do what he is forbidden to do by the instrument of trust.

But now I would have you observe that these statutes merely extend the number of the modes of investment which shall not be unlawful for trustees. They do not say that a trustee may safely invest in any security which can be brought under one of the fifteen or sixteen heads. Thus, to take one example, the Consolidated Stock of the London County Council is included. Now suppose a trustee acting under an instrument which tells him to invest in Consols, but does not expressly forbid him to invest in stock of the London County Council. If he invests in the latter this mere fact standing by itself will not be a breach of trust; still in the circumstances of some particular case such an investment may be a breach of trust. Suppose it notorious that this stock is becoming worthless, the statute would not save a trustee who invested in it. Within the limits of what is authorized the trustee must act prudently.

This is best seen in the case of an investment upon what are called real securities. In trust deeds and wills it has been very usual to say that the trustees may invest upon real securities in England or Wales. And now in the list of securities authorized by the Acts of 1889 and 1893 we find 'real or heritable securities in Great Britain or Ireland.' But the Court has long ago come to a doctrine about the liberty given to trustees by such a phrase as this. Thus it has established a rule about the amount of money that should be

advanced on a mortgage. Trustees should not, it is generally said, advance more than two-thirds of the actual value of the estate if it be freehold land—*i.e.* if it be an agricultural estate, nor more than one-half if it be freehold house property. This rule is not applied with strict arithmetical rigour, but it is supposed to formulate pretty accurately the limit that prudence sets. Then again the trustee who is lending money on mortgage ought to insist upon having a valuation made by some expert, some independent expert—that is some one who is acting for him and not for the mortgagor. Then again a trustee should not lend upon a second mortgage. For a reason which I hope to give on another occasion second mortgages are never very safe. I do not know that this is a quite absolute rule, that the mere fact of lending on second mortgage is of itself a breach of trust, but undoubtedly the trustee who lends on such a mortgage ought to be able to show some very special reason for doing so. And thus about investments on 'real securities' we have a whole group of rules. Some of them more stringent, some of them less stringent, but all of them pointing to this that even though the trust deed or the Act of Parliament authorizes the trustee to choose a security of this class, he is bound to take all reasonable precautions before he lends money upon mortgage. Now this is dealt with by the Trustee Act, 1893, sec. 8, which protects the trustee against several of his former risks, and in particular where he has advanced to the extent of not more than two-thirds of a valuation made for him by a competent surveyor or valuer.

I will choose one other illustration of the law's dealings with trustees. This also has been affected by recent statutes. Often enough a trustee is under the duty of selling land. Often enough this duty was a very difficult one. Before he offered the land for sale he had to consider the conditions under which the sale should be made. He had to consider two different things. On the one hand if he did not make the conditions stringent enough, the purchaser would be able to put the trust estate to great cost by insisting on his right to a sixty years' title and on strict proof of the matters of fact involved in the title ; and then after all when the cost had been incurred perhaps the purchaser would raise some small

and yet valid objection and so slip out of the contract. On the other hand if he made the conditions extremely stringent, this might frighten away purchasers and the land might be sold below its true value. Well, I do not know that any more definite general rule could be laid down than that reasonable conditions were permissible and that unreasonably stringent conditions were not permissible. Certainly however the Court's standard of reasonableness was a high one. It considered that he would be right in taking legal advice, in having the title perused and the conditions drawn by a lawyer, and if he did not do this he acted at his peril. For the conveyancer it was (and still is) often a delicate task to advise a trustee who was selling. There were certain rules about divers conditions of sale which have a certain validity—it was generally understood that this or that condition was one which a trustee might use—but all these rules might give way in a given case, for they were but emanations (if I may use that phrase) of the one great rule that a trustee ought to insert all reasonable but no unreasonable conditions.

Of late Parliament has given us some help. The Vendor and Purchaser Act of 1874 laid down certain rules which were to prevail between vendors and purchasers in the absence of any stipulation to the contrary—rules much more favourable to vendors than the old unenacted rules had been. And then it said that 'trustees who are vendors or purchasers may sell or buy without excluding the application' of these rules. This policy was carried much further by the Conveyancing Act of 1881. A much larger body of rules favourable to vendors was laid down as applicable wherever not excluded by express stipulation. And then (sec. 66) it was said in effect that trustees might treat these rules as being reasonable. Finally the Trustee Act of 1888 and the Trustee Act of 1893, sec. 14, have done yet more for those who buy from trustees. A sale by a trustee is not to be impeached upon the ground that it was made under depreciatory conditions unless it shall appear that the consideration for the sale was thereby rendered inadequate. After conveyance the sale can not be impeached as against the purchaser on the ground that the conditions were depreciatory unless it shall appear that the purchaser

was acting in collusion with the trustee. This however is rather a protection for the person who buys from the trustee than for the trustee himself, and subject to the two earlier Acts we still may have the question arising—Was the trustee justified in inserting or in omitting a condition of this or that kind? I know no general answer to this save that he ought to use such conditions as a prudent vendor would use and to avoid such conditions as a prudent vendor would avoid.

We may notice in this place the Judicial Trustee Act of 1896. Section 3 says in brief that the Court may relieve from personal liability for breach of trust a trustee who has acted honestly and reasonably and ought fairly to be excused for that breach. This statute in effect declares that trustees may, according to the existing law, be guilty of breaches of trust not only if they act honestly, but if they act reasonably. I do not think that Courts of Equity would have admitted that this was so, though in truth they had (so to speak) screwed up the standard of reasonableness to what many men would regard as an unreasonable height. If this was so, then it was for Parliament to lower the standard. That however is not what Parliament has done. What but for the Act would have been a breach of trust will be one still; but the Court is to have a discretionary power of 'relieving' the trustee from the legal consequences of his act. The consequence is that (as the law reports show) the Courts have now before them the difficult task of defining a second and lower standard—a standard of excusable breaches of trust. This, it is already evident, will be a difficult and prolonged task. For my own part I can not think that in the civil, *i.e.* non-criminal, law there should be any place for discretionary mercy. If the act is one for which a trustee 'ought fairly to be excused' then it ought not to be stigmatized as a breach of trust. For a good example of the considerations which may disentitle the trustee to relief under this Act you should read the case of *In re Stuart*, 1897, 2 Ch. 583, and also the case of *National Trustees Company of Australia* v. *General Finance Company of Australia*, 1905, Appeal Cases 373[1]. The case of *Perrins* v. *Bellamy*, 1899,

[1] A decision of the Judicial Committee of the Privy Council on a Victorian statute in the same terms as section 3 of the Judicial Trustee Act, 1896.

1 Ch. 797, is a good instance of the granting of relief to trustees who have honestly and reasonably committed a clear breach of trust.

We have considered how men become trustees; we have now to consider how they cease to be trustees. But here we must draw a distinction. In one sense a trustee may cease to be such by wrongfully alienating those rights which he has been holding upon trust. Thus if T be holding land or goods upon trust for A and he conveys the land or the goods to X, he, T, will no longer be holding anything upon trust. It may be that in certain cases he will still have a right and a duty to recall this wrongful alienation, to get back the property and again hold it upon trust. But it may be that he can not do this; he can not do it if he has passed the legal estate or legal property to one who purchased *bona fide*, for value and without notice of the trust. In that case he no longer holds the land or the goods in trust and he is unable to get them back. Still even in this case if the money that he received from the purchaser is still in his hand, or if it can still be traced into any investment, then he holds this money or the fund into which it has been converted upon trust. Of this tracing of trust funds I should like to speak at another time. But even this may not be the case; the money that he received may no longer be traceable, and he may be insolvent. Here then he will be holding nothing upon trust. I do not think that we can in strictness call such a man a trustee; it is true that he is liable for his breach of trust; but then a man who has been lawfully discharged from the office of trustee may still be liable to an action in respect of some past and perhaps as yet undiscovered breach of trust.

At any rate we must distinguish this wrongful destruction of the trust from a lawful ending of it. How can a man lawfully cease to be a trustee?

(1) By death. This requires no commentary. But his estate may be liable; and his representatives may be trustees if he be a sole or the sole surviving trustee.

(2) By duly winding up the trust by conveying the trust property to those who have become lawfully entitled to receive it and to give him a valid receipt for it. T held a fund upon

trust to pay the income to the widow of S, and divide the capital among the children of S. The widow is dead. All the children are of full age. T assigns to each child his share. The trust is at an end and T is no longer a trustee.

(3) With this is closely connected another mode. T holds property upon trust for several people; they are all of full age and under no disability. If all of them agree in directing T to do something with the property and T does it and thereby divests himself of the property, the trust is at an end and he is no longer trustee. T, for example, held a fund upon trust to pay the income to the widow of S for life, and then to divide the capital among the children. The children are all of full age but the widow is still living. Now if the widow and children tell T to transfer the property to K, or to divide it among them, and T does this, the trust is at an end and T is no longer a trustee. Here of course it can not be said that T has obeyed to the letter the instrument of trust, for that bade him go on paying the income to the widow as long as she should be living. The principle is this: No *cestui que trust* who consents to a breach of trust, being of full age and under no disability, can afterwards complain of it—so if it be clear that T is a trustee for A, B, C and D, and that no other person has or can have an interest in the property, and A, B, C and D being of full age and under no disability agree in desiring T to divest himself of the property in this way or in that way, T is safe in doing it, and by doing it will bring the trust to an end. Not only is he safe in doing it but he is bound to do it. T, let us say, holds property upon trust for me for life and, subject to my life interest, upon trust for you absolutely. You and I agree that we would like to have the capital divided between us now, that I am to have a quarter and you three-quarters, or we agree that the property should go to a charity, T will be safe in carrying out our declared wishes and is bound to carry them out. And so all the beneficiaries being competent persons they can at any time put an end to the trust. Of course if there be infants among the beneficiaries, or if the trust comprehends unborn children, it can not be thus brought to an end.

(4) By virtue of a power given by the settlement or by

Act of Parliament the trustee may resign his office and divest himself of the trust property by passing it on to some new trustee. Apart from powers given expressly by the settlement or by certain modern statutes the trustee can not resign his office, and he can not lawfully appoint a new trustee; to do so would be to delegate the trust. It was usual therefore in every well drawn instrument of trust to insert a power for the appointment of new trustees, and this power was expressly made applicable to a case in which a trustee desired to retire from his office. However it was common enough to find that no such power had been inserted. In that case it used to be necessary to institute a suit and to have new trustees appointed by the Court. Then an Act of 1860, known as Lord Cranworth's Act (23 and 24 Vic., c. 145), gave a certain general power of appointing new trustees. This was a useful power and reliance was often placed upon it. But we need not discuss it now, for it has been replaced by certain sections of the Conveyancing Act, 1881, which deals with trusts created either before or after the Act. This is now represented by Part II of the Trustee Act, 1893, which is a Consolidation Act. It gives a power to appoint a new trustee. This power is exercisable where a trustee either original or substituted is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged, or becomes unfit to act or incapable of acting. The power is to be exercised by the person or persons nominated for this purpose by the instrument creating the trust, or if there be no such person or none who is able and willing to act, then by the surviving or continuing trustees or trustee, or the personal representative of the last surviving or continuing trustee. The power must be exercised by writing—not necessarily by deed. It is, you will see, possible for the creator of the trust to nominate in the instrument creating the trust the person who is to exercise this statutory power. Thus suppose a man making a will in favour of his wife and children in the common form, he will probably say 'And I declare that during my wife's lifetime she shall have the power of appointing new trustees.' And in a marriage settlement one will probably say 'And it is hereby agreed that the husband and wife during their lives and the

survivor of them during his or her life shall have the power to appoint new trustees.' These simple clauses have taken the place of the old lengthy forms. If there be no person nominated and able and willing to exercise the power, then the surviving or continuing trustees or trustee, or the representative of the last survivor, will have the power to appoint. Thus it is generally possible nowadays for a trustee to retire lawfully from his office, and divest himself of the trust property in favour of a new trustee.

(5) These powers, however, will not meet all cases. Formerly, as I have said, it was very common to find that there was no power to appoint new trustees. In these cases a suit was necessary. A suit was an expensive affair. The Trustee Act of 1850 (13 and 14 Vic., c. 60) gave the Court of Chancery a power to appoint new trustees whenever it was found inexpedient, difficult or impracticable so to do without the assistance of the Court; and a summary procedure, something much cheaper and more rapid than a suit, was instituted for the purpose. This power will still be useful in some cases, and in late days the procedure has again been simplified. This statutory power is now contained in section 25 of the Trustee Act, 1893.

You will observe, however, that the various Acts of Parliament that I have been mentioning contemplate only an appointment of new trustees; they do not contemplate a trustee retiring unless there be some one ready to perform the trust. And I believe I may say that a sole trustee has no right to retire so long as a new trustee can not be found. He has accepted the trust, and he is bound to perform it—even the Court can not relieve him of it unless he can produce a fit and proper person willing to take his place.

(6) A trustee may be removed from his office against his will. You will have observed for example that the Conveyancing Act of 1881 (now the Trustee Act of 1893, sec. 10) allows the appointment of a new trustee if an old trustee remains for twelve months out of the United Kingdom. A settlor might provide for other cases in the same way. But apart from such powers the Court will remove a trustee who has shown himself an unfit person for the office. Thus if

a trustee becomes bankrupt or commits a breach of trust proceedings may be taken by the beneficiaries, and he can be removed from his office even though (as sometimes happens) he is desirous of continuing to be a trustee.

And now there are two distinctions that we ought to take,

(i) We distinguish between the appointment of new trustees and the transfer of the trust property from the old trustees to the new. Put a case: T is trustee of all manner of property; he goes to reside abroad; A is tenant for life under the settlement, and has been given a power of appointing new trustees. He appoints K. At common law this appointment can not transfer to K the rights that are vested in T—the legal fee simple in lands, a legal term of years, a sum of Consols and the like. In order that these may pass from T to K, T must execute the acts appropriate for transferring the various rights—convey the fee simple, assign the lease, transfer the stock and so forth. In some cases such a transfer was rendered unnecessary by the Conveyancing Act, sec. 34. Now by the Trustee Act, 1893, sec. 12, the person appointing a new trustee has power to execute a declaration which will have the effect of taking the property out of the old and vesting it in the new trustee. This declaration does not transfer all kinds of property, *e.g.* legal estates in copyholds, mortgages to secure trust funds, and stocks and shares transferable only by entry in the books of a company—see sec. 12 (3) of the Act of 1893. The exception of mortgages to secure trust funds from the operation of this declaration is probably due to the keen desire of conveyancers to keep the trust off the title.

Other cases in which there is any difficulty about the transfer can be met by applications to the Court under the Trustee Acts of 1850 and 1853. And now under the Act of 1893, section 26 and the following sections deal with the cases where the Court has power to make what is known as a 'vesting order,' vesting the property in the new trustees. I must not speak at length of these matters, must only distinguish the appointment of new trustees from the transfer of the trust property.

(ii) Distinguish also between an act whereby a man ceases to be a trustee for the future, and an act whereby he

obtains a release in respect of his past trusteeship. Of course the two things are very distinct, but you may come across phrases which seem to confuse them, *e.g.* the term 'discharge.' A trustee may be discharged from all future duties under the trust—the property may no longer be vested in him, and he will be no longer a trustee—yet for all this he may remain liable to the *cestui que trust* for what he has done in the past; he has not been released from the consequences of his past breaches of trust.

LECTURE IX.

THE NATURE OF EQUITABLE ESTATES AND INTERESTS. (I).

THIS is a topic which, as it seems to me, is insufficiently explained in some of our elementary text-books. Language is there used about one person being the owner at law while another is the owner in equity in which there is no harm, provided it be properly understood; but it does not explain itself and is liable to lead to serious mistakes, not merely to unsound theories but to practical blunders.

By way of illustration I take a passage from Austin's *Jurisprudence*, I, 388. He has been explaining the difference between *jus in personam* and *jus in rem*. Then he says 'By the provisions of that part of the English law which is called equity, a contract to sell at once vests *jus in rem*, or ownership, in the buyer, and the seller has only *jus in re aliena*. But according to the conflicting provisions of that part of the English system called peculiarly law, a sale and purchase without certain formalities merely gives *jus ad rem*, or a right to receive ownership, not ownership itself:—and for this reason a contract to sell, though in equity it confers ownership, is yet an imperfect conveyance, in consequence of the conflicting pretensions of law. To complete the transaction the legal interest of the seller must be passed to the buyer in legal form.'

Now as a piece of speculative jurisprudence this seems to me nonsense, while as an exposition of our English rules, I think it not merely nonsensical but mischievous. Suppose that A, an owner of land, has agreed to sell land to X, but that the transaction has not yet been perfected by a conveyance. Is it really true that while law, as distinguished from equity,

says that A is still the owner, equity holds that X is the owner? Is it true that in the year 1874 there was this conflict between law and equity? Think for a moment what such a conflict would have meant, one court saying that A is owner, another that X is owner—it would simply have meant anarchy. And supposing that this was so in 1874, what are we to say nowadays when the Judicature Act of 1873[1], by section 25, has declared that when there is a conflict or variance between the rules of equity and the rules of the common law, the rules of equity shall prevail? If the contract passes ownership, why be at the expense of a conveyance? Is it either law or equity at the present moment that a mere contract to sell land passes the ownership in land, passes a *jus in rem* from the vendor to the purchaser?

No, the thesis that I have to maintain is this, that equitable estates and interests are not *jura in rem*. For reasons that we shall perceive by and by, they have come to look very like *jura in rem*; but just for this very reason it is the more necessary for us to observe that they are essentially *jura in personam*, not rights against the world at large, but rights against certain persons.

I need not here repeat how in the fifteenth century it became common for landowners to enfeoff their friends to the use of them, the feoffors, or describe the reasons why this was done—to evade the Statute of Mortmain, to evade feudal dues and forfeitures, to evade the rights of creditors, to acquire a power of disposing of lands by will; nor need I say how the Chancellors enforced these uses, how a statute of 1535 (27 Hen. VIII, c. 10) tried to put an end to the system, or how the old use reappeared under the newer name of trust. Rather let us notice that from the very first the Chancery began to adopt the rules of common law as a model in its dealings with the rights of those for whom lands or chattels were held in use or trust—let us say for the rights of 'beneficiaries.' The beneficiary was treated as having an estate in fee simple, or in fee tail or for life in the use or trust, an equitable estate; or as having a term of years in the use or trust. These estates and interests were to devolve and be transmitted like the

[1] The Judicature Act came into operation on Nov. 1st, 1875.

analogous estates and interests known to and protected by the common law. The equitable fee simple would descend to heirs general, the equitable estate tail to heirs in tail, equitable chattel interests would pass to the executors or administrators. In all such matters the analogies of the common law prevailed; the Chancery moulded equitable estates and interests after the fashion of the common law estates and interests.

The equitable estate or interest could be conveyed or assigned *inter vivos*. Until the Statute of Frauds (29 Car. II, c. 3) it could be conveyed or assigned by word of mouth. The 9th section of that Act says that all grants and assignments of any trust or confidence ['any' you will observe—whether the subject-matter of the trust be land or personal property] should be in writing signed by the party granting or assigning the same [observe, nothing about an agent], or by his last will, or otherwise should be utterly void and of none effect. That is the law now-a-days. Observe that a deed is not required even for the conveyance of an equitable fee simple.

Then again equitable estates or interests, if they are of such a kind that they do not expire with the death of the *cestui que trust*, can be devised or bequeathed by him. Exactly the same solemnities are required of a will that is to pass such an estate or interest as of a will that is to pass the legal estate in land or the legal ownership of goods.

The best because an extreme application of this principle, that equity follows the law, is perhaps to be found in the treatment of equitable estates tail. Legal estates tail could be barred by fictitious proceedings known as common recoveries. How were equitable estates tail to be barred? After some fluctuations of opinion, it was decided, though not I think until about the beginning of the eighteenth century, that the analogies of the common law must be strictly pursued:—there must be an equitable recovery; the beneficiary having the first equitable estate of freehold must make an equitable tenant to the praecipe, and thus equitable estates tail and the equitable remainders dependent on them might be barred[1]. Even in its fictions and its archaic mysteries the common law was to be the model.

[1] See Lewin on Trusts, 11th edition, pp. 869 *et seq.*

There were, however, some exceptions, and a few words about these will make the point clearer.

(1) In the matter of curtesy equity followed the law. When the law gave curtesy of a legal estate, equity gave curtesy of a corresponding equitable estate. It even gave curtesy when the fee simple was settled to the separate use of the married woman. But after some hesitation it refused to create equitable dower. The reason, I take it, was that dower had become an intolerable nuisance; when once dower had attached it could not be got rid of without a fine. This exception was abolished by the Dower Act of 1833 (3 and 4 Will. IV, c. 105); it gave equitable dower of equitable estates; but at the same time it utterly altered the whole nature of dower.

(2) As regards equitable contingent remainders, if such they ought to be called, equity did not adopt the corresponding legal rules, and does not now adopt them. This point is still of some importance and I hope to speak of it on another occasion. The rules of the common law about this matter had long ago ceased to be reasonable, and there was a good excuse, as we shall see hereafter, for refusing to extend them to a new and substantially different class of rights.

(3) There was no escheat of equitable estates. Suppose land conveyed unto and to the use of T and his heirs in trust for E and his heirs; E dies without having disposed of his estate and without an heir. Nothing escheated to the lord; he had a tenant T and he was entitled to no more; T might now hold the land beneficially, the trust was gone and he was simply owner. However it took a great case (*Burgess* v. *Wheate*, 1 Eden, 176) to decide this point and it was decided against the opinion of Lord Mansfield, who was for carrying out the legal analogy. And now the Intestates Estates Act of 1884 has removed this exception: there can now be escheat of equitable estates; the trustee may have to hold in trust for the feudal lord.

These exceptional cases, two of which have been abolished and the third of which—that about contingent remainders—has no longer its old importance, will be sufficient to illustrate the wide generality of the rule that equity has permitted the creation of equitable estates and interests which so far as

regards their transmissible and inheritable quality are copies of legal estates and interests.

And so again as to the rights of creditors legal analogies have been pursued. Gradually—but I do not think that this goes back beyond the Restoration—it was established that the creditor of a beneficiary might get at the equitable estate or interest by means of *fi. fa.* or *elegit.* Having got his writ of *fi. fa.* or *elegit* he might go into the Chancery and there attack the equitable rights of his debtor. But the legal analogies were strictly pursued. Before a statute of 1838 (1 and 2 Vic., c. 110, sec. 12) the judgment creditor had no means of getting at stock in which the debtor had a legal interest, for stock could not be seized under a *fi. fa.*; even so he was denied a means of getting at stock in which the debtor had a merely equitable interest. So the *elegit* would enable him only to get at a moiety of the land in which the debtor had an equitable estate.

We may well say therefore that a *cestui que trust* has rights which in many ways are treated as analogous to true proprietary rights, to *jura in rem.* But are they really such?

We must begin with this that the use or trust was originally regarded as an obligation, in point of fact a contract though not usually so called. If E enfeoffs T to his (E's) use the substance of the matter clearly seems to be this that T has undertaken, has agreed, to hold the land to the use of E.

To my mind it is much easier to understand why the Chancellors of the fifteenth century should have enforced such a compact than why the courts of law should have refused a remedy. Why should they not have given an action of *assumpsit*? (See on this question, Pollock, *Land Laws,* Note E.) The action of *assumpsit* was just being developed when uses were becoming fashionable. It would I think be found that the Chancellors were beforehand in this matter and, by giving a far more perfect remedy than the common law courts could give, made any remedy in those courts unnecessary. All that the *cestui que use* could have obtained from them would have been an action for damages; the Chancellor compelled the feoffee not only to answer any

complaint on oath but also to perform his duty specifically on pain of going to prison. Anyhow a *cestui que use* or *cestui que trust* never got an action at common law against his trustee; but all the same it seems utterly impossible for us to frame any definition of a contract which shall not include the acts by which ninety-nine out of every hundred trusts are created, unless we have recourse to the expedient of adding to our definition of contract a note to the effect that the creation of a trust is to be excluded. This is excellently explained by Sir Frederick Pollock[1]. We are, as I think, obliged to say that though our definition of contract will include almost every act creating a trust, yet, for historical reasons which still have an important influence on the whole scheme of our existing law, trusts are not brought within all, or even perhaps the larger part, of the great principles which form the Law of Contract, but have rules of their own. Thus, to give one example, though as I have just said ninety-nine out of a hundred trusts begin in a transaction which must fall within our definition of an agreement, the hundredth will not; for I can make myself a trustee for a person, and so create a trust, without his knowing anything about it, by a declaration that I hold lands or goods in trust for him. Certainly as a matter of convenience it seems desirable to keep the Law of Trust apart from the Law of Contract, though as a matter of principle it is necessary to see, as we shall see hereafter, that there are important analogies between the two.

However our present point must be that the Law of Trusts (formerly Uses) begins with this, a person who has undertaken a trust is bound to fulfil it. We have no difficulty in finding a ground for this—the trustee, the feoffee to uses, is bound because he has bound himself. This is the original notion. The right of *cestui que trust* is the benefit of an obligation. This is how Coke understood the matter. 'An use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land...*cestui que use* had neither *jus in re* nor *jus ad rem*, but only a confidence and trust.' (Co. Lit. 272 b.)

[1] *Principles of Contract*, 7th edition, pp. 208–9.

But if this be so, why is it that the rights of *cestui que trust* come to look so very like real proprietary rights, so like ownership, so that we can habitually speak and think of him as the owner of lands and goods? Part of the answer has already been given. As regards (if I may be allowed the phrase) their internal character these equitable rights are treated as analogous to legal rights in lands or goods—I mean as regards duration, transmission, alienation. But the whole answer has not yet been given. We are examining the external side of these rights, asking against whom they are good, and we shall find that even when examined from this point of view they are like, misleadingly like, *jura in rem.*

In this development we may trace several logical stages:—

(i) The first is reached when the *cestui que trust* has a remedy against the person who has undertaken to hold land or goods on trust for him.

(ii) A second step is easy. The use or trust can be enforced against those who come to the land or goods by inheritance or succession from the original trustee, against his heir, his executors or administrators, against the trustee's doweress. Such persons may be regarded as sustaining wholly or partially the *persona* of the original trustee and being bound by his obligations as regards the proprietary rights to which they have succeeded.

(iii) A third step is to enforce the trust against the trustee's creditors—*e.g.* against the trustee's creditor who has taken the land by *elegit.* There seems to have been a good deal of difficulty about this step—more than we might have supposed—and it was not taken finally until after the Restoration in 1660. Just at the same time the Court of Chancery was beginning to insist that the *cestui que trust's* creditors could attack his equitable rights. However it became well established that these rights were good against the creditors of the trustee[1].

(iv) What shall we say of the trustee's donee, of one to whom the trustee has given the thing without valuable consideration? He has not entered into any contract with *cestui que trust* or into anything at all like a contract; he may be

[1] See *e.g. Finch* v. *Earl of Winchilsea*, 1 P. Wms. 277.

utterly ignorant of the trust. Nevertheless this step was taken, and as it seems at an early period. The right of *cestui que trust* was enforced against any person who came to the thing through or under the trustee as a volunteer—*i.e.* without valuable consideration, even though he had no notice of the trust. We see the *cestui que trust's* right beginning to look 'real.'

(v) A fifth step was taken and this also at an early time. The trust was enforced even against one who purchased the thing from the trustee, if he at the time of the conveyance knew of the trust. What is the ground for this? The old books are clear about it, the ground is fraud or something akin to fraud. It is unconscientious—'against conscience'—to buy what you know to be held on trust for another. The purchaser in such a case is, we may well say, liable *ex delicto vel quasi.* He has done what is wrong; has been guilty of fraud, or something very like fraud.

(vi) Having taken this step, another is inevitable. If we stop here purchasers will take care not to know of the trust. To use a phrase used in the old reports, they will shut their eyes. The trust must be enforced against those who would have known of the trust had they behaved as prudent purchasers behave. Thus, to use the term which Holmes has made familiar[1], an objective standard is set up, a standard of diligence. It is not enough that you should be honest, it is required of you that you should also be diligent. To describe this standard will be my object in another lecture. Here it must be enough that it was and is a high standard—the conduct of a prudent purchaser according to the estimate of equity judges. If a purchaser failed to attain this standard, to make all such investigations of his vendor's title as a prudent purchaser would have made, he was treated as having notice, he was 'affected with notice,' of all equitable rights of which he would have had knowledge had he made such investigations: of such rights he had 'implied notice,' or 'constructive notice.' We arrive then at this result, equitable rights will hold good even against one who has come to the legal ownership by purchase for value, if when he obtained

[1] *The Common Law, passim.*

the legal ownership he had notice express or constructive of those rights.

But here a limit was reached. Against a person who acquires a legal right *bona fide*, for value, without notice express or constructive of the existence of equitable rights those rights are of no avail. I will read one passage in which James L.J. stated this in forcible terms. In the case of *Pilcher* v. *Rawlins*, L.R. 7 Ch. 259, at page 268, he said this: 'I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and according to my view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained. In such a case the purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.'

How could it be otherwise? A purchaser in good faith has obtained a legal right. In a court of law that right is his: the law of the land gives it him. On what ground of equity are you going to take it from him? He has not himself undertaken any obligation, he has not succeeded by voluntary (gratuitous) title to any obligation, he has done no wrong, he has acted honestly and with diligence. Equity cannot touch him, because, to use the old phrase, his conscience is unaffected by the trust.

The result to which we have attained might then, as it would seem, be stated in one of two alternative ways.

(1) *Cestui que trust* has rights enforceable against any person who has undertaken the trust, against all who claim through or under him as volunteers (heirs, devisees, personal representatives, donees) against his creditors, and against those who acquire the thing with notice actual or constructive of the trust.

Or (2) *Cestui que trust* has rights enforceable against all save a *bona fide* purchaser ('purchaser' in this context always includes mortgagee) who for value has obtained a legal right in the thing without notice of the trust express or constructive.

Of these two statements the second form is now the more popular, but I should prefer the first—I should prefer an enumeration of the persons against whom the equitable rights are good to a general statement that they are good against all, followed by an exception of persons who obtain legal rights *bona fide*, for value and without notice. A statement in the former form is I think preferable because it puts us at what is historically the right point of view—the benefit of an obligation has been so treated that it has come to look rather like a true proprietary right—and it might still be rash to say positively that purchasers without notice are the only owners against whom the equitable rights are invalid. It is extremely probable that until 1834, until the statute 4 and 5 Will. IV, c. 23, equitable rights could not be enforced against a lord coming to the land by way of escheat upon the death of the trustee[1]. This curious little point is very instructive. A trustee in fee simple died intestate and without an heir; the legal estate escheated to the lord. What equity was there against the lord? He did not claim through or under the trustee, and his conscience was not affected by the trust. The point is now unimportant, because the Act just mentioned, now replaced by later Acts, provides for the continuance of the trust even though there is an escheat of the legal estate. We have already seen a statutory alteration of the converse rule which declared that of an equitable estate there was no escheat.

So late as the time of Coke a corporation was not bound by a trust (and to this day it is said that a corporation cannot take to the use of another).

[1] See Challis, *Law of Real Property*, 2nd edition, p. 36.

And there were others against whom the trust could not be enforced; it could not be enforced against one who claimed the thing by title adverse to the title of the trustee. Land, let us say, was given to T upon trust for E, but P was in possession asserting a different title, asserting, let us say, that the creator of the trust was not owner of the land; E could not sue P in Chancery and enforce the trust against him; T had to recover the land at law before the trust could be carried out; E's right was not a right to obtain the land from P; but if T would not bring an action against P, then E could proceed in Chancery to compel T to assert his (T's) legal right, or he might obtain permission to bring the action in T's name. In other words, as Lewin says (*Trusts*, 11th ed. 275), 'a disseisor is not an assign of the trustee either in the *per* or *post*, for he does not claim through or under the trustee, but holds by a wrongful title of his own.' Since the Judicature Acts we cannot have that circuitous procedure by which E went to Equity in order to compel T to enforce rights at law; but still the principle of course holds good, if the land is to be recovered from P who is in no wise bound by the trust, it must be proved that T has a superior title.

The case of *In re Nisbet and Potts' Contract*, 1906, 1 Ch. 386, decides for the first time that the Court of Chancery will enforce an equitable right against a disseisor—against a squatter—who has acquired title by lapse of time. But this is a case which we shall have to consider later on[1].

Sir Frederick Pollock says, and as I think with justice, 'The true way to understand the nature and incidents of equitable ownership is to start with the notion not of a real ownership which is protected only in a court of equity, but of a contract with the legal owner which (in the case of trusts properly so called) cannot be enforced at all, or (in the case of constructive trusts, such as that which arises on a contract for the sale of land) cannot be enforced completely except in a court of equity[2].'

[1] See *infra*, p. 169.

[2] *Principles of Contract*, 7th edition, p. 209.

LECTURE X.

THE NATURE OF EQUITABLE ESTATES AND INTERESTS. (II.)

EQUITABLE estates and interests are rights *in personam* but they have a misleading resemblance to rights *in rem*. This resemblance has been brought about in the following way. The trust will be enforced not only against the trustee who has accepted it and his representatives and volunteers claiming through or under him, but also against persons who acquire legal rights through or under him with knowledge of the trust—nor is that all, it will be enforced against persons who acquire legal rights through or under him if they ought to have known of the trust. The Court of Chancery set up a standard of diligence for purchasers and a high one, one so high that it certainly is difficult for a purchaser to buy land without obtaining constructive notice of all trusts which concern that land. Still now and again the difficulty is surmounted, and then the true character of equitable rights becomes apparent—a purchaser acquires a legal right *bona fide*, for value, and without notice either actual or constructive of the trust, and he holds the land successfully against *cestui que trust*, and *cestui que trust* may then comfort himself with the reflection that the land never was his.

The defence of 'legal estate by *bona fide* purchase for value without notice' is not, you should understand, a merely personal defence flowing from the moral merits of the purchaser and competent only to him; it is competent to all who claim through or under him even though they have notice of the equitable rights. Thus T holds land in trust for A; T sells and conveys to X who purchases and obtains the legal estate *bona fide* for value and without notice; X then sells the land to Y, and Y when he takes the conveyance has notice of the trust. None the less Y is protected against

the trust and may ignore it. The rule is put thus 'A purchaser with notice from a purchaser without notice is exempt from the trust, not from the merits of the second purchaser but of the first; for if an innocent purchaser were prevented from disposing of the' land 'the necessary result would be a stagnation of property[1],' that is to say we decide that X is legal owner, that there is no equity against him, that he is owner at law and in equity; it follows that he may convey his rights to another, otherwise A by an advertisement in the *Times* might deprive X, a legal and equitable owner, of that power of selling that is incidental to ownership. If by any chance the land comes back to T, the trustee, then A's rights in the land (if we are to call them rights in the land) revive —T is holding the subject-matter of the trust, and is bound to hold it upon the trust—*sed quaere de hoc*[2].

I have said that the standard of diligence required of purchasers is high, so high that a purchaser without notice of equitable rights is not a very common object of the law courts.

How was this standard fixed? The starting point is here:—Quite apart from any doctrine of equity, a prudent purchaser (or mortgagee) of land will investigate his vendor's (or mortgagor's) title. Further a vendor of land who contracts to sell it, contracts to show a good title. This is a legal contract enforceable at law by an action for damages[3]. If the vendor fail in his part of the contract, the purchaser is not bound to fulfil his part. Rules were evolved as to what title must be shown. For instance as to length of title, it became settled that, in the absence of any bargain to the contrary, the vendor had to show a 60 years title. The origin of this rule may perhaps be found in the Statute of Limitation, 32 Hen. VIII, which limited 60 years as the time within which a writ of right must be brought. The rule was altered by the Vendor and Purchaser Act, 1874, which substituted 40 years

[1] Lewin, 11th edition, p. 1077.

[2] *Quaere, e.g.*, if T gets back the land only as trustee under some new trust, or as executor of such a trustee.

[3] But remember that these damages are narrowly limited, *Bain* v. *Fothergill*, L. R. 7 H. of L. 158 (1874).

for 60 as the time for which good title must be shown. That Act and the Conveyancing Act of 1881 made other changes tending to absolve the vendor who sells without special stipulations from many of the heavy obligations to which the common law subjected him—they were heavy; indeed to sell land without special conditions as to title, and evidence of title, was an act of extreme rashness. But our present point must be to notice that if there had never been any such thing as equity a prudent purchaser would have investigated his vendor's title—he would have done so in order to see that the vendor had an estate to sell, that there were no legal charges on the land, no legal rent-charges for example, for against such legal rights it would be no defence to say 'I purchased in good faith.' Now equity required of purchasers that they should make that investigation of title which a prudent purchaser would have made and which a purchaser on an open contract (*i.e* a contract without special terms) would have been entitled to make. The purchaser was deemed to have notice of all equitable rights the existence of which he would have discovered if he had made such an investigation. The standard was high. According to the view taken by equity judges the prudent purchaser of land was one who employed a solicitor—and certainly this view was defensible. In the days of fines and recoveries a prudent purchaser would in his own interest have employed a highly trained adviser, and, even with all our modern reforms, the average man could not yet be counselled to carry through a purchase without legal aid. But in reading some of the cases about constructive notice we may be inclined to say that equity demanded not the care of the most prudent father of a family but the care of the most prudent solicitor of a family aided by the skill of the most expert conveyancer.

For some years past indeed there has been a noticeable inclination against extending and even towards contracting the range of constructive notice, and in 1882 Parliament attempted to define the doctrine.

The Conveyancing Act of 1882, sec. 3, said this:—'A purchaser shall not be prejudicially affected by notice of any instrument fact or thing unless—

(i) It is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him ; or

(ii) In the same transaction with respect to which a question of notice to the purchaser arises it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.'

How far this altered the existing rules of equity remains to be seen. Probably it altered them in one respect of which a word may be said in passing. Of course equity held that as a general rule notice, constructive notice, to the purchaser's agent was notice to the purchaser. Of course, on the other hand, it could not go so far as to say that if a solicitor acting in one transaction gained notice of a fact, every client of his in every other transaction would be affected by notice of that fact: to have so held would have been to say in effect that no one can safely employ a solicitor or counsel in large practice, for he will have had notice of thousands of equities. But there was a small group of cases in which it had been said that the transactions might be so closely connected that notice gained by the agent in one of them might be ascribed to the principal in the other of them. Now the section before us seems definitely to strike at this particular doctrine. If notice to the agent is to be notice to the principal it must have been acquired actually or constructively in the same transaction. Having regard to the previously existing rules we must I believe regard as emphatic those words 'in the same transaction.' But, to pass from this comparatively small point, it will be seen that our legislators have not told us very much—they refer to such inquiries and inspections as 'ought reasonably' to have been made. In so doing the statute seems but to state the pre-existing law. I do not think that any equity judge would have acknowledged that he required of a purchaser more than was reasonable. Perhaps, however, the section may serve as an excuse for rejecting

some of the more extreme applications of the doctrine. As already said constructive notice has been little favoured of late.

In the case of *Bailey* v. *Barnes*, 1894, 1 Ch. 25 it was said by Lord Justice Lindley (at page 35) 'The Conveyancing Act, 1882, really does no more than state the law as it was before, but its negative form shows that a restriction rather than extension of the doctrine of notice was intended by the Legislature.'

'"Ought" here does not import a duty or obligation; for a purchaser need make no inquiry. The expression "ought reasonably" must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances.'

This was approved by the Court of Appeal in the case of *Taylor* v. *London and County Banking Company*, 1901, 2 Ch. 231 (see at page 258); and at page 259 Lord Justice Stirling, with reference to this doctrine, said 'the Conveyancing Act, 1882, has introduced very considerable modifications, to which the Court is now bound to give effect.'

You should understand that this doctrine of constructive notice had given rise to a number of sub-rules of a more or less positive kind, which were generally expressed in the form 'Notice of x is notice of y.' In a court of equity there was no jury—to whom the question of what is reasonable could be left as a question of fact. Thus every decision that A was or was not 'fixed' with notice of a trust tended to generate or define a rule, and could be regarded as a precedent. By way of illustration I may refer to *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221 (1885). It was so much the practice for every woman who had property to have that property settled on the occasion of her marriage, that there was some ground for a contention that if a purchaser found that the property of a married woman had been dealt with as though there had been no settlement, he was bound to inquire whether there had not been a settlement—in other words that notice of a woman's marriage would be notice of a settlement. In the case just cited counsel, not without some show of authority, tried to convince Pearson J. that this was so; but he refused to be convinced. 'I am not aware,' he said, 'of any pre-

sumption of law that when a woman marries she will settle her leasehold property.'

As another illustration take *Hunt* v. *Luck*, 1902, 1 Ch. 428, decided by Farwell J. and affirmed by the Court of Appeal, where it was held that the occupation of land by a tenant affects a purchaser of the land with notice of all that tenant's rights, but not of his lessor's title or rights.

As to a tenant's legal rights—*e.g.* in a legal term of years—absence of notice is not to the point, they stand independently of notice; but as to the tenant's equitable rights—*e.g.* under an agreement for a lease, not giving the legal term of years—here notice is all-important, and the fact that a tenant is in occupation is constructive notice of all the equitable rights that he has.

The case of *Hunt* v. *Luck* was an attempt to extend this, and to say that such occupation gives constructive notice of the rights of that tenant's lessor. The facts were these. X is buying land from A; M is in possession; M pays rent to a house agent, who pays over the rent to B in a manner inconsistent with A's title. It was held that the occupation by M does not give X constructive notice of B's equitable rights. Thus we get to a rule—Occupation by a tenant is constructive notice of all the tenant's equitable rights, but is not constructive notice of the rights of some other person to whom the tenant pays rent. The purchaser was not bound to follow up the trail through the house agent though thereby he might have come upon a fraud perpetrated by his vendor. But if he had in fact learnt that the rent was being paid to someone whose receipt was inconsistent with the title of his vendor then that would be notice to him of that person's rights.

By a curious convention it is clearly settled that the fact that people are lending money jointly is not notice that they are trustees. In fact it is pretty certain that they will prove to be so.

If I agree to accept a shorter title than 40 years I still get notice of what I should have discovered if I had fully investigated the 40 years title. The imaginary reasonable man never takes less than a 40 years title. So in the case of

Patman v. *Harland*, 17 Ch. D. 353, it was held that a lessee got notice of what was discoverable if the lessor's title was investigated (and having constructive notice of a deed had constructive notice of the contents of it). This remains so even though since the Vendor and Purchaser Act, 1874, the lessee can not, on an open contract, ask for the lessor's title. He is treated as if he had before the Act stipulated not to inquire into his lessor's title[1].

There is danger in making unnecessary inquiries as is shown by the case of *Jared* v. *Clements*, 1903, 1 Ch. 428.

Though a large number of sub-rules have been thus established, rules which constitute a great part of the learning of conveyancers, still from time to time we see that they are but applications of a general rule, a rule which is now expressed in the Statute Book. We can see also from time to time that the historical basis of the whole elaborate structure is the prevention of fraud. A good illustration of this is given by *Kettlewell* v. *Watson*, 21 Ch. D. 685 (1882). In that case there was a question whether a purchaser had acquired constructive notice of an equitable right. The purchaser had indeed done very little. He employed no solicitor of his own, but allowed the vendor's solicitor to prepare his conveyance; he made no inquiry about the title or the deeds. But he purchased a very small plot, and his whole purchase money was but £42. Now if these rules about constructive notice were rules of property law, these last facts, the small extent of land, the small amount of the price, could hardly be of importance. But Fry J. (p. 708) treated them as of the greatest importance. The purchaser had done all that could reasonably be required of him considering what he was buying, 'the costs of an investigation of title would have been so onerous as no doubt to have made the purchase impossible.' In the same case we find the judge going back to an old classical case of *Le Neve* v. *Le Neve* (1 Amb. 436) decided by Lord Hardwicke—'Consider,' said Hardwicke, 'what is the ground of all this....The ground is plainly this:—that the

[1] This is the accepted opinion, although it seems difficult to reconcile such a rule with the express words of section 3 (i) of the Conveyancing Act, 1882 (*ante*, p. 125). Edd.

taking of a legal estate after notice of a prior right makes a person a *mala fide* purchaser....This is a species of fraud and *dolus malus* itself; for he knew that the first purchaser had the clear right of the estate, and after knowing it he takes away the right of another person by getting the legal estate....' Fraud or *mala fides* is the true 'ground on which the Court is governed in the cases of notice.' And then Fry J. speaks of 'that wilful shutting of the eyes' which is treated as equivalent to fraud and he absolves the purchaser of this, in consideration of the smallness of the transaction. Now to a true proprietary right we never hear the defence 'Is it not a little one?'

The case of *Battison* v. *Hobson*, 1896, 2 Ch. 403, is an illustration of the length to which the doctrine of notice was formerly carried; it was allowed practically to deprive of value the old Registry Acts for Middlesex and Yorkshire. A person who knows or ought to know of a prior charge shall not get priority over that charge by registration. Therefore he may be put to inquiry of what is not on the Register. The Yorkshire Registries Act of 1884, however, expressly declares that priority given to registered assurances by the Act shall have full effect except in cases of actual fraud. A strenuous attempt was made to induce the Court to hold that the Act had not altered the previous law but it was unsuccessful. Stirling J. said, at page 412 of the report, '"Actual fraud" I understand to mean fraud in the ordinary popular acceptation of the term, *i.e.* fraud carrying with it grave moral blame.' He held that it would be fraudulent for a solicitor to insist on priority over his client whose interest he was bound to protect, but that it would be otherwise if there were no fiduciary relationship between the two claimants.

Let us now see this difference between legal and equitable rights in its practical operation. We will put two cases which in the eyes of the moralist may seem closely similar but between which the lawyer will see a vast difference. (1) A is tenant in fee, B is occupying his land as his tenant at will; B forges a complete set of title deeds showing that he is tenant in fee; he sells the land to X; X diligently investigates the title, finds nothing suspicious; pays his purchase money and takes a conveyance. (2) T is tenant in fee holding land in

trust for S; T forges title deeds concealing the trust and showing him to be simply tenant in fee subject to no equitable liability; he sells to Y, who investigates the title; the forgery is clever and it deceives him, he pays his money and takes a conveyance. The two cases may be like enough to the moralist, but how different to the lawyer. In the first A is legal owner of the land and X has had the misfortune to buy from one who had nothing to sell, to take a conveyance from one who had nothing to convey. In the other case the purchaser is the legal owner of the land, and having come to legal ownership *bona fide* for value and without notice, actual or constructive, of S's rights, S has no equity against him; S's only remedy is against the fraudulent trustee.

Observe now that this is the effect of the legal estate. Suppose that in the second of the two cases, after the fraudulent trustee has contracted to sell, the *cestui que trust* hears of this and informs the purchaser of it before the purchaser gets the legal estate. Now the case is very different even if the purchase money has been paid. Neither purchaser nor *cestui que trust* has legal ownership; the *cestui que trust's* right is merely equitable, the purchaser's right in the land is merely equitable; the *cestui que trust's* right is the older right and it prevails. As between merely equitable interests in land the rule is '*qui prior est tempore potior est jure*'—the older equity is the better. But let the purchaser get the legal estate without notice, there is no place for this maxim. The rights concerned are, if I may so speak, rights of different orders; the purchaser is legal owner and the *cestui que trust* has no means of attacking him. One would hardly have guessed this from Austin's talk about a contract to sell land passing a *jus in rem*.

We have now come upon the main clues to the complicated labyrinth of cases about 'priorities.' It happens with unfortunate frequency that a man having title to land contrives by means of fraudulent concealment to get money from a number of different persons on the security of the land—then disappears—and the lenders are left to dispute among themselves as to the order in which they are to be paid out of the value of land which is insufficient to pay all of them.

In such cases these two rules have to be held in mind. First:—As between merely equitable rights the oldest prevails. Secondly:—No merely equitable right can be enforced against one who has acquired a legal right *bona fide*, for value, and without notice. And if these two rules be remembered the cases will become intelligible. If on the other hand we begin thinking of equitable interests as rights in land—proprietary rights—much will be unintelligible.

A neat case is *Cave* v. *Cave*, 15 Ch. D. 639. It comes to this:—T is a trustee of money for A; in breach of trust he purchases land with it and has it conveyed to himself. Stopping there, A has an equitable interest in that land, T is a trustee for him, and A could enforce his right against a purchaser from T who had notice of that right. But T mortgages to X who has no notice (in this case it is easy for him to have no notice) of A's right and the mortgage is a legal mortgage. Then T mortgages to Y who also has no notice of A's right; but the mortgage to Y can only be an equitable mortgage, for X has got the legal estate. Now in what order shall we place A, X, Y? In this order—X, A, Y. We place X first; he has the legal estate and got it for value and without notice. A cannot attack him. As between A and Y order of time settles order of right, for they have both but equitable interests.

These two are not the only rules. There are some others; for a man may lose the priority that he has got. I may illustrate this by a problem set in the Law Tripos.

A lends money to B, a solicitor, on security of a legal mortgage of freeholds and with the mortgage receives possession of the title deeds. A subsequently lends the title deeds to B on a fraudulent representation by him that he desires to prepare an abstract of title and conditions of sale in order to sell and pay off the debt. B then borrows a further sum from C depositing the deeds with him as security—and soon after absconds. The property will only suffice to pay A or C. Is A's security postponed to C's? What is the rule as to loss of priority? Would A's position be different if his mortgage had been an equitable one merely?

Now why should A's security, whether it be legal or merely

equitable, be postponed to C's? The suggestion of course is that A has been guilty of some negligence or imprudence in allowing B to get the title deeds, that he enabled B to commit a fraud, that he ought therefore to be postponed to C. There have been many cases about this matter. It has often been before the Courts of late and a strong line has been drawn between the conduct which will deprive a legal charge of its priority, and that which will deprive a merely equitable charge of its priority.

To return to the case taken from the examination paper. It seems quite certain that the legal mortgagee will not lose priority by mere negligence—but he will lose it by participating in fraud. Gross negligence may be evidence of fraud.

It seems probable that the equitable mortgagee may lose priority by negligence. The old cases were this way; the opposite was held by Kay J. in *Taylor* v. *Russell*, but great doubt was thrown on this by the opinions of the law lords when that case came before them (1892, A.C. 244).

In our case there seems nothing to show that there was participation in fraud. Within the dicta the representation was a reasonable one, *i.e.* we can hold that a reasonable man might believe it. Therefore if the mortgage to the solicitor were legal we don't postpone, for we don't infer fraud. The reasonableness of the representation—*i.e.* its believableness—here comes in to negative fraud.

But suppose the mortgage equitable. Can we acquit the mortgagee of negligence? *Semble que non.* He ought not, I think (as a matter of prudence), to let deeds get into the mortgagor's hands on any pretence—even though the pretext is such as a man might well believe to be true. I think a court would say so. He may very properly believe what the mortgagor says. If so he will employ a solicitor who will supply the mortgagor with an abstract or copies and will at the proper time produce the originals to a purchaser—but a prudent mortgagee does not let deeds get into the hands of the mortgagor. We cannot say that a suspicion of fraud ought to have been aroused, but we can say that it is careless to part with the deeds.

As regards the postponement of a legal charge, *Northern*

etc. Fire Insurance Co. v. *Whipp* (1884), 26 Ch. D. 482 is the most important modern case. It was there laid down that the Court will not postpone a legal mortgage to an equitable mortgage on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee[1]. It will however postpone a legal to an equitable mortgage on the ground of fraud—it will do so (1) where the legal mortgagee has assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title deeds may be sufficient evidence where such conduct can not be otherwise explained; or (2) when the legal mortgagee has made the mortgagor his agent with authority to raise money and the security given for raising such money has by misconduct of the agent been represented as the first estate. In the case before us A, however careless he may have been, cannot I think be charged with conniving at a fraud. In the case just cited the Court of Appeal said that 'where the title deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, the legal mortgagee has retained his priority over the subsequent equities[2].' I think that the representation made by B in this case was within this language a reasonable representation, that is to say, a representation that a reasonable man might believe, namely that he wanted the deeds in order that he might sell the estate and pay off the mortgage.

But as to the postponement of merely equitable charges it is otherwise. Negligence is sufficient for this purpose[3]. This has been laid down by the Court of Appeal several times within recent years. *National Provincial Bank* v. *Jackson*, 33 Ch. D. 1, *Union Bank of London* v. *Kent*, 39 Ch. D. 238, *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182. In this case before us, and according to the authorities, I think that there was quite enough negligence to postpone A to C, had A's right been merely equitable.

[1] But see and compare *Oliver* v. *Hinton*, 1899, 2 Ch. 264, *Lloyd's Bank* v. *Jones*, 29 Ch. D. 221, and *Walker* v. *Linom*, 1907, 2 Ch. 104.

[2] 26 Ch. D at p. 492.

[3] See *infra*, p. 140.

Here then again we get a distinction between legal and equitable rights, and this is quite intelligible, for legal estates are proprietary rights, ownership or fractions of ownership, equitable rights are not. Negligence will not deprive one of ownership[1]. It is excessively negligent for one to leave one's purse on the counter of a shop, but one shall not for that reason lose ownership. Fraud or connivance at fraud is a different matter. But as between merely equitable claimants, the court can consider the moral merits of the parties—*qui prior est tempore potior est jure* is a natural rule where merits are equal, but negligence may be a ground for postponing an older to a younger equity.

But the Court of Chancery's respect for legal right may best be seen in the rules relating to the tacking of mortgages. A mortgages land first by legal mortgage to X, and then by equitable mortgage to Y; X now without notice of Y's right makes a further loan to A upon the security of his mortgage. X can get repayment of both his loans in priority to Y. That is one of the examples of tacking; but it is by no means an extreme one. A mortgages legally to X, then equitably to Y, then equitably to Z; Z when he made the loan had no notice of Y's right. Now if Z pays off and takes a transfer of X's mortgage he can get repayment not merely of the amount due on X's first mortgage, but also of the amount due on Z's third mortgage in priority to Y; he can, as is sometimes said, 'squeeze out the second mortgagee,' and he can do this even though in the interval he has obtained notice of Y's right. That is the strange part of the doctrine, he obtains priority for his own equitable charge by obtaining the legal estate after he has obtained notice of Y's equitable charge which had priority over his. Now one might have thought that equity would have shown its respect for legal rights sufficiently if it held that the person who took a legal estate without notice of an equitable right was protected against that right, and that no advantage should have been attainable by taking a convey-

[1] See *e.g. Farquharson Brothers* v. *King*, 1902, A.C. 325, and the authorities cited by Lord Macnaghten at pp. 336 and 337. 'If a person leaves a watch or a ring on a seat in the park or on a table at a café it is no answer to the true owner' (suing a *bona fide* purchaser) 'to say that it was his carelessness and nothing else that enabled the finder to pass it off as his own.'

ance of a legal right with notice of an equitable right. And indeed if Courts of Equity could begin again perhaps they would not carry the doctrine to this extreme. But the view taken seems to be that suggested by the phrase, *tabula in naufragio*, applied in some of these cases to the legal estate. Y and Z are both equally honest men, one of them must lose his money—here is a shipwreck—he who can lawfully come by a legal plank may save himself; the fact that Y's equitable right is older than Z's is not a sufficient reason for depriving Z of what he has obtained by his own diligence and the law of the land, namely, a true proprietary right.

This doctrine of tacking has fallen out of favour. An attempt was made to abolish it by section 7 of the Vendor and Purchaser Act, 1874, but the section which made the attempt was repealed in the next year by 38 and 39 Vic., c. 87, sec. 39. Modern cases have put some restraints on the doctrine, which at one time seemed to go to the great length of saying that the third mortgagee—always supposing that when he made his advance he had no notice of the second mortgage—might obtain priority over the second mortgagee by obtaining the legal estate in any fashion; but now it is held that if the holder of the legal estate is bound by a trust in favour of the second mortgagee, and the third knows this, the third can get no priority by means of a conveyance of that legal estate, which conveyance would be a breach of trust[1]. However the doctrine just stated about the three mortgages holds good. I quote it here as one extreme example of the respect paid by equity to the legal estate. It warns us forcibly that legal estates and equitable estates are not rights of one and the same order; they belong to different orders; the one is a right *in rem*, the other the outcome of an obligation, a trust, and of the rule that trusts can be enforced against those who when they obtain ownership know or ought to know of those trusts.

The case of *Taylor* v. *Russell*, 1892, A.C. 244, is an excellent illustration. The facts, slightly simplified, were these:—M, tenant in fee simple, gives a legal mortgage to N in fee simple: this includes, among other lands, Blackacre. But

[1] *Pilcher* v. *Rawlins*, L. R. 7 Ch. Ap. 268. *Harpham* v. *Shacklock*, 19 Ch. D. 207.

the parties seem not to have known that Blackacre was included in the mortgage, and the title deeds of Blackacre remained with M. Then M sold Blackacre to F and conveyed it to him in fee, nothing being said of the mortgage. F thus obtained the equitable fee simple in Blackacre. F determines to commit a fraud by mortgaging Blackacre twice over, to A and to X, representing to each that he gets a first mortgage. He forges title deeds by which one P conveyed Blackacre to him. This deed he produces to A's solicitor, who made no further inquiry, being satisfied that F had bought from P. A advanced his money and took a mortgage. Then F produced the true title deeds to X and got another advance, X taking a mortgage, and knowing nothing (and having no notice) of A's rights. Neither X nor A knew anything of N's legal mortgage. F vanishes, and Blackacre will not pay both A and X.

Stopping here we find that A and X both have merely equitable mortgages; A's is first in point of time, and will prevail unless we hold that A has been so careless in not investigating the forgery that he ought to be postponed to X. Kay J. who tried the action, thought that there had not been such negligence as would serve to postpone A to X. But owing to what happened it became unnecessary to decide this question. What happened was this:—X heard of N's legal mortgage, represented to N that he, N, did not require the security of Blackacre since the other lands were sufficient to secure the debt owed by M to N and asked N to let him, X, have the legal estate in Blackacre. N, who does not seem to have known until now that Blackacre was included in his mortgage, consented to give up his right in it, so he reconveyed Blackacre to M in order that M might convey it to X, and M did convey it to X. Before this transaction was completed M, N and X knew of A's rights. X then had got the legal estate. Did this give him priority over A? Held by the Court of Appeal and by the House of Lords that it did—albeit he got it without giving value for it, and although when he got it he knew of A's rights. It is impossible to explain such a case unless we remember that legal and equitable rights are rights of different orders.

You should read also the case of *Bailey* v. *Barnes*, 1894, 1 Ch. 25. The case, a little simplified, was this:—

Johnson, tenant in fee simple, mortgages land to Bristowe and Robins for £6000.

Next a judgment is recovered against Johnson by the plaintiff Bailey, who obtains an order for a receiver by way of equitable execution against Johnson's equity of redemption: in other words Bailey now acquires an equitable charge.

The mortgagees took possession. On the 21st of December, 1889, they transferred the mortgages to Barnes in consideration of some £6300, the amount of principal and interest.

On the 23rd of December, 1889, Barnes purporting to exercise the mortgagee's power of sale conveyed to Hannah Midgley, for the exact sum which he had paid, free from the equity of redemption. The apparent inference is that the equity of redemption was worth nothing. In fact Barnes was a mere nominee of Midgley and there had been no real exercise of the power of sale.

On the 4th of March, 1890 (3 months afterwards) Midgley mortgaged to X for £6000.

On the 29th of July, 1890, Midgley being dead, her executor agreed to sell the equity of redemption to Lilley for £2500, and on the 13th of August he conveyed it to Lilley for that sum. (Ought not Lilley to have said to himself 'I am treating as worth £8800 odd what three months ago a mortgagee sold for £6300, can that sale have been an honest transaction, were not Midgley and Barnes colluding to deprive Johnson of an equity of redemption which was not valueless?' However, the suspicions of his solicitors were not aroused, and this even though they saw a valuation at £8700, which had been made in January, 1890.)

On the 15th of August the plaintiff Bailey begins proceedings to set aside the sale by Barnes to Midgley. Stirling J. sets aside the sale. Then at this late hour, Lilley, knowing that the sale was invalid, paid off the £6000 mortgage and took a conveyance of the legal estate.

Two questions arose: (1) Had he notice of the fraud or impropriety at the time of his purchase of the equity of redemption? (2) If not, can he at this very late moment

save himself by means of the legal estate? It was held by Stirling J., and by the Court of Appeal, that the answer to the first question was No, and to the second question Yes.

Let us take the case of *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231. It is a very instructive case, and so let us read the whole story in the head note to the report in the Law Reports. That head note, as you see, covers more than two pages, but the bare facts are these:

In 1882 one T, a solicitor, took with his own money a mortgage by sub-demise of certain leaseholds.

In 1889, being then a trustee of the B settlement, he received and, without the knowledge of his co-trustee, fraudulently appropriated a sum of money belonging to that settlement, and by entries in his books purported to appropriate his own mortgage debt to make it good but he never communicated this to his co-trustee or to their *cestui que trusts*.

[In 1896, however, one of the *cestui que trusts* heard of the appropriation. He was a solicitor, and acted as such for the others, but though all were *sui juris* and absolutely entitled they never called for a transfer or made any inquiry as to the mortgage.]

In 1889 T was also a trustee of the T settlement.

In 1895 he had become sole trustee and N was appointed co-trustee with him. N inquired as to the trust funds. T represented the mortgage to be part thereof, and, at N's request, T drew up and executed a legal transfer of it to himself and N. N was ignorant of the B settlement, T acted as the solicitor and retained the deeds.

In 1897 T fraudulently deposited the deeds with the defendant bank as security for a debt and executed a deed-poll charging the debt on all his interest, binding himself to execute a legal mortgage, and appointing three officers of the bank as his attorneys to execute such legal mortgage on his behalf. The bank had then no notice of either settlement.

In 1898 T absconded. The bank received notice of the T settlement, but not of the B settlement. It thereupon caused its three officers to execute a legal mortgage to the bank.

Now let us analyse the case and consider the following points:—

Point 1. Do the rules as to realty apply, or those as to charges on debts or personal trust funds? If the latter rules apply notice determines priority, according to the rule in *Dearle* v. *Hall*[1].

It was held, of course, that mortgage debts charged on land are governed by the rules as to priorities applicable to interests in land, and so notice to the mortgagor is immaterial (*Jones* v. *Gibbons*, 9 Ves. 407)—just as leaseholds are treated as real estate for this purpose.

Point 2. Is there appropriation of the mortgage to B settlement, in other words did this mortgage belong in equity to the *cestui que trusts* of B settlement? Rigby L.J. said No. Stirling and Williams L.JJ. said Yes; and I think that the previously decided cases undoubtedly support the majority, though they have done a great deal of harm by introducing a questionable doctrine:—*Middleton* v. *Pollock*, 2 Ch. D. 104, *Sharp* v. *Jackson*, 1899, A.C. 419.

Therefore if all that had happened was T's bankruptcy, then the B *cestui que trusts* could have held the mortgage; though in this case it was not even an authorised security. But they are volunteers only; not purchasers for value.

Point 3. On the transfer of 1895 the legal estate vests in T and N. All the Lords Justices agreed that the transfer was for valuable consideration, as N had a right to sue T for the trust fund, which right he gave up when he accepted the mortgage. Such cases as *Thorndike* v. *Hunt*, 3 De Gex and J. 563, and *Taylor* v. *Blakelock*, 32 Ch. D. 560, establish that a person in the position of N must be treated as a purchaser for value.

Point 4. There was no actual notice of the appropriation to the B trust to trustees of the T trust as such. Was there constructive notice? It was contended that there was, but this question was held to be concluded by section 3 (ii) of the Conveyancing Act, 1882, for T did not acquire his knowledge as N's solicitor, nor in the preparation of the transfers to himself and N—'not,' to use the words of the section, 'in the same transaction in which a question of notice to the purchaser arises.'

[1] 3 Russ. 1.

Before the bank's mortgage the position therefore was that the legal estate was in the T trustees holding for value upon express trusts for the *cestui que trusts* of that settlement.

Point 5. The bank does not get the legal estate by the deed of 1897 executed by T. Later it did get a legal mortgage; the deed of 1898 executed by its three officials gave it the legal estate in an undivided moiety by severing the joint tenancy existing in T and N, the other moiety remaining vested in N. Can the bank use this legal estate in a moiety as *tabula in naufragio*?

Here the bank takes the legal estate in breach of an express trust binding on T, and it had actual notice of the trust at the time the transfer of this legal estate was executed by its officers in 1898. Where there is no such notice then the point is still open. There was of course no relation back of the legal estate to the deed of 1897, and it was held to be contrary to equity for the bank, with such notice, to get in the legal title against N or the T beneficiaries, and it was not allowed to gain any priority by virtue of having done so.

Point 6. But ought not the beneficiaries of the T settlement to be postponed for negligence—as regards the moiety of which the legal estate went to the bank—because the title deeds were left in T's possession? Probably among equities such postponement may take place upon the principles laid down in *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182 (1888). But it was held that there had not been such negligence as will postpone in this case, since a fiduciary relationship existed between them and T, the person left in possession of the deeds, and they had no ground to suspect any want of good faith on his part, *In re Vernon*, 33 Ch. D. 402 (1886).

The result is that as regards both moieties the bank has no priority over the T settlement, and can be compelled to give up the legal estate in the moiety obtained from T to the T trustees.

Point 7. There remains a struggle between the B settlement and the T settlement as to this moiety, the legal estate in which was thus vested in the bank.

B settlement got no declaration of trust nor any assignment of the legal estate. Its charge was first in time, and that

is all that can be said on that side—but it was not obtained for value. On the other hand the T beneficiaries (by their trustee N) are purchasers for value, with an express trust in their favour; this gives them the better right to call for the legal estate, and therefore having the better right to call for the legal estate they are entitled to the benefit of the legal title under the rule laid down in *Wilkes* v. *Bodington*, 2 Vern. 599 (1707).

The result therefore was the complete triumph of the T settlement, and the bank was directed to re-convey to the present T trustees the moiety of the legal estate, and also to deliver up to them the deeds relating to the property.

LECTURE XI.

THE NATURE OF EQUITABLE ESTATES AND INTERESTS. (III.)

By this time we shall have convinced ourselves, if we required conviction, that it is practically unsafe to regard equitable estates and interests as rights *in rem*, as ownership or fractions of ownership. As to what I may call the theoretic question, the question of appropriate classification, I will say one word more. I do not for one minute think that it should be part of our conception of a right *in rem*, that the person who has that right can never be deprived of it save by his own act. To say nothing of cases in which the law may force a sale of it upon him—cases in which, under our Lands Clauses Act or similar provisions, he is deprived of his land in order that a railway or the like may be constructed—there are other cases in which he may lose his right by the act and the wrongful act of another. Thus is it under our common law when one who is not the owner, and who even may be a thief, sells goods in open market to a *bona fide* purchaser; the owner's ownership is gone, the purchaser becomes owner. A similar result may be brought about under the Factors Act—a Factors Act of great importance was passed in 1889 and was largely repeated in the Sale of Goods Act, 1893. Some foreign codes go yet further and lay down that as regards moveables *possession vaut titre*—the *bona fide* purchaser from a possessor in general obtains ownership. Now at first sight these instances may seem analogous to the case of the person with an equitable estate who loses it when a *bona fide* purchaser acquires the legal estate for value and without notice; and I think it possible that the equitable doctrine may be historically connected with the doctrine about sales in market

overt. But really there is a marked difference between the two cases—in that of the sale in market overt the buyer gets ownership, but we do not conceive that he gets it from the seller, for the seller never had ownership; while the rule about the effect of a purchase in rendering equitable rights unenforceable is based on this that the trustee has ownership, and transfers it to the purchaser, and that there is no reason for taking away from the purchaser the legal right which has thus been transferred to him.

To come to practical applications. One maxim of prudence is this:—Never leave a legal estate outstanding however 'dry' it may be. Often enough land is conveyed or devised to trustees who at first have some active duties to perform—there may be charges to pay, children to be educated and the like—but after awhile the whole equitable estate becomes vested in one person of full age, who is in possession of the land; the trustee now has nothing to do but to convey the land according to the directions of this *cestui que trust*; very probably the very existence of this legal estate is forgotten; on the trustee's death it passes to his devisee or heir, or since the Conveyancing Act, 1881 (sec. 30), to his personal representatives, and perhaps it goes on devolving from one set of representatives to another—it is as 'dry' a legal estate as dry can be—it looks like the ghost of a departed right. Nevertheless if you are buying or taking a mortgage from the *cestui que trust*, from the person who seemingly is to all intents and purposes the real and only owner of the land, do not be persuaded to leave that legal estate outstanding, but insist on having a conveyance of it. For think what will be your position if it is conveyed to someone who can say 'I have bought the land and obtained the legal estate *bona fide* for value and without notice of your merely equitable rights.'

Another practical rule is this—Have as little to do with second mortgages as possible, for think of the possibility that a charge later than yours may be tacked to the legal estate and that you may be squeezed out. Yet another rule is that if you do take a second mortgage you should at once give notice of it to the first mortgagee for this will at all events prevent his tacking a subsequent advance.

Thus far we have been dealing with land. The rules which decide the priority of equitable charges on personal trust funds are different to those which relate to charges on land. As regards equitable charges on land the general rule is that they rank in order of date, but as regards charges on personal trust funds, the general rule is that they rank according to the order in which the trustees get notice of them[1]. T holds stocks or shares in trust for E, E gives a charge on his interest to X as security for a loan, and then gives a similar charge to Y as security for a later loan; Y having at the time no notice of X's right gives notice to T before X does; Y's charge is prior to X's. The rule is the same where the subject-matter of the charge is not a trust fund but a mere debt—a creditor assigns his debt first to X and then to Y: Y when he paid his money had no notice of the previous assignment; he gives notice to the debtor before X does and so gets priority. In the case of a debt we see the reason for this rule; it is a rule for the protection of debtors. A debtor is of course justified in paying his creditor until he has received notice that he ought to pay someone else; when he has received notice that he ought to pay to Y, he is justified in paying to Y; you cannot expect him to make inquiries as to secret assignments. The same rule has been applied to interests in personal funds created by trusts as well as to rights arising under what are commonly and conveniently called contracts as opposed to trusts—indeed we here see once more how like a right under a trust is to a purely contractual right—the trustee may safely pay to *cestui que trust* until he has notice of an assignment, and he may safely pay and will be bound to pay to the assignee who is the first to give him notice, even though there has been another assignment of earlier date. Therefore of course we get the practical rule—If you take an equitable assignment of a debt or trust fund give notice to debtor or trustee. The notice is not necessary to complete the equitable assignment as against the original creditor himself or his representatives, including his

[1] Note that where the subject-matter is a mortgage of leaseholds by sub-demise the rules as to 'interest in land' apply—not the rules applicable to personal trust funds or to debts. *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231.

trustee in bankruptcy, but the claims of competing assignees rank as between themselves according to priority of notice.

Let us sum up the question of priorities when the subject-matter is a chose in action or a trust fund of personalty.

Here notice to the debtor or trustee becomes important. A second assignee (mortgagee) if he has no notice of the first assignment may gain priority by being the first to give notice. The rule had its origin in *Dearle* v. *Hall*[1] and *Loveridge* v. *Cooper*[2], both in 1823, and both decided by Plumer M.R.; and is based upon an obscure mixture of principles. They are :—

(1) Protection of the debtor or trustee. The debtor may pay his original creditor until he has received notice of an assignment. He gets notice of an (equitable) assignment. What may he do then? He is not necessarily safe in paying the assignee. But if there be another earlier assignee who has not given notice he can not complain of payment to the person who has given notice.

So in the case of a trust fund. T is trustee for A. A assigns to X then to Y. Y gives notice. If before notice of X, T pays to Y, X can not complain.

Hence the rule of prudence :—give notice. See *Ward* v. *Duncombe* per Lord Macnaghten, 1893, A.C. at page 394.

(2) Hence arose a sort of notion that notice was necessary to complete the title. (Lord Macnaghten at page 392.)

(3) By the Bankruptcy Acts—the order and disposition clause—goods left in the order and disposition of a debtor with the consent of the true owner were treated in bankruptcy as the property of the estate. This idea was applied to choses in action. A owes a debt to X, X assigns to M. X goes bankrupt, the debt is part of his estate, unless M has already given notice to A. (The giving of notice is regarded as a sort of taking possession—the chose in action is no longer in assignor's order and disposition.) This is not so in the modern law. In the Act of 1883 the order and disposition clause (sec. 44) has a proviso 'things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.'

[1] 3 Russ. 1. [2] 3 Russ. 49.

One base of *Dearle* v. *Hall* is thus cut away, and one on which Plumer M.R. had laid great stress.

Well, it gets decided that a second assignee (if he had no notice of the prior assignment) can get priority by being first to give notice to the debtor or trustee even though before payment notice of the first assignment comes in. The rule pushed to this extent where several assignees have given notice before payment is not necessary for the protection of the debtor or trustee. But *Dearle* v. *Hall* can not be overruled for it was followed in the House of Lords in *Foster* v. *Cockerell*[1].

But difficulties begin when there is not continuously just one trustee.

The modern cases show a tendency towards treating 'the trustees' as a sort of corporation, so that notice if once got in sticks for good and all—or like a register in which something is inscribed. But this is not yet triumphant.

Take the great case of *Ward* v. *Duncombe*, 1893, A.C. 369. A is first assignee, B is second assignee. T1 and T2 are trustees. T1 knows of A; T2 doesn't. B gives notice to T1 and T2. T1 dies. T3 is appointed. In the contest A is preferred to B, though when the contest opens the trustees for the time knew of B and not of A. (You should read the judgment of Lord Macnaghten.)

Then take *In re Wasdale*, 1899, 1 Ch. 163, decided by Stirling J. T1 and T2 are the trustees. A gives notice to T1 and T2. Both die or resign. T3 and T4 are appointed. B gives notice to them. A is preferred. This is what has been called the registration principle.

But see *In re Phillips' Trusts*, 1903, 1 Ch. 183. T1, T2 are the trustees. A gives notice to T1—not to T2. T1 dies. B gives notice to the existing trustees. B is preferred (against the registration principle), by Kekewich J., on the authority of a case[2] much doubted by Lord Macnaghten in the House of Lords.

This is an unsatisfactory result. The practical moral is this:—give notice to each one of the trustees.

[1] 3 Clark and Finnelly, 456.

[2] *Timson* v. *Ramsbottom*, 2 Keen 35, doubted, 1803, A.C. at p. 394.

Read *In re Lake*, 1903, 1 K.B. 151, a case of secret misappropriation. L was a solicitor and many times over a trustee. He executed in favour of a client and *cestui que trust*, A, whose money he had appropriated, a mortgage of some policies of life insurance. The mortgage was not communicated to A nor was any notice given to the Insurance Companies. Later L executed another mortgage of the same policies to a clerk in his own office as trustee for other defrauded clients. This second mortgagee was the first to give notice to the Insurance Companies and he prevailed.

And see *In re Dallas*, 1904, 2 Ch. 385. In that case D in 1897 charged in favour of S his interest in a legacy expected from his father who was still living. In 1898 he charged the same expected legacy to B. In 1902 the father died naming D sole executor. In January, 1903, D, who had never acted, renounced probate. In March, 1903, administration was granted with the will annexed. Next day B gave notice to the administratrix and a week later S did so. Subsequently the legacy which was in Court was paid out to the administratrix. It was held by the Court of Appeal that, though S's delay was not due to any default on his part, yet B was to be preferred as he was the first to give notice when the fund came into existence and there was a person having a legal dominion. *Semble*, notice to an executor who never acts and renounces is bad; and a notice to the assignor is ineffectual.

As to the legal assignment of debts in general, this only became possible under sec. 25, sub-sec. 6 of the Judicature Act, 1873. To make the assignment a 'legal' one, *i.e.* to enable the assignee to sue in his own name, it must under that section (1) be an absolute assignment in writing and one which does not purport to be by way of charge only, (2) express notice in writing must be given to the debtor, and (3) it is expressly provided that the assignee's right shall be subject to all equities which would have had priority over it, if this Act had not passed. Thus the assignment will not be legal, *i.e.* will not enable the assignee to sue in his own name, until notice in writing has been given to the debtor. The possible analogy of the rules relating to a legal estate in lands

is excluded, the legal assignee may find that his assignment is treated as posterior to one which is merely equitable and of which he had no notice. For merely equitable assignments are still important[1]. Any assignment which is not absolute but conditional and any assignment which on the face of it purports to be by way of charge only can not be a legal assignment. Any agreement for value to transfer to another the benefit of the debt or chose in action is a good equitable assignment even though made by word of mouth only and not in writing; and the notice to the debtor or trustee necessary to give priority under the rules of equity was not, and is not now, required to be notice in writing. Further it appears to be questionable[2] whether an assignment of part only of a debt is within section 25, sub-section 6 of the Judicature Act, 1873, or whether such an assignment can only be valid in equity and whether, therefore, the assignee must still sue in the name of the assignor. In modern practice instead of suing in the name of the assignor it is usual merely to join the assignor as a co-plaintiff, or even as a defendant if he refuses to be a plaintiff. And recently in several cases where the joining of the assignor has been a mere formality in no way needed to protect the debtor the highest courts have shown a tendency to permit the equitable assignee to succeed, although the assignor has not been joined in any form[3].

[1] See *Brandts* v. *The Dunlop Co.*, 1905, A.C. 454. A mere direction, request or even permission given by the creditor to the debtor to pay the debt to a third person may be a valid equitable assignment which the debtor must observe upon peril of having to pay twice over. See per Lord Macnaghten at p. 462: 'All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person.'

[2] See *Durham Brothers* v. *Robertson*, 1898, 1 Q.B. 765, per Chitty L.J. at p. 774. The objection is based upon the hardship of permitting a creditor to split the cause of action and so to subject his debtor to several actions at law. And see per Cozens-Hardy L.J. in the case of *Nelson* v. *Nelson Line, Ltd.*, 1906, 2 K.B. 217, at p. 225.

[3] See *Tolhurst* v. *Associated Cement Manufacturers*, 1903, A.C. 414, at pp. 420 and 424; *Brandts* v. *Dunlop Co.*, 1905, A.C. at p. 462, and *Dawson* v. *Great Northern and City Railway Company*, 1905, 1 K.B. 260, per Stirling L.J. at p. 271 delivering the judgment of the Court (Collins M.R., Stirling and Mathew L.JJ.). In the first of these cases the assignor was a Company in liquidation and possibly dissolved; in the second the assignor was a bankrupt, and had already been paid in error; in the last case the assignee had irrevocable authority to give a receipt for the assignor.

Finally, as regards equitable rights in moveable goods, corporeal chattels, we hear very much less. Doubtless if I bought a piece of plate from a trustee knowing that he held it on trust for E, E might enforce his right against me, and this would be so even though I purchased in market overt. But a purchaser of moveable goods is not expected to investigate his vendor's title. Of course if he buys from one who is not owner, and the sale does not take place in market overt or fall within the rules introduced by the Factors' Acts he gets a bad title. But though this be so, equity has not been able to say of corporeal chattels as it has said of land and of trust funds that the prudent purchaser makes an investigation of title. Corporeal chattels are outside the realm of constructive notice. In *Joseph* v. *Lyons*, 1884, 15 Q.B.D. 280, an attempt was made to apply that doctrine to goods, but the Court of Appeal would not hear of it. Cotton L.J. said 'I think that the doctrine as to constructive notice has gone too far and I shall not extend it'—and Lindley L.J. 'It seems to me that the modern doctrine as to constructive notice has been pushed too far, and I do not feel inclined to extend it.'

In leaving this particular topic I may perhaps be allowed to say that in my opinion the words that I have just quoted point out the true course for the law reformer. If our land law is to be simplified this will not be by a repetition of the partial and abortive attempt at abolishing the difference between equitable and legal estates which was made by the Vendor and Purchaser Act of 1874 in the section directed against tacking; but on the contrary by laying stress on the distinction and depriving equitable estates of their would-be proprietary character by relaxation of the doctrine of constructive notice. Perhaps the statutory definition of constructive notice that we have now got in section 3 of the Conveyancing Act of 1882 may do something towards this end; but more thorough-going measures seem necessary.

And now a few words as to the general relation between Equity and Law. A few years ago there was, if I may so speak, a visible distinction. If it was impossible to explain the distinction without a long historical discourse, still it was possible to point to the distinction as a visible matter of fact—

to say to the inquirer 'Go to Westminster Hall and you will there see courts administering Common Law; then go to Lincoln's Inn and you will there see courts administering Equity.' The existence of the distinction was made emphatic in every sort of way. In the Courts of Common Law were judges hearing 'actions' begun by 'writ,' carried on by 'declaration' and 'plea' with a system of procedure of which trial by jury was the central fact. In the Court of Chancery were the Chancellor, Master of the Rolls, and Vice-Chancellors hearing 'suits' begun by 'bill' with a system of procedure which made no use of a jury and differed at almost every possible point from the procedure of the Common Law. In the smallest matters one saw the difference—the same man who was a 'solicitor' of the Court of Chancery was an 'attorney at law.' If at times the differences in detail seemed unnecessarily great one had to remember that the Chancery had by the very law of its being to keep very clear of the field of common law. The mere fact that the old courts could do something was a reason why the new court should not do it.

And now all this has passed away; one can no longer say 'Here is a Court which administers nothing but common law, and there a Court which administers nothing but equity.' The task of the student is really all the harder. Let us look at the matter a little.

In the first place let us guard ourselves against the fallacy of supposing that the Chancery Division of the new High Court is the Court of Chancery under a new name, or that the old courts of common law are now called the Queen's Bench Division. This would be a great error. It is true that actions of certain kinds have been assigned to one division, actions of certain other kinds to the other, though in many cases the plaintiff has a choice. This is a convenient division of labour —the trying with a jury is done in one division, the other has a machinery adapted for taking accounts. But a rule of court might alter this assignment, and an Order in Council might abolish the existing 'divisions'—the Common Pleas Division and the Exchequer Division were thus merged in the Queen's Bench Division. And, to come to a more important point,

every judge in whatever division he may be sitting is bound to apply every rule whether of common law or of equity that is applicable to the case before him. He cannot stop short and say that is a question of common law which I am incompetent to decide, or, that is a merely equitable right and I can take no notice of it.

But if this be so, if the two bodies of rules have to be administered together, have not the terms law and equity lost their meaning? Well, as terms, they are merely historical terms, and such they have been for centuries past; but they will endure for a long time yet, for they do express distinctions of the utmost importance—distinctions among the rules of substantive law—and if we had not inherited this pair of terms we should be obliged to invent others to serve the same purpose.

For the Judicature Act did not alter the substantive law —save in a few points to be hereafter mentioned—did not change the nature of rights or even give new remedies. It only made a thorough change in procedure—introducing a new procedural code, partly borrowed from that of the common law, partly borrowed from that of equity, and in part newly invented.

A few points of substantive law were expressly dealt with by section 25—the 1st sub-section relates to the administration of assets; it never came into force, for the Act of 1875, sec. 10, repealed it and put another somewhat similar clause in its stead—the 2nd subsection said that no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust shall be barred by any Statute of Limitations—the 3rd sub-section related to the doctrine of equitable waste—the 4th to merger by operation of law—the 5th to the rights of a mortgagor in possession —the 6th to the assignment of choses in action—the 7th to stipulations in contracts, which according to the doctrines of equity are not of the essence of the contracts—the 8th to the issuing of injunctions and the appointment of receivers—the 9th to damages by collisions at sea—the 10th to the custody of infants and to a number of little miscellaneous points—then follows the 11th to which I wish to draw attention. 'Generally

in all matters not herein-before particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.'

Now what did this sub-section do? Did it turn equitable estates into legal estates, acting like a second Statute of Uses? Of course it did not. There was no conflict or variance here between common law and equity. The statement that T is owner but is a trustee for E is not self-contradictory. It is no more self-contradictory than the statement that A is the owner of goods but owes more debts than he can pay. Austin, we have seen, speaking of the position of one who has agreed to buy land but has not yet obtained a conveyance, talks of the conflict between law and equity, of how equity held that the contract passed a *jus in rem*. To speak thus is to take a very superficial view of the case—the right that the purchaser gets by the contract is no right *in rem*, and there is no conflict between law and equity.

So far as I am aware it never entered into the head of anyone that the Judicature Act had rendered trusts impossible. But it did enter the heads of some that this 11th sub-section had done much more than really it did. Some of the cases about this are very instructive and will help to show us what is the relation between law and equity at the present time.

Take the case of *Joseph* v. *Lyons*, 1884, 15 Q.B.D. 280. The substance of the case is this. One Manning by bill of sale assigned to Joseph as security for money lent certain furniture and jeweller's stock in trade then in a certain house —'and also all the stock in trade and effects which shall at any time during the continuance of this security be brought into the said house.' After a while Manning pledged part of the jewellery which formed the stock in trade with Lyons, a pawnbroker, who took the goods without knowing of the bill of sale and in the ordinary course of his business. These things Manning had acquired after the date of the bill of sale. Joseph demanded these goods from Lyons, but Lyons claimed to hold them as security for the money that he had lent; whereupon Joseph sued Lyons.

Now of course it is a rule of common law that a man

can not give to another the ownership of goods that he neither owns nor yet possesses. I assign to you my furniture now in my house, and any furniture that I may hereafter acquire and place in that house. The ownership in these hereafter to be acquired goods[1] can not pass to you—for either the things are not yet in existence, or if in existence they are not mine to give. The utmost that can be done under the common law by any would-be assignment of goods hereafter to be acquired will be to act (1) as a licence to you to seize those goods when I have acquired them, and (2) as a covenant by me that I will deliver them to you and thereby make them yours when I do acquire them. Equity was prepared to do a little more for you. If the assignment was for value and was sufficiently specific in its terms, pointing out exactly what goods it was to affect—saying, *e.g.* any stock in trade hereafter acquired by me and brought into such a shop—it would decree specific performance of this contract. This being so, as in the case of land, it would further hold that the contract could be specifically enforced against volunteers claiming under me, and even against persons purchasing the goods from me with notice of this specifically enforceable contract. This was the subject of a famous decision by a divided House of Lords in *Holroyd* v. *Marshall* (10 H.L.C. 191). And so lawyers easily slipped into the way of saying that in equity one could make an assignment of goods hereafter to be acquired though one could not do so at law. This was a compendious way of putting the matter and was not likely to deceive any equity lawyer.

It seems however to have deceived Huddleston B., who (his reasons are not given) held that Joseph could recover the goods or their value from Lyons. In the Court of Appeal Joseph's counsel boldly stated the propositions that he had a valid equitable title to the after acquired goods, and that as the Judicature Acts had abolished the distinction between legal and equitable interests, he had also a valid legal title. The answer to this argument lies in the question :—But what was meant by a valid equitable title—a title good against all men—a right *in rem*—a title good against a *bona fide*

[1] Or 'future goods' as they are called in the Sale of Goods Act.

purchaser for value without notice? No, certainly not, equity never gave any such right. The Court of Appeal reversed the judgment. Lindley L.J. put the matter succinctly. 'Reliance was placed upon the provisions of the Judicature Acts, and it was contended that the effect of them was to abolish the distinction between law and equity. Certainly that is not the effect of these statutes: otherwise they would abolish the distinction between trustee and *cestui que trust*.' A desperate effort was made to say that the pawnbroker had constructive notice of the bill of sale; the Lords Justices rejected this contention in words that I have already read[1]. We see then that merely equitable rights keep their peculiar character still—there is here no conflict between law and equity.

When considering the case of *Joseph* v. *Lyons* it is worth noticing that 'declarations of trust without transfer' may be bills of sale within sec. 4 of the Bills of Sale Act, 1878; and also that under the Bills of Sale Act, 1882, sec. 5, a bill of sale given by way of security for money will be void, except as against the grantor, as regards any chattels of which the grantor was not the true owner at the time of the making of the bill of sale.

Another very interesting case is *Britain* v. *Rossiter*, 1879, 11 Q.B.D. 123. For our present purpose we may state it thus. The plaintiff agreed to serve the defendant for longer than a year. After some months he was dismissed and then brought this action for wrongful dismissal. The defendant relied on the 4th section of the Statute of Frauds, on the fact that there was no note or memorandum in writing of the agreement. In answer to this the plaintiff urged that the agreement had been in part performed, and that the rule of equity was that 'part performance takes a case out of the statute.' True that before 1875 this contract could never have come before a court of equity at all, because equity had no jurisdiction to compel the specific performance of contracts of hire and service; but now the Judicature Acts provide that when there is a conflict between law and equity the rules of equity must prevail, and the rule of equity is that part

[1] *Ante*, page 149.

performance takes the contract out of the statute. The answer to this given by the Court of Appeal was in effect this:—that to read the Judicature Acts in the way suggested would be to alter not merely procedural rules but substantive rights. Before 1875 in breach of this agreement no right to sue for damages would have accrued to the plaintiff—specific performance was out of the question—breach of the agreement even though part performed would not have enabled him to call on equity for assistance. Before the Judicature Acts he would have had no remedy either in law or in equity, and he has none now. Brett, the Master of the Rolls, added, what is very true, that the cases in the Court of Chancery as to the part performance of contracts relating to land 'were bold decisions on the words of the statute.' Cotton L.J. pointed out that they had a peculiar origin and a limited scope. When the contract is for the sale of land, payment of a part or even the whole of the purchase money would not serve to dispense with the written evidence required by the statute: it was only the purchaser's possession of the land, a fact hardly explicable save by the supposition of some contract for its sale or lease that would have this effect.

These cases then will serve to show that the 11th sub-section can have but a very limited operation.

LECTURE XII.

THE PRESENT RELATIONS OF EQUITY AND THE COMMON LAW.

THE Judicature Act, 1873, sec. 25, sub-sec. 11, speaks, we have seen, of cases in which there is a conflict or variance between the rules of the common law and the rules of equity. We have seen, however, that normally the relation between equity and law has not been one of conflict. How could it have been otherwise? After all, for centuries past this country has been decently governed and reasonably peaceful, and this would not have been so if we had really had two conflicting systems of law in full operation. 'The courts of common law said that the trustee was the owner, but the Court of Chancery said that the *cestui que trust* was the owner'—if we take this crude statement literally it is an invitation to civil war. No, we ought to think of the relation between common law and equity not as that between two conflicting systems, but as that between code and supplement, that between text and gloss. And we should further remember this, that equity was not a self-sufficient system—it was hardly a system at all—but rather a collection of additional rules. Common law was, we may say, a complete system—if the equitable jurisdiction of the Chancery had been destroyed, there still would have been law for every case, somewhat rude law it may be, and law imperfectly adapted to the needs of our time, but still law for every case. On the other hand, if the common law had been abolished equity must have disappeared also, for at every point it presupposed a great body of common law.

It is a little difficult therefore to say what this sub-section means when it speaks of conflict and variance, and it is very much easier to find cases in which a despairing appeal has

been made to these words than to find cases in which such appeals have been successful. I think we must say that in some few cases the joint operation of law and equity produced a result so capricious that they might be regarded as at conflict or at variance. Such cases were rare; we have for instance seen in *Joseph* v. *Lyons*[1] that there was no conflict between them as to the effect of an assignment of chattels hereafter to be acquired; we have seen in *Britain* v. *Rossiter*[2] that there was no conflict between them as to the effect of the part performance of an agreement of which there is no note in writing, though one is required by the Statute of Frauds. Was there a conflict about (so-called) equitable waste? Perhaps there was. If a tenant for life, made unimpeachable for waste, cut down ornamental timber, he could not be made to pay damages in an action at law, but equity would prevent him from so doing by injunction, or if he did it would compel him to account. So we might here say that equity did consider that he must pay for his act, while law held that he need not. But it is needless to speculate about this matter, for the Act specially provided for it. By section 25, sub-section 3, an estate for life is not to confer any legal right to commit waste of the description known as equitable waste, unless a contrary intention has been expressed. And so again as to stipulations being of the essence of a contract, the 7th sub-section provided that stipulations which would not have been deemed to be or have become of the essence of a contract in a court of equity should receive in all courts the same construction and effect as they would have heretofore received in equity. Before the Act we might certainly have had results which could be called capricious and inelegant. A contract had ceased to be enforceable in a court of law by action for damages because the party who might have wished to enforce it had himself broken it, while in equity the contract (being one belonging to the genus enforceable by specific performance) might still be enforceable, the broken stipulation being treated as one which was not of the essence of the matter. What would have happened had this point not been specially dealt with by the Act, had it

[1] 15 Q.B.D. 280. [2] 11 Q.B.D. 123.

been left to the general words of the 11th sub-section, we need not speculate. I doubt it could be said that there was any conflict here, any self-contradiction, in the statement that a decree for the specific performance of this contract will be made, but no damages can be given for its breach[1].

The best example that I have found of the operation of sub-section 11 is *Job* v. *Job*, 6 Ch. D. 562. The assets of a testator come to the hands of his executor, and are afterwards lost to the estate without any wilful default on the part of the executor; can the executor be made liable for their value? It is probable, though perhaps not quite certain, that the common law said 'Yes, if they have once come to his hands he can be made liable, default or no default.' Equity however had come to a different rule, namely, that to make the executor liable one must prove wilful default. Now, supposing these rules to be so, there was something that might reasonably be called a conflict, for the question might have come before a court of law in an action for devastavit, or before a court of equity in an administration suit, and in each case the question would have really been the same, viz. is the executor bound to restore the value of these goods. And so in *Job* v. *Job*, Jessel M.R. treated the case as one of conflict or variance, and held that the rule at law as well as in equity now is that an executor or administrator is in the position of a gratuitous bailee, who can not be charged with the loss of his testator's assets without wilful default. That is one example.

Another illustration is to be found in the case of *Lowe* v. *Dixon*, 16 Q.B.D. 455. Several persons, A, B, C, D, enter into a joint adventure, *e.g.* buying and selling corn, a loss ensues; one of them, A, is compelled by the creditor, X, to pay the whole loss, say £1000. Of course he has some right to call upon his fellows to contribute, and there being no agreement to the contrary they ought to contribute in equal shares—this is law and equity—B, C and D, each of them ought to pay A £250. But suppose that one of them

[1] Not any more conflict than in the converse statement (which is still good law in countless cases):—Damages will be given for the breach of this contract but specific performance of it will not be decreed.

can not pay, *e.g.* D has not a farthing in the world, how much can A get from B and from C? The view taken by courts of law was that each adventurer agreed with his fellows to contribute one quarter of the loss and no more. In this case A, having paid away £1000 to X, could at law obtain a quarter of that sum from B, and another quarter from C, but no more; thus he himself would lose £500, while B lost but £250, and C but £250. Equity had taken a different, and to us it must seem a more sensible view; the whole loss should be borne equally. The whole loss is £1000, therefore, since D has nothing, A can get £333. 6*s.* 8*d.* from B, and a like sum from C. The consequence of course would have been that before the Judicature Act A would not have brought an action at law against B and C, but would have brought a suit in equity. Thus the legal rule had become a *caput mortuum* before the Act. The case of *Lowe* v. *Dixon* merely shows that this *caput mortuum* has disappeared altogether. We are no longer obliged to say that A can recover two-thirds of the loss, but that this is a result of equity since at law he can recover but half the loss; we can simply say that A can get two-thirds in whatever division of the High Court he may bring his action. I do not think that in this matter there has been any real change in the substantive law.

One other illustration, *Walsh* v. *Lonsdale*, 21 Ch. D. 9, a somewhat difficult and dangerous case, *i.e.* one which may lead us to suppose that the 11th sub-section has done more than really it has done.

By a written agreement L agreed to let to W a cotton mill for seven years at a rent which was to be payable in advance if demanded. This was not a lease, for it was not made by deed, it was merely an agreement for a lease. W entered and occupied the mill, and for some time paid the rent, but not in advance. Then L demanded a year's rent in advance, and this demand not being complied with he distrained. W then brought an action against L claiming damages for an unlawful distress.

Now before the Judicature Act the position of affairs would have been this. The agreement for a lease did not in the view of a court of law operate as a lease. The only facts that

a court of law could have considered were these:—W has entered on land of L, and has paid rent periodically, this shows that W is holding the land of L as tenant from year to year at a rent. Now if I have a tenant from year to year holding of me at a rent, that does give me a power to distrain for rent in arrear, but it does not give me power to distrain for rent in advance: therefore in this case L has done wrong. On the other hand a court of equity would have granted specific performance of the agreement for a lease. If W had come to it with a bill for specific performance it would have decreed that L should perform his contract by accepting a lease in accordance with the agreement. What is more, had L distrained for rent in advance he would have been doing an unlawful act—an act unlawful in the narrow sense—and at law W would have had an action for damages against him: but I think that L might have applied to a court of equity to enjoin W from bringing that action, on the ground that W had agreed to pay rent in advance, and was occupying the land under that agreement. Now if this be so, then the Court of Appeal in deciding that under the Judicature Act L could distrain for rent in advance, did but give effect to the net result of the previously existing rules of law and equity. Jessel M.R. however, put the matter thus, at page 14 of the report in 21 Ch. D.:

'There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so he can not complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand he is protected in the same way as if a lease had been granted; he can not be turned out by six months notice

as a tenant from year to year. He has a right to say "I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry." That being so, it appears to me that being a lessee in equity he can not complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed.'

Now I am not sure that these words are not a little misleading, and I have heard remarks upon *Walsh* v. *Lonsdale* which seemed to imply that since the Judicature Act an agreement for a lease is in all respects as good as a lease. Now Jessel certainly did not say this, and to say it would certainly be untrue. An agreement for a lease is not equal to a lease. An equitable right is not equivalent to a legal right; between the contracting parties an agreement for a lease may be as good as a lease; just so between the contracting parties an agreement for the sale of land may serve as well as a completed sale and conveyance. But introduce the third party and then you will see the difference. I take a lease; my lessor then sells the land to X; notice or no notice my lease is good against X. I take a mere agreement for a lease, and the person who has agreed to grant the lease then sells and conveys to Y, who has no notice of my merely equitable right. Y is not bound to grant me a lease[1].

The later case of *Swain* v. *Ayres*, 21 Q.B.D. 289, has made it clear that the Judicature Act has not abolished the difference between a lease and an agreement for a lease. An agreement for a lease is not a lease within section 14 of the Conveyancing Act, 1881, which says that the right of re-entry or forfeiture under any proviso or stipulation in a lease for breach of any covenant or condition in the lease shall not be enforceable unless a certain notice has been served by the lessor on the lessee. Note that the law was extended by sec. 5 of the Conveyancing Act of 1892, and 'lease' and 'under-lease' are made to include for this purpose any agreement for a lease or for an under-lease where the

[1] But if at the time that he buys I am in possession of the land under the agreement Y will have constructive notice of all my equitable rights.

lessee has become entitled to have his lease (or under-lease) granted.

The case of *Lowther* v. *Heaver*, 41 Ch. D. 248, is also worth consulting; as is also the case of *Manchester Brewery* v. *Coombes*, 1901, 2 Ch. 608. There Farwell J. at page 617 said: 'Although it has been suggested that the decision in *Walsh* v. *Lonsdale* takes away all differences between the legal and equitable estate, it, of course, does nothing of the sort, and the limits of its applicability are really somewhat narrow. It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates' ... and at page 618: 'It is not necessary to call in aid this doctrine in matters that are purely equitable; its existence is due entirely to the divergence of legal and equitable rights between the same parties, nor does it affect the rights of third parties.'

In the case of *Foster* v. *Reeves*, 1892, 2 Q.B., 255, the defendant entered on premises of greater value than £500 under an executory agreement for a lease. He subsequently gave six months notice and left. An action was brought against him for rent accruing due after he had given up possession. It was held by the Court of Appeal that the equitable doctrine that a person who enters under an executory agreement for a lease is to be treated as in under the terms of the agreement, can only be applied if the Court in which the action is brought has power to give judgment for specific performance, and the action was therefore dismissed, but solely on the ground that it had been brought in a County Court which in cases above the value of £500 had not such power.

I have now mentioned the main cases in which some effect has been attributed to the 11th sub-section of section 25 of the Judicature Act. The other cases in which an operation has been found for this sub-section hardly rise above the region of procedure. Doubtless the full force of this provision has not yet been spent, and those who live longest will know most about its meaning; but it has been law these thirty years, and has produced very little fruit. And one thing it certainly has

not done, it has not discharged us from the necessity of learning the true nature of equitable estates and interests.

I pass to a final illustration of our theme. We all know something of the common law doctrine of covenants running with the land, and probably we have heard about covenants which run with the land in equity though they do not run with the land at law. Now our point will be to contrast common law rules with equitable rules and to understand that the term 'a covenant running with the land in equity though not at law,' though it may be a useful term, is one that might easily lead to mistakes.

First as regards the common law rules: I do not propose to go into them very deeply—there is an excellent tabular statement of them in Pollock, *Contracts*, 7th ed. pp. 235 *et seq.*—but still a few words must be said about them.

I. In the first place we must mark off from all other cases those in which the covenant in question is *contained in a lease*; and about such covenants there are some elaborate rules. There seem to be four cases for consideration—for we have to consider the burden and the benefit of the lessor's and the lessee's covenants respectively. We have also to note that some of our rules are ancient common law while others are due to a statute of 1540, 32 Hen. VIII, c. 34.

(1) *The Burden of the lessee's covenants.* As to this the common law made provision. The assignee of a lease is bound by the lessee's covenants (i) as to an existing thing parcel of the land demised, whether assignees be expressly mentioned in the covenant or no, (ii) as to something to be newly made upon the premises, if, but only if, assignees be mentioned.

The classical authority is *Spencer's Case*, 5 Rep. 16a (1 Smith's, L.C. 52, 10th ed.).

You should read also the case of *White* v. *Southend Hotel Co.*, 1897, 1 Ch. 767, where it was held by the Court of Appeal that a covenant not to sell any wines in the demised house except those purchased from the lessor runs with the land at law without mention of assigns.

(2) *The Burden of the lessor's covenants.* Whatever may have been the case before 1540 (and perhaps this matter is

not free from doubt) the assignee of the reversion is bound by the lessor's covenants under section 2 of the Statute of Henry VIII.

(3) *The Benefit of the lessee's covenants.* It seems certain that at common law, *i.e.* before the statute, the assignee of the reversion could not sue upon the lessee's covenants—the statute says as much, 'by the common law of this realm no stranger to any covenant shall take any advantage or benefit of the same by any means or ways in the law, but only such as be parties or privies thereunto' (cf. the rule that a chose in action is not assignable). The statute proceeds to give the assignee of a reversion the benefit of the lessee's covenants.

(4) *The Benefit of the lessor's covenants.* This runs with the tenancy at common law. (See *Spencer's Case.*)

These provisions of the common law and of the statute of Henry VIII have been in some respects amplified by sections 10 and 11 of the Conveyancing Act of 1881, but into their details we must not examine at present; the changes are not of very great importance.

Let us notice in passing that when a lessee assigns his lease there is no transfer of the liability on his covenants from him to the assignee. The original lessee remains liable on his covenants throughout the term. But the assignee also becomes liable and remains so while he has the term, but his liability ceases when he assigns the term, *i.e.* he is not liable for what happens after that. Also the assignee is liable to indemnify the lessee in respect of any breaches of covenant which take place after assignment.

Notice also that 'assignment' does not include 'under-lease.' The under-lessee is not liable on the lessee's covenants, and this is the reason why when leaseholds are mortgaged they are usually mortgaged by way of sub-demise, in order that the mortgagee may not become liable on the lessee's covenants.

Note the case of *Bryant* v. *Hancock* in the Court of Appeal, 1898, 1 Q.B., 716[1]. I covenant that I, my executors, administrators or assigns, will not use in a certain way a house which you demise to me. I make an under-lease. My

[1] Affirmed in the House of Lords, 1899, A.C. 442, but upon another point.

under-lessee uses the house in the prohibited way. You can not sue me (for he is not an 'assign'), nor can you sue him, for the same reason.

II. As to other cases of covenants relating to land—*i.e.* cases other than those between landlord and tenant—these fall into two classes:—

(*a*) Covenants of this kind entered into with a landowner for the benefit of the land; the benefit runs with the estate, if the covenant touches and concerns the land of the covenantee, *e.g.* vendor's covenants for title.

(*b*) Covenants of this kind entered into by a landowner—it seems that the burden never runs with the land even though assigns be mentioned.

Now all these rules are rules of law—and the liability of the assignee is quite independent of his having or not having notice of the covenant. On the one hand in an action for damages against the assignee of a lease, it would be no defence for the assignee to urge that he never had notice of the covenant—that his assignor had by some clever fraud contrived that he should not have notice. On the other hand the lessor could not bring an action against the under-lessee on the lessee's covenants, even though the under-lessee when he took his under-lease had notice—as would usually be the case—of the covenants in the lease. Notice and absence of notice are quite immaterial. It will neither give nor take away rights. Further, no distinction is drawn at law between positive and negative covenants.

Then comes the equitable gloss developed by a long line of cases of which *Tulk* v. *Moxhay* (1848, 2 Phil. 774) is the leading case. Until lately it would have been expressed thus:—Anyone coming to the possession of land with notice actual or constructive of a covenant entered into by someone through or under whom he claims, restricting the use to be made of that land, will be prohibited from doing anything in breach of the covenant. Now, since the case of *In re Nisbet and Potts' Contract*, 1906, 1 Ch. 386 (with which I will deal presently) we must perhaps say merely that anyone coming to the land with notice actual or constructive of a covenant entered into by some previous owner of the land, restricting

the use to be made of that land, will be prohibited from doing anything in breach of that covenant.

Let us see the foundation of this doctrine. Why should equity interfere at all, and first, why should it interfere between the original covenantor and covenantee? Because the remedy which the common law gives in such covenants is an inadequate one. I have covenanted with you that I will not build on a certain piece of land, or that a certain house shall not be used as a public house. Now practically the common law would render it possible for me to force you to sell the right given you by the contract, to oblige you to accept in lieu thereof a sum of money assessed by a jury as damages. Equity then begins interfering between covenantor and covenantee, restraining by injunction the covenantor from using the land in defiance of his contract. Once started on this task—it could hardly stop here—by a very little conveyancing machinery, a collusive conveyance, the covenantor might practically set himself free from the covenant. So equity began restraining grantees, assignees, under-lessees of the land from doing anything in breach of the restrictive covenant, if they came to the land with notice of it, and this regardless of the question whether the covenant ran with the land at law. And so the conception was formed of covenants running with the land, not at law, but in equity. The phrase however is not a very happy one. The injunction does not go against the grantee or assignee or sub-lessee on the ground that he has come to the land, it goes against him on the ground that he has come to the land with notice—express notice or constructive—of this restrictive obligation. The covenant must be a restrictive one, a negative one. This point was decided in *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403. A covenant not to build falls within the doctrine—as regards a covenant to build equity would have nothing to say, the parties are left to the rights, if any, which the common law gives them.

The Judicature Acts have not made any confusion of these different principles. Let us examine an instructive case, *Hall* v. *Ewin* (1887), 37 Ch. D. 74. Hall demised a house to Tarlington for eighty years, and the lessee covenanted that

he, his executors, administrators and assigns would not use the premises or permit or suffer them to be used by any person for any noisome or offensive business. Tarlington sub-demised the premises by way of mortgage to Ruddach for the term of eighty years less three days. Under the power of sale in this mortgage, Ruddach's executors sold and assigned the premises to Ewin for the residue of the eighty years term less the three days. Ewin then sub-let to McNeff for 21 years, and McNeff covenanted not to carry on any noisome or offensive trade or business, but proceeded to open a wild beast show. Hall then sued McNeff and Ewin. We may take it (1) that the wild beast show was an offensive business, and (2) that both Ewin and McNeff had notice of the covenant contained in the original lease. This being established it could not be disputed that an injunction ought to go against McNeff. But how about Ewin—could he be enjoined from suffering the nuisance to continue? Kekewich J. granted an injunction against him on the ground that 'he was equitably bound by the covenant and that as he had power to enforce the covenants contained in the sub-lease to McNeff and to stop the nuisance, he had broken the covenant against suffering the premises to be used for the purpose of a noisome occupation.' The Court of Appeal dissolved the injunction against Ewin. The first point that we have to notice is that Ewin was not at law liable on the covenant; he was not an assignee of the original lease, but had a derivative term created by the mortgage deed. Then as to equity, Cotton L. J. put the matter thus:—'There is no doubt that under the principle of *Tulk* v. *Moxhay*[1] if a man had actually done anything in contravention of the covenants of which he had notice the Court would grant an injunction. As I understand *Tulk* v. *Moxhay* the principle there laid down was that if a man bought an underlease, although he was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants the Court of Chancery could not allow him to use the land in contravention of the covenants. That is a sound principle. If a man buys land subject to a restrictive covenant he regulates the price accordingly, and it would be

[1] 2 Ph. 774.

contrary to equity to allow him to use the land in contravention of the restriction. But here the Plaintiff does not seek to restrain Ewin from using the house in a particular way, or from doing something which will enable the tenant so to use it, but to compel him to bring an action against his tenant who is in possession of the house'.... The Court of Appeal in '*Haywood* v. *Brunswick Permanent Benefit Building Society*[1] ...laid down that the principle in *Tulk* v. *Moxhay* was not to be applied so as to compel a man to do that which will involve him in expense.'

And Lord Justice Lindley said (at page 81) 'It is important to bear in mind that Ewin is not an assignee of the original lease, and is not bound at law by the covenants. It is true that the distinction between an assignee and an underlessee of the term, less a few days, is a very nice and technical one, but we can not help that; we can not hold that Ewin is bound at law by any covenant, nor can he be made liable for damages in any action at law. Therefore the Plaintiff is driven to bring him within the principle of *Tulk* v. *Moxhay*. I do not think that he has succeeded in doing so. This is an attempt to extend the principle of that case beyond its proper limits, and I think that such attempts ought not to be encouraged.'

The position of a person who has come to land with notice of a covenant but without becoming legally liable on that covenant is thus a peculiar one; it would be unconscientious of him to do anything by way of active breach of a negative covenant; but this is all that equity can expect of him, at law he is not bound by the covenants and equity expects no more than that he will not actively break them. But note that an injunction may go against a mere managing occupier, *Mander* v. *Falcke* [C.A.], 1891, 2 Ch. 554. It is not at all necessary that the person enjoined should be standing in the legal shoes of the covenantor.

An argument which might at first sight seem plausible would bring us to a different result. Law says that an underlessee is not bound by covenants in the original lease; Equity says that he is bound; the Judicature Act says that when

[1] 8 Q.B.D. 403.

there is any conflict between the rules of Law and Equity the rules of Equity are to prevail, therefore, he is bound. But we have seen the danger of this very rough reasoning. There was no conflict—equity was but supplementing the law, adding a liability founded on notice to the liabilities created by the legal doctrines about covenants running with the land. It has been, and still is, so hard for a purchaser of land to buy without constructive notice of all covenants affecting the land; it has been, and still is, so next to impossible for an under-lessee to have no notice of the covenants contained in the original lease—that we may easily come to the notion of an equitable obligation running with land in the same way that the burden of a covenant may run with land. But every now and then, owing perhaps to some ingenious fraud, arises the case of a *bona fide* purchaser or lessee getting the legal estate for value and without notice, and then we may see that the land or the purchaser's interest in the land is not bound by the covenant, that the covenant does not really run with the land. The very difficulty that there is of purchasing without notice makes it all the more necessary for us to insist on the abiding difference that there is between a legal and an equitable right in land.

A turning point in this doctrine is Sir George Jessel's judgment in *London and South Western Railway Company* v. *Gomm*, 20 Ch. D. 562. He there suggested (at page 583) that the doctrine of *Tulk* v. *Moxhay* might be treated as an extension in equity of *Spencer's Case* or of the doctrine of (legal) negative easements. In the latter case an equitable estate would be subject to it.

The last extension of the doctrine is to be found in the case of *In re Nisbet and Potts' Contract*, 1905, 1 Ch. 391, Farwell J., affirmed in the Court of Appeal, 1906, 1 Ch. 386.

In 1872 X conveys a farm to A in fee. A covenants not to build within 30 feet of a certain road.

Sometime or another B enters as a squatter (disseisor or abator[1]), remains in possession, and in 1890 sells and conveys to C. At this time neither B nor C knows of the covenant. In 1903 C sells to D, and by the conditions of sale the title

[1] For this distinction see Challis, *Law of Real Property*, 2nd edition, p. 207.

was to commence with the deed of 1890. Someone on behalf of X (or of those who stand in the shoes of X) gives warning to D of the covenants. D declines to fulfil the contract of sale. Is he bound to fulfil it?

Remember how the Statute of Limitations operates (3 and 4 Will. IV, c. 27, amended by the Real Property Limitation Act, 1874). The action to recover the land is lost and then the former owner's right is extinguished, not conveyed to the now possessor.

Can this negative covenant be enforced against B the disseisor before time has run in his favour? Yes. And after? Yes. He is not a *bona fide* purchaser for value. He is held bound because the rule is being stated thus, 'all occupiers are bound except the man who has purchased for value in good faith and without notice actual or constructive.' Thus the negative covenant is put on a level with an easement—though one subject to a peculiar exception, viz. that it is destroyable by a *bona fide* purchase for value with the legal estate.

But was not C a *bona fide* purchaser without notice? C had no actual notice. What of constructive notice? Yes, it is there said, he had constructive notice. If he had bought on an open contract he would have had the right to a 40 years title, and a title under the Statute of Limitations would not have been forced upon him. He 'must take the consequences.'

As to the burden of proof see Farwell J. in the court below, at page 402. 'The plea of purchaser for value without notice is a single plea, to be proved by the person pleading it. It is not to be regarded as a plea of purchaser for value, to be met by a reply of notice....It is therefore for the vendor (Nisbet) to prove that he had no notice from the prior deeds, and he can only do this by producing such deeds.'

The burden of proof is thus thrown upon the person who asserts that he has no notice. Equity in its dealing with restrictive covenants began at the opposite end to this[1].

Note, too, that this equity is enforced against one who is not a party to the transaction creating the equity, and who does not claim through or under any party. A curious class of negative easement is here created.

[1] *Attorney General* v. *Biphosphated Guano Co.*, 11 Ch. D. 327.

LECTURE XIII.

THE REMEDIES FOR BREACH OF TRUST.

In considering the nature of equitable estates and interests we have partially answered a question to which we ought now to turn; namely, what are the remedies for a breach of trust?

Now if a trustee in breach of trust has alienated the trust property, in general the best remedy that the *cestui que trust* can wish for is that he should be able to recover that property from the person who is holding it. Fraudulent people are apt to be impecunious people and a merely personal remedy against the trustee who has been guilty of a fraud is apt to be of little value. Therefore the *cestui que trust* will be anxious to recover the trust property, let us say the land from its present possessor. But can he do so? Already we have an answer. He can recover it from one to whom the trustee has given it without valuable consideration, he can recover it from one who purchased it with notice of his equitable rights unless indeed it had already passed through the hands of one who had obtained the legal estate *bona fide*, for value and without notice; again his equitable right will, as a general rule, prevail against any merely equitable right which is posterior to it in order of time. On the other hand if once the land has passed to a person who obtained the legal estate *bona fide*, for value and without notice, *cestui que trust* will not be able to get back that land again, unless indeed by some chance it should come into the hands of the guilty trustee.

Failing this remedy the *cestui que trust* can proceed personally against the guilty trustee. For every breach of trust there is this personal remedy against the trustee—the trustee is bound to restore the trust fund or trust property that has

been alienated, or has perished, or has been deteriorated owing to a breach of trust, and the courts are severe—I must not go into details—in taking accounts against trustees who have misconducted themselves; in charging them with interest, in holding them liable not merely for what they have received, but also for what they might have received, but for their wilful default. But it will sometimes happen that a *cestui que trust* will have a somewhat better remedy than this merely personal remedy against the trustee.

To this remedy we ought to give a moment's attention—it is known as following the trust fund. Suppose that T holds a fund upon trust for A, and in breach of trust invests this fund, or rather the money produced by selling this fund, in the purchase of land, of which he obtains a conveyance in his own name. A can now say that the trust fund is represented by that land—he can obtain that land from T. Even if T be bankrupt A can, if I may so speak, pull this piece of land out of T's estate, and say 'No this is not part of the fund divisible among T's creditors, it is mine, bought with my money.' If T sells that land or gives it away, then A's power to obtain that land depends on considerations of which we have already spoken at some length. A is treated as having an equitable estate in that land; the question whether he can enforce that estate against X, the person now holding the land, raises the questions with which we are familiar:—Has X got the legal estate? Did he obtain it *bona fide*, for value, without notice? Does he claim under one who obtained it *bona fide*, for value, without notice, and so forth?

But—and this may be a newer point to you—a *cestui que trust* is also allowed to follow money into investments or into the hands of the trustee's banker. T is a trustee for A of a plot of land, or of a sum of Consols. Wrongfully, and let us suppose it, with dishonest intent, he sells that land or that fund of Consols for £1000—this sum is paid to him in cash or in bank notes. Now of course in one sense A will not be able to follow the coins or the notes. A third person will be perfectly safe in receiving those sovereigns or those bank notes, unless indeed he is a participator in the trustee's fraud. But suppose that the trustee on having received the money or the

notes at once goes and buys with them a number of shares in the Great Northern Railway Company—can A lay hold of those shares, and say 'They are mine'? Can he do so if the trustee is bankrupt, or will those shares form part of the trustee's estate and be divisible among all his creditors? We may complicate the question by supposing that T sells the Great Northern shares and buys a Great Eastern debenture, and then sells the Great Eastern debenture and buys shares in the Cambridge Water Works. Can A, when T is bankrupt, point to those Water Works shares and say, 'They are mine, bought with my money—I trace my fund from investment to investment and I find it here.' There is no doubt that in all these cases the *cestui que trust* is allowed to pursue the fund from investment to investment and to claim it in whatever shape he finds it.

We get the idea of a trust fund as a thing, an incorporeal thing, which can be invested, that is dressed up in one costume or another, but which remains the same beneath all these changes of apparel: and that idea suffices us in many cases.

But I have been putting simple cases and the courts have gone much further than this in enabling a *cestui que trust* to follow the trust fund. In the cases that we have put we have supposed that the trustee does not mix up the proceeds of the trust fund with his own money. But very often this may happen. He sells, let us say, a trust estate or trust fund for £1000 and then we find him investing a sum of £2000 in the purchase of railway shares or the like. Or perhaps we find that he pays in the £1000 to his own account at his bankers, where already he has a credit, and he then proceeds to draw various cheques on that account and to pay them to various tradesmen as the price of articles that he has bought. Even in such cases as these the *cestui que trust* has been allowed to follow the trust fund. Take the former, the trustee sells the trust fund for £1000 and with £2000 he purchases land, or he purchases shares in a company; it is considered that as against the trustee and the creditors of the trustee the *cestui que trust* has a charge, a specific charge, on the land or the shares for the sum of £1000. Take the second case, the trustee pays the £1000, the proceeds of the trust fund, to his

own account at his bankers—in other words he lends the £1000 to his bankers—and then he pays in other money to the same account, and then he begins drawing out sums of money from this account and paying them to tradesmen and the like. It has been contended that in such a case, a rule known as the rule in *Clayton's Case*, a rule which is certainly applicable for certain other purposes, ought to be applied, and that the items on the two sides of the account should be set against each other in the order in which they occur. Let me explain—T had an account with his bankers which showed a credit to the amount of £500. He then paid in £1000 which was trust money, and then £250 which was not trust money. Then he drew several cheques amounting in all to £750—the result is that he has now a credit of £1000. The *cestui que trust* now begins his action; if we suppose that the trustee draws out first the moneys which he pays in first, then £250 of the *cestui que trust's* money (if such we may call it) is gone. But this is not the rule. The rule as laid down by Jessel M.R. in the case of *In re Hallett's Estate*, 13 Ch. D. 696, is that neither the trustee nor his creditors, who stand in his place, can be heard to say that he acted dishonestly, that he drew out and spent upon his own purposes the trust monies which were standing to his account. It must be taken that his cheques were drawn against his own money, and the *cestui que trust* will have the first claim to any balance that the account may show.

The rule in *Clayton's Case*, 1 Mer. 572, is a rule which was evolved for the purpose of settling the liabilities of partners in banking firms. X banks with a firm of A, B and C (not being a corporate body); his account shows a credit of £1000; at this moment C dies: A and B continue the business and X banks with them; X pays in £500; then draws out £500; then the bank breaks and A and B are insolvent; C's estate is solvent; X wants to know how much he can claim from C's estate. When C died A, B and C owed X £1000. We consider that C (or his estate) incurs no new liability. In such a case we follow the chronologic order of the payments, for the purpose of settling the liability of the continuing and the departed partners. By the rule in *Clayton's Case* the items

drawn out are attributed to the earliest items paid in and not to the last items nor merely to items paid in to the surviving partners. Consequently the £500 drawn out goes to reduce the £1000 for which alone C's estate was liable. X can recover from C's estate only £500. But between a *cestui que trust* and the creditors of his trustee or trustees we do not apply this rule: we suppose that the trustee takes for his own purposes his own money and not the money of the *cestui que trust.*

However as between various trusts the rule in *Clayton's Case* is applied. I hold £1000 upon trust for A, £1000 upon trust for B; I pay to an account at my bank, first A's £1000, then B's £1000; I begin drawing out for my own purposes; as between A and B, I am drawing against A's £1000 until all of it is gone. See *In re Hallett*, 13 Ch. D. 696, at page 726 *et seq.* and *Hancock* v. *Smith*, 41 Ch. D. 456.

Just let us consider the application of the rule in *Clayton's Case* as between two *cestui que trusts* of one trustee.

T, a trustee, has an account at his bank which shows a balance of £500. He pays in £500 of trust money held for A. Afterwards he pays in £500 of trust money held for B, and then £500 of his own, and then he begins drawing out. It is held that he first exhausts all of the £1000 that is his own—then he begins to exhaust A's.

I have great doubts of the convenience of all this. It may be hard that a *cestui que trust* should not have 'his' property, but it is also hard that creditors should go unpaid. Courts of Equity, which in this matter have had the upper hand, have thought a great deal of the *cestui que trust*, much less of creditors. This result has been obtained under cover of the metaphor of investment—the idea of a 'fund' preserving its identity during any change of investment. Equity has been always striving to prevent the *cestui que trust* from falling to the level of an unsecured creditor. T sells for 100 sovereigns some land which he holds upon trust. He has the sovereigns in his purse, he spends them upon a banquet, the fund is gone, the *cestui que trust* is merely an unsecured creditor. Or with those sovereigns the trustee buys a horse which dies, the fund is represented by the carcase. But if he changes those

sovereigns for some chose in action the *cestui que trust* has a charge on this for the amount of 100 sovereigns or he may elect to take this chose in action itself as being in equity his —an investment by his trustee of the trust funds which he, the *cestui que trust*, may adopt, although it was unauthorised or wrongful.

It is not for the trustee to dictate to the *cestui que trust* in what shape he shall make his claim.

So far as regards following the proceeds of a rightful or wrongful disposal of the property there is no difference between the cases of an express trustee, or an agent, or a bailee, or a collector of rents or anybody else in a fiduciary position. As was said by Sir George Jessel in *Hallett's Case*, at page 710, 'the moment you get into a Court of Equity, where a principal can sue an agent as well as a *cestui que trust* can sue a trustee, no such distinction was ever suggested'—and 'the moment you establish the fiduciary relation the modern rules of Equity as regards following trust money apply.'

Thus you see that the *cestui que trust* is no mere creditor of the trustee who has committed a breach of trust. I lend you £100; you buy a horse with it; if you go bankrupt I can not claim that horse, I must take my dividend (perhaps 2*d.* in the pound) along with your other creditors. But if you are a trustee for me I may be able to trace the trust fund from investment to investment, and this even although you have mixed it up with your own money.

We have next to notice that it is possible for a *cestui que trust* to lose all or some of his remedies by lapse of time This is a subject about which unfortunately there is now a great deal of confused and complicated statute law. To explain it fully would take several lectures; but just a little may be said. In the first place we must distinguish between two cases—(1) the *cestui que trust* is seeking a remedy against one who has been expressly made a trustee for him, or against the representative of one who has been expressly made a trustee for him—(2) the *cestui que trust* is seeking a remedy against one who is but constructively a trustee for him.

(1) Now the old rule was that in the case of an express trust and as between the *cestui que trust* and the trustee lapse

of time was no bar. Suppose that T has undertaken to hold land upon trust for A. T is in possession of the land, but instead of paying over the profits to A, he put those profits in his own pocket. He may do this for 10, 20, 60 years, and yet he will never get rid of his obligation to hold the land in trust for A. In other words, a trustee could not acquire a title to the property by lapse of time. You will observe that in such a case there would be nothing that could be called an adverse possession. The trustee's possession could not be adverse to his *cestui que trust*. You could not say that the trustee was wrongfully in possession, for by law he was entitled to be in possession. Of course it was a quite different question whether you could make the trustee refund all the profits that he had wrongfully appropriated to his own use. The rule might have been that though the trustee could never acquire the land by adverse possession against his *cestui que trust* still he could only be made to refund the profits which he had wrongfully pocketed during the last 10 years or the last 20 years. Such however was not the rule. The rule was that in this case also time would not be a bar to an action by *cestui que trust* against the express trustee. Thus if for the last 40 years I had been holding land upon trust for you, owing (let us say) to some mistake I had been appropriating the profits to my own use and paying nothing to you, not only would you have been able to claim the land from me, but you would have been able to make me account for all the monies that I had misappropriated ever since the misappropriation began.

Then in 1873 this rule was laid down in very positive terms by section 25 sub-section 2 of the Judicature Act of that year. 'No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitation.' I very much doubt whether this altered the law. I suppose that the legislature thought well to declare the rule expressly at a moment when a new court which was to administer both common law and equity concurrently was being created.

In 1888, however, the current of legislation turned in

favour of the trustee. A section of the Trustee Act of that year (51 and 52 Vic. c. 59, sec. 8) dealt with the matter[1]. It is a complicated section—but put very roughly its result is I think this :—

(*a*) If the *cestui que trust* is attempting to recover property that the trustee is holding upon an express trust, no Statute of Limitations bars his action. Thus say that for forty years I have been holding land and under the terms of some settlement I ought to have been holding it upon trust for you, but all the while I have been pocketing the profits instead of paying them to you, you can still recover the land from me, in other words, you can compel me to do my duty for the future, my duty being to hold that land upon trust for you.

But (*b*) unless there has been fraud a *cestui que trust* can not recover from his trustee income which the trustee has misapplied more than six years ago, or, under certain circumstances, if the trust was created by deed more than 20 years ago. For the purposes of the Statutes of Limitation a breach of trust is for the future—if there be no fraud—to be treated as though it merely created a debt due from the trustee to the *cestui que trust*—and, as you know, the general rule is that one can not sue for a simple contract debt after six years or for a specialty debt after 20 years. These periods are now introduced in favour of a trustee who has been guilty of a breach of trust. His breach of trust is for this purpose to be treated as creating a debt, a specialty debt if he has executed a trust deed, a simple contract debt if no trust deed has been executed by him ; and this debt (if in the meanwhile there be no written acknowledgement of it) will be barred in the one case after 20 years and in the other after six years[2].

But (2) we have to consider the case as it stands between the *cestui que trust* and one who has purchased the property from the trustee—one that is who is only bound by the trust because when purchasing the property he had notice of the trust. This case was met by the Real Property Limitation

[1] This was left unrepealed by the consolidating Act of 1893, the Trustee Act, 1893.

[2] This paragraph must be taken merely as a general statement of the rule. For a detailed statement see Carson, *Real Property Statutes*, p. 405.

Act of 1833 (3 and 4 Will. IV. c. 27, sec. 25). This in effect said that as between *cestui que trust* and the purchaser of trust property, the ordinary statutory rules as to limitation were to apply, and that the statutory period was to run as from the time of the conveyance to the purchaser. The ordinary statutory period introduced by that act was 20 years. The Real Property Limitation Act of 1874 curtailed this period, substituting 12 years for 20. The rule therefore is that in favour of a purchaser from a trustee time begins to run against *cestui que trust* as from the date of the conveyance —and in the normal case the limiting period is now 12 years.

One curious result is produced by these statutes.

You will remember what we have said before, that an executor while acting merely as executor is not a trustee— but that the will often makes the same persons executors and trustees, and that it is often difficult in a given case to say whether an action is that of a legatee for his legacy or that of a *cestui que trust* against his trustee. Under the Act of 1888 the *cestui que trust* has often less time (six years) for his action against his trustee based on a breach of trust than a legatee has against an executor (12 years—under section 8 of the Act of 1874).

Read *In re Timmis*, 1902, 1 Ch. 176. There the defendant was concerned to say I am trustee, not executor. It is a curious reversal of the old position. Our Statutes of Limitation are indeed in a great mess.

The term 'express trust' used in this context is by no means so plain as it might be. There are interesting judgments on this point in the case of *Soar* v. *Ashwell*, 1893, 2 Q.B. 390, to which I have already referred you[1].

Let me remind you once more of the Judicial Trustees Act, 1896. Under section 3 of that Act the Court may relieve from personal liability for breach of trust a trustee who has acted honestly and reasonably if in the opinion of the Court he ought fairly to be excused from such liability. This section seems destined in time to produce a large crop of cases.

[1] *Ante*, pp. 76 and 77.

There is much more to be said about this matter; but I think that we have more profitable matters before us than these Statutes of Limitation which are very complicated and, in some points, very obscure.

Before we leave this subject we should just consider for a moment first the possibility of criminal proceedings against the trustee and secondly the possibility of his imprisonment in civil proceedings.

1. As to criminal proceedings. For a trustee (properly so called) to convert to his own use the trust property was no crime at all until the year 1857. The Act passed in that year was replaced by several sections of the Larceny Act of 1861. See Stephen's *History of the Criminal Law*, vol. III. pp. 156,&c.; and his *Digest of the Criminal Law*, articles 372 *et seq.*

Section 80 of the Larceny Act of 1861 hits the 'trustee' who misappropriates the property of the trust, but, by the definition given in section 1, 'trustee' is limited to 'trustee on some express trust created by some deed, will or instrument in writing' and to the representatives of such a trustee or persons upon whom the duty of such a trust may have devolved. Section 80 therefore won't work unless the trust has been created by writing.

Sections 75 and 76 of the Act of 1861 hit some classes of agents misappropriating property entrusted to their care. For these sections the Larceny Act of 1901 substitutes more general clauses dealing with the criminal liability of agents and persons entrusted with property, but the trustee on an express trust is still (by express reservation in section 1 subsection 2) left to section 80 of the old Act of 1861. Probably, however, most other trustees are hit by the extremely wide and general terms of the new sections in the Act of 1901.

2. As to imprisonment in civil proceedings. The Debtors' Act of 1869 abolished imprisonment for debt except in certain cases. One of the cases excepted is that of default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control.

LECTURE XIV.

SATISFACTION AND ADEMPTION.

MANY of the rules which equity has added to our legal system are rules establishing presumptions, rebuttable presumptions. They take this form—in this or that class of transactions it is presumed that the parties, or the settlor, or testator have or has this or that intention, and it is for those who contend for a different intention to prove their case. They are presumptions as to the intention of a person in cases in which the primary rule is that the intention of that person is to take effect. Indeed they are occasionally treated by text writers rather as rules of evidence than as rules of substantive law.

It is to one group of these rules that I ask your attention this morning. And the first matter that we have to consider is the legacy given to a creditor. The case is this: A person A owes a debt to another person X, and this debt is not a portion debt. That phrase 'a portion debt' I shall explain by and by; suffice it for the present that the debt that is owing to X is a debt of an ordinary kind, incurred, let us suppose, in the course of trade. Then A makes a will and by it he gives some benefit to X, and then A dies, the debt being still unpaid. Is X to have the benefit that is given to him by the will, and is he also to be able to exact his debt? Or, on the other hand, are we to say that the provision made for him by the will is intended as a satisfaction of the debt and that if he insists, as of course he may insist, on being paid his debt he can not claim the benefit given him by the will, or can only claim a certain part of it.

Now the rule to which our courts have come in this matter is that if the legacy be equal to the debt or greater than the

debt then the legacy is intended to be a satisfaction of the debt, and the creditor if he insists on his debt can not claim any part of this equal or greater legacy. On the other hand if the legacy be less than the debt the presumption is the other way—the testator does not intend the legacy to be a partial satisfaction of the debt. Of course it stands to reason that a debt can not be fully satisfied by a legacy of smaller amount; the only question can be as to whether the legacy is to be deemed a partial satisfaction, or satisfaction *pro tanto*; and the rule is that it is not a satisfaction *pro tanto*; the creditor may exact his debt and also claim the whole legacy. Indeed the courts have not of late much favoured the doctrine of the satisfaction of debts by legacies, and though the first part of our rule holds good in a general way, and a legacy of an amount equal to or greater than that of the debt is in general deemed to be given in satisfaction of the debt, still the scope of this rule has been narrowed, that is to say, the courts have been very ready to find in the will an indication that the debt is not to be satisfied by the legacy. For example, if the testator says in his will—and very often he does—'I direct that my debts shall be paid,' that excludes this presumption of satisfaction. Or again he gives to the creditor not a certain sum of money, not a pecuniary legacy, but the residue, or a share of the residue of his personal estate; in this case it is held that the gift of an uncertain sum, even though in the event that sum proves to be larger than the debt, is not to be deemed a satisfaction of the debt. And small differences between the debt and the testamentary benefit have been thought sufficient to exclude the presumption. Long ago Sir Thomas Clarke M.R. said 'I remember a case before the Lord Chancellor where an old lady, indebted to a servant for wages, by will gave ten times as much as she owed or was likely to owe; yet because it was payable in a month after her own death, so that the servant might not outlive the month, although great odds the other way, the Court laid hold of that[1].' On the whole it is not very often that a debt, not being a portion debt, is satisfied by a legacy[2].

[1] (1755) *Matthews* v. *Matthews*, 2 Ves. Sen. at p. 636.

[2] For a recent instance see *In re Rattenberry*, 1906, 1 Ch. 667.

Observe that the presumption of satisfaction, if it arises at all, arises only where the debt is incurred before the will is made. There is no presumption whatever that by my will I intend to satisfy debts that I have not yet incurred, and though for very many purposes a will is considered to speak at the moment of the testator's death, is treated as being the words that he uttered just as he was leaving the world, still this is one of the purposes for which we must look to the date of the will, and there can be no presumption that he intended a legacy to be a satisfaction of a debt that did not exist at the time when he executed the will.

For my own part I think that it would be well if our courts had stopped here. Unfortunately, however—at least I think it unfortunate—they have evolved a different doctrine about one class of debts, namely, portion debts, a class that is not very easily defined. I use the term 'portion debts' but in your books you will find that the doctrine of which I am about to speak is spoken of as the doctrine concerning the satisfaction of portions by legacies. There is no great harm in this phrase, only you must not allow it to mislead you. We are to deal with a case in which a father has incurred a debt of a particular kind and then gives a legacy. You must, of course, distinguish this from a case in which a father has made a completed gift *inter vivos* and then gives a legacy. The doctrine of satisfaction presupposes that there is some obligation to be satisfied; but a completed gift is a completed gift, and can not require satisfaction. Thus if I establish my son in trade, buy a business for him for £5000 and pay the money, or if when my daughter marries I transfer £5000 worth of shares to the trustees of her settlement, here is a completed gift; if afterwards I bequeath £5000 or any other sum to my son or daughter, there can in this case be no talk of satisfaction, for there is nothing to be satisfied. Otherwise is it if when my son starts in business I enter into a bond conditioned for the payment of £5000, or if when my daughter marries I covenant with the trustees of her settlement that I will pay a sum of money or transfer a sum of stock to them. Here I become a debtor, I am under an obligation, an obligation that ought in some way or another to be satisfied, and the

question may arise whether a provision that I make by my will is meant to be a satisfaction of this obligation. Therefore it is that I prefer to speak not of the satisfaction of portions by legacies, but of the satisfaction of portion debts by legacies.

Mark what our case is: the existence of a debt of a particular kind, a portion debt, followed by a provision made in the debtor's will—this raises the question of satisfaction. Afterwards I shall treat of the converse case where the execution of the will is followed by an act constituting a portion—this raises the question of 'ademption,' is the legacy adeemed by the portion?

Well, in our case of satisfaction a portion debt exists and then a will is made. What do we mean by a portion debt? Seemingly this, a debt incurred by a father or mother by way of making provision for a child of his or hers, or a debt incurred by some person who stands *in loco parentis* to another in favour of that other. The doctrine of satisfaction of portion debts does not apply in other cases. In other cases you would have to turn to those rules about the satisfaction of ordinary debts which have already come before us, rules which make the satisfaction of a debt by a legacy a pretty rare occurrence. But a debt incurred by a father by way of provision for his child stands on a quite different footing. Here there is a strong presumption that if afterwards the father gives by his will some benefit to or in favour of that child, he is intending to satisfy the debt thus incurred, either totally or partially. This special doctrine does not apply to a debt incurred by a husband by way of provision for a wife, or by a brother by way of provision for a sister. It holds only where there is the parental relation or what is called a quasi parental relation. In all cases other than that of parent and child you have in the very first place to consider whether the testator had placed himself *in loco parentis* to the beneficiary. For this purpose a putative father is not necessarily *in loco parentis* to his illegitimate child. Lord Eldon once remarked that this rule was hard on legitimate children, the court presuming that a man does not intend to make two provisions for a legitimate child while it has no such rule against the bastard. What is meant by placing oneself *in loco parentis*? The only answer

that we can get in general terms is that I place myself *in loco parentis* to a child if I come under a moral obligation to make a provision for that child. Nothing that could in a popular sense be called adoption of the child is necessary—I say in a popular sense, for adoption has no legal meaning in England. The child to whom I place myself *in loco parentis* need be no orphan, he or she may be living with his or her parents, and may be maintained by them. It is not necessary that I should assume or attempt to assume all those moral duties which a father owes to his child. In short it seems enough that I should do or say such things as would give rise to the belief that I held myself morally (of course not legally), but morally bound to make some pecuniary provision for that child such as fathers make for their children. Of course it is easier to establish such a relationship where there is some bond of consanguinity or affinity between the two persons. It might easily be shown that a wealthy grandfather had placed himself *in loco parentis* to the children of a dead son. Still no such bond is essential, I may have placed myself *in loco parentis* to the child of one who was a perfect stranger to me. I think that if you will look at the cases you will agree with me that the Court of Chancery entered on a very difficult task when it adopted this phrase '*in loco parentis*.'

Then the parental relation being established, there is a strong presumption that a benefit given by the will is meant to be a satisfaction of what I have called the portion debt. The Court, it is said, leans strongly against double portions. We are dealing, you will remember, with cases in which the testator has incurred a debt before he has made his will. The creditor of course has the ordinary right of a creditor; nothing that the testator can do by his will can deprive him of this right. The only question will be whether besides insisting on this right the child can also claim the benefit given by the will. If the benefit given by the will be equal to or greater than the amount of the portion debt, then, as in the ordinary case where it is not a portion debt, there is a presumption of satisfaction; if the benefit given by the will be less than the portion debt, then there is here—what there is not in the case of an ordinary debt—a presumption of satisfaction *pro tanto*;

which means in effect, that the child can not claim the legacy. But further it is well settled that small differences between the provision promised by the testator in his life time and that made by him in his will are not sufficient to exclude the presumption. It is indeed necessary that the two provisions should be of somewhat the same character: a covenant to pay £1000 would not be satisfied by a devise of Blackacre, even though Blackacre was worth more than £1000[1]; a covenant to pay £1000 in any event would not be satisfied in whole or in part by a legacy of £1000 contingent on the happening of a particular event; a covenant to pay £1000 would not be satisfied by a testamentary gift of an aliquot share of the testator's personalty if the testator had by his will directed that his debts should be paid. But I can best show you how far the doctrine has been carried by reference to a modern case which is instructive because great judges disagreed about it. The case is *In re Tussaud*, 9 Ch. D. 363. The facts were these: In 1867 T, on the marriage of his daughter, covenanted with the trustees of the marriage settlement that his executors or administrators would within twelve months after his death transfer £2000 consols to be held upon the trusts of the settlement, which were for such persons as the wife with the consent of the trustees or trustee for the time being should appoint, and in default of appointment in trust for the wife for life for her separate use, then for the husband for life, then for such children of the marriage as being sons should attain 21 years, or being daughters should attain that age or marry, and in default of children for the husband absolutely. In 1871 T satisfied one half of the covenant by paying over a sum to the trustees, so that thenceforth he was only bound to transfer to them a sum of £1000 consols. In 1873 he made his will, and thereby bequeathed £2800 to certain trustees in trust for his daughter for life for her separate use without power of anticipation, and after her death for such of her children as should attain 21 in equal shares.

This case came before Sir George Jessel M.R. There were, you will see, very considerable differences between the two settlements. Under the marriage settlement £1000

[1] Cf. *In re Lawes*, 20 Ch. D. 81, and *In re Jaques*, 1903, 1 Ch. 267.

consols was due. By the will £2800 was given. Under the marriage settlement the wife had a power of appointing the whole fund with the consent of the trustees to any person whom she chose. Under the will she had no such power. Under the marriage settlement the husband had a life interest, under the will he had none. Under the marriage settlement the wife was not restrained from anticipating her income, under the will she was restrained. The Master of the Rolls admitted that there were differences, he even called them important differences. Further he said 'I strongly suspect that what I am about to say will not carry out the intention of the testator'—but he felt himself bound by the decided cases to hold that those differences were not substantial enough to remove the presumption of satisfaction. His decision was that the wife and children must elect between the £1000 due on the covenant contained in the marriage settlement and the £2800 settled upon them by the will, the latter having been meant (according to this interpretation which equity put upon the transaction) to be a satisfaction of the former. The husband of course was put to no election; nothing was given to him by the will; he had simply to rely on the settlement.

However, the Court of Appeal came to a different opinion. It said that the differences between the two provisions were not slight, but substantial. No new principle was laid down; in every case a judge has to decide whether or no in his opinion the differences are sufficiently substantial to exclude the presumption. I have mentioned this case because we may well say that when the Court of Appeal overruled Jessel M.R. the case was very near the border line.

In this case it was allowed in both courts that differences sufficient to exclude the presumption of satisfaction might well be insufficient to exclude the converse presumption of ademption. Let us turn to the doctrine of the ademption of legacies by portions.

First let us notice that the term ademption often occurs in another context. We often hear of the ademption of specific legacies by the alienation or the destruction of the subject-matter of the legacy. I give you in my will my black horse

Dobbin or my copy of Coke upon Littleton, I sell the horse or the book, the horse dies or I lose the book. In such a case the legacy is adeemed ; you can not call upon my executors to pay you the value of the horse or of the book—you will get nothing at all[1]. Well it is in a somewhat similar sense that we talk of a legacy being adeemed by a portion. By my will I give my son Thomas a legacy of £1000, then on his marriage I pay or I covenant to pay a certain sum to him or to the trustees of his marriage settlement, or I buy him a business, or without buying him a business I make him a present of money. Here the question of ademption is raised, just as it is raised if I bequeath you a particular horse and then sell that horse to another. It is the question whether that legacy to my son is or is not to take effect, is or is not to be struck out of my will.

Now in this case the so-called leaning against double portions has been allowed a great scope. Notice first that it only takes effect where the person making the two provisions is the parent of or stands *in loco parentis* to the beneficiary. In the second place it is not every gift, every provision made by a parent for the benefit of his child, that is a portion. I think that a portion implies something that having regard to the circumstances of the parties may be called a substantial provision. If I had left my son a £10,000 legacy, he would not be called to account for every five pound note that I gave him on his birthday. On the other hand the term portion does not imply that there is a solemn marriage settlement, or the purchase of a business or an estate—any considerable gift of money might be regarded as a portion (see *Leighton* v. *Leighton* L.R. 18 Eq. 458). Then again you will observe that in this case we have not to distinguish between completed gifts and obligations. By my will I bequeath £1000 to my daughter. On her marriage I actually pay over £10,000 to the trustees of her marriage settlement, or I covenant that I

[1] For an instance of the application of this doctrine even to an appointment under a special power, see *In re Dowsett*, 1901, 1 Ch. 398. There a testator, having a special power of appointment, by his will appoints Blackacre to an object of the power. Later Blackacre is bought by a company under statutory powers of compulsory purchase. The appointment by the testator is held to fail. And see *In re Slater*, 1907, 1 Ch. 665.

will pay them £10,000. In either case the presumption of ademption will arise. This marks off ademption from satisfaction, two things which are somewhat easily confused. Satisfaction, as I have already said, presupposes an obligation —there must be something to be satisfied, and a completed gift leaves nothing to be satisfied. But a legacy may be adeemed either by a completed gift or by the acceptance of an obligation—by a settlement or by a covenant to settle. You should notice this distinction, for many of the rules which apply to satisfaction apply also to ademption. We must, however, say that the presumption in favour of ademption is somewhat stronger even than the presumption in favour of satisfaction. A legacy can be adeemed by a gift or a covenant to give an equal or a greater sum, it can be adeemed *pro tanto* by a less sum. Indeed some time ago the rule was held to be that a legacy might be totally adeemed by a less sum. Observe this, for it brings out once more a difference between satisfaction and ademption. Of course I can not wholly satisfy a debt of £100 by a legacy of £50. But by my will I have bequeathed to my son £1000; I then give him £500. Here it is, or rather was, quite possible to contend that by giving £500 I had shown an intention that that should be my son's portion, and that he should take it in lieu of the provision made for him by my will. That contention, after having been considered sound, was overruled by the case of *Pym* v. *Lockyer*, 5 My. and Cr. 29, which decides that a smaller portion will be deemed an ademption of a larger legacy *pro tanto*, but *pro tanto* only. You understand me? In the case just put I bequeath £1000 to my son and then give him £500 by way of portion, he will on my death be able to demand another £500. I have adeemed half of the legacy but not the whole.

The two provisions even in the case of ademption must have somewhat of the same character. A bequest of £10,000 was not adeemed by a subsequent settlement of a beneficial lease. But very considerable differences—at least I should have called them very considerable—between the two provisions will not exclude the presumption. You will remember the case of *In re Tussaud*. The Court of Appeal seems to have thought that had that case been one not of satisfaction

but of ademption, the result would have been different. A legacy to a daughter may well be adeemed by a settlement which gives her only a life interest with a subsequent life interest for her husband, and settles the corpus on the children of the marriage. 'In a case of ademption' said Cotton L.J. (9 Ch. D. at page 380) 'where the will is first, that is a revocable instrument, and the testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will, the testator when he makes his will, is under a liability which he cannot revoke or avoid. He can only put an end to it by payment, or by making a gift with the condition, expressed or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation. It is therefore easier to assume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation[1].'

In re Furness, 1901, 2 Ch. 346, a testator by his will made in 1885 gives £20,000 to his daughter directing that £15,000 shall be settled on certain trusts for her and her children. On her marriage in 1893 he settles £7300 consols upon her and her children, but the trusts are not the same. It is indisputable that as regards her interest there is ademption *pro tanto*, the question is whether it is to be treated as in ademption of the settled £15,000 or of the unsettled £5000. Joyce J. holds that it is in partial ademption of the former. The case shows the strength of this presumption.

In re Smythies, 1903, 1 Ch. 259, is a good case to illustrate the doctrines of ademption. It was the case of a legacy of £500 upon trust for a great niece of the testator and a subsequent voluntary settlement of exactly the same sum. It was decided that there was no ademption because there was no parental relationship.

Lastly note that these presumptions of satisfaction or

[1] A bequest of a share of residue will not be deemed to be in satisfaction of an obligation, but such a bequest if made to a child will be presumed to be adeemed *pro tanto* by a subsequent portion given. The advance must be brought into hotchpot. The rule is designed to produce equality among children; see *Meinertzagen* v. *Walters*, L.R. 7 Ch. 670, and *In re Heather*, 1906, 2 Ch. 230.

ademption are but presumptions, and can be rebutted by parol evidence of the settlor's or testator's intention. Seeing two provisions made by a father for one of his children, Equity, in accordance with the rules that we have tried to state, presumes that he did not mean to give that child two portions; but then you may produce evidence to show that on the contrary, he did mean to give two portions. This point also is illustrated by the case of *In re Tussaud*[1]. An affidavit was there tendered to prove that the testator had used expressions indicating that he did not intend that the legacy in his will should be a satisfaction of the obligation to which he was subjected by his daughter's marriage settlement, and that affidavit was received in evidence. Then of course if evidence be thus let in to rebut the presumption, evidence will be received to support the presumption, to show that a decision in conformity with the presumption will really carry out the intention of the testator. On the other hand you can not produce external evidence, evidence outside the documents, in the first instance in order to raise the presumption. If for example a man covenanted to settle £1000 upon his daughter, and then by his will devised Blackacre to her, here the presumption of satisfaction would not arise, and you could not produce external evidence to show that the testator had intended his daughter to take Blackacre in lieu of the £1000.

[1] 9 Ch. D. 363.

LECTURE XV.

ADMINISTRATION OF ASSETS. (I.)

AMONG the departments over which equity is said to have exercised an exclusive jurisdiction it was usual to mention the administration of the estates of dead persons, and by the Judicature Act of 1873, section 34, the administration of the estates of deceased persons is one of the matters which is assigned to the Chancery Division of the High Court of Justice. But it will strike you at once that the exclusive jurisdiction of equity in this matter must have been of a somewhat different kind to its exclusive jurisdiction in matters of trust. For of the trust a Court of Common Law would take no notice at all; on the other hand the Court of Chancery in administering the estate of a dead man was, at least to a very large extent, giving effect to rights which were perfectly well known to other courts. The creditor's right to sue the executor or administrator of his dead debtor was a right known to and protected by the Courts of Common Law; it would be enforced by an action of debt or of assumpsit and judgment would be given that the defendant should pay the sum due to the plaintiff out of the assets of the testator or intestate[1]. In some cases too, as you know, the creditor would be able to sue the heir, and under the Statutes 3 and 4

[1] Notice the decisions that such a judgment *de bonis testatoris* operates as a conclusive admission of assets, with the result that unless at the time of that action he has pleaded either *plene administravit* or *plene administravit praeter* the executor will have to pay the debt as well as the costs even out of his own assets. See *e.g. In re Marvin*, 1905, 2 Ch. 490, and Williams on Executors, 10th ed. p. 1583 *et seq.* Even if he fails to prove either plea he, by the plea, limits his liability to the assets. Here is a solemn jugglery.

W. and M. c. 14 he might sue the devisee of his debtor. As to the legatee he, it is true, had no action in a Court of Common Law. From of old the enforcement of the last will of the dead man had been a matter for the ecclesiastical court; still in the ecclesiastical court the legatee would find a tribunal which would compel the executor to pay the legacy. It may seem then that there was little reason why the Court of Chancery should interfere in this matter.

But interfere it did. Already in Elizabeth's day a legatee instead of going to the ecclesiastical court will sometimes file a bill in Chancery; by this time the ecclesiastical courts have grown too feeble to protect themselves. It may be that the cases in which the Chancery first interfered were cases in which the legatee was not a mere legatee but was also a *cestui que trust*. But at any rate the Court of Chancery soon became the regular court for actions by legatees. Then again the creditor had often an occasion to go thither. He had no specialty, or no specialty that bound the testator's heir, and the testator's personal estate was inadequate for the payment of his debts; on the other hand the testator, being an honest man, had devised his real estate to X and Y upon trust to pay his debts. Here the creditor wanted the aid of a Court of Equity because he wanted to enforce a trust. Thus in one way and another the Court obtained a footing in this field and gradually it subdued the whole province of administration. It had a machinery for taking accounts; it could call upon all the creditors of the deceased to come in and prove their debts and then by its injunctions it could prevent the creditors from suing in any other Court. At the instance of a creditor, or of a legatee, or of the personal representative of the dead man it would decree that the estate should be administered by the Court; it took upon itself the duty imposed upon the personal representative, and called upon all creditors to come in and distributed the estate in accordance with the rules of law and equity. Of law, I say, and equity—for some of the rules that it had to apply were old legal rules, while others were new rules of its own invention to which it came gradually in the course of its business as an administrator of estates.

Now of these rules I intend to speak briefly; and first we must consider the various kinds of debts. Of course the main distinction that meets us directly we think of the debts of a dead man is this, that some of them may be secured debts while others of them may be unsecured. By a secured debt we mean this, that the creditor, besides having a personal right against the debtor, has some mortgage or charge upon a specific portion of the debtor's property. For instance he has a mortgage on Blackacre, a bill of sale of certain chattels, a charge upon a certain trust fund. Then of course he has some means of availing himself of this security. Thus in the case of a mortgage of Blackacre he probably has several different remedies open to him; he can enter on Blackacre and take the rents and profits, he can sell Blackacre, he can foreclose the mortgage—to use a common phrase, he can realize his security.

Now the chief thing that we have to notice in this region is an old rule of equity about the rights of a creditor who has a security, but an insufficient security for his debt. A dies owing X £2000 and this debt is secured by a mortgage of Blackacre. X realizes his security; he sells Blackacre, but the sale produces only £1000. Well of course X is still entitled to be paid another £1000 and if A's estate is sufficient for the payment of all his debts then X will get that other £1000. But suppose that A's estate is insolvent, X will certainly be entitled to something besides the £1000 that he got out of Blackacre. It would I think be natural to say that X's right is to prove against the testator's estate a debt of £1000, and take a dividend, whatever it may be, say five shillings in the pound, proportional to that debt of £1000, for £1000 is what is due to him after Blackacre has been sold. Now that was the rule to which the Court of Bankruptcy came in the administration of the insolvent estates of living persons. Its rule was this, the creditor with an insufficient security may do one of two things; he may abandon his security (abandon Blackacre) and prove for his whole debt (prove for £2000), or he may realize his security and prove for what still remains due to him after such realization—thus in the case I have put he may pocket £1000, the price of Blackacre, and then claim

a dividend on the other £1000 which still remains due to him. But the Court of Chancery in its administration of the estates of dead persons came to another rule, usually known as the rule in *Mason* v. *Bogg*[1]. The mortgagee may realize his security and may also prove against the general estate for the whole of his debt, provided always that he is not to get more than twenty shillings in the pound. Thus in our case X might keep the £1000 that he gets from the sale of Blackacre, and then he may also prove against the general estate of the dead man for the whole £2000; but of course he is not to get in all more than the whole debt, the whole £2000 that is due to him. This rule may seem to you unjust, and it has seemed unjust to Parliament; it seems to favour the secured creditor unduly at the expense of unsecured creditors. However you can see that there was a certain logic in it. The mortgagee has two distinct rights, the right *in personam*, the personal right against the debtor, and the real right, the right in Blackacre. Why should he not use both of these? Why should the fact that he has used one of them, hamper him when he desires to make good the other. He sells Blackacre, well and good; but the dead man owed him £2000, why should he not prove against the dead man's estate for the whole of this debt? However it is needless now to consider whether or no there was much justice in this reasoning, for a section of the Judicature Act of 1875 —section 10—declared in effect that in the administration of the estates of dead persons the bankruptcy rule was to prevail as between the secured and the unsecured creditors. To this section I shall have to return hereafter; meanwhile (for this will save us trouble and I have a complicated story to tell) I will ask you to remember the rule in *Mason* v. *Bogg*.

We can now leave the treatment of securities out of account, and looking at debts merely as debts we have to notice that the debts of a dead man are not all of equal rank. In the administration of his estate out of Court and by his personal representatives the debts may, I believe, be ranked according to the following order[2].

[1] (1837) 2 My. and Cr. 443 (45 R.R. 111).

[2] In strictness this order applies only in the administration of legal assets. Until

1. Debts due to the Crown by record or specialty.

2. Debts to which a priority has been given by certain particular statutes, *e.g.* debts due to a friendly society by its officers, and regimental debts.

3. Debts due upon judgments obtained in courts of record against the dead person. These are to be paid rateably *inter se*[1].

4. Recognizances, and (could these ever occur now-a-days) statutes staple and statutes merchant—that is to say debts acknowledged with certain formalities prescribed by ancient statutes which have long become obsolete.

5. Debts due upon judgments recovered against the executor or administrator, whether registered or not, and whether recovered in respect of specialty or of simple contract. These are payable according to priority of date[2].

6. Debts due upon specialty or simple contract.

You will remember that until the year 1870 specialty debts had a preference over simple contract debts. Hinde Palmer's Act (32 and 33 Vic. c. 46) threw them together. What is the exact position of a simple contract debt due to the Crown is somewhat doubtful. The old order used to be, specialty debts, debts due to the Crown upon simple contract, other simple contract debts. The Act of 1869 says nothing about the Crown—is the result of it that simple contract debts due to the Crown now rank in the very high place assigned to specialty debts due to the Crown? This seems doubtful, and is not very important. However in 1897 it was decided that a simple contract debt due to the Crown has preference over ordinary simple contract debts but not over specialties[3].

an order is made for administration in the Chancery Division or in Bankruptcy under s. 125 of the Bankruptcy Act of 1883 the executor must follow these rules. See per Lindley L.J. in *In re Hargreaves*, 44 Ch. D. 236, at p. 242.

[1] Until the Land Charges Act, 1900, s. 5, registration was necessary in order to give the judgment priority (under the Act of 1860, 23 and 24 Vic. c. 38, ss. 3 and 4). Apparently now the judgment debt stands as it did before that Act. *Sed quaere.*

[2] *In re Williams's Estates*, L.R. 15 Eq. 270.

[3] *Bentinck* v. *Bentinck*, 1897, 1 Ch. 673. But *quaere* whether the Crown's simple contract debts would not now be held to have preference over specialties also; see *In re Samson*, 1906, 2 Ch. 584, at p. 592.

7. Voluntary covenants and bonds. These are usually placed last. But at law they were of equal validity and ranked with other specialties. But Equity in its administration postponed them to all obligations incurred for valuable consideration[1].

Now we ought to observe the character of these rules. At least in the main, they are legal, they are common law rules, though modified by statute. They mean this, that an executor or administrator ought to pay the testator's debts in a certain order and that if he pays them out of this order, he is answerable, personally answerable, for any loss that he may thereby inflict upon any creditor. Suppose, for example, that an executor pays away the whole of the testator's assets in satisfying simple contract debts, and then a creditor with a bond makes his appearance; under the law as it stood before 1869 the executor was himself liable to pay that bond debt; and even now the case is the same if the creditor who thus makes his appearance instead of having a bond debt has a judgment debt. In paying a debt of a lower order while a debt of a higher order is outstanding an executor commits the legal wrong known as a devastavit, he has been guilty of wasting the estate of his testator. Now-a-days under a statute of 1859 (22 and 23 Vic. c. 35, sec. 29) an executor or administrator has power to protect himself by issuing advertisements calling upon the creditors of the dead person to send in their claims; but still you should understand that an executor or administrator does wrong in paying a debt of a lower order while a debt of a higher order is yet outstanding, and should he do this without issuing the proper advertisements, and should the estate of the dead man prove insufficient for the satisfaction of all his debts, then the executor will have made himself liable, liable in a common law action, to the privileged debtor whose privilege he has ignored. Here of course we may find one strong reason which drove executors and administrators to seek the protection of the Court of Chancery and as the phrase went to 'throw the estate into Chancery' and thereby shuffle off their risky duties.

[1] *Payne* v. *Mortimer*, 4 De Gex and Jones, 447, and *In re Whitaker*, 42 Ch. D. 119, at p. 124.

Then within each of these classes of debts that I have mentioned there was in general no priority whatever—thus among the specialty creditors of the dead man the executor might single out one of them and pay him in full, though this payment would exhaust the assets and thereby deprive the other specialty creditors of their remedy. And at the present day the executor or administrator may still do this, he may prefer one creditor to another, he may do so at any time before the Court has given judgment for the administration of the estate, even though an action for administration has been commenced[1]. Here was another strong motive for administration suits in the Court of Chancery. A creditor who feared that the executor was going to prefer some other creditor to him would make haste to obtain a decree that the estate should be administered by the Court.

A corollary of this doctrine that an executor or administrator may prefer one debt to another of equal degree is his right to retain for his own debt. If he may prefer a creditor and he himself is a creditor, he will very naturally prefer himself. He might prefer his own debt to any debt of equal degree, but he could not prefer it to a debt of a higher degree. Of this right of retainer or self-preference he was not deprived even by a decree declaring that the estate was to be administered by the Court. At any time before the distribution of the estate he might claim payment of his debt in preference to debts of equal degree.

Now the rules which instituted what we may call a hierarchy of debts, rules developed in Courts of Law, were from time to time taken over by the Court of Chancery when it had begun to concern itself with the administration of estates. It would do what a personal representative ought to do, it would respect the legal order of debts. Within each class it would pay creditors rateably—that is to say, if there was not enough for the whole class it would pay each member of it a dividend proportional to his debt; but the hierarchy of debts it would respect. However in course of time the Court found that it sometimes had

[1] For a statement of the reasons for this rule see *In re Samson*, 1906, 2 Ch. 584, at p. 594.

property to distribute among the creditors to the distribution of which these legal rules had never been applied. Thus a testator devised all his real estate upon trust for the payment of debts—here was property available for distribution and yet it was property which either was not vested in the personal representative of the dead man, or if it was vested in his executor was vested in him not *qua* executor but *qua* devisee. Here equity could neglect the old rules—it could say, and did say, that an equal or rather a proportional distribution among all the creditors was the fairest mode of distribution. It had come by certain property which could be called equitable assets as opposed to legal assets; it could say that these equitable assets should be distributed without regard to the legal rank of debts, it could even forbid the executor to give himself an advantage by retaining his own debt out of these equitable assets.

What are equitable assets? The accepted definition seems to be:—Equitable assets are property which is applicable for the payment of the dead person's debts but which is not vested in his personal representative, his executor or administrator, *virtute officii*. It is necessary to be somewhat careful about this matter, for one plausible definition might lead us astray. We can not say that equitable assets include all assets that can not be made available without the aid of a court of equity. Put this case, T holds a term of years upon trust for A; A dies having appointed M his executor; that term of years, that interest in the land is legal assets, though it is but an equitable interest in the land. It becomes vested in M, because he is executor of A, that is enough to decide that it is legal assets. On the other hand if A be legal tenant in fee simple and devises his realty to M, upon trust to pay debts, and appoints M his executor; then although M's estate in the land is a legal estate it is equitable assets, for M does not take this freehold estate *virtute officii*, he does not take it as executor, he takes it because it has been devised to him[1].

At the present day we seem to have two or perhaps three kinds of equitable assets, all other assets being legal. In the

[1] See the judgment of Kindersley V.C. in *Cook* v. *Gregson*, 3 Drew. 547.

first place there is the oldest kind of equitable asset—it consists of freehold and copyhold estates which the testator has by his will either devised for the payment of his debts or charged with the payment of his debts. And here I may remark that in old days the Court was extremely anxious to find in a will a charge of debts upon the real estate and that to this day a charge of debts upon the real estate will be very easily found. For example, if a testator says 'In the first place I direct that all my debts be paid and then I give my real estate to A and my personal estate to B,' this is quite enough to charge the real estate with the payment of debts. The reason for this anxiety will be apparent to you if you will remember that until the year 1833 freehold and copyhold estates were not assets for the payment of simple contract debts or even of specialty debts unless the heir was mentioned in the specialty—therefore unless a charge of debts could be found in his will a testator might die leaving large estates and yet his creditors would go unpaid. The rule of construction which easily finds a charge of debts was begotten by these circumstances, but it still holds good though since 1833 the dead man's freeholds and copyholds have been assets for the payment of all debts. Well, if there be a charge of debts on the realty, then the realty is equitable assets. Secondly we come to the Act of 1833 (3 and 4 Will. IV, c. 104) which made realty assets for the payment of all debts, made, as I understand it, all realty which was not devised for the payment of debts or subjected to a charge for the payment of debts, equitable assets, but subject to this rule that out of such realty a creditor with a specialty binding on heirs, was to be preferred to creditors with specialties not binding on heirs and simple contract creditors. Then the Act of 1869 abolished this preference—and so, as I understand it, the result is reached that freeholds and copyholds are equitable assets whether or no they be charged by the testator with the payment of his debts (see *Walters* v. *Walters*, 18 Ch. D. 182). Then under the old law, I mean the law as it stood before the Married Women's Property Act of 1882, the separate estate which a married woman left behind her was equitable assets for the payment of her debts—the separate

estate, and the debt payable out of separate estate, were purely equitable institutions. I am not aware that under the statute which enables a married woman to have separate property at law as well as in equity there has been any decision as to the character of the assets that she leaves behind her; but that ill-drawn Act is full of traps[1].

It will strike you that if the dead person's estate consists partially of legal and partially of equitable assets, there must be considerable difficulty in adjusting the claims of the two systems. Out of the legal assets the debts are to be paid in order of their rank, out of the equitable assets they are to be paid rateably without regard to their rank. The adjustment has been effected by one branch of the doctrine—other branches of it will come before us hereafter—which is known as marshalling. The rule may be stated thus:—a creditor who has obtained part payment of his debt out of the legal assets is not to be paid anything out of the equitable assets unless he will bring what he has received back into hotchpot. Thus to put a case, a testator leaves £1000 of legal assets and £2000 of equitable assets; he owes a judgment debt of £1200 and simple contract debts to the amount of £3000. The judgment creditor has a right to carry off in this case all the legal assets; these will satisfy £1000 out of the £1200 that is owing to him; £200 will remain due, but he can have no more unless he will throw the £1000 into hotchpot with the £2000 and permit the whole £3000 to be divided rateably among all the creditors. Were he to do this, instead of getting £1000 he would get something less than £860, so of course he will not do it. I might easily however have chosen figures which would make it worth his while to abandon his preferential claim on a small sum of legal assets in order that he might share rateably with the other creditors in a division of a large sum made up of legal and equitable assets.

Since the Act of 1869, Hinde Palmer's Act, the rank of

[1] In the MS. of the lecture there is a marginal note at this place as follows:—'Query as to the effect of the Land Transfer Act of 1897? Apparently its effect is to increase the legal assets.' This opinion is supported by Mr Carson (*Real Property Statutes*, p. 418). The question was raised but not decided in the case of *In re Williams*, 1904, 1 Ch. 52.

debts, the distinction between legal and equitable assets, and this doctrine of marshalling have been far less important than they used to be—for specialties and simple contracts have been placed on the same level; but still judgment debts have a priority and therefore the principles with which we have been dealing are existing law. As we shall see next time the Judicature Acts by their so-called fusion of law and equity did not abolish the distinction between legal and equitable assets.

LECTURE XVI.

ADMINISTRATION OF ASSETS. (II.)

IN my last lecture I was speaking of the mode in which legal and equitable assets respectively are applied for the payment of debts. I ended with the remark that the section of the Judicature Act which provides for the prevalence of the rules of equity over the rules of the common law made no change in this matter. There was no conflict, no variance between the two sets of rules. Each held good within its own sphere. And so it is now. Within the common law sphere, *i.e.* in the distribution of legal assets, the rules of the common law still prevail, while the rules of equity are applicable only within the equitable sphere, that is to say, in the distribution of equitable assets.

But the Judicature Acts contained another provision that touched our theme. The Act of 1873 had in it a certain clause, section 25, subsection 1, which dealt with the administration of assets; but this never came into force, for it was repealed and replaced by section 10 of the Act of 1875, which said that in the administration by the Court of the assets of any person who should die after the commencement of this Act and whose estate might prove to be insufficient for the payment in full of any of his debts or liabilities, the same rules should prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of securities and future and contingent liabilities respectively as might be in force for the time being under the law of bankruptcy.

Now this section caused a great deal of difficulty and gave rise to many decisions. I must try to explain the general nature of the difficulty. You will remember that as

regards the rights of a secured creditor the Court of Chancery in its administration of the estates of dead persons had come to one rule, while the Court of Bankruptcy in its administration of bankrupts' estates had come to another rule. The Chancery rule—it is convenient to speak of it as the rule in *Mason* v. *Bogg*—was that the secured creditor with an insufficient security might realize that security and also prove against the general estate for the whole of the debt, but of course he was not to get more than was due to him, more than 20*s.* in the pound. The Bankruptcy rule was less favourable to him, therefore more favourable to the unsecured creditors. He was put to his choice, either he might abandon his security and prove for the whole debt, or he might realize his security and prove for such part of his debt as remained unpaid after the security had been realized. Now there was no doubt at all that section 10 of the Act of 1875 had in this respect introduced the bankruptcy rule into the administration of the estates of dead persons, and, now-a-days, when the Court is administering the estate of a dead person this bankruptcy rule as to the relative position of secured and unsecured creditors prevails. But the question was whether that section had not done far more than this, whether it had not swept away the old rules of administration in mass and replaced them by the rules observed in bankruptcy.

In order to explain this I must remind you that from the very first our bankruptcy law has been statute law, law to be found in successive Acts of Parliament, and, if I may so speak, it has gone its own way unaffected by those rules which courts of law and of equity applied to the payment of the debts of dead persons not made bankrupt in their lifetime. Thus the Bankruptcy Acts have ignored that legal hierarchy of debts of which I have been speaking; consequently they would ignore the distinction between legal and equitable assets. As a general rule all the bankrupt's debts were to be paid rateably, *pari passu*. On the other hand certain debts to which no preference would have been given in the administration of a dead man's estate have been expressly preferred. Section 40 of the Bankruptcy Act of 1883 set out three classes of preferential payments. This part of

section 40 is repealed and is now represented by section 1 of the Preferential Payments in Bankruptcy Act, 1888, which is in very similar terms. We find there a preference given for (*a*) certain taxes and parochial and local rates, (*b*) the wages or salary of a clerk or servant in respect of services rendered during the last four months and not exceeding £50, (*c*) the wages of any labourer or workman in respect of services rendered during the last four months not exceeding £25 (under the Act of 1883 this was £50). These preferential debts are to rank *pari passu* among themselves; and then it is said that all other debts proved in the bankruptcy shall be paid *pari passu*. Then again divers Acts of Parliament have provided that in case of bankruptcy divers past transactions may be wholly or partially avoided in favour of the creditors, and have thus increased the assets of the bankrupt divisible among his creditors. The Bills of Sales Acts have done this, and you will find that the Married Women's Property Act, 1882, by section 3, did this also. If a married woman lends money to her husband for the purpose of any trade or business carried on by him, that money is to be treated as assets in the case of her husband's bankruptcy, and the wife's claim to repayment is to be postponed to the claims of all other creditors.

Now the question occurred in a great variety of forms whether the 10th section of the Judicature Act, 1875, had merely swept away the rule in *Mason* v. *Bogg*, or whether it had introduced into the administration of the estates of dead persons all these bankruptcy rules. On the words of the section the question was a very open one, and for a while there were contradictory decisions. Until comparatively lately the tendency of the courts was to set a very narrow limit to the operation of the section. In the case of *In re May*, 45 Ch. D. 499, you will find North J. deciding that a widow, the administratrix of her late husband, whose estate was insolvent, might retain out of his assets a sum of money which she had lent him to be used in his business. Had he been made bankrupt in his lifetime the widow would have been postponed to all other creditors. As it was, she was allowed to prefer herself to all other creditors.

But in the case of *In re Heywood*, 1897, 2 Ch. 593, it was decided that the bankruptcy preferences for rates and wages, set out in the Preferential Payments in Bankruptcy Act of 1888, were introduced by the operation of section 10 of the Judicature Act of 1875.

Then such cases as *In re Maggi*, 20 Ch. D. 545, and *Smith* v. *Morgan*, 5 C.P.D. 337, to the effect that judgments still have priority, are disapproved and are apparently overruled by *In re Whitaker*, 1901, 1 Ch. 9, where the Court of Appeal decided that the effect of section 10 of the Judicature Act, 1875, is to introduce into the administration of the estates of deceased insolvents the bankruptcy rule that voluntary creditors are to be paid *pari passu* with creditors for value.

Thus the inclination to a narrow construction has given way to an inclination to a wide construction. All the recent judgments of the appellate courts point this way. The bankruptcy rules are introduced except those which go to augment the bankrupt's assets as against third persons. It is well settled that those rules apply only in actual bankruptcy. After *In re Whitaker*, *semble* judgment debts have lost their priority and *semble* also the bankruptcy preferences are admitted.

Query whether the prerogative of the Crown is not touched. You have to know the new law and the old law too.

But I have not yet finished the story. The Bankruptcy Act of 1883, by section 125, introduced certain quite new provisions. A man cannot be made bankrupt after his death, but for the first time this Act authorized the administration by courts having bankruptcy jurisdiction of the estates of persons who have not been made bankrupt in their lifetime. If within three months before my death I commit an act of bankruptcy then after my death a creditor may take bankruptcy proceedings against my estate—he may obtain an order for the administration of my estate in bankruptcy, and if he does this then (with considerable modifications)[1] the bankruptcy

[1] That which is administered is the dead man's estate, that only which passes to his personal representatives, and subject to all liens, charges and rights of other persons. An order under s. 125, which divests the interest of the personal representatives, does not increase the assets to be administered or affect the rights of third persons therein. Thus the rights of execution creditors are not affected, *Hasluck* v. *Clark*, 1899, 1 Q.B. 699 (C.A.), nor does the executor who is a

rules come into play. Thus the executor's right to retain debts due to himself still exists after an order made under section 125 of the Bankruptcy Act; and the existence of the executor's right of retainer still necessitates a knowledge of the hierarchy of debts and preserves the distinction between legal and equitable assets. For you will remember that the executor can not retain against a debt of higher rank than his own, nor is his right of retainer available against equitable assets. The result of this is I think very unfortunate and very capricious. The whole law as to the administration of the estates of dead persons sadly needs a thorough reform.

I turn to another part of our subject. We have considered the order in which debts should be paid. We have now to consider the order in which assets should be applied in the payment of debts. First let us note a great difference between these two sets of rules. Over the one a testator has no control; over the other he has complete control. Before the Act of 1869 it would have been no good for a testator to say 'I declare that my executors are to pay my simple contract debts in preference to my specialty debts,' and now it would be of no avail for him to say that a simple contract debt was to be preferred to a debt of record due to the Crown. On the other hand it is perfectly competent for me to say, and to say with effect, in my will 'My real estate is to be the primary fund for the payment of my debts, if that be insufficient then let my plate be sold, and if that be insufficient my library,' and so forth—for in saying all this I am not attempting to affect the rights of my creditors, I am merely deciding as between my various legatees and devisees, what they respectively are to have, and none of them have any rights save such rights as I choose to give them.

The following rules therefore as to the order in which the assets are to be consumed in the payment of debts are rules which hold good only in so far as the dead man has not by his will (if any) declared a contrary intention.

The executor or administrator must apply to the satisfaction of the debts of a dead man the property which may be available, but in the following order:

creditor lose his right of retainer, *In re Rhoades*, 1899, 2 Q.B. 347. And see also *In re Mellison*, 1906, 2 K.B. 68.

1. Personalty not specifically bequeathed, retaining a fund sufficient to meet any pecuniary legacies.

2. Realty specifically appropriated for, or devised in trust for (and not merely charged with) payment of debts.

3. Realty that descends to the heir.

4. Realty charged with the payment of debts.

5. Fund (if any) retained to pay general pecuniary legacies.

6. Realty devised whether specifically or by general description and personalty specifically bequeathed *pro rata* and *pari passu*.

7. Property which did not belong to the dead man, but which is appointed by his will in exercise of any general power of appointment.

Doubt was occasioned by the case of *In re Bate*, 43 Ch. D. 600, as to which ought to go first, realty charged with the payment of debts or a pecuniary legacy. Kay J. held that the pecuniary legacy must go first, but, *semble* wrongly, and in the later cases of *In re Salt*, 1895, 2 Ch. 203, and *In re Roberts*, 1902, 2 Ch. 834, it was decided that where a will contains a general direction for payment of debts the pecuniary legatees are entitled to have the assets marshalled as against specific devisees of the real estate.

Then note that a lapsed share of residue is not applicable before other shares. I give all my personalty to A, B and C in equal shares. (A, B and C are not descendants of mine—those of you who have read the Wills Act[1] will know why I make this remark.) A dies during my lifetime, so his share lapses to my next of kin. The three shares must contribute equally to the payment of my debts. You are not to throw the debts on to the lapsed share for the benefit of the other shares. (*Trethewy* v. *Helyar*, 4 Ch. D. 53.)

Next observe that specific and residuary devises and specific bequests all rank together. I devise Blackacre to A, the rest of my real estate to B, my black horse Dobbin to C and the rest of my personalty to D. First you exhaust my residuary personalty, *i.e.* all my personalty except the horse. Then the rest of my property contributes rateably, A, B and C contribute rateably. True that the devise to B is a resid-

[1] Wills Act, 1837, s. 33.

uary devise, and you might well think that whatever is comprised in this should be exhausted before we turn to Blackacre or to Dobbin—but that is not so. A residuary devise is for this purpose put exactly on the same footing as a specific devise.

Lastly note that when a dead man's own property has been exhausted you may turn to certain property which in strictness was not his own. If he had a general power of appointment and exercised this power by his will then he thereby made the appointed property part of his assets for the payment of his debts, but a part that is only to be absorbed in the last resort, when all else has failed. This doctrine you must remark only applies where the power is a general power. If under my marriage settlement I have power to appoint a fund among my children, and I exercise that power, I do not make the appointed fund assets for the payment of my debts. But to make the fund assets I must actually exercise the power. If I have a general power of appointment and leave it unexercised, my creditors will not be able to touch the fund.

I think that you will hardly be able to understand the import of these rules unless you will attempt to work out a few imaginary cases. I will suggest one or two.

A man dies intestate leaving realty and personalty. In what order are the assets applicable for the payment of his debts?

A testator made his will in these words—'I give my freehold estate called Dale to A, my leasehold house in Brook Street to B, my gold snuff box to C, £1000 to D, the rest of my realty to E and the rest of my personalty to F.' [The order will be this: F loses all, then D loses all, then A, B, C and E contribute rateably.]

A testator, tenant in fee simple of Blackacre, Whiteacre, Greenacre, and entitled to a leasehold house in Brook Street and other personalty, makes his will as follows—'I give Blackacre to A. I declare that my debts shall be a charge on the rest of my real estate. I give Whiteacre to B, and my house in Brook Street to C. I give £1000 to D, all my books to E, and the residue of my personalty to my cousins F and G in equal shares.' G dies before the testator; the testator

dies leaving H his heir at law and K his sole next of kin. Greenacre is undisposed of, there being no residuary devise. In what order are his assets to be applied for the payment of his debts? [The answer is this:—Exhaust the personalty bequeathed not specifically, but as residue, to F and G (that is the whole personalty except the books and £1000 deducted for D's legacy), showing no preference to F the legatee over K who, as the testator's next of kin, takes the lapsed share. Next turn to Greenacre as real estate descended to the heir, next to Whiteacre as being realty charged with debts, next to the £1000 set apart to pay D's legacy. Lastly, when those are exhausted, the books, the house in Brook Street and Blackacre must contribute *pari passu*.]

But now let me repeat once more that a testator can upset this order if he pleases. He can direct that as between the various persons entitled under his will this or that part of his property shall be the first fund for meeting debts—he can make the last first, or the first last. For example he may say, and effect will be given to his saying, that all his real estate is to be absorbed before his personal estate is touched. But if he wishes that this shall be so, he must say it clearly—a mere charge of debts on real estate will, as we have seen, have some effect in altering the order in which the assets are to be consumed, but it will not put the real estate thus charged before the general or residuary personalty, and if only part of the realty is thus charged with the payment of debts this will not even put that part before other realty which is not disposed of by the will and descends to the heir as heir. There is a strong presumption that the general or residuary personalty is to be the very first fund for the payment of debts, and if a testator wants to put his realty before his personalty he ought to say, not merely 'I charge my debts upon my real estate,' but 'I charge my debts on my real estate to the exoneration of my personalty.' For this purpose you want, it is said, not merely words onerating the realty, but words exonerating the personalty.

Then again it is quite possible that the order of assets in administration may be disturbed—assets may be applied out of their proper order in the payment of debts. I want you

to perceive that the order of assets is nothing to creditors. Before the Land Transfer Act a specialty[1] creditor might, as the phrase went, upset the order of assets. Take this case as occurring before the Act of 1897. I had a debtor owing me a sum of money under a deed, he died and we will suppose that he died intestate. His real estate descended to A, his heir at law, his personal estate vested in an administrator B who, when debts are paid, must distribute it among the next of kin. Well, as between heir and next of kin the personalty was the first fund for the payment of my debt; but that was nothing to me. I could sue the administrator or the heir. I chose to sue the heir, and the heir was liable to pay me to the extent of the assets that had descended upon him. But then, as between the persons claiming under my debtor, comes in a principle of marshalling. It is put thus: 'Where the order in which assets are liable to pay debts is disturbed by creditors it will be put right by marshalling.' If in the case just put the heir paid me my debt he had a right to claim repayment out of the personal estate.

The Act of 1897 has lessened the chances of any disturbance in the established order of liability of assets through the action of a creditor. Real estate, you remember, now passes in the first instance to the executor or administrator and it would seem clear that until he (as and when required to do by the Act) assents or conveys, in the case of land devised, or conveys in the case of land descended, a creditor could bring no action against the devisee or heir. Still cases in which marshalling is required may occur. To take simple examples, the executor or administrator may perhaps fail at first to discover some part of the personalty and may thus apply real estate in paying debts before all the personalty which comes under a prior liability has been exhausted; or he may fail to discover that the deceased was entitled to some realty which will descend to his heir and, in ignorance of that realty, the executor or administrator may have sold articles specifically bequeathed, which should come after, not

[1] Until that Act the specialty creditor had a direct remedy against the land, he could sue the heir or devisee directly, the simple contract creditor had to take administration proceedings in order to make the land liable for his debt.

before, realty descended to the heir; or it may happen that after either assent or conveyance under the Act of 1897 the devisee or heir may find a creditor making a claim against him which should be discharged by the personal estate. The exact effect of the Land Transfer Act upon the legal liability of the heir or devisee must however be said to be very doubtful.

But there remains a point that we have hitherto avoided. In discussing the order of assets we have spoken as though all the debts were unsecured; but what of secured debts? Among the debts owed by the dead man there was one debt which was secured by a mortgage of Blackacre. Does the fact that this debt was thus secured make any difference when we are discussing the question what fund is the primary fund for its payment? The old answer to this question was (as a general rule) none at all. Here is a debt and it must be paid like other debts. If the dead man has not made a will and therein given some direction to the contrary the first fund for the payment of his debts, including this debt, consists of his general or residuary personalty. Put the simplest case. He owed £1000 upon mortgage of Blackacre, of which, subject to the mortgage, he was tenant in fee simple. He dies intestate. His real estate, including Blackacre, descends to his heir at law, while his personalty will be distributed among his next of kin. But first debts must be paid, including the mortgage debt on Blackacre, and all his personalty must be swallowed up in paying debts before any part of his realty, including Blackacre, could be touched. This seemed unfair, and by three Acts, the first of which is always spoken of as Locke King's Act, parliament has tried to set this matter straight. The three Acts are 17 and 18 Vic. c. 113 (1854), 30 and 31 Vic. c. 69 (1867), and 40 and 41 Vic. c. 34 (1877). The last of these Acts says in effect that in the administration of the estate of any testator or intestate dying after the 31st of December, 1877, seised or possessed of any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum by way of mortgage or any other equitable charge, including a lien for unpaid purchase money, the devisee or heir at law shall not

be entitled to have such sum satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall have signified a contrary intention, and that a contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts out of residuary real and personal estate or residuary real estate.

That, at least for the time being, is the last word in the history of a muddle. Of the earlier acts it seems only necessary to say that it was discovered that owing to defective workmanship the first Act (1854) would not apply to an equitable mortgage by deposit of title deeds, nor to a vendor's lien for unpaid purchase money, nor to leaseholds for years—though the specific legatee of a leasehold was entitled to have it exonerated at the expense of the general personalty. The second Act declared that the word mortgage was to include a lien for unpaid purchase money upon any lands purchased by the testator—it corrected one omission but made another blunder, for after testator it should have added 'or intestate,' and so a third Act was necessary. Even this third Act is giving rise to some difficulties, and may, I think, give rise to more. However most loopholes are by this time stopped and we may say in pretty general terms that as between the various persons claiming under a dead debtor real property which forms the security for any debt is the primary fund for the payment of that debt. A contrary intention expressed in the dead man's will will prevail; but we may say that such an intention has to be clearly expressed. But these Acts, the Real Estates Charges Acts, to give them their statutory title, have nothing to do with mortgages or charges upon chattels or upon choses in action or upon anything but realty passing to an heir or devisee.

Instructive cases as to what amounts to the expression of a contrary intention are *In re Smith*, 33 Ch. D. 195; *In re Fleck*, 37 Ch. D. 677.

Let us take an illustration of the working of the rules that we have been considering.

A is entitled as tenant in fee simple to Blackacre, of the value of £1000, but mortgaged for £500. He is entitled also to Whiteacre, now of the value of £800 only, but mortgaged

for £1000; also to personalty of the value of £1500. He owes unsecured debts to the amount of £1200. He makes his will: he devises Blackacre to B, gives a legacy of £500 to C, and bequeaths the residue of his personalty to D. He says nothing of Whiteacre. E is his heir at law. What, if any, part of his legacy will C obtain?

The debts are £500 secured by Blackacre + £1000 secured by Whiteacre + £1200 unsecured. Total £2700.

Assets £1500 + £1000 + £800 = £3300. The estate is not insolvent. There is a surplus of £600.

The mortgagee of Blackacre can get his whole £500, and for this Blackacre is the first fund.

The mortgagee of Whiteacre can certainly get £800 by realizing his security on Whiteacre, thus leaving a balance of £200 due to him.

The debts now remaining unpaid are £1200 + £200 = £1400.

You must begin by applying the personalty not specifically bequeathed, £1500, after retaining out of that £1500 £500 for C's legacy. That gives you £1000 towards the £1400, but it still leaves £400 due.

What is now left of A's estate? £500 of his personalty, which you have retained for the pecuniary legacy, and £500, the surplus value of Blackacre; £400 of debts are still unpaid.

The competition is between B who is devisee of Blackacre and C who has been given a pecuniary legacy. The liability of the pecuniary legacy comes first and C can only get £100 out of the £500 that has been left to him. B gets his £500, the whole balance left of the value of Blackacre. It would have been otherwise if Blackacre had been charged with the payment of debts. B would then have had to lose the £400 and C would have got his pecuniary legacy in full. D, the residuary legatee, and E, the heir at law, of course get nothing.

LECTURE XVII.

CONVERSION.

THE equitable doctrine of conversion is the outcome of the fact that we have two systems of intestate succession, the one for realty the other for personalty: but for that unfortunate fact there would have been no need of this doctrine.

The Land Transfer Act of 1897 makes hardly any difference; the land vests in the personal representatives, but the beneficial interests are unaffected.

The equitable doctrine of conversion has its root in this simple principle that when property has been given to a trustee it must not be in the power of that trustee to alter the devolution of the beneficial interests by committing a breach of trust.

A testator devises land to a trustee upon trust that he shall sell it, invest the proceeds of the sale, pay the dividends of the invested fund to the testator's wife during her life and hold the capital in trust for his son. The trustee in breach of trust neglects to sell the land; meanwhile during the wife's life, the son dies and, let us say, dies intestate. Now who is to be entitled to what was destined for the son? On the one hand the son's heir makes a claim, saying that what was destined for the son was land, and that an equitable estate of fee simple in the land has descended to him. On the other hand the administrator claims on behalf of the next of kin, urging that what was intended for the son was not land but an invested fund of personalty. The court decides in favour of the administrator. If the trustee had done his duty there would have been no land, there would have been a fund of personalty, which would have gone to the administrator.

The fact that the trustee has not done his duty must make no difference; the land is held upon trust for the administrator.

Take the converse case. A testator leaves £10,000 to a trustee upon trust to purchase land and settle it to the use of the testator's wife for life, with the remainder to the use of his son. The trustee omits to buy any land. Meanwhile during the wife's life the son dies, and dies, let us say, intestate; his heir at law shall have the money.

The root of the doctrine then is this, that a breach of trust is not to affect the devolution of equitable interests. Had it remained in this, its first form, the doctrine could never have been called into operation save when there had really been a breach of trust—save when some trustee had been guilty of not effecting a conversion which he was bound to effect.

But the doctrine was found a convenient one and was extended beyond the simple principle in which it had its origin. It was discovered that settlors and testators might give their trustees a certain discretion as to the external form which the property should take, *i.e.* whether it should be land or money, and at the same time make the devolution of the equitable interests independent of any exercise by the trustees of their discretion. For example it often happens that a testator wishes the whole of his property to devolve in one way; he has some freehold land, but he does not wish 'to make an eldest son'; he wishes his wife to enjoy during her life the whole income of his fortune, and he wishes that fortune, subject to her life interest, to be divided equally among his children, and if a child dies during the wife's life he does not wish that one part of that child's share should be treated as realty, another as personalty; so far as is possible he wishes to treat his fortune as a single whole. By an extension of the principle that we have been considering he is enabled to effect this object to a very considerable extent. He devises and bequeaths all his realty and personalty to trustees upon trust to convert it into money, and to invest that money, and then he declares how the invested fund shall be held, on trust for his wife for life and so forth. But he does not mean that the trustees should be bound to make an immediate sale of the land—such a sale might be very improvident—so he

goes on to give his trustees the widest discretion as to the time at which they shall sell; they may postpone the sale so long as they shall think fit.

Now in this case if the trustees do postpone the sale they are committing no breach of trust. Nevertheless it is held that as between the real and personal representatives of the beneficiaries the land is to be considered in equity as though it were a sum of money; it is according to a common phrase impressed with a trust for conversion, albeit that trust is accompanied by a discretionary power of postponement. It will be needless to state a converse case in which money is to be turned into land. Occasionally, though less frequently, a testator making what we may call a primogenitary settlement of his land, desires that his personalty shall be expended in the purchase of yet more land to be settled in similar fashion. Here of course it will be very expedient that the trustees should have power to postpone the purchase of land, it may be long ere they will find in the market what would be a suitable addition to the family estate. By means of a trust for conversion and a discretionary power of postponement, the testator can at once give the trustees all the time requisite for finding suitable lands and at the same time provide that the delay thus occasioned shall have no effect on the devolution of the equitable interests in his personal estate.

The working out of this principle is of course not free from difficulties. In the first place wherever it is alleged that there has been an equitable conversion of land into money or money into land we must first make certain that there is a trust for conversion. On the one hand a trust for conversion accompanied by a power of retention will be effectual, on the other hand a mere power to convert will not be enough. Of course in a badly drawn instrument it may be difficult to say which of these has been created, and thus questions of construction arise. Good conveyancers are careful in the first instance to make an absolute trust for conversion, declaring that the trustees are to sell the land, or to lay out the money in the purchase of land, and then, generally by some later and independent clause, they give such a discretionary power of

postponing the sale or purchase of land as is desirable, and add that in the meanwhile the land is to be impressed with the character of personalty, or the personal fund with the character of realty. But the great principle is that to effect an equitable conversion there must be a trust for conversion, and not a mere power to convert.

This doctrine of a notional conversion of realty into personalty, or personalty into realty, has been worked out with logical consistency. If once a fund of personalty has been subjected to a trust for the purchase of freehold land, then until something happens which has the effect of reconverting it into personalty, it is treated as realty for all purposes of succession and devolution. Thus there may be dower and curtesy of such a fund, and again one may have an estate tail in such a fund. In order that such an estate tail may be barred a deed enrolled under the Fines and Recoveries Act is required. Section 71 of that Act (3 and 4 Will. IV, c. 74) deals specially with this matter: for the purposes of this Act money subject to be invested in the purchase of lands to be settled so that any person would have an estate tail therein is in effect treated as though it were land purchased and settled. Great use has been made of this idea by the modern Acts of Parliament which enable railway and other companies to compel a sale of settled land, and also by the Settled Land Act of 1882. Under this last Act the money arising from the sale of settled land and any securities upon which such money is invested shall 'for all purposes of disposition, transmission and devolution be considered as land and shall be held for and go to the same persons successively in the same manner and for and on the same estates, interests and trusts as the land wherefrom the money arises would, if not disposed of, have gone under the settlement.' (45 and 46 Vic. c. 38, sec. 22 (5).)

Further, this idea has been introduced into the interpretation of wills and other documents. If, for example, a trustee is holding money upon trust to purchase land and convey it to A in fee simple, and A dies having devised all his realty to X and bequeathed all his personalty to Y, it is X, not Y, who will be entitled to the money—it will pass by a general devise

of all lands, tenements and hereditaments; it will not pass by a general bequest of personal estate[1].

The cases which have occasioned most difficulty have been those in which the object which was to be gained by the conversion of the property has wholly or partially failed. Let us begin with a simple case. A by his will leaves land to trustees upon trust to sell and to pay the proceeds to B; B dies in the lifetime of A and (not being a descendant of the testator—see the Wills Act, sec. 33) the disposition of the proceeds of sale fails utterly. The sale then is not required for any purpose whatever, and as between the testator's heir at law and his next of kin, we shall I think have little difficulty in deciding in favour of the heir. But A by his will leaves land to trustees upon trust to sell and divide the proceeds between B and C; B survives the testator, C does not. Now a sale is required by the will, it is required in order that B may have what the testator has intended to give him, namely money and not land. But this will exhaust but half of the fund (B and C were not made joint tenants but tenants in common). What is to become of the residue? The testator's heir at law and his next of kin seem both to have plausible claims. The land must be turned into money in order that B may get his share, will not the other moiety also be personalty, and is it not the rule that a dead person's undisposed of personalty goes to his next of kin? In the famous case of *Ackroyd* v. *Smithson* (1 Bro. C. C. 503) this reasoning was overruled. The land, it is true, must be sold, but that is merely in order that B may get that moiety of the price which A has given to him. As between his real and his personal representatives the testator has made no choice. The property comes to them not because the testator has said that it shall come to them, but because he has not effectually given it to anyone else; they are not entitled under the will, they claim in consequence of a partial intestacy—and our law is that if a tenant in fee simple dies

[1] But A, being entitled absolutely, may of course in his lifetime elect to take the fund as personalty or may in his will either by express terms or by manifest intention effect a reconversion of this notional realty again into personalty. Cf. *In re Grimthorpe*, 1908, 1 Ch. 666.

intestate his land descends to his heir. So here the testator's heir takes the moiety of the property that was destined for C. In this case the gift to C lapses in consequence of C's death in the testator's lifetime. The result would be the same if the gift to him had failed for any other reason, for instance, as being contrary to law.

Thus suppose the case last put to have occurred before the Mortmain Act of 1891, and suppose C to have been a charitable institution, the testator at that time could not give the proceeds of the sale of his land to a charity. (I mention this because one might have thought that the doctrine of conversion might have enabled him to do this, but this is not so. Under the Act of 1736 (9 Geo. II, c. 36), a charity could not take either money impressed with a trust for conversion into land or land to be converted into money, and I take it that the consolidating Act of 1888 (51 and 52 Vic. 42) did not alter the law in this respect.) So, the gift to the charity failing, the testator's heir at law would have become entitled. The same is the case if the testator directs the sale of land, and forgets to dispose of some share of the fund to arise from such sale, the testator's heir at law (not his next of kin) becomes entitled to that share.

A further point is well established, namely that in all these cases where the heir at law becomes entitled to an undisposed of share of money to arise from the sale of land he takes it not as realty but as personalty. A devises land upon trust for sale, and the proceeds are to be divided between B and C, C dies in A's lifetime, A's heir at law becomes entitled to half the property; but before the sale is made he dies—perhaps he dies intestate and the question is between his heir and his next of kin—or perhaps he has left a will devising his realty to X, and bequeathing his personalty to Y—any way, his real and his personal representatives both claim the share, and the question is decided in favour of his personal representatives (*Smith* v. *Claxton*, 4 Madd. 484). The heir has become entitled—to what? To land that is subject to a trust for conversion into money—a trust which B can enforce—he has become entitled to personalty. *In re Richerson*, 1892, 1 Ch. 379.

In re Wood, 1896, 2 Ch. 596, is a very pretty case. In 1893 the testatrix dies without an heir, having devised a house of which she was legally seised in fee simple to her executors upon trust for sale, and out of the proceeds to pay her debts, funeral expenses and legacies. There was no gift of residue. Her house is sold, and the proceeds are more than sufficient to pay all her debts, funeral expenses and legacies. Who is entitled to the surplus? But for the Intestates Estates Act, 1884, the executors would be entitled for their own use[1]. Till then there had been no escheat of an equitable interest. But under section 4 of the Act of 1884 the Crown successfully claimed the fund. Admittedly if there had been an heir he would have taken the surplus proceeds of this land.

We turn to the other side of the picture and we find the same principles prevailing. The testator bequeaths personalty to trustees upon trust to purchase land and convey it to B and C. Of course if both B and C die before the testator there is an utter end of the trust; the testator's next of kin will become entitled to the personal estate and will become entitled to it as personalty—for there is no trust for turning it into realty. But suppose a partial failure—C dies before the testator but B outlives him—or the gift fails in whole or in part owing to some rule of law, *e.g.* the rule against perpetuities, or the testator has forgotten to declare trusts of some share of the land that is to be bought. Whatever he has not effectually disposed of his next of kin will take, not his heir at law, he has shown no preference for his heir at law, whichever party is to succeed must claim under the law of intestate succession which gives personalty to the next of kin (*Cogan* v. *Stephens*, 5 L. J. Ch. (N. S.) 17). But again the question arises on the death of one of these next of kin who dies before any land is purchased—who will become entitled, his real or his personal representative? His real representative—his heir at law or perhaps a devisee of 'all my realty'; nor what he becomes entitled to is realty, for it is a share in a

[1] As to the right of the executors to take for their own use as against the Crown see *Attorney General* v. *Jefferys*, 1908, A. C. 411.

fund of money that is subject to an existing trust for the purchase of land (*Curteis* v. *Wormald*, 10 Ch. D. 172).

The doctrine of conversion is not confined to cases where there is a trust for sale created by a settlement or a will. It is applied also where there is a contract to sell. As soon as I have bindingly contracted to sell freehold land I have, as between those who can claim my property at my death, rather personalty than realty. Similarly if I contract to buy freehold, I have rather realty than personalty. See the case of *In re Isaacs*, 1894, 3 Ch. 506.

The doctrine is set going by an option to purchase in a lease. A demised to B on lease with the option to purchase within six months of A's decease. A died intestate. B exercised the option. Here at A's death there is freehold land, his heir is entitled to it until the option is exercised, and so he gets the profits, but when the option is exercised the price is part of A's personalty and goes to his next of kin[1].

The ideal or 'notional' conversion of realty into personalty or personalty into realty continues until either an actual conversion takes place or until some person competent to elect does elect to take the land as land or the money as money, until he elects, that is, to put an end to the trust for conversion. A person may well be in a position to make such election. Suppose the very simple situation that a trustee holds land upon trust to sell and pay the proceeds to me, or holds money upon trust to buy land and convey it to me in fee simple—in the former case I would rather have land, in the latter case I would rather have money. Of course it would be ridiculous that land should be sold in order that I might buy land with the proceeds, or that land should be purchased when next day I should advertise it for sale. I am entitled to say to the trustee I will take the land as it is, or I will take the money as it is, and he is bound to obey my expressed wishes. If then I have openly expressed my wish then at my death there will be no question. I have taken the land as land and it will pass at my death as realty, or I have taken the money as money and it will pass at my

[1] See *Lawes* v. *Bennett*, 1 Cox, 167; and see the cases on this discussed in an article by Mr Hart in *The Law Quarterly Review*, October, 1908.

death as personalty. But it often happens that no plain declaration can be produced or has been made—then the Court, looking at my behaviour, will have to say whether I have manifested an intention to put an end to the trust for conversion. Among the acts which have been relied on as showing this intention are the granting of leases not authorized by the trust; such leases granted by my concurrence would show that I did not intend to have the land sold under the trust. In one case a fact much relied on was that a bill was introduced into parliament authorizing a railway company to make a line through the land, and the *cestui que trust* presented a petition against the bill as owner of the land stating that he desired to lay out the estate for building. That case is *In re Davidson*, 11 Ch. D. 341. Another case which will serve to show how such questions are dealt with is *In re Gordon*, 6 Ch. D. 531.

Where there is a single *cestui que trust* absolutely entitled the principle is simple even though it may be difficult of application because his conduct has been very ambiguous. He has an absolute right to effect a reconversion and the only question will be whether he has shown an intention of taking the subject of the trust in its unconverted state. But when there are several persons entitled to share the subject-matter of the trust between them, then another principle comes into play, and it has been held to make a distinction between land which is to be turned into money, and money which is to be turned into land. The principle is just this that one of several *cestui que trusts* can not put an end to the trust, even so far as his own share is concerned, if thereby he would be damaging his fellows. Land is held upon trust for sale and the proceeds are to be divided between A, B and C: A by himself of course can not put an end to the trust; but he can not even say (without the concurrence of B and C) 'I for my part shall keep my undivided one-third of the land, while you if you like can have your undivided two-thirds sold according to the trust.' The reason given for this is simple, namely that the price of two undivided shares of the land will probably be far less than two-thirds of the price of the whole land. On the other hand it has been held that similar reasoning does not

apply to what we may call the converse case. Money is held on trust for the purchase of land to be conveyed to A, B and C as tenants in common in fee; any one of them may insist on taking his share as money; for it is said that in so doing he will not affect the interests of his fellows. Whether this distinction shows a deep insight into the theory of value I must leave you to consider; but it seems well established[1].

Can a mere remainder-man elect? The question is not free of difficulty. A testator devises land at Dale to trustees upon trust to sell, to invest the proceeds, pay the income to his wife for life, and hold the capital upon trust for his son. The son dies during the widow's life, and while the land is yet unsold, having declared explicitly to the trustees that should the land not be sold in his mother's lifetime, he will take it as land and not have it sold. We will suppose him to die intestate, and the question to arise between his heir and his next of kin. The case of *Meek* v. *Devenish*, 6 Ch. D. 566 (1877), makes it a probable opinion that his election to take the land as land is effectual to settle the course of devolution of his interest, is effectual to decide that his heir becomes entitled in consequence of this prospective election. But how far this can be carried seems rather doubtful, for the remainder-man's so-called election can not prevent the tenant for life from insisting on a sale of the land, and if between the act of prospective election and the death of the remainder-man a sale is made, then is his heir to take money which is subject to no trust for conversion into land? May it not be said that if this be allowed we practically enable the remainder-man to make a will in favour of his heir by a mere declaration of intention, without any of those formalities required by the Wills Act? We may yet see some cases on this point.

[1] See *e.g.* *Holloway* v. *Radcliffe*, 23 Beav. 163, *Seeley* v. *Jago*, 1 P.W. 389.

LECTURE XVIII.

ELECTION.

THE doctrine of Election may be thus stated:—That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it. If therefore—this is the simplest application of the rule—a testator has affected to dispose of property which is not his own and has also given some benefit to the person, X, to whom that property belongs, that person, X, if he accepts the benefit thus destined for him by the testator, must make good the testator's attempted disposition of the property that belonged to him, X. If on the other hand X insists on his proprietary rights, will not give up that property of his which the testator has endeavoured to give away, then equity will sequester the benefit that the testator has given to X for the purpose of making satisfaction to the persons whom he disappoints by insisting on his proprietary rights—X it is said must elect to take under the will or against the will; he can not it is said 'blow hot and cold,' or to use a phrase that our courts have borrowed from Scotland, he can not both 'approbate and reprobate' the will[1].

Let us put a simple instance: X is tenant in fee simple of Blackacre; a testator says 'I devise Blackacre to Y and I bequeath to X a legacy of £1000.' Now X can not be allowed

[1] Cf. *Douglas-Menzies* v. *Umphelby*, 1908, A.C. 224, where a man had made two separate wills, one for his Scottish and one for his Australian estate. His widow having claimed her 'tierce' and *jus relictae* against the Scotch will was held to have made her election, and was ordered to make compensation out of her interest under the Australian will.

both to keep Blackacre and to take the legacy of £1000. He may do one of two things. He may elect to take the legacy that has been given to him and abandon Blackacre to Y. Or he may elect to stand upon those proprietary rights that he has outside the will, may say 'Blackacre is mine and I am not going to abandon it.' In this latter case there has in times past been a controversy as to what ought to happen. The debated question was sometimes stated thus: Is the principle that we are to enforce against X the principle of forfeiture, or the principle of compensation? Are we to say to him: Very well, you insist on your rights outside the will, therefore you can take nothing under the will, or are we to say to him merely, You insist on rights outside the will, therefore you can take nothing under the will unless you make compensation to the person whom you will disappoint by your election to stand on your rights? To return to our case; X says Blackacre is mine and I am not going to give it up. Are we to say to him: Very well, then you must abandon all claim to the £1000, or are we to say to him merely: You must abandon so much of the £1000 as will serve to compensate Y for the loss of that benefit, namely, Blackacre, which the testator designed for him? Of course if the value of Blackacre is equal to or greater than £1000 these two principles will lead to one and the same result:—if X insists on retaining Blackacre then he loses all claim to the £1000. But suppose that Blackacre is worth but £500, then the question becomes important. Shall we say: If you keep Blackacre you can claim no part of the legacy—or shall we say: If you keep Blackacre you must compensate Y by giving him the value of Blackacre? In the one case, you see, X will merely keep Blackacre and take nothing under the will, in the other he will be able to keep Blackacre and also to claim one-half of the legacy—since the legacy of £1000 minus £500, the value of Blackacre, leaves £500.

It is now well settled that the principle of compensation is the true one[1]. We do not say to X: By insisting on rights

[1] There was a long conflict of judicial opinion before the principle of compensation was definitely accepted; see the earlier authorities collected in 1 Swanston n. (*a*) p. 433.

outside the will you forfeit all rights under the will. We say to him: If you insist upon rights outside the will you can take no benefit under the will until you have compensated those who are disappointed by your refusal to give effect to the whole will as it stands.

Such is the principle. It is immaterial whether the testator knew or did not know that he was attempting to give away another person's property. It may seem to you at first sight that the rule should only be applied where the testator has been acting under a mistake, where he has given, *e.g.* Blackacre, believing that Blackacre is his. But our courts have refused to go into the question—it would often be a very difficult one—as to the testator's ignorance of his want of title. Thus, though I know well that Blackacre belongs to you and not to me, I can put you to your election by taking upon myself to devise Blackacre to a third person if at the same time I devise to you another estate or bequeath to you some legacy.

In order that a case of election may be raised it must be clear that the testator has affected to dispose of something that does not belong to him and you may not have recourse to external evidence to prove that by some general phrase he intended to give away what is not his own. Thus suppose that the testator devises 'All my real estate' to Y, you may not prove by oral evidence that he was in the habit of treating as part of his real estate a field that belonged to X. You must find in the will itself that the testator has attempted to dispose of a certain thing that belongs to X. As already said, you need not find that the testator knew that that thing belonged to X, but you must find in the words of the will itself an attempted disposition of that thing, and therefore a general devise of my real estate, or general bequest of my personal estate will be insufficient. A good illustration of this may be found in cases relating to wills made before 1838. Under the old law, you will remember, a testator could devise only such real estate as he was entitled to at the time when he made his will—in other words, real estate acquired between the date of the will and the date of his death would not pass under his will. Very well—a testator having no real estate

said 'I give all my real estate to X.' Here there was ground for a fair argument that the testator must have meant something by these words, must therefore have intended to give away some real estate that did not belong to him. That argument however was rejected.

Difficult cases sometimes arise in which a testator who is entitled to but a partial interest in certain property uses a phrase which may be sufficient to describe the whole property. Thus he gives 'my freehold house called Dale Hall,' and he is but one of several tenants in common of Dale Hall. Or again he gives 'my freehold house called Dale Hall,' and he is not tenant in possession of Dale Hall but merely tenant in remainder, there being perhaps several life estates preceding his estate in fee. Is he attempting to give away more than his own interest? This is a question of construction and may be one of great difficulty. No general rule can be laid down save this, and it is a natural one, namely that you must have clear words to induce the conclusion that a man has attempted to give away more than belonged to him. Still of course, here as elsewhere, you may look at the will as a whole, and you may find that the testator has dealt with the property in some manner that shows that he was not disposing of a partial interest in it. Again if a testator having an estate which is subject to an incumbrance gives this estate to Y and gives a legacy to the incumbrancer X, this will not put X to his election between his incumbrance and the legacy. In order that such a case of election may be raised you must find that the testator has given or attempted to give to Y the estate freed from the mortgage, and the rule is that if I simply give Blackacre to Y, without saying more, I mean that he shall take it subject to any incumbrances that affect it.

Under the old law of dower a great crop of cases arose as to whether a widow was by her husband's will put to her election between her dower and those benefits that were destined for her by the will. You will remember that under the old law when dower had once attached to the land, the husband could not get rid of it by act *inter vivos* or by will—a fine levied by husband and wife was necessary. If then a husband affected to devise land that was subject to his wife's

right of dower to Y and gave other benefits to his wife, a question often arose as to whether the doweress was put to her election. Many rules had been elaborated. Thus, for example, it was settled that a devise in general terms, 'all my land,' would not oblige her to elect. But we need not go into this matter, for under the new law of dower, I mean the law introduced in 1833, even a general devise is sufficient to bar the widow of her dower and so no case of election can arise. The widow under the new law can only be endowed of land which her husband has not disposed of during his lifetime or by his will.

The doctrine of election is applicable to cases of appointments under powers. Suppose that a person has a limited power of appointment in favour of a certain class of persons and he proposes to make an appointment in favour of one who is not an object of that power, and by the same instrument gives a benefit to some one of the persons who are entitled to the property in default of appointment, that person will be put to his election. Thus, for example, I have a power to appoint by will or deed a fund of £1000 in favour of all or any of my brother's sons and in default of appointment that fund is to be divided among all my brother's sons equally. By my will I profess to appoint this £1000 to my brother's daughter, and I bequeath £500 to one of my brother's sons; that son will be unable to dispute the appointment unless he is willing to compensate his sister. But on the other hand it seems that an object of the power will not be put to his election unless he also is (he usually will be) the person or one of the persons entitled in default of appointment. Put this case. I have power to appoint a fund of £1000 among my brother's sons, but if I make no appointment the fund will go to the Charing Cross Hospital. My brother has but one son. By my will I affect to appoint that the £1000 shall be divided between himself and his sister, and I further devise Blackacre to him. Here the appointment to the sister is of course a void appointment. One half of the fund is unappointed and the Hospital will get it. But it seems that my brother's son will not be put to his election, he will be able to keep the £500 and also to keep Blackacre,

for I have not attempted to give to his sister *what belonged to him.* He had no right to any part of the £1000 until an appointment was made, and if no appointment was made the money was to go not to him but to the Hospital.

But again we must distinguish between cases in which a person attempts to make an appointment to some person who is not an object of the power from cases in which he makes an appointment to one who is an object of the power, but superadds some proviso or condition in favour of some one who is not an object of the power. Put the case that I have a power to appoint £1000 among my children. I appoint the whole sum in favour of my eldest son, but I add that he is to settle it upon his wife and children, who are no objects of the power, and then I proceed to devise Blackacre to my said son. Here there is no case of election[1]. I have made a valid appointment in favour of a person who was a proper object of the power. I have followed this up by a direction that he is to do this or that with it. This is a void clause and may simply be neglected. The result is that I have made a good appointment in favour of my son and have also made a valid devise to him; he is not put to his election, for I have not attempted to give to any other person what belonged to him. However if you will look at the case of *White* v *White*, 22 Ch. D. 555, you will find that this distinction is a somewhat fine one. In that case a testator having power to appoint certain lands among the children of his first marriage, appointed them (describing them as his own property) in favour of a son of his first marriage subject to a charge in favour of his other children, including the children of his second marriage (who were not objects of the power), and he devised property of his own to the same son subject to the same charges in favour of his other children, 'so as to equalize the shares of all my children in all my property.' Fry J. held that in this case there was enough to put the son to his election.

We must, it seems, distinguish between an appointment to a person not an object of the power and an appointment

[1] See *e.g. Carver* v. *Bowles*, 2 R. and M. 301; *Churchill* v. *Churchill*, 5 Eq. 44.

which is bad for remoteness, as infringing the rules against perpetuities.

The validity of that distinction was denied by Kekewich J. in the case of *In re Bradshaw*, 1902, 1 Ch. 436. A by will gives property upon trust for B for life and after his death upon trust for such of his children and other issue (such other issue to be born within the limits allowed by law) as B shall by will appoint, and in default of appointment for B's children equally.

B, by his will, purports to appoint in favour of his son C for life, and after the death of C for such of C's children as are then living. The latter part of this appointment is void. (Read back the appointment into A's will. Then there would be a gift to those great-grandchildren of the testator who shall be living at the death of a grandchild.)

But B gives his own property in the same way. Is there here a case of election? Kekewich J. (but with the current of authority against him)[1] says yes. The objection is that a sort of indirect validity is thus given to a disposition which the law, on grounds of policy, pronounces void. The testator says: You must treat my void disposition as valid, otherwise you will be losers. But Kekewich J. assimilates this to an appointment in favour of a non-object, a person not within the power[2].

Turning to another question, in *In re Wheatley*, 27 Ch. D. 606, Chitty J. adopted the general rule laid down by Lord St Leonards in his treatise on powers[3]. 'Where a man having power to appoint a fund, which in default of appointment is given to B, exercises the power in favour of C and gives other benefits to B, although the execution is merely void, yet if B will accept the gifts to him, he must convey the estate to C according to the appointment.'

I refer you to this case of *In re Wheatley* chiefly because

[1] Dicta of James V.C. in *Wollaston* v. *King*, L.R. 8 Eq. at p. 175; and Pearson J. in *In re Warren's Trusts*, 26 Ch. D. at p. 219; *re Handcock's Trusts*, 23, Irish Reports 34.

[2] *In re Bradshaw* was not followed in *In re Oliver's Settlement*, 1905, 1 Ch. 191; *In re Beales' Settlement*, 1905, 1 Ch. 256; *In re Wright*, 1906, 2 Ch. 288.

[3] 8th edition, p. 578.

it raises a question which has more than once troubled the courts of late years, and seems to have been now set at rest. Can a married woman, by reason of this doctrine of election, be compelled to make compensation out of a fund that is settled to her separate use without power of anticipation? Put a simple case. Blackacre belongs to Mary, the wife of John. By my will I devise Blackacre to Peter and bequeath £10,000 to trustees upon trust to pay the income thereof to Mary for her separate use without power of anticipation. Can Mary retain Blackacre and at the same time insist that she ought to have the income of the £10,000, or must she make compensation out of this income to the disappointed Peter? There have been contradictory decisions about this matter. In the case that I have mentioned Chitty J. decided that the married woman was not bound to elect, but could take both benefits. Shortly afterwards *In re Vardon's Trusts*, Kay J. came to an opposite conclusion, but the Court of Appeal reversed his judgment, 31 Ch. D. 275.

In that case Miss Vardon, who was an infant, married Mr Walker. A settlement was made. The lady's father settled £5000 upon trusts which gave the wife a life interest for her separate use without power of anticipation. By the same deed she covenanted that any property that she might afterwards acquire should be settled upon certain trusts in favour of herself, her husband, and the children of her marriage. Then her brother died having by his will given her a sum of £8000 for her separate use. Now the covenant as a covenant was invalid, for as I have said when she entered into it she was an infant. But the trustees of the settlement raised the question whether she was not put to her election. Could she say this covenant is invalid and I will take the £8000 and yet go on receiving the income of the £5000 that was provided for her by the settlement? Would not this be both approbating and reprobating the deed? The Court of Appeal held that she was not put to her election. Had it not been for the restraint on anticipation she would have been put to her election, for even an infant can not say I will take the benefits provided for me by this settlement, and yet reject the covenants by which I professed to bind myself. But the

Court of Appeal treated the matter thus. The doctrine of election rests upon the general presumption that the authors of an instrument intend that effect shall be given to every part of it. But this intention can be rebutted by an express declaration that the doctrine of election is not to be applied. Thus for example if I give Blackacre (which belongs to Peter) to John, and also give Peter £1000, the doctrine will apply, but it will not apply if I go on to say 'Nevertheless I hereby declare that Peter shall not be bound to elect between Blackacre and the £1000.' So here if this settlement had contained an express declaration excluding the doctrine of election, there would have been no difficulty. But does it not contain something that really is equivalent to such a declaration? 'What,' asked Fry L.J., 'is the force and effect of this restraint on anticipation? It provides that nothing done or omitted to be done by Mrs Walker shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due. But if she be put to her election and if she deprives herself of the right to receive subsequent payment of the income until her husband and children are compensated, it follows that she has by the act of election, or by the default in performing her covenant, deprived herself of the benefit of the income in the way of anticipation, which is the very thing that the settlement declares that she can not do. This settlement, therefore, in our judgment contains a declaration of a particular intention, inconsistent with the doctrine of election and therefore excludes it[1].'

This well brings out the point that the doctrine depends upon a presumed intention. It can be excluded by words definitely stating that it is to be excluded, it can be excluded also by words which show a contrary intention, and by giving property to a married woman 'without power of anticipation' one in effect says that as regards that property she is not to be put to her election.

That it is matter of intention is well illustrated by *Haynes* v. *Foster*, 1901, 1 Ch. 361. A testator owns lands in Turkey, he devises them upon trust to sell them and the proceeds are to form one fund with his residuary estate. He disposes of his

[1] 31 Ch. D. at p. 280.

residuary estate in such wise that interests in it are given to a son, X, and to two daughters, Y and Z, who are subjected to restraint against anticipation. By Turkish law his disposition of the proceeds of the sale of his land is invalid. They go, as to two-fourths to the son, while each daughter takes one-fourth share. This is a clear case of election against the son. But at the time when the question rises one of the daughters, Y, is a married woman, but the other, Z, is a widow. Following the case of *In re Vardon's Trusts* it was held that Y is not bound to elect. But what of Z—the widow—since for the time the restraint on anticipation is inoperative? But it was held to be a matter of intention. The testator has shown an intention that Z shall not be put to her election by saying that her share is to be inalienable. Kekewich J. thinks that the result would be the same if the testator had attempted to deprive a man of the power of alienation, notwithstanding that such an attempt must be futile. What is important is not the validity of the restraint but the attempt to render inalienable which is in effect a declaration that the doctrine of election is excluded.

Then (to turn to another point) as regards the power to make an election, there never was a doubt that a married woman could make an election if the property was given to her separate use, and there was no restraint on anticipation in the case. An infant can not make a binding election: but on behalf of infants the Court will elect. It will direct an inquiry as to which of the two alternatives is the more beneficial to the infant, and adopt that one on his behalf.

An election may be inferred from conduct—it need not be made by any formal instrument. You may discover as a matter of fact that a person has elected to take under the instrument, or that he has elected to take against the instrument, and in this latter case he will be liable to make compensation to those persons whom he has disappointed by his election.

You will have noticed from what has already been said that an infant may be bound to elect—also that an infant may be bound to elect by reason of his or her own act. This is a point that has often to be considered in relation to

marriage settlements executed by infants. A covenant in a marriage settlement made by an infant is not void but is voidable at the infant's option (*Smith* v. *Lucas*, 18 Ch. D. 531 at 543). The Infants' Settlement Act, 1855, validates such settlements (by a boy if over 20, or by a girl if over 17 years) if made with the sanction of the Court. But apart from this an infant, when of full age, may be put to an election.

This case leads us to consider a second application of the general principle of election. We have hitherto been speaking as though that principle only came into play in a case in which a person attempts to dispose of property that does not belong to him since it belongs to some other person. But the same or a very similar principle may be applied to cases in which a person affects to dispose of property that really is his own, but of which, owing to some personal disability such as coverture or infancy, he or she can not effectually dispose. Here again there can be no case of election unless in the same transaction the person in question acquires some benefit from another. An infant on the occasion of his or her marriage affects to make a settlement of his or her property in favour of his or her future wife or husband and the children of the marriage. Now if this be all—if there is no benefit provided by some one else for this infant settlor—there can be no talk of election. But suppose that such a benefit is provided, then the infant, when he is of full age, may be bound to make his choice, repudiating the settlement as a whole or adopting the settlement as a whole. Thus, suppose a female infant, on the occasion of her marriage, covenants to settle all her property, present and after acquired, in a manner that benefits her husband and the children of the marriage, and by the same deed the husband brings property into the settlement for the benefit of the wife and children. Here we have a question of election. Can this woman be allowed to say I repudiate my covenant, but I intend to receive the benefits provided for me on the part of my husband? No. That is not to be suffered.

Either you must fulfil your covenant or out of the benefits that you receive under the settlement you must make compensation to those whom you disappoint by not fulfilling your covenant.

Of late years there has been a considerable number of cases illustrating this principle—that you must accept the settlement as a whole or reject it as a whole. One of them is *Greenhill* v. *North British Insurance Co.*, 1893, 3 Ch. 474. On her marriage a woman (of full age) agreed to settle *inter alia* a reversionary interest in a policy of insurance, a memorandum of this agreement was signed before the marriage by the husband alone, and he after the marriage executed the settlement. It was held that if the wife took the benefits given her by the settlement she was bound thereby to fulfil her own side of the agreement. Further it was held that her conduct amounted to an election—that by taking benefits under the settlement she had adopted it and was bound to fulfil her side of the bargain. Here the difficulty was occasioned not by her infancy but by the Statute of Frauds and her incapacity arising from coverture—but the principle is the same—you are not to approbate and reprobate[1].

[1] As to this case note (*a*) that the property agreed to be settled included real estate and that the agreement was one made in consideration of marriage, hence the question as to the Statute of Frauds, (*b*) that the woman's title to the policy of insurance accrued before Malins' Act, 1857, came into operation and hence was not assignable by her, and an assignment which she had in fact made was invalid.

LECTURE XIX.

SPECIFIC PERFORMANCE.

In the past we have seen Equity inventing certain new rights and obligations, rights and obligations of a substantive kind. We have seen it inventing the trust, conferring on *cestui que trust* a right where he had none at law, imposing an obligation on the trustee, though at law he was under no such obligation. We have seen it inventing the equity of redemption, giving a right to the mortgagor after he had lost his rights at law and putting a new duty upon the mortgagee. We have also seen it enforcing its peculiar theories as to the way in which assets should be administered. We have now to observe it inventing not, at least in the first instance, new substantive rights, but new remedies. Two great remedies it invented, remedies peculiar to itself—the decree for the specific performance of a contract, and the injunction.

In granting a decree of specific performance—or a judgment for specific performance—the Court in effect says to the defendant, You must perform specifically the contract into which you entered—that is to say you must do the very thing that you promised to do on pain of going to prison as a contemner of this Court. For instance, if you have sold land, you must convey it to the purchaser, he being ready to pay you the agreed price. If you have bought land you must pay the price to the vendor, he being ready to convey the land to you.

The original foundation of this jurisdiction no doubt is this. There are many cases in which if a contract be broken no amount of damages that a jury will give will be a sufficient

remedy to him who suffers by the breach. A man for example agrees to buy land, and he agrees perhaps to give for it more than any one else would have given. The seller refuses to perform his part of the agreement, it may be that no damages that could be given to the buyer would be a just compensation to him for his loss. What damages can you give? Even if land can be said to have a market value, still a man may well have consented to pay more than its market value and yet be very anxious that the agreement should be performed; to him the land has a fancy value. Our courts of common law, too, held that on a contract for the sale of land the purchaser was not entitled to any damages for the loss of his bargain if the sale went off by reason of the vendor being unable to make a good title to the land; that the buyer could only recover the expenses to which he has been put in relation to the attempted purchase. This rule laid down in *Flureau* v. *Thornhill*, 2 W. Bl. 1078, was confirmed by the House of Lords in 1874 in the case of *Bain* v. *Fothergill*, L.R. 7 H. of L. 158. But too wide a scope must not be attributed to these decisions. They only protect a vendor who without fraud and without his default is unable to make a good title, not a vendor who wantonly refuses to complete the purchase or wilfully abstains from doing what is necessary to make a good title[1]. But if the purchaser chooses to accept such title as the vendor has he may have his decree of specific performance. Starting then with the principle that when the legal remedy was inadequate it would grant its own remedy of specific performance, the Court of Chancery acquired a large jurisdiction.

Let us first ask—To what contracts has it been applied?

It has been applied to contracts for the sale of land and for the lease of land. It has been applied at the suit of a vendor as well as at the suit of a purchaser, at the suit of one who has contracted to grant a lease as well as at the suit of one who has contracted to take a lease. This may seem

[1] See per Lindley L.J. in *Day* v. *Singleton*, 1899, 2 Ch. 320, and see per Turner L.J. in *Williams* v. *Glenton*, L.R. 1 Ch. 200 at p. 209 and Mayne on Damages, Chap. v.

a little strange. A vendor has a mere pecuniary demand against the purchaser who refuses to complete, a demand which may be enforced by a common law action. If the conveyance has been executed, he may in such an action recover the whole purchase money; if no conveyance has been executed then he has the land, and may recover the difference between the price agreed on and the estimated price on a resale. His case, therefore, is not one in which the common law remedy is inadequate. But the Chancery came to the doctrine, convenient for the spread of its jurisdiction, that 'remedies should be mutual,' that if the contract was of such a kind that Equity would decree specific performance of it at the suit of the one party, it would also decree specific performance of it at the suit of the other party. In this way the vendor of land acquired the remedy of specific performance.

Now these are the common cases. We generally see the remedy given when the contract is for the sale or for a lease of land. Still these are not the only cases. As a general rule a contract for the sale of goods will not thus be enforced—the legal remedies are adequate; but specific performance may be decreed of a contract for the sale of unique chattels, rare china or the like[1]. So again an agreement will not as a general rule be specifically enforced if it be for the sale of stock, *e.g.* Consols, such as may always be had in the market; still it has been granted of a contract for the sale of railway shares such as were not always to be had in the market. Then as a general rule you can not compel the specific performance of a contract to do work, to erect buildings or to make other things—still sometimes when the agreement to build or to repair is a mere subsidiary term in an agreement for the sale of land or for a lease of land a judgment for specific performance can be obtained. I have a decree before me which says (Seton on Decrees (1901), vol. III. 2281) 'And it appearing that a plan of the house to be erected in pursuance of such agreement has been approved of between the parties, let the defendant S forthwith proceed to construct and erect a house on the ground

[1] The Sale of Goods Act, 1893, s. 52, authorizes judgment for specific performance, if the Court thinks fit, in any action for breach of contract to deliver specific or ascertained goods.

comprised in the agreement in accordance with such plan[1].' So a decree for the specific performance of an agreement for the sale of the good will of a business has been denied, but such a decrec has been granted where the good will was sold as an adjunct to a house[2]. An agreement to execute a mortgage will be specifically enforced when the money has been advanced—a large part of the doctrine of equitable mortgages depends on this, but an agreement to lend money will not be thus enforced. The reason usually given is that to enforce it would be nugatory, since at the next moment the lender might demand his money back again. But the rule is now general and extends to cases where the lender could not at once demand his money back again[3]. An agreement to serve can not be specifically enforced, otherwise men might in effect sell themselves into slavery. See *Ryan* v. *Mutual Tontine Association*, 1893, 1 Ch. 116.

On the whole I think that we may say that specific performance applies to agreements for the sale or the lease of lands as a matter of course; its application outside these limits is somewhat exceptional and discretionary.

Having convinced ourselves that the agreement before us is one of a kind of which equity will decree specific performance, we have next of course to be sure that this particular agreement is a valid, enforceable contract. And we may take as a main rule this—that equity will only enforce specific performance of a contract that is valid at law and provable in courts of law. In particular, since we are mainly concerned with contracts which come within the 4th section of the Statute of Frauds, contracts for the sale of some interest in lands, or for the lease of lands—we must say that the note or memorandum in writing is as necessary in a court of equity as in a court of law—the doctrine as to what it must contain and

[1] *Cubitt* v. *Smith* (1864) 11 L.T. 298, and see *Wolverhampton Corporation* v. *Emmons*, 1901, 1 K.B. 515.

[2] See *Darbey* v. *Whitaker*, 4 Drew. 134 at p. 139.

[3] See *South African Territories* v. *Wallingford*, 1898, A.C. 309, but this particular form of agreement to lend money—viz. on debentures to a company—was excepted from this rule by the Companies Act, 1907, s. 16, now s. 105 in the Companies Act of 1908.

how it must be executed was not peculiar to a court of law, or to a court of equity.

To this however there was, and is, one large exception or apparent exception in the purely equitable doctrine of part performance. Equity would sometimes enforce an agreement which, owing to the absence of any written note of it, could not be relied on in a court of law. A bold step certainly was here made: but yet perhaps a necessary one. A agrees to sell land to B—there is no writing—he lets B take possession of the land. What is one to do? Leave B in possession though he has not paid the price? Allow A to treat B as a trespasser? Under the 17th section of the Statute such a problem as this did not arise, for if the goods have changed hands, if even a part of the goods has changed hands—there is no need for the written note. It is a pity that the 4th section did not contain similar words. A Court of Equity in effect set itself to supply them.

In order to give rise to this equitable doctrine it is, as I understand, necessary that the Court should find the parties unequivocally in a different position from that in which according to their legal rights they would be were there no contract. You find A letting B into possession and you say that this is cogent evidence of the existence of some agreement between them, and of some agreement relating to this land. Thus we get the rule that delivery of possession is a sufficient part performance on the part of the vendor to sustain his suit against the purchaser, and that acceptance of possession is a sufficient part performance on the part of the purchaser to sustain his suit against the vendor.

But you must find some cogent evidence in the situation of the parties before you can receive oral evidence of the agreement. Thus put the case that B has paid A a sum of money, £1000, and that he is ready to swear and bring plenty of witnesses to swear that he paid it as part or even as the whole of the purchase money of Blackacre which A had sold to him. You can not admit this evidence; there may have been any one of a thousand causes for this payment; it is in no way connected with Blackacre. So part payment, or even full payment of the price can not be relied upon as an act of

part performance so as (such is the phrase) 'to take the case out of the Statute[1].' Again take marriage—A in consideration that B will marry his daughter promises to settle Blackacre upon him. B marries A's daughter. This is not enough[2]. The fact that B has married A's daughter in no way points to Blackacre as being involved in any bargain. So A induces B to serve him as his housekeeper without wages by promising to leave her certain lands by his will; he does not leave her the lands, and there is no signed memorandum of the promise. Here the fact that B has gone on serving A without wages is not unequivocal; indeed it does not in any way point to the lands in question; and it can not be relied on as a part performance to take this case out of the Statute. This was decided by the House of Lords in 1883 in the case of *Maddison* v. *Alderson*, 8 Ap. Cas. 467.

I believe, indeed, that the only things that can be relied on as acts of part performance for the purpose of our doctrine, are delivery and acceptance of possession of land, and in some cases retention of possession of land. Of the change of possession from A to B I have already spoken—this will be enough to let in oral evidence of an agreement. I mentioned a retention of possession because there are cases in which this when coupled with other acts may be enough. A has let land to B; the lease expires, but B continues in possession. If this be all, then B can not produce oral evidence of an agreement for a sale or for another lease and thus disturb the relation which the law implies between a landlord and a tenant who is holding over after the determination of his lease. But it is said that the retention of possession may, in special circumstances, be treated as part performance of an agreement for the sale of the land or for another lease—it is said to be thus if the tenant in possession lays out money upon the land upon the faith of an agreement. But the cases seem to show that some quite unequivocal act is required of the tenant[3]. So much as to the doctrine of part performance.

[1] *Hughes* v. *Morris*, 2 De G. M. and G. at p. 356; *Britain* v. *Rossiter*, 11 Q.B.D. at p. 130.

[2] *Lassence* v. *Tierney*, 1 Mac. and G. 551.

[3] As to payment of an increased rent see *Nunn* v. *Fabian*, L.R. 1 Ch. 35, and *Miller and Aldworth Ltd.* v. *Sharp*, 1899, 1 Ch. 622.

I think we may say that subject to this doctrine the plaintiff who goes to equity for a decree of specific performance must prove an agreement which in a court of law was a valid contract. At one time certain judges in the Court of Chancery had almost succeeded in inventing a doctrine that equity would compel a person to 'make good his representations'—I am not speaking of representations of existing facts, but of representations of intentions—and would thus go beyond the law of contract. But the wholesome influence of the Judicature Act and the decision in *Maddison* v. *Alderson*[1], seems to have given the death blow to this loose doctrine. If you go to equity for specific performance there must have been a valid contract. But I say 'must have been,' not 'must be.' Let us take this distinction, though now-a-days it belongs to the past.

It not unfrequently happened that one of two contractors could go to equity for specific performance, though he could not go, though he had lost his right to go, to law for damages. Note this case, a contractor could sometimes go to equity though he could not go to law, just as he could sometimes go to law though he could not go to equity. As a general rule a man can not sue upon a contract at law if he himself has broken that contract, though of course, as you know, there are many exceptions to this statement. Now in contracts for the sale of land it very frequently happens that a breach of the terms of the contract has been committed by the person who wishes to enforce it. Such a contract will be full of stipulations that certain acts are to be done within certain times. Within 14 days, for example, after the seller has delivered his abstract of title to the purchaser, the purchaser is to make all his requisitions and objections. On a certain day the sale is to be completed by a conveyance of the land and payment of the price—and so forth. Well you know that equity held that as a general rule these stipulations as to time were not of the essence of the contract—that for example a purchaser might sue for specific performance although he

[1] 8 Ap. Cas. 467 (1883); and see this doctrine discussed, Pollock, *Contract*, 7th edition, Note K, p. 713.

had not in all respects kept the days assigned to him by the contract of sale for his various acts. This was the general rule—these stipulations as to time were not essential unless the parties declared them to be so[1]. There were exceptions—the court looked at the whole contract to see whether time was or was not essential. Thus it is said that time is of the essence of the contract on the sale of a public house as a going concern[2], on the sale of a reversion, on the sale of a life estate, or life annuity, on the sale of a leasehold held for a short term, and generally when the property is of a fluctuating value or of a determinable character[3]. Thus it would often come about that a man could enforce a contract in equity though he could no longer enforce it at law. But, as you know, the Judicature Act of 1873, by section 25, sub-section 7, has removed this anomaly, 'Stipulations in contracts as to time or otherwise which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would heretofore have received in equity.'

So I think that we may say now that any one who goes to equity for specific performance must (subject to the doctrine of part performance) show a contract that is binding in law. Suppose now the contract to be one of a kind of which specific performance is usually granted, for instance a contract for the sale of land, can we go on to say that in the particular case before us specific performance will be decreed. I believe that as a general rule we may. It used to be said, and from time to time this sort of thing is still repeated, that specific performance is a discretionary remedy, but I think that of late years this talk has lost its old meaning, and that the right to specific performance may now be regarded as a right which normally accrues to every contractor when a contract falling within certain recognised classes has been broken. The exceptions have been brought under heads.

[1] *Seton* v. *Slade*, 7 Ves. 265; 6 R.R. 124.

[2] *Cowles* v. *Gale*, L.R. 7 Ch. 12.

[3] See *Hipwell* v. *Knight*, 1 Y. and C. 401 at p. 416; *Newman* v. *Rogers*, 4 Bro. C.C. 391.

For the more part these exceptions are best treated now-a-days as part of our law of Contract, and you will find them discussed in your books on Contract. Thus of course there is much to be said about Fraud, Misrepresentation, and Mistake. You will, however, remember that in this region we can not, even under the new regime, argue from a refusal of the remedy by specific performance to the invalidity of the contract, though one may, at least in general, argue in the reverse direction. Thus under the head of Mistake one may mention a case, *Malins* v. *Freeman* (1837) 2 Keen, 25, in which the Court refused to grant specific performance against a purchaser who at a sale by auction bid for and bought a lot different from that which he intended to buy; he had acted with considerable negligence, and the question was left open whether there was not a valid contract on which damages might be recovered at law[1].

Very often indeed the Court in an action for specific performance has to consider the effect of some misdescription of the land, either as regards its character, its quantity, or its title contained in the particulars or conditions of sale. Often when the misdescription is not of a very serious character it is able to say to the plaintiff vendor, 'Yes we will decree specific performance, but only if you will make compensation for this misdescription by accepting a somewhat lower price than that which was agreed on.' We have indeed three cases[2]:

(1) If the misdescription be but slight equity will enforce the contract at the instance of either party, but only with compensation. If the purchaser will get substantially what he bargained for he can be obliged to take it with a compensation for deficiency—that is, at an abated price[3].

(2) Then we have the case of more serious misdescription in which the purchaser has the option of fulfilling the contract with compensation or avoiding the contract altogether. He

[1] But cf. *Tamplin* v. *James*, 15 Ch.D. 215; and see these cases discussed in *Van Praagh* v. *Everidge*, 1902, 2 Ch. 266; and see Williams, *Vendors and Purchasers*, p. 693.

[2] See Pollock, *Contract*, 7th edition, pp. 537 *et seq.*

[3] See *e.g. Esdaile* v. *Stephenson*, 1 S. and S. 122; 24 R.R. 151; and *Powell* v. *Elliott*, L.R. 10 Ch. 424.

has his choice—he can say I will not take this, or I will take this with compensation[1].

(3) The misdescription may be so material that the Court will not enforce the contract at all, even with compensation. A sells Blackacre to B as freehold land; when the title is examined it turns out to be copyhold. The Court will not compel A to convey and make compensation[2]. One can not in such a case calculate the proper compensation. Of course if B will take the copyhold land without compensation he is entitled to have it, but the Court will not compel A to convey the land with compensation. It will leave B to his common law remedy, the action for damages, and that, as we have seen, will give him nothing for the loss of his bargain[3].

But the cases on this subject are complicated by conditions of sale. There are two conditions in common use which have contrary effects. The one says that if any mistake or omission be discovered in the description of the property this shall not annul the sale, but the vendor or the purchaser is to allow compensation, and the amount of the compensation is to be settled by two referees or their umpire. It is well settled, however, that such a condition will not prevent a really serious misdescription from making the sale voidable at the option of the purchaser[4]. Another condition, less frequently used, says that any error shall not annul the sale, nor is the vendor or the purchaser to claim any compensation in respect thereof. This again will not prevent the purchaser from resisting an action for specific performance if the misdescription goes to the root of the matter[5].

Mistake, misdescription and fraud are topics with which both law and equity have had to deal. But to the action for specific performance there may be other defences which the common law would not recognize. It is, I think, a little doubtful whether we ought not here to mention a gross

[1] See *In re Contract between Fawcett and Holmes*, 42 Ch.D. 150, approving the rule laid down in *Flight* v. *Booth*, 1 Bing. N.C. 370, at p. 377.

[2] See *Rudd* v. *Lascelles*, 1900, 1 Ch. 815.

[3] *Ante*, p. 238.

[4] See *Flight* v. *Booth* supra and *In re Terry and White's Contract*, 32 Ch.D. 14 and 28.

[5] *Jacobs* v. *Revell*, 1900, 2 Ch. 858.

inadequacy of price. It is not impossible that there are cases in which the Court, while holding that there was a contract enforceable by action for damages, would yet hold that owing to the gross inadequacy of the price that contract could not be enforced specifically. But I am not very certain that this class of cases really exists, or that now-a-days the Court would on the ground of inadequacy refuse to order specific performance, unless it was treating that inadequacy as evidence of fraud or of undue influence which rendered the contract voidable.

Among the defences to the action of specific performance one will sometimes find mention of 'want of mutuality.' But this seems to disappear on examination[1]. It was at one time thought that if the purchaser had signed an agreement to purchase, but the vendor had not signed an agreement to sell, the vendor could not obtain specific performance. That 4th section of the Statute of Frauds requires, you will remember, only the signature of the party to be charged; but it was argued that a Court of Equity would not enforce a contract against one party while the other was free. However, this argument was overruled on the ground that the vendor by filing a bill asking for specific performance became bound by the contract, so that from that moment there was the desired 'mutuality[2].' So it has been said sometimes that if a man agrees to sell what is not his he can not enforce specific performance of the contract. Observe that a man may agree to sell what is not his and yet be able to fulfil his agreement. I agree to sell Blackacre to you; Blackacre belongs to X; but having made this agreement I buy Blackacre and am ready to convey it to you. It was said that in such a case you could not obtain specific performance of the contract against me, since at the time when it was made I could not have obtained specific performance against you—for the Court of course could not compel you to buy Blackacre since it could not compel X, to whom it then belonged, to sell it. But on the whole the cases seem to show that this supposed 'want of mutuality' is no defence if when the time comes for completing the contract I show a good title to Blackacre; you can

[1] See the question discussed in Ashburner on Equity, pp. 557 *et seq.*

[2] See *Martin* v. *Mitchell*, 2 J. and W. at p. 426.

not resist my action on the ground that I acquired that title after the date of the contract[1].

Other defences there are. The Court will not by a judgment for specific performance order a man to do what he can not do, or can not do lawfully. I thought that Blackacre was mine; I agreed to sell it to you; upon examination it turns out that Blackacre belongs not to me, but to X; the Court will not order me to convey to you an estate that belongs to X. I am a trustee of Blackacre; in breach of my trust I agree to sell Blackacre to you; the Court will not compel me to convey it to you. I am owner of Blackacre; I agree to sell it to A, and then I agree to sell it to B; the Court will not compel me to convey it to B. It will not compel me to do a wrong. You will notice that we are not here trenching on the subject of contracts tainted by illegality. But the case —it may very easily happen—that I offer a great mass of lands for sale, and that when my title deeds are examined it is discovered that I have agreed to sell a piece of land that is not mine; here is a contract for breach of which damages may be recovered; it is in no way tainted by illegality—but I can not be compelled to perform it specifically.

Lastly it used to be said that the Court would not thrust a doubtful title upon a purchaser. If the purchaser could show that there was some doubtful point of law involved in the vendor's title, then the Court would not compel the purchaser to take it. The Court would not decide the question; it would say 'Here is a seriously arguable question—that is a sufficient obstacle to specific performance at the suit of the vendor.' But of late years the Courts have grown much bolder in this matter. Of course you will understand that a judgment of specific performance is in no sense a judgment *in rem*. A purchaser may well be compelled to take what afterwards proves to be a bad title. For example a purchaser may bind himself to demand no more than a five years' title, or to demand no title at all. He is held to his contract, and after-

[1] *Hoggart* v. *Scott*, 1 R. and M. 293; *Salisbury* v. *Hatcher*, 2 Y. and C. C. C. 54. But note that until the seller has acquired the land the buyer may repudiate the contract; and see the whole matter discussed in *Halkett* v. *Lord Dudley*, 1907, 1 Ch. 590.

wards it may turn out that he got a bad title. But even when the purchaser has not thus contracted away his right to require a good title it may happen that a bad title will be thrust upon him. A sells to B; B objects to A's title; urges that according to the deeds the estate belongs to X not to A; A brings his action against B, the Court decides the point in A's favour; compels B to complete the purchase. Some years afterwards X appears upon the scene; he sues B for the land. The judgment which compelled B to accept the title is not a defence for him, it is no estoppel against X; X can say 'This judgment is *res inter alios acta*—I have not as yet been heard.' Therefore it was natural that the Courts should be somewhat reluctant to force dubious titles upon unwilling purchasers. However, the modern cases oblige us to say that the doubt which is to serve as the purchaser's defence must be a very serious doubt. A purchaser has even been compelled to accept a title under an obscure will when the judge—it was Sir George Jessel—before whom the case came had to dissent from another judgment pronounced on the very same will before he could hold that the title was a good one (*Baker* v. *White* L.R. 20 Eq. 166); and a purchaser has often been compelled to accept a title where no one could have said that there was not a very arguable question to be decided[1].

Our dealings with specific performance should induce us to say a little more about agreements for the sale of land and their effect. Normally in this country a considerable time elapses between the agreement for sale and the conveyance, during which time the purchaser is engaged in investigating the vendor's title. Of course it is just possible that there never should be any agreement, or any binding agreement, for sale distinct from the conveyance. In conversation you make me an offer of £1000 for Blackacre, and I at once sit down and make a deed of conveyance and you at once pay the price. However this is not the way in which business is done. Usually there are two distinct acts in the law; the

[1] See *In re Carter and Kenderdine's Contract*, 1897, 1 Ch. 776. The cases are discussed in Fry on Specific Performance, 4th edition, chap. XVIII, and Williams on Vendors and Purchasers, 1005 *et seq.*

agreement on the one hand, the conveyance on the other; and weeks or months elapse between the two.

Now we have on a previous occasion seen the error of Austin's dictum that the mere agreement for sale transfers the *dominium*, the *jus in re*. In the sale of specific goods in a deliverable state that is so, but in the sale of land the agreement does nothing of the kind. The most that it does is that it gives to the purchaser an equitable estate in the land, a right good against those who claim under the vendor by gratuitous title, or who have or ought to have notice of it. In this sense the purchaser acquires an estate in the land—suppose that he has agreed to buy the fee simple, there is something to descend to his heir, there is something that will pass by a devise of all my real estate. But for the Acts of Parliament which it is convenient to refer to collectively as Locke King's Acts[1], the heir or devisee would even have a right to call upon the executor or administrator to pay for this estate out of the purchaser's personal estate. As it is, though he can no longer claim this exoneration from the vendor's lien, yet the estate comes to him as part of the purchaser's realty. And so when the contract is signed the purchaser has rights that he can convey to another; they are not treated as a mere chose in action; for the purpose of conveyance he has already an equitable estate in the land, though one which is subject to the vendor's lien for the unpaid purchase money. But the vendor has as yet the legal estate in the land, and any one who purchases from the purchaser must purchase subject to those legal rights. Unless in the case of some very peculiar agreement the vendor may keep the legal estate, and may keep possession of the land until he is paid his price. If you say that the contract passes ownership, be careful to say that it does so only in equity.

So again it is common enough to say that the vendor becomes a trustee for the purchaser. And for certain purposes this is true enough. For example a man contracted to sell land, the title was accepted, but before conveyance he died, having by his will devised his real estate to X, and all real estate held by him upon any trust to Y; it was held by

[1] See *ante*, p. 212.

Jessel M.R. that the legal estate in the land sold passed under the latter devise and not under the former (*Lysaght* v. *Edwards*, 2 Ch. D. 499)[1]. He had become a trustee of the land that he had contracted to sell. Still the trusteeship of the unpaid vendor is a very peculiar trusteeship; one that stands by itself. In some respects he is rather in the position of the mortgagee than of the trustee. He can say I will not part with this land, I will not give up the legal estate, I will not deliver possession until I am paid. Then if the purchaser will not pay he has a right resembling that of foreclosure. He can go to the Court; the Court will order the purchaser to pay within a reasonable time, and in default of payment the purchaser will lose his right to the land under the contract, and the vendor will be in the same position as that in which he was before the contract was made, he will be owner at law and in equity.

Then again we may say that in another respect the purchaser, so soon as the contract is made, is treated as though he were the owner, provided that the contract is enforceable specifically. In the absence of agreement to the contrary the risk of loss is with him. The house that is sold is burnt down by accident; the purchaser must bear the loss[2]. So on the other hand if trees be blown down these windfalls belong in equity to him[3]. And so again if the vendor wilfully damages the land that he has sold he must pay for it; nay more, he is expected to take reasonable care of what he has sold, so long as it is in his possession[4]. In all these respects, it may be said, equity treats the purchaser as owner, the vendor as one who is in possession of another person's property. But then remember that there is a sphere into which equity can not enter; suppose that this vendor sells and conveys to one who has no notice of this previous contract for sale, then you will see soon enough what ownership 'in equity' means. That contract passed no *jus in rem*.

And then observe the effect of conveyance. We will

[1] Cf. *In re Thomas*, 34 Ch. D. 166.

[2] *Paine* v. *Meller*, 6 Ves. 347; 5 R.R. 327.

[3] *Magennis* v. *Fallon*, 2 Molloy, 561, 591, and *Poole* v. *Shergold*, 1 Cox, 273.

[4] *Royal Bristol Society* v. *Bomash*, 35 Ch. D. 390.

suppose that the vendor makes a conveyance without receiving the price, or without receiving the whole price. He is still said to have a lien for the unpaid purchase money. This term 'vendor's lien' is often applied indifferently to the rights of a vendor who has not yet been paid and has not yet conveyed, and to the rights of a vendor who has not yet been paid but who has conveyed. But really these rights are of different orders. In the first case the vendor is legal owner of the land, and he can refuse to part with the land until he is paid—unless indeed he has expressly contracted to do so: he relies on this legal right. In the latter case he has parted with his land; the only right that the common law gives him is a purely personal right, a right to sue for the purchase money. Equity does something more for him: it gives him what is (with no great accuracy) called a lien on the land—with no great accuracy, for in general a lien signifies a right to retain what you have already in your possession, and here our vendor has parted with possession. It is a handy equitable right. It comes to this, that against the purchaser and those persons—but only those persons—against whom an equity will prevail, the unpaid vendor after conveyance has a charge upon the land, which charge he can enforce by demanding that the estate be sold and that he be paid what is due to him out of the proceeds of the sale. Against whom is such an equity good? Against whom are equitable estates in general good? This equity can be enforced against the purchaser, his representatives, those claiming under him as volunteers, against any later equity (unless there is some ground, such as negligence, for postponing the older to the younger equity), even against those who have legal rights in the land, unless there has been a *bona fide* purchase for value without notice of this vendor's lien. But the acquisition of the legal estate *bona fide* for value and without notice puts an end to the lien[1]. You see then that the rights of the unpaid vendor are radically altered by the conveyance.

You must not think that an unpaid vendor always has this right, this lien for unpaid purchase money. He may expressly waive it, and often a question may arise whether he has not

[1] See *Harris* v. *Tubb*, 42 Ch. D. 79.

by implication waived it by taking some other security for his money. The general rule seems to be that if he takes another security, or if for example he takes a charge on a sum of stock, or a mortgage on another estate, or if he takes a mortgage on a part only of the estate that he has sold, this is presumably an abandonment of his lien; but taking a promissory note, a bill of exchange, or a bond is not sufficient. It must be remembered that the burden of proving the waiver is upon those denying the existence of the lien[1].

The vendor is not precluded from insisting on this equitable right by a statement either in the conveyance or on the back of the conveyance that he has received the purchase money. Equity was inclined to treat the receipt clause in the body of the deed and also the endorsed receipt as forms[2]. At law the receipt clause in the body of the deed being under the vendor's seal would estop him from denying that he had received all that he said that he had received. But in equity as against the purchaser the vendor was allowed to prove that despite these receipt clauses he had not really received his money. As against persons claiming for value under the purchaser—sub-purchasers let us call them—the rule I believe was that if there was a proper receipt on the back of the deed, then, at all events if there was also a receipt in the body of the deed, this sub-purchaser would not have notice of the vendor's lien; but the absence of a receipt on the back of the deed was sufficient to give him implied notice of a vendor's lien, even though there was a receipt in the body of the deed. Therefore in perusing titles one was always careful to see that there was a proper endorsed receipt. The law has been altered in some respects by the 54th and 55th sections of the Conveyancing Act, 1881. A receipt in the body of the deed comes now to serve all the purposes that were served by the two receipts which were formerly usual; and in favour of a subsequent purchaser a receipt either in the body of the deed or endorsed therein is to be sufficient evidence that the money was really paid unless that purchaser has some other notice that it was not paid.

[1] See *Mackreth* v. *Symons*, 15 Ves. 329, White and Tudor, L.C. vol. II. 926.

[2] See *Kennedy* v. *Green*, 3 M. and K. 699, 716.

LECTURE XX.

INJUNCTIONS.

By means of its decrees for specific performance the Court of Chancery obtained command of one great province of law, namely of contracts for the sale of land. It fashioned another weapon, namely the injunction, which was far more flexible, far more generally applicable, and thereby it obtained not merely certain particular fields of justice, but a power of making its own doctrines prevail at the expense of the doctrines of the common law.

Let us see what an injunction is. It is an order made by the Court forbidding a person or class of persons from doing a certain act, or acts of a certain class, upon pain of going to prison for an indefinite time as contemners of the Court. This penalty will not be mentioned in the injunction, but if knowing of an injunction you break it, then the Court has a large discretionary power of sending you to prison and keeping you there.

I will give you an example or two of the form that an injunction takes. 'Let an injunction be awarded against the defendants the Mayor, Aldermen and Burgesses of Leeds to restrain the said defendants, their servants, agents and workmen from causing or permitting the sewage of the borough of Leeds or any part thereof to flow or pass through the main sewer or any other outfall into the river Aire unless and until the same shall be sufficiently purified and deodorised so as not to be or create a nuisance or become injurious to the public health.'

'Let the defendant E be restrained from infringing the plaintiff's trade marks registered under the Trade Marks

Registration Act, 1875, or either of them, and from selling or offering for sale any tea in, or from otherwise using, wrappers having imprinted thereon any imitation or colourable imitation of the plaintiff's trade marks or either of them.'

'Let an injunction be awarded to restrain the defendant from using or permitting to be used the premises called X or any part thereof for the purpose of balloon ascents, fireworks, dancing, music, or other sports or entertainments, whereby a nuisance may be occasioned to the annoyance or injury of any inmates of the asylum in the pleadings mentioned.'

There are certain technical terms the meaning of which you should understand if you are to read about injunctions. Very often a plaintiff wants an injunction at once; he wants to have it the moment he has begun his action and long before that action can be tried. Put the case that my neighbour is building a wall close to my land and is thereby beginning to block out the light from ancient windows of mine. I want an injunction at once, and I shall prejudice my case for an injunction if I allow him to go on building until the action can be tried—very possibly though I proceed with the utmost despatch the action will not be tried for many months to come. So soon as I have begun my action, so soon as I have served a writ of summons upon my adversary, I shall make an application, a motion to the Court for an injunction[1]. This will be an 'interlocutory application,' and the injunction if granted will be an interlocutory injunction. Proceedings which take place in an action before the trial are said to be interlocutory. I shall serve my adversary with a notice telling him that on the next motion day (in the Chancery Division one day a week is usually given for the hearing of motions) my counsel will apply to the Court[2] for an injunction. Then if by the affidavit that I produce I make what the judge considers a sufficient case, he will grant an injunction. This however will not be a perpetual injunction; it will be an interlocutory injunction to hold good

[1] Commonly leave is obtained to serve notice of this motion with the writ.

[2] In the King's Bench Division applications for interlocutory or 'interim' injunctions are made to the judge in Chambers either *ex parte* or on a summons, and not by motion in Court.

until the trial of the action. And I shall be obliged if I obtain it to give 'an undertaking in damages'—that is to say by the mouth of my counsel I shall have to undertake to pay any damages which the Court may hereafter award to the defendant in consequence of my having obtained an injunction when I ought not to have had one. The order will be in some such form as this.

'Upon motion by counsel for the plaintiff and upon hearing counsel for the defendant and upon reading such and such affidavits, and the plaintiff by his counsel undertaking to abide by any order that this Court may make as to damages in case this Court shall hereafter be of opinion that the defendant shall have sustained any by reason of this order which the plaintiff ought to pay, this Court doth order that the defendant, his servants, workmen and agents, be restrained by injunction from &c. until judgment in this action, or until further order.'

But further there is sometimes so much need for speedy procedure, that the plaintiff can not even wait to serve upon the defendant a notice of motion, but having obtained his writ and filed an affidavit about the facts applies to the Court *ex parte*, and obtains from the Court an *ex parte* injunction—these words *ex parte* signifying that the defendant has not had an opportunity of being heard. In general such an injunction will be limited to a few days, *e.g.* until the next motion day, and then the defendant will have an opportunity of appearing and saying what he has to say against a continuance of the injunction until the trial. In such cases the Court is acting upon *prima facie* evidence—in the case of the *ex parte* injunction it acts upon the evidence produced by the plaintiff without hearing the defendant's version of the story. Then comes the trial, and the plaintiff either establishes his right to a perpetual injunction, or fails to do so. In the former case an injunction is granted without any limit of time which forbids the defendant to do the acts in question. In the other case the action is dismissed and an inquiry is ordered as to the damages which the defendant has suffered by reason of the interlocutory injunction, and the plaintiff will be ordered to pay these damages.

In general an injunction forbids a defendant to do certain

acts, but sometimes it forbids him to permit the continuance of a wrongful state of things that already exists at the time when the injunction is issued. The Court does not merely say 'Do not build any wall to the injury of the plaintiff's right of light'; it can say 'Do not permit the continuance of any wall to the injury of the plaintiff's right of light.' If such a wall already exists then the defendant is, in effect, told to pull it down. An injunction which takes this latter form, an injunction forbidding the defendant to permit the continuance of an existing state of things is called a mandatory injunction[1]. A mandatory injunction is less easily to be had than a merely prohibitive injunction; in general it will not be granted until the plaintiff has fully proved that the existing state of things is wrongful.

Now this weapon was fashioned by the Court of Chancery and was used by it for all manner of purposes. One of these purposes is of great historical importance. It was the injunction which in the last resort enabled that Court to enforce its equitable doctrines, for it would grant an injunction to prevent a man suing in a court of law, or taking advantage of a judgment obtained in a court of law. I have already told you how this right of the Chancery was established in the reign of James I after the great quarrel between Coke and Ellesmere[2]. It gave the Chancery the upper hand. The Chancellor could say to a person 'You must not go to a court of law,' and the court of law had no power to say 'You must not go to a court of equity.' Well, when the Judicature Acts came into force in 1875 all this came to an end. It was expressly enacted by the Act of 1873 section 24 (5) that no cause or proceeding at any time pending in the High Court should be restrained by prohibition or injunction. If in an action in the King's Bench Division—one of the old common law actions—the defendant has some equitable defence, he can plead it, and the court must listen to it and administer the rules of equity as well as the rules of law. However our Court

[1] A mandatory injunction is now usually put in the form of a direct order to do the act required by the Court.

[2] *Ante*, p. 9; and see the notes to the *Earl of Oxford's Case*, White and Tudor L. C., vol. I. 739.

still has power, and occasionally exercises it, to prohibit persons from suing in Colonial or foreign courts. I say this because I wish to remind you that the Chancery never claimed any superiority over the Courts of Common Law. It could not send orders to them; but it could prohibit a person from going to them. And just so now our High Court of Justice has no superiority over a Colonial court, and of course it has no superiority over a French or German Court, nevertheless, in a proper case it will prohibit a person from suing there. Equity acts *in personam*—this has been an important maxim. Equity did not presume to interfere with or to control the action of the common law courts. It acted upon the person who was inequitably suing in those courts.

In this way the Judicature Act curtailed the field of injunctions; in another way it extended that field. But first I ought to remark that the Common Law Procedure Act of 1854 section 79 (now repealed) gave to the Courts of Common Law what in terms was a very large power of granting injunctions, but that those courts being unaccustomed to the exercise of such a power made very little use of it.

Then came the Judicature Act of 1873 (sec. 25 sub-sec. 8). 'A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.'

Now this is the statute law of the land, and you will observe how wide are the terms employed, how large a power

of granting injunctions it gave to the Court. That power now certainly goes beyond the power that was formerly possessed by the Court of Chancery. The concluding phrases of the section show that this—at least in certain definite respects—was the intended effect of the section. One of the few definite restrictions—and after all this was not very definite—which the Court of Chancery had set to its own power of granting injunctions was to be found in an unwillingness to interfere in disputes about legal rights in land when no equitable rights were involved. X was in possession of land, A was asserting title to that land, a purely legal title; he was bringing an action of ejectment against X. Meanwhile X was cutting down timber, pulling down houses, or committing other acts which would be waste if committed by a tenant for life. Equity was in such a case unwilling to interfere—for the question at stake was a purely legal question, namely whether X or A was owner of the land. It would only interfere against flagrant acts of spoliation which would immediately damage the disputed land. And so again if X was in possession and A without claiming title entered on the land and committed acts of trespass, equity was not very willing to interfere against A. The whole matter might well be left to a court of law—still if A was doing irreparable damage to the land the Court of Chancery would interfere. Well the last phrases of the section that I have read are aimed against this restriction. Before or at or after the hearing the Court may grant an injunction to prevent threatened or apprehended waste or trespass, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or if out of possession does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or either of the parties are legal or equitable.

But further the High Court now has got not only the old power of the Court of Chancery, it has also the powers granted by the section of the Act of 1873 that I have read. The consequence is that since 1875 injunctions have been granted in cases in which they were not granted before that

Act. I have already spoken of matters of waste and trespass; the Court of Chancery's unwillingness to meddle with questions of pure common law title to land no longer stands in the way. But in the second place it had been settled that the Court of Chancery would not grant an injunction to restrain, either before trial or after trial, the publication or continued publication of a libel. The reason was this. The publication of a libel is usually a crime, and the Chancery having no jurisdiction in criminal matters steered very clear of the field of crime—there was to be no criminal equity. Besides, as we are often told, the question of libel or no libel is pre-eminently one for a jury, and the Court of Chancery knew no trial by jury. However, since 1875 it has been decided that the Courts of Common Law, though they had not exercised this power, had under the Common Law Procedure Act of 1854 obtained power to grant an injunction against the publication of a libel, and that the High Court now has this power, and can grant the injunction at the trial (a perpetual injunction) or before the trial (an interlocutory injunction). Its power is only limited by what is just and convenient. However, a good many cases are now tending toward establishing the rule that an interlocutory injunction against a libel is hardly ever to be had. An action for libel is one of the actions in which a defendant has a right to trial by jury. When the jury has found him guilty of publishing a libel there is no difficulty about granting an injunction to prevent a continuance of the publication as an additional remedy beside the judgment for damages. But before trial an injunction is hardly to be had. The defendant may allege that the libel is true; in this case he does no civil wrong in publishing it, and we ought not to assume against him before the trial that he will not be able to set up this defence and make it good. This was the effect of the decision of the Court of Appeal in the case of *Bonnard* v. *Perryman*, 1891, 2 Ch. 269. But the Court has clear jurisdiction to grant an interlocutory injunction, even in an action for libel, if a proper case for it be made out. See *Monson* v. *Tussauds*, 1894, 1 Q.B. 671, a case that you will find both amusing and instructive.

Well our written, our statute law now says that an injunction, even an interlocutory injunction, may be granted whenever it is just or convenient. Of course, however, as I have just shown by reference to the case of libel, judges must follow the stream of decisions in adjudging that the issue of an injunction will or will not be just or convenient.

I think that we shall best divide the work of injunctions by taking as our two heads Tort and Contract.

A very large part of the whole province of Tort is a proper field for the injunction. I should say that the only torts which lie outside the field of injunctions are assault and battery, false imprisonment, and malicious prosecution. I do not think that an injunction has been used or could be used to prevent these torts, which if they be torts will also at least in most cases be crimes. Here there are other remedies. If you go in fear of a man you can have him bound over to keep the peace, while if you are wrongfully imprisoned the writ of habeas corpus with its rapid procedure should serve your turn. A civil court, again, must not prohibit a man from instituting criminal proceedings. The Attorney-General's *Nolle prosequi* should be a sufficient preventive check on criminal proceedings of an obviously vexatious kind. But with these exceptions it would be hard to find a tort which might not in a given case be a proper subject for an injunction. Of libel I have already spoken, and something I have said of trespass and of waste. It was the Chancery's power of issuing injunctions against acts of waste that begot the doctrine of equitable waste. Sometimes the Chancery would give an injunction against waste for which a Court of Law would give no damages. Nuisance is a fertile field, so is the infringement of copyright, of patents, of trade marks. Indeed there are many rights which are chiefly, though not solely, protected by an injunction—the remedy by action for damages being but a poor one. Damages and injunction are not, you will understand, alternative remedies—in old times you could get the one from the Courts of Common Law, the other from the Court of Equity; now-a-days you may well get both from the same court, the same division of the court in the same action, damages to compensate you for wrong suffered, and

an injunction to prevent a continuance of the wrong, it may be a mandatory injunction to prevent the continued existence of a wrongful state of things. But while the remedy by damages is a matter of strict right, the remedy by injunction is not. This is best seen by referring to the cases in which a plaintiff can recover nominal damages. He has not really been hurt; he has not been made the poorer; but still his rights have been infringed and the court pronounces a judgment in his favour. But the court will not interfere by injunction where the tort complained of, though a tort, is one which does no real damage, and it will not interfere by injunction if damages will clearly be an adequate remedy[1]. Then again it may consider the plaintiff's conduct, and in particular any delay of his in bringing the action. To an action for damages delay is no defence unless the case has been brought within one of the Statutes of Limitation. Either the plaintiff still is entitled to the remedy or it has been taken from him by a statute, and you can fix the precise moment of time at which the statute takes effect—one moment he has a remedy, the next moment he has none. It is not so with the injunction; the court may well hold for example that my neighbour must pay me damages for having blocked out light from my ancient windows, and yet, as I stood by and let him build, it would be inequitable to compel him to pull down his wall. Especially when a mandatory injunction is to be sought, the plaintiff must at once take action and prosecute his action diligently. The court, it is said, in granting a mandatory injunction may look at the balance of convenience. The defendant is by supposition in the wrong, but on the whole and considering the conduct of both parties, shall we not be inflicting on him more harm than he deserves if we compel him to pull down his wall[2]?

[1] See *e.g. Llandudno Urban District Council* v. *Woods*, 1899, 2 Ch. 705; *Behrens* v. *Richards*, 1905, 2 Ch. 614; and see *Fielden* v. *Cox* (1906), 22 Times Reports, 411, where Buckley J. refused to grant an injunction against a Cambridge medical student and three young brothers who were alleged to have disturbed game by hunting for moths on a highway and on some adjoining lands near Whittlesea Mere. The plaintiff recovered a shilling as damages, which had been paid into court, and he was ordered to pay the whole of the defendants' costs.

[2] See the cases collected in Seton on Decrees (1901), vol. I. pp. 528 *et seq.*

Within the province of Contract the injunction plays a considerable part, but not so large as that which it plays in the field of Tort. Equity it will be remembered has here another weapon, namely the decree for specific performance. It has come to a body of doctrine about the use of that remedy, has decided that it is applicable to contracts of certain classes, in particular to contracts for the sale of land, and that it is not applicable to contracts of some other classes. However, for the enforcement of contract, it has used the injunction as well as the decree for specific performance. We must start with this principle that the injunction is only applicable to breaches of negative contracts, *i.e.* contracts not to do, as distinguished from positive contracts, *i.e.* contracts to do something. For the enforcement of negative contracts it is very largely employed, for example it has been the chief method of enforcing negative contracts contained in leases, covenants not to assign, not to use as a public house, not to sell hay or straw off the farm. You will remember how it was as an outcome of this power to grant injunctions that the doctrine about covenants which run with the land, not at law but in equity, made its appearance. And you will remember that that doctrine is confined to negative covenants, it goes no further than the remedy by injunction will go[1]. Then again a common case for an injunction arises upon breach of a covenant against carrying on business of a certain kind. You will find that the decisions which have settled the limits between lawful and unlawful restraint of trade have been chiefly decisions of Courts of Equity given in suits for injunctions. These I mention as common cases. But I think that the rule is a very general one that the breach of a negative contract can be restrained by injunction. And applications for an injunction in these cases are treated somewhat differently from similar applications in actions founded on torts. We hear much less of 'the balance of convenience' when there is a contract and the applicant is not bound to show that he has already suffered actual damage. When a man has definitely contracted not to do a certain thing, it is not for him to say that it will be greatly to his convenience, and not much to the

[1] *Ante*, pp. 166–168.

inconvenience of the other party, that he should be allowed to do it. But this general rule seems to be limited by this, that you are not by means of an injunction to compel the specific performance of a positive contract which does not fall within one of those classes of contract of which the court will decree the specific performance. Suppose that I agree to serve you as your clerk for ten years, no doubt this agreement will (at least in any common case) imply a term that I am not during that period of ten years to serve any other person. But a contract of hire and service is not one of those contracts of which the court will decree the specific performance. Therefore you cannot directly compel me to serve you. Can you do so indirectly by obtaining an injunction to prevent me from breaking that negative but unexpressed term in the contract that I am not to enter the service of anybody else? No you can not. This seems well settled, that a merely implied negative term in a contract which is substantially positive can not be enforced by injunction. There has, however, been some difference of opinion as to cases in which an express negative covenant has been added as an accessory to an express positive covenant. In the famous case of *Lumley* v. *Wagner*, 1 D.M.G. 604, the defendant had agreed to sing at the plaintiff's theatre and not elsewhere without the plaintiff's permission; it was held that though she could not be compelled to fulfil the positive part of the agreement she could be restrained from breaking the negative part. In the well-known case, however, of *Whitwood Chemical Co.* v. *Hardman*, 1891, 2 Ch. 416, Lindley L.J. said that he looked upon *Lumley* v. *Wagner* as an anomaly not to be extended. In that case the manager of a manufacturing company had agreed that during a specified term he would give all his time to the business. It was held by the Court of Appeal that the company could not have an injunction to prevent him giving part of his time to a rival company. The state of affairs seems to be this. You can not indirectly by means of an injunction enforce the specific performance of an agreement which is of such a kind that specific performance of it would not be directly decreed; but if you can separate from this positive agreement an express negative agreement that the

defendant will not do certain specific things, then you may have an injunction to restrain a breach of that negative agreement[1].

[1] As to the enforcement by injunction of direct covenants or agreements between masters and servants that the servant *after* the termination of the service shall not (usually within some named limits of time or space or of both) engage in any similar work or business the practice of the courts is now governed by the case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, 1894, A.C. 535. Such agreements, although in restraint of trade, will be enforced by injunction if not wider than is reasonably necessary for the protection of the employer and not injurious to the public interests of this country.

On the other hand if the master or employer has wrongfully determined the service then he is not merely liable in damages for the wrongful dismissal but he is also thereby precluded from enforcing the promise made by the servant not to carry on his trade thereafter within the named limits of time or space. *General Bill Posting Company Limited* v. *Atkinson*, 1909, A.C. 118.

LECTURE XXI.

MORTGAGES.

YOU will have read how Equity came to interest itself in mortgages. In consequence of its doctrine that a mortgage is merely a security for money, a security which can be redeemed although, according to the plain wording of the mortgage deed, the mortgagee has become the absolute owner of the land, it drew almost every dispute about mortgages into the sphere of its jurisdiction and had the last word to say about them.

I think that I may best serve you by speaking of the structure of mortgage deeds. We shall have to consider what they say and what they do. You will know that the Conveyancing Act of 1881 has very much shortened the forms hitherto in use. It has done this by saying that in the absence of any expression of a contrary intention a mortgage deed is to be deemed to contain certain clauses. These clauses are like, though not exactly like, certain clauses which used to be expressly inserted in the deed—set out in full. But it will be expedient that for a while we should go behind the Act and we will consider a mortgage of the most simple and elementary kind. Doe is tenant in fee simple of Blackacre, in which he has an unencumbered estate; Nokes is going to lend him £1000 upon the security of Blackacre and the debt is to bear interest at the rate of £4 per cent. per annum. Let us begin.

'This Indenture made the 1st day of January 1880 between Doe of the one part and Nokes of the other part Witnesseth that in consideration of the sum of £1000 upon the execution of these presents paid by the said Nokes to the said Doe (the

receipt of which said sum the said Doe doth hereby acknowledge) He the said Doe doth hereby for himself his heirs, executors and administrators covenant with the said Nokes his executors and administrators that the said Doe his heirs executors or administrators will on the 1st day of July next pay to the said Nokes his executors, administrators or assigns the sum of £1000 with interest for the same in the meantime at the rate of 4 per cent. per annum And that if the said sum of £1000 or any part thereof shall remain unpaid after the said 1st day of July the said Doe his heirs executors or administrators will pay to the said Nokes his executors administrators or assigns interest for the said sum of £1000 or for so much thereof as shall for the time being remain unpaid at the rate of 4 per cent. per annum by equal half-yearly payments on the 1st day of January and the 1st day of July.'

Here ends one section of the deed and as yet we have come upon nothing that affects Blackacre, nothing that can be called a mortgage. We have a mere covenant, creating of course a specialty debt, that Doe will repay the loan with interest six months hence, and that in case of non-payment on a certain day Doe will go on paying interest half-yearly. Then opens a second section of the deed.

'And this Indenture also witnesseth that for the consideration aforesaid the said Doe doth hereby grant unto the said Nokes his heirs and assigns All that piece of land called Blackacre [Here you describe the property—'the parcels'—and you used to insert the 'general words' and the 'estate clause'][1] To have and to hold unto the said Nokes his heirs and assigns to the use of the said Nokes his heirs and assigns subject to the proviso for redemption hereinafter contained.'

You see you make an absolute conveyance of the fee simple to Nokes, just mentioning at the end of it that it is subject to a proviso for redemption which is coming. This proviso for redemption—in strictness it were better called a proviso for reconveyance—comes immediately.

'Provided always and it is hereby agreed and declared that if the said Doe his heirs, executors, administrators or assigns shall on the 1st of July next pay to the said Nokes his executors

[1] See now the Conveyancing Act, 1881, ss. 6 and 63.

administrators or assigns the said sum of £1000 with interest for the same in the meantime at the rate of 4 per cent. per annum, then the said Nokes his heirs or assigns shall at any time thereafter upon the request and at the cost of the said Doe his heirs, executors, administrators or assigns reconvey the said premises to the use of the said Doe his heirs and assigns or as he or they shall direct.'

Now there is a mortgage. It is a very imperfect deed, it does not give to Nokes, the mortgagee, nearly all the rights that should be given to him. Still here is all that is essential to make a mortgage—a loan of money, in consideration thereof a conveyance of land, subject to a proviso that if on a given day the debt be paid off with interest the mortgagee shall reconvey that land to the mortgagor. Now here let us pause for a while and consider the effect of this short instrument, for thereby we shall come to the reasons why mortgages were not as a rule such short affairs as this. What are the rights and duties of Doe the mortgagor, and Nokes the mortgagee?

Well, in the first place we note that Doe has bound himself by covenant to pay Nokes a certain sum with interest on a certain day. So soon as that day, the 1st of July, 1880, is passed without payment of the money, Nokes will have an action on the covenant against Doe, will be able to obtain a judgment for what is due, will then have a judgment debt owing to him, will be able to obtain execution against all Doe's chattels and all Doe's land by *fieri facias*, *elegit* or the like. Of course this is a somewhat small thing, every creditor who has a specialty debt owing to him has as much as this, and now-a-days every simple contract creditor is almost as well off as a specialty creditor. A man advancing money upon mortgage wants something better than this, he wants some *jus in rem*, some right in certain specific things as well as the mere *jus in personam* that the mortgagor's covenant will give him. Still note that the mortgagee has this *jus in personam*, for in easily imaginable circumstances it will be of use to him. He has advanced £1000 upon the security of Blackacre and we may suppose that like a prudent man he has observed the wholesome rule which the court enforces upon trustees, and has not lent more than two-thirds of the value

of Blackacre. Still in these days of agricultural depression it is by no means impossible that he may hereafter find that Blackacre is not worth £1000. Then his personal remedy against Doe, the mortgagor, who may be a solvent, wealthy person, will be of great value to him. He may sell Blackacre for £800 and get £200 more by suing Doe upon the covenant, and even if Doe be insolvent, be bankrupt, he will have his choice between realizing his insufficient security and taking a dividend proportioned to the sum still due, or abandoning his security and taking a dividend proportioned to the whole debt. You should understand that it is by no means of the essence of a mortgage that the mortgagee should look to the mortgaged property alone for the repayment of the loan, on the contrary he always or almost always can also look to the personal liability of the mortgagor. He is not the less a creditor because he is a secured creditor.

But of course it is more important to him that he should have rights in Blackacre. And on the face of the mortgage deed it seems plain enough that if the 1st of July passes without his debt being paid to him with interest, he will be the absolute owner of Blackacre—or, to be more accurate, unqualified tenant in fee simple of Blackacre. Of course if on that day he be paid or tendered his principal and interest then under the express words of the proviso for reconveyance, he will be bound to reconvey. But then it is an extremely rare, an almost unheard of, event, that there should be this punctual payment or tender—indeed Nokes, who thinks that he has found a permanent investment for his £1000, would probably be much annoyed if on the 1st of July Doe appeared with his 1020 sovereigns in hand. That is the worst of our mortgage deed—owing to the action of equity, it is one long *suppressio veri* and *suggestio falsi*[1]. It does not in the least explain the rights of the parties; it suggests that they are other than really they are.

Though the 1st of July has passed, yet at any time before foreclosure or sale Doe will be able to redeem the mortgage, will be able to demand from Nokes a reconveyance if he

[1] Cf. Lord Bramwell's remarks in *Salt* v. *Marquess of Northampton*, 1892, A.C. pp. 18 and 19.

tenders to him his principal, his interest, and his costs. I say 'until foreclosure or sale'—how there comes to be any talk of a sale I shall explain hereafter. But what is a foreclosure? Well, equity in effect said this: A mortgagee shall not become the absolute owner of the mortgaged thing until he has come into my court, until the mortgagor has had an opportunity of saying anything that he has to say, and also a last opportunity definitely limited to him by my order of paying what is due and redeeming the land. Only after a judicial proceeding can the mortgagee become the owner of the land. Let us understand a little about this judicial proceeding.

For some reason or another Nokes wishes to foreclose this mortgage. After due notice given he begins an action against Doe, the mortgagor, claiming by his writ[1] that the mortgage may be foreclosed. Of course it may happen that there is some defence to this action—Doe, it is possible, may dispute the existence of the mortgage, or say that it was obtained by fraud—but if Doe has no such defence, if he is merely unable or unwilling to pay the debt then he has no valid defence at all. Very probably he will not appear in the action, for he would gain nothing by appearance. At any rate judgment is given against him. The judgment is in this form:—

Let an account be taken of what is due to the plaintiff for principal and interest on his mortgage in the pleadings mentioned and for his costs of this cause, such costs to be taxed. And upon the defendant paying to the plaintiff what shall be certified to be due to him for principal, interest and costs as aforesaid within six calendar months after the date of the Master's certificate at such time and place as shall be thereby appointed, let the plaintiff reconvey the hereditaments comprised in the said mortgage and deliver up on oath all deeds and writings in his custody or power relating thereto to the defendant or to whom he shall appoint. But in default of the defendant paying what shall be so certified to be due to him for such principal, interest and costs as aforesaid by the time aforesaid, the defendant is from thenceforth to stand absolutely debarred and foreclosed of and from all right, title,

[1] Proceedings are now usually by originating summons.

interest and equity of redemption of, in and to the said mortgaged hereditaments[1].

Then in the judge's chambers Nokes the mortgagee will prove what is due to him. The Master will then draw up a certificate stating that this is the sum due and naming some place and hour on the day six months from the date of the certificate—I think that it was usual to name the Rolls Chapel[2]—at which the money is to be paid. If matters have gone so far as this we may be pretty certain that the money will not be paid—it is only in novels, and in novels written by ladies, that the mortgagee's hand is stayed at the last moment by some god out of the machine. Yet another order from the Court is still necessary before the foreclosure is complete. We have as yet but an order *nisi* for foreclosure—the defendant is to be foreclosed *unless* he pays—an order for foreclosure absolute is necessary before the plaintiff mortgagee will be safe. So he, or his solicitor on his behalf, attends on the appointed day, and waits an hour (the certificate generally gives the defendant an hour, *e.g.* 12 to 1, for his appearance) on the outlook for the mortgagor. An affidavit is sworn in proof of this default, and a motion of course (a mere form) is then made before the Court for foreclosure absolute[3]. Thereupon 'this Court doth order that the defendant Doe do from henceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the said mortgaged hereditaments.' There are cases in which the mortgagee can get an absolute foreclosure at once—in particular if the mortgagor appears and consents to this; but here I can only follow up the ordinary course of practice.

Just by the way I must mention an improvement introduced by the Judicature Act—for it is typical of many other improvements. Before 1875 a proceeding for foreclosure was of course a proceeding in equity. In the eye of a Court of Common Law the mortgagee was already owner of the land:

[1] See Seton (1901), vol. III. 1895.

[2] Now a room at the Royal Courts of Justice.

[3] The application is usually by summons whether the proceedings commenced by originating summons or by writ.

nothing that such a court could do would make him more of an owner than he was. On the other hand there was one thing that a Court of Equity could not do for him—it could not give a judgment on the mortgagor's covenant for the payment of the money. An action on a covenant was given by Courts of Law, and if he wanted such a judgment (as well he might) he would have had to go to a Court of Law. But now, though the redemption and foreclosure of mortgages are among the matters specially assigned to the Chancery Division, that Division can since the Judicature Act give all relief, whether equitable or legal, that the plaintiff is entitled to. Now-a-days therefore in his foreclosure action the mortgagee can obtain not only foreclosure, but a judgment on the mortgagor's covenant[1].

But to return from this bye-point. Now you might well think that Nokes the mortgagee having taken these judicial proceedings, having obtained a judgment for foreclosure—first an order *nisi*, then an order absolute—would at last be able to look upon Blackacre as his very own and to treat Doe as having no interest in it. It is not so. A Court of Equity will as the phrase goes 'reopen a foreclosure' and permit the mortgagor to redeem, and it has refused to lay down any precise rules as to the circumstances in which it will do this. I need say nothing of fraud, but fraud apart, it will sometimes permit a foreclosed mortgagor to redeem. I think that the last important case about this matter is *Campbell* v. *Holyland*, 7 Ch. D. 166, in which Jessel M.R. discussed the circumstances in which a foreclosure would be reopened. If the mortgaged property was far more valuable than the mortgage debt, if it had for the mortgagor a *pretium affectionis* being an old family estate, if the mortgagor was prevented from redeeming by some accident, if he has come speedily—these all are circumstances in favour of permitting him to redeem, though an absolute order for foreclosure has been made against him. The Court's power to open the foreclosure is a highly discretionary power—all the circumstances of the particular case may be considered. What is more that power may be

[1] *Poulett* v. *Hill*, 1893, 1 Ch. 277. It is regarded as an abuse of the process of the Court if two actions are brought. *Williams* v. *Hunt*, 1905, 1 K.B. 512.

exercised not only as against the mortgagee but as against one who after foreclosure has purchased the estate from the mortgagee. One is not very safe in purchasing a foreclosed estate, and owing to this meddlesome equity foreclosure is not a procedure upon which prudent mortgagees will place much of their reliance.

Well, we have considered two cases open to the mortgagee —he can sue upon the covenant, he can foreclose. But is there not another course open to him? Why should he not enter and take possession of the land that has been conveyed to him? Suppose the mortgagor in possession, why should not the mortgagee turn him out, cultivate the land and take its profits? Suppose that the land when it was mortgaged was occupied by tenants for years, why should not the mortgagee—since he cannot turn them out—demand their rents from them? In short, why should not Nokes enter into the possession or the receipt of the rents and profits of Blackacre. Certainly he can do this. If Doe the mortgagor resisted him, refused to quit possession, a Court of Law would give Nokes its assistance. Nokes would bring an ejectment action against Doe. To this action under the old law Doe would have had no defence even had he been willing and able to pay to Nokes his principal, interest and costs—for in the eye of a Court of Law the time for payment had passed. True a Court of Equity would have prohibited Nokes by injunction from going on with his action, if, but only if, Doe commenced a suit to redeem the mortgage and offered to pay all that was due. What is more, by a statute passed as early as the reign of George II—7 Geo. II, cap. 20 (1743)[1]—this mock equity had been introduced into the procedure of the common law courts, that in an action for ejectment by mortgagee against mortgagor (no suit for foreclosure or redemption being then pending), the mortgagor might bring into court the sum due upon the mortgage, and thereupon the court was to compel the mortgagee to make a reconveyance. But neither by legal nor by equitable procedure could the mortgagee be prevented from ejecting the mortgagor unless the latter was ready and willing to pay what was due. And so it is now.

[1] And see the Common Law Procedure Act, 1852, ss. 219 and 220.

If Doe can not or will not pay what is due Nokes may, without foreclosing, enter into possession of the mortgaged land. If need be the Court will aid him to obtain possession of it.

Well, here we seem to have a third course open to Nokes the mortgagee—without foreclosing the mortgage he can enter upon the mortgaged lands. But, owing again to the interference of equity, this means of availing himself of his mortgage is not nearly so pleasant as it may look at first sight. 'The situation of a mortgagee in possession is far from an eligible one' (Davidson)[1]. On the principle that a mortgagee must make no advantage out of his mortgage beyond the payment of principal, interest and costs, he is bound to account upon terms of great strictness. The common decree is for an account of what he has received or what but for his wilful default he might have received. He is chargeable with an occupation rent in respect of property in hand (*i.e.* property not let to tenants), and is liable for voluntary waste, as in pulling down houses or opening mines. He may charge his actual expenses, but can not stipulate for an allowance or commission to himself for the trouble of collecting the rents. If he recovers rents or profits in excess of the sum due for interest, the Court will often direct an account with half-yearly rests—that is to say, it will direct that in taking the past accounts a balance shall be struck at the end of each half-year, and that any sum in excess of interest that the mortgagee shall have received during that period shall be struck off from the principal sum. On the whole it is not a pleasant thing to be a mortgagee in possession. In general a mortgagee is very loath to take possession, and only does so when he is forced into doing it. The right upon which a mortgagee most frequently places his main reliance is given him by a power of sale, an extra-judicial power of sale. I say an extra-judicial power because I wish to distinguish this from the power of sale under the Conveyancing Act of 1881. Under section 25 of that Act—which in this respect superseded and enlarged the provisions of an earlier Act of 1852 (15 and 16 Vic. c. 86, s. 48)—the Court has now a very wide power of ordering a sale of the mortgaged property

[1] Davidson's *Precedents*, 4th edition, vol. II, part II, p. 90.

in any action for the redemption or the foreclosure of a mortgage. That is a very useful power. Often it is to the interest of both parties that instead of a redemption on the one hand or a foreclosure on the other, there should be a sale, a payment to the mortgagee of what is due to him, and a payment of the residue of the price (if any) to the mortgagor. Still the mortgagee does not want to go to court in order to obtain payment of what is due to him. He wants to have a power of sale which he can exercise without applying to the Court.

Now I want you to observe, for this is not unimportant, that a mortgagee with the legal estate had always in a certain sense a power of sale. We take up the brief mortgage which we have supposed to be given by Doe to Nokes in the year 1880. As soon as the 1st of July is passed without any payment of the debt then Nokes is, at law, the absolute owner of the land. The proviso for reconveyance has failed to take effect because Doe has failed to pay his debt on the appointed day. Well of course at law—*i.e.* so far as a court of common law can see—Nokes is able to sell the land and make a good title to it. It has not been *said* that he can sell, but there is no good in saying that an absolute owner can sell; of course he may. Nevertheless Nokes so long as the mortgage is unforeclosed is under an equitable obligation not to sell. If he attempts to sell, equity will stop him by injunction. Put the case that he does sell and does convey to a purchaser, the mortgagor will in all probability be able to get back that land from the purchaser, to redeem it out of the purchaser's hand. But mark these words 'in all probability.' It is not very likely that this land will come to the hands of a *bona fide* purchaser for value who has obtained the legal estate without notice of the mortgagor's right to redeem—still this is conceivable, for occasionally men are hardy enough to forge title deeds—well in that case we shall find out that the sale and conveyance by the mortgagee who had been given no power of sale is not a nullity—the purchaser, perhaps a sub-purchaser, will be able to laugh at the merely equitable rights of the mortgagor. Indeed in no case will the sale and conveyance be a nullity; it will at least be a transfer of the mortgage, a

transfer of such rights as the mortgagee had at law and in equity, and it will be from the purchaser that the mortgagor will have to redeem the land. Still of course this merely legal power of sale, this power which is involved in the legal estate, a power the exercise of which equity will restrain, is not what the mortgagee wants. He wants a power of sale exercisable in equity as well as at law, a power which he can exercise without doing anything condemnable by a Court of Equity.

Before Lord Cranworth's Act, 1860 (23 and 24 Vic. c. 145), if he was to have such a power, such a power had to be given him expressly, and a great deal of ingenuity had been spent by conveyancers in devising a thoroughly convenient power. The statute just mentioned gave a somewhat similar power—but it was not in all respects quite so beneficial to mortgagees as that which was commonly in use amongst conveyancers, and very little reliance was placed upon this statutory power. A far more successful attempt to abbreviate mortgages was made by the Conveyancing Act, 1881. It took the wise course of giving to mortgagees—unless an intention to the contrary was expressed—a somewhat more beneficial power of sale than that which it had been usual to give them. It follows the old forms in this respect that a really good form would begin by declaring not that in certain events, *e.g.* if the interest was in arrears for so many months, the mortgagee might sell, but that so soon as ever the mortgage debt should become payable the mortgagee might sell—then however it would go on to say that this power was not to be exercisable except on the happening of certain events—and then lastly it would absolve the purchaser from inquiring whether those events had happened. This form had been devised in order to give the mortgagee the utmost freedom in dealing with purchasers, and a purchaser the utmost freedom in dealing with mortgagees. Thus to return to the mortgage on Blackacre which Doe has been giving to Nokes. After the proviso for reconveyance we should find something of this kind—I shall abbreviate the full form very much:

'And it is hereby agreed and declared that it shall be lawful for the said Nokes at any time after the 1st of July

next without any further consent on the part of the said Doe to sell the said premises or any part thereof. Provided always that the said Nokes shall not execute the power of sale hereinbefore declared until default shall have been made in the payment of some principal money or interest hereby secured at the time appointed for payment thereof and he shall have given a notice in writing to the said Doe to pay off the monies due upon the security of these presents and default shall have been made for six calendar months from the time of such notice, or until the whole or some half-yearly payment of interest shall have become in arrear for three calendar months.

'Provided also that upon any sale purporting to have been made in pursuance of the power in that behalf, the purchaser shall not be bound to see or inquire whether either of the cases mentioned in the last preceding clause has happened or whether any default has been made in the payment of any principal money or interest intended to be hereby secured at the time appointed for payment thereof or whether any money remains due upon the security of these presents or otherwise as to the propriety or regularity of any such sale and notwithstanding any impropriety or irregularity whatsoever in any such sale the same shall so far as regards the safety and protection of the purchaser be deemed to be within the aforesaid power in that behalf and be valid and effectual accordingly, and the remedy of the mortgagor in respect of any breach of the last preceding clause or provision or of any impropriety or irregularity in any such sale shall be in damages only.'

Thus you see the person who purchases from the mortgagee who is professedly exercising a power of sale given in this form is absolved from making inquiry as to whether a proper case has arisen for the exercise of the power. Suppose *e.g.* that the mortgagee sells when no interest is in arrear, still the purchaser will be safe against the mortgagor, and the mortgagor's only remedy will be an action for damages against the mortgagee, founded on his wrongful use of the power.

Then after this in the old mortgage—I mean the mortgage as drawn before the Act of 1881—came a clause declaring

what was to be done with the money arising from any sale under the power. The mortgagee shall in the first place reimburse himself and pay or discharge all the costs and expenses incurred in or about the sale, and in the second place apply the monies in or towards satisfaction of the mortgage debt and then pay the surplus if any to the mortgagor, his heirs or assigns.

You will understand that a sale under the power of sale put a complete end to the right to redeem—the equity of redemption was extinguished—the purchaser became owner at law and in equity and the mortgagor if he had a right to anything, had a right only to be paid by the mortgagee any surplus that there might be when the amount due upon the mortgage for principal, interest and costs had been deducted from the price paid by the purchaser[1].

Now the Conveyancing Act has given to every mortgagee, where the mortgage is made by deed, a power of sale which closely follows that given by the forms in use among conveyancers. The mortgagee so soon as the debt has become due may sell; but he is not to exercise this power unless (a) notice has been given to pay off the debt and default has been made in so doing for *three* months after the notice, or (b) some interest is in arrear for *two* months, or (c) there has been a breach of some provision contained in the mortgage deed on the part of the mortgagor other than a covenant for the payment of money. Then however the purchaser is protected in the usual way; he is absolved from inquiring whether any of these three cases has arisen. This statutory power of sale is a little more beneficial to the mortgagee than that which was formerly in use—it can be exercised if any interest be in arrear for two months (three months was usual) or if after notice to pay off the debt default in so doing is made for three months (six months was usual).

[1] The student should note that the mortgagee becomes a trustee of the residue of the purchase money remaining in his hands after satisfying his own claims. He must pay the residue to the persons entitled in equity thereto. See *e.g. West London Commercial Bank* v. *Reliance Building Society*, 29 Ch. D. 954. Till such a residue exists he is never a trustee even in exercising his power of sale though he is then under certain duties to the mortgagor. *Kennedy* v. *De Trafford*, 1897, A.C. 180.

Then in the old forms came the covenants for title, and the rule was that a mortgagor had to give absolute covenants for title. Without any limitation of his liability he covenanted that he had good right to convey, that the mortgagee after default should quietly enjoy the land free from incumbrances, and that the mortgagor would do all things (if any) necessary for his further assurance. These covenants will now be imported into the mortgage deed by force of the Conveyancing Act if the mortgagor is therein said to convey 'as beneficial owner.'

I believe that now-a-days in the preparation of mortgage deeds great reliance is placed upon this Act, and that it has become usual to omit a power of sale and covenants for title. However of course in each particular case the mortgagee or his adviser should see that the powers given by the Act are really the powers that he wants.

You will well understand that a mortgage deed may contain many other clauses. But taking the simple elementary case of a plain mortgage in fee we may say that down to 1881 it contained five parts: (1) the covenant to pay principal and interest, (2) the conveyance, (3) the proviso for redemption or reconveyance, (4) the power of sale with its attendant clauses, (5) the covenants for title. In general the Conveyancing Act will enable you to omit the 4th and 5th parts. The Act attempted to do somewhat more. By a different section (26) from that to which I have been referring (19) it declared that certain very short forms given in a schedule were to be deemed to contain all sorts of things that they do not contain. These are the forms of 'statutory mortgage.' I do not think that much use has been made of them or that they are likely to be employed save in very simple cases where very small sums are lent and every shilling is of importance. A deed may be too short.

The form which I have been describing was the form of a legal mortgage in fee simple. This we may take as the typical form of mortgage, but of course many variations were necessary in order to adapt it to other estates, interests and forms of property. Thus it is common to find a tenant for life mortgaging his life estate in the settled land. But a life

estate of course is but a poor security, for it is constantly disappearing. Therefore if a man borrows money on a life estate he has generally to effect a policy of insurance upon his life and then to mortgage that policy also to the person who advances the money. In such a case you will have three 'witnessing parts' in your deed: (1) the covenant to pay principal and interest, (2) the conveyance of the life estate subject to a proviso for redemption, (3) the assignment of the policies subject to a proviso for redemption. Then leaseholds you mortgage by way of sub-demise; this you do in order that there may be no privity between the mortgagee and the lessor, in order that the mortgagee may not become liable on the covenants contained in the lease. Here by the mortgage deed the mortgagor will demise the land to the mortgagee for the residue of the term less the last day thereof, subject to a proviso for redemption; and then the mortgagor will go on to declare that he holds the original term upon trust for the mortgagee, but subject to the proviso for redemption.

Copyholds one mortgages by conditional surrender. A surrender is made conditioned to be void on payment of the mortgage debt and interest at a specified time, so that on payment of the money at that time the mortgagor would remain tenant as of his old estate. This condition corresponds to the proviso for the reconveyance of freeholds. The surrender is accompanied by a deed which contains the usual covenants for the payment of the mortgage debt and interest.

Personalty also can be mortgaged. Corporeal personalty, if I may use that phrase; physical goods and chattels one mortgaged very much in the same way that one mortgaged lands. One assigned them by deed to the mortgagee subject to a proviso that they should be reassigned if the debt was paid off on the day fixed for its payment. But you know that mortgages of such things are bills of sale and are subject to the provisions of certain statutes of which I am not going to speak, since they have nothing to do with the doctrines of equity. Then you can mortgage your share, your reversionary share it may be, in a personal trust fund, *e.g.* a share which belongs to you under your parent's marriage settlement, but which will not be paid to you until after their deaths. So

you can mortgage a debt—you can mortgage a mortgage debt—that is a sub-mortgage. In all these cases it is usual to follow as closely as may be the type set by the ordinary mortgage of land. There is the covenant to pay the debt on a certain day with interest, then the conveyance or assignment of whatever is to be mortgaged—then the proviso for reconveyance or reassignment in case the debt be duly paid on the specified day. The ordinary equitable doctrines about redemption and foreclosure apply to these things. Before 1881 you would have given to the mortgagee of them a power of sale. You will now find that the sections of the Conveyancing Act giving the power of sale apply as well to mortgages of personal as to mortgages of real property.

I want however to say a little more than I have yet said about the nature of the mortgagor's rights—and let us keep before our minds the simple and typical case of a legal mortgage in fee simple. Doe, who is tenant in fee simple, mortgages to Nokes. We often say that subject to the mortgage Doe is still tenant in fee simple. But remember what this means. So soon as the day appointed for payment of the money has gone by, Doe's rights are purely equitable rights—in many respects they are like the rights of a *cestui que trust*—that is to say, they will not hold good against a purchaser who gets the legal estate *bona fide* for value, and without notice[1]. Still it is true that subject to this limitation Doe is treated as a tenant in fee simple. He has a heritable estate, he has real estate. If by his will he devises all his real estate to one man and bequeaths all his personalty to another man, the former, not the latter, will take this equity of redemption. If he dies intestate the equity of redemption descends to his heir; if the land be gavelkind land this equity of redemption descends to his heirs according to the custom of gavelkind. There could be courtesy of an equity of redemption, and since the Dower Act of 1833 there can be dower of an equity of redemption. Then Doe can convey this to another, or he can settle it—create life estates and

[1] And see as showing the purely equitable nature of the mortgagor's estate *Copestake* v. *Hoper*, 1908, 2 Ch. 10.

estates tail in it (nothing is commoner than to find that a settled estate is subject to a mortgage, to many mortgages, so that the whole settlement is overridden by the mortgage, and so that all the limitations in the settlement give but equitable estates), or again he can make another mortgage; but since he himself has only equitable rights he can only confer equitable rights on others.

Now any person who thus becomes entitled to any interest in the equity of redemption may redeem—thus the heir or the devisee may redeem, the tenant by the courtesy or the doweress may redeem, a tenant for life in the equity of redemption may redeem, a second mortgagee may redeem, even a judgment creditor who by issuing execution has obtained an interest in the land may redeem[1]. It follows that if the mortgagee desires to foreclose he has in general to bring before the Court every person who has any interest in the equity of redemption, so that each and all of them may have an opportunity of redeeming before they lose the land. A decree for foreclosure is sometimes a very elaborate affair. I have before me one in which a first mortgagee is suing a second, third, fourth, fifth mortgagee and the mortgagor. If we compress it, it takes this form: if second mortgagee pays on such a day let first mortgagee reconvey to him, but in default let second mortgagee be foreclosed, in that case give third mortgagee six months from thence in which to pay; if he pays let first mortgagee reconvey to him, if not let him be foreclosed; in that case give a day six months thence to fourth mortgagee, and so forth. The rule is that where there are more incumbrancers than one, the mesne incumbrancers must successively redeem all prior to them or be foreclosed and must be redeemed by or will be entitled to foreclose all subsequent to them (Seton on Decrees, 1901 edition, p. 1982).

Seeing then that there are many mortgages which are merely equitable, which confer upon the mortgagee no legal rights whatever in the land, we are led to examine these equitable mortgages a little more closely. Doe, tenant in fee

[1] See *e.g.* *Tarn* v. *Turner*, 39 Ch. D. 456, where a lessee for years under a lease made by the mortgagor after the mortgage was held entitled to redeem.

simple, has mortgaged Blackacre to Nokes, and the mortgage is a legal one. He now goes on to mortgage it to Styles. The mortgage deed will probably take almost precisely the form of a first mortgage—except that probably there will be a recital of or some reference to Nokes's first mortgage and that the land will be conveyed to Styles expressly 'subject to' the previous mortgage. Now at law this deed will have but little effect. It will contain a covenant for the payment with interest of the money lent by Styles, and the right to sue on this covenant will of course be a legal right, Styles will become a creditor by specialty. Here is one reason for having a deed. But at law Doe can not convey Blackacre to Styles: he has already conveyed it to Nokes, and Nokes's estate has become at law an absolute estate since Doe did not pay him his debt on the appointed day. Therefore Styles can get no legal rights in the land, and there can be no talk of Styles being tenant at law while Doe is tenant in equity. Nevertheless courts of equity construed equitable mortgages in much the same fashion as that in which they construed legal mortgages. Subject to the first mortgage the land is conveyed to Styles, but until foreclosure or sale, or even in certain cases after foreclosure, Doe will be entitled to redeem it from him. And so it was usual to give a second mortgagee a power of sale closely resembling that given to a first mortgagee. But what could the second mortgagee sell—what could such a power enable him to sell? He could sell the land subject to the first mortgage—he could sell the equity of redemption. You will find that the Conveyancing Act, 1881, enables a second or yet later mortgagee if his mortgage is made by deed (and here is a second reason why a second mortgage should be made by deed) to sell subject to the prior mortgages. Indeed that Act gives a second or later mortgagee a certain power of selling the estate free from incumbrances if he makes a provision for the satisfaction of the incumbrances that are prior to his own—into the details of this process I can not go[1]. Now we have seen more than one reason why as a matter of prudence a second mortgage should be made by

[1] See sec. 21, sub-secs. (1) and (2).

deed—still a deed is not essential to an equitable mortgage. Of course it is essential to a legal mortgage, for a legal estate is not to be transferred without deed. But signed writing is all that is required for the equitable mortgage. Suppose X lends me money and in return I write on a piece of paper 'In consideration of £1000 lent to me by X I agree to execute a proper mortgage of all my freehold estates in the County of Middlesex to secure the repayment of the said sum with interest at 4 per cent.' This already is an equitable mortgage, and X can go to the Court and ask for foreclosure or sale. In form it is an agreement to give a mortgage, an agreement which satisfies the 4th section of the Statute of Frauds since I have signed it. It is an agreement of which specific performance can be compelled[1]. That being so X is already in equity a mortgagee. Mark the words 'in equity' and think of the rights of a *bona fide* purchaser who gets the legal estate without notice of this memorandum. That X is already in equity a mortgagee means this, that he can go to the court and obtain an order for foreclosure or for sale. It would be requiring a round-about process were it necessary for X to ask for specific performance of the agreement to grant a mortgage, and then, the mortgage having been granted, to ask for foreclosure. X can ask for foreclosure at once. An opportunity will be given me to redeem, and if I do not pay on the appointed day I shall be foreclosed and compelled to convey the land to X. Such a conveyance will be necessary if I have the legal estate—a judgment declaring me foreclosed would not pass the legal estate from me to X; but the Court will compel me to convey the land to him free from all equity of redemption. What can be done by a signed writing stating an agreement to grant a mortgage can be done also by a signed writing declaring that the land is charged with the repayment of the loan. It is best not to trust to informal papers; they would not give one the covenant for repayment which may be useful, they would not give the convenient extra-judicial power of sale—the Conveyancing Act would not

[1] A mere agreement to lend on mortgage, when the money has not been advanced, is not specifically enforceable, see *supra*, p. 240.

interpolate such a power into them; one would get no covenants for title. Still an equitable mortgage can be created by very informal writings. If you can find a written agreement for a mortgage such that equity would enforce specific performance of it, then you have already the equitable mortgage.

But the Court of Chancery went further than this: it enabled people to make equitable mortgages without any writing at all. An equitable mortgage (enforceable by an order for foreclosure or for sale) can be made by a deposit of title deeds if they were deposited with intent that the land which they concern shall be security for the payment of a debt. You may well say that this doctrine is hardly to be reconciled with the 4th section of the Statute of Frauds. The foundation of the equitable doctrine is an agreement, an agreement of which the specific performance will be compelled. The depositor has agreed to mortgage his land. But then the Statute says that 'no action shall be brought upon any contract or sale of any lands, tenements or hereditaments or any interest in or concerning them, unless the agreement upon which such action shall be brought or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or some other person by him lawfully authorized.' Well certainly it is not very easy to reconcile the mortgage by deposit of title deeds with the words of this clause. Let us just notice this—that the mortgage by deposit is an outcome or offshoot of the equitable doctrine of part performance. A lets B take possession of land of which A is owner. Here according to the Court of Chancery is cogent evidence of the existence of some agreement between A and B. What agreement? We will allow either of the parties to prove that it was an agreement for a sale, although he has no note or memorandum of that agreement. And so it is here. A has handed over the title deeds of a certain estate to B. Why on earth should he have done this? Here is cogent evidence of some agreement between them. Something we must do. To say that B has no charge upon the land and yet to allow him to keep as his own, or to destroy the title deeds of another man's property, this would be absurd.

On the other hand it would be hard to force B to give back the title deeds when it is plain that they were put into his hand for some purpose about which there was an agreement between him and A. So we allow B to prove, though he has no note or memorandum in writing, what this agreement really was, we allow him to prove that there was an agreement for a mortgage[1]. I think that we ought to regret this doctrine of equity; it has done a good deal of harm; but there it is. It does harm in this way—an intending purchaser or an intending mortgagee may somewhat easily get constructive notice of a mortgage by deposit, and thus costs are accumulated and titles are rendered insecure. If you are purposing to buy land or to take a mortgage, you must be careful to see that you get all the title deeds, otherwise you may find yourself, even though you have the legal estate, postponed to some banker who is holding a few deeds. If A's deeds are in B's hands and there be no written agreement B may prove by oral evidence that they were deposited with him by way of security; but if there be a written agreement then (according to the ordinary rule) oral evidence is not admissible to contradict that writing or vary its terms.

Equitable mortgages are not very safe things. I have before now referred to the doctrine of tacking[2]. Let me once more recall the two main rules. (a) A first mortgagee having the legal estate makes a further advance to the mortgagor without having notice of a second mortgage; he may tack his further advance to the original debt and hold the land until he has been paid both the debts. For this reason it is that on taking a second mortgage one should always give notice of it to the first mortgagee, for this will prevent his having a right to tack to his original debt any advances that he may make after he has received that notice. (b) A third or subsequent mortgagee who when he lent his money had no notice of the second mortgage becomes entitled by paying off the first mortgage and getting a conveyance of the legal estate, to tack his own debt to the first mortgagee's so that the second mortgagee's right will be postponed to both these debts. This

[1] See *Russel* v. *Russel*, 1 Bro. C. C. 269; 2 White and Tudor, 76, 7th edition.
[2] *Supra*, pp. 134–138.

doctrine of tacking was abolished by the Vendor and Purchaser Act, 1874, sec. 7, but in the next year it was restored, for that section was repealed as from its commencement by the Land Transfer Act of 1875.

Another danger was created by the doctrine of the consolidation of mortgages. The Conveyancing Act, 1881, sec. 17, has robbed this doctrine of some but not all of its importance. That section says that 'A mortgagor seeking to redeem any one mortgage shall be entitled to do so, without paying any money due under any separate mortgage made by him or any person through whom he claims on property other than that comprised in the mortgage which he seeks to redeem.' But then it adds 'This section applies only if and so far as a contrary intention is not expressed in the mortgage deeds or one of them.' So in a mortgage one can still stipulate for the benefit of the old doctrine, and I believe that this is not infrequently done. So let us see what the old doctrine was and, we may say, still is. Where distinct estates are separately mortgaged as securities for distinct debts by the same mortgagor to the same mortgagee, the latter had the right to consolidate, *i.e.* to hold all the estates as a security for the aggregate of all the debts and to require that the mortgagor should not redeem one without redeeming all. The doctrine was useful to a mortgagee when one of the estates was insufficient, while the other was more than sufficient to provide the sum charged upon it. He could say 'You shall not redeem this overcharged estate unless you will pay all that you owe me upon both the mortgages.' The rule has been extended to cases in which the same person makes two mortgages of different estates to two different persons, and afterwards by assignment these two mortgages have become vested in one person—that person can say 'You must redeem both or you can redeem neither.' However it is not probable that this doctrine will be extended[1]. In a modern case the House of Lords had to decide on these facts (*Jennings* v. *Jordan*, 6 Ap. Cas. 698)—A mortgages Blackacre to X; then conveys the equity of redemption in Blackacre to M; then

[1] See *Pledge* v. *White*, 1896, A.C. 187.

mortgages Whiteacre to X. M can redeem Blackacre without redeeming Whiteacre. But it would be otherwise if both these mortgages to X were made before the conveyance of the equity of redemption[1].

Some other alterations have been made in the law of mortgages by the Conveyancing Act which may be noticed here as they may serve to illustrate the way in which mortgages have been regarded by courts of common law and courts of equity. When land is mortgaged the creditor gets rights of two distinct kinds—the right to be paid a debt, certain rights in land. Let us first suppose, for this is the simplest case for our present purpose, that what is mortgaged is a house held by the mortgagor for a term of years—he mortgages it either by assigning the term to the mortgagee, or by sub-demising it for a shorter term to the mortgagee. Either way the mortgagee becomes entitled to the chattel real known as a term of years. He is also entitled to a chose in action, a debt, the benefit of a covenant for the payment of money. One sees that the two are distinct if one looks at the transfer of a mortgage—for a mortgagee can transfer his rights, and this without the concurrence of the mortgagor. What does he transfer? You will find that he transfers, he assigns 'All that the sum of £1000 due upon a certain Indenture of Mortgage and all interest due or to become due in respect of the same.' This he assigns absolutely. Then he goes on to assign 'All that house et cetera, to hold to the transferee, his executors, administrators, and assigns during the residue of the said term'—the term for which the transferor has been holding them 'subject to the proviso for redemption contained in the Indenture of Mortgage.' I said that this was the simplest case, for in it all the rights of the mortgagee bear the character of personalty. If he dies both the debt and the leasehold interest in the land will go the same way; they will go to his executors or (as the case may be) his administrators. The

[1] *Note.* If A had first mortgaged Blackacre to X, then Whiteacre to Y, and then assigned for value the equity of redemption in Blackacre to Z, and subsequently B had taken a transfer to himself of both mortgages, he, B, could not consolidate against Z. *Harter* v. *Colman*, 19 Ch. D. 630; *Minter* v. *Carr*, 1894, 3 Ch. 498.

mortgagor will have only one person or only one set of persons (two or three executors) to deal with—they can give him a valid receipt for the debt and they also can reassign or surrender the leasehold house to him. And so if a transfer is to be made the executors or the administrator can do all that has to be done and the transferee will be safe in dealing with them—one is very safe in dealing with personal representatives who are disposing of the personal property of the testator or intestate. And so again they can exercise the power of sale contained in the mortgage deed or given by statute. But it was far otherwise when what was mortgaged was an estate in fee simple. The mortgagee's rights were some of them personalty, while others of them were realty. There was the debt which passed to the personal representatives, there was the estate which descended to the heir at law, unless it had been given by will to some devisee. For the mortgagee like any other tenant in fee simple, like the trustee in fee simple, could devise the estate. The usual course was to insert in every will a clause saying that the testator devised all freehold estates vested in him upon trust or by way of mortgage unto the same persons whom he appointed his executors; this kept the estate in the same hands as the right to the money. Unless this were done there would like enough be a difficult question as to whether a general devise of 'all my real estates' comprised estates vested in the testator by way of mortgage. Often enough the estate would descend as undisposed of to the heir at law. Now the Court of Chancery held that in substantial essence the right of the mortgagee in fee simple was personalty, a right to a sum of money. Thus for example if he gave all his real estate to X and all his personal estate to Y, the latter phrase and not the former would carry the real benefit of the mortgage. The heir or the devisee would be treated as a trustee for the personal representative, bound to dispose of the estate in fee that had vested in him in such manner as the personal representative should direct. Thus the personal representative could foreclose. The power of sale was always so drawn that it should be exercisable by him—'and it shall be lawful for the mortgagee, his executors.

administrators or assigns [not his heirs] to sell.' When I say that the power was always so drawn, I mean that to have given the power to the mortgagee 'and his heirs' would have been a bad mistake, inducing confusion. But for all this in almost every transaction concerning the mortgage the presence and concurrence of the heir or devisee was necessary. If the mortgagor wanted to pay off the mortgage, he had to pay the money to the personal representatives, but he had a right to a conveyance of the estate, and the estate was vested in the heir or the devisee. So if the personal representatives desired to transfer the mortgage they were obliged to obtain the concurrence of the heir or the devisee, for otherwise there could be no transfer of the estate, though there might be a transfer of the debt. The transfer would have to consist of two parts. In the first the personal representatives would assign 'All that sum of £1000 due upon such and such an Indenture of Mortgage' to the transferee, his executors, administrators and assigns. By the second the heir or devisee would grant 'All that piece of land called Blackacre' to the transferee, his heirs and assigns, 'subject to the proviso for redemption contained in the said Indenture of Mortgage.' Then again if the personal representatives employed the power of sale, the concurrence of the heir or devisee was necessary in order that the estate might be conveyed to the purchaser. The heir or devisee could in these cases be compelled to do what the personal representatives desired him to do: he was a trustee for them. But often enough it might be difficult to obtain his concurrence—he might be an infant, a lunatic, beyond the sea; if he made any difficulties an application to the Court was necessary. Some of these cases were dealt with by the Trustee Act of 1850 (13 and 14 Vic. c. 60)—thus if the mortgage estate had come to a lunatic or an infant the Court could by what was called a Vesting order take it out of him and vest it in some other person—still this of course necessitated an application to the Court. Another partial tentative step was taken by the Vendor and Purchaser Act, 1874, sec. 4. The legal personal representative of a mortgagee of a freehold estate was enabled on payment of all the

sums secured by the mortgage, to convey the mortgaged estate. The mortgaged estate was not under this section to pass, on the mortgagee's death, to his personal representative; it was to pass as of old to his heir or devisee, but in a certain event the personal representative was to have power to convey it. This rather clumsy device had but a limited application. For example it was held that this section did not apply to the transfer of a mortgage (*In re Spradbery's Mortgage*, 14 Ch. D. 514). But now the Conveyancing Act, 1881, sec. 30, has repealed this section and given us a different rule. Where an estate of inheritance is vested in any person solely upon trust or by way of mortgage that estate shall notwithstanding any testamentary disposition devolve to and become vested in his personal representatives or representative from time to time in like manner as if the same were a chattel real. Therefore for the future it must at least be very rare for us to find the right to the mortgage debt vested in one person while the mortgage estate is vested in another person.

It is, I think, in connexion with this section that we ought to read section 51 of the same Act. That section says that in a deed it shall be sufficient in the limitation of an estate in fee simple to use the words 'in fee simple' without the word heirs. That section may have struck you as a very odd and unnecessary one. It says that one sacramental phrase shall be as good as another sacramental phrase—for mark that it only does this[1]: it only gives you the choice between two phrases and does not give you liberty to invent other phrases which you may choose to think are just as good as these—and the one phrase is no shorter than the other. 'In fee simple' contains precisely the same number of letters as 'and his heirs.' The explanation, I take it, is to be found in the 30th section. It seems rather silly to convey land to a man and his heirs when one does not intend that in any event his heir shall have anything whatever to do with the land. This is now the case when one is conveying to a trustee or a mortgagee, and I think that it is a little prettier in such a case to say 'in fee simple' than to

[1] The words 'in fee' are not sufficient, see *In re Ethell and Mitchell and Butler's Contract*, 70 L. J. Ch. 498; 1901, 1 Ch. 945.

say 'and his heirs'—a little less misleading. But the day I hope is coming when we shall see that two systems of intestate succession are one system too many.

The student should remember that in this lecture Professor Maitland attempts to give a general view of the mortgage as a legal and equitable institution. Important points, such as the doctrines of consolidation and tacking, are only glanced at and some startling consequences of the intervention of Equity in the contract that the parties have made for themselves pass unnoticed. The student should note, for instance, the maxim 'once a mortgage always a mortgage,' and the extreme rigour lately given to the doctrine forbidding any 'clog on the equity of redemption.' See *Noakes* v. *Rice*, 1902, A.C. 24; *Carritt* v. *Bradley*, 1903, A.C. 253; *Samuel* v. *Jarrah etc. Coy*, 1904, A.C. 323.

LECTURES ON THE FORMS OF ACTION AT COMMON LAW

LECTURE I[1].

I PROPOSE to begin by speaking briefly of the Forms of Action, with especial relation to those which protected the possession and ownership of land. It may—I am well aware of it—be objected that procedure is not a good theme for academic discussion. Substantive law should come first—adjective law, procedural law, afterwards. The former may perhaps be studied in a University, the latter must be studied in chambers. As to obsolete procedure, a knowledge of it can be profitable to no man, least of all to a beginner. With this opinion I can not agree. Some time ago I wished to say a little about seisin, which still, with all our modern improvements, is one of the central ideas of Real Property Law; but to say that little I found impossible if I could not assume some knowledge of the forms of action. Let us remember one of Maine's most striking phrases, 'So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure[2].' Assuredly this is true of our real property law, it has been secreted in the interstices of the forms of action. The system of Forms of Action or the Writ System is the most important characteristic of English medieval law, and it was not abolished until its piecemeal destruction in the nineteenth century[3].

What was a form of action? Already owing to modern reforms it is impossible to assume that every law student

[1] A paged table of contents of these lectures is printed at the end of the book. Edd.

[2] Maine, *Early Law and Custom*, 389.

[3] See *post*, p. 301.

must have heard or read or discovered for himself an answer to that question, but it is still one which must be answered if he is to have more than a very superficial knowledge of our law as it stands even at the present day. The forms of action we have buried, but they still rule us from their graves. Let us then for awhile place ourselves in Blackstone's day, or, for this matters not, some seventy years later in 1830, and let us look for a moment at English civil procedure.

Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring. It is not enough that in some way or another he should compel his adversary to appear in court and should then state in the words that naturally occur to him the facts on which he relies and the remedy to which he thinks himself entitled. No, English law knows a certain number of forms of action, each with its own uncouth name, a writ of right, an assize of novel disseisin or of *mort d'ancestor*, a writ of entry *sur disseisin* in the *per* and *cui*, a writ of *besaiel*, of *quare impedit*, an action of covenant, debt, detinue, replevin, trespass, assumpsit, ejectment, case. This choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds. Let us notice some of the many points that are implied in it.

(i) There is the competence of the court. For very many of the ordinary civil cases each of the three courts which have grown out of the king's court of early days, the King's Bench, Common Pleas and Exchequer is equally competent, though it is only by means of elaborate and curious fictions that the King's Bench and the Exchequer can entertain these matters, and the Common Pleas still retains a monopoly of those actions which are known as real.

(ii) A court chosen, one must make one's adversary appear; but what is the first step towards this end? In some actions one ought to begin by having him summoned, in others one can at once have him attached, he can be compelled to find gage and pledge for his appearance. In the assize of novel disseisin it is enough to attach his bailiff.

(iii) Suppose him contumacious, what can one do? Can one have his body seized? If he can not be found, can one have him outlawed? This stringent procedure has been extending itself from one form of action to another. Again, can one have the thing in dispute seized? This is possible in some actions, impossible in others.

(iv) Can one obtain a judgment by default, obtain what one wants though the adversary continues in his contumacy? Yes in some forms, no in others.

(v) It comes to pleading, and here each form of action has some rules of its own. For instance the person attacked —the tenant he is called in some cases, the defendant in others—wishes to oppose the attacker—the demandant he is called in some actions, the plaintiff in others—by a mere general denial, casting upon him the burden of proving his own case, what is he to say? In other words, what is the general issue appropriate to this action? In one form it is *Nihil debet*, in another *Non assumpsit*, in another 'Not guilty,' in others, *Nul tort*, *nul disseisin*.

(vi) There is to be a trial; but what mode of trial? Very generally of course a trial by jury. But it may be trial by a grand or petty assize, which is not quite the same thing as trial by jury; or in Blackstone's day it may still conceivably be a trial by battle. Again in some forms of action the defendant may betake himself to the world-old process of compurgation or wager of law. Again there are a few issues which are tried without a jury by the judges who hear witnesses.

(vii) Judgment goes against the defendant, what is the appropriate form of execution? Can one be put into possession of the thing that has been in dispute? Can one imprison the defendant? Can one have him made an outlaw? or can he merely be distrained?

(viii) Judgment goes against the defendant. It is not enough that he should satisfy the plaintiff's just demand; he must also be punished for his breach of the law—such at all events is the theory. What form shall this punishment take? Will an amercement suffice, or shall there be fine or imprisonment? Here also there have been differences.

(ix) Some actions are much more dilatory than others; the dilatory ones have gone out of use, but still they exist. In these oldest forms—forms invented when as yet the parties had to appear in person and could only appoint attorneys by the king's special leave—the action may drag on for years, for the parties enjoy a power of sending essoins, that is, excuses for non-appearance. The medieval law of essoins is vast in bulk; time is allowed for almost every kind of excuse for non-appearance—a short essoin *de malo veniendi*, a long essoin *de malo lecti*. Now-a-days all is regulated by general rules with a wide discretion left in the Court. In the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules. This question of essoins has been very important—in some forms, the oldest and solemnest, a party may betake himself to his bed and remain there for year and day and meanwhile the action is suspended.

These remarks may be enough to show that the differences between the several forms of action have been of very great practical importance—'a form of action' has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment. But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents. It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modern, rapid, cheap, on the other. Or again he may make a bad choice, fail in his action, and take such comfort as he can from the hints of the judges that another form of action might have been more successful. The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts

and he may take to himself the lesson that where there is no remedy there is no wrong.

The key-note of the form of action is struck by the original writ, the writ whereby the action is begun. From of old the rule has been that no one can bring an action in the king's courts of common law without the king's writ; we find this rule in Bracton—*Non potest quis sine brevi agere*[1]. That rule we may indeed say has not been abolished even in our own day. The first step which a plaintiff has to take when he brings an action in the High Court of Justice is to obtain a writ. But there has been a very great change. The modern writ is in form a command by the king addressed to the defendant telling him no more than that within eight days he is to appear, or rather to cause an appearance to be entered for him, in an action at the suit of the plaintiff, and telling him that in default of his so doing the plaintiff may proceed in his action and obtain a judgment. Then on the back of this writ the plaintiff, in his own or his adviser's words, states briefly the substance of his claim—'The plaintiff's claim is £1000 for money lent,' 'The plaintiff's claim is for damages for breach of contract to employ the plaintiff as traveller,' 'The plaintiff's claim is for damages for assault and false imprisonment,' 'The plaintiff's claim is to recover a farm called Blackacre situate in the parish of Dale in the county of Kent.' We can no longer say that English law knows a certain number of actions and no more, or that every action has a writ appropriate to itself; the writ is always the same, the number of possible endorsements is as infinite as the number of unlawful acts and defaults which can give one man an action against another. All this is new. Formerly there were a certain number of writs which differed very markedly from each other. A writ of debt was very unlike a writ of trespass, and both were very unlike a writ of *mort d'ancestor* or a writ of right. A writ of debt was addressed to the sheriff; the sheriff is to command the defendant to pay to the plaintiff the alleged debt, or, if he will not do so, appear in court and answer why he has not done so. A writ of trespass is addressed to the sheriff; he is to attach the

[1] Bract. f. 413 b.

defendant to answer the plaintiff why with force and arms and against the king's peace he broke the plaintiff's close, or carried off his goods, or assaulted and beat him. A writ of *mort d'ancestor* bade the sheriff empanel a jury, or rather an assize, to answer a certain question formulated in the writ. A writ of right was directed not to the sheriff but to the feudal lord and bade him do right in his court between the demandant and the tenant. In each case the writ points to a substantially different procedure.

In the reign of Henry III Bracton had said *Tot erunt formulae brevium quot sunt genera actionum*[1]. There may be as many forms of action as there are causes of action. This suggests, what may seem true enough to us, that in order of logic Right comes before Remedy. There ought to be a remedy for every wrong; if some new wrong be perpetrated then a new writ may be invented to meet it. Just in Bracton's day it may have been possible to argue in this way; the king's court and the king's chancery—it was in the chancery that the writs were made—enjoyed a certain freedom which they were to lose as our parliamentary constitution became definitely established. A little later though the chancery never loses a certain power of varying the old formulas to suit new cases and this power was recognized by statute, still it is used but very cautiously. Court and chancery are conservative and Parliament is jealous of all that looks like an attempt to legislate without its concurrence. The argument from Right to Remedy is reversed and Bracton's saying is truer if we make it run *Tot erunt actiones quot sunt formulae brevium*—the forms of action are given, the causes of action must be deduced therefrom.

Of course we must not for one moment imagine that seventy years ago or in Blackstone's day litigation was really and truly carried on in just the same manner as that in which it was carried on in the days of Edward I. In the first place many of the forms of action had become obsolete: they were theoretically possible but were never used. In the second place the words 'really and truly' seem hardly applicable to

[1] Bract. f. 413 b. A whole group of these forms is ascribed to Bracton's master, W. Raleigh—one might well have spoken of *actiones Raleighanae*.

any part of the procedure of the eighteenth century, so full was it of fictions contrived to get modern results out of medieval premises: writs were supposed to be issued which in fact never were issued, proceedings were supposed to be taken which in fact never were taken. Still these fictions had to be maintained, otherwise the whole system would have fallen to pieces; any one who would give a connected and rational account of the system was obliged—as Blackstone found himself obliged—to seek his starting point in a very remote age.

We will now briefly notice the main steps by which in the last century the forms of action were abolished. First we must observe that there was a well-known classification of the forms:—they were (1) real, (2) personal, (3) mixed. I shall have to remark hereafter[1] that this classification had meant different things in different ages; Bracton would have called some actions personal which Blackstone would have called real or mixed. But at present it will be sufficient if we note Blackstone's definitions[2].

Real actions, which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands, or tenements, rents, commons, or other hereditaments in fee simple, fee tail or for term of life.

Personal actions are such whereby a man claims a debt, a personal duty, or damages in lieu thereof; and likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained.

Now in 1833 the real and mixed actions were swept away at one fell swoop by the Real Property Limitation Act of that year, 3 and 4 Will. IV, c. 27, sec. 36. That section sets out the names of 60 actions and says that none of these and no other action real or mixed—except a writ of right of dower, a writ of dower, *unde nihil habet*, a *quare impedit*, or an ejectment—shall be brought after 31 December, 1834. Practically for a very long time past the action of ejectment,

[1] See lecture V. *post*.

[2] Bl. *Comm.* III. 117, 118.

which in its origin was distinctly a personal action, had been made to do duty for all or almost all the actions that were now to be abolished. The *quare impedit* had become the regular action for the trial of all disputes about advowsons, and, as ejectment was here inapplicable, this had to be spared. There were special reasons for saving the two writs of dower, since the doweress could not bring ejectment until her dower had been set out. But they were abolished in 1860 by the Common Law Procedure Act of that year (23 and 24 Vic., c. 126, sec. 26), and a new statutory action of a modern type was provided for the doweress. By the same Act, sec. 27, the old *quare impedit* was abolished and a new statutory action was put in its place.

Meanwhile in 1832 a partial assault had been made on the personal forms. The principal personal forms were these —Debt, Detinue, Covenant, Account, Trespass, Case, Trover, Assumpsit, Replevin. By 2 Will. IV, c. 39 (1832) 'Uniformity of Process Act'—the process in these personal actions was reduced to uniformity. The old original writs were abolished and a new form of writ provided. In this writ, however, the plaintiff had to insert a mention of one of the known forms of action. Another heavy blow was struck in 1852 by the Common Law Procedure Act, 15 and 16 Vic., c. 76. It was expressly provided (sec. 3) that it should not be necessary to mention any form or cause of action in any writ of summons. But still this blow was not heavy enough—the several personal forms were still considered as distinct.

The final blow was struck by the Judicature Act of 1873 and the rules made thereunder, which came into force in 1875. This did much more than finally abolish the forms of actions known to the common law for it provided that equity and law should be administered concurrently. Since that time we have had what might fairly be called a Code of Civil Procedure. Of course we can not here speak of the details of that Code; but you will not misunderstand me if I say that the procedure which it enjoins is comparatively formless. Of course there are rules, many rules.

We can not say that whatever be the nature of the plaintiff's claim the action will always take the same course

and pass through the same stages. For instance, when the plaintiff's claim falls within one of certain classes he can adopt a procedure[1] whereby when he has sworn positively to the truth of his claim the defendant can be shut out from defending the action at all unless he first makes oath to some good defence. So again there are cases in which either party can insist that the questions of fact, if any, shall be tried by jury; there are other cases in which there will be no trial by jury. Again, I must not allow you to think that a lawyer can not do his client a great deal of harm by advising a bad or inappropriate course of procedure, though it is true that he can not bring about a total shipwreck of a good cause so easily as he might have done some years ago. The great change gradually brought about and consummated by the Judicature Acts is that the whole course of procedure in an action is not determined for good and all by the first step, by the original writ. It can no longer be said, as it might have been said in 1830 that we have about 72 forms of action, or as it might have been said in 1874 that we have about 12 forms of action. This is a different thing from saying that our English law no longer attempts to classify *causes* of action, on the contrary a rational, modern classification of causes of action is what we are gradually obtaining—but the forms of action belong to the past.

Since the Judicature Acts there are, of course, differences of procedure arising out of the character of the various actions, whether for divorce, probate of a will, specific performance of a contract: such differences there must be, but they can now be regarded as mere variations of one general theme—procedure in an action in the High Court of Justice. It was entirely otherwise in the Middle Ages, then lawyers say very little of the procedure in *an* action, very much of the procedure in some action of a particular kind, *e.g.* an assize of *mort d'ancestor* or an action of trespass. Knowledge of the procedure in the various forms of action is the core of English medieval jurisprudence. The Year Books are largely occupied by this. Glanvill plunges at once into the procedure in

[1] Commonly called (from the Order which authorises this procedure) 'Going under Order XIV.'

a writ of right. Bracton, with the Institutes scheme before him, gives about 100 folios to Persons and Things and about 350 to the law of Actions.

We can now attempt to draw some meagre outline of the general history of these forms of action, remembering however that a full history of them would be a full history of English private law.

Now I think that our first step should be to guard ourselves against the notion that from the very beginning it was the office of the king's own court or courts to provide a remedy for every wrong. This is a notion which we may but too easily adopt. In the first place it seems natural to us moderns, especially to us Englishmen, that in every decently governed country there should be some one tribunal, or some one definitely organized hierarchy of tribunals, fully competent to administer the whole law, to do right to every man in every case. In the second place it is true that in England such a scheme of centralized justice has existed from what, having regard to other countries, we may call a very remote time; it has existed for some five hundred years. Ever since Edward I's time, to name a date which is certainly not too recent, the law of England has to a very large extent been the law administered by the king's own courts, and to be without remedy in those courts has commonly been to be without any remedy at all. A moment's reflection will indeed remind us that we must use some such qualifying words as 'to a very large extent' when we lay down these wide propositions. Think for one moment of the copyholder, or of his predecessor the tenant in villeinage; he was not protected in his holding by the king's court, still to regard him as without rights would be a perversion of history. And then think of the ecclesiastical courts with their wide jurisdiction over matrimonial and testamentary causes; at least until the Reformation they were not in any sense the king's courts; their power was regarded as a spiritual power quite independent of the temporal power of the state. But in the third place we may be led into error by good masters. So long as the forms of action were still in use, it was difficult to tell the truth about their history. There they were, and it was the

duty of judges and text writers to make the best of them, to treat them as though they formed a rational scheme provided all of a piece by some all-wise legislator. It was natural that lawyers should slip into the opinion that such had really been the case, to suppose, or to speak as though they supposed, that some great king (it matters not whether we call him Edward I or Edward the Confessor, Alfred or Arthur) had said to his wise men 'Go to now! a well ordered state should have a central tribunal, let us then with prudent forethought analyze all possible rights and provide a remedy for every imaginable wrong.' It was difficult to discover, difficult to tell, the truth, difficult to say that these forms of action belonged to very different ages, expressed very different and sometimes discordant theories of law, had been twisted and tortured to inappropriate uses, were the monuments of long forgotten political struggles; above all it was difficult to say of them that they had their origin and their explanation in a time when the king's court was but one among many courts. But now, when the forms of action are gone, when we are no longer under any temptation to make them more rational than they were, the truth might be discovered and be told, and one part of the truth is assuredly this that throughout the early history of the forms of action there is an element of struggle, of struggle for jurisdiction. In order to understand them we must not presuppose a centralized system of justice, an omni-competent royal or national tribunal; rather we must think that the forms of action, the original writs, are the means whereby justice is becoming centralized, whereby the king's court is drawing away business from other courts[1].

[1] As an example of the theory against which it is necessary to protest see Blackstone's account of Alfred's exploits, *Comm.* IV. 411; 'To him we owe that masterpiece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating ducts and channels; which wise institution has been preserved for near a thousand years unchanged from Alfred's to the present time.'

LECTURE II.

At the beginning of the twelfth century England was covered by an intricate net-work of local courts. In the first place there were the ancient courts of the shires and the hundreds, courts older than feudalism, some of them older than the English kingdom. Many of the hundred courts had fallen into private hands, had become the property of great men or great religious houses, and constant watchfulness was required on the king's part to prevent the sheriffs, the presidents of the county courts, from converting their official duties into patrimonial rights. Then again there were the feudal courts; the principle was establishing itself that tenure implied jurisdiction, that every lord who had tenants enough to form a court might hold a court of and for his tenants. Above all these rose the king's own court. It was destined to increase, while all the other courts were destined to decrease; but we must not yet think of it as a court of first instance for all litigants; rather it, like every other court, had its limited sphere of jurisdiction. Happily the bounds of that sphere were never very precisely formulated; it could grow and it grew. The cases which indisputably fell within it we may arrange under three heads. In the first place there were the pleas of the crown (*placita coronae*), matters which in one way or another especially affected the king, his crown and dignity. All infringements of the king's own proprietary rights fell under this head, and the king was a great proprietor. But in addition to this almost all criminal justice was gradually being claimed for the king; such justice was a profitable source of revenue, of forfeitures, fines and amercements. The

most potent of the ideas which operated for this result was the idea of the king's peace. Gradually this peace—which at one time was conceived as existing only at certain times, in certain places, and in favour of certain privileged persons, covering the king's coronation days, the king's highways, the king's servants and those to whom he had granted it by his hand or his seal—was extended to cover all times, the whole realm, all men. Then again when Henry II introduced the new procedure against criminals by way of presentment or indictment—placed this method of public or communal accusation by the side of the old private accusation or appeal—he very carefully kept this new procedure in the hands of his justices and his sheriffs. Subsequent changes diminished even the power of the sheriffs, and before the twelfth century was out all that could be called very serious criminal justice had become the king's, to be exercised only by his justices or by a few very highly privileged lords to whom it had been expressly granted. With the history of criminal law we have here no great concern; only let us notice that it is in this field that the centralizing process goes on most rapidly and that the idea of the king's peace is by no means exhausted when all grave crimes are conceived as committed against the peace of our lord the king; the same idea will in course of time bring within the cognizance of the royal court every, the slightest, wrongful application of physical force.

Secondly, even had feudal theory and feudal practice gone unchecked, the king, as the ultimate lord of all lords, would have been able to claim for his own court a certain supervisory power over all lower courts. If a man could not get justice out of his immediate lord he might go to that lord's lord, and so in the last resort to the king. We must not here introduce the notion of an 'appeal' from court to court, for that is a modern notion. In old times he who goes from court to court does not go there merely to get a mistake put right, to get an erroneous judgment reversed; he goes there to lodge a complaint against his lord or the judges of his lord's court, to accuse his lord of having made default in justice (*propter defectum justiciae*), to accuse the judges of having pronounced a false judgment; he challenges his judges and they may have

to defend their judgment by their oaths or by their bodies. Still the king has here an acknowledged claim to be the supreme judge over all judges, and this claim can be pressed and extended, for if it profits the king it profits the great mass of the people also.

Thirdly, even the extremest theory of feudalism would have to allow the king to do justice between his own tenants in chief; however little more a king may be he is at the very least a feudal lord with tenants, and may hold, and ought to hold, a court of them and for them.

Had the worst come to the worst the king might have claimed these things, jurisdiction over his own immediate tenants, jurisdiction when all lower lords have made default, a few specially royal pleas known as pleas of the crown. To this he might have been reduced by feudalism. We ought not indeed to think that in England his justice was ever strictly pent within these limits; the kingship established by conquest was too strong for that, still he could not exceed these limits without a struggle. That his court should fling open its doors to all litigants, should hold itself out to be a court for all cases great and small, for all men, whosesoever men they be, is a principle that only slowly gains ground. Despite all that was done by Henry II, despite the ebb of feudalism, we can hardly say that this principle is admitted before the coronation of Edward I. In the middle of the thirteenth century, Bracton, a royal judge, whose work constantly displays strong anti-feudal leanings, who has no mean idea of his master's power, who holds the theory that all justice is in the last resort the king's, that it is merely lack of time and strength that prevents the king from hearing every cause in person, is none the less forced to make something very like an apology for the activity of the king's court—one class of cases must come before it for one reason, another for another, but some reason, some excuse there must be; it can not yet be assumed as an obvious rule that every one whose rights have been infringed can bring his case before the king's justices.

A little must be said about the constitution and the procedure of these communal and feudal courts. In the courts of the shire and the hundred the judgments were made by the

suitors of the court, those freeholders who were bound to attend its periodic sittings. The court was presided over by the sheriff, or if the hundred was one that had fallen into private hands, by the lord's steward; but the judgments were made by the suitors; they were the *judicatores* of the court; it is not improbable that in English they were called the dooms-men of the court. So in the feudal courts, the lord's steward presided, but the tenants who owed suit of court were the dooms-men. It was for them to make the judgments, and it is probable that if they differed in opinion the judgment of the majority prevailed. But this judgment was not like a modern judgment. In modern German books dealing with ancient procedure we find the startling proposition that judgment preceded proof; it was a judgment that one party or the other to the litigation was to prove his case. Now when in our own day we speak of proof we think of an attempt made by each litigant to convince the judge, or the jurors, of the truth of the facts that he has alleged; he who is successful in this competition has proved his case. But in old times proof was not an attempt to convince the judges; it was an appeal to the supernatural, and very commonly a unilateral act. The common modes of proof are oaths and ordeals. It is adjudged, for example, in an action for debt that the defendant do prove his assertion that he owes nothing by his own oath and the oaths of a certain number of compurgators, or oath-helpers. The defendant must then solemnly swear that he owes nothing, and his oath-helpers must swear that his oath is clean and unperjured. If they safely get through this ceremony, punctually repeating the right formula, there is an end of the case; the plaintiff, if he is hardy enough to go on, can only do so by bringing a new charge, a criminal charge of perjury against them. They have not come there to convince the court, they have not come there to be examined and cross-examined like modern witnesses, they have come there to bring upon themselves the wrath of God if what they say be not true. This process is known in England as 'making one's law'; a litigant who is adjudged to prove his case in this way is said to 'wage his law' (*vadiare legem*), when he finds security that on a future day he will bring compurgators and perform this

solemnity; then when on the appointed day he comes and performs that ceremony with success, he is said to 'make his law' (*facere legem*). An ordeal is still more obviously an appeal to the supernatural; the judgment of God is given; the burning iron spares the innocent, the water rejects the guilty. Or again the court adjudges that there must be trial by battle; the appellor charges the appellee with a crime, the appellee gives him the lie; the demandant's champion swears that he saw the demandant seised of the land, and is ready to prove this by his body; the wit of man is at fault in presence of a flat contradiction; God will show the truth. It is hard for us to say how this ancient procedure worked in practice, hard to tell how easy it was to get oath-helpers who would swear falsely, hard to tell how much risk there was in an ordeal. The rational element of law must, it would seem, have asserted itself in the judgment which decided how and by whom the proof should be given; the jurisprudence of the old courts must have been largely composed of the answers to this question; and some parts of it are being recovered, for example we can see that even before the Norman Conquest the man who has been often accused has to go to the ordeal instead of being allowed to purge himself with oath-helpers. But the point now to be seized is that the history of the forms of action presupposes this background of ancient courts with their unprofessional judges, their formal, supernatural modes of proof.

In its constitution and in its procedure the king's court is ahead of the other courts. Theoretically, from the Conquest onwards, it may be a feudal court, one in which all the king's tenants in chief, or such at least of them as are deemed barons, are entitled and bound to sit under the presidency of the king, his high steward or his chief justiciar. To this day the king's highest court of all is the assembly of the lords spiritual and temporal. But practically a small knot of trained administrators, prelates and barons, becomes the king's court for ordinary judicial purposes. The reforms of Henry II, the new actions invented in his reign, brought an ever increasing mass of litigation before the royal court. It became more and more a group of men professionally learned in the law.

Gradually, as is well known, this group breaks up into three courts, there are the three courts of common law, the King's Bench, Common Bench, and Exchequer. This process is not complete until Edward I's reign; but we may say that for a century before this the king's court for ordinary judicial purposes has been no feudal court of tenants in chief, but a court of professional justices; the justices of Henry III's time are often men who have had a long education in the subordinate offices of the court and the chancery.

As to procedure, all the old formal modes of proof have been known in the king's court. It made use of the ordeal until that ancient process was abolished by the Lateran Council of 1215. Trial by battle, as we all know, was not abolished until 1819[1], and wager of law was not abolished until 1833[2]. For a very long time before this any practical talk of these barbarisms had been very rare, and for a still longer time pent within ever narrowing limits; still, if we are to understand the history of the forms of action, we must be mindful of these things; a long chapter in that history might be entitled 'Dodges to evade Wager of Battle,' a still longer chapter, 'Dodges to evade Wager of Law.' We must not suppose that the unreasonableness of these archaic institutions was suddenly perceived; the cruelties of the *peine forte et dure* had their origin in the sentiment that trial by jury is not a fair mode of trial save for those who have voluntarily consented to it; the remembrance of the ordeal was dear to the people; they would 'swim a witch' long centuries after the Lateran Council; so late as 1376 we find that wager of law is still popular with the commons of England, they pray that there may be wager of law in the Exchequer as in the other courts[3]. But to a very great extent the early history of the forms of action is the history of a new procedure gradually introduced, the procedure which in course of time becomes trial by jury. It would be needless to repeat here what has been sufficiently said elsewhere about the first germs of the jury. The Frankish kings, perhaps assuming to themselves the rights of the Roman fiscus, had placed themselves outside

[1] 59 Geo. III, c. 46. [2] 3 and 4 Will. IV, c. 42, sec. 13.
[3] Rot. Parl. III. 337.

the ancient formal procedure of the popular courts, had sought to preserve and enforce their royal rights by compelling the inhabitants of the district, or a representative body of such inhabitants, to swear that they would tell the truth as to the nature and extent of these rights. Further, they gave or sold this privilege to specially favoured persons, especially to the churches which were under their patronage. The favoured person, if possessions were attacked, need not defend them by battle, or ordeal, or any of the ancient modes of proof, but might have an inquest of neighbours sworn to tell the truth about the matter in hand. Immediately after the Norman Conquest we find that this procedure has been introduced into England, and it is employed on a magnificent scale. Domesday Book is the record of the verdicts of bodies of neighbours sworn to tell the truth, and its main object is the ascertainment and preservation of the king's rights. Very soon after this we find the inquest or jury employed in the course of litigation; for instance, in a suit touching the rights of the Church of Ely the Conqueror commands that those who best know how the lands lay in the days of the Confessor shall be sworn to tell the truth about them; so a number of the good folk of Sandwich are sworn to tell the truth about a certain ship, and they testifying in favour of the Abbot of St Augustine's, the Abbot is 'reseised' of the ship. The right to a jury makes its appearance as a royal prerogative, a prerogative, the benefit of which the king can give or sell to those who obtain his grace. We see traces of this origin even at a very late time; it is an established maxim that one can not wage one's law against the king. In an action for debt upon simple contract, were the plaintiff a subject, the defendant would be allowed to purge himself with oath-helpers in the ancient way, but when the king is plaintiff he must submit to trial by jury.

In the competition of courts, therefore, the king's court has a marked advantage; to say nothing of its power to enforce its judgments it has, for those who can purchase or otherwise obtain such a favour, a comparatively rational procedure. As yet, indeed, trial by jury is far from being what it became in later times; the jurors are not 'judges of fact,' they are witnesses; but they are not like the witnesses and the com-

purgators of the old procedure; they are not brought in by the party to swear up to a set form of words in support of his case, they are summoned as impartial persons by a royal officer, and they swear to tell the truth, whatever the truth may be. This is the procedure, far more rational than battle, or ordeal, or wager of law, which the king's court has at its command when it begins to bid against the communal and feudal courts. If for a moment we may refer to Roman law, we may say that the history of English law does not begin with the formulary system—that is the product of the twelfth and thirteenth centuries—at the back of the formulary system are *legis actiones*

LECTURE III.

THIS morning I shall attempt a sketch in brief outline of the order in which the different forms of action are developed. But first I ought to say that I do not know that any such attempt has yet been made, and that, as I must be very brief, I shall be compelled perhaps to state in too dogmatic a fashion some conclusions that are disputable. To this I must add that some things that I say this morning may seem unintelligible. I hope to make my meaning clearer in subsequent lectures. We must break up our history into periods.

I. 1066—1154. The first of these periods would end with the great reforms of Henry II. Litigation of an ordinary kind still takes place chiefly in the communal and feudal courts; even the king's court may be considered as a feudal court, a court of and for the king's tenants in chief, though a professional element is apparent in it since the king keeps around him a group of trained administrators. His court is concerned chiefly with (1) the pleas of the crown, *i.e.* cases in which royal rights are concerned, (2) litigation between the king's tenants in chief—for such tenants it is the proper feudal court, (3) complaints of default of justice in lower courts. From time to time he interferes with ordinary litigation; at the instance of a litigant he issues a writ commanding a feudal lord or a sheriff to do justice, or he sends out some of his officers to hear the case in the local courts, or again he evokes the case before his own court. Such interferences can not be secured for nothing; they may be considered as luxuries, and men may be expected to pay for them; the litigant does not exactly buy the king's justice, but he buys the king's aid, and the king has valuable commodities for sale;

the justice that he does is more peremptory than the justice that can be had elsewhere, and the process of empanelling a body of neighbour-witnesses, the process which in course of time will become trial by jury, is a royal monopoly. The writs of this period, so far as we can judge from the specimens that have been preserved, were penned to meet the particular circumstances of the particular cases without any studious respect for precedent. We do indeed come upon writs which seem as it were to foretell the fixed formulas of a later age; we are sometimes inclined to say 'This is a writ of right, that a writ of debt, that a writ of trespass'; but we have little reason to suppose that the work of issuing writs had as yet become a matter of routine entrusted to subordinate officers whose duty was to copy from models. Perhaps no writ went out without the approval of the king himself or the express direction of his justiciar or chancellor; and probably every writ was a purchaseable favour.

II. 1154—1189. The legislative activity of Henry II's reign marks a second period. Under Henry II the exceptional becomes normal. He places royal justice at the disposal of anyone who can bring his case within a certain formula. From the end of his reign we have Glanvill's book, and we see already a considerable apparatus of writs which are at the disposal of litigants or of such litigants as will pay for them; they have assumed distinct forms, forms which they will preserve until the nineteenth century, and probably the issue of them is fast becoming a matter of routine; each writ is the beginning of a particular form of action. Let us look at some of these writs.

First the Writ of Right. There is good reason to believe that Henry, in some ordinance lost to us, laid down the broad principle that no man need answer for his freehold without royal writ. Every one therefore who demands freehold land must obtain a writ; otherwise his adversary will not be bound to answer him. This principle of vast importance is laid down clearly enough in the book ascribed to Glanvill. On the other hand it seems to be a new principle; we have little cause to believe that it was in force before Henry's day or that it ever was law in Normandy; more than once we find it

connected with another rule which we also ascribe to Henry, a rule of which much must be said hereafter, namely, that no one is to be disseised of his freehold unjustly and without judgment, that every one so disseised has an action (called an Assize of Novel Disseisin) before the king's own justices. In 1207 King John sent a writ to the people of Ireland in which he coupled these two rules: 'we will that none shall disseise you of your free tenements unjustly and without a judgment, and that you shall not be impleaded for your free tenements without our writ or that of our justiciar[1].' We find Bracton again coupling these two principles: no one shall be disseised of his free tenement without a judgment, nor need he answer for it without the king's command and writ[2]. Of these two principles the one is that of the great possessory action, the Assize of Novel Disseisin, the other is of wider import, no action for freehold can be begun without the king's writ, or if it be so begun the person who is in possession need not answer. But let us observe that there is a close connexion between the two: both can be represented as measures for the protection of possession, of seisin of free tenement; such possession is to be protected against extrajudicial force; but this is not enough, it is to be protected also against irresponsible justice; he who is seised shall remain seised until some judgment is given against him in accordance with the king's writ. Henry did not ordain, could not have ordained, that all litigation respecting free tenements should take place in the king's court; such a measure would have been too open an abrogation of the first principle of feudalism. It seems very possible that he was able to represent the great step that he took as no interference with proprietary rights but a mere protection of possession, while the protection of possession was intimately associated with the maintenance of the king's peace which was now conceived as surrounding all men.

At any rate this principle took firm root in English law: no one need answer for his freehold without the king's writ. This does not mean that every action for freehold must be

[1] Rot. Pat. 76; Select Pleas in Manorial Courts, I LIV.

[2] Bract. f. 161: 'Nemo debet sine judicio disseisiri de libero tenemento suo, nec respondere sine praecepto domini Regis nec sine brevi.'

begun in the king's court; far from it. Suppose that A claims land that B holds, and that it is common ground between them that the land ought to be held of C; then undoubtedly C's court is the proper tribunal. But B need not answer unless A obtains a writ. The writ which A will obtain if he is asserting title to the land will be a writ addressed by the king to C in this form: 'I command you that without delay you hold full right to A (*i.e.* do full justice to A) concerning a virgate of land in Middleton which he claims to hold of you by such and such a free service, and unless you do it my sheriff of Northamptonshire shall do it, that I may hear no further complaint about this matter for default of justice.' Such a writ is called a writ of right (*breve de recto tenendo*), and because it is an open writ and not sealed up, as some writs are, it is a writ of right patent (*breve de recto patens*)[1]. If however the demandant claims to hold the land of the king as tenant in chief such a writ is out of place; there is no mesne lord to whom it can be directed; the proper tribunal is the king's own court. So the writ takes a different form[1]. It is directed to the sheriff: 'Command B that justly and without delay he render to A a hide of land in Middleton, whereof A complains that B unjustly deforces him, and if he will not do it, summon him that he be before my justices at such a place and time to answer why he has not done it'; the tenant of the land must give it up to the demandant or answer in the king's court. In saying that this simple writ, this *Praecipe quod reddat*, was only used when the demandant claimed to hold of the king as tenant in chief, we have been guilty of some inaccuracy. Glanvill tells us that such a writ is issued when the king pleases; Henry II was not very careful of the interests of mesne lords and would send a *Praecipe quod reddat* to the sheriff when a Writ of Right addressed to the lord would have been more in harmony with feudal principles. But this was regarded as a tyrannical abuse and was struck at by a clause of the Great Charter[2]—the

[1] The Writ of Right Patent and the *Praecipe quod reddat* are printed among the Select Writs after these lectures.

[2] Magna Carta (1215), c. 34: Breve quod vocatur Praecipe non fiat alicui de aliquo tenemento unde liber homo amittere possit curiam suam.

writ called *Praecipe* shall not be issued for the future so as to deprive any free man of his court; a proprietary action for land must be begun in the lord's court; the *Praecipe quod reddat* is only in place when the demandant claims to hold in chief of the king, in other words when it is a *Praecipe in capite*. We have therefore to distinguish between two forms of the proprietary action for land, that begun in the lord's court by Writ of Right, that begun in the king's court by *Praecipe in capite*; but in course of time the term 'Writ of Right' gains a somewhat extended sense and is used so as to include the *Praecipe in capite*. This is due to the contrast between possession and property, or, to use the terms then current, between 'seisin' and 'right.' The *Praecipe in capite* is the beginning of a proprietary action, one in which the demandant relies on right, not merely on seisin, and so it may be called a writ of right.

Now the action commenced by Writ of Right was an extremely slow and solemn affair—so at least it was considered in after ages when it could be compared with more rapid actions. It involved a great number of delays (*dilaciones*), of adjournments from term to term. Among the causes which in course of time have rendered justice more rapid we must reckon not merely good roads, organized postal service, railways, electric telegraphs, but also the principle that men can hand over their litigation and their other business to be done for them by agents, whose acts will be their acts. Rapid justice may now-a-days be fair justice, because if a litigant can not be present in court in his own person, he may well be there by his attorney and his counsel. But this principle that every suitor may appear in court by attorney is one that has grown up by slow degrees, and, like so many other principles which may seem to us principles of 'natural justice,' it first appears as a royal prerogative; the king can empower a man to appoint an attorney[1].

[1] Fitz. *Nat. Brev.* 25: Bl. *Comm.* III, 25. Blackstone adds 'This is still the law in criminal cases, and an idiot cannot to this day appear by attorney, but in person, for he hath not discretion to enable him to appoint a proper substitute: and upon his being brought before the court in so defenceless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that anyone present can suggest.'

But so long as litigants have to appear in person justice must often be slow if it is to be just; the sick man can not come, so one must wait until he is well; one must give the crusader a chance of returning. But one can not wait for ever; that would be unfair to the other party; so a great deal of law is evolved as to the excuses for non-appearance, in technical language the *essoins*, that a man may proffer. This is one of the causes which raise high the barriers between the various forms of action. In the action begun by Writ of Right, which will finally deprive one of the parties of all claim to the land, the essoins are manifold; a litigant can generally delay the action for year and day by betaking himself to his bed[1]; in other actions so many essoins are not admissible.

It is worthy of notice that the Praecipe for land, the Writ of Debt, and many other writs afterwards invented, are not in the first instance writs instituting litigation; that, according to their tenor, is not their primary object. The king through his sheriff commands a man to do something, bids him give up the land that he wrongfully withholds, or pay the debt that he owes. Only in case of neglecting to obey this command is there to be any litigation. May we not say then that the 'cause of action' in the king's court is in theory not the mere wrong done to the plaintiff or demandant by keeping him out of his land or neglecting to pay money due to him, but this wrong coupled with disobedience to the king's command? There can I think be little doubt that such a conception was operative in the growth of royal jurisdiction. If we look back at the *Leges Henrici* we find that among the rights which the king has over all men, among the pleas of the crown, stands the *placitum brevium vel praeceptorum ejus contemptorum*, any action we may say founded on a contempt of his writs or commands[2]. The wrong done to the plaintiff or

[1] Some care was taken to see that his excuse was not too unreal. Four knights were sent to visit him, to award whether he had 'malum transiens' or a 'languor'—which was what he needed—after consideration of whether they found him 'vagantem per rura' or 'in bed as befits a man making such excuse, unbooted, unbreeched and ungirt, or even naked which is more' (decalceatum, et sine braccis et decinctum, vel forte nudum, quod plus est). Bracton, f. 356 b.

[2] Leg. Hen. Prim. c. 10.

demandant is a breach of law and a wrong which should be redressed somewhere; but it is the contempt of the king's writ which makes it a wrong which should be redressed in the king's court; in the language of the old English laws there has been an 'oversceness' or 'overhearness' of the king which must be emended; the deforciant of land or of a debt has not merely to give up the land or pay the debt, he is at the mercy of our lord the king and is amerced accordingly.

The mode of trial appropriate to the Writ of Right has been trial by battle. We may reckon as the second of Henry's reforms in civil procedure that he gave to the tenant the option of another mode of trial; instead of the judicial combat he might put himself upon the grand assize of our lord the king. The text of this ordinance, this grand assize (*magna assisa*) we have not got. Glanvill's account of it is well known—'The grand assize is a royal boon conceded to the people by the clemency of the prince on the advice of his nobles whereby wholesome provision is made for the lives of men and the integrity of the state, so that in defending the right which every one possesses in his free tenement they may refuse the doubtful issue of battle....This institution proceeds from the highest equity; for the right which after many and long delays can hardly be said to be proved by battle is more rapidly and more fitly demonstrated by this beneficent ordinance[1].' If the tenant (that is, the party attacked by the Writ of Right) claims the benefit of this ordinance, puts himself on the grand assize of our lord the king, the action is removed out of the lord's court and is brought before the king's justices; four knights of the neighbourhood are summoned to choose twelve other knights who are sworn to say, to 'recognize' (*recognoscere*), whether the demandant or the tenant has the greater right to the land. The name 'grand assize' is transferred from the ordinance to the institution that it creates; these twelve recognitors are 'a grand assize.' It is best not to call them a 'jury,' for though we see here one stage, and a very important stage, in the growth of trial by jury, still in many respects trial by the grand assize to the last day of its existence—and such a trial was possible

[1] Glanv. II. 7; Stubbs, *Const. Hist.* I. 615.

in 1834[1]—remained a distinct thing from trial by jury. We observe for instance that the recognitors were sworn to tell the truth not about mere facts—the separation of questions of fact from questions of law belongs to a later day—but to tell the truth about rights, to say whether A or B has the greater right (*jus majus*). We may notice also that here again the king is interfering in favour of possession; it is not either party that can claim this royal boon, it is only the tenant, the man in possession; no such grace is shown to demandants, they can be compelled to stake their claims on the issue of a combat.

Now the possessory assizes: In sharp contrast to the action begun by Writ of Right there now stand three possessory actions, the three Assizes of Novel Disseisin, Mort d'Ancestor, and Darrein Presentment. There can, I suppose, be but little doubt that the notion of a definitely possessory action may be traced to the Roman interdicts, through that *actio spolii* which the canonists were gradually developing. But the English and Norman assizes—for we find these actions in Normandy as well as in England, and there is some reason for thinking that they are a little older in Normandy than in England—have many features which are distinctly not Roman and not Canonical. Roman law and Canon law may have afforded suggestions but hardly models. We will look at these three assizes.

(*a*) The principle of the Novel Disseisin is this, that if one person has unjustly and without a judgment disseised another of his free tenement, and the latter, the disseisee, at once complains of this to the king he shall be put back into seisin by the judgment of the king's court. The procedure is this, the plaintiff lodges his complaint, at once a writ is issued bidding the sheriff summon twelve good and lawful men of the neighbourhood to 'recognize' (*recognoscere*) before the king's justices whether B unjustly and without a judgment disseised A of his free tenement within the time limited for the bringing of an assize. If this body of recognitors, this assize—for the procedure is called an assize and the twelve neighbours are called an assize—answers 'yes' to the question

[1] 3 and 4 Will. IV, c. 27, sec. 36.

thus formulated in the writ, then the plaintiff, the disseisee, will be put back into seisin.

The formula of the Novel Disseisin contains terms which in course of time will give birth to a great deal of law; the successful plaintiff must have been disseised of his free tenement unjustly; but what is seisin, what is a free tenement, when is a man disseised unjustly? Postponing any discussion of these terms we can still notice that the action has a narrow definite scope. It can be brought only by a disseisee against a disseisor. It can not, for example, be brought by the heir of the disseisee, or against the heir of the disseisor. Again, disseisin implies more than a wrongful assumption of possession, it implies a turning of some one out of possession; to enter on land of which no one is seised is no disseisin; if, for example, on the death of a rightful tenant a stranger enters before the heir enters, that stranger is no disseisor. This Assize of Novel Disseisin is no remedy for the recovery of land to which one is entitled; to speak roughly it is an action competent to a person who has been turned out of possession, and competent against the person who turned him out. It decides nothing as to proprietary right. In a Writ of Right the demandant claims the land as his *right* and inheritance (*ut jus et hereditatem suam*); he has to allege that he or some ancestor of his was seised as of right (*ut de jure*); no such allegation is made by the plaintiff in the Novel Disseisin; it is enough that he has been seised and disseised, and of right there is no talk. Consequently this action, if the plaintiff be successful, in no way decides that the plaintiff has better right than the disseisor; the plaintiff is put back into seisin, but after all the disseisor may be the true owner; he may at once bring a Writ of Right against his hitherto successful adversary; the court will help him to his own though it has punished him for helping himself.

Then again this action must be brought within a limited term; the complaint must be one of recent dispossession (*de nova disseisina*). In England this term was fixed from time to time by royal ordinance. When Glanvill wrote the action had to be brought since the king's last passage to Normandy, an event which must have been quite recent. In

Normandy we find a rule which has a curiously archaic sound; the plaintiff must have been seised when the last harvest was reaped. The principle of the Novel Disseisin if it has one root in the Interdicts seems to have another in the ancient notion, very prominent in Norman law, that the man engaged in agricultural operations enjoys a special peace.

Then again the Novel Disseisin was a very summary action, *ut per summariam cognitionem absque magna juris solemnitate quasi per compendium negotium terminetur*[1], says Bracton. In course of time these assizes became very by-words for dilatoriness; but I see no reason to doubt that in the twelfth century their procedure was quite as rapid as was compatible with the elementary rules of justice[2]. No essoin was permitted; no pleading was necessary; the question for the recognitors was formulated in the writ which summoned them; there could be no voucher to warranty of any one not named in the writ; the first process against the defendant was not a mere summons but an attachment; it was even enough to attach his bailiff. When Bracton tells us that the invention of this action had cost pains, that it was *multis vigiliis excogitata et inventa*[3], we can believe him; a splendid success awaited it.

(*b*) The principle of the Assize of Mort d'Ancestor (*assisa de morte antecessoris*) is this, that when a person has died seised as of fee—*ut de feodo*—his heir ought to be seised, and that if any other person obtains seisin before the heir, that person shall be turned out by the judgment of the court in favour of the heir. The procedure is somewhat like that of the Novel Disseisin, though not so summary. The questions for the recognitors are formulated in the original writ and are these, 'Whether M, the father, mother, brother, sister, uncle or aunt of A, the plaintiff, was seised in his demesne as of fee of the land in question now held by X, whether M died within the time limited for bringing the action, and whether A is M's next heir.' If all these questions are answered in the plaintiff's favour then he is put in seisin.

The action is regarded as distinctly possessory in this

[1] Bract. f. 164 b.
[2] See Glanv. XIII. 38.
[3] Bract. f. 164 b.

sense that it decides nothing about proprietary right. It is necessary that the plaintiff's ancestor should have been seised, that he should have been seised 'as of fee,' that is to say, that he should not have been seised as a mere tenant for life or the like, that he should have been seised 'in demesne,' that is that he should, in our modern terms, have been seised of the land itself and not merely of a seignory over lands held of him by another; but it is by no means necessary that he should have been seised as of right; of right there is no talk at all. It follows A may recover from X in a Mort d'Ancestor, while X having better right than A will recover from him in a proprietary action, in a Writ of Right.

Seisin, we may observe, is not conceived as a descendible right. The heir of one who died seised is not at once in seisin; he must enter on the land before he will be seised. If during the interval a stranger enters, that stranger will be no disseisor. Had seisin been considered as a descendible right there would have been no place for the Mort d'Ancestor, for its sphere would have been covered by the Novel Disseisin. On the other hand seisin (unless the person seised claims but a temporary estate as tenant for life or the like) does found or generate a descendible right—a person who dies seised ought to be succeeded by his heir and by no other, and if any other person obtains seisin, he shall be put out of it; if he thinks that he has better right than the heir because better right than the ancestor, let him bring his action; help himself he shall not. In course of time (but this as I think belongs to a later period) it is even said that on the death of one who dies seised as of fee, his heir is at once 'seised in law' though he is not 'seised in deed' until he enters; this means that during the interval he has some, though by no means all, of the advantages of seisin. The older notion seems to be that though seisin is not descendible it does beget a descendible right, and at any rate the Mort d'Ancestor gives us this important principle that the heir of one who dies seised ought to be put in seisin and remain seised until some one else proves a better right in due course of law.

But we have mis-stated the rule implied in this assize in a point worth mentioning. In order that the plaintiff may be

successful, it is essential not merely that he should be the heir of the dead person, but that he should be the son, daughter, brother, sister, nephew, niece of that person. The Mort d'Ancestor lies only on the death of a father, mother, brother, sister, uncle or aunt. The dead man's heir happens to be his grandson; that grandson can not bring an assize. Why so? We must, as I think, answer that the limitation is quite unprincipled; that legislators deal with obvious cases and leave rarer cases unprovided for, either because they are forgotten or because they are troublesome. The remark is worth making for there are many things in the history of our law, and, I should suppose, in the history of every body of law, which can only be explained by that *vis inertiae* which makes against legal reforms. And let us observe what happens. The formula of the Mort d'Ancestor is never enlarged; but new actions are invented to meet the omitted cases. This happened it would seem under Henry III in or about 1237. The actions known as actions of Aiel, Besaiel and Cosinage; if the dead man was the grandfather (aiel), or great-grandfather (besaiel), or cousin of the heir, that heir was to have an action which would do for him what the Mort d'Ancestor would have done had the degree of kinship between them been closer. But there was difficulty about giving these actions; the feudal lords resisted the endeavour on the ground that business which properly belonged to their courts was thus attracted to the king's court. Bracton has to argue that the new actions are purely possessory, that they are mere necessary supplements of the Assize of Mort d'Ancestor and that they do no wrong to the lords[1]. The story is instructive; it illustrates what I may call the irrational element in the history of the forms of action, the element of chance in legal history. The result is that a mere accident of no juristic value, the mere accident that the degree of kinship between heir and ancestor is near or remote, decides whether the heir shall have a twelfth century remedy by Assize of Mort d'Ancestor or a thirteenth century remedy by a Writ of Cosinage; the procedure in these two actions is substantially different, the one is more archaic than the other and yet the same principle of law covers them both.

[1] Bracton's Note Book, pl. 1215; Bract. f. 281.

(*c*) The third of the possessory Assizes is that of Darrein Presentment or last presentation (*de ultima presentatione*). It deals with a matter which was of great value in the middle ages and which gave rise to an enormous amount of litigation, the advowsons of churches. If a man claimed property in an advowson his remedy was by a Writ of Right closely resembling the *Praecipe in capite* for lands. The king had asserted successfully both as against the feudal lords and as against the ecclesiastical tribunals that all litigation about the right to present to churches must take place in his court. The Writ of Right of Advowson was the proprietary remedy; but here also a possessory action was needed and was instituted. The procedure closely resembled that of the two other possessory assizes though it was not quite so summary as that of the Novel Disseisin. Its principle was this: if a church is vacant the person who last presented or his heir is entitled to present; if any other person conceives that he has better right, he must bring his action and recover the advowson, but until he has done this it is for the person who last presented, or his heir, to present again. The question addressed to the recognitors is this—Who was the patron who in time of peace presented the last parson to this church? The act of successfully presenting a parson to a church was regarded as a seisin, a possession of the advowson; the man who has performed that act is seised of the advowson and when the church again falls vacant, it is for him or, if he be dead, his heir to present another parson, provided that in the meantime he has not been deprived of his seisin by judgment. The need of some rapid procedure to meet cases in which two persons claimed the right to present to the same church was great; while an action by Writ of Right of Advowson was dragging on its wearisome length, the parishioners would be left as sheep without a shepherd or the bishop would step in and deprive both litigants of the coveted piece of patronage; therefore let him who has presented once present again until some one has proved a better right in due course of law.

(*d*) A fourth Assize must here be mentioned, the Assize *Utrum* or Writ *Juris Utrum*. It reminds us that in the twelfth century royal justice had to contend not only with feudal justice, but also with ecclesiastical justice. If land has

been dedicated to ecclesiastical purposes, has been given in free alms, in frank almoign (*libera elemosyna*) the church claims cognizance of all disputes relating to that land The question is what to do when one party to the litigation asserts that the land is held in free alms, and so within the sphere of the ecclesiastical tribunals, while the other asserts that it is lay fee. This difficulty gave occasion for one of the very earliest applications of what in a loose sense we may call trial by jury. One of the Constitutions of Clarendon (1164)[1] is to this effect: 'If a dispute arises between a clerk and a layman, or a layman and a clerk about any tenement which the clerk asserts to belong to free alms, the layman to lay fee, it shall be decided on a recognition of twelve lawful men by the judgment of the king's chief justiciar, whether (*utrum*) the tenement belongs to free alms or to lay fee. And if it be "recognized" to belong to free alms, the plea shall proceed in the ecclesiastical court, but if it be lay fee then the plea shall proceed in the king's court, unless both parties claim to hold of the same bishop or baron, in which case it shall proceed in the [feudal] court of that bishop or baron. And the person who is in seisin shall not lose his seisin on account of that "recognition" until the plea be tried out.' We see here a preliminary procedure; it is to settle nothing about right, nothing even about seisin, it is merely to settle the competence of tribunals, to decide whether the action shall proceed before a spiritual or a temporal tribunal. But it had a very peculiar history. Subsequent changes in the relation between church and state, changes which in this instance extended the sphere of the lay courts at the expense of that of the Courts Christian, gave this assize a new turn. Still keeping its old form of an assize it became a proprietary remedy in the king's court for a parson who wished to recover the lands of his church; it became 'the parson's writ of right.' We have constantly to remember this, that an action instituted for one purpose in one age comes to be used for another purpose in another age[2].

[1] Cap. 9.

[2] *Très Ancien Coutumier*, c. 57; Const. Clarend. c. 9; Glanv. XIII. 23; Bract. f. 285 b; Fitz. *Nat. Brev.* 49; Bl. *Comm.* III. 252; Brunner, *Schwurgerichte*, 324.

These were all the actions which in England permanently took the name and form of assizes. By saying that they took the form of assizes I mean that the original writ directed the summoning of a body of recognitors to give sworn answer to a particular question formulated in that writ. In Normandy there were some other assizes, and these may for a short while have been used in England; but the germ of trial by jury having once been introduced in these formal assizes, it began to spread outside their limits, to take a new shape and become susceptible of free development. We learn from Glanvill that certain incidental questions may be raised in an action which will be decided by the oath of twelve men. For example, A brings an Assize of Mort d'Ancestor against B, who is an infant; now it is a rule of law that an infant during his infancy need never answer for land of which his ancestor died seised as of fee; if the infant has come to the land as heir of one who died seised as of fee, then the action against him must stand over until he is of full age. Now in this case the infant asserts that his ancestor died seised as of fee, and that therefore he need not answer; the demandant asserts that the infant's ancestor was not seised in fee, he was seised merely as guardian in chivalry. To settle this question a body of twelve men can be summoned. The question that they are to be asked is not the question formulated by the original writ, which concerns the alleged seisin of A's ancestor; it is quite another question relating to the alleged seisin of B's ancestor, and Glanvill is inclined to regard it as a 'prejudicial' question, that is to say an affirmative answer will not prove that A is entitled to recover, it will merely prove that B, albeit an infant, must answer A[1]. So again, to put another case, C may bring against D an action for land, claiming that he, C, mortgaged, or rather we must say 'gaged,' the land to D for a sum of money which C now offers to pay; D, however, alleges that the land is his own, that he is seised in fee and not in gage; to decide this issue a body of recognitors is usually summoned, and if it declares that D holds in gage then D loses the land and loses the debt also, for he has chosen a particular mode of defence to the action, and has failed in

[1] Glanv. XIII. 14, 15.

it[1]. Glanvill seems half inclined to treat the questions that can thus be raised by pleading and answered by jury, as numerable and nameable; there is the recognition 'utrum quis sit infra aetatem an non,' the recognition 'utrum de feodo vel de warda,' the recognition 'utrum de feodo vel de vadio'; he even casually speaks of the body of recognitors thus called in to answer a question raised by pleading as an 'assisa[2].' Our law we see might conceivably have taken this shape, that only certain particular issues, of which a list might be made, are to be decided by the new mode of trial, that in all other cases proof must be given in the old ways, by formal testimony, by compurgation, ordeal, battle. But really the questions which litigants can raise, which might well be decided by the oath of their neighbours, are innumerable. It becomes more and more a recognized principle that a defendant need not confine himself to a bare denial of the charge brought against him, that he may allege facts that disprove this charge, that if these facts be denied, the best way of deciding the dispute is to call in a set of twelve neighbours who will be likely to know and sworn to tell the truth. Such a body called in, not by the original writ, but in the course of the action, to determine a question of fact raised by the pleadings, gets the name of a jury (*jurata*) as contrasted with an assize (*assisa*); the *assisa* is summoned by the 'original' writ issued out of the chancery before there has been any pleading; the *jurata* is summoned by a 'judicial' writ issuing out of the court before which the action is proceeding, and it comes to answer a question raised by the pleadings. Any considerable development of this principle, however, lies in the future; in Glanvill's book we see no more than this, that the practice of referring a disputed question to a body of 'recognitors' is beginning to extend itself outside the limits of the assizes.

We have now enumerated those actions begun by royal writ which were common in Glanvill's day. When from some seven years later (1194) we get the oldest roll of the king's court that has been preserved, we see that by far the greatest part—quite nine-tenths—of the litigation there recorded falls under the heads that we have already mentioned; Writs of

[1] Glanv. XIII. 26—31. [2] Glanv. XIII. 1, 2, 13, 31.

Right, Assizes of Novel Disseisin, Mort d'Ancestor, and Darrein Presentment, these are common; other civil actions are rare. Still Glanvill knew some other civil actions. By attending to these for a while we may be able the better to understand the manner in which the king's justice grows, and the obstacles that impede its growth.

Claims for dower are not uncommon. According to the general principle which is now part of the law, the widow who wishes to bring an action for her dower must obtain a writ from the chancery; but according to the feudal principle the action should be begun in the court of him of whom the widow will hold her dower, that is to say, the court of her husband's heir, in the common case the court of her own son. We therefore find a Writ of Right of Dower, whereby the king commands the heir to hold full right to the widow concerning the hide of land which she claims to hold of him as her reasonable dower[1]. If the heir's court makes default then the action may be removed, like any other Writ of Right, to the county court, and thence it may be removed to the king's court. The appropriate mode of trial, if the widow's right be contested, is battle. But then we find this rule, which goes far to interfere with the feudal principle: If the woman has already got some part of her dower, then, as already said, her action must be begun in the feudal court, the heir's court; but if she has as yet got no part of her dower, then she must begin her action in the king's court. In order to do this she can obtain a Writ of Dower, *unde nihil habet*, which bids the sheriff to command the holder of the land to deliver to the widow her reasonable dower, 'whereof she complains that she has nothing' (*unde nihil habet ut dicit*), and in default of his so doing the sheriff is to summon him to the king's court, that he may state why he hath not done it[2]. Glanvill gives no explanation of this curious rule; but Bracton does, and the explanation is quite as curious as the rule. As the widow has not as yet got any part of her dower it is still possible that the holder of the land may deny the fact of the marriage. Now the fact of the marriage can only be proved by the bishop's certificate, marriage being a matter for the law

[1] Glanv. VI. 5. [2] Glanv. VI. 15.

ecclesiastic, and the only person who can compel the bishop to certify whether the woman was married or no, is the king; to the mandate of the mere lord of a feudal court he would pay no heed. It follows that if there is any chance of a denial of the marriage the widow must go to the king's court[1]. Such is the pretext for the Writ of Dower *unde nihil habet.* Blackstone, looking at the matter from a modern point of view, turns the story topsy-turvy (*Comm.* III. 182, 183). It is an ingenious if rather flimsy excuse for allowing widows to sue in the king's court: Blackstone could hardly conceive that any such excuse could ever have been necessary. We have thus two forms of action concerning dower, and there is yet a third, namely the writ of Admeasurement of Dower, which lies when the widow has got more than she ought to have; this directs the sheriff to admeasure the land and allot to each party what is right[2].

We turn to a matter of importance in social and economic history. There is a writ for the recovery of a serf, a 'nativus.' This writ, *de nativo habendo,* is directed to the sheriff, and bids him deliver to the claimant his fugitive bondman X, unless he has taken refuge on the royal demesne[3]. If, however, the person thus claimed asserts that he is free, and gives the sheriff security for the proof of his assertion, then the sheriff's power ceases, and the would-be free man obtains a writ *de libertate probanda,* which bids the sheriff put the case before the king's justices and summon the would-be lord to set forth his claim[4]. Why can not this matter be tried in the county court? Glanvill gives no reason; Bracton says 'I can assign no reason unless it be in favour of liberty, which is a thing inestimable and not lightly to be trusted to the judgment of those who have but little skill[5].' Whether then we prefer to suppose that we have here some relic of ancient times, of the time before feudalism, or to believe that Henry, who interfered in favour of the seisin of freehold, interfered also in favour of personal freedom, we have here a notable fact, the man who is claimed as a serf may go to the king's court and prove his liberty there.

[1] Bract. f. 106, 296 b. [2] Glanv. VI. 18; Bract. f. 314
[3] Glanv. XII. 11. [4] Glanv. V. 2. [5] Bract. f. 105 b.

As regards those claims which in after days give rise to the personal actions, those actions which, as we say, are founded on contract or founded on tort, Glanvill has but little to tell us; they are seldom prosecuted in the king's court. But the action of Debt is known there. As against the ecclesiastical courts the king has successfully asserted that actions for debt or for the detention of chattels if they in no way concern marriage or testament and are brought against laymen, belong to the temporal, not to the spiritual tribunals, and an action of Debt is occasionally brought in the king's own court[1]. The writ of Debt given by Glanvill[2] is of great interest for it seems to imply a very archaic conception. It is almost an exact copy of the *Praecipe in capite*, a certain sum of money being substituted for a certain piece of land. 'The king greets the sheriff. Command X that justly and without delay he render to A one hundred marks which he owes him, so he says, and of which he (A) complains that he (X) deforces him; and if he will not do so summon him by good summoners to be before me or my justices on such a day to show why he has not done it.' The non-payment of a debt seems regarded as a 'deforcement,' an unjust and forcible detention of money that belongs to the creditor. We are tempted to say that Debt is a 'real' action, that the vast gulf which to our minds divides the 'Give me what I own' and 'Give me what I am owed' has not yet become apparent[3]. In this action of debt the old modes of proof still prevail; there may even be trial by battle as there may be in a Writ of Right and there is no mention of any jury, of anything comparable to the grand assize[4].

In connexion with debts Glanvill speaks of mortgages of lands and of goods, or rather we must say of gages, for the term mortgage has at this time a very special sense. These gages occasionally give rise to actions in the royal court.

[1] Glanv. x. 1. Observe the words 'si placitum illud ad curiam Regis trahere possit.'

[2] Glanv. x. 3.

[3] That there is a close connexion between the verbs *owe* and *own* is certain. Dr Skeat gives 'Owe, to possess; hence to possess another's property, to be in debt, be obliged.'

[4] Glanv. x. 5.

There is already a writ for the gage creditor calling on the debtor to pay; there is another for the debtor calling on the gage creditor to receive his debt and give up the gaged land[1]. This latter writ is of interest, because it is the ancestor of a large family of writs. The commonest mode then in use of making land a security for the payment of money was to demise it to the creditor for a fixed term of years. The writ now in question is brought by the debtor who has made such a demise for a term that has expired, and who is now desirous of paying the debt and getting back the land: 'The king to the sheriff greeting. Command X that justly and without delay he render to A all the land in such a vill which he gaged to him for a sum of 100 marks for a term now past, as he says (*quam ei invadiavit pro centum marcis ad terminum qui praeteriit ut dicit*), and to receive his money, and if he will not do this summon him before our justices to show why he hath not done it.' Here we see is a *Praecipe* for land, but not a simple *Praccipe*; it is a *Praccipe* with a special reason assigned; A is not simply claiming the land as his own, he is claiming it as having been demised to X for a term that has expired; the writ assigns a reason why X should no longer hold the land; he has come to it by a title which no longer holds good. Now such writs for land, *Praecipes* with a reason assigned why the tenant's title is invalid, are going to play a great part in future history. The change of a few words would turn the writ now before us into one of the commonest of the 'Writs of Entry,' the Writ of Entry *ad terminum qui praeteriit*. Here is the first germ of a great institution. We learn also that in this action, if the tenant affirms that he holds the land in fee, either party can have a 'recognition' to decide the question '*utrum ut feodum suum vel vadium suum*.' This is an important step; the action is not 'an assize'; the original writ says nothing about recognition, nothing about the mode of trial, but *either* party can, if he pleases, have twelve neighbours called in to answer the question 'fee or gage.' If neither cares for this new-fangled procedure then the case is treated as though it were one of Writ of Right, and there may be battle or grand assize to decide, not this narrow

[1] Glanv. x. 7, 9.

question, but the wider question whether A or X hath the greater right to this land[1]. We seem to catch the thought that when there has been some recent gage of the land easily provable by the testimony of the neighbours, it is hard on A that X should be allowed to raise the whole question of greater right, and force A to stake all on the issue of a battle. But still in this region of debt and gage, battle reigns as a normal mode of proof. Suppose that the creditor has a charter, a deed as we should say, if the debtor acknowledges the seal as his, well and good, he must pay even if he never put the seal there, for he ought to have taken better care of his seal; but if he denies that the impression on the wax is that of his seal, then there may be battle, though he may be debarred from this by a collation of the disputed document with other charters which admittedly bear his seal[2]. In another case relating to the loan of chattels Glanvill leaves us an unanswered query as to the mode of proof that is applicable, and makes no suggestion that the question should go to a jury[3].

[1] Glanv. x. 9.
[2] Glanv. x. 12.
[3] Glanv. x. 13.

LECTURE IV

III. 1189–1272. This, our third period, extending from the death of Henry II to the accession of Edward I, is a period of rapid growth, as we learn from Bracton's treatise. New writs are freely invented, though towards the end of Henry III's reign this gives rise to murmurs and the barons seek to obtain a control over the king's writ-making power. There is now a large store of original writs which are writs of course (*brevia de cursu*), that is to say, they may be obtained from the subordinate officers of the royal chancery on payment of fees, the amount of which is becoming fixed. A Register of these writs of course has been formed and is kept in the chancery. The earliest Register known to me is one of 1227. In the Cambridge University Library we have two other Registers of Henry III's reign; Registers of Edward I's reign are common in MS. The size of the Register is rapidly increasing.

Litigation about land is still chiefly conducted by the proprietary action begun by writ of right, and the two possessory actions of Novel Disseisin and Mort d'Ancestor. When the tenement in question is held in chief of the crown, instead of a writ of right there is a *Praecipe in capite*—but the lords have succeeded in getting a provision inserted in Magna Carta to the effect that such a writ as this, which at once summons the tenant before the king's court shall not be used if the tenement is held of a mesne lord who has a court—in that case the action must be by writ of right (*breve de recto tenendo*) commanding the lord to do justice. But this victory of feudalism is illusive. Between the proprietary action and the possessory assizes there is growing up a large and popular

group of *brevia de ingressu*—'Writs of Entry.' The characteristic of a writ of entry is that it orders the tenant to give up the land or answer the demandant's claim in the king's court—thus far following the form of the *Praecipe in capite*, but goes on to add that there is some specified and recent flaw in the tenant's title—he only had entry into the land, *e.g.* by the feoffment of a husband who was alienating his wife's inheritance, or by the feoffment of an infant, or by the feoffment of an abbot without consent of the monks, or by the feoffment of one who had disseised the demandant. This flaw, this recent flaw, in the tenant's title is suggested in order to take the case outside the rule that litigation about proprietary rights in land should be begun in the lord's court. The flaw must be recent. If the land has changed hands several times since the unlawful entry then no writ of entry is applicable and there must be a writ of right. The various writs of entry therefore are very numerous—there is one applicable to almost every conceivable case in which a tenant has come to the land by some title in which a recent flaw can be pointed out—we hear *e.g.* of a form of action as a writ of entry '*sur disseisin* in the *per*,' a writ of entry '*sur disseisin* in the *per* and *cui*[1].' In 1267 the Statute of Marlborough, which in many ways marks the end of feudalism, in effect abolished the restrictions on the formation of writs of entry—but it only did this by adding to their number. If since the unlawful entry the land had passed through several hands a writ of entry 'in the post' might be used—the demandant might allege that the tenant only had entry *post* (after) a disseisin committed by someone without showing how the land had passed from the disseisor to the tenant.

The words of the Statute (cap. 29) were as follows: 'Provisum est eciam, quod si alienaciones illae, de quibus breve de ingressu dari consuevit, per tot gradus fiant, quod breve illud in forma prius usitata haberi non possit, habeat conquerens breve de recuperanda seisina, sine mentiona graduum, ad cujuscunque manus per hujusmodi alienaciones res illa devenerit, per brevia originalia per consilium domini Regis providenda.'

[1] For the form of these writs of entry see the Select Writs, *post*.

'It is provided also, That if those alienations (whereupon a writ of entry was wont to be granted) hap to be made in so many degrees, that by reason thereof the same writ cannot be made in the form beforetime used, the plaintiffs shall have a writ to recover their seisin, without making mention of the degrees, into whose hands soever the same thing shall happen to come by such alienations, and that by an original writ to be provided therefor by the council of our lord the King[1].'

We are accustomed to regard the English real actions as a hopeless tangle—this is the result of the writs of entry. If we place ourselves at the death of Henry II the situation is really very simple. Let us review the position. If a proprietary action is to be brought for land it must be begun by *Praecipe quod reddat* (after Magna Carta, 1215, this is only permissible where the demandant claims to hold in chief of *Dominus Rex*) or by *Breve de recto tenendo.* In either case the demandant will have to allege that the land is *jus et haereditatem suam*—will have, *i.e.* to rely upon proprietary right. He will have a proprietary, petitory, droiturel action, in the language of the Roman Law a *vindicatio rei.* Besides this there are two possessory actions, each of narrow scope and analogous to the possessory interdicts: (1) The Novel Disseisin, which is the English counterpart of the Roman Interdict *Unde Vi* and is probably derived from that source immediately through the *actio spolii* of the Canon Law. It has a narrow limit; A complains that X has disseised him—that this very X has ousted this very A from seisin. If that be so then, without any discussion of 'right,' A ought to be put back into seisin—'*salvo jure cujuslibet.*' (2) The Mort d'Ancestor: B has died seised as of fee—not necessarily 'as of right'—he had, or behaved as having, heritable rights, A is his next heir, but, before A could enter, X entered. If this be so, X is to be turned out of seisin and A placed in seisin of that land. As I understand there was a good Roman analogy for this too, the *haereditatis petitio possessoria*, but it is doubtful whether this was known to the lawyers of Henry II.

These possessory assizes are marked off from the pro-

[1] This is the translation given in the Statutes at Large.

prietary action, first by a summary royal procedure, in which essoins are reduced to a minimum, and secondly by their short periods of limitation.

Then come the writs of entry invented in the time of Richard, John, and Henry III. A writ of entry is, as we have seen, a writ of *praecipe* suggesting a recent flaw of a particular kind in the tenant's title. Their object seems to have been to evade feudal jurisdiction, probably on the theory that they are in a certain sense possessory and therefore do not fall to the lords. The demandant relies on a recent seisin, hence these writs are confined within 'the degrees,' that is to say they are competent only if the tenant is first, second or third faulty possessor[1]. Even this limit is removed by the Statute of Marlborough after which a writ of entry can be used if it can be said that the tenant came to the land after some faulty or wrongful entry.

It is these writs which make the history of our forms of action so very complex and unintelligible. Are they proprietary, are they possessory? The answer seems to be that in their working they are proprietary, in their origin possessory or quasi-possessory, since the justification for litigation in the king's court lies in the notion that the demandant has recent seisin on his side.

The result of this, as to substantive law, is that we seem to get a *tertium quid* between property and possession, between *jus* and *seisina*. To this I shall recur[2].

In what I have just said I have been compelled to contradict Blackstone. He treats the writs of entry as older than the assizes. 'In the times of our Saxon ancestors, the right of possession seems only to have been recoverable by writ of entry[3].' 'Thus Henry II probably in the twenty-second year

[1] Here Professor Maitland has in mind the writs of entry *sur disseisin* or on intrusion; in other instances, 'the degrees' stretched only to the second faulty possessor, *e.g.* where the tenant C is alleged to have entered *per* B *cui* A the husband (*cui invita*) or the idiot (*dum non compos*) or the doweress or life tenant (*ad communem legem etc.*). In these cases A cannot be said to be a faulty possessor, in that of the idiot or infant he may even be the demandant himself—it would perhaps be more accurate in the text to say 'if the tenant is first, second or third from the creator of the flaw in the title.'

[2] *Post*, p. 340.

[3] *Comm.* III. 184.

of his reign gave the assizes of novel disseisin and mort d'ancestor.' In this last statement there is I think a small mistake. Blackstone refers these two assizes to the Council held at Northampton in 1176. Now it is very possible that the Mort d'Ancestor was created on that occasion, and that we have the words which created it in an instruction to the itinerant justices, some words of which Bracton cites in a note and the whole of which will be found in the Select Charters. But the Novel Disseisin seems about ten years older—we have not got the text of the ordinance which created it, but on the Pipe Roll for 12 Henry II we begin to have entries of fines inflicted *pro disseisina super assisam Regis*. There can I think be little doubt that the ordinance was made at the Council of Clarendon in 1166. But this mistake is small compared with that of supposing that the writs of entry are older than the assizes, and I need hardly say that it is nonsense to suppose that our Saxon ancestors knew anything about writs of entry. As to their date, we must start with the fact that Glanvill gives no writ of entry, though (x. 9) he has got just one writ which might easily be converted into a writ of entry *ad terminum qui praeteriit*. The Registers of the early years of Henry III give two such writs, the writ of entry *ad terminum qui praeteriit* and the writ *cui in vita*, and on a Patent Roll of 1205, there is a writ of entry *sur disseisin*, a writ for the disseisee against the heir of the disseisor, followed by a writ which directs that this henceforward shall be a writ of course (Rot. Pat. i. 32), before the middle of the century we find almost all the writs of entry in use, except those which were afterwards given by statute. The truth is that the writs of entry presuppose the assizes. Suppose that X has disseised A and that X is still in seisin, there is no writ of entry applicable to this simple case, because it is a case for an Assize of Novel Disseisin. If X dies and his heir Y enters then there is a writ of entry for A against Y, because there can not be an assize, for an Assize of Novel Disseisin can only be brought against a disseisor. It is true that very late in the day we do find a writ of entry covering the ground of the Assize of Novel Disseisin, 'the writ of entry in the nature of an assize'; but I do not believe that this writ appears until very

late times, until Richard II's reign, when the procedure by way of assize had become more clumsy than the procedure by writ of entry—more clumsy because more antiquated. I have been compelled to insist on this point, because Blackstone's theory turns the whole history of seisin upside down.

Meanwhile a number of other gaps are being filled up with new writs. For instance, the Assize of Mort d'Ancestor, as we have seen[1], lies only when the claimant can assert that the person who has just died in seisin, and whose heir he is, was his father, mother, sister, brother, uncle, aunt. It had been sufficient to provide for the common cases; if the dead person was the claimant's grandfather or cousin the assize could not be used. This gap was filled up in 1237 by the actions of Aiel, Besaiel and Cosinage, though the lords resisted these new inventions. So again the group of writs relating to advowsons has received additions, and there is another group relating to wardships and marriages. Here again we see the line between proprietary and possessory actions; besides the proprietary writ of right of ward there is the possessory action of ejectment of ward.

There are also writs for settling disputes between lord and tenant—writs relating to easements, writs relating to rights of common. Very frequently there is one writ which is deemed possessory and one which is deemed proprietary or droiturel—thus there is an assize of nuisance and a writ *quod permittat prosternere* for the abatement of nuisances which can not be brought within the terms of the assize. The group of actions relating to land and to the so-called incorporeal hereditaments is a very large one—but the forms which hereafter will deserve attention are the possessory assizes, the writs of entry, and the writ of right. They form a sort of hierarchy of actions—the writs of entry seem to bridge the gulf between possession and property, between seisin and right. This, as we shall hereafter see, is a very remarkable feature of English Law.

An illustration of the important results of the invention of new writs may be found in the remedies granted to termors.

[1] *Ante*, p. 325.

Slowly a practice has arisen of letting land for terms of years. At first the termor's right is regarded as a merely contractual right—his only remedy is an action of covenant against his lessor—indeed in the first half of the thirteenth century we seldom find the action of covenant used for any other purpose. If ejected by his lessor, the termor can recover the land by action of covenant; if disturbed or ejected by anyone else his one remedy is to obtain by the same action damages from the lessor who has contracted that he shall enjoy the land during the term. He is not regarded as having any right in the land, or any seisin, *i.e.* possession, of the land, he has only, as we should say, *jus in personam*. But about 1237, as it would seem, a new writ was given him, the *quare ejecit infra terminum* which would enable him to recover the land from any person who ejected him, at least if that person claimed under the lessor. Bracton thought that it would enable him to recover against any ejector; but the form which came into use supposed that the defendant was a purchaser from the lessor, and it seems to have been held that it could not be brought against a mere stranger to the title. We are even told who invented this writ; it was William Raleigh, the chief justice. There is no legislation, no intention to give a new right, merely a new remedy; but as you see the character of the old right is being changed, it is ceasing to be a merely contractual *jus in personam*. In a few years we have Bracton discussing the problem whether the termor is not seised of the land. Undoubtedly his lessor is seised, and if the termor be ejected by a third person the lord can recover the land from that third person as from one who has disseised him;—but the termor also is getting protection—what are we to say, can two persons at one and the same time be seised or possessed of the same acre in two different rights? Bracton hesitates—Roman law points one way, English practice another. In course of time in the fifteenth century, there will be a differentiation of terms, the termor will be possessed, the freeholder will at the same time be seised. Our law thus has on its hands the very difficult task of working two different sets of possessory remedies—the ancient set which protect seisin, the more modern set which protect possession. Then 'seised' will

come to imply the right to use the assizes competent to the freeholder, 'possessed' will imply the right to use the writ of trespass.

Meanwhile the actions which came to be known as personal make their appearance. The oldest seems to be 'Debt-Detinue,' which appears already in Glanvill I say 'Debt-Detinue'—originally men see little distinction between the demand for a specific chattel and the demand for a certain sum of money. Gradually this action divides itself into two, Detinue for a specific chattel, Debt for a sum of money—this differentiation takes place early in the thirteenth century. As in Detinue the judgment given for the plaintiff awards him either the chattel itself, or its value; and, as the defendant thus has the option of giving back the chattel or paying its value, Bracton is led to make the important remark that there is no real action for chattels—an important remark, for it is the foundation of all our talk about real and personal property. To Debt and Detinue we must now add Replevin, the action for goods unlawfully taken in distress. This action we are told was invented in John's reign—another tradition ascribed its invention to Glanvill. Covenant also has appeared, though during the first half of the thirteenth century it is seldom used except in cases of what we should call leases of land for terms of years. Gradually the judges came to the opinion that the only acceptable evidence of a covenant is a sealed writing, and one of the foundations of our law of contract is thus laid. Account appears in Henry III's reign; but it is very rare and seems only used against bailiffs of manors.

But the most important phenomenon is the appearance of Trespass—that fertile mother of actions. Instances of what we can not but call actions of trespass are found even in John's reign, but I think it clear that the writ of trespass did not become a writ of course until very late in Henry III's reign. Now trespass is to start with a semi-criminal action. It has its roots in criminal law, and criminal procedure. The historical importance of trespass is so great that we may step aside to look at the criminal procedure out of which it grew. The old criminal action (yes, action) was the Appeal of Felony (*appellum de felonia*). It was but

slowly supplanted by indictment—the procedure of the common accuser set going by Henry II, the appeal on the other hand being an action brought by a person aggrieved by the crime. The appellant had to pronounce certain accusing words[1]. In each case he must say of the appellee '*fecit hoc* (the murder, rape, robbery or mayhem) *nequiter et in felonia, vi et armis et contra pacem Domini Regis.*'

He charges him with a wicked deed of violence to be punished by death, or in the twelfth century by mutilation. The procedure is stringent with outlawry in default of appearance. The new phenomenon appears about the year 1250, it is an action which might be called an attenuated appeal based on an act of violence. The defendant is charged with a breach of the king's peace, though with one that does not amount to felony. Remember that throughout the Middle Ages there is no such word as misdemeanour—the crimes which do not amount to felony are trespasses (Lat. *transgressiones*). The action of trespass is founded on a breach of the king's peace:—with force and arms the defendant has assaulted and beaten the plaintiff, broken the plaintiff's close, or carried off the plaintiff's goods; he is sued for damages. The plaintiff seeks not violence but compensation, but the unsuccessful defendant will also be punished and pretty severely. In other actions the unsuccessful party has to pay an amercement for making an unjust, or resisting a just claim; the defendant found guilty of trespass is fined and imprisoned. What is more, the action for trespass shows its semi-criminal nature in the process that can be used against a defendant who will not appear—if he will not appear, his body can be seized and imprisoned; if he can not be found, he may be outlawed. We thus can see that the action of trespass is one that will become very popular with plaintiffs because of the stringent process against defendants. I very much doubt whether in Henry III's day the action could as

[1] See *e.g.* Bracton, f. 138*a*, for the accusation by a brother in an appeal of murder (reciting that the appellor and his brother, the murdered man, were in the peace of God and of our Lord the King at such a place and on such a day) where the words '*vi et armis*' do not appear but are replaced by setting out the detail of the assault and the mortal wounding with a sword.

yet be used save where there really had been what we might fairly call violence and breach of the peace; but gradually the convenience of this new action showed itself. In order to constitute a case for 'Trespass *vi et armis*,' it was to the last necessary that there should be some wrongful application of physical force to the defendant's lands or goods or person—but a wrongful step on his land, a wrongful touch to his person or chattels was held to be force enough and an adequate breach of the king's peace. This action then has the future before it.

Meanwhile trial by jury is becoming the normal mode of trying disputed questions of fact. The older modes of trial are falling into the background. In Debt and Detinue and some other cases there still is compurgation. The obsolescence of this ancient mode of proof, however, is a gradual process. It can not be explained by rationalistic statements such as that in Debt and Detinue the cause of action is one peculiarly within the knowledge of the defendant. We must look rather to the historical order of development of the various actions. Debt and Detinue are formulated at an early period, Trespass is the product of a later age. But the permissibility of this old mode of proof in Debt and Detinue is of great importance—it sets men on attempting to substitute for them, even within their own sphere, forms of action in which there will be trial by jury. And so with the forms of trial appropriate to the assizes. Though in a large sense this may be called a sub-form of trial by jury, still it is an archaic sub-form and men try to evade it; they would gladly, if they could, use actions of trespass instead of the novel disseisin, and the mort d'ancestor. In these old assizes the question for the recognitors was formulated in the original writ; in the newer forms the procedure was more flexible—a jury was only called in after the parties to the action had by their pleadings come to some issue of fact—it was not called in until pleading had decided what exactly was the real point of dispute.

IV. 1272–1307. The reign of 'the English Justinian' may be treated as a period by itself—a period of statutory activity. Statutes made by king and parliament now interfere with many details both of substantive law and of procedure.

A number of new actions are given by statute, *e.g.* the De Donis gives the issue in tail the 'formedon in the descender'; this is a well-known and typical example The whole system stiffens. Men have learnt that a power to invent new remedies is a power to create new rights and duties, and it is no longer to be suffered that the chancellor or the judges should wield this power. How far the process of crystallisation had gone, how rigid the system was becoming, we learn from a section of the Statute of Westminster II, 13 Edw. I c. 24 (1285). Men have been obliged to depart from the Chancery without getting writs, because there are none which will exactly fit their cases, although these cases fall within admitted principles. It is not to be so for the future—'Et quotienscumque de cetero evenerit in Cancellaria quod in uno casu reperitur breve et in consimili casu cadente sub eodem jure et simili indigente remedio, concordent clerici de Cancellaria in brevi faciendo vel atterminent querentes in proximo parliamento et scribant casus in quibus concordare non possunt et referant eos ad proximum parliamentum et de consensu jurisperitorum fiat breve ne contingat de cetero quod curia diu deficiat querentibus in justicia perquirenda.' 'And whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks of the Chancery shall agree in making the writ; or adjourn the plaintiffs until the next Parliament, and let the cases be written in which they can not agree, and let them refer them until the next Parliament, and by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants.' In after times we hear complaints that the Chancery made but little use of the permission thus given to it; but for my own part I doubt whether it enjoyed or was intended to enjoy any very considerable liberty. It may vary the old writs—but it is not to invent new rights or new remedies—*in consimili casu cadente sub eodem jure et simili indigente remedio.* But when we say that but little use was made of this Statute there is one great exception. It is regarded as the statutory warrant for the variation of the writs of trespass so as to suit special

cases, until at length—about the end of the Middle Ages—lawyers perceive that they have a new form 'Trespass upon the special case' or 'Case.' Specialised forms of this branch off forming (1) Assumpsit, so important in the law of Contract, (2) Trover, (3) Deceit, (4) Action upon the Case for words—slander and libel. It is worth noting that a writ issued by the Chancery is not necessarily a good writ. The justices may quash it as contrary to law, and in the later Middle Ages the judges are conservative; they hold the writ bad not merely if it does not suit the case but if it contravenes what they deem legal principle. At any rate the tale of common law (*i.e.* non-statutory) actions was now regarded as complete[1]. The king's courts had come to be regarded as omnicompetent courts, they had to do all the important civil justice of the realm and to do it with the limited supply of forms of action which had been gradually accumulated in the days when feudal justice and ecclesiastical justice were serious competitors with royal justice.

[1] *Notandum.* Registrum Brevium—printed by Rastell 1531, Medieval Register MS. (there are many in the University Library). The earliest seen by me is a Register sent by Henry to Ireland—it contains about 50 writs. There is an early Register of Henry III in the University Library (ii. 6. 13). This book has grown to perhaps 50 times its bulk when printed under Hen. VIII; there is the work of four centuries in it. There are Commentaries; the Old Natura Brevium and Fitzherbert's Natura Brevium published 1534 (Fitz. ob. 1538). His work which Coke called 'an exact work exquisitely penned' ran through many editions. The theme of the expounder is not the nature of rights but the nature of writs.

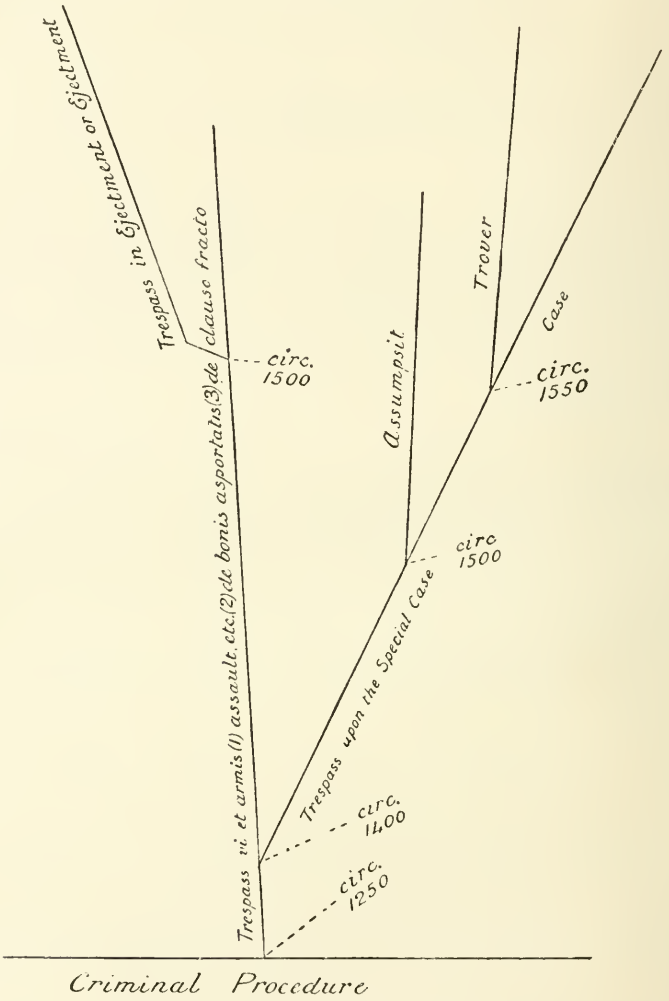
LECTURE V

V. 1307–1833. A period lasting from 1307 to 1833 is enormously long, still I do not know that for our present purpose it could be well broken up into sub-periods. Our interest must be chiefly concentrated on the action of trespass. We may perhaps draw a map of the ground. Here is a sketch (see next page).

I have tried to assign dates in a rough way to the various developments of trespass; but you should understand that this, from the nature of the case, must be a somewhat arbitrary proceeding. So continuous is legal history that the lawyers do not see that there has been a new departure until this has for some time past been an accomplished fact; their technical terminology will but slowly admit the fact that a single form of action has become several forms of action.

From Edward I's day onwards trespass *vi et armis* is a common action. We may notice three main varieties—unlawful force has been used against the body, the goods, the land of the plaintiff; so we have trespass in assault and battery, trespass *de bonis asportatis*, trespass *quare clausum fregit*. These are the main varieties, but the writ can be varied to meet other cases and sometimes states the facts of the particular case pretty fully, *e.g.* the defendant has not only assaulted the plaintiff, but has imprisoned him and kept him in prison so many days, or again, the defendant's dog has bitten the plaintiff's sheep. But for a while it seems essential that there should be some unlawful force, however slight, something that can by a stretch of language be called a breach of the peace. Now, among other things that the writ of trespass can do is that it can protect possession of land.

If B trespasses on the land which A possesses, A can recover damages from B by a writ of trespass *quare vi et armis*—B has broken A's close and the king's peace. A can recover damages,



but if B proceeds to eject A, though A may recover damages he can not recover possession of the land by this writ. If A wants to recover possession he must bring an assize or a writ

of entry, or a writ of right. Now the possession which is thus protected by the *quare vi et armis* is something different from the seisin which is protected by the assizes. The action of trespass grows up in an age in which the letting of land for terms of years has become a common practice—and if land be so let to a farmer and a stranger trespass, it is the termor, not the freeholder, who will be able to complain that the stranger has entered and broken his close. Indeed, after some little hesitation, it is admitted that if the lessor without justification enters the land demised to the termor, the termor will be able to bring a writ of trespass against him, albeit the lessor has only entered on land of which he himself is seised. Thus we are coming to have two protected possessions, the old possession or seisin protected by the assizes, the new possession protected by the writ of trespass. The two terms become specified. We may, I think, fix upon the middle of the fifteenth century as the time of the specification. Littleton, who wrote between 1474 and 1481, in section 324 says in effect that a termor is not seised but is possessed. But in section 567 he himself slips into speaking of the termor as seised.

So again, the holder in villeinage now gets protection. The assizes did not protect him; they did not protect him against mere strangers, much less against his lord. The assize of novel disseisin required that the plaintiff should be disseised *de libero tenemento suo*. To have extended the royal protection to holders in villeinage would have been too bold a measure even for Henry II. The view of the king's court was that the lord of the manor was seised of the villein tenements. If a stranger ejects one of the villein tenants it is the lord, not the tenant who is disseised. The tenant's remedy was an action in the lord's court, and so long as the manorial courts were efficient tribunals the tenant in villeinage, even though personally a villein, was, I think, very fairly and efficiently protected against all but his lord. Times had changed when the action of trespass became common at the end of the thirteenth century. The new action was based on violence and breach of the peace. The mere tenant at will was allowed that action, was allowed to call the land *clausum suum*. Putting the rights of the tenant in villeinage at their

lowest, he was still a tenant at will, and as such should have the action of trespass against all but the lord. Then in the middle of the fifteenth century we begin to hear hints that he may bring trespass even against his lord. In 1457 we hear such a hint; and in 1467 and 1481 it is definitely said that the copyholder—that is the new name for the tenant in villeinage, shall have an action against the lord if ejected contrary to the custom of the manor. This, of course, is an enormously important step.

Thus there are many persons protected in possession by the writ of trespass who are not seised. But the protection thus given is only that of an action for damages—one can not recover possession by means of such an action. However, just at the end of the Middle Ages there comes a change. The special form of a writ of trespass applicable to the case of an ejected lessee is known as a writ *de ejectione firmae*, it calls on the defendant to answer 'quare vi et armis intravit [unum mesuagium] quod M demisit praedicto A ad terminum qui nondum praeteriit et ipsum A ejecit de praedicta firma sua . . . contra pacem nostram.' It is just a writ of trespass *vi et armis*. Now, at the very end of the fourteenth century it seems perfectly settled that this writ will only give damages and will not restore the plaintiff to the land (Pasch. 6 Ric. II, Fitz. Abr. *Ejectione firmae*, pl. 2). On the other hand, about the middle of the fifteenth century, lawyers certainly speak as though possession might be recovered by this writ (Pasch. 7 Edw. IV (1467), f. 6, pl. 16; Mich. 21 Edw. IV (1481), f. 11, pl. 2). A judgment of 14 Hen. VII, in error, however, seems to have been necessary to decide the point finally (Fitz. N. B. 220, 1491–2). Thus it became settled that judgment might be given that the plaintiff do recover his term, and a writ might go to the sheriff bidding him put the plaintiff in possession—*habere facias possessionem*. This step may have been easier because there was an older writ—*quare ejecit infra terminum*—whereby a termor might recover possession from persons claiming under the lessor.

To sum up for a moment. Early in the reign of Henry III the termor's remedy was an action of covenant[1].

[1] Bracton, f. 220, and Cambridge Register, *circ.* 1237.

Raleigh invented the writ of *quare ejecit infra terminum*. Bracton thought it would enable the termor to recover *contra quoscunque dejectores*[1]. However (and this is a good instance of inflexibility) the writ actually settled supposed the ejector to have bought from the lessor. It was then held that the writ only lies against those claiming under the lessor.

Then Trespass comes into use—and one specialised form of trespass *quare vi et armis*, is trespass *de ejectione firmae*—this lies against all, but only for damages.

[Fitzherbert (N. B. 198 A) begins a confusion which has misled later writers. He supposes *ejectione firmae* to be older than *quare ejecit infra terminum*—which is not true. He also supposes trespass primeval—this certainly is not true.]

The action of trespass *de ejectione firmae* becomes the Action of Ejectment, and the common means of recovering possession of land, no matter the kind of title that the claimant asserts. What makes this action of ejectment so interesting is the process whereby the freeholder acquires the termor's remedy. Why did he want it? The reasons are twofold, first the dilatoriness of the old proprietary or droiturel action with their essoins, vouchers, and possible trial by battle or the grand assize, and secondly the rudeness of the old possessory actions, each with its narrow formula (a process which confines the jurors to the answering of questions of pure fact, a process carried out under cover of a highly technical system of pleading which sets many traps for the litigant. But this step is only made under cover of an elaborate fiction. It may occur to you to ask why so elaborate a fiction is necessary. Has not the principle been conceded that possession may be recovered in an action for trespass? A claims land against X, why should he be compelled to say that he, A, demised the land to John Doe, who was ejected, and bring the action in John Doe's name—why should it not be enough, in an action of trespass, to say that A himself was ejected? The answer to that is I think this—if you are a freeholder claiming land you should bring a writ of entry, or a writ of right. If you, being freeholder, have been ejected, that is a disseisin, you should bring the assize of novel dis-

[1] Bracton, f. 220.

seisin. The law has provided you with abundant remedies, both proprietary and possessory, you must use them. If to us it seems that such an answer as this is unsatisfactory we should try to look at the matter from X's point of view. Has he not, so to speak, a vested interest in the maintenance of the old procedure. You are proposing to use against him an action in which he may be imprisoned and outlawed, while, supposing that he is in the wrong, the law has provided other forms of action which do not permit this procedure against his person. Arguments of this kind have had a considerable influence on the course of our legal history, and have produced very odd results—a newer, and perhaps less common right, is sanctioned by a modern and comparatively rapid action, while older, and perhaps commoner, rights are protected only by old and clumsy remedies.

However, in the present case, as is well known, a dodge was discovered by which the action of ejectment (*ejectione firmae*) could be made generally available as a means of enabling any claimant to recover possession of land. Blackstone has described this dodge fully and well[1]. You are in possession of land of which I say that I am the true owner, the tenant in fee simple. If this is correct I have as a general rule a right to enter. Mark, 'as a general rule'; for there are exceptions—the cases where the entry is 'tolled' of which hereafter[2]. I do in fact enter and then and there make a lease for years to a third person, John Doe. John Doe stays on the land until ousted by you, and then brings the action, trespass in ejectment or, briefly, ejectment. To succeed in his action he must prove (1) my *right to enter*, (2) the *lease*, (3) his *entry* under the lease and (4) his *ouster* by you. When all this is proved he recovers his term with damages. Upon this form there is a variation. I put John Doe as tenant upon the land and he is ousted not by you but by a fourth person, William Stiles. Doe then has the action of ejectment against Stiles, but there is a rule that no plaintiff shall proceed in ejectment without notice being given to the person actually in possession and an opportunity being given him to appear as a defendant if he pleases. Where Doe sues Stiles, Stiles informs you of

[1] *Comm.* III. 201. [2] *Post*, p. 354.

the action and you, if you do not want to see the land adjudged to Doe, defend the action in Stiles's stead. In the end my title as against you is put in issue in the action.

Then the Court in effect says 'Here is an action in which any title can be tried. Why not abbreviate the process by supposing that things have been done which in fact have not been done?' The ultimate outcome is that, bringing my action in the name of Doe (for on the record I am merely the 'lessor of the plaintiff'), I tell of (1) a lease to Doe, (2) an entry and (3) an ouster by Stiles, the 'casual ejector.' I then send you a notice purporting to be signed by 'your loving friend, William Stiles' to the effect that he claims no interest but advises you to defend; and the Court will only allow you to defend in place of Stiles the action that I bring in the name of Doe if you will agree to confess at the trial the *lease*, *entry* and *ouster* and leave the trial to go upon the merits of the title only.

The development of this action is a long story and about such a matter it is hard to fix any dates—one can not tell the exact moment at which a proceeding becomes fictitious—but I believe we may say that during the Tudor reigns the action of ejectment became the regular mode of recovering the possession of land. A few improvements remained to be invented under the Stuarts, and the perfection of the action is attributed to the Lord Chief Justice Rolle of the Upper Bench during the Commonwealth; but already in the day of James I Coke expressed his deep regret that the assizes and real actions were going out of use. That is in the Preface to 8 Rep., in which book Coke reports two assizes of Novel Disseisin, one writ of dower and a formedon in the remainder. Blackstone still says that 'the plaintiff ought to be some real person, and not merely an ideal fictitious one who hath no existence, as is frequently though unwarrantably practised[1].'

It is worth while to notice the form taken by the title of the action. The action which would to-day be known as *Atkyns* v. *Horde* was entitled *Doe on the demise of Atkyns* v. *Horde* or, briefly, *Doe dem. Atkyns* v. *Horde*, Atkyns appearing as the 'lessor of the plaintiff.'

[1] *Comm.* III. 203.

The real actions never went quite out of use until they were abolished by statute in 1833 and a few were brought in the nineteenth century. There were to the last certain cases —possible rather than probable—in which a man was entitled to the possession of land but could not bring an action of ejectment for it. The basis of the action of ejectment was the right of the 'lessor of the plaintiff' to enter upon the land. The action presupposes that the plaintiff has not merely a better right than the defendant but a right to enter on the defendant and it was possible that a man had the former and not the latter.

To understand these exceptional cases we must go back to the strict possessory protection of seisin to the days when, at all costs, force was forbidden. An ejector must be re-ejected at once or never, in Bracton's time, *infra quatuor dies*. The Roman owner turned out by armed force may only repossess himself by armed force there and then—*non ex intervallo sed ex continenti*—otherwise he must have recourse to the *interdict unde vi*[1]. In the later middle ages however this strict possessory protection was gradually relaxed in favour of a doctrine that the man with the better right (the true owner) generally has a right to enter. The older rule becomes a string of exceptions to the newer rule. Certain events are said to 'toll' (*i.e.* to take away) the entry of the true owner—to leave him with a right only to bring an action, a writ of entry. The story is a very difficult one to explain here and one which is hardly for beginners. For example it may however be said that (1) a descent cast to an heir tolls entry and (2) a discontinuance (in particular, a tortious feoffment in fee simple) turns a right of entry into a right of action. So, then, to the end there were some exceptions to what had become the general rule that title to land could be made good in Ejectment.

I have said 'to the end,' that is to say until 1833. As we have seen[2] the action of ejectment, with all its fictions, was spared from the wholesale abolition of real and mixed actions made by the Real Property Limitation Act of 1833, and it was reformed by the Common Law Procedure Act of

[1] Dig. 43, 16, 3, 9. [2] *Ante*, p. 301.

1852[1]. The fictitious procedure was abolished, the real claimant was to sue in his own name, John Doe disappeared. The action thus remodelled was in use until 1875. Since that time we have had in the old sense no forms of action—an action for the recovery of land, an action, *i.e.* to obtain possession of land, can be brought by any person entitled to possession, no matter the nature of his title, be it freehold, leasehold, copyhold.

Let us recall the accepted definition of the words 'real,' 'personal,' and 'mixed' as applied to actions; meaning, that is to say, actions of which the result is the recovery of the thing or of damages or of both, respectively: and let us examine in somewhat greater detail into the personal actions.

We may say that they were nine in number, (1) Replevin, (2) Detinue, (3) Debt, (4) Account, (5) Covenant, (6) Trespass, (7) Case, (8) Trover, and (9) Assumpsit.

Replevin we may quickly put aside, its importance in the middle ages was very great, but it was not capable of much development. It is an action founded upon a wrongful distraint—the distrainee offers security that he will contest the distrainor's rights in court, and thereupon the distrainor is bound to surrender the goods—usually cattle. If he does not do so the sheriff is to raise the *posse comitatus* and retake them. An action beginning thus with a demand for replevin (*i.e.* that the goods be 'repledged' pending action) becomes the normal mode of trying the rightfulness of distraint, and such actions are of very common occurrence in the middle ages.

A procedure for securing the delivery of goods by way of replevin still exists—the registrar of the County Court playing the old part of the sheriff. A few instances of replevin used to recover goods though not taken by way of distress are known. These occur late in the day, and are not important in relation to general theory.

Detinue[2]. This is a very old action. The defendant is charged with an unjust detainer (not, be it noted, an unjust taking)—*injuste detinet*. This action looks very like a real action. The writ originating it bears a close similarity with

[1] 15 and 16 Vic. c. 76, sec. 168 fol.

[2] See also *ante*, p. 342.

the writ of right (*praecipe in capite*), but in the first place the mesne process is not *in rem*, and in the second (and this is very important) the defendant when worsted is always allowed the option of surrendering the goods or paying assessed damages. The reason of this may perhaps be found partly in the perishable character of medieval moveables, and the consequent feeling that the court could not accept the task of restoring them to their owners, and partly in the idea that all things had a 'legal price' which, if the plaintiff gets, is enough for him.

This option leads Bracton to say that there is no real action for chattels, and this sentence is the starting-point of the fashion which teaches us to say that goods and chattels are not 'real' but 'personal' property.

Behind all this probably lies the time when the doctrine is current that *mobilia non habent sequelam*, which doctrine, though never in the mouth of English lawyers, runs through French law down to modern times. If I let my goods go out of my possession with my will and consent I am to have no action against any third hand—a bailee of my bailee, or even a taker from my bailee. When I put my trust in the promise of my bailee I have that promise in exchange for my ownership, as the German proverb has it, 'where one has put his trust there must he seek it again.' But the English law never reached a full conformity with this theory. Modern English law is, on the other hand, highly favourable to owners of chattels. Subject to the ancient exception about sales in market overt, and to modern statutory exceptions (now embodied in the Factors Act, 1889, and the Sale of Goods Act, 1893), ownership is never lost by acts of others than the owner. But this is clearly not the starting-point—of old the property in moveables is not so intense as property in land; and archaic law finds difficulty in giving two rights in the one thing, one to the owner and another to his bailee. At any rate, however this may be, the terminology became fixed—there is no 'real' action for moveables, and therefore chattels are not 'real property.'

Here we must note the great defect of the action for Detinue—a defect which it shares with its sister Debt—

the defendant may wage and make his law, in other words, may resort to the compurgatory oath. Attempts have been made to rationalize and explain this fact. It has been said that debt and detinue were matters more particularly within the knowledge of the parties, and so on, but the simple explanation is that detinue and debt were older than trial by jury[1]. But wager of law was abolished in 1833 by 3 and 4 Will. IV, c. 42, sec. 13.

Debt[2]. An action for a fixed sum of money due for any reason, and own sister to Detinue. Here also we have a *praecipe quod reddat*. *Praecipe quod reddat* (1) *terram*, (2) *catalla*, (3) *pecunia* are the writs of right (for land), of detinue, and of debt respectively.

Its first and chief use was for the recovery of money lent —a sense in which the word 'recovery' is still used. The difference between *commodatum* and *mutuum*—the loan to be returned and the loan to be repaid—was hardly seen. It is hardly seen to-day by the vulgar. 'My money at the bank,' is a phrase in common use. Another use of the action of debt was for the recovery of the price upon a sale, and another the recovery of rent due. There were other *causae debendi*, and gradually the progress towards generalization got to be expressed in the phrase that debt would lie for a fixed sum of money if there were a *quid pro quo* or, later, if there were 'consideration.' Thus Debt, originally conceived as recuperatory, like Detinue, becomes capable of being used for the enforcement of contracts of sorts. One limitation, however, remained—the untranscendible limit—the claim must be for a fixed sum. Debt can not be used to obtain compensation for breach of contract. And further, debt can always be met by wager of law, which becomes more and more absurd. It is never forgotten that the action of debt is not necessarily based on contract—it serves for the recovery of statutory penalties, of forfeitures under bye-laws, of amercements, and of monies adjudged by a court to be due.

Account. The action of Account is another *praecipe*, originally granted against manorial bailiffs. *Praecipe quod*

[1] They appear in very early registers.

[2] See also *ante*, pp. 332 and 342.

reddat compotum. Auditors were appointed to supervise the account. At a later stage it was extended to some other classes, thus it could be used between partners, but partnership is uncommon and unimportant in the England of the middle ages. A few modern instances of its use are recorded, but the common law action of account remains at a low level of development because of the fact that it was in practice superseded by the equitable jurisdiction of the Chancellor, who in the Bill for account had a more modern remedy operating under a more favourable and convenient procedure.

Covenant. This action is also an old one. Its writ directs *quod conventio teneatur.* The earliest use of the action is for the protection of the termor; at one time it is the lessee's only remedy. It early sends off a branch which is reckoned a real action because land is recovered[1], in other cases the action results in money being obtained. It appears for a time as if covenant might be of general use wherever there is an agreement (*conventio*), might become, in fact, a general action for breach of contract; but the practice of the thirteenth century decides that there must be a sealed writing. A sacramental importance was attached to the use of the seal—*collatio sigilli*—and it was finally adopted as the only acceptable evidence of a covenant. Thus we come to the English formal contract, the Covenant under Seal. One curious limitation appears, and is maintained until the seventeenth century; Covenant can not be brought for the recovery of a debt, though attested under seal. This action remains useful but in its own narrow sphere.

[1] This action of Covenant Real was abolished in 1833. See *post*, p. 371.

LECTURE VI.

Trespass[1]. All the other personal actions branch out from one, namely Trespass. *Trespass* appears *circ.* 1250 as a means of charging a defendant with violence but no felony. The writ, as we have seen, contains the words *vi et armis contra pacem*, the procedure is enforced by a threat of outlawry, imprisonment is resorted to by way of mesne process, and the vanquished defendant is punished for his offence. He is not merely *in misericordia*, he is liable to a *capias pro fine*. There is a trifurcation, the writ varying according as the violence is done (1) to land, (2) to the body, or (3) to chattels. Speaking of trespass to land let us once more remember how trespass *quare clausum fregit* sends out the action for ejectment as a branch.

Trespass to the body (assaults and batteries) covered the whole ground of personal injury, and no great development was possible here. Trespass to goods, trespass *de bonis asportatis* is an action which results in damages, never return of the goods, for carrying goods off from the plaintiff's possession—and therefore the bailee can bring it[2].

I have already said that the writ-making power wielded by the king and his Chancellor was gradually curbed by our parliamentary constitution, and in Edward I's day it has become necessary to tell the Chancery that it is not to be too pedantic, but may make variations in the old formulas when a new case falls under an old rule. Some use was made of this liberty, but slowly and cautiously; it had not been intended that the Chancellor should legislate. Thus we find one

[1] See also *ante*, pp. 342 to 344 and 347 to 355.

[2] On this subject see Holmes, *The Common Law*, *sub tit.* Possession and Bailment.

new writ of entry devised which is distinctly ascribed to the freedom of action left to the Chancery by the Statute of Westminster II, c. 24—it is the writ of entry *in consimili casu*[1]. But the most important use made of this liberty consisted in some extensions of the action of trespass. Gradually during Edward III's reign we find a few writs occurring which in form are extremely like writs of trespass—and they are actually called writs of trespass—but the wrong complained of does not always consist of a direct application of unlawful physical force to the body, lands, or goods of the plaintiff; sometimes the words *vi et armis* do not appear. Sometimes there is no mention of the king's peace. Still they are spoken of as writs of trespass, they appear in the Chancery Register as writs of trespass, mixed up with the writs which charge the defendant with violent assaults and asportations. The plaintiff is said to bring an action upon his case, or upon the special case, and gradually it becomes apparent that really a new and a very elastic form of action has thus been created. I think that lawyers were becoming conscious of this about the end of the fourteenth century. Certain procedural differences have made their appearance—when there is *vi et armis* in the writ, then the defendant if he will not appear may be taken by *capias ad respondendum* or may be outlawed—this can not be if there is no talk of force and arms or the king's peace. Thus Case falls apart from Trespass—during the fifteenth century the line between them becomes always better marked. In 1503 (19 Hen. VII, c. 9) a statute takes note of the distinction; the process of *capias* is given in 'actions upon the case.' Under Henry VIII Fitzherbert in his *Abridgment* and his *Natura Brevium* treats of the 'Action sur la Case' as something different from the action of trespass—each has its precedents. The title of Case covers very miscellaneous wrongs—specially

[1] The writ of entry called *ad communem legem* lay where the flaw in the tenant's title originated in an alienation by a doweress or by a tenant by the curtesy, or for life or in tail, in excess of her or his powers (*e.g.* in fee) and lay only where the doweress etc. was dead. The Statute of Gloucester c. 7 gave the remainderman an action by writ of entry, called *in casu proviso*, during the life of the alienor but only in case of alienation by a doweress. After the Statute of Westminster II the writ of entry *in consimili casu* was given during the life of the alienor to the remainderman in the other cases. F.N.B. 205, 206, 207.

we may notice slander and libel (for which, however, there are but few precedents during the middle ages, since bad words are dealt with by the local courts, and defamation by the ecclesiastical courts), also damage caused by negligence, also deceit.

Case becomes a sort of general residuary action; much, particularly, of the modern law of negligence developed within it. Sometimes it is difficult to mark off case from trespass. The importance of the somewhat shadowy line between them was originally due to the fact that where *vis* and *arma* were not alleged there was no imprisonment in mesne process, nor was the defeated defendant liable to the judgment *quod capiatur pro fine.*

The judgment *quod capiatur pro fine* was abolished, formally, in 1694 (5 and 6 W. and M. c. 12), but had long before this been a mere form. The act recited that 'whereas in actions of trespass, ejectment, assault, and false imprisonment upon judgment entered against the defendant the courts do (*ex officio*) issue out process against such defendant for a fine to the Crown, for a breach of the peace thereby committed, which is not ascertained, but is usually compounded for a small sum by some officer of the court, but never estreated into the Exchequer, which officers do very often outlaw the defendants for the same to their very great damage,' and the act proceeded to prohibit the issue of the writ of *capias pro fine* and to substitute a fixed payment of six shillings and eightpence to be paid in the first place by the plaintiff on signing judgment but to be recovered by him as costs from the defendant.

Greater uniformity was introduced, partly by statute and partly by fiction, but still the distinction had to be observed. The plaintiff must sue either in case or in trespass, and upon the accuracy of his claim depended the success of his action. The well-known case of *Scott* v. *Shepherd* (2 W. Bl. 892 and 1 Sm. L.C.) turns upon this distinction, and is worth reading as illustrating the narrowness of the margin between the two. Even as late as 1890 parties in a case of wounding by a glancing shot fired from the defendant's gun are still arguing as to the appropriateness of trespass or case, the plaintiff

contending, though without success, that in trespass negligence is immaterial and the defendant is liable for inevitable accident[1]. In 1875 Lord Bramwell (then Bramwell B.), in the case of *Holmes* v. *Mather*[2], had explained the distinction thus: 'If the act that does the injury is an act of direct force, *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons no action is maintainable, though trespass would be the proper form of action if it were wrongful.'

Sub-forms of Case become marked off, *e.g.* Case for negligence, for deceit, for words (slander and libel); but two great branches were thrown out which gain an independent life, and are generally important, *viz.* Assumpsit and Trover.

Assumpsit. The most curious offshoot of Case is Assumpsit and the great interest of this action lies in the fact that it becomes the general form by which contracts not under seal can be enforced by way of action for damages. Under the old law the contracts are formal, or 'real,' the form required being the instrument under seal, the bond or covenant, and the 'real' contracts—the word 'real' being used in the sense of general jurisprudence—are protected by Debt-Detinue without it being seen that contract is the basis. Gradually however within the delictual action of Case various precedents collect in which the allegation is made that the defendant had undertaken to do something and then hurt the plaintiff either in his person or in his goods by doing it badly—by misfeasance.

Further an important element in this progress is the idea of breach of contract as being deceit—the plaintiff suffers detriment by relying on the promise of the defendant. This point is brought out by Ames in the *Harvard Law Review*[3] in two masterly articles which should be read at length.

The having undertaken (*assumpsit*) to do something, makes its appearance as part of the cause of action in

[1] *Stanley* v. *Powell*, 1891, 1 Q. B. 86.
[2] L.R. 10 Ex. 261.
[3] 2 *H. L. R.*, pp. 1 and 53.

various writs upon the case. Thus we find an early group of cases, from Edward III's reign, in which the plaintiff seeks to recover compensation for some damage done to his person or goods by the active misconduct of the defendant, but still the defendant can not be charged with a breach of the peace, as the plaintiff has put his person or his goods into the defendant's care. The defendant, for example, is a surgeon, and has unskilfully treated the plaintiff or his animals so that he or they have suffered some physical harm. In such cases we find an assumpsit alleged. It is necessary to allege that the defendant undertook the cure—had it not been so, according to the notions of the time, it might well have been urged that the harm was occasioned by the plaintiff's own folly in going to an inexpert doctor. A little later, in the fifteenth century, we have actions against bailees for negligence in the custody of goods intrusted to them, and here also it was necessary to allege an assumpsit. Again, there is another class of cases in which an undertaking is alleged—a seller has sold goods warranting them sound, and they have turned out unsound; the cause of action is regarded not as breach of contract, but as deceit. Thus in divers directions the law was finding materials for a generalisation, namely, that breach of an undertaking, an assumpsit, for which there was valuable consideration was a cause of action.

Gradually the line between mis-feasance and non-feasance was transcended, and gradually lawyers awoke to the fact that by extending an action of tort they had in effect created a new action by which parol contracts could be enforced. It is, I think, about the beginning of the sixteenth century that they begin to regard Assumpsit as a different form from Case, a form with precedents of its own and rules of its own. Then begins a new struggle to make Assumpsit do the work of Debt. Plaintiffs wish for this result because they desire to avoid that wager of law which is allowed in Debt, and defendants may fairly argue that according to the law of the land they are entitled to this ancient mode of proof. Professor Ames's article gives the stages of this struggle. Through the sixteenth century, an actual express agreement alone gives rise to Assumpsit, and therefore if Assumpsit is to be used to enforce

a debt, for example for the price of goods sold and delivered, a new promise—a promise to pay that debt—must be alleged and proved. However, in 1602, *Slade's case* (4 Rep. 92 b) decides that Assumpsit may be brought where Debt would lie, and thenceforth Assumpsit supplants Debt as a means for recovering liquidated sums. In that case such a new promise had been alleged and the jury by a special verdict had found the bargain and sale to be proved but that 'there was no promise or taking upon him, besides the bargain aforesaid[1].' Upon this finding the case was argued in the King's Bench and the action in Assumpsit was held to lie, the Court resolving that 'Every contract executory imports in itself an *assumpsit*, for when one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it[2].' Thenceforth the proof of the new promise becomes unnecessary. This form of Assumpsit takes the name of Indebitatus Assumpsit.

Some seven years later we have this action extended from cases of express executory contract to cases where the original bargain was an implied contract, in the sense that a contract is really to be implied from the facts of the case, for example, cases of actions for *Quantum meruit*.

Lastly, at some date between 1673 and 1705, Indebitatus Assumpsit is extended to actions upon Quasi-Contracts in which the element of contract is purely fictitious.

As we have already seen, this action of Assumpsit, which at least seems to us as of delictual origin, becomes the general mode of enforcing contracts even when a sum certain has to be recovered, and thus Assumpsit becomes a rival to and a substitute for Debt in which latter action the defendant may still wage his law. For some reason Debt was brought as late as 1824 in the case of *King* v. *Williams*, 2 B. and C. 538, when the defendant, although the court refused to assist him even to the extent of telling him how many helpers he needed, produced eleven helpers (*jurare decima manu*) and the plaintiff withdrew. Wager of law was however not formally abolished until 1833[3].

[1] Rep. IV. 92 a.

[2] Rep. IV. at p. 94 a.

[3] 3 and 4 Will. IV, c. 42, sec. 13.

Trover. One other great branch is thrown out by Case, namely Trover. For the history of this action see Ames's articles in the *Harvard Law Review*[1]. This also is an action for damages based upon a fictitious loss and finding and a subsequent conversion to the use of the defendant. Here there is no trespass, the defendant may be a perfectly innocent purchaser from the original wrongdoer; and there is no 'recuperation'—the gist of the action is the conversion.

I believe that Trover begins to appear about the middle of the sixteenth century. Gradually it begins to supplant Detinue, in which there is wager of law, and it becomes the normal mode of trying the title to moveable goods. The plaintiff charges that he was possessed of goods, that he lost them, that the defendant found them and converted them to his use. The court will not permit the defendant to dispute the loss and finding, but obliges him to answer the charge of conversion.

Since the provisions of sec. 78 of the Common Law Procedure Act of 1854 the old option, between paying the value of the chattel and restoring it to the successful plaintiff, is not necessarily left to the defendant, the court may order the restitution of the chattel. This statute has removed the original basis for the use of the terms by which we call lands 'real and chattels 'personal' property; but the terms were adopted long ago and are likely to endure. The yet abiding distinction between lands and chattels lies in the two systems of intestate succession applicable to them.

Thus, by the beginning of the eighteenth century, Trespass and the various branches that it had thrown out, had come to be the only forms of action that were in very common use. Trespass in ejectment, or ejectment, served the purpose of most of the real actions, though, as already said, there were occasions on which the latter had to be used. Assumpsit covered the old province of Debt, and a much larger province as well. Trover covered, and more than covered, the old province of Detinue. Trespass *vi et armis* still served for all cases in which the defendant had been guilty of directly applying unlawful force to the plaintiff's body, goods or

[1] 11 *H. L. R.*, pp. 277 and 374.

chattels. Case covered the miscellaneous mass of other torts. Of the old actions Replevin maintained itself as the proper action against a distrainor. Covenant remained in use for the enforcement of promises under seal. The province of Account was gradually annexed by the Court of Chancery, and brought within the sphere of its equitable jurisdiction; and the use of the common law writs of dower, too, was to a great extent superseded by the relief given to the doweress in Courts of Equity, where new and valuable rights were given to her and to her personal representatives against the heir and his representatives which could not have been enforced by any process of the common law[1]. After 1833, when wager of law was abolished, Debt and Detinue were occasionally brought; but there was no longer much need for them, their place having been well filled by Assumpsit and Trover.

[1] See *e.g. Bamford* v. *Bamford*, 5 Hare 203, and *Williams* v. *Thomas*, 1909, 1 Ch. 713, by Cozens-Hardy, M.R., at p. 720.

LECTURE VII.

BEFORE parting with the forms of action a little should be said about attempts to classify them. Let me first remind you of a few sentences of Justinian's Institutes which have had a very important effect; *omnium actionum...summa divisio in duo genera deducitur: aut enim in rem sunt aut in personam*, Lib. IV. 6. § 1[1]. In a later chapter Justinian recognizes a class of actions which are mixed, *i.e.* partly real, partly personal, IV. 6. 20.

Then there is another and a cross division of actions, some are *rei persequendae causa comparatae*, others are *poenae consequendae causa comparatae*, others belong to both these classes, IV. 6. 16.

Along with this we must take the classification of the obligations which are enforced by *actiones in personam*, III. 13; these are *ex contractu aut quasi ex contractu, ex maleficio aut quasi ex maleficio.*

Now these famous distinctions have at various times attracted English lawyers, and attempts were made to impose them upon the English materials, attempts which have never been very successful. Such phrases as criminal and civil, real and personal, possessory and proprietary, contractual and delictual are apparent already in Glanvill and prominent in

[1] 'The leading division of all actions whatsoever, whether tried before a judge or a referee, is into two kinds, real and personal; that is to say the defendant is either under a contractual or delictual obligation to the plaintiff in which case the action is personal, and the plaintiff's contention is that the defendant ought to convey something to, or do something for him, or of a similar nature; or else, though there is no legal obligation between the parties, the plaintiff asserts a ground of action against someone else relating to some thing, in which case the action is real. Thus a man may be in possession of some corporeal thing, in which Titius claims a right of property and which the possessor affirms belongs to him; here if Titius sues for its recovery the action is real.' Moyle, II. p. 176, translating Institutes IV. 6. 1.

Bracton's work, who makes use of them on the whole with great intelligence. These divisions of actions never, however, well fit the native stuff; they always cut across the form of the writs. A good example of this difficulty is seen in Trespass. It comes of penal stock, the defendant is liable to imprisonment, in the middle ages it covers all crimes short of felony—yet it is the ordinary civil action to recover damages for stepping on the land of another. Again, as we have seen, we have the writs of Entry standing between the indubitably proprietary and the indubitably possessory actions—this distinction is long regarded in England as a matter of degree, some writs are more 'in the right' than others.

Bracton says, however, that there is no action *in rem* for moveable goods (f. 102 b)—'At first sight it may appear that the action should be both real as well as personal, *tam in rem quam in personam*, since a particular thing is claimed, and the possessor is bound to give it up, but in truth it will be merely *in personam*, for he from whom the thing is claimed is not absolutely bound to restore the thing, but is bound in the disjunctive to restore the thing or its price, and by merely paying he is discharged, whether the thing be forthcoming or no. And therefore any one who claims a moveable for whatever cause, be it as having been carried off, or as having been lent, is bound to state its price, and count thus "I demand that such an one restore to me such a thing, of such a price," or "I complain that such an one detains from me, or has unjustly robbed me of such a thing of such a price," and if the price be not named the *vindicatio* of a moveable thing is bad.' The chattels of the middle ages were, I take it, both of a perishable kind and of a kind the value of which could be easily appraised; if the plaintiff got the *precium* of his ox he got what would do as well as his ox. However, this remark which made the reality or personality of the action depend not on the nature of the right asserted by the plaintiff but on the result of the judgment, has had results which as I think are much to be regretted. In the first place it is the origin of all our talk about real and personal property. The opinion comes to prevail that the action is 'real' if a favourable judgment gives possession of lands, tenements

and hereditaments, 'personal' if damages are awarded and 'mixed' if both lands and damages are recovered. Gradually the terms 'things real' and 'things personal' begin to make their appearance and to supplant the old, and surely far better terms *terrae et tenementa* on the one hand, *bona et catalla* on the other. The law of intestate succession is in time made the test of realness and personalness; we are deprived of the legitimate use of a valuable pair of terms, because they have been put to an illegitimate use, and we have to talk about a term of years as a chattel real, but personal property. That is not all—having said that every action in which a chattel or its value is claimed is personal, are we not compelled to say that every such action is either founded on contract or founded on tort? Yes, that conclusion has been drawn, it is expressly drawn by Blackstone. The result of this has been to extend our notion of tort far beyond the Roman notion of *maleficium*. A chattel is stolen from me, and you in good faith buy it from the thief. I demand it from you, you require that I should prove my title in an action;—my action is personal, and since it obviously is not founded on contract, it must be founded on tort. What is the tort? I think we are obliged to say that the mere possessing of a moveable thing by one who is not entitled to possess it is a tort done to the true owner. It would surely have been far more convenient if we could have said that the owner's action is *in rem*, that he relies merely on the right of ownership, and does not complain that the possessor, who came by the thing quite honestly, has all along been doing him a wrong. The foundation for all this was abolished by the Common Law Procedure Act of 1854 which enabled a judge to order execution to issue for the return of a chattel detained without giving the defendant the option of paying the value assessed. (The effect of that section is now represented in the existing rules of court.) But I think we must still say that an action whereby an owner claims his chattel is an action founded on tort.

The attempt to distribute our personal forms under the two heads of contract and tort was never very successful or very important. In late days it was usual to put under the heading of Contract the following:—Debt, Covenant, Account,

and Assumpsit; under the head of Tort—Trespass, Trover, Case, Replevin. Some writers put Detinue on one side of the line and some on the other. The truth was that (1) in substance Detinue might be an action founded on a contract or might be an action *ex maleficio*, or again might be an action founded on proprietary right which it would have been well could we have called real, while (2) in form Detinue was almost indistinguishable from Debt and both were closely allied to the writ of right;—the law of the twelfth century to which these forms referred us saw little distinction between 'Give me up that piece of land for it is mine,' 'Give me up that ox for it is mine,' 'Give me up those £10 which are mine because I lent them to you.' In each case the claimant demands (*petit*) what is or ought to be his—the distinction between 'is' and 'ought to be' being hardly discerned. In very old cases we find a creditor called a demandant not a plaintiff, he is *petens* not *querens*. We have no longer to classify the forms, for they are gone; but I think that we still are obliged to say that every action for a chattel is founded on tort if it be not founded on contract, and thus to make our conception of tort considerably wider than our neighbour's notion of a delict.

Then as to land there have been difficulties. We have already noticed how Bracton says that there is no *actio in rem* for moveable goods. But he knew too much about Roman law to say that an action is *in rem* merely because the result of it is that the claimant will thereby obtain possession of land. Thus he says that the Novel Disseisin is a personal action founded on tort, it is *in personam* though the judgment will restore the plaintiff to the land. The plaintiff is not relying on a real right, but is merely complaining of a tort. His test of the 'reality' of an action is much rather the mesne than the final process. By mesne process is meant the procedure against a contumacious defendant for compelling him to plead. If the mesne process is merely against the person, by attacking him or seizing his body, then the action is *in personam*. If the procedure is against the thing in dispute the action is *in rem*. In the Novel Disseisin you proceed against the person; in a writ of right you proceed against the thing—the land is seized into

the king's hand, and if the defendant, or rather tenant, remains contumacious, it is adjudged to the demandant. Gradually however as the influence of Roman law becomes weaker a different test is adopted, an action is real if it gives the person the very thing that he wants. Now the action of ejectment did this from Henry VII's day onwards but it did not receive the name of a real action, or of a mixed action for a very long while—it had been developed out of a purely personal action, the action for trespass, and if you will look at Blackstone's definitions you will see that they are carefully framed so as to keep ejectment out of the 'real' class[1]. I am not certain that it ever became correct to speak of ejectment as either real or mixed until the statute of 1833 abolished all real and mixed actions 'except' ejectment and some others, thus speaking as though ejectment were either real or mixed. The truth is that this classification never fitted our law very well. One of the actions abolished in 1833 as 'real or mixed' was an action of covenant real, *i.e.* an action founded on a covenant to convey or let land—an action in which a plaintiff could obtain judgment for the land, a judgment not for damages but *quod conventio teneatur.* To call an action based on covenant, or contractual right, a real or mixed action must of course seem very strange to students of 'general jurisprudence'; but it was the logical result of making the distinction turn on the answer to the question whether the plaintiff demands land or damages or both.

I do not see why at the present day under the Judicature Act an action for the recovery of land wherein the plaintiff relies merely on his proprietary right should not be called 'real'; but historically it is doubtless the representative of the action of ejectment and I see no reason for trying to reintroduce a distinction which has never fitted our law very well. The abiding influence of the history of ejectment is, I think, this, that if I am possessing land which you have a better right to possess I am incurring a liability to you for damages. You will read in Blackstone (III. 205) of the action for mesne profits. By means of piling fiction on fiction our courts came to the doctrine that when a plaintiff had recovered the land in an

[1] *Comm.* III. 117.

action of ejectment he could then proceed to treat the defendant's possession as one long continued trespass, and sue him in an action for mesne profits in which he could recover not only compensation for any damage done to the land, but compensation for loss of enjoyment. This doctrine still holds good, though its fictitious supports have been kicked away, and though now-a-days one can get the land and the damages in one and the same action. But the result is that however honest the wrongful possessor may be and however plausible may be the title under which he is possessing, he is doing a continuous wrong to him who has a better right to be in possession and will have to pay damages for it. Some modern judges have regretted the severity of our law against *bona fide* possessors holding under faulty titles, but it is the natural and abiding result of the disuse and abolition of the old real actions.

On the whole the lesson of this part of our legal history should be that it is dangerous to play with foreign terms unless we know very well what we are about.

It is worth while to consider for a moment why I am troubling you with these matters which might be called details of mere obsolete procedure. I must refer you again to Sir Henry Maine's good saying, 'Substantive law is secreted in the interstices of procedure.' So important in the past was this fact that the great text-books take the form of treatises on procedure. Fitzherbert's book is called *De Natura Brevium*—and even at a much later date, indeed until quite recently, text-books take the form of discussions as to when a man can bring this or that action—trespass, trover, detinue, or assumpsit. This dependence of right upon remedy it is that has given English law that close texture to which it owes its continuous existence despite the temptations of Romanism. As an illustration of the importance of this past history in forming the law of the present consider the question—why do we talk to-day of 'real' and 'personal' property? Any answer to this question must speak to us of obsolete forms of action.

And now to go back. We have seen a gradual process of formal decay which set in soon after the death of Edward I in

1307, and together with this formal decay a vigorous but contorted development of substantive law brought by fiction within the medieval forms. This is a long process; we may say that it even extends from 1307 to 1875. In this development there are two stages.

(1) The stage of evasory fiction, the last days of which are well described by Blackstone. During this stage a few relatively modern actions are made to do substantially all the duty of the courts—these actions are Trespass and its progeny. Again steps were dropped out of the procedure and merely replaced by the supposition that they had been taken. Thus the original writ was omitted, unless Error be brought upon the record, in which case, the record must be duly made up.

This stage is complicated by a process which slowly makes the courts of King's Bench and Exchequer competent courts for most practicable actions. The original distribution of jurisdiction between the courts was as follows. *Communia placita*—ordinary civil suits between subject and subject—belong to the Common Bench or Court of Common Pleas; *Placita coronae*, including, be it noticed, trespass *vi et armis*, to the King's Bench. The Court of Exchequer, as the financial court, has the duty of getting in the king's debts, but this includes getting in debts due to the king's debtor. The King's Bench and Exchequer have already therefore a footing in the field of civil actions and this footing they proceed to improve.

The King's Bench adopted the following fiction. Suppose for example that an action of debt is to be begun. First an action of trespass is begun and the defendant is arrested. He is thus in the custody of the marshal of the King's Bench and the court has jurisdiction in cases against its prisoners. Then follows a declaration in Debt by the plaintiff against this prisoner of the King's Bench.

The Exchequer fiction for the same purpose was known as a *quo minus*. The plaintiff pretends to be the king's debtor and alleges that he is being kept out of money due to him by the defendant whereby the less (*quo minus*) he is able to pay his debt to the king.

If we look for the motive which induced this stealing of business we may find it in the fact that the staff of the courts and to some extent the judges are paid by fees derived from the litigants. This result was also partly due to the fact that the serjeants had the exclusive right of audience in the court of Common Bench. The serjeants were created by royal writ—a man was appointed to the 'state and degree' of serjeant-at-law, an honour entailing, at least until the days of George III, an expensive banquet upon his creation. He became a member of the 'Order of the Coif.' Until the passing of the Judicature Act by custom all judges appointed must first be admitted serjeants-at-law, a custom which is believed to have had its origin in the terms of an Edwardian statute[1]. After the Judicature Act they disappeared. Now there were practitioners before the other courts, the Barristers (originally known as 'apprentices') who were interested in diverting business from the court in which serjeants alone had the right of audience to those in which they themselves could be heard. By such means our archaic procedure is being adapted to modern times but in an evasory and roundabout way by means of fictions.

(2) A new stage began in 1832 with the Unification of Process Act of that year[2]. So far no destruction of the forms of action was attempted, but the original and the mesne process are henceforward to be statutory and uniform in all personal actions.

In the following year the statute 3 and 4 Will. IV, c. 27, by sec. 36 abolished all the Real and Mixed actions excepting ejectment, *quare impedit* and the two writs of dower (the writ of right of dower and the writ of dower *unde nihil habet*): and in the same year the statute c. 42, sec. 13 made Debt and Detinue practicable and gave them a new lease of life by abolishing wager of law.

Still the forms of action remaining have to be kept apart

[1] 14 Edw. III. 16. Dealing only with Nisi Prius Commissions it says that one of the Commissioners must be either a judge of K.B. or C.P., Chief Baron of the Exchequer or a serjeant sworn. Under this a puisne Baron of the Exchequer would not be qualified unless he were a serjeant-at-law.

[2] 2 and 3 Will. IV, c. 33.

and each must be used only within its proper precedents,—trespass, case, assumpsit, trover, ejectment, debt and detinue.

The next great step was taken by the Common Law Procedure Act, 1852, sec. 3. Under this statute no form of action is to be mentioned in the writ, which is for the future to be a simple writ of summons. But even after this act the form of action remains of vital importance to the pleader for each action retains its own precedents, and although the choice of the proper form of action need no longer be made in the choice of writ it is merely deferred until the declaration.

The last great step comes with the Judicature Acts of 1873–75, the statutes effecting the fusion of equity and law. By these statutes and by the Rules of the Supreme Court made thereunder a new code of civil procedure was introduced, largely dependent for its working upon wide discretionary powers allowed to the judges. Henceforward not only is the writ a simple writ of summons but there are no longer any 'forms of action' in the old sense of the phrase.

The plaintiff is to state his case, not in any formula put into the king's mouth but in his own (or his adviser's) words endorsed upon the writ, and his pleader is to say not upon what form of action he relies but merely what are the facts upon which he relies. Some differences there are in the procedure due to differences in the nature of the action, of the facts relied upon and of the rights to be enforced. Thus in some cases there is and in others there is not a right to a trial by jury, in some cases there is a right to special procedure for judgment by default if the claim is for a liquidated sum, and so forth. Much there is for practitioners to study in the Judicature Acts and the Rules of the Supreme Court, but it is no longer possible to regard any form of action as a separate thing.

This results in an important improvement in the statements of the law—for example in text-books—for the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law.

SELECT WRITS

(beginning with those relating to Land).

Praecipe in Capite.

Rex vicecomiti salutem. Praecipe X quod juste et sine dilatione reddat A unum mesuagium cum pertinentiis in Trumpingtone quod clamat esse jus et haereditatem suam et tenere de nobis in capite et unde queritur quod praedictus X ei injuste deforciat ut dicit. Et nisi fecerit, et praedictus A fecerit te securum de clamore suo prosequendo, tunc summone eum per bonos summonitores quod sit coram justiciariis nostris apud Westmonasterium[1] [tali die] ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve[2].

The King to the sheriff greeting. Command X that justly and without delay he render to A one messuage with the appurtenances in Trumpington which he claims to be his right and inheritance, and to hold of us in chief and whereof he complains that the aforesaid X unjustly deforceth him. And unless he will do this, and (if) the aforesaid A shall give you security to prosecute his claim, then summon by good summoners the afores[d] X that he be before our justices at Westminster [on such a day] to show wherefore he hath not done it. And have there the summoners and this writ.

Breve de recto.

Rex K (a bishop, baron or other lord of manor) salutem. Praecipimus tibi quod sine dilatione plenum rectum teneas A de uno mesuagio cum pertinentiis in Trumpingtone quod

[1] *i.e.* In the court of Common Pleas.

[2] F.N.B. 5 I. Fitzherbert's *Natura Brevium* was published in 1534. (Fitzherbert ob. 1538.) When quoted F.N.B. without a date, the edition of 1553 is referred to. The translations added here and there for the assistance of the student are taken from the English edition of 1794, which preserved the paging of the edition of 1553.

clamat tenere de te per liberum servitium [unius denarii per annum] pro omni servitio, et quod X ei deforciat. Et nisi feceris, vicecomes de Cantabrigia faciat, ne amplius inde clamorem audiamus pro defectu recti[1].

The King to K greeting. We command you that without delay you do full right to A of one messuage with the appurtenances in Trumpington which he claims to hold of you by free service of [so much] *per annum* for all service, of which X deforceth him. And unless you will do this, let the sheriff of Cambridge do it that we may hear no more clamour thereupon for want of right.

Assisa Novae Disseisinae.

Rex vicecomiti salutem. Questus est nobis A quod X injuste et sine judicio disseisivit eum de libero tenemento suo in Trumpingtone post [ultimum reditum domini regis de Brittannia in Angliam] (or other period of limitation). Et ideo tibi praecipimus quod, si praedictus A fecerit te securum de clamore suo prosequendo, tunc facias tenementum illud reseisiri de catallis quae in ipso capta fuerint et ipsum tenementum cum catallis esse in pace usque ad primam assisam cum justiciarii nostri ad partes illas venerint. Et interim facias xij liberos et legales homines de visneto illo videre tenementum illud et nomina illorum imbreviari. Et summoneas eos per bonos summonitores quod sint ad primam assisam coram prefatis justiciariis nostris, parati inde facere recognitionem. Et pone per vadium et salvos plegios praedictum X vel ballivum suum, si ipse inventus non fuerit, quod tunc sit ibi auditurus recognitionem illam. Et habeas ibi summonitorum nomina, plegios et hoc breve[2].

The King to the sheriff greeting. A hath complained unto us that X unjustly and without judgment hath disseised him of his freehold in Trumpington after (the last return of our lord the king from Brittany into England). And therefore we command you that, if the afores[d] A shall make you secure to prosecute his claim, then cause that tenement to be reseised and[3] the chattels which were taken in it and the same tenement with the chattels to be in peace until the first assize when our justices

[1] Bracton, f. 328 a. F.N.B. 1 G.

[2] Bracton, f. 179 a. F.N.B. 1534, 69, where the wording has become slightly different.

[3] Quaere 'of.'

shall come into those parts. And in the mean time you shall cause twelve free and lawful men of that venue to view that tenement and their names to be put into the writ. And summon them by good summoners that they be before the justices afores[d] at the assize afores[d], ready to make recognizance thereupon. And put by gages and safe pledges the afores[d] X or, if he shall not be found, his bailiff, that he be then there to hear that recognizance. And have there the (names of the) summoners, the pledges, and this writ[1].

Assisa de Morte Antecessoris.

Rex vicecomiti salutem. Si A fecerit te securum de clamore suo prosequendo tunc summoneas per bonos summonitores xij liberos et legales homines de visneto de Trumpingtone quod sint coram[2] justiciariis nostris ad primam assisam cum in partes illas venerint, parati sacramento recognoscere si B pater, [mater, frater, soror, avunculus, amita[3]] praedicti A fuit seisitus in dominico suo ut de feodo de uno mesuagio cum pertinentiis in Trumpingtone die quo obiit, et si obiit post [period of limitation], et si idem A ejus haeres propinquior sit. Et interim praedictum mesuagium videant et nomina eorum inbreviari facias. Et summone per bonos summonitores X qui mesuagium praedictum tenet quod tunc sit ibi auditurus illam recognitionem. Et habeas ibi summonitores et hoc breve[4].

The King to the sheriff greeting. If A shall make you secure, &c. then summon, &c. twelve free and lawful men of the neighbourhood of Trumpington that they be before our justices at the first assize when they shall come into those parts, ready to recognize by oath if B father [mother, brother, sister, uncle, aunt,] of the afores[d] A was seised in his demesne as of fee, of one messuage with the appurtenances in Trumpington the day whereon he died, and if he died after [the period of limitation] and if the same A be his next heir : and in the mean time let them view the s[d] messuage, and cause their names to be put in the writ, and summon by good summoners X who now holds the afores[d] messuage, that he may be there to hear that recognizance ; and have there the summoners and this writ[5].

[1] F.N.B. 177 E.

[2] It might be 'apud Westmonasterium' or *coram dilectis et fidelibus nostris* O. *et* P. (special commissioners).

[3] Beyond these 'degrees' writs of 'aiel' 'bezaiel' and 'cosinage' introduced by William Raleigh were used. For their forms see F.N.B. 220, 221.

[4] Bracton, f. 253 b.

[5] F.N.B. 195 E.

Brevia de Ingressu.

Rex vicecomiti salutem. Praecipe X quod juste et sine dilatione reddat A unum mesuagium cum pertinentiis in Trumpingtone quod clamat esse jus et haereditatem suam et in quod praedictus X non habuit ingressum nisi—

a. per W qui illud ei dimisit qui inde injuste et sine judicio disseisivit eundem A [*or* B patrem ejusdem A cujus haeres ipse est] post [time of limitation].

b. per W cui V illud dimisit qui inde injuste etc., *as above.*

c. post disseisinam quam T inde injuste et sine judicio fecit B patri ejusdem A cujus haeres ipse est post [time of limitation] et unde queritur.

d. per K quondam virum ipsius A qui illud ei dimisit, cui ipsa in vita sua contradicere non potuit, ut dicit.

e. per W cui K quondam vir ipsius A qui illud ei dimisit, cui ipsa in vita sua contradicere non potuit, ut dicit.

f. post dimissionem quam K quondam vir ipsius A, cui ipsa in vita sua contradicere non potuit, inde fecit T ut dicit et unde queritur.

g. per W cui praedictus A illud dimisit dum non fuit compos mentis

h. per W cui praedictus A illud dimisit dum fuit infra aetatem.

i. per W cui B pater praedicti A cujus haeres ipse est illud dimisit ad terminum qui praeteriit.

Et nisi fecerit summone eum per bonos summonitores quod sit coram justiciariis nostris apud Westmonasterium tali die ostensurus quare non fecerit. Et habeas ibi nomina summonitorum et hoc breve.

Note. The writs of entry given here are but a few out of great numbers of writs framed to cover almost every conceivable case of a flaw in the tenant's title. Amongst the writs recorded in Fitzherbert are (1) writs *super disseisinam*, or as they are sometimes called writs *de quibus*; where the flaw was a disseisin (of these *a*, *b* and *c* above are examples):

(2) writs *ad communem legem*, *in casu proviso* and *in consimili casu* (explained above, p. 360 n.) where the flaw was an alienation in excess of powers by a doweress or a tenant by the curtesy, for life or in tail: (3) writs *cui in vita*, on alienation by a husband (examples *d*, *e* and *f* above) and (4) writs *cui ante divortium*, the same where the marriage has been dissolved (a strangely modern sound this has): (5) writs of *Dum non compos mentis* (example *g* above) and (6) of *Dum fuit infra aetatem* (example *h* above) on alienation by an idiot and an infant respectively: (7) writs of entry *ad terminum qui praeteriit* (example *i* above) where the flaw is the holding over of a lease: (8) writs of *intrusion*, where the flaw is similar to the wrong aimed at by the assize of Mort d'Ancestor and (9) the writ *sine assensu capituli* where the flaw is an alienation by an abbot &c. without his chapter's consent. Each of these writs may be in either of the three forms within the 'degrees' in the *per* (as *a*), in the *per* and *cui* (as *b*) and, outside the 'degrees,' by virtue of the statute of Marlborough, in the *post* (as *c* in the above writs). Professor Maitland has in several instances omitted a few words for the sake of clearness.

Quare ejecit infra terminum[1].

Rex vicecomiti salutem. Si A fecerit te securum de clamore suo prosequendo tunc summoneas etc. X quod sit coram justiciariis etc. ostensurus quare deforciat praefato A unum mesuagium cum pertinentiis in Trumpingtone, quod M ei dimisit ad terminum qui nondum praeteriit, infra quem terminum idem M praefato X illud mesuagium vendidit, occasione cujus venditionis idem X praefatum A de mesuagio praedicto ejecit ut dicit. Et habeas ibi etc

Trespass quare clausum fregit[2].

Rex vic. sal. Si A fecerit etc. tunc pone per vadium et salvos plegios X quod sit etc. ostensurus quare vi et armis clausum ipsius A apud Trumpingtone fregit [et blada sua ibidem crescentia falcavit etc. etc.] et alia enormia ei intulit ad grave damnum ipsius A et contra pacem nostram. Et habeas ibi nomina plegiorum et hoc breve.

[1] F.N.B. 198 B. Fuit hoc breve inventum per discretum virum Will. de Merton. F.N.B. 1534 ed. p. 81.

[2] This writ and the next one appear here without regard to their historical order for the purpose of showing in one group the greater writs relating to the land.

De ejectione firmae[1].

Rex vic. sal. Si A fecerit te securum etc. tunc pone etc. X quod sit coram etc. ostensurus quare vi et armis unum mesuagium apud Trumpingtone, quod M praefato A dimisit ad terminum qui nondum praeteriit, intravit et ipsum a firma sua praedicta ejecit et alia enormia ei intulit ad grave damnum ipsius A et contra pacem nostram. Et habeas ibi etc.

De Libertate Probanda.

Rex vic. sal. Monstravit nobis A quod cum ipse liber homo sit et paratus libertatem suam probare, X clamans eum nativum suum vexat eum injuste. Et ideo tibi praecipimus quod si praedictus A fecerit te securum de libertate sua probanda, tunc ponas loquelam illam coram justiciariis nostris ad primam assisam cum in partes illas venerint quia hujusmodi probatio non pertinet ad te capienda. Et interim idem A pacem inde habere facias. Et dic praedicto X quod sit ibi loquelam suam versus praedictum A inde perfecturus si voluerit. Et habeas ibi hoc breve.

The King to the sheriff greeting. A hath showed unto us that whereas he is a free man and ready to prove his liberty, X claiming him to be his nief[2] unjustly vexes him; and therefore we command you, that if the afores[d] A shall make you secure touching the proving of his liberty, then put that plea before our justices at the first assizes, when they shall come into those parts, because proof of this kind belongeth not to you to take; and in the mean time cause the s[d] A to have peace thereupon, and tell the afores[d] X that he may be there, if he will, to prosecute his plea thereof against the afores[d] A. And have there this writ[3].

[1] For a translation of the writ of ejectment see *post*, p. 383.
[2] nief (nativus) = villein.
[3] F.N.B. 77 F.

Debt, Detinue and Account.

Rex vic. sal. Praecipe X quod juste et sine dilatione reddat A:—

(*Breve de Debito*[1]) centum libras quas ei debet et injuste detinet

(*Breve de Catallis reddendis*[2]) catalla ad valentiam centum librarum quae ei injuste detinet

(*Breve de Compoto*[3]) rationabile compotum suum de tempore quo fuit ballivus suus in Trumpingtone et receptorum denariorum ipsius A

ut dicit. Et nisi fecerit et praedictus A fecerit te securum de clamore suo prosequendo, tunc summone eum per bonos summonitores quod sit coram justiciariis nostris apud Westmonasterium [tali die] ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve[4].

Covenant.

Rex vic. sal. Praecipe X quod juste et sine dilatione teneat A conventionem factam inter ipsum A et [S patrem praedicti] X [cujus haeres ipse est,] de [uno messuagio]

et nisi fecerit &c. tunc summone &c.[5]

Trespass vi et armis[6].

Rex vic. sal. Si A fecerit te securum de clamore suo prosequendo tunc pone per vadium et salvos plegios X quod sit coram justiciariis nostris[7] &c. *tali die* ostensurus

[1] F.N.B. 119 L.

[2] F.N.B. (1534 ed.) 40.

[3] F.N.B. 117 E.

[4] Note that these writs are in the same terms as the writ of Praecipe in Capite except for the words stating what the defendant is to deliver up to the demandant.

[5] F.N.B. (1534) 66, the ending is as for debt.

[6] F.N.B. 85 to 88. As an example we give the translation of the writ of Ejectment from Fitzherbert (1794 edition). Several trespasses may be alleged in one writ.

[7] Or 'coram nobis tali die ubicumque fuerimus tunc in Angliae' if the writ be in the King's Bench.

(assault and battery) quare vi et armis in ipsum A apud Trumpingtone insultum fecit et ipsum verberavit vulneravit et male tractavit, ita quod de vita ejus desperabatur

(false imprisonment) quare vi et armis in ipsum A apud Trumpingtone insultum fecit et ipsum vulneravit imprisonavit et male tractavit

(trespass to land) quare vi et armis clausum ipsius A apud Trumpingtone fregit

(trespass to chattels) quare vi et armis lapidem molarem[1] ipsius A precii xl. s. apud Trumpingtone fregit et bona et catalla sua precii tanti cepit et asportavit

(ejectment) quare vi et armis unum mesuagium apud Trumpingtone quod M praefato A dimisit ad terminum qui nondum praeteriit intravit et ipsum A a firma sua praedicta ejecit

et alia enormia ei intulit ad grave damnum ipsius A et contra pacem nostram. Et habeas ibi nomina plegiorum et hoc breve.

The writ of Ejectment.

The King to the sheriff greeting. If A shall make you secure &c. Then put by gages and safe pledges X that he be before our justices at Westminster on (such a day)[2] to show wherefore with force and arms he entered into one messuage in Trumpington which M demised to the said A for a term which is not yet passed and ejected him, the said A, from his farm aforesaid; and other enormous things did, to the great damage of him the said A and against our peace: and have there the names of the pledges and this writ. (F.N.B. 220 G.)

[1] A mill stone.

[2] Thus for an action in the Common Pleas, but it would read 'that he be before us on (such a day) wheresoever we shall then be in England' if it were for an action in the King's Bench.

Trespass on the Case or Case.

Rex vic. sal. &c. *as in Trespass* ostensurus :—

quare[1] [here set out the matter complained of *e.g.* :—] in aqua de Plim, per quam inter Humber et Gaunt navium et batellorum communis est transitus, ex transverso aquae pilos defixit, per quod quaedam navis cum triginta quarteriis brasii ipsius A submersa fuit, et viginti quarteria brasii precii centum s. deperierunt. Et alia enormia &c. *as in Trespass.*

The King to the sheriff &c. *as in Trespass* to show :—

wherefore (*e.g.* :—) he fixed piles across the water of Plim along which, between the Humber and Gaunt, there is a common passage for ships and boats, whereby a certain ship, with thirty quarters of malt of him the s^d^ A, was sunk under water, and twenty quarters of the malt of the price of one hundred shillings perished ; and other wrongs &c. *as in Trespass.*

Trespass on the Case in Assumpsit.

Rex vic. sal. &c. *as in Trespass* ostensurus :—

quare[2] [*e.g.* :—for misfeasance] cum idem X ad dextrum oculum ipsius A casualiter laesum bene et competenter curandum apud Trumpingtone pro quadam pecuniae summa prae manibus soluta assumpsisset, idem X curam suam circa oculum praedictum tam negligenter et improvide apposuit, quod idem A defectu ipsius X visum oculi praedicti totaliter amisit, ad damnum ipsius A viginti librarum ut dicit. Et habeas ibi &c.

quare[3] [*e.g.* :—for non-feasance] cum idem X tres currus pro victualibus ipsius A ad partes transmarinas ducendis pro certa pecuniae summa prae manibus soluta infra certum terminum inter eos concordatum facere et fabricare apud Trumpingtone assumpsisset, idem X currus praedictos infra terminum praedictum facere et fabricare non curavit per quod A diversa bona et catalla

[1] F.N.B. 92 F.
[2] Blackstone, *Comm.* III. 122 note.
[3] F.N.B. 94 A.

sua ad valentiam centum marcarum, quae in curribus praedictis duci debuissent, pro defectu curruum praedictorum totaliter amisit ad grave damnum ipsius A ut dicit et habeas &c.

The King to the sheriff greeting &c. *as in Trespass* to shew :—

wherefore whereas he the s^d^ X undertook well and competently to cure the right eye of the s^d^ A, which was accidentally injured, for a certain sum of money beforehand received, he the same X so negligently and carelessly applied his cure to the said eye, that the said A by the fault of him the said X totally lost the sight of the said eye, to the damage of him the said A of twenty pounds, as he saith, and have there &c.

wherefore whereas he the said X undertook to make and build three carriages for conveying victuals of him the said A to parts beyond the sea for a certain sum of money beforehand received, within a certain term between them agreed ; he the said X did not take care to make and build the carriages afores^d^ within the term afores^d^, by which he the s^d^ A hath wholly lost divers his goods and chattels, to the value of one hundred marks, which ought to have been conveyed in the carriages aforesaid, for want thereof to the great damage of him the said A as it is said : and have there &c.

Case on Indebitatus Assumpsit[1].

The King to the sheriff &c. *as in Trespass* to shew :—

for that, whereas the s^d^ X heretofore, to wit (*date and place*) was indebted to the s^d^ A in the sum of —— indebitatus

for divers goods wares and merchandises by the s^d^ A before that time sold and delivered to the s^d^ X at his special instance and request

and being so indebted, he the s^d^ X in consideration thereof afterwards to wit (*date and place afores^d^*) assumpsit undertook and faithfully promised the s^d^ A to pay him the s^d^ sum of money when he the s^d^ X should be thereto afterwards requested.

Yet the s^d^ X, not regarding his said promise and undertaking but contriving and fraudulently intending craftily and subtilly to deceive and defraud the s^d^ A in this behalf, hath not yet paid the s^d^ sum of money or any part thereof to the s^d^ A breach

[1] Stephen, *Pleading*, 1824, p. 17.

(although oftentimes afterwards requested). But the s^d^ X to pay the same or any part thereof hath hitherto wholly refused and still refuses, to the damage of the s^d^ A of —— pounds as it is said. And have you there &c.

damage

Case for Trover[1].

The King to the sheriff greeting &c. *as in Trespass* to shew:—

for that, whereas the s^d^ A heretofore to wit [*date and place*] was lawfully possessed as of his own property, of certain goods and chattels to wit, twenty tables and twenty chairs of great value to wit of the value of —— pounds of lawful money of great Britain;

possession

and, being so possessed thereof he the s^d^ A afterwards, to wit (*date and place afores^d^*) casually lost the s^d^ goods and chattels out of his possession:

loss

and the same afterward, to wit (*date and place afores^d^*) came into the possession of the s^d^ X by finding;

finding

Yet the s^d^ X well knowing the s^d^ goods and chattels to be the property of the s^d^ A and of right to belong and appertain to him, but, contriving and fraudulently intending craftily and subtilly to deceive and defraud the s^d^ A in this behalf, hath not as yet delivered the s^d^ goods and chattels, or any part thereof, to the s^d^ A (although often requested so to do) but so to do hath hitherto wholly refused and still refuses; and afterwards to wit (*date and place afores^d^*) converted and disposed of the s^d^ goods and chattels to his the s^d^ X's own use,

conversion

to the damage of the s^d^ A of —— pounds as it is said; and have you there &c.

damage

[1] Stephen, *Pleading*, 1824, p. 19.

INDEX TO EQUITY

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CONTENTS OF LECTURES ON THE FORMS OF ACTION

LECTURE I.

Why obsolete procedure has importance (p. 295). Maine's phrase 'Substantive law...secreted in the interstices of procedure' (295). Until 1830 choice of form of action will determine the competency of the court, process to make defendant appear, process in the event of contumacy, whether judgment by default is possible, forms of pleading (*e.g.* general issue), mode of trial, form of execution, punishment of beaten defendant, summary or dilatory nature of procedure (296–298). Choice of action is made at plaintiff's peril (298). Keynote of form is struck by writ (299). Modern writ contrasted with old writs (299, 300). Certain forms of action are given and causes of action must be deduced from them (300).

By 1830 many forms had become obsolete and the whole were overlaid with fictions (300, 301). Actions were (1) Real, (2) Personal, (3) Mixed (301).

Main steps by which the forms of action were abolished between 1832 and 1875 (301, 302).

Since 1875, Judicature Acts have established a Code of Civil Procedure. Causes of action can be classified rationally. Forms of action belong to the past (301–303).

The forms of action, the original writs, were the means whereby justice became centralized, whereby the king's courts drew away business from the feudal courts (304, 305).

LECTURE II.

At the beginning of the 12th century England was a network of local courts (306). Jurisdiction of the king's courts (306). Gradually increasing idea of the king's peace (307). Royal jurisdiction on denial of justice (307, 308). Not till Edward I did the modern theory prevail, that the king's courts were open to all litigants (308).

Constitution and Procedure of inferior courts. Shire and hundred courts, Lord's courts. Judgment preceded proof. Proofs are by oath of helpers or by ordeals, or by battle, God will show the truth (308–310).

Superiority of king's court to local courts. It had professional judges for about a century before Edw. I (310). Formal modes of proof known; ordeal till 1215, battle till 1819, wager of law till 1833; their unreasonableness only slowly recognized, but to a great extent the history of forms of action is the history of devices to evade wager of battle and wager of law and of the procedure which becomes trial by jury (311). Short account of jury, inquests of Frankish kings, right to inquest given or sold as a favour (311, 312). Domesday Book. Inquest becomes a royal prerogative. King's courts have advantages over local courts of better procedure and greater power. The jury are impartial neighbour-witnesses (313).

Lecture III.

Sketch of the order in which forms of action developed. Periods:—(I) 1066–1154. Litigation still mainly in local courts. King's court has (1) pleas of the crown, (2) suits between tenants in capite, (3) complaints of default of justice in lower courts (314, 315).

(II) 1154–1189. Reign of Henry II, Glanvill's book. Writs assumed distinct forms, each begins a particular form of action (315).

1. **The Writ of Right.** Henry ordained that no man need answer for his freehold without royal writ (315). A man disseised of his freehold unjustly and without judgment has action in the king's court (316). This means that all litigation about freeholds in the local courts must begin by the king's writ (316, 317).

Breve de recto tenendo orders a lord to do justice (317).

Praecipe quod reddat or *praecipe in capite* used where the king's court had jurisdiction (317). Term 'Writ of Right' comes to include both forms (318). Action by Writ of Right slow and dilatory (318). Essoins (319). Trial by battle or the 'Grand Assize' *i.e.*, twelve knights (320).

2. **The Three Possessory Actions,** traceable to Roman interdict (321).

(*a*) **The Assize of Novel Disseisin** (321–323)

(*b*) **The Assize of Mort d'Ancestor** (323). Where a man has died seised as of fee his heir will be put into seisin. Action limited to 'the degrees' (325). This defect remedied by supplementary actions of **Aiel, Besaiel** and **Cosinage** with more modern procedure (325).

(*c*) **The Assize of Darrein Presentment.** Principle, that he who last presented to a benefice or his heir should do so again (326).

A fourth assize:—(*d*) **The Assize Utrum** to decide whether land was lay fee or ecclesiastical (326, 327). Later this action changed into 'the parson's writ of right' (327).

Certain questions begin to be tried by '*jurata*' (328). Recognitions (329). Differences between a 'jurata' and an 'assisa' (329).

Dower: two actions, the **Writ of Right of Dower** bidding the lord do justice in his court, and the **Writ of Dower unde nihil habet** brought in the king's court (330, 331). A third action, the writ of **Admeasurement of Dower** (331).

Action to recover a serf by writ **de nativo habendo.** Writ **de libertate probanda** given to alleged serf calling on the would be lord to prove his case in the king's court (331).

Personal actions in Glanvill's day are mostly in local courts (332).

Debt or **Detinue of chattels,** writ similar to *Praecipe in capite*, little distinction between 'I own' and 'I am owed.' No jury or grand assize (332).

Gages of land made usually by demise of a term. This gave rise to several writs. Writ for gagee calling on gagor to pay; and writ for gagor calling on gagee to take his money and return the land. This latter (form given) is a *Praecipe* for land with a reason and is the forerunner of the writs of Entry (333). If the tenant says he holds in fee either party can have a 'recognition' to decide the question 'fee or gage.' But otherwise battle or the grand assize will decide the main question (333). Certain rules as to sealed charters exist but means of proof are not explained (334).

Lecture IV.

(III) 1189–1272. Third Period. Ric., Joh. and Hen. III. Rapid growth of writs *de cursu*. Registers formed (335). Between proprietary and possessory actions there grow up **Writs of Entry** alleging some particular flaw in the tenant's title; very numerous; originally limited by the 'degrees': restriction abolished by Stat. of Marlborough 1267, creating writs in the *post* (336).

Confusion of English real actions due to these writs (337). Until death of Hen. II all is simple. The proprietary and possessory actions are distinct. Then come Writs of Entry, extended by 1267 to every flaw in title. They are possessory in origin but proprietary in working (338). Blackstone thought them older than the assizes (339).

Other gaps are filled, writs of **Aiel, Besaiel** and **Cosinage**, also new writs relating to advowsons, wardships and marriages, easements, common rights and nuisance, frequently two forms—one regarded as proprietary the other as possessory (340).

Remedies of termors under the new writs. At first termor's sole remedy by **Covenant**: recovers the land but only against lessor (341). About 1237 writ **Quare ejecit infra terminum**, invented by Raleigh. It gives termor a protected 'possession,' subsequently distinguished from 'seisin.' But it is held to lie only against persons claiming under the lessor (341).

Personal actions make their appearance. **Debt-Detinue**, differentiated in the 13th century. In Detinue there is no specific restitution, hence Bracton says there is no real action for chattels (342).

Replevin for chattels distrained: invented *temp.* John (342).

Covenant, early 13th century, restricted to the recovery of terms of years and sealed writing required (342).

Account, appears *temp.* Henry III, a rare action and only against bailiffs (342).

Trespass. This is the most important. Instances *temp.* John, but it became a writ of course, late *temp.* Henry III. It originates in criminal law (the appeal of felony) (342). The defendant if found guilty is fined and imprisoned, not merely amerced. If he will not appear he can be seized or outlawed (343). At first real 'force and arms' probably necessary but later the least wrongful force is held to be enough (344).

Trial by jury is becoming normal trial for disputed facts and is slowly superseding the older forms, but compurgation survives in Debt and Detinue (344).

(IV) 1272–1307. Fourth Period. The reign of Edward I (344). Period of Statutory activity. Stat. De Donis gives **Formedon in the Descender.** Writs *in consimili casu.* The tale of non-statutory actions complete. The king's courts have come to be omnicompetent, working all civil justice through these forms of action (346).

Lecture V.

(V) 1307–1833. A long period but difficult to break up. Chief interest lies in development of **Trespass** (347).

Trespass *vi et armis* common from Edw. I's day. Main varieties (1) assault and battery, (2) *de bonis asportatis* and (3) *quare clausum fregit.* Unlawful force essential (347). Trespass can protect possession of land (348). **Trespass quare clausum fregit.** This writ given to the termor in 15th century (349); 'possession and seisin' (349). Tenant in Villeinage gets protection; by end of 15th century even against his lord (349, 350). At end of 14th century action merely gave damages. *Temp.* Hen. VII the land itself can be recovered (350). *Quare ejecit infra terminum* not to be confused with Trespass *de ejectione firmae* (351). Latter becomes **Ejectment** and is extended by fiction to all claimants of land (351). Reasons for this (351). Description of the fiction of Ejectment (352, 353). During Tudor reigns Ejectment supplants the real actions (353). In some cases, *e.g.* where entry 'tolled,' Ejectment not available (354). Ejectment was remodelled by C. L. P. Act, 1852, and was in use until 1875 (354, 355).

Personal Actions (355).

Replevin, action for wrongful distraint (355).

Detinue, damages always alternative to return of goods. Hence chattels not 'real' property (355, 356). Ancient and modern views as to property in chattels (356). Wager of law (357).

Debt, originally purely recuperatory, later used to enforce all contracts for a fixed sum of money, and all fixed sums due (357). But Debt admits of wager of law (357).

Account, originally for bailiffs only, superseded by Chancery Bill for account (357, 358).

Covenant. Lessee's only remedy at one time; he recovers the land itself by the action of covenant real. In 13th century the seal becomes a necessity for covenant (358).

Lecture VI.

Trespass, appears about 1250. *Vi et armis, contra pacem* (359). Trespass is to (1) land, (2) body, (3) chattels (359). Vanquished defendant *in misericordia* and liable to *capias pro fine* (359). Statute of Westminster II, writs *in consimili casu* result in the extension of trespass (359, 360).

Trespass upon the special Case or **Case**, where the words *contra pacem* are left out. Falls apart during 15th century (360). Slander and Libel and Negligence and Deceit grow up within Case which becomes a sort of residuary action (361). *Capias pro fine* abolished (361). Distinction between Case and Trespass (362).

Assumpsit an offshoot of Case (362), involved the ideas of misfeasance and deceit (362). Earliest are cases of misfeasance, then of negligence by bailees, then of breaches of warranty, then of non-feasance and Assumpsit becomes a separate action (beginning of 16th century) (363). Assumpsit then begins to do the work of Debt. **Indebitatus Assumpsit** (363, 364). This extended to implied contract and quasi-contract (364).

Trover (365); another branch of Case. Comes into existence about the middle of 16th century. Action supplanted Detinue (365). Since C. L. P. Act, 1854, courts have had power to order specific restitution of the chattel. Old option of paying the value no longer a right of the defendant (365). Thus Trespass and its offspring, Ejectment, Assumpsit, Trover and Case are substantially the only actions in common use (365, 366). Replevin still used against a distrainor (366). Account and Dower practically superseded by Chancery remedies (366).

Lecture VII.

Attempts to classify Actions. Justinian's classifications (367). Do not well fit the English Actions. Bracton lays down that there is no action *in rem* for moveable goods because the possessor has the option of paying damages instead of giving up the thing. From this distinction come the terms 'Real' and 'Personal' property (368, 369). Hence the extension of idea of Tort in England far beyond the Roman *maleficium* because it is conceived that all 'personal' actions must be founded either on contract or tort (369). Mere possession by the wrong person however honest is held a tort (369). Distribution of all actions between Contract and Tort never very easy or very successful (369). Position of Detinue (370). Mesne process is used by Bracton as the test of a real or personal action (370, 371). In later times however the final result attained becomes the test (371). Position of Ejectment and Covenant Real (371). The Action for mesne profits originated in this idea of mere possession, however honest, being a tort done to the true owner (371, 372).

Past importance of procedure (372). The great text books were treatises on procedure. Formal decay set in soon after Edward I but a great development of substantive law was brought about by fictions (372, 373). This is a long process with two stages. (1) The stage of evasory fiction. Trespass usurps the work of other actions. Again steps in procedure are omitted or are feigned (373). Even the original writ was omitted unless the record had to be made up (373). Capture of Common Pleas jurisdiction by King's Bench and Exchequer (373). The King's Bench fiction, all actions begun by an action of Trespass and the arrest of the defendant: the Exchequer fiction—the *quo minus* (373). The reason for this stealing of business; partly due to the monopoly of Serjeants-at-law in the Common Pleas (374). The Order of the Coif (374).

(2) End of the forms of action:

The Unification of Process Act, 1832 (374).

3 and 4 Will. IV, c. 36 abolishing Real and Mixed Actions (374).

,, ,, c. 42 ,, wager of law (374).

The Common Law Procedure Act, 1852. No form of action was thenceforward to be mentioned in the writ (374).

The Judicature Acts. Forms of action are finally abolished (375), this results in greater clearness of exposition, greater attention to the real substance of the law itself (375).

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